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FILE NO.

February 17, 1994

James P. Gleason, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

G. Paul Bollwerk, III
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

In the Matter of
SEQUOYAH FUELS CORPORATION
Source Material License No. SUB-1010
Docket No. 40-08027-EA

Dear Administrative Judges:

On behalf of General Atomics, we have filed (1) General Atomics' Motion for Summary Disposition or For an Order of Dismissal, (2) Brief in Support of General Atomics' Motion for Summary Disposition or For an Order of Dismissal, (3) the Affidavit of Reau Graves, Jr., (4) the Affidavit of J. Neal Blue, and (5) General Atomics' Motion to Stay Discovery.

Both Affidavits have been signed, and the original of the Graves Affidavit has been filed. Since we have not yet received the original of the Blue Affidavit, we have filed a copy of it. Upon our receipt of the original, we will, of course, promptly file it.

Sincerely,

Stephen M. Duncan

Stephen M. Duncan

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| SEQUOYAH FUELS CORPORATION | ) | Docket No. 40-8027-EA |
| and GENERAL ATOMICS | ) | |
| | ) | |
| (Sequoyah Facility in | ) | February 17, 1994 |
| Gore, Oklahoma) | ) | |

**GENERAL ATOMICS' MOTION FOR SUMMARY DISPOSITION OR FOR AN ORDER OF DISMISSAL**

Pursuant to Nuclear Regulatory Commission Rule of Practice § 2.749, General Atomics hereby moves for an order granting summary disposition in its favor on all matters involved in this proceeding or for an order of dismissal.

AS GROUNDS for its motion for summary disposition, General Atomics submits the following:

1. For the purpose of granting this motion, it is not necessary for the Atomic Safety and Licensing Board ("Board") to determine certain material facts as to which there is no genuine issue and which are set forth in the Annex attached hereto.

2. The statutes upon which the Nuclear Regulatory Commission ("NRC") relied in its Order of October 15, 1993, do not authorize it to either assert jurisdiction over General Atomics in this matter or to impose upon General Atomics the non-civil penalty financial liability which is claimed.

3. Congress never intended to delegate to the NRC the authority which it now seeks to assert over General Atomics.

4. By their own terms, the NRC's regulations do not apply to General Atomics, and to any extent that they appear to apply, the regulations are void, since they cannot confer any greater authority than that granted by Congress.

5. The attempt by the NRC to stretch its jurisdiction far enough to encompass a non-licensee in these circumstances is arbitrary and so unreasonable as to be unlawful, even if it were not obviously beyond the NRC's authority.

6. In its October 15, 1993 Order (the "October 15 Order"), the NRC has otherwise failed to plead or assert a legally cognizable claim against General Atomics.

7. The NRC has admitted that General Atomics is not legally obligated to provide assurance of the decommissioning and remediation costs of the Gore, Oklahoma facility operated by Sequoyah Fuels Corporation (the "Licensee"). The NRC is thus estopped from seeking to compel such assurance and General Atomics should not now be forced to defend against the allegations contained in the NRC's October 15, 1993 Order.

8. In its Order of October 15, 1993, the NRC made numerous allegations about the purported reliance by members of the NRC on certain verbal and written statements by the Chairman of General Atomics. Since they have personal knowledge of disputed evidentiary facts, each of the individual NRC Commissioners are material witnesses in the matter in controversy. Under such

circumstances, each of the Commissioners must be disqualified and a decision must be rendered in favor of General Atomics. Otherwise, General Atomics will be required to contest the October 15, 1993 Order before this Board and ultimately before the same Commissioners who are material witnesses, thereby depriving it of procedural due process rights guaranteed by the Constitution and the Administrative Procedure Act.

9. The NRC's own Rule of Practice § 2.720(h)(1) prohibits the issuance of a subpoena requiring the attendance and testimony of the same members of the NRC who are alleged to have reasonably relied upon statements made by the Chairman of General Atomics. The testimony of the Commissioners is essential to the adjudication of the issues raised by the October 15 Order. If General Atomics is barred from obtaining such evidence, it will necessarily be deprived of procedural due process rights guaranteed by the Constitution, the Administrative Procedure Act, and Secton 2.718 of the NRC's own Rules of Practice.

10. The actions of the NRC strongly suggest that it has prejudged the contested matters raised by the October 15 Order. To require General Atomics to contest the NRC assertions further before the NRC itself or in this or any other administrative forum which is inferior to the NRC would be to deprive General Atomics of the fairness traditionally associated with any form of judicial process and violate due process rights that are guaranteed to General Atomics under the Constitution.

IN THE ALTERNATIVE, and pursuant to Rule of Practice § 2.730, General Atomics moves for an order by the presiding officer of the Board dismissing the claims against General Atomics which are contained in the NRC's Order of October 15, 1993.

AS GROUNDS for its motion for an order of dismissal, General Atomics reasserts the grounds set forth above and in addition, submits the following:

1. In its October 15 Order (p. 21), the NRC alleges that General Atomics is responsible for the decommissioning and related costs of the Licensee because it "exercised and exercises de facto control over the day-to-day business of" the Licensee. The NRC has not, and cannot cite a statute or a controlling opinion of a court of law that establishes a "de facto control" doctrine for the definition of the NRC's jurisdiction. Even if such a doctrine did exist, it could not be relied upon in this proceeding for the kind of relief that the NRC seeks. The NRC has, therefore, failed to state a legally cognizable claim against General Atomics and it can prove no set of facts that would entitle it to impose the non-civil penalty financial liability upon General Atomics which it seeks here.

2. When pressed by the Board at the January 19, 1994 Prehearing Conference to more clearly state the NRC's theory of the case, Staff Counsel for the NRC stated that the theory is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent

. . .." The NRC has not, and cannot cite a statute or a controlling opinion of a court of law that vests the NRC with jurisdiction to make such claims against non-licensees based upon the common law doctrine of a state that has not even been identified. Nor has the NRC even alleged any of the factors that must be present for the formal differences between affiliated corporations to be disregarded. The NRC has failed, therefore, to state a legally cognizable claim against General Atomics and it can prove no set of facts that would entitle it to impose the non-civil penalty financial liability upon General Atomics which it seeks here.

3. At the Prehearing Conference on January 19, 1994, Staff Counsel for the NRC agreed that the NRC has the burden to prove those claims against General Atomics which are set forth in the October 15 Order. Staff Counsel further advised the Board that the NRC's "theory [of the case] can be developing upon facts that are later discovered . . .." Having already issued a Demand for Information to which General Atomics responded, the NRC is now improperly attempting to use the October 15 Order as a fishing expedition for any facts upon which it might somehow base some claim. General Atomics must not be required to defend itself against insufficient and conclusory allegations of facts which have not even been discovered, and which if true, would not support a legally cognizable claim against it.

4. At the Prehearing conference, Staff Counsel for the NRC further stated (a) that the October 15 Order is not based on and

the NRC does not allege deliberate misconduct by General Atomics; (b) that the NRC's claim against General Atomics is not based upon "a contractual obligation or legal duty it has to Sequoyah Fuels Corporation or to the agency, which may flow from, among other things, the Commission's purported reliance upon representations made by GA," (see pp. 3-4 of the Board's January 13, 1994 Memorandum Posing Matters for Consideration at Prehearing Conference); and (c) that the Staff does not intend to pursue any quasi-contract "theory of the case" which is based on allegations of reliance. All claims against General Atomics which are expressly or implicitly based on these two grounds must, therefore, be dismissed in order to prevent unnecessary and costly discovery on matters that are not relevant to the controversy.

GENERAL ATOMICS RESPECTFULLY REQUESTS ORAL ARGUMENT ON THESE MOTIONS PURSUANT TO RULE OF PRACTICE § 2.730(d).

Respectfully submitted,

By Stephen M. Duncan
Of Counsel

Stephen M. Duncan
Bradfute W. Davenport, Jr.
MAYS & VALENTINE
110 South Union Street
Alexandria, Virginia 22314

ATTORNEYS FOR GENERAL ATOMICS

February 17, 1994

ANNEX "A"

MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE

For the purpose of its Motion for Summary Disposition or for an Order of Dismissal, General Atomics contends that there is no genuine issue as to the following material facts:

1. Sequoyah Fuels Corporation (the "Licensee") is the holder of Source Material License No. SUB-1010 (the "License") issued by the Nuclear Regulatory Commission ("NRC") pursuant to 10 C.F.R. Part 40. The License authorized the Licensee to possess and use source material in the production of uranium hexafluoride ($UF_6$) and depleted uranium tetrafluoride ($DUF_4$). The License for $UF_6$ production was originally issued on February 20, 1970 by the Atomic Energy Commission.

2. Sequoyah Fuels Corporation is the sole licensee named in the License.

3. For several years, and until July 6, 1993, the Licensee engaged in the activities described above at its facility in Gore, Oklahoma (the "Sequoyah Facility").

4. General Atomics is not now and has never been a licensee of the NRC in connection with the Sequoyah Facility.

5. General Atomics is not engaged in licensed activities and it does not possess licensed or other NRC regulated materials in connection with the Sequoyah Facility.

6. On June 20, 1988, Sequoyah Holding Corporation ("SHC")

was incorporated in the State of Delaware. SHC was, and is a wholly-owned subsidiary of General Atomics. From June 30, 1988 to January 28, 1992, Reau Graves, Jr. ("Graves") served as Chairman of SHC.

7. On July 7 and August 2, 1988, meetings were held between the NRC Staff and representatives of General Atomics to discuss the consent of the NRC to the transfer of control of the Licensee from Kerr-McGee Corporation ("Kerr-McGee") to SHC, a subsidiary of General Atomics, and of the license amendment application of the Licensee to reflect a change in ownership. As part of its review of the situation, the NRC Staff performed a financial review of the proposed transfer of ownership to determine whether the change would affect the financial resources of the Licensee for safely operating the plant and for future decommissioning of the Sequoyah Facility. The review concluded that "the proposed transfer of ownership will not impair [the Licensee's] ability to perform decommissioning and reclamation activities or to safely operate the plant." (See the October 27, 1988 internal NRC Memorandum of W. Scott Pennington, attached hereto as Appendix 1).

8. On or shortly after September 19, 1988, Robert S. Wood of the NRC Staff forwarded an internal NRC Memorandum to Leland C. Rouse of the NRC Staff. A copy of that memorandum is attached hereto as Appendix 2.

9. On or shortly after October 18, 1988, Graves forwarded a

letter to Rouse. A copy of that letter is attached hereto as Appendix 3 and to the Affidavit of Graves. That letter formally requested that the NRC provide its advance consent to the transfer of control of Sequoyah Fuels Corporation, then a wholly-owned subsidiary of Kerr-McGee, to SHC. In that letter, SHC also requested that the NRC confirm that, through an amendment to Chapter 7.5 of the License, "Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility." (Letter from Graves to Rouse, at page 3). This amendment, along with several other revisions to the License, was reflected in SHC's application for amendment of the License, which was also dated October 18, 1988.

10. Sometime prior to the filing of his October 18, 1988 letter, Graves had met with representatives of the NRC in the Washington, D.C. area to discuss the acquisition of Sequoyah Fuels Corporation by SHC. They specifically discussed the question of whether or not the NRC would require a guarantee by General Atomics of decommissioning costs. At the time, Graves was familiar with the guarantee of those costs that had been required of Kerr-McGee. If a guarantee had been required of General Atomics, the acquisition would not have taken place. (See the Affidavit of J. Neal Blue.)

11. By letter to Graves dated October 27, 1988, the NRC approved the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee to SHC. A copy of that letter is attached

hereto as Appendix 4 and to Graves' Affidavit. By letter dated October 28, 1988, the NRC also approved the proposed amendments to the License, including the revisions to Chapter 7.5 which effected the release of Kerr-McGee. The revisions to Chapter 7.5 approved by the NRC did not substitute General Atomics for Kerr-McGee and did not in any way impose an obligation on General Atomics that was similar to the one from which Kerr-McGee was being released. Moreover, no other conditions were placed upon the License which created any such obligation on the part of General Atomics.

12. On November 4, 1988, SHC purchased Sequoyah Fuels Corporation from Kerr-McGee.

13. On August 29, 1989, New Sequoyah Fuels Corporation ("NSFC") was incorporated in Delaware as a wholly-owned subsidiary of Sequoyah Fuels Corporation.

14. On December 29, 1989, the NRC amended the Sequoyah license to authorize a change in the Licensee's name to NSFC, the incorporation of NSFC, and a transfer of assets to NSFC. On December 31, 1989, Sequoyah Fuels Corporation and NSFC entered into a Transfer Agreement in which Sequoyah Fuels Corporation transferred its assets and ongoing business (excluding certain farm-related business and assets and certain conversion contracts with international customers) to NSFC.

16. On March 26, 1990, the NRC amended the Sequoyah license to authorize the change of the Licensee's name from NSFC to

"Sequoyah Fuels Corporation." The former Sequoyah Fuels Corporation changed its name to "Sequoyah Fuels International Corporation" ("SFIC").

16. Sequoyah Fuels Corporation is now a wholly-owned subsidiary of SFIC. SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics. General Atomics is a third-tier parent company of Sequoyah Fuels Corporation.

17. On or shortly after March 27, 1992, Samuel J. Chilk, the Secretary of the NRC forwarded to James M. Taylor, Executive Director of Operations, an internal NRC Memorandum. A copy of that memorandum is attached as Appendix 5.

18. On or shortly after May 6, 1992, Richard E. Cunningham of the NRC Staff, forwarded a letter to James J. Sheppard of the Sequoyah Fuels Corporation. A copy of that letter is attached as Appendix 6.

19. The proposed contract referred to in Appendix 5 was never entered into (See the Affidavit of J. Neal Blue).

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OCT 27 1988

DOCKET NO: 40-8027

LICENSEE: Sequoyah Fuels Corporation

FACILITY: Sequoyah Facility
Gore, Oklahoma

SUBJECT: NRC STAFF ASSESSMENT OF ACQUISITION OF SEQUOYAH FUELS CORPORATION BY SEQUOYAH HOLDING CORPORATION

## Background

Sequoyah Fuels Corporation (SFC) is an NRC licensee engaged in uranium hexafluoride production and uranium hexafluoride reduction activities. All SFC stock is held by Kerr-McGee Corporation.

Meetings were held between NRC staff and representatives of General Atomics and the firm's legal counsel, Winthrop, Stimson, Putman, and Roberts, on July 7 and August 2, 1988. During the August 2, 1988, meeting and by letter dated September 16, 1988, draft copies of the letter requesting NRC consent to the transfer of control of SFC from Kerr-McGee Corporation to Sequoyah Holding Corporation, a subsidiary of General Atomics, and of the license amendment application to reflect a change in ownership and corporate oversight were provided for staff comment. By letter dated October 7, 1988, staff provided General Atomics counsel with additional topics to be addressed in the letter and comments for the license amendment application. By separate letters dated October 18, 1988, Sequoyah Holding Corporation formally requested NRC consent for the transfer of control of SFC and an amendment to the license. The transfer of control of SFC would be effected by a transfer of stock ownership.

Staff's review of the request for consent was conducted pursuant to requirements in 10 CFR 40.46 to ensure there would be no adverse impact on the public health and safety or common defense and security as a result of the transfer of control of SFC. A separate evaluation is being prepared for the amendment application.

In support of the consent review, staff performed a financial review to determine whether the proposed change in SFC ownership will affect the financial resources of SFC for safely operating the plant and for future decommissioning of the Gore facility. Financial information for this review was provided in the draft documents submitted at the August 2, 1988, meeting, by telefax on August 25, 1988, and telephonically on August 29, 1988.

Discussion

Subject to NRC consent and the issuance of an amendment to the license, Sequoyah Holding Corporation (Purchaser) has agreed to purchase SFC from Kerr-McGee Corporation, the current holder of SFC stock. The purchase includes acquisition of the uranium hexafluoride production and reduction facilities near Gore, Oklahoma, as well as ranches near the plant. The Purchaser will not acquire the Cimarron facility, the Wyoming properties, and other properties previously owned by SFC.

Sequoyah Holding Corporation is a wholly-owned subsidiary of General Atomics which is itself a wholly-owned subsidiary of General Atomics Technologies Corporation. General Atomics is a corporation that engages in commercial research and development in the areas of nuclear energy and defense products. Sequoyah Holding Corporation is not owned, controlled, or dominated by an alien, a foreign corporation, or foreign government.

SFC will remain as a separate corporate entity. The Purchaser has stated that (a) it will install a new board of directors for SFC, (b) the new President of SFC is currently an employee of General Atomics and will be located at the facility, (c) the principal officers of SFC will be changed, and (d) the current oversight and audit responsibilities of the Kerr-McGee corporate staff will be assumed by the General Atomics corporate staff.

The transfer of control of the license requires an amendment to the license. An amendment application was submitted to reflect a change in SFC ownership and corporate oversight. The proposed change in control is effected by a change in SFC ownership through a purchase of stock. There will be no changes in the current license conditions affecting health and safety requirements or plant operations. There are no major changes in onsite management and operating personnel.

A financial review to determine whether the proposed acquisition will affect SFC's financial resources to operate and decommission the Gore facilities has been conducted by Robert Wood, Office of Nuclear Reactor Regulation. The financial analysis evaluated SFC's ability to perform the activities authorized by the license and how such activities would be affected by the proposed transfer of ownership of SFC from Kerr-McGee Corporation to Sequoyah Holding Corporation. The review concluded that the proposed transfer of ownership will not impair SFC's ability to perform decommissioning and reclamation activities or to safely operate the plant.

Regarding the staff's additional topics provided to General Atomics' counsel by letter dated October 7, 1988, the Purchaser has addressed each topic and provided the following information and commitments:

1. Sequoyah Fuels Corporation and Quivira Mining Company have executed a contract which provides that the Quivira Uranium Mill continue to accept the Sequoyah Facility's raffinate and fluoride sludges for uranium

recovery. The contract remains in effect through December 1, 1992, and provides for yearly extensions for so long as Quivira is licensed to process source material. If Quivira terminates the contract at its completion, a portion of the mill will remain operable at an agreed upon rental rate to handle SFC processing needs. The provisions of the contract will survive if the mill is transferred to another party.

2. Sequoyah Holding Corporation has committed to submittal of the financial statements for itself and SFC within 90 days of December 31, 1988, and within 90 days of the close of each fiscal year thereafter until the time that SFC files a decommissioning funding plan.

3. Sequoyah Holding Corporation has committed SFC to the submittal of a decommissioning funding plan pursuant to the new decommissioning rule, Section 40.36 of 10 CFR Part 40, at the time SFC submits a license renewal application. The license is scheduled to expire September 30, 1990.

4. Sequoyah Fuels Corporation has an established policy for accruing expense for waste disposal projects and decommissioning activities. Upon transfer of control, SHC intends to continue this policy. These accruals are based on units of production or a fixed monthly charge depending on the nature of the activity. The balance of the accounts for these activities appears as a decommission and reclamation reserve on the SFC balance sheet. The reserve is funded from working capital and is reduced to reflect costs related to specific disposal projects and decommissioning.

Conclusions/Recommendations

Based on the above, the staff concludes that the proposed transfer of control of Sequoyah Fuels Corporation to Sequoyah Holding Corporation:

a) Is in accordance with requirements in 10 CFR 40.46;

b) Will not have an adverse effect on the public health and safety;

c) Will not change the health and safety requirements in the license;

d) Will not significantly change onsite management and operating personnel;

e) Is not likely to adversely affect the common defense and security based on statements and representations of the Purchaser and the requirements of the license;

f) Will provide for the continued acceptance of the plant's raffinate and fluoride sludges for uranium recovery at the Quivira Uranium Mill in New Mexico;

g) Includes the acquisition of the Gore facilities and nearby ranches but not the Cimarron facility, the Wyoming properties, and other previously owned SFC properties;

h) Provides a commitment for the submittal of annual financial statements for Sequoyah Fuels Corporation and Sequoyah Holding Corporation;

i) Provides a commitment to maintain the reserves for decommissioning and reclamation expenses;

j) Provides a commitment for SFC to submit a decommissioning funding plan at the time SFC submits a license renewal application.

Based on these conclusions, staff recommends NRC consent to the transfer of Sequoyah Fuels Corporation to Sequoyah Holding Corporation subject to the issuance of a license amendment and the commitments described in the above items h) and i). Furthermore, staff recommends that item j) be made a condition of the SFC license.

W. Scott Pennington

W. Scott Pennington
Uranium Fuel Section
Fuel Cycle Safety Branch
Division of Industrial and
Medical Nuclear Safety, NMSS

Approved by: George H. Bidinger
George H. Bidinger, Section Leader

RETURN TO 396 SS

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40-8027

PDR LPDR

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

September 19, 1988

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MEMORANDUM FOR: [redacted] E. Rouse, Chief
Uranium Fuel Licensing Branch
Division of Fuel Cycle and Material Safety
Office of Nuclear Material Safety and Safeguards

THRU: Darrel, Nash, Section Chief
Policy Development Financial Evaluation Section
Policy Development and Technical Support Branch
Program Management, Policy Development and Analysis Staff
Office of Nuclear Reactor Regulation

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FROM: Robert S. Wood
Policy Development Financial Evaluation Section
Policy Development and Technical Support Branch
Program Management, Policy Development and Analysis Staff
Office of Nuclear Reactor Regulation

SUBJECT: PROPOSED TRANSFER OF OWNERSHIP OF KERR-MCGEE'S GORE FACILITY TO SEQUOYAH HOLDING CORPORATION

As you requested, I have performed a financial evaluation of the proposed transfer of ownership of the Gore facility of the Kerr-McGee subsidiary, Sequoyah Fuels Corporation, to Sequoyah Holding Corporation, a subsidiary of General Atomics Corporation.

I. BACKGROUND

This evaluation is based on material submitted by officials of and counsel to Sequoyah Holding Corporation, with emphasis on the balance sheet dated May 31, 1988 and the balance sheet and income statement dated June 30, 1988. The June 30 statements were not part of Sequoyah Holding Corporation's original submission to NMSS but rather were telefaxed directly to me on August 25, 1988. Information for this financial evaluation was further supplemented by a conference call on August 29, 1988 among me, Chuca Meyer, an attorney for Winthrop, Stimson, Putnam and Roberts, counsel to Sequoyah Holding Company, and Reau Graves, Jr., President of Sequoyah Holding Company. The purpose of this conference call was to answer questions on and clarify the May 31 and June 30, 1988 financial statements cited above. (See Appendix A for a list of questions asked by me in the conference call.)

II. ANALYSIS

A. Balance Sheets

1. Reau Graves indicated that the purchase of the Gore and associated facilities would be financed by a $5,000,000 direct stock purchase

24922

plus a $10.5 million ten-year note payable to Kerr-McGee at an interest rate within the range available in international financial markets. This would have the effect of increasing the long-term debt liability on future balance sheet statements and, in effect, increasing the ratio of capitalization of debt to stockholders' equity to approximately one to one. That is, other things being equal, long term debt would increase to approximately $10.8 million and stockholders' equity would decrease to approximately $13.4 million. This is a reasonably acceptable debt-to-equity ratio, and is consistent with similar ratios of net worth-to-total liabilities (less decommissioning reserves) proposed elsewhere in NRC regulations and guidance for use in parent company guarantees.

2. The current-asset-to-current-liability position reflected in the balance sheets is quite strong. As an indication of short-term solvency, current assets should exceed current liabilities. The minimum acceptable ratio in NRC's parent company guarantee requirements is 2:1. The May 31, 1988 balance sheet for Gore and related facilities showed a current ratio of nearly 4.5. For the June 30, 1988 balance sheet the current ratio improved to over 5.0. In absolute terms, current assets exceed current liabilities by nearly $12,000,000.

   As part of current assets, the Gore and related facilities maintain a strong cash position, although this in part appears to reflect a stipulation by buyers as part of the purchase agreement that cash position be improved.

   Another primary component of current assets, accounts receivable, also appears to be strong. Reau Graves indicated that a recent CitiBank evaluation of the facility's accounts receivable indicated that they were all from utilities and had a 30-35 day average maturity term. Further, there has never been an instance of a bad debt write-off for a delinquent customer account.

   Product inventories account for nearly 30% of current assets. Apparently, this line item represents work already under contract and is analogous to unbilled accounts receivable with a 60 to 90 day term.

   Materials and supplies are shorter term assets used in the production process. Of all the current assets these are the least liquid (i.e., would be the most difficult to convert to cash on short notice.) Materials and supplies represent only about 17% of total current assets and, according to a recent audit by Arther Anderson Co. as indicated by Reau Graves, are accurately valued. Thus, the overall current asset position of the Gore facility is strong and demonstrates good liquidity.

3. Longer-term assets are carried at book value (which normally means original purchase price) less depreciation. Because of the limited number of UF6 conversion plants extant, it is difficult to determine the

salvage value of existing fixed assets. Mr. Graves indicated that a plant recently built in Canada using similar processes and of similar capacity cost nearly $100,000,000. This suggests that, in the event of a liquidation of the Gore facility and assuming a market for its equipment, there would be some salvage value obtainable. The fixed assets appear to be fairly valued according to audits performed during the purchase agreement negotiations.

B. Income statement

An income statement for the period (unspecified) ending June 30, 1988 was included with material telefaxed on August 25, 1988. A net income of approximately $1.48 million was realized on operating revenues of $11.1 million. However, a significant component of operating expenses for the period, the cost of product and material, is shown as a negative operating expense (i.e., as a received asset rather than expense requiring cash outlay). Reau Graves explained that this included a transfer from Kerr-McGee as part of the conditions of sale and would not be a recurring item. (However, I also understand that the material is generally owned by utilities and thus may not be reflected as a cost per se. I will have to clarify this point with Reau Graves when he returns to his office.) If this negative expense is eliminated (i.e., if cost of product and material required cash outlay), and other items were equal, a loss rather than a profit would have been realized.

Depreciation as a non-cash expense contributed nearly $2.4 million to cash flow during the period ending June 30, 1988. Although significant, it might not be sufficient in future years to compensate for possible cash outlays for cost of product and material. Of course, an effective management could increase revenues or reduce other expenses to improve both income and cash flow.

III. Conclusions and Recommendations

The balance sheet for the Gore and related facilities appears quite strong. The excess of current assets over current liabilities appears sufficient to cover the decommissioning and reclamation reserves carried on the liabilities side of the balance sheet. Additional protection is afforded by the likelihood that significant value still resides in the salvage value of the fixed assets of the facility. Another positive indicator is the relatively strong proportion of stockholders' equity in Sequoyah Holding Corporation's overall capital structure.

The income statement is less positive, if my understanding of cost of product and material is correct. Nevertheless, there appears to be sufficient leeway for improvement and limited potential for losses that would significantly impair the ability of Sequoyah Holding Corporation to

perform necessary decommissioning and reclamation activities. (This assumes that the $11.7 million figure given on the balance sheet reasonably represents decommissioning and reclamation costs.)

Therefore, I conclude that, based on the information provided, Sequoyah Holding Corporation is financially qualified to assume the license to operate the Gore facility. Notwithstanding this conclusion, you may wish to consider the following additional safeguards:

1. Require Sequoyah Holding Corporation to provide annual balance sheets and income statements certified by a corporate officer. A statement that these financial statements meet generally accepted accounting principles should also be required from a Certified Public Accountant. The first statements should be required at the time the license is transferred.

2. Ask for a guarantee from Sequoyah Holding Corporation's parent, General Atomics Corporation, for decommissioning and reclamation expenses. You indicated that General Atomics would probably be unwilling to do this. If they refuse, we shouldn't make an issue of it, given the relative strength of Sequoyah Holding Corporation's financial statements; but it does not hurt to ask again. I don't believe this is essential, given the information provided to date; but it would provide an added degree of assurance.

Robert S. Wood
Policy Development Financial
Evaluation Section
Policy Development and Technical
Support Branch
Program Management, Policy Development
and Analysis Staff
Office of Nuclear Reactor Regulation

cc: R. Fonner, OGC

RETURN TO ~~396-SS~~ PI-137

40-8027
PDR/LPDR

# SEQUOYAH HOLDING CORPORATION

P.O. BOX 610 • I-40 AND HIGHWAY 10 • GORE, OKLAHOMA 74435
PHONE: (918) 489-5511 • FAX: (918) 489-5620

DOCKETED USNRC OCT 20 1988 NMSS MAIL SECTION U.S. NRC CLERK

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RECEIVED OCT 20 1988 U.S. NUCLEAR REGULATORY COMMISSION NMSS Mail Section

October 18, 1988

Mr. Leland C. Rouse, Chief
U.S. Nuclear Regulatory Commission
Fuel Cycle Safety Branch
Division of Industrial and Medical Nuclear Safety
Office of Nuclear Material Safety & Safeguards
Washington, DC 20555

Re: License SUB-1010; Docket 40-8027
Transfer of Control of Licensee

Dear Mr. Rouse:

Sequoyah Holding Corporation ("Holding"), a corporation organized under the laws of the State of Delaware, hereby seeks the consent of the Nuclear Regulatory Commission ("NRC"), pursuant to the Atomic Energy Act of 1954 and the regulations promulgated thereunder, to a transfer of control of Sequoyah Fuels Corporation ("Sequoyah"), a corporation organized under the laws of the State of Delaware. Sequoyah presently is a wholly-owned subsidiary of Kerr-McGee Corporation ("Kerr-McGee"), a corporation organized under the laws of the State of Delaware. Sequoyah is the present holder of NRC Source Material License Number SUB-1010 (the "License"). Holding has entered into an acquisition agreement with Kerr-McGee, pursuant to which, subject to the approval of the NRC, Holding will acquire all of the outstanding stock of Sequoyah.

Holding is a wholly-owned subsidiary of General Atomics ("GA"), a corporation organized under the laws of the State of California, which is itself a wholly-owned subsidiary of General Atomic Technologies Corporation ("GATC"), a corporation organized under the laws of the State of Wyoming. The capital stock of GATC is owned 79.5% by Tenaya Corporation, a corporation organized under the laws of the State of Delaware, 20.01% by Linden S. Blue, a United States citizen and .49% by James N. Blue, a United States citizen. Tenaya is a holding company for investments of the family of James N. Blue. Mr. Blue owns 60.6% of the voting stock of Tenaya, his wife Anne P. Blue, a citizen of the Federal Republic of Germany, owns 18.2%, and 21.2% is held in trust for the benefit of their children. Holding is not

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owned, controlled or dominated by an alien, a foreign corporation or a foreign government. Further information concerning Holding is provided in Appendix A.

Holding has simultaneously filed, with the consent of Kerr-McGee and Sequoyah Fuels Corporation, an application for an amendment to the License seeking to delete references to Sequoyah's current parent company, Kerr-McGee, to reflect the new ownership of Sequoyah. As reflected in the letters from Mr. Randolph and Mr. Luke attached to the application for amendment, Sequoyah and Kerr-McGee consent to this request for consent to a transfer of control of Sequoyah.

Holding will acquire Sequoyah which owns and operates the Sequoyah facility situated near Gore, Oklahoma and consists of a uranium hexafluoride conversion facility and a depleted $UF_4$ facility (the "Sequoyah Facility") and the ranches in the vicinity owned by Sequoyah. Holding will not acquire the Cimarron Facility, the Wyoming properties and other properties which have been owned by Sequoyah and which have been transferred to other Kerr-McGee entities.

The Sequoyah Facility will continue to be operated in the same manner as it has been operated; nothing will change in the manner in which Sequoyah, as the licensee, conducts its operations and discharges its obligations under the License. No major changes are anticipated in the on-site operating and management personnel of Sequoyah, other than that the President of Sequoyah will no longer be an employee of Kerr-McGee. As set forth in Appendix A, the President of both Sequoyah and Holding will be Reau Graves, Jr. Mr. Graves is also a Senior Vice President and Director of GA.

The only other changes will be in the ownership of the stock of Sequoyah and the directors of Sequoyah as set forth in Appendix A. The oversight responsibilities and obligations of off-site personnel who are currently employees of Kerr-McGee will be assumed by employees of GA, as set forth in the application for an amendment to the License, filed simultaneously with this request for consent.

Sequoyah currently has numerous contracts with a number of utilities and other domestic and foreign corporations. These contracts will remain in place following the acquisition and will be the basis of Sequoyah's ability to finance its on-going operations and to comply with the safety and other requirements of the License. Holding will submit to the NRC copies of audited financial statements for itself and Sequoyah within 90 days of December 31, 1988, the close of Holding's and Sequoyah's fiscal years. Holding and Sequoyah will submit such financial statements to the NRC within 90 days of the close of each fiscal year, until the

time that Sequoyah files with the NRC a decommissioning funding plan pursuant to 10 C.F.R. § 40.36 (as published in the Federal Register on June 27, 1988). The License is currently scheduled to expire September 30, 1990. Sequoyah will submit to the NRC a decommissioning funding plan pursuant to 10 C.F.R. § 40.36 at the time it submits a renewal application for the License.

Sequoyah and Quivira Mining Company ("QMC") have executed a Source Material Toll Milling Contract, dated September 28, 1987 (the "Contract"), which provides that the Quivira Uranium Mill continue to accept the Sequoyah Facility's raffinate and fluoride sludges for uranium recovery. The Contract remains in effect through December 1, 1992, and provides for year by year extensions for so long as QMC is allowed to process source material. Sequoyah may terminate the Contract at any time; however, QMC may not terminate the Contract until December 1, 1992, and may do so only if QMC elects to permanently cease the operation of the mill. If QMC terminates the Contract, QMC will leave in place such portion of the mill facilities sufficient to handle Sequoyah's anticipated processing requirements and the parties will mutually agree upon a rental rate for the continued use of those facilities. The Contract and all its provisions shall inure to the benefit of, and shall be binding upon, the respective parties, their successors and assigns and, except for the sale or transfer of the mill, neither party can assign the Contract without the written consent of the other.

Sequoyah has established a policy of accruing decommission and reclamation expense for specific waste disposal projects and decommissioning activities, and intends to continue this policy upon transfer of ownership. These accruals are made based on units of production or a fixed monthly charge depending on the nature of the account. The sum of the balance of these accounts appears on Sequoyah's balance sheet as a Decommission and Reclamation Reserve. As work is performed on a specific project for which a reserve has been established, the related expense is funded from working capital and the balance of the reserve account is reduced. In the unlikely event the Sequoyah Facility would be required to decommission prematurely, the related cost would be funded from working capital.

Holding requests that the NRC confirm that, at the time an amendment to the License is issued pursuant to the application submitted on the same date as this letter, Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility, and, that in accordance with that release, the third paragraph in Chapter 7.5 will be deleted.

After the NRC has consented to the transfer of control of Sequoyah and has issued an amendment to the License, the transaction will be consummated. Holding will immediately notify the NRC of the closing when it occurs.

SEQUOYAH HOLDING CORPORATION

By Reau Graves Jr
President

STATE OF OKLAHOMA )
)
COUNTY OF SEQUOYAH )

On this 8 day of October 1988, before me, L. M. Clifton, a Notary Public for the State of Oklahoma, personally appeared Reau Graves, Jr. who being duly sworn, stated that he is President of Sequoyah Holding Corporation, that he has read the foregoing letter to Leland C. Rouse and that the information and statements therein are true and correct to the best of his knowledge and belief.

L. M. Clifton
Notary Public

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OCT 27 1988

Docket No: 40-8027
License No: SUB-1010

Sequoyah Holding Corporation
ATTN: Mr. Reau Graves, Jr., President
P. O. Box 610
Gore, Oklahoma 74435

Gentlemen:

In accordance with your letter dated October 18, 1988, we have reviewed your request for NRC consent to the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee Corporation to Sequoyah Holding Corporation. We understand that the proposed transfer will be a purchase of the outstanding stock of Sequoyah Fuels Corporation.

In your letter, you have stated that there will be no change to operations or in the existing conditions of the license affecting health and safety requirements and no major changes for the current onsite operating and management personnel. The President of Sequoyah Fuels Corporation, who is presently a Kerr-McGee employee, will be replaced by an employee of General Atomics. Kerr-McGee corporate positions with oversight and audit responsibilities will be assumed by General Atomics corporate staff.

Based upon the information submitted, we have determined that the transfer of control is in accordance with the provisions of Title 10, Code of Federal Regulations, Section 40.46. We find that there will be no adverse impact on the public health and safety or the common defense and security as a result of the transfer of control of Sequoyah Fuels Corporation by virtue of the change in stock ownership. Accordingly, pursuant to 10 CFR 40.46, the Commission hereby consents to Sequoyah Holding Corporation acquiring control of Sequoyah Fuels Corporation. The consent is subject to the issuance of a license amendment and commitments to submit financial statements for Sequoyah Holding Corporation and Sequoyah Fuels Corporation and to maintain the decommissioning and reclamation reserves. Sequoyah Holding Corporation's commitment for Sequoyah Fuels Corporation to submit a decommissioning funding plan at the time Sequoyah Fuels Corporation submits a license renewal application will become a condition in the license.

By separate letter, a license amendment reflecting changes in ownership and corporate oversight is being issued prior to the stock transfer. The amendment will become effective at the time of stock transfer. We understand that you will notify NRC at the time the transaction is consummated.

OCT 2 7 1988



For your information, a copy of the staff assessment concerning this decision is enclosed. If you should have any questions regarding this matter, please contact Mr. Scott Pennington on (301) 492-0693 or me on (301) 492-0642.

FOR THE NUCLEAR REGULATORY COMMISSION

Leland C. Rouse, Chief
Fuel Cycle Safety Branch
Division of Industrial and
Medical Nuclear Safety, NMSS

Enclosure:
Staff Assessment of Acquisition

cc w/encl: Dr. John C. Stautan
Sequoyah Fuels Corporation

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE SECRETARY

IN RESPONSE, PLEASE REFER TO: M920317A

March 27, 1992

MEMORANDUM FOR: James M. Taylor
Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - BRIEFING ON STATUS OF RESTART OF GENERAL ATOMICS' SEQUOYAH FUELS FACILITY, 8:30 A.M., TUESDAY, MARCH 17, 1992, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

The Commission was briefed by the NRC staff, the licensee, and petitioners (Native Americans for a Clean Environment and the Cherokee Nation of Oklahoma) on the status of restart of the licensee's facility in Gore, Oklahoma. The issues which were discussed fall into two categories: a.) solutions to problems identified in the October 3, 1991 order, which therefore are preconditions to restart and b.) gaps in the current license which should be remedied, but not as a precondition to restart. Based on the discussions at that meeting the Commission directs the staff to undertake the following:

1. When and if the staff is prepared to permit restart, taking into account the results of the OI investigation, a memo should be sent to the Commission before restart is permitted. This memorandum should announce the staff's intentions and the rationale behind them. The staff should consult with the solicitor about incorporating into any restart decision a "housekeeping" stay of up to eight business days.

2. To deal with some of the concerns expressed about the depth of understanding and commitment to changes emplaced at SFC, the staff should consider approving a phased start-up of the facility, rather than moving directly to full process operation. This start-up could be based on appropriate hold points, at which the staff would observe and evaluate performance of the management and work force in terms of compliance with procedures, adequacy of training, and management awareness of overall operations. Once the staff finds performance at a given level of operation to be

acceptable, approval could be granted to move to operation at the next level. SFC has identified the DUF4 facility as such a hold point in its March 20, 1992 letter. The staff should explore the feasibility and advisability of this and other possible hold points with the licensee.

3. To ensure that past commitments and lessons learned have not been overlooked, the staff should:

   i. Beginning with the 1986 incident at Gore, examine its own reports and studies as well as those conducted by the licensee, for recommendations and lessons learned that were identified in those reports and studies;

   ii. Identify those recommendations or lessons which are important but have not been implemented, including any additional commitments made by the licensee at the March 17 briefing (such as those relating to quality assurance, training, etc.); and

   iii. Obtain from the licensee written assurances and schedules for implementation of those recommendations or lessons which are important but have not been implemented. The staff should also establish a mechanism for tracking such commitments.

   These steps, insofar as feasible, should be completed prior to restart. If, in evaluating the agency's follow through on the lessons-learned from the 1986 event, the staff identifies issues of concern that were overlooked at the time, the staff should bring such issues to the Commission's attention.

4. The staff should pay particular attention to: (1) the development and full implementation of a formal internal quality assurance program; and (2) the position of a dedicated full-time QA manager within the SFC organizational structure. The reliance on augmented oversight for quality assurance by General Atomics is acknowledged to be an interim measure while the internal program matures. Staff should ensure that effective external and internal programs emerge. This is not a precondition to restart.

5. The staff should communicate with EPA prior to any decision on restart and should also inform the Commission of its past and present interactions with EPA and OSHA regarding SFC, including consideration of a joint inspection. If appropriate and feasible, such consideration should include a joint inspection prior to restart.

6. The role of the Plant Operations Review Committee (PORC) needs elaboration. What will its role be in the future? If it has a role, what is needed to assure it is effective?

7.a. The staff should ensure that the licensee's commitments for monitoring and remediating environmental conditions made at the March 17, 1992 meeting as well as appropriate requirements for reporting the results of such monitoring are included in the license.

b. The staff, in connection with its review of the license renewal application, should expedite completion of the environmental assessment.

These requirements are not preconditions for restart.

8. In the paragraphs marked "(1)" and "(2)" in its March 19, 1992 letter to the Commission, General Atomics has made certain financial commitments regarding cleanup of the Gore site. The staff should make these commitments legally binding on General Atomics if it is practicable and advisable to do so.

This is not a precondition to restart.

9. Finally, with respect to restart issues, the staff should instruct the licensee to continue to make available to the petitioners documents sent to the NRC on the same schedule that we receive them.

10. The actions in Items 3-9 above are without prejudice to any matter in the pending license renewal proceeding. They are included here to address any possible concerns about potential effects of operations, in the event restart is authorized.

cc: The Chairman
Commissioner Rogers
Commissioner Curtiss
Commissioner Remick
Commissioner de Planque
OGC
OCAA
OIG
ACRS
PDR - Advance
DCS - P1-24

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

MAY 06 1992

Docket No. 40-8027
License No. SUB-1010

RECEIVED
MAY 11 1992
Newman & Holtzinger, P.C.

Mr. James J. Sheppard
President
Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435

Dear Mr. Sheppard:

I am writing pursuant to the Commission's direction to the Staff to take all practicable and advisable steps to make legally binding the financial commitments of General Atomics (GA) regarding cleanup of the Sequoyah Fuels Corporation (SFC) facility. (Staff Requirements Memorandum, March 27, 1992.) These commitments are contained in numbered Paragraphs 1 and 2 of a letter dated March 19, 1992, from Mr. J. Neal Blue, Chairman of GA, to the Commission.

The Staff would consider acceptable, subject to NRC review, a contract between Sequoyah Fuels Corporation (SFC) and GA, or other suitable arrangement making GA's commitments legally binding. The contract or documented arrangement, which would provide that it can be enforced, if necessary, directly by the NRC, would be incorporated by reference into SFC's operating license by amendment. We would expect that such an arrangement would include a binding pledge by GA to meet the financial commitments undertaken in numbered Paragraphs 1 and 2 of Mr. Blue's letter. Any such arrangement and license amendment would remain in effect throughout the term of SFC's license. Additionally, the financial commitments made by GA, and any license amendment reflecting those commitments, are considered by the NRC to be in addition to, and not in lieu of, SFC satisfying the decommissioning funding requirements in 10 C.F.R. § 40.36.

Please advise me by June 4, 1992, of your plans to accomplish the foregoing.

Sincerely,

Richard E Cunningham

for Robert M. Bernero, Director
Office of Nuclear Material Safety
and Safeguards

cc: J. Neal Blue, General Atomics Corporation
M. Axelrad, Newman & Holtzinger, P.C.
D. Curran, Harmon, Curran, Gallagher & Spielberg
J. Wilcoxen, Wilcoxen & Wilcoxen
Brita Haugland-Cantrell, Assistant Attorney General

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| SF OYAH FUELS CORPORATION | ) | Docket No. 40-8027-EA |
| a GENERAL ATOMICS | ) | |
| | ) | |
| (Sequoyah Facility in | ) | February 17, 1994 |
| Gore, Oklahoma) | ) | |

**BRIEF IN SUPPORT OF GENERAL ATOMICS' MOTION FOR SUMMARY DISPOSITION OR FOR AN ORDER OF DISMISSAL**

In support of its Motion for Summary Disposition or for an Order dismissing all claims against it that are contained in the Nuclear Regulatory Commission's Order of October 15, 1993, and pursuant to the Commission's Rules of Practice in 10 C.F.R. § 2.749 and § 2.730(d), General Atomics respectfully submits this brief.

## INTRODUCTION

The Rules of Practice in 10 C.F.R. § 2.749 authorize a presiding officer to consider a party's motion for a decision in that party's favor on any part of the matters involved in the proceeding. The NRC's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure.[1] Decisions arising under the Federal Rules thus may serve as

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[1] See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

guidelines to licensing boards in applying 10 C.F.R. § 2.749.[2] Under the Federal Rules, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[3] "Factual disputes that are irrelevant or unnecessary will not be counted."[4] Accordingly, a disputed factual issue in and of itself does not preclude summary disposition.

Facts that are material to the Board's determination of whether the NRC has jurisdiction over General Atomics are set forth in Annex A to General Atomics' Motion for Summary Disposition or for an Order of Dismissal and in the Affidavits of J. Neal Blue and Reau Graves, Jr. None of the facts is in dispute. When there is no genuine issue to any material fact, summary disposition is appropriate.[5] An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[6] There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for

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[2] Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 419 (1982), citing ALAB-443, supra, at 754.

[3] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[4] Id.

[5] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 15 NRC 987, 1003 (1981), citing Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980).

[6] Anderson, 477 U.S. at 248.

that party.[7] Accordingly, a dispute over a fact material to the decision does not preclude summary judgment in favor of the moving party unless the evidence could support a decision in favor of the non-moving party.

In its January 13, 1994 Memorandum (Posing Matters for Consideration at Prehearing Conference), the Atomic Safety and Licensing Board ("Board") noted that the October 15, 1993 Order ("October 15 Order") of the Nuclear Regulatory Commission ("NRC") "does not delineate the specific legal theory under which the agency has the authority to place this non-civil penalty financial liability upon [General Atomics]." At the January 19, 1994 Prehearing Conference, Judge James P. Gleason reiterated the point with the comment that "we do have some questions in our own mind about the theories supporting this case with respect to the participation of General Atomics . . . ." When given full opportunity to cite the legal basis for the NRC's assertion of its claim against a <u>non-licensee</u> -- a claim which he conceded is not based upon any deliberate misconduct by General Atomics -- counsel for the NRC responded that the NRC's "theory can be developing based upon facts that are later discovered . . . ." (See the excerpt from the Official Transcript of Proceedings of the January 19, 1994 Prehearing Conference, p. 106, attached at Tab A of this Brief).

The Board was correct in raising the fundamental issue of

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[7] <u>Id</u>. at 249.

jurisdiction. General Atomics submits that the NRC lacks jurisdiction to compel General Atomics to guarantee the financial obligation of Sequoyah Fuels Corporation and that for the reasons set forth below, General Atomics is entitled to a decision that as a matter of law the NRC lacks such jurisdiction.

The NRC's Rules of Practice in 10 C.F.R. § 2.730 also authorize a party to file motions addressed to the presiding officer. In addition to its Motion for Summary Disposition, General Atomics has filed a motion seeking a dismissal of the claims against it on the grounds that the NRC has otherwise failed to allege a legally cognizable claim against General Atomics, and that the NRC can prove no set of facts that would entitle it to impose a non-civil penalty financial liability upon General Atomics.

General Atomics further submits that the NRC is estopped from seeking a guarantee by General Atomics of the decommissioning and remediation costs of the Licensee and that if General Atomics is required to contest the NRC's October 15, 1993 Order in this proceeding, the results of which are likely to be ultimately reviewed by the NRC, it will be deprived of procedural due process rights guaranteed to it by the Constitution, the Administrative Procedure Act, and the NRC's own Rules of Practice.

Finally, General Atomics submits that this Board can and must resolve these threshold issues of law before the matter can proceed.

## ARGUMENT

### I. THE COMMISSION LACKS JURISDICTION TO COMPEL GENERAL ATOMICS TO GUARANTEE THE FINANCIAL OBLIGATION OF THE LICENSEE.

#### A. The statutory provisions upon which the NRC relies do not authorize it to assert the jurisdiction over non-licensees which is claimed here.

It is a fundamental principle of administrative law that an agency may exercise "only the powers granted by the statute reposing power in it." Pentheny, Ltd. v. Gov't of Virgin Islands, 360 F.2d 786, 790 (D.C. Cir. 1966). The principle has been repeatedly adopted by the U.S. Supreme Court:

> First, an agency literally has no power to act . . . unless and until Congress confers power upon it. Second, the best way of determining [agency authority] . . . is to examine the nature and scope of the authority granted by Congress to the agency.

Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 374-375, 106 S. Ct. 1890, 1901 (1986).[8]

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[8] See Lyng v. Payne, 476 U.S. 926, 937, 106 S. Ct. 2333, 2340 (1986) (same); Stark v. Wickard, 321 U.S. 288, 309-10, 64 S. Ct. 559, 571 (1944) ("[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted"). See also, Killip v. Office of Personnel Management, 991 F.2d 1564, 1969 (Fed. Cir. 1993) ("An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress"); Seal Air Corp. v. United States Int'l Trade Comm'n, 645 F.2d 976, 993 (3d Cir. 1981) ("Any authority delegated or granted to an administrative agency is necessarily limited to the terms of the delegating statute."); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir. 1984) (administrative agencies are vested only with

The Supreme Court has also recently emphasized that in any case involving the construction of a federal statute, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklow Drilling Co., 112 S. Ct. 2489, 2594, 120 L. Ed. 2d 379-388 (1992). Appropriate respect for legislative authority thus requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress. Office of Consumers Counsel v. Federal Energy Regulatory Comm'n, 655 F.2d 1132, 1152 (D.C. Cir. 1980); State of New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969).

Whatever may be the scope of the NRC's authority and discretion on matters over which it has undisputed subject matter jurisdiction over its licensees, the question presented here is whether, under the unique circumstances that exist in this proceeding, the NRC has jurisdiction over General Atomics. In short, does the authority delegated by Congress to the NRC to issue orders, give the NRC such broad power over its licensees, that it can impose an $86 million non-civil penalty financial liability upon the corporate parent of a licensee, when there is no claim of

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the authority given to them by Congress), cert. denied, 471 U.S. 116, 105 S. Ct. 2357 (1985); Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Comm'n, 607 F.2d 1199, 1203 (7th Cir. 1979) (same).

illegal or intentional misconduct against either the licensee or the parent, and where, with respect to the licensee's regulated site and activities, the parent is not a licensee, is not engaged in activities within the subject matter jurisdiction of the NRC, and does not possess or use regulated source materials?[9] Clearly, it does not.

In its October 15 Order, the NRC alleged as a matter of fact that it has jurisdiction over General Atomics for two reasons. First, the NRC asserted that the individual members of the Commission reasonably relied upon statements in the form of "guarantees" made by the Chairman of General Atomics (October 15 Order, pp. 3, 13, 16, 19-21). Apparently, the NRC is seeking to enforce the alleged "guarantees" under some form of estoppel theory. At the Prehearing Conference on January 19, 1994, however, counsel for the NRC advised the Board that "the Staff at this time is not relying upon a contract or quasi-contract theory stemming from purported reliance by the Commission on statements of General Atomics" (see Tab A, pp. 106-107).

Second, the NRC asserted in its October 15 Order that for the purposes of this matter, General Atomics and Sequoyah Fuels Corporation ("Licensee") are one and the same because General Atomics has "de facto control" over the day-to-day business of the

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[9] General Atomics does have a license from the NRC for its TRIGA reactors, used in training, research and isotope production, and for its use of source materials in research and development, but it is not a licensee of the NRC in connection with any aspect of the Sequoyah Fuels Corporation Facility in Gore, Oklahoma, nor does it possess or use regulated source materials in connection with that facility.

Licensee (October 15 Order, pp. 14-15, 19-21). While the Order is not entirely clear, the NRC is presumably seeking to "pierce the corporate veil" that separates the Licensee and General Atomics in order to compel the latter to guarantee the financial obligation of the former. This was made slightly more clear by counsel for the NRC at the January 19, 1994 Prehearing Conference when he stated that the NRC's legal theory is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . . ." (See Tab A, p. 107).

The NRC, significantly, has <u>not</u> alleged any form of illegal conduct or intentional misconduct by General Atomics. The October 15 Order is devoid of any such claim. At the January 19, 1994 Prehearing Conference, counsel for the NRC declared that the NRC is "not charging deliberate misconduct on the part of any party . . .." (See Tab A, p. 106).

As the basis in <u>law</u> for its assertion of jurisdiction over General Atomics, the NRC cites sections 62, 161b, 161c, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and its own regulation in 10 C.F.R. § 2.202 and 10 C.F.R. Part 40 (Order, p. 23). Of the seven statutory provisions relied upon by the NRC, four are simply inapposite to the claims asserted against General Atomics in this proceeding.

Section 62 requires a license for the transfer of source materials. The NRC has made no allegation whatsoever, that in

connection with the Licensee's Facility, General Atomics has engaged in the activities described in Section 62 or that it has failed to obtain any required license.

Section 161 generally relates only to the general subject matter jurisdiction of the NRC, and not with its personal jurisdiction. It deals with the matters the NRC has been authorized to regulate and how they will be regulated, not the individuals or companies that are subject to that regulation. Section 161c merely grants the NRC authority to conduct investigations. Section 161o addresses the subject of inspections and records of licensed activities. It is undisputed that with respect to its ownership of Sequoyah Fuels Corporation, no activity of General Atomics is licensed by the NRC. Section 182 defines certain requirements which must be met by applicants for a license authorized by the NRC, including submission of technical and other information. Section 186 authorizes the NRC to revoke a license already issued for any material false statement made in the application for the license. It further authorizes revocation on the basis of facts which would have caused the NRC to refuse to grant the license originally, or because a particular licensee has failed to comply with a condition upon which its license was issued, a regulation of the NRC, or another term and provision of the statute. Neither provision authorizes the NRC to take punitive action against or to otherwise regulate non-licensees.

The two remaining statutory bases upon which the NRC purports to find jurisdiction over General Atomics are Sections 161b and

161i of the Atomic Energy Act. In relevant part, Section 161b authorizes the NRC to establish

> . . . by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and by-product material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

In addition, the NRC is authorized to

> . . . prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235; . . . .

42 U.S.C. § 2201(b) (emphasis added). That part of the statute first quoted dates to the original enactment of the Atomic Energy Act in 1954. The second part quoted was added by Congress in 1990. Neither part delegates to the NRC authority to regulate non-licensees in the circumstances that exist here. Even if the assertion in the Order that the NRC reasonably relied on statements made by the Chairman of General Atomics were true -- which General Atomics emphatically denies -- the assertion cannot conceivably be construed to be part of an order governing General Atomics' "possession and use" of nuclear material, or "control, ownership, or possession" of nuclear equipment or devices. At the most, the October 15 Order relates to an alleged (contractual or equity) obligation of General Atomics to pay money.

An allegation of personal jurisdiction under a "piercing the corporate veil" or "de facto control" theory is equally unsupported

by Section 161b. The NRC does not even allege that General Atomics possesses or owns or uses regulated source material in connection with the Licensee's Facility at Gore, Oklahoma. In fact, it does not. In order to make Section 161b fit its control theory, therefore, the NRC would have to contend that General Atomics, as a result of its purported control over the Licensee, had constructive "possession and use" of nuclear material, subjecting it to NRC jurisdiction. This argument in turn would require a construction of the words "possession and use" in a fashion that would make them apply to not only those who have actual, tangible "possession and use" of nuclear material, such as licensees and their employees, but also to all others who, in the subjective judgment of the NRC, stand in sufficiently close legal relationship with a licensee who does have actual physical possession and use of such material.

Any such interpretation of the statute would require the disregard and outright breach of settled rules of statutory construction. In amending Section 161b in 1990 to give the NRC jurisdiction over certain nuclear devices and equipment, Congress used substantially different language to describe the scope of the activity it wished to be regulated. The "control, ownership or possession" of devices or equipment is what is now subject to regulation. In contrast, the first prong of Section 161b only covers "possession or use." Under the forced interpretation urged by the NRC, the words "possession and use," in the first prong and the use of the words "control" and "ownership" in the second prong,

would be redundant. The word "possession" would already bring with it those concepts.

The Supreme Court has adopted the black-letter principle of statutory construction requiring that "effect" be given, "if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979). More specifically, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

The application of the principle in this matter is clear. Legal control by one corporate entity over another which possesses regulated material, cannot be equated with "possession" of the material under Section 161b. Otherwise, the "control, ownership and possession" language of that section would necessarily be either a meaningless redundancy, or a drafting mistake.

The relevant part of Section 161i authorizes the NRC to prescribe regulations and orders that it deems necessary

> to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property; . . .

42 U.S.C. § 2201(i)(3). By its own terms, Section 161i is limited to "any activity authorized pursuant to this chapter," i.e., to licensed activities. The inevitable implication is that Section

161i is also limited to the licensees who engage in the licensed activities. One court has unequivocally ruled that the "very language of section 161(i)" as well as the "whole of the legislative history" demonstrates that it deals only with those who are subject to the authority of the Atomic Energy Commission (and its successor, the NRC), i.e., to licensees. Reynolds v. United States, 286 F.2d 433, 438 (9th Cir. 1960).

Even if the Ninth Circuit in Reynolds had found the parameters of Section 161i to be broader than it did, i.e., that the section permitted a cause of action against at least some classes of non-licensees in some circumstances, none of the connections alleged by the NRC in its October 15 Order would be sufficient to satisfy the requirement of a nexus between the statute and an "authorized (licensed) activity." While it is undisputed that the Licensee, Sequoyah Fuels Corporation, has engaged in licensed activities, none of the conduct attributed to General Atomics in the October 15 Order involved a licensed activity.

Not one word of the Atomic Energy Act addresses the conduct of a licensee's parent company which does not itself involve a violation of the NRC regulatory scheme. Not one word of the statute authorizes the enforcement as a matter of contractual obligation, of statements made to the NRC by a representative of a non-licensed parent of a licensee. The October 15 Order contains no allegation that either the alleged "de facto control" of its licensee-subsidiary by General Atomics or the refusal of General Atomics to voluntarily accept without condition the responsibility

of "guaranteeing" the financial obligations of its licensee-subsidiary, constitutes a breach of an existing NRC regulation.

A refusal by a non-licensee parent company to voluntarily provide a financial assurance (guarantee) of a very large financial obligation of one of its subsidiary companies cannot, under any conceivable construction, be sufficient to constitute a violation of the statute. It is the conduct of licensees that is regulated by the statute. Any other conclusion must presume a grant of authority never even imagined, much less intended, by Congress.

General Atomics recognizes, of course, that on occasion in the past, the NRC has asserted that its enabling statute is similar to that of the Federal Communications Commission ("FCC") and that the NRC has further relied on certain judicial interpretations of the Federal Communications Act of 1934, as evidence that its own authority is very wide in scope. This bootstrap argument has no merit here. The cases usually cited are either limited to FCC rulemaking authority applicable to its licensees, or to the authority of the FCC to issue interim relief and interim orders to its licensees, or to the FCC's general ordering authority over its licensees, or the authority of the FCC (based upon the plain language of its enabling statute) over non-licensees which are themselves clearly engaged in activities within the FCC's subject matter jurisdiction.[10]

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[10] In United States v. Southwestern Cable Co., 392 U.S. 157, 88 S. Ct. 1994 (1968), for example, the Court described the broad authority over all forms of electrical communications which was delegated to the FCC by the Communications Act of 1934. It was undisputed that the respondent community antenna television system

Whatever may be the power of the NRC over its licensees and activities which fall clearly within its subject matter jurisdiction, the statute upon which it relies for its claim against General Atomics does not authorize it to assert jurisdiction over non-licensees in the circumstances which are present in this matter.

B. Congress never intended to delegate the authority which the NRC seeks to assert over General Atomics.

The words of the NRC's enabling statute regarding the scope of its authority are not ambiguous, but even if they were, the NRC could take no comfort from an analysis of congressional intent regarding its passage. It was not and could not be the intent of

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companies were engaged in "communication by wire or radio," but the respondents had argued that they were neither common carriers nor broadcasters and did not, therefor, fall within the regulatory categories created by the Act. Observing that when Congress passed the Communications Act it could not have foreseen the development of community antenna television systems, the Court nevertheless held that since the activities of the respondents were admittedly communications, those activities fell within the FCC's regulatory authority.

In the instant matter, of course, it is undisputed that with respect to the Licensee's Facility, General Atomics is not a licensee of the NRC and that it has not filed an application to become one. The NRC has not even alleged that General Atomics is engaged in activities in connection with Sequoyah Fuel Corporation's Facility that normally require a license. Rather, General Atomics is merely a third-tier parent company of a licensee which is engaged in such activities. Moreover, in passing the Atomic Energy Act of 1954, Congress did foresee the investment of companies like General Atomics in the nuclear industry and it drafted the Act to encourage such investment by limiting the scope of the NRC's (AEC's) jurisdiction over non-licensees.

Congress to delegate to the NRC unrestrained authority to prosecute administrative claims that involve monetary obligations only, that are based on common law theories of liability, and that are asserted against non-licensees in the circumstances that exist here.

The Atomic Energy Act of 1954 does give the NRC power to authorize private industry to participate in developing peaceful uses of atomic energy. The importance of this legislative policy objective is apparent from the Ninth Circuit's opinion in Reynolds v. United States, supra:

> The first event leading to the passage of the Atomic Energy Act of 1954 was a message from the President of the United States to Congress on February 17, 1954.
>
> * * *
>
> Speaking of domestic development of atomic energy the President said 'in this undertaking, the enterprise, initiative and competitive spirit of individuals and groups within our free economy are needed to assure the greatest efficiency and progress at the least cost to the public.'
>
> * * *
>
> He went on to say that . . . 'I recommend amendments to the Atomic Energy Act which would: . . . 2. Permit private . . . ownership . . . of atomic reactors and related activities, subject to necessary safeguards and under licensing systems administered by the Atomic Energy Commission.'
>
> * * *
>
> Thus it appears that one of the two major purposes of the proposed new act was to provide for increased private participation in the atomic energy program.

286 F.2d at 435-436.

The legislative policy objective is also apparent from a proposed draft of the 1954 amendments to the Atomic Energy Act which is quoted with approval by the court in Reynolds:

Widespread participation and investment will speed the

> Nation's progress toward this objective [the development of industrial applications of atomic energy].

286 F.2d at 436 (emphasis added).

It is not surprising, therefore, that the only statutory provisions cited by the NRC as the legal basis of its October 15, 1993 Order, are devoid of any reference to either parent companies of licensees or to non-licensees who do not engage in conduct that constitutes a licensed activity. It could not be otherwise. If the words of the Act permitted a broad exercise of jurisdiction by the NRC over non-licensee parent companies such as that alleged by the NRC in its October 15 Order, the Act's legislative purpose -- i.e., "widespread participation and investment" by private industry in the peaceful uses of atomic energy -- would be defeated ab initio. No member of private industry could be reasonably expected to invest and participate in the peaceful uses of atomic energy if, by making such an investment, it would (1) subject itself to the actions of a federal agency seeking to expand its jurisdiction in an adjudicatory proceeding, rather than through the more predictable mechanism of the rule-making process, and (2) be governed and regulated in the same manner and to the same extent as a licensee engaged in an activity that Congress clearly intended to regulate. Indeed, if the authority now claimed by the NRC had been delegated by Congress, few companies would have the courage to enter or to remain in the nuclear industry at all, since it would be impossible to predict just what legal relationships with a licensee would fall within the scope of the NRC's jurisdiction.

The NRC does not rely upon Section 234 of the Atomic Energy Act (42 U.S.C. § 2282) for its claim of jurisdiction over General Atomics, but that section is relevant to any discussion of legislative policy regarding the NRC's authority over non-licensees. Section 234 was passed by Congress in 1969, some 15 years after the Act first became law. The provision authorizes the NRC to issue civil monetary penalties and, in contrast to Section 161, it specifically addresses the jurisdiction of the NRC over non-licensees.

> Any person who (1) violates any licensing provision of section 2073, 2077, 2092, 2093, 2111, 2112, 2131, 2133, 2134, 2137, or 2139 of this title or any rule, regulation or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 2236 of this title, shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed $100,000 for each such violation.

42 U.S.C. § 2282(a)(emphasis added).

On its face, the provision obviously applies to persons who do not have licenses. It does not, however, give power to the NRC to issue orders to non-licensees.[11] Moreover, even the jurisdiction over non-licensees that was conferred by the new provision was limited. Congress was clearly concerned only with certain specific types of non-licensees, namely, those who violate the licensing

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[11] It is noteworthy that the NRC previously amended its regulations in 10 C.F.R. Part 2 to allow the issuance of notices of violation and civil penalties to certain unlicensed persons under Section 234. At the time, it did not revise 10 C.F.R. § 2.202, relating to orders. Thus, while notices to non-licensees can be issued, orders (such as that involved here) cannot.

provisions of the Atomic Energy Act. In explaining why the new legislation was necessary, the Joint Committee on Atomic Energy declared that:

> . . . Several points concerning the bill as reported are worthy of special note. For one thing, this new authority of the AEC to impose civil monetary penalties would not be confined to AEC licensees. Any person, whether or not an AEC licensee, would be subject to such a penalty if he committed a violation of the type covered by this legislation . . . . Otherwise it would be possible, for example, for a person who neglected to obtain a license, or who once had a license but allowed it to expire, to be immune to any penalty under the legislation.

S. Rep. 553, 91st Cong., 1st Sess. (1969) (emphasis added), reprinted in 1969 U.S.C.C.A.N. 1607, 1618. The new authority is limited to circumstances in which a non-licensee has committed a violation "of the type" covered by the legislation. In the instant matter, of course, the NRC does not seek any form of monetary penalty. Rather, it seeks nothing less than the power to take private property of a non-licensee which is not even alleged to have committed some form of "violation."

The fact that Congress did not intend to grant the NRC any broader authority is also apparent in the Joint Committee's reference to the NRC's pre-existing authority, which was clearly limited to the suspension or revocation of a previously issued license or the issuance of a cease and desist order.

> In some instances, for example, the revocation of a license or suspension thereof may be too harsh a penalty under the circumstances. Moreover, in certain cases suspension may penalize the licensee's employees through the loss of income without having any significant impact on the licensee itself. At the present time, the AEC in

> such cases essentially must choose between issuing a revocation or suspension order, on the one hand, or, on the other hand, issuing a cease and desist order.

Id. at 1616.

The limited jurisdiction over non-licensees that was delegated by Congress also restricted the enforcement power of the NRC. Civil penalties can only be enforced by the initiation of a civil action in an Article III court by the Attorney General, and, in such actions, the penalized party is entitled to a trial de novo. NRC v. Radiation Technologies, Inc., 519 F. Supp. 1266, 1277-1286 (D.N.J. 1981).

Because it was not the intent of Congress to delegate to the NRC the kind of authority over non-licensees which it seeks in this proceeding, no such authority can be fairly implied from the Atomic Energy Act. See Walker v. Luther, 830 F.2d 1208, 1211 (2d Cir. 1987) ("As a matter of statutory construction, statutes granting power to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication."). Congress has repeatedly considered the scope of the NRC's jurisdiction, and after consideration, it has narrowly crafted and expressly defined the limited situations in which the NRC has personal jurisdiction over non-licensees. It is a fundamental rule of statutory construction that when a statute refers to certain persons, all omissions must be understood as exclusions. 2A Sutherland Statutory Construction § 47.23 at 216 (5th ed. 1992). Moreover, implied exceptions to a statutory scheme will be found only to prevent absurd results or consequences

obviously at variance with the policy of the enactment as a whole. United States v. Rutherford, 442 U.S. 544, 551-552, 99 S. Ct. 2470, 2475 (1979).

Notwithstanding its current position in the instant proceeding, the NRC has previously recognized that its jurisdiction has definite limits. In State of New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969), the court was asked to review an order of the Commission granting a construction permit for a nuclear power reactor. New Hampshire had challenged the order on the ground that the Commission erred when it refused to consider, as outside its regulatory jurisdiction, evidence of possible thermal pollution of the Connecticut River as a result of the discharge of cooling water by the applicant's facility. Relying on the legislative history of the Atomic Energy Act, the Commission had rejected the challenge.

Acknowledging that the Atomic Energy Act is replete with many broad references to "health and safety of the public" and that the case presented a serious gap between the dangers of modern technology and the protections afforded by law, the court nevertheless concluded that the atomic safety and licensing board and the Commission properly refused to act beyond the authority granted by Congress. The analysis employed by the court is particularly relevant here:

> Tempting as it may be, we do not presently feel that we fulfill our function responsibly by simply referring to the dictionary [for definitions of 'health' and 'safety']. This is perhaps a more legitimate occasion than most for invoking Mr. Justice Holmes' aphorism that 'A page of history is worth more than a volume of logic.'

* * *

> Or, conceding that there is a gap . . . between the law . . . and a demonstrable social interest, we may well be mindful of Mr. Justice Cardozo's admonitory gesture, "Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action."

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> . . . the very fact that complex questions of jurisdiction among federal agencies, of federal-state relations, of procedure, and even of specialized staff and appropriations must be resolved indicates the inappropriateness of any judicial fiat . . ..

406 F.2d at 173, 176.

A similar recognition of the importance of resisting a tendency to exceed the intent of Congress was made by Judge Learned Hand in his dissenting opinion in Spector Motor Service v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944). Judge Hand observed that it is not desirable for a lower court to "embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." It is even less desirable for an administrative agency to unreasonably imply broad, new parameters on its jurisdiction -- especially when the implication does not have, and is very unlikely to ever have, legislative sanction.

It is not clear from the allegations of the October 15 Order just what social interest the Order seeks to advance, other than the generalized desire to have someone, somewhere guarantee the Licensee's decommissioning and related costs. Nor has it been demonstrated that there is a gap between the law and this (or another) social interest. Even if there had been such a showing, it is beyond the power of the NRC to eliminate the gap by an

assertion of jurisdiction over non-licensees in circumstances such as these, unless and until Congress elects to give it such power.

The analysis thus far has focused on the words and legislative history of the Atomic Energy Act. Additional evidence that Congress did not intend for the NRC to exercise the kind of jurisdiction over non-licensees which it claims here, may be found in an analysis of the Energy Reorganization Act of 1974 (the "Reorganization Act"). Section 206 of that Act, 42 U.S.C. § 5846, includes a unique reporting and penalty provision which is applicable to certain, specified non-licensees ("Any individual director, or responsible officer of a firm constructing, owning, operating or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended, or pursuant to this [Act]").

If the NRC's existing authority had included the power to issue orders to and to penalize all non-licensees, it would have been unnecessary for Congress to adopt Section 206. The legislative history of section 206 makes clear, however, that "[t]he Atomic Energy Act contains no similar provisions requiring the reporting of defects and noncompliances, subject to civil or criminal penalties." 1974 U.S.C.C.A.N., 93rd Cong., 2d Sess., vol. 3 at 5528. Neither the rulemaking authority nor the ordering authority of the NRC was expansive enough to reach the non-licensees who are now the subject of Section 206.

The fact that Section 206 of the Reorganization Act is nothing more than a limited departure from the narrowly crafted

jurisdiction delegated to the NRC by the Atomic Energy Act was fully recognized by the NRC in a 1983 rule-making issuance of notices of violations to non-licensees:

> in general, the Commission's regulatory authority is limited to NRC licensees or persons who are required to obtain a license under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974 (ERA). However, in some regulatory areas, the Congress has extended the Commission's statutory authority to include non-licensees as well as licensees.

48 Fed. Reg. at 44,170 (Sept. 28, 1983). The NRC noted that some commentators to the proposed rule making had been concerned about the use of the open-ended phrase "any person subject to the jurisdiction of the Commission," and responded by stating that the intent of the regulation was not to attempt to "expand" existing authority granted by Congress, but rather to provide for issuance of notices to "those entities, in addition to those licensed by the Commission, which must comply with certain regulations promulgated by the Commission pursuant to its statutory authority." Id. at 44,171. It is also important to note that since Congress passed Section 206, it has not elected to expand the limited personal jurisdiction which that section confers.

Additional evidence of the desire of Congress to carefully limit the jurisdiction of the NRC over non-licensees may be found in Section 210 of the Reorganization Act, 42 U.S.C. § 5851(a). That carefully crafted "whistleblower" protection provision authorizes the NRC to regulate the conduct of unlicensed "employers" engaged in certain specified activities. The language of the statute is measured, however, and nothing in that section

would support a broader claim by the NRC of personal jurisdiction over other types of non-licensees.

For all of these reasons, the absence in those statutes which govern the NRC's limited jurisdiction of the kind of authority over non-licensees which the NRC seeks in this proceeding must be understood and treated as an intentional exclusion by Congress. No exception to the statutory scheme over non-licensees that was adopted by Congress can be reasonably or fairly implied by this Board or by the NRC. Any such implication would not only not prevent, it would actually require, absurd results and consequences obviously at variance with the policy objectives of Congress.

### C. By their own terms the NRC's regulations do not apply to General Atomics and to any extent that they appear to, the regulations are void since they cannot confer any greater authority than that granted by Congress.

In addition to the sections of the Atomic Energy Act discussed above, the NRC relies upon its own regulations in 10 C.F.R. § 2.202 and 10 C.F.R. Part 40 for its assertion of personal jurisdiction over General Atomics. In 1991, the NRC amended the regulation at § 2.202 to revise its procedures for issuing orders to non-licensees who are "otherwise subject to the Commission's jurisdiction." The amendment was further designed to put non-licensees on notice that "they may be subject to enforcement action (1) for willfully causing a licensee to violate any of the Commission's requirements or (2) for other willful misconduct that

(a) arises out of activities within the jurisdiction of the NRC and (b) places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety." 56 Fed. Reg. 40,664 (Aug. 15, 1991).

In promulgating the new rule, the NRC claimed broad authority over any corporation which "engages in conduct within the Commission's subject matter jurisdiction." Id. The examples which it gave to illustrate the scope of its claimed jurisdiction, however, required a direct link to a licensed activity,[12] and included those who possess or use regulated material as defined by Section 161b of the Atomic Energy Act, id. at 40,666; employees of a licensee or other persons who perform activities at a licensee site, id. at 40,669; those persons who in the past had engaged in licensed activities, id.; and certain persons who deliberately engaged in misconduct which caused, or threatened to cause, a licensee to violate NRC regulations. Id. at 40,666. The final rule adopted by the NRC expressly limits its effect to a limited class of non-licensees, namely, "any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, or a licensee." 10 C.F.R. § 40.10.

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[12] "Licensed activity" was defined broadly to encompass "all of those activities that a licensee, employees of a licensee, or a licensee's contractors, subcontractors and employees of contractors or subcontractors, perform to permit the licensee to carry out activities licensed by the Commission . . . ." 56 Fed. Reg. 40,665.

The 1991 amendments are thus grounded upon a tangible connection between specifically defined classes of non-licensees and conduct which could cause a violation of NRC regulations regarding a licensed activity. The NRC's October 15 Order alleges no such link. The NRC has not alleged that General Atomics caused the violation of any NRC regulation, nor has it alleged that General Atomics is itself engaged in any willful misconduct in a licensed activity. Thus, by their own terms, and irrespective of any challenge to their basis in law and applicability to other non-licensees in other circumstances, the NRC's regulations at 10 C.F.R. § 2.202 do not give it jurisdiction over General Atomics.

To any extent that the NRC's regulations appear on their face or otherwise serve to give it apparent jurisdiction over General Atomics, the regulations are invalid. No rule or regulation can confer on an agency any greater authority than that conferred under its governing statute. Killup v. Office of Personnel Management, 991 F.2d at 1569; Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 471 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 96 S. Ct. 1375, 1391 (1976); Office of Consumers Counsel v. Federal Energy Regulatory Comm'n.

D. The attempt by the NRC to stretch its jurisdiction far enough to encompass a non-licensee in these circumstances is arbitrary and so unreasonable as to be unlawful even if it were not obviously beyond the NRC's statutory authority.

It requires no great citation of authority to state that arbitrary powers may not be conferred on an administrative agency. In conferring adjudicatory and rulemaking powers, Congress cannot leave the determination of matters to the uncontrolled discretion of the agency. Rather, it must declare a policy and fix a limit to control the agency's discretion, and the absence of guiding standards may render a statute unconstitutional. A statute that reposes authority in an administrative agency to make determinations affecting important rights of individuals must necessarily, therefore, be sufficiently definite and clear to warn those potentially affected of the conduct to which the statute attaches serious consequences. Jordan v. De George, 341 U.S. 223, 71 S. Ct. 703-04 (1951). Otherwise, the statute is "void for vagueness." Similarly, conduct which will violate an administrative rule or regulation must be defined in advance with sufficient specificity to warn potential offenders of the proscribed conduct.

By its October 15 Order, the NRC attempts to hold General Atomics jointly and severally liable with the Licensee for (1) providing "funding to continue remediation of existing contamination" at the Licensee's facility, and (2) providing "financial assurance for decommissioning." The Order further

purports to require General Atomics to provide "financial assurance for decommissioning and remediation in the amount of $86 million" through one of three specific methods. The only factual bases relied upon for the assertion of such broad authority are (a) allegations by the NRC that the individual members of the NRC reasonably relied upon statements in the form of "guarantees" by the Chairman of General Atomics of such funding, and (b) allegations that for the purposes here, General Atomics and the Licensee are one and the same because the former has "de facto control" over the latter.

Four conclusions are beyond dispute. First, neither the Atomic Energy Act nor the Energy Reorganization Act expressly authorize the NRC to assert personal jurisdiction over a non-licensee in circumstances such as those which are present in this matter. Second, no court of law has held that the NRC has the personal jurisdiction which it is attempting to assert over General Atomics here. Third, no rule or regulation of the NRC expressly identifies any conduct as the type of conduct which, if engaged in under the circumstances that exist in this matter, will subject a non-licensee to the jurisdiction of the NRC. Fourth, the NRC has not engaged in any form of rule-making process which would define in advance, and with sufficient specificity, the kind of conduct by non-licensees that would subject then to the kind of liability claimed here by the NRC against General Atomics. The attempt by the NRC to hold General Atomics jointly and severally liable for a major financial obligation of the Licensee, without first creating

in advance clear standards by which General Atomics and other non-licensees could gauge and control their conduct, is, therefore, arbitrary, and so unreasonable as to violate the due process rights of General Atomics.

E. The NRC's decision in the Safety Light Corporation case does not, and could not, independently establish its jurisdiction over General Atomics.

In its February 8, 1994 Supplemental Petition to Intervene, Native Americans for a Clean Environment ("NACE") has argued broadly that the NRC has jurisdiction over General Atomics as a result of the NRC's own decision in Safety Light Corporation (Bloomsbury Site Decontamination), ALAB-931, 31 NRC 350 (1990). The NRC cannot, of course, carve out new parameters of its jurisdiction independent of a legislative delegation of authority. Moreover, the facts and jurisdictional grounds of the Safety Light case were so different from those in the instant matter that it raises the question of why the case was cited at all.

In Safety Light, an NRC license was unlawfully transferred through an "elaborate and complex corporation restructuring" and a subsequent sale. A licensing board found that "there was not even an attempt [by the companies involved] to comply with the mandatory requirements" of Section 184 of the Atomic Energy Act, which prohibit the transfer of a license without NRC consent. The NRC was not notified of the sale prior to its consummation and it never gave its approval to the transaction. The NRC concluded that that

fact, coupled with the 100 percent ownership of the licensee by the newly formed "parent" company, brought the parent within the jurisdiction of the NRC.

In the instant matter, no part of the NRC's October 15 Order is based on Section 184 and there is no claim whatsoever of any illegal transfer of a license. Nor could there be. It is undisputed that for several weeks prior to the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee Corporation to Sequoyah Holding Corporation, the NRC Staff and representatives of General Atomics discussed the subject. It is also undisputed that as part of its review of the proposed transfer the NRC performed a financial review to determine whether the change would affect the financial resources of the Licensee for safely operating the plant and for the future decommissioning of the Sequoyah Facility (see Appendix 1 attached to Annex "A" of General Atomics' Motion for Summary Disposition or for an Order of Dismissal.). By letter of October 18, 1988 (attached to Annex A of General Atomics' Motion as Appendix 2), Mr. Reau Graves, Jr., the President of Sequoyah Holding Corporation, formally and expressly asked for the consent of the NRC to the transfer of the control of Sequoyah Fuels Corporation. It is undisputed that the NRC approved the transfer of control. (see Appendix 4 to Annex "A" of General Atomics' Motion).

For all these reasons, the NRC clearly lacks jurisdiction to compel an <u>unlicensed</u> company -- which is <u>not</u> engaged in licensed activities, which does <u>not</u> use or possess regulated source

materials in connection with the activities of a licensee, and which has not engaged in deliberate misconduct -- to guarantee the financial obligation of the licensee. In order to reach this conclusion, it is not necessary for the Board to reach, much less decide broader issues, such as whether the NRC has power to order a non-licensee to cease deliberate conduct which is causing a licensee to breach a NRC regulation or order; or whether it has power to order a non-licensee to cease deliberate conduct which threatens to cause a licensee to breach a NRC regulation or order; or whether it has power to order a non-licensee to cease a deliberate breach of some obligation directly imposed by the NRC's statutes or regulations. It would only have to rule, as it must now, that the NRC has not been vested by Congress with personal jurisdiction over non-licensees in the circumstances that are present in this matter.

## II. THE NRC HAS FAILED TO STATE A LEGALLY COGNIZABLE CLAIM AGAINST GENERAL ATOMICS AND IT CAN PROVE NO SET OF FACTS THAT WOULD ENTITLE IT TO IMPOSE A NON-CIVIL PENALTY FINANCIAL LIABILITY AGAINST GENERAL ATOMICS.

Not deterred by either the absence in its enabling statute of any delegation of the authority which it seeks to assert here, or by strong evidence that Congress never intended such a delegation, the NRC Staff asserts in its October 15 Order that because the Licensee's decommissioning funding plan "does not provide the level of assurance" required by the Commission, "supplemental financial

assurance is required" from General Atomics (Order, pp. 11-12). Citing no legal authority for its conclusion, the NRC alleges broadly that General Atomics "exercised and exercises de facto control over the day-to-day business of" the Licensee and that General Atomics' "representations of financial guarantees . . . on which the Commission has relied, make [General Atomics] responsible, along with [the Licensee] to satisfy the NRC financial assurance requirements." (Order, pp. 19, 21). As noted earlier, counsel for the NRC advised the Board at the Prehearing Conference that in making this allegation, the NRC hopes to advance a theory that is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . . ." (see Tab A, p. 107).

General Atomics recognizes that federal agencies routinely claim authority to ignore the formalities of corporate law if the observation of those formalities would somehow -- at least in the minds of agency representatives -- interfere with the broad regulatory power they seek. The NRC's attempted reliance on a common law doctrine does not, however, vest the NRC with jurisdiction that Congress has not elected to give it. Nor does it relieve the NRC from its obligation to plead a legally cognizable claim and facts that would support it.

There is absolutely nothing in the legislative history of the Atomic Energy Act that suggests that Congress intended to expand the liability for decommissioning and remediation costs at the

expense of the limited liability conferred by the corporate veil. Nor is there any statute or controlling opinion of a court of law that establishes a "de facto control" doctrine for the definition of the NRC's jurisdiction.

Substantial authority exists, however, for the proposition that liability cannot arbitrarily be based on a theory of corporate veil piercing. In American Bell, Inc. v. Federation of Tel. Workers, 736 F.2d 879 (3d Cir. 1984), the U.S. Court of Appeals for the Third Circuit stated the proposition this way:

> A court may not disregard at will the formal differences between affiliated corporations, and in fact the requirements for corporate veil piercing, although rather imprecise in their various formulations, are demanding ones. This court has stated that 'the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.' Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967). The court may only pierce the veil in 'specific, unusual circumstances', lest it render the theory of limited liability useless. Id. at 273. Regarding the 'alter ego' theory of veil piercing, we have endorsed the Fourth Circuit's list of factors that must be considered. In addition to gross undercapitalization, these factors are
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>> failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.
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> DeWitt Truck Brokers, Inc v. W. Ray Flemming Fruit Co., 540 F.2d 681, 686-87 (4th Cir. 1976), quoted with approval in United States v. Pisant, 646 F.2d 83, 88 (3d Cir. 1981).

736 F.2d at 886.

There are obvious reasons why theories of corporate veil piercing are disfavored. In structuring their financial transactions, businessmen depend on state corporate law and other established commercial rules to provide the stability in the marketplace which is essential for the reliable evaluation of the risks involved. United States v. Kimbell Foods, Inc., 440 U.S. 730, 739, 99 S. Ct. 1448, 1464 (1979). If the NRC were free to expand its jurisdiction by arbitrarily extending liability to the parent companies of its licensees in an adjudicatory proceeding, those companies which justifiably rely on settled corporate law and predictable rule-making procedures in making a decision to invest in the nuclear industry, would consistently have their expectations thwarted. That would clearly be contrary to the intent of Congress. As the court said in International Brotherhood of Painters v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988):

> limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history.

856 F.2d at 1550.

Even if Congress did intend to expand liability for decommissioning costs to non-licensees by piercing corporate veils, the NRC would still have to properly state a claim against General Atomics. A complaint in an action at law may, of course, be dismissed for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. 2A J. Moore, Moore's Federal Practice ¶ 12.07 at 2271 (2d ed. 1993). If

the allegation of additional facts consistent with a challenged pleading cannot possibly cure the deficiency, then a dismissal without leave to amend is proper. Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988).

With respect to its "piercing the corporate veil" theory, the NRC's October 15 Order contains nothing more than conclusory allegations and unwarranted inferences, both of which are insufficient. To establish that the corporate identity of a company has ceased to exist, i.e., that it is a mere instrumentality and alter ego of its corporate parent, a claimant must at least plead and prove some form of fraud, illegality or other improper conduct by the parent. The NRC has made no such allegations against General Atomics. It has not alleged, for example, that corporate formalities have not been observed by General Atomics and the Licensee, or that General Atomics has siphoned funds from the Licensee. Nor has it alleged the presence of any other factor that is necessary to state a legally cognizable claim based upon a theory of veil piercing. Indeed, as noted above, counsel for the NRC stated unequivocally at the Prehearing Conference that the NRC is "not charging deliberate misconduct on the part of any party . . . ."

On December 29, 1992, the NRC issued a Demand for Information to which General Atomics responded. The NRC then issued its October 15 Order and made a broad non-civil penalty financial liability claim against General Atomics. It now appears that its claim is based upon either a "de facto control" doctrine which has

no basis in law, or a corporate veil piercing theory which could not be supported by the facts the NRC alleges under any circumstances. Contrary to the assertion of its counsel, the NRC cannot use the October 15 Order as a point of departure for a fishing expedition for any facts upon which it might somehow base some claim that meets the tests of the law. Having failed to state both a legally cognizable claim against General Atomics and any facts that would entitle it to impose such financial liability, the NRC cannot be permitted to engage in what it has itself characterized as "fairly extensive" discovery (Tab A, pp. 120-121) in the hope of developing a theory "upon facts that are later discovered . . . ." (Tab A, p. 106).

## III. THE NRC HAS ADMITTED THAT GENERAL ATOMICS IS NOT LEGALLY OBLIGATED TO PROVIDE ASSURANCE OF DECOMMISSIONING AND REMEDIATION COSTS, AND IT IS ESTOPPED FROM ATTEMPTING TO COMPEL SUCH ASSURANCE.

The Licensee is the holder of Source Material License No. SUB-1010 (the "License") which was issued by the NRC pursuant to 10 C.F.R. Part 40. The license authorized the Licensee to possess and use source material in the production of uranium hexaflouride ($UF_6$) and depleted uranium tetraflouride ($DUF_4$). The License for $UF_6$ production was originally issued on February 20, 1970 by the Atomic Energy Commission. Sequoyah Fuels Corporation is the sole licensee named in the license.

The 1988-1990 Transactions

On June 20, 1988, Sequoyah Holding Corporation ("SHC") was incorporated in the State of Delaware. SHC was and is a wholly-owned subsidiary of General Atomics.

On July 7 and August 2, 1988, meetings were held between the NRC Staff and representatives of General Atomics to discuss the consent of the NRC to (1) the transfer of control of the Licensee from Kerr-McGee Corporation ("Kerr-McGee") to SHC, a subsidiary of General Atomics, and (2) the license amendment application of the Licensee to reflect a change in ownership. As part of its review of the situation, the NRC Staff performed a financial review of the proposed transfer of ownership to determine whether the change would affect the financial resources of the Licensee for safely operating the plant and for future decommissioning of the Sequoyah Facility. The review concluded that "the proposed transfer of ownership will not impair [the Licensee's] ability to perform decommissioning and reclamation activities or to safely operate the plant." (See the October 27, 1988 internal NRC Memorandum of W. Scott Pennington, and the September 19, 1988 internal NRC Memorandum from Robert S. Wood to Leland C. Rouse, attached to Annex "A" of General Atomics' Motions as Appendices 1 and 2 respectively).

Even though he had concluded that SHC was financially qualified to assume control of the License through stock ownership of the Licensee, Robert S. Wood recommended to the NRC that as an additional safeguard, the NRC "[a]sk for a guarantee from [SHC's]

parent, General Atomics Corporation, for decommissioning and reclamation expenses." Mr. Wood recognized that General Atomics would probably be unwilling to give such a guarantee and he advised the NRC that "if they refuse, we shouldn't make an issue of it . . . ."

On or shortly after October 18, 1988, and as required by Section 184 of the Atomic Energy Act, the then President of SHC (Reau Graves, Jr.) wrote to the NRC expressly seeking NRC consent to the transfer of control of the Licensee from Kerr-McGee to SHC. In the letter, Graves also requested that the NRC confirm that, through an amendment to Chapter 7.5 of the License, "Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility." (See the Graves Affidavit, letter from Graves to Rouse, at page 3). This amendment, along with several other revisions to the License, was reflected in SHC's application for amendment of the License, which was also dated October 18, 1988.

Sometime prior to the filing of his October 18, 1988 letter, Graves had met with representatives of the NRC in the Washington, D.C. area to discuss the acquisition of Sequoyah Fuels Corporation by SHC. They specifically discussed whether the NRC would require a guarantee by General Atomics of decommissioning costs. At the time, Graves was familiar with the guarantee of those costs that had been required of Kerr-McGee. (See the Graves Affidavit.) If a guarantee had been required of General Atomics, the acquisition would not have taken place. (See the Affidavit of J. Neal Blue.)

By letter to Graves dated October 27, 1988, the NRC approved the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee to SHC. (See the Graves Affidavit.) By letter dated October 28, 1988, the NRC also approved the proposed amendments to the License, including the revisions to Chapter 7.5 which effected the release of Kerr-McGee. The revisions to Chapter 7.5 approved by the NRC did not substitute General Atomics for Kerr-McGee and did not in any way impose an obligation on General Atomics that was similar to the one from which Kerr-McGee was being released. Moreover, no other conditions were placed upon the License which created any such obligation on the part of General Atomics.

On November 4, 1988, SHC purchased Sequoyah Fuels Corporation from Kerr-McGee. On August 29, 1989, New Sequoyah Fuels Corporation ("NSFC") was incorporated in Delaware as a wholly-owned subsidiary of Sequoyah Fuels Corporation. On December 29, 1989, the NRC amended the Sequoyah license to authorize a change in the Licensee's name to NSFC, the incorporation of NSFC, and a transfer of assets to NSFC. On December 31, 1989, Sequoyah Fuels Corporation and NSFC entered into a Transfer Agreement in which Sequoyah Fuels Corporation transferred its assets and ongoing business (excluding certain farm-related business and assets and certain conversion contracts with international customers) to NSFC.

On March 26, 1990, the NRC amended the Sequoyah license to authorize the change of the Licensee's name from NSFC to "Sequoyah Fuels Corporation." The former Sequoyah Fuels Corporation changed its name to "Sequoyah Fuels International Corporation" ("SFIC").

Sequoyah Fuels Corporation is now a wholly-owned subsidiary of SFIC. SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics. Consequently, General Atomics is a third-tier parent company of Sequoyah Fuels Corporation.

The decision of the NRC not to place new conditions on the transfer of the control of the Licensee was critical to the consummation of the transfer of the control of the Licensee. If the NRC had at that time required General Atomics to accept responsibility for providing funding, or financial assurance, or any form of guarantee of the decommissioning and remediation costs of the Licensee's Facility, the sale and transfer of control would not have taken place (see the Affidavit of J. Neal Blue).

The 1992 Transactions

Having abandoned all attempts to obtain a guarantee from General Atomics two years earlier, the NRC, in a Staff Requirements Memorandum dated March 27, 1992 (attached to Annex "A" of General Atomics' motion as Appendix 5), recognized and referred to certain "gaps in the current license which should be remedied, but not as a precondition to [the] restart" of the Licensee's facility (p. 1). The NRC further referred to "certain financial commitments" allegedly made by General Atomics in a March 19, 1992 letter to the Commission (see the October 15 Order, pp. 3, 12-13, 16, 18-20) regarding the cleanup of the facility and it directed the NRC staff to "make these commitments legally binding on General Atomics if it is practicable and advisable to do so." The Staff Requirements

Memorandum was obviously prepared ten days after the March 17, 1992 public meeting of the Commission at which the Chairman of General Atomics is also alleged to have made certain verbal financial commitments to provide financial assurance for the decommissioning and reclamation costs of the Licensee.

By letter dated May 6, 1992 (attached to Annex "A" of General Atomics' Motion as Appendix 6), to the Licensee, Mr. Richard E. Cunningham (on behalf of Robert M. Bernero, Director of the NRC Office of Nuclear Material Safety and Safeguards) acknowledged "the Commission's direction to the Staff to take all practicable and advisable steps to make legally binding the financial commitments of General Atomics (GA) regarding cleanup of the Sequoyah Fuels Corporation (SFC) facility." Mr. Cunningham went on to propose "a contract between Sequoyah Fuels Corporation (SFC) and GA, or other suitable arrangement making GA's commitments legally binding," and that the proposed contract contain terms that would permit it to be enforced by the NRC. It is undisputed that no such contract was ever entered into.

At the public meeting of the NRC on December 21, 1992, over nine months after the comments of the Chairman of General Atomics were made (i.e., at the March 17, 1992 public meeting and in the March 19, 1992 letter) -- comments upon which the NRC now alleges that it relied, thereby placing some form of legal obligation upon General Atomics -- the Chairman of the NRC admitted that no binding legal commitment had ever been made by General Atomics.

> CHAIRMAN SELIN: "Permission to restart was granted after a Commission meeting in which we received what sounded like

> firm assurance from General Atomics that they would stand squarely behind Sequoyah Fuels in providing for decontamination and decommissioning funding.
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> However, the staff's concerted efforts to translate this apparent commitment into a binding written agreement have been repeatedly frustrated . . . ."

(Transcript of the December 21, 1992 public meeting, pp. 3-4, attached at Tab B).[13]

At least two conclusions are unavoidable. First, despite repeated opportunities in 1988-1990 to require a financial guarantee by General Atomics (of the decommissioning and reclamation expenses of the Licensee) as a condition of the transfer of control of the license, the NRC decided not do so. Second, the NRC has repeatedly and publicly admitted that whatever comments the Chairman of General Atomics made in the NRC's public meeting of March 17, 1992 and in his letter of March 19, 1992, those comments were not and are not, legally binding.

For all of these reasons, the NRC is estopped in this proceeding from seeking to compel a financial guarantee by General Atomics of the decommissioning and reclamation costs of the

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[13] The transcript of the March 17, 1992 public meeting was prepared by the Court Reporters and Transcribers Firm of Neal R. Gross and Co., Inc. It is accompanied by a "Certificate of Transcriber" in which the transcriber certified that the transcript is complete and is a "true and accurate record" of the meeting. The transcript also includes a one page "Disclaimer" which appears to prohibit the use of the transcript in proceedings before the NRC. Whatever right, if any, the NRC may have had previously to object to the use of this transcript, or the transcripts of certain other meetings, that right was waived when the NRC based its October 15 Order in substantial part on matters that took place and subjects that were discussed at those meetings. Moreover, any attempt to prohibit the use of the transcripts by General Atomics would clearly violate its rights to procedural due process of law.

Sequoyah Facility.

## IV. IF GENERAL ATOMICS IS REQUIRED TO CONTEST THE ORDER BEFORE THE COMMISSION OR THIS BOARD, IT WILL BE DEPRIVED OF PROCEDURAL DUE PROCESS RIGHTS GUARANTEED TO IT BY THE CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT.

### A. Each of the individual NRC Commissioners must be disqualified since they have personal knowledge of disputed evidentiary facts and must be material witnesses in the matter in controversy.

Few doctrines of American law are as well established as that which applies the requirements of procedural due process to the deprivation of interests encompassed by the Fifth and Fourteenth Amendments' protection of liberty and property. The Supreme Court has eschewed rigid or formalistic limitations on the protection of procedural due process, Board of Regents of State College v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), and Supreme Court decisions in an unbroken line of cases from the first decade of the twentieth century have interpreted due process to require a trial-type hearing when sufficient interests are at stake in an administrative proceeding. Kenneth C. Davis, Administrative Law Treatise § 12:1 (2d ed. 1979).

Just how the concept of "due process" applies to particular proceedings, can, of course, vary with the nature of the proceedings, but it has long been the law that when governmental agencies make adjudications that affect legal rights, it is imperative that the agencies use procedures "which have

traditionally been associated with the judicial process." Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 263 (D.C. Cir. 1962). At the very least, quasi-judicial proceedings entail a fair trial and "with respect to agency adjudicatory proceedings, due process might be said to mean at least 'fair play.'" Id. at 264. A due process violation may be established without a showing of actual bias where it can be determined from the special facts and circumstances present in a case that the "risk of unfairness is intolerably high." Greenberg v. Bd. of Gov. of Federal Reserve System, 968 F.2d 164 (2nd Cir. 1992).

An essential requirement of fair play in the judicial process is the disqualification of individual members of a tribunal who have personal knowledge of disputed evidentiary facts concerning the proceeding, 28 U.S.C. § 455(b)(1) or who have been a material witness concerning it. Id. at § 455(b)(2). So important is this requirement that recusal of a judge is warranted where the judge is a personal friend of a witness who is not even a party to an action, if the witness' testimony is likely to be pivotal and the credibility of the witness is a major factor to be resolved by the judge. Hadler v. Union Bank and Trust Co. of Greensburg, 765 F. Supp. 976 (S.D. Ind. 1991). It is self-evident that recusal or disqualification of a judge is required where the judge is, himself, a witness in the proceeding. It is inconceivable that a jurist should be permitted the authority to weigh his own credibility.

That the testimony of the members of the Commission is pivotal to the resolution of critically important factual issues raised by the Commission itself, is apparent both on the face of the Commission's October 15 Order[14] and from the public statements of the Commission's chairman.

The Order commands General Atomics to accept financial liability for the decommissioning and remediation of the Licensee's Facility. The purported imposition of such broad liability on a company that is admittedly not a licensee of the Commission, is based in material part upon the Commission's own factual allegations, allegations which are totally denied by General Atomics At page 13, for example, the Order states that "The Commission relied on the above General Atomics financial commitments in authorizing restart of the SFC Facility . . . ." At page 16, the Order states that "Mr. Blue's March 17 statements to the Commission and March 19 letter to Chairman Selin were clear and unconditional financial assurance guarantees." At page 20, the Order states that "[t]he Commission reasonably took Mr. Blue at his word" and that Mr. Blue's purported promise "reassured the Commission that SFC's cleanup effort was creditable."

Certain of Chairman Selin's comments at the December 21, 1992

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[14] The terms "Nuclear Regulatory Commission," "NRC" and "Commission" are used interchangeably throughout the Order (Order, p. 1). The term "Commission" is further used in both a general or institutional sense, and in reference to the individual commissioners. For example, at page 2, the Order refers to "[t]he Commission's regulations" and states that "on October 3, 1991, the Commission issued an Order." Elsewhere, the Order states that "The Commission reasonably took Mr. Blue at his word." (Order, p. 20).

meeting of the Commission also related directly to matters that are currently disputed issues of material fact.[15] The following comments are illustrative:

> . . . the assurances that you gave and that Mr. Sheppard asked and you agreed on March 17th were clearly a lot more than an arm's length financial. I mean we were given to understand -- I specifically asked you and you certainly answered that GA's management resources, its technical resources, its financial resources were behind Sequoyah, that you're not a passive investor that's protected from further commitments by the corporate structure as far as I'm concerned and I'm sure the other Commissioners are concerned.

(Tab B, p. 51). Later in the meeting, the Chairman stated that:

> In April of 1992, . . . the [Licensee's] plant was permitted to restart operations. But a second major ingredient in that decision was the public meeting that we held on March 17th, 1992 with officials . . . who gave us a number of assurances and those assurances were critical to that restart.
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> * * *
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> I want to emphasize that these assurances were very important to the Commission when we reached our decision to permit resumption of operation.

(Tab B, pp. 62-63).

Each of these and almost certainly other equally contested material facts cannot be fairly determined without the personal testimony of each of the Commission's individual Commissioners. Only they can testify to the truth of the allegations that Mr. Blue's comments were "clear and unconditional" and that they were interpreted by the Commissioners as a "guarantee" of General

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[15] The transcripts of this and the other meetings that are referenced elsewhere in this brief, contain identical certifications of accuracy, as described in Footnote 13.

Atomics' financial support of the Licensee. Only they can testify as to whether or not they each "relied" upon and "reasonably" interpreted Blue's comments. Only they can testify as to whether or not any of Mr. Blue's statements were interpreted as "assurances" and whether the alleged assurances were "very important to the Commission when [the individual Commissioners] reached [their] decision to permit resumption of operation."

It is no expression of disrespect to either the NRC collectively, or the individual Commissioners, to assert that neither the Commission nor any of its inferior administrative tribunals can be permitted to adjudicate such disputed evidentiary facts when the Commissioners themselves have personal knowledge of matters which are directly relevant to those facts.

B. The NRC's own rules prohibit the attendance and testimony of witnesses whose personal knowledge of disputed evidentiary facts is essential to the adjudication of the issues raised by the October 15 Order.

Almost no aspect of the trial or hearing is so indispensable to the fundamental fairness associated with due process, as is the right of cross-examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970). It is for such reasons that the Administrative Procedure Act mandates "such cross-examination as may be required for a full and

true disclosure of the facts." 5 U.S.C. § 556(d) (1977). When administrative judges resolve credibility issues such as those that appear in this case, they must consider several factors, including the contradiction of a witness' version of events by other evidence or its inconsistency with other evidence; the demeanor of the witnesses; the inherent probability or improbability of a witness' version of events; any prior inconsistent statement by a witness; and, other factors. In his classic The Art of Cross-Examination, Francis Wellman succinctly summarized the importance of cross-examination: ". . . no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions." Francis L. Wellman, The Art of Cross-Examination 22 (1904).

Despite the critical importance of each Commissioner's testimony on contested issues of fact like those described above, the Commission's own rules prohibit General Atomics from exercising its right to cross-examine these witnesses. The rule that appears at 10 C.F.R. § 2.720(h)(2)(i) states unequivocally that "[t]he attendance and testimony of the Commissioners . . . at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise."

Under Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, the process that is due depends on three factors: first, the private interest affected by the official action; second, the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional procedures; and third, the

government's interest, including the function involved and the fiscal and administrative burden that additional procedures would entail. 424 U.S. at 335, 96 S. Ct. at 903.

In this case, the private interest of General Atomics that would be adversely affected if this panel or ultimately the Commission is permitted to adjudicate the matters in dispute, is the economic survival of the company itself. Should the Commission ultimately rule against General Atomics on the contested issues, the Order would impose upon General Atomics, among other liabilities, the obligation to provide immediate financial assurance for decommissioning and remediation in the amount of $86 million through a mechanism that meets the requirements of 10 C.F.R. § 40.36 (Order, p. 25). The risk that General Atomics will be erroneously deprived of that interest, i.e., economic survival, if the October 15 Order is adjudicated here, is very high. If General Atomics' instant motion is granted, however, an alternative to the attempted issuance and enforcement of the October 15 Order is immediately available, namely, the initiation by the NRC of civil litigation in the appropriate federal court asserting such claims as the NRC believes it can prove against General Atomics. The fiscal and administrative burden of litigating these issues in federal court, rather than here, would be inconsequential to the Commission.

Due process also calls for such procedural protections as a particular situation demands. Matthews v. Eldridge, 424 U.S. at 334, 96 S. Ct. at 902. This particular situation demands that

General Atomics be permitted to cross-examine each Commissioner on the matters that are relevant to several contested issues of fact which are set forth in the October 15 Order and in General Atomics' November 2, 1993 Answer.

C. The actions of the NRC suggest that it has prejudged the contested matters raised by the October 15 Order.

When hearings are required, as in the instant matter, due process requires a hearing that is fairly conducted by an impartial tribunal. Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 652, (1912). Only last month the Supreme Court reaffirmed the elementary principle that "a fair trial in a fair tribunal is a basic requirement of due process." Weiss v. United States, 62 U.S.L.W. 4047, 4052 (U.S. Jan. 19, 1994). There can hardly be a more important component of fair procedure than the requirement that the decider in an administrative proceeding be neutral toward the parties and issues before him or her. In re Murchison, 349 U.S. 133, 136-37, 75 S. Ct. 623, 625 (1955); Richard J. Pierce, Jr., Sidney A. Shapiro, Paul R. Verkuil, Administrative Law and Process (§ 9.2, 1985). Indeed, a fair trial is of the essence of the adjudicatory process, whether the judging is done in an administrative forum or in a court by a judge. Bernard Schwartz, Administrative Law § 6.18 (2d ed. 1984); H. Friendly, "Some Kind of Hearing," 123 Pa. Law Rev. 1267 (1975). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law

has always endeavored to prevent even the probability of unfairness.'" Withrow v. Larken, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975), quoting Murchison 349 U.S. at 136, 74 S. Ct. at 625.

When adjudicatory proceedings reach a predetermined end, they may be fair in form only. It thus took little insight for the Preceptor in Ivanhoe to observe that: "The trial moves rapidly on when the judge has determined the sentence beforehand." Scott, Ivanhoe, ch. 36; see Continental Box Co. v. NLRB, 113 F.2d 93, 96 (5th Cir. 1940). So fundamental to fairness is the requirement of an impartial tribunal, that one who prejudges adjudicative facts that are in dispute may be disqualified. 3 Kenneth C. Davis, Administrative Law Treatise § 19.4 (2d ed. 1980).

General Atomics recognizes that mere exposure to adjudicative facts prior to a hearing may not require the disqualification of agency heads or administrative judges within an agency. But, advance knowledge of such facts, coupled with a public statement of position about them, demonstrates more than procedural irregularity. They suggest an insensitivity to the requirements of due process and perhaps, a closed mind.

In Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970), the court vacated an order of the Federal Trade Commission on due process grounds which are relevant here. While the appeal of an F.T.C. hearing examiner's decision was pending before him, the Chairman of the Commission gave a public speech that addressed those same matters. The court was unequivocal in its response:

> It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in public statements of government officers, but we are charged with the responsibility of making certain that the image of the administrative process is not transferred from a Rubens to a Modigliani.
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> We indicated . . . that 'there is in fact and law authority in the Commission, acting in the public interest, to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act . . ..
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> * * *
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> This does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deemed it necessary to do so after consideration of the record. There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.

Id. at 590 (emphasis in original).

In ordering the disqualification of the Commission Chairman from all further proceedings in the matter, the court adopted the rationale that "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." 425 F.2d at 592, quoting Berkshire Employees Ass'n. of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941). The court also cited with approval the following test for disqualification of an administrative agency:

whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 425 F.2d at 591, quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896, 80 S. Ct. 200 (1959).

The comments of the Chairman of the NRC at the Commission's December 21, 1992 public meeting (attended by all five members of the Commission), his comments at the Press Conference that he conducted immediately thereafter, as well as the NRC's direction to the staff to make legally binding the purported "financial commitments of General Atomics regarding cleanup" of the Licensee's facility, strongly suggest and give the appearance, that the contested matters raised by the NRC's October 15 Order have been prejudged by the NRC. The Chairman's adversarial tone is apparent to anyone who reads the transcripts of the two meetings, especially pages 48-65 of the transcript of the NRC meeting, and the transcript of the Press Conference (see the excerpts from the transcript of the December 21, 1992 public meeting, pp. 48-65, and the entire transcript of the December 21, 1992 press conference, attached respectively at Tabs B and C of this Brief).

Chairman Selin opened the public NRC meeting with the comment that the NRC Staff's "efforts to translate this apparent commitment into a binding written agreement have been repeatedly frustrated by Sequoyah Fuels and General Atomics." (See Tab B, p. 4). During the meeting, he stated to the Chairman of General Atomics that

> . . . the assurances that you gave and that Mr. Sheppard asked and you agreed on March 17th were clearly a lot

more than an arm's length financial. I mean we were given to understand -- I specifically asked you and you certainly answered that GA's management resources, its technical resources, its financial resources were behind Sequoyah, that you're not a passive investor that's protected from further commitments by the corporate structure as far as I'm concerned and I'm sure the other Commissioners are concerned.

(Tab B, p. 50-51). He concluded the meeting with the following comment:

> The message I want you to leave with, that I want to make sure you have absolutely clearly, is that the Commission considers the obligation on licensees and on people running NRC licensed plants to assure proper decontamination and decommissioning to be a very serious one and one which we intend to see is properly carried out. In my view, the Commission should direct Sequoyah Fuels and General Atomics promptly to provide a specific proposal to assure adequate funding for timely and satisfactory decontamination and decommissioning and if such a proposal is not soon forthcoming, to initiate appropriate legal steps to compel such measures.

(Tab B, p. 65).

At the Press Conference which followed the public meeting, the Chairman made further comments which suggest at least his own conclusive prejudgment of the issues involved in this matter:

> CHAIRMAN SELIN: ". . . <u>we</u> have considerable authority. <u>We</u> can issue a demand for information ourselves and, if <u>we</u> don't get satisfactory answers to that demand, <u>we</u> can shut down operations immediately and take steps to go for the assets." (Tab C, pp. 2) (emphasis added).

> CHAIRMAN SELIN: ". . . in my opinion, a flow of funds which is based on the future prospects for an unknown business is completely inconsistent with our regulations and what's to be expected." (Tab C, pp. 3-4).

> QUESTION: "Do you feel euchred?"

> CHAIRMAN SELIN: "No. Well -- do I feel euchred? Well, a smart leader is never euchred, of course, but there were

assurances given to us which do not seem to be holding up under pressure and we intend to make sure that those assurances are followed up on. . . [General Atomics and the Licensee] have a commitment and a responsibility that's independent of ConverDyn or anything else." (Tab C, p. 5) (emphasis added).

CHAIRMAN SELIN: "Well, we think we've got a very good shot at General Atomics' resources based on a whole set of actions that have opened up -- ". (Tab C, p. 6) (emphasis added).

CHAIRMAN SELIN: "Now, if you ask me a different question, do I wish that the Commission five years ago had done different things with McGee and General Atomics at the time the deal went through, the answer is I don't know, but maybe." (Tab C, p. 11).

CHAIRMAN SELIN: "You see, I'm not really livid. I'm not pleased, but I'm not livid." (Tab C, p. 11).

The public comments of the Chairman of the Commission and documents prepared by the NRC Staff would strongly suggest to a disinterested observer that the NRC has already determined the result which it seeks in this matter. The Chairman's comments leave the impression that his ability, and the ability of the entire Commission to act in a totally disinterested manner, have been impaired. Chairman Selin has not merely made abstract public remarks about a perceived need to extend the NRC's jurisdiction over non-licensees generally. He has specifically identified General Atomics as a target of the NRC's frustration and displeasure. Some ten months before the NRC issued its October 15 Order, he specifically mentioned the allegations which later appeared in the Order. Because many of his comments were made at the December 21, 1992 public meeting of the NRC, because he continuously used the word "we" in his comments at the Press Conference, thereby implying that he was speaking for the entire

Commission, and because his public comments at the Press Conference presumably came to the attention of the other members of the Commission, there is no way in which General Atomics can know or can quantitatively measure whether the comments and actions of the Chairman have influenced the other members of the Commission. Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, supra.

Since the NRC can seek to prosecute its claim against General Atomics in a court of law, General Atomics should not, and cannot be forced to contest the allegations set forth in that Order here, or in any other forum which is inferior to the NRC.

For all of the foregoing reasons, General Atomics will be deprived of procedural due process rights guaranteed to it by the Constitution and by the Administrative Procedure Act if it is required to contest the NRC's October 15 Order before the Commission or this panel.

## CONCLUSION

It is not entirely clear what theory the NRC relies upon for its claim that General Atomics can be compelled to satisfy the NRC's financial assurance requirements for the decommissioning and remediation of the Licensee's Facility. At the Prehearing Conference, the NRC Staff Counsel stated that the NRC is "not charging deliberate misconduct on the part of any party," that it

is "not relying upon a contract or quasi-contract theory stemming from purported reliance by the Commission on statements of General Atomics," and that its theory is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . . ." There is, however, no policy of federal nuclear energy law, either legislative or judge-made, that a corporate parent of an NRC licensee can be compelled to guarantee or otherwise assume the financial liability of its subsidiary, simply because it controls the subsidiary's stock and exercises general "management oversight" of the licensee.

Whatever may be the NRC's theory of the case, and whatever may be the authority of the NRC over licensees or non-licensees in other circumstances, it has no jurisdiction to hold General Atomics -- a company which is not a licensee of the NRC for any activity relating to the Gore, Oklahoma facility, which does not use or possess regulated source materials in connection with the facility, which is not engaged in licensed activities in connection with that facility, and which is not charged with any deliberate misconduct -- jointly and severally liable for the $86 million cost associated with the decommissioning and remediation of the Licensee's Facility.

General Atomics further submits that the NRC has recognized and admitted that General Atomics is not legally obligated to guarantee or pay such costs and that as a consequence, the NRC is

estopped from seeking to compel such a guarantee.

For these reasons, the NRC has failed to state a legally cognizable claim against General Atomics, and the NRC can prove no set of facts that would entitle it to impose this non-civil penalty financial liability upon General Atomics.

Finally, General Atomics submits that the testimony of the individual members of the NRC is essential to the adjudication of the contested issues raised by its October 15 Order, that the actions of the NRC strongly suggest that it has prejudged those issues, and that if General Atomics is forced to contest those issues before the NRC itself or in any administrative forum which is inferior to the NRC, it will be deprived of the fairness traditionally associated with any form of judicial process and of due process rights guaranteed to it by the Constitution.

Respectfully submitted,

By Stephen M. Duncan
Of Counsel

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ATTORNEYS FOR GENERAL ATOMICS

February 17, 1994

1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3

4 - - - - - - - - - - - - - - - - -X

5 In the Matter of: :

6 SEQUOYAH FUELS CORPORATION :

7 AND GENERAL ATOMICS : Docket No. 40-8027-EA

8 (Gore, Oklahoma Site :

9 Decontamination and :

10 Decommissioning Funding) :

11 - - - - - - - - - - - - - - - - -X

12

13 Nuclear Regulatory Commission

14 Hearing Room 521

15 4320 East West Highway

16 Bethesda, Maryland

17 Wednesday, January 19, 1994

18

19 The above-entitled matter came on for prehearing

20 conference at 9:32 a.m.:

21

22 BEFORE:

23 JAMES P. GLEASON, Chairman

24 THOMAS O. MURPHY, Administrative Judge

25 G. PAUL BOLLWERK, III, Administrative Judge

1 APPEARANCES:

2

3 On behalf of the Sequoyah Fuels Corporation:

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6 JOHN E. MATTHEWS, ESQ.

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11 On behalf of General Atomics:

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14 BRADFUTE W. DAVENPORT, JR., ESQ.

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17 Alexandria, Virginia 22314

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19 On behalf of the Native Americans for a Clean Environment:

20

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1 APPEARANCES [Continued]:

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3 On behalf of the Nuclear Regulatory Commission:

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5 RICHARD G. BACHMANN, ESQ.

6 STEVEN R. HOM, ESQ.

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9 Office of the General Counsel

10 U.S. Nuclear Regulatory Commission

11 Washington, D.C. 20555

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1 as amicus for this purpose or as to anything else, but I
2 don't think we want to preclude her from making any comments
3 if she has some to make.
4 Essentially, I think this is a matter that goes
5 between you and the Staff -- or not between you and the
6 Staff but between General Atomics and the Staff, and those
7 are the comments we would like. In fact, if you didn't want
8 to even discuss your theory, that would be all right with
9 me, but there are some members of the Board that are
10 concerned about it, and it is my responsibility to raise it.
11 Mr. Hom?
12 MR. HOM: Your Honor, without getting into very,
13 very specific matters and, again, with the caveat that the
14 Staff's theory can be developing based upon facts that are
15 later discovered, I think the Staff is willing to make some
16 comments in this area.
17 We do have the three theories so to speak that
18 came with the January 13 memorandum and the Staff will say
19 that the theory of this case will not be based on, as I read
20 Item Number 2, we are not charging deliberate misconduct on
21 the part of any party at this time and, therefore, that does
22 not provide a basis in support of the Staff's theory.
23 With respect to Item Number 3, the Staff at this
24 time is not relying upon a contract or quasi-contract theory
25 stemming from purported reliance by the Commission on

1 statements of General Atomics.

2 The Staff's theory is more akin to, with obvious

3 factual distinctions, but more akin to the common law,

4 corporation/contract, sometimes tort action involving

5 parent-subsidiary relationships where a claimant attempts to

6 pierce the corporate veil between the subsidiary and the

7 parent to reach the parent based fundamentally on day-to-

8 day or intimate control of the parent over the subsidiary.

9 JUDGE GLEASON: Does that do it, Mr. Hom?

10 MR. HOM: Pardon me?

11 JUDGE GLEASON: Does that do it?

12 MR. HOM: Yes.

13 JUDGE GLEASON: Mr. Duncan, I think we will ask

14 you to go next, please.

15 MR. DUNCAN: You will appreciate, Judge Gleason,

16 as you already have twice and I thank you for that, that we

17 are relatively new to the case and I am not prepared to

18 argue the merits of the jurisdictional issue this morning

19 except to say that thus far I can represent that we have

20 searched diligently in all of the statutes that we can find

21 that would appear to be relevant at all as well as all other

22 applicable law, and we can find nothing that poses

23 jurisdiction in the NRC to make this kind of claim against a

24 non-licensee and to purport to oppose non-civil penalty

25 financial liability upon a non-licensee in the circumstances

# UNITED STATES OF AMERICA
# NUCLEAR REGULATORY COMMISSION

Title: BRIEFING ON STATUS OF GENERAL ATOMIC-SEQUOYAH FUELS FACILITY

Location: ROCKVILLE, MARYLAND

Date: DECEMBER 21, 1992

Pages: 65 PAGES

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

- - - -

BRIEFING ON STATUS OF
GENERAL ATOMIC - SEQUOYAH FUELS FACILITY

- - - -

PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Monday, December 21, 1992

The Commission met in open session, pursuant to notice, at 2:00 p.m., Ivan Selin, Chairman, presiding.

COMMISSIONERS PRESENT:

IVAN SELIN, Chairman of the Commission
KENNETH C. ROGERS, Commissioner
FORREST J. REMICK, Commissioner
JAMES R. CURTISS, Commissioner
E. GAIL de PLANQUE, Commissioner

STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE:

SAMUEL J. CHILK, Secretary

WILLIAM C. PARLER, General Counsel

NEAL BLUE, Chairman of the Board and CEO, General Atomics

JAMES SHEPPARD, President, Sequoyah Fuels Corporation

JAMES EDWARDS, Vice President, General Counsel, General Atomics Board of Directors, SFC

MAURICE AXELRAD, Esquire, Newman & Holtzinger

JACK NEWMAN, Esquire, Newman & Holtzinger

1 P-R-O-C-E-E-D-I-N-G-S

2 2:00 p.m.

3 CHAIRMAN SELIN: Good afternoon. The
4 Commission is meeting at this time to receive a
5 briefing on matters concerning the status and future
6 of Sequoyah Fuel Corporation's uranium processing
7 facilities near Gore, Oklahoma. The briefing will be
8 provided by the licensee, Sequoyah Fuels and by its
9 parent company, General Atomics.

10 The Commission awaits this briefing with
11 keen interest. Recent events have served to worsen a
12 situation that was already of great concern to the
13 Commission. The Gore facility has terminated its
14 uranium hexafluoride production and it appears to have
15 only a short-term need to continue its depleted
16 uranium production, if and when that process is
17 restarted at all. In the longer term, this facility
18 must be properly decommissioned in full accordance
19 with all applicable NRC requirements.

20 Earlier this year, the Commission
21 deliberated on the question of whether or not to allow
22 the plant to restart after serious contamination,
23 management deficiencies and other problems were
24 recognized. Permission to restart was granted after
25 a Commission meeting in which we received what sounded

1 like firm assurance from General Atomics that they
2 would stand squarely behind Sequoyah Fuels in
3 providing for decontamination and decommissioning
4 funding.
5 However, the staff's concerted efforts to
6 translate this apparent commitment into a binding
7 written agreement have been repeatedly frustrated by
8 Sequoyah Fuels and General Atomics, including a letter
9 that we just received this morning. And now,
10 continued productive facility operation, which was
11 promised to be the revenue producer for
12 decommissioning funding, is but ended.
13 The Commission is quite concerned over the
14 situation. There's a current multi-million dollar
15 decommissioning liability. There is a Commission
16 requirement that once decommissioning starts that it
17 be carried out as promptly as possible. As far as we
18 can see, there's virtually no assurance that the
19 needed funding will be made available on a timely
20 basis. These are obviously the questions that are
21 first and foremost in our minds this afternoon and we
22 are very interested to hear from Sequoyah Fuels and
23 from General Atomics on this matter as well as some
24 operational matters.
25 Do any of the Commissioners have remarks

1 conviction that a satisfactory resolution of the
2 issues associated with cleanup of the Sequoyah site
3 can best be accomplished through a cooperative effort
4 with the NRC which assures that these revenues are
5 effectively applied to accomplishing work at the site
6 for its safe and orderly decommissioning.
7 Finally, I appreciate the opportunity to
8 discuss these matters with you and Mr. Sheppard will
9 summarize the overall presentation and then I would be
10 very happy to answer further questions.
11 CHAIRMAN SELIN: Well, we behaved
12 reasonably well in allowing you to finish statements
13 before we came in, but I can't wait for Mr. Sheppard.
14 I have a few things I must say to your remarks, Mr.
15 Blue.
16 First of all, I completely disagree with
17 your characterization of who shot John, you know, why
18 the place closed down, et cetera. I don't think
19 that's all that germane to where we come from here,
20 but I can't just let that stand. It's sort of like
21 driving a car off the cliff and blaming a rigorous
22 application of the law of gravity for the problem of
23 the accident. I think your company steps had led to
24 the regulatory environment which made things so
25 difficult. I don't ask you to agree. It's not really

1 necessary for where we go from here.

2 The second is that our unhappiness is not

3 to do with the timing of when we learned about the

4 ConverDyn deal. I don't think we would have felt any

5 different in July or August, except we would have

6 understood a little bit better than we did at the time

7 why the negotiations on financial assurances didn't

8 happen. It's the substance of the arrangement. It's

9 not the ConverDyn deal per se, it's the use of that as

10 the basis for financial assurances.

11 Our regulations, our understanding call

12 for two things. One is a very high assurance that

13 decommissioning will be paid for and even if I don't

14 add any provisos or contingencies to the one you went

15 through, you went through a whole lot if this happens,

16 if that happens, if the deal holds up, if the revenues

17 are in, if the business is there it will produce

18 money, which if we looked at your proprietary figures

19 would tell us that maybe there will be enough money

20 for decommissioning, except we don't know quite how

21 much that is yet. The assurances aren't there and the

22 timing is not there. Our rules call for approval of

23 a decommissioning plan provided that it's responsible,

24 protects the health and safety of the workers and that

25 it's as -- well, I could read it, but it says rapid as

1 possible and 12 years is not as rapid as possible.
2 You're clearly proposing a plan that is neither
3 satisfactory assurances, nor is based on a technical
4 or a reasonable rate of spending from the point of
5 view of are we asking to do inefficient things. It's
6 based on an ability of an as yet untested deal to
7 produce the revenues that will allow you to finance
8 the deal, which is completely inconsistent with the
9 sense of our regulations and I think what common sense
10 calls for in a decommissioning.
11 Third is that --
12 MR. BLUE: May I respond to that point?
13 CHAIRMAN SELIN: Well, I didn't interrupt
14 you. Why don't you let me go through the list and
15 then you can take them.
16 MR. BLUE: All right.
17 CHAIRMAN SELIN: Third is at one point you
18 laid out your position as an arm's length financial
19 owner but the assurances that you gave and that Mr.
20 Sheppard asked and you agreed on March 17th were
21 clearly a lot more than an arm's length financial. I
22 mean we were given to understand -- I specifically
23 asked you and you certainly answered that GA's
24 management resources, its technical resources, its
25 financial resources were behind Sequoyah, that you're

1 not a passive investor that's protected from further
2 commitments by the corporate structure as far as I'm
3 concerned and I'm sure the other Commissioners are
4 concerned.
5 The fourth point is that the assurances
6 that you gave us on March 17th are a lot more than you
7 seem to recognize today. I have the transcript in
8 front of me. I'm not completely surprised that the
9 conversation took this turn. I asked you, among other
10 things, is GA committed to dealing with the residual
11 magnitude of the problem that has to be faced.
12 "Yes, we're committed to dealing with the
13 residual when it has to be faced," and there's a long
14 discussion of how you hoped a lot of the remediation
15 will come along the way. But the bottom line was that
16 whether or not the remediation is done under
17 operation, that GA is committed to supporting,
18 financially supporting Sequoyah Fuels when
19 decontamination has to be done.
20 The last point is the idea that a letter
21 of credit which is useful only if Sequoyah is
22 operating should be used to finance decommissioning is
23 completely inconsistent on itself. You don't
24 decommission when you're operating. You put up the
25 Citicorp letter of credit as a further example of a

1 concrete piece of support that says, "Yes, we have not
2 only our own resources but these financial resources
3 to support decommissioning." And then to say that,
4 "Well, they'll only make the money for decommissioning
5 available as long as we don't have to decommission,
6 i.e. as long as we're still operating, that's just
7 quite internally inconsistent.
8 That's sort of the top five items on my
9 list. I'd be very pleased to hear whichever ones
10 you'd care to respond to.
11 MR. BLUE: Very good. Well, first of all,
12 as has been earlier stated, we're operating under a
13 license approved by the Commission in 1985 and
14 approved by the Commission's approval of the transfer
15 of ownership from Kerr-McGee to the holding
16 corporation actually that owns Sequoyah Fuels in 1988.
17 As you are aware, there is a decommissioning funding
18 plan which was submitted and approved by the NRC at
19 that time. Of course, the letter of credit in that
20 particular instance provided in connection with the
21 NRC's approval is in force and effect. So, as we
22 operate under that current license, that's the basis,
23 I would presume, that we're operating.
24 Now, it is also the case, as I've
25 indicated earlier, that all of us contemplated and

1 very much hoped that it would be feasible to relicense
2 the Sequoyah facility so that it could continue to
3 contribute what amounts to about $100 million of
4 economic activity to Sequoyah County. We made great
5 efforts to achieve that objective. It was in the
6 context of that relicensing and all of my comments
7 which are explicit on the 17th and then memorialized
8 on the 19th, two days after that, to try to even be
9 more clear in terms of what our approach would be. It
10 was explicit in all of that discussion that the issue
11 of determining and quantifying the amount of
12 guarantees to be provided by third parties, not
13 necessarily even GA, would be done in the context of
14 the relicensing process and obviously if a
15 satisfactory agreement couldn't be reached pursuant to
16 that relicensing process, then the NRC would not grant
17 a license which would enable the facility to continue
18 to be operated. It's the fact that this relicensing
19 upon which all of those comments and those letters and
20 my statements of the 17th were based became impossible
21 to implement that we have circumstances which are
22 different.
23 But I don't want to miss making the really
24 important point that notwithstanding this very
25 unfortunate, if not devastating set of circumstances,

1 regardless of who might have been -- what the reasons
2 might have been, the fact is we've been able to
3 conclude an arrangement which will provide an
4 alternative source of funding so that the licensee can
5 accomplish and fulfill its obligations. That is the
6 fundamental spirit and context of my comments to you
7 on the 17th of March and as attempted to be elaborated
8 upon in the subsequent correspondence.
9 Sometimes you don't -- in business, you're
10 not able to plan forward without making material
11 changes. The point here is that we've been able to
12 bring something to the table which I'm very pleased
13 about and which very materially improves the ability
14 of the licensee to discharge its obligations, to
15 satisfy you and to fulfill the remediation
16 requirements. I think it's also important for me to
17 reemphasize the fact that one reason why we didn't
18 wish to move directly to the approach of an immediate
19 decommissioning, which I understand from counsel
20 doesn't provide for financial assurances, a reason why
21 we didn't wish to move precipitously in that direction
22 and instead wished to have a measured period of time
23 to consider our alternatives and discuss them with
24 you, is that we're very conscious of the fact that the
25 closure of the plant at Sequoyah has created an

1 economically devastating effect on that county in that
2 part of Oklahoma.
3 To the extent that we can be resourceful,
4 although perhaps not embarking upon the plans of
5 several months ago, but resourcefully find an
6 alternative means of reconstituting economic activity
7 which would provide jobs at that site, then we want to
8 do that. I don't know whether we can be successful
9 and I don't know how long it will take and I'm sure
10 we'll be conferring or our people will be conferring
11 with the staff in respect to what the chances are, how
12 much time it may take. But I can assure you of our
13 good faith efforts in that regard. Yes, indeed, that
14 will impact the way this issue of immediate
15 reclamation or some sort of a variation of standby
16 licensing should occur.
17 I think if we work the problem, we will
18 develop the solution.
19 CHAIRMAN SELIN: I need to say two things
20 about your remarks. The first is that when a plant
21 goes into operation, in other words when it first
22 becomes contaminated, we do not require that enough
23 cash be available on day one to shut the plant down if
24 its stops operating on day two. The cash we require
25 is separate from the liability that the licensee

1 incurs. We try to be reasonable and match the cash to
2 a reasonable set of needs. But the amount of cash put
3 up, say the $750,000.00, bears no resemblance to the
4 liability of the licensee. The licensee is liable to
5 clean up the site and the cash is a good faith piece,
6 assuming things go well. But if things don't go well,
7 then other --
8 The second point I'd like to make is
9 nobody has asked you to decontaminate the plant
10 immediately. What I have said, and I think what the
11 Commission would say is we would like to see a plan
12 that, first of all, has much higher assurances of
13 funding than the fees from ConverDyn and, secondly,
14 which is based on a reasonable cleanup plan. Mr.
15 Sheppard went through a set of steps which sound
16 plausible about first we do this and then we do that.
17 But we want, at least I want and I think we want the
18 pace to be set by what is reasonable from a technical
19 point of view, not when you happen to get some cash in
20 from an iffy future deal to pay for it. That's the
21 point. You have the 60 days. That's not the problem.
22 But that's the point that we expect to emphasize in
23 our discussions about the rate and structure of the
24 decontamination, the decommissioning work.
25 MR. BLUE: I don't know that I would

1 characterize it -- feel that the characterization of
2 the ConverDyn transaction to be an iffy future deal is
3 accurate. I don't think that properly characterizes
4 that arrangement. That's why we invited and would
5 request a proprietary session, so that you could take
6 a more studied -- make a more studied assessment of
7 that issue.
8 Fundamentally, however, I would say that
9 the period of reclamation, if it were to take 10 or 12
10 years, for example, which is pretty heavily front end
11 loaded because of the removal of the raffinate and
12 calcium fluoride sludges loaded on the front end,
13 would appear to be a rational and very reasonable,
14 sensible approach from any point of view you would
15 consider.
16 My experience with the reclamation of mill
17 sites, for example, is that before you've completed
18 the planning and final sign off and all of the
19 arrangements, even though the expenses may be more
20 heavily loaded in the front, it takes of that general
21 order before the work is done.
22 In any case, I would think that that's the
23 sort of thing that we ought to present to you our view
24 as to how this ought most efficiently to be done from
25 a technical point of view, and then we'll show you

1 what we've been able to do, which was responsive to
2 those technical requirements. It was not, was not the
3 function of some other consideration than addressing
4 this problem.
5 CHAIRMAN SELIN: Commissioner?
6 COMMISSIONER ROGERS: Are you going to
7 give us some kind of a detailed schedule that matches
8 these numbers that you -- total of $20 million for the
9 surface decontamination and then the other
10 decontamination activities? Are you going to give us
11 a schedule, rough schedule of when those will take
12 place?
13 MR. SHEPPARD: We're developing that
14 schedule now, yes, sir.
15 COMMISSIONER ROGERS: And you've mentioned
16 how important it is to you to keep jobs in that area.
17 Will you also give us what your staffing level would
18 be from the 300 that you have now through the
19 decommissioning period and so we see what that amounts
20 to, at least to appreciate the significance of your
21 remarks?
22 MR. SHEPPARD: Yes, sir, we'll be able to
23 provide that.
24 COMMISSIONER ROGERS: That's all.
25 CHAIRMAN SELIN: Commissioner Remick?

1 COMMISSIONER REMICK: Is Mr. Sheppard
2 going to give us a summary?
3 CHAIRMAN SELIN: He will. He will.
4 COMMISSIONER REMICK: I can wait.
5 CHAIRMAN SELIN: Okay. Mr. Sheppard, the
6 floor is yours.
7 MR. SHEPPARD: Just to kind of make sure
8 we know where we've traveled for the last hour and 25
9 minutes, with respect to the plant, the plant status,
10 the UF6 process is shut down and we expect it to
11 remain shut down. Intermediate products are being
12 removed from the bins. The chemicals are being
13 offloaded. It's being cleaned out. The UF4 facility
14 is awaiting to go back into operation. We hope that
15 that decision would be imminent. We are continuing to
16 conduct the cleanup and remediation activities that
17 we've been discussing with the staff and committed to
18 as late as January of '92.
19 With regard to the November 17th event, we
20 conducted thorough investigations of that event. I
21 think that our conclusions coincide very closely with
22 those of the augmented inspection team from Region IV.
23 Corrective actions have been designed to meet all
24 those concerns and those actions have been taken. As
25 I said before, we're awaiting regional concurrence for

1 the restart of that facility.

2 With regard to the new business

3 arrangements, as Mr. Edwards discussed, they call for

4 the long-term shutdown of the UF6 process and in

5 return for that there is a substantial flow of

6 revenues to Sequoyah Fuels to be used for remediation

7 and cleanup and decommissioning of the site.

8 With regard to the status of the license,

9 the present license remains in effect in timely

10 renewal. Sequoyah Fuels is a licensee that continues

11 to meet the requirements of the license. We are

12 reviewing the license to determine if there are any

13 portions of the license which need to be revised based

14 upon the new status and would submit license amendment

15 requests for any of those conditions. We will be

16 meeting with the staff in early February to discuss

17 both the outcome of our business activities reviews

18 and our decisions with respect to where we want to go

19 with respect to the license.

20 Finally, with regard to decommissioning

21 planning, we have been conducting decommissioning

22 planning in support of license renewal. We are making

23 some revisions based upon the new business

24 developments. Again, that will be part of the

25 discussions in early February.

1 With that, we'd be pleased to answer any
2 other questions the Commission might have.
3 CHAIRMAN SELIN: Commissioner Remick?
4 COMMISSIONER REMICK: Just a comment. I
5 think the meeting that you talked about in February in
6 my mind is extremely crucial in better defining what
7 you intend to do. If we would continue a long time
8 with the existing license based on a renewal
9 application that was submitted on a timely basis but
10 which no longer meets the actual situations, I would
11 be very concerned. So, I hope that in February you
12 can clarify where you're heading and what you're going
13 to do about renewal of the license or a modified
14 license, what amendments and so forth so that we
15 aren't in limbo.
16 MR. SHEPPARD: Yes, sir.
17 COMMISSIONER REMICK: Thank you.
18 CHAIRMAN SELIN: Commissioner de Planque?
19 COMMISSIONER de PLANQUE: No.
20 CHAIRMAN SELIN: Well, as you know, we
21 have been concerned for some time about what we
22 consider spotty operation and, of course, the extent
23 of contamination of the Sequoyah Fuels Facility. Since
24 the summer of 1990, there was an event that led to
25 close scrutiny by Region IV. A number of operational

1 and managerial weaknesses were identified, leading to
2 the issuance of several enforcement actions.
3 These culminated in October 1991 when we
4 issued an order requiring the plant to remain shut
5 down to take specific actions to improve operations.
6 In April of 1992, based in large part on your
7 reference, Mr. Sheppard, we were satisfied that
8 progress was being made and the plant was permitted to
9 restart operations. But a second major ingredient in
10 that decision was the public meeting that we held on
11 March 17th, 1992 with officials, most of whom are here
12 today, who give us a number of assurances and those
13 assurances were critical to that restart.
14 At that meeting, the Commission expressed
15 its concern about the operational weaknesses and the
16 contamination of the facility. We also expressed our
17 concern about Sequoyah Fuels' resources and your
18 ability not only to operate but to guard against
19 contingencies and to do decontamination, as well as
20 your personnel resources. On both of these counts,
21 the Commission was given assurances at the highest
22 level of Sequoyah Fuels and General Atomics, both of
23 whom are here today, that General Atomics' personnel
24 were providing close oversight of the operation and
25 would provide needed personnel and financial

1 resources. Mr. Blue, who as he said is the Chairman
2 and Chief Executive Officer of General Atomics,
3 committed that with the full backing of General
4 Atomics' financial and technical, Sequoyah is
5 addressing the regulatory requirements for the plant.
6 I want to emphasize that these assurances
7 were very important to the Commission when we reached
8 our decision to permit resumption of operation. The
9 staff indicates that there have been improvements at
10 the facility since restart, but operation was still
11 plagued by preventable errors. On two occasions, in
12 May and in November, as Mr. Sheppard discussed,
13 incidents occurred which required the shutdown of
14 operations. Now, for your own corporate business
15 reasons, the owners of the facility have decided to
16 sharply curtail operations and, as we've been given to
17 understand, apparently to close it down completely, at
18 least the UF6, within the next few months.
19 I wish to stress that that's a business
20 decision. It's your obligation and your authority to
21 make such decisions, not for the NRC to decide.
22 However, it is a matter of NRC's responsibility to
23 assure that termination of operation is carried out
24 safely and promptly and to ensure that the responsible
25 parties properly clean up the radioactive

1 contamination of the site. This is a responsibility
2 that we will take very seriously and will pursue with
3 vigor.
4 Today, I'm very sorry to say that we have
5 not heard a reaffirmation of the ringing commitments
6 of March 17th, of full backing of General Atomics'
7 financial and technical. Mr. Blue: "We, Sheppard and
8 Kemp have had numerous conversations about the
9 resources that are required for cleanup and
10 decontamination. There is a strong commitment coming
11 to me, Mr. Sheppard, from General Atomics that the
12 resources are available. We, General Atomics are
13 committed to dealing with the residual contamination
14 when it has to be faced."
15 Rather, today's discussion of General
16 Atomics' support for cleanup of Sequoyah is full of
17 contingencies and is based on expectations extending
18 over a decade into the future. Our regulations
19 require more than this. They require an explicit plan
20 to both fund and implement prompt decommissioning.
21 Further, there are a number of important
22 questions about the licensee's proposal to fund the
23 Sequoyah Fuels' continuing remediation efforts and
24 eventual decommissioning based on the currently
25 unknown ability and success of a new commercial

1 enterprise, ConverDyn, an organization which does not
2 appear to have any direct corporate affiliation with
3 SFC. There are also questions about a proposal for
4 decommissioning that would be carried out over a 12
5 year period.
6 The message I want you to leave with, that
7 I want to make sure you have absolutely clearly, is
8 that the Commission considers the obligation on
9 licensees and on people running NRC licensed plants to
10 assure proper decontamination and decommissioning to
11 be a very serious one and one which we intend to see
12 is properly carried out. In my view, the Commission
13 should direct Sequoyah Fuels and General Atomics
14 promptly to provide a specific proposal to assure
15 adequate funding for timely and satisfactory
16 decontamination and decommissioning and if such a
17 proposal is not soon forthcoming, to initiate
18 appropriate legal steps to compel such measures.
19 Thank you very much for your appearance.
20 The meeting is adjourned.
21 (Whereupon, at 3:31 p.m., the above-
22 entitled matter is concluded.)
23
24
25

# UNITED STATES OF AMERICA
# NUCLEAR REGULATORY COMMISSION

Title: PRESS CONFERENCE

Location: ROCKVILLE, MARYLAND

Date: DECEMBER 21, 1992

Pages: 11 PAGES

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# DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on December 21, 1992 in the Commission's office at One White Flint North, Rockville, Maryland. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determination or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of, or addressed to, any statement or argument contained herein, except as the Commission may authorize.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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PRESS CONFERENCE

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PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Monday, December 21, 1992

The Chairman of the Commission, Ivan Selin, met with members of the press, pursuant to notice, at 3:34 p.m.

1 P-R-O-C-E-E-D-I-N-G-S

2 3:34 a.m.

3 CHAIRMAN SELIN: I thought the meeting was
4 pretty clear, but I'll still try to answer whatever
5 questions you may have.

6 QUESTION: (Questioner off mike.)

7 CHAIRMAN SELIN: This is a hypothetical
8 question, but we have considerable authority. We can
9 issue a demand for information ourselves and, if we
10 don't get satisfactory answers to that demand, we can
11 shut down operations immediately and take steps to go
12 for the assets. I hope it won't come to this, but
13 that's a hypothetical question.

14 Now, as far as GA's responsibilities,
15 that's a legal question about whether they are in fact
16 a passive investor or they take a very strong role in
17 the management. Our view is they're clearly an
18 integral part of the operation. They've given us
19 assurances far beyond those you would ever expect just
20 from an investor.

21 QUESTION: To a more general audience,
22 what is your basic concern about their arrangement
23 that guarantees payment for the --

24 CHAIRMAN SELIN: It doesn't guarantee
25 anything. I mean, their arrangement is based on --

1 well, we have -- I tried to say it clearly, but we
2 have two major concerns.
3 The first is to get a plan in hand which
4 is driven by the technical considerations that Mr.
5 Blue addressed at the end. I agree with the last
6 thing Mr. Blue said. It may take a while, but it
7 should be driven by what makes sense in what order to
8 close things down.
9 The second -- so, the first consideration
10 is assurances that there will be financial resources
11 available to pay for a reasonable decontamination
12 plan. And the second is assurances that we get a
13 reasonable decontamination plan, that it's not based
14 on external financial considerations, but --
15 QUESTION: (Questioner off mike.)
16 CHAIRMAN SELIN: Yes. I mean, basically
17 they want the citizens of Gore, Oklahoma, to be
18 shareholders in ConverDyn and after all other expenses
19 are paid you get your share. They clean up your
20 neighborhood based on your profits from this future
21 organization.
22 QUESTION: (Questioner off mike.)
23 CHAIRMAN SELIN: It's not even 12 years.
24 I mean, a flow of funds -- in my opinion, a flow of
25 funds which is based on the future prospects for an

1 unknown business is completely inconsistent with our
2 regulations and what's to be expected.
3 QUESTION: (Questioner off mike.)
4 CHAIRMAN SELIN: I need to see in detail
5 what money they propose to put in on what schedule.
6 It's not out of the question that you had a plan that
7 took 12 years before you got final complete
8 decontamination, but we would expect and wish to see
9 measurable major amounts of decontamination far in
10 advance of that. It's not clear to me from this
11 meeting that that's inconsistent with SFC's plans.
12 QUESTION: (Questioner off mike.)
13 CHAIRMAN SELIN: They asked us to have a
14 proprietary meeting on some business purposes in July.
15 QUESTION: (Questioner off mike.)
16 CHAIRMAN SELIN: Yes. I would have
17 listened then if somebody had told us what it was
18 about. I mean, it just sounded to me like they wanted
19 a meeting that we would go to and everybody else would
20 be excluded from.
21 Ben, let me just finish. The fact is that
22 they were still a going operation in July and a closed
23 operation in November, so that's sort of a smoke
24 screen. I mean, what were they going to tell us, that
25 they continued to operate?

1 QUESTION: That's what I mean. Do you
2 feel euchred?
3 CHAIRMAN SELIN: No. Well -- do I feel
4 euchred? Well, a smart leader is never euchred, of
5 course, but there were assurances given to us which do
6 not seem to be holding up under pressure and we intend
7 to make sure that those assurances are followed up on.
8 But, I'd like to come back to Mr. Weiss'
9 point. What we are objecting to -- we don't have a
10 plan in hand, so we're not objecting to the plan. We
11 don't have a financial plan in hand. We're not
12 objecting to that. We're telling them up front before
13 they get very far that we will not depend -- which
14 means that you and your neighbors will not depend on
15 some company's being able to generate some cash to
16 pay. They have a commitment and a responsibility
17 that's independent of ConverDyn or anything else.
18 We're not a bankruptcy judge who's trying
19 to choose between Chapter 11 and Chapter 7 to try to
20 figure out what their financial future is. They have
21 an obligation. If they choose to fund it through
22 ConverDyn, let ConverDyn reimburse General Atomics,
23 not pay directly for the clean-up.
24 QUESTION: (Questioner off mike.)
25 CHAIRMAN SELIN: We have -- I mean, SFC in

1 bankruptcy court or General Atomics?

2 QUESTION: (Questioner off mike.)

3 CHAIRMAN SELIN: Well, we think we've got

4 a very good shot at General Atomics' resources based

5 on a whole set of actions that have opened up --

6 QUESTION: (Questioner off mike.)

7 CHAIRMAN SELIN: Well, Super Fund would be

8 an extreme situation. Super Fund would open up the

9 liabilities not only to General Atomics but to

10 previous licensees. That is an option available.

11 It's not one we would choose early in the chain.

12 QUESTION: (Questioner off mike.)

13 CHAIRMAN SELIN: Under Super Fund, General

14 Atomics or the government would be able to go to Kerr-

15 McGee and say, "Regardless of your arrangement with

16 General Atomics, you're still liable for the

17 contamination." That is a long-term option. It's not

18 early in the list of things that we would do.

19 The key point I want to make is we do not

20 intend to accept a clean-up plan based on timing

21 that's driven by external financial considerations and

22 funding which is based on if a company happens to

23 produce the money it will pay for the pieces. That's

24 internal to GA and SFC. We want assurances of a

25 timely plan and resources behind it. And whether they

1 use the profits from ConverDyn to repay themselves,
2 that's their business.
3 We don't think you, the citizens of
4 Oklahoma, or we, the federal government, should be
5 effectively shareholders in ConverDyn and we won't
6 accept such a situation.
7 QUESTION: What sort of timetable is
8 there? You said if they don't fall into line, provide
9 this detailed plan --
10 CHAIRMAN SELIN: They're talking about
11 sitting down in February with a detailed
12 decontamination plan. Everything depends on the
13 decontamination plan. In fact, what I've been saying
14 is we want to start with the decontamination plan and
15 then look at the funding, not start with the funding
16 and see what can you afford to do in the way of
17 decontamination.
18 I have to say, I still have quite a bit of
19 confidence in Mr. Sheppard and his straightforwardness
20 and his ability to run an operation if supported, so
21 we're optimistic that that plan will in fact be a
22 reasonable plan and, if it is, then we can concentrate
23 on the funding and the assurances and the assets that
24 are put up to back the plan. If not, then we're at an
25 impasse and then we'd have to take stronger measures.

1 QUESTION: Mr. Chairman, Mike Napik with
2 McGraw-Hill.
3 Because there is some controversy or
4 difference of opinion about what these documents and
5 the contract with ConverDyn actually say and what
6 revenue streams this contract will generate, do you
7 think that these documents ought to be made part of
8 the public record?
9 CHAIRMAN SELIN: Well, that's a little bit
10 backwards. I mean, our view is that, in order for us
11 to make certain decisions on behalf of the public, we
12 must be given certain assurances on a nonproprietary
13 basis. In theory, if -- I mean, we might look at the
14 proprietary information in order to confirm something
15 that we could demonstrate in a way that Ms. Curran and
16 her colleagues could be satisfied themselves. You
17 know, it's like a security classification. You still
18 have to make the argument with unclassified data, but
19 the classified information might improve your
20 confidence in it.
21 So the answer is, we're not going to
22 accept -- we would not accept an argument purely on
23 proprietary information. We might look at -- I mean,
24 we have the authority and really the need to look at
25 the proprietary information to see if by digging a

1 step deeper we feel better or worse, but it would be
2 purely in a confirmatory basis. But, that's not the
3 big objection.
4 The big objection is there isn't -- it
5 doesn't matter what the numbers say. We don't care.
6 That's their business. How they fund their
7 obligations is their business. We want to know that
8 funding and requirements for this decontamination are
9 based on assets in hand, not on the success of some
10 future business. We're not going to try to make a
11 business judgement about whether that's a good
12 business or a bad business. Let them worry about it.
13 We want to see pledges of assets, real
14 assets not contingent on the profits or the revenue
15 stream of a future organization. So, to go a step
16 further, not only would we not make a decision based
17 entirely on proprietary information or that couldn't
18 be justified in public, but in this case it's not the
19 proprietary information that's the problem. It's the
20 business concept that some future business is going to
21 make the money and, if they don't make the money, the
22 implication is that the decontamination doesn't get
23 paid for.
24 It's not that ConverDyn is any worse a
25 business than SFC. It's just irrelevant. I mean, we

1 want to know, as of today, regardless of what happens,
2 that that decontamination will be done.
3 Yes, Mr. Rice?
4 QUESTION: (Questioner off mike.)
5 CHAIRMAN SELIN: Well, you know, it's not
6 reasonable to expect a guarantee on day 1 in terms of
7 fixed assets in an escrow fund, to take the extreme
8 case, that could pay for decommissioning 30 or 40
9 years down the road.
10 On the other hand, this has led me to take
11 a look at what we expect in escrow funds for
12 nonreactor licensees and I do think that the amounts
13 are inadequate. The obligation is no less for not
14 putting up the same amount of money, but we have -- it
15 is true we have not applied to facilities, nonreactor
16 facilities, the same logic that we have applied to
17 reactor facilities in terms of decommissioning funds.
18 QUESTION: (Questioner off mike.)
19 CHAIRMAN SELIN: It might, but that's not
20 the main issue. The main issue is that even in a
21 reactor you don't have them put up enough money on day
22 1 so that if they had to close down on day 2 they
23 could pay for the whole clean-up. I mean, that's
24 really unreasonable. You need some assurances, partly
25 escrow and partly other assets, that the licensee has

1 both the ability and the willingness to pay.

2 Now, if you ask me a different question,

3 do I wish that the Commission five years ago had done

4 different things with McGee and General Atomics at the

5 time the deal went through, the answer is I don't

6 know, but maybe. I mean, that was a long time ago.

7 QUESTION: From what you do know, is $20

8 million enough to clean-up?

9 CHAIRMAN SELIN: It's not a pessimistic

10 assumption. It's likely not to be less, but it's not

11 a ridiculous amount. It's really hard to say, Mr.

12 Franklin.

13 You know, we do need that plan. As they

14 said, they haven't drilled. For good reason, they

15 haven't drilled through the pools. Those pools are a

16 major contamination concern.

17 You see, I'm not -- who is the Inside NRC

18 reporter? Well, you are, but is there a McGraw-Hill

19 person here too?

20 You see, I'm not really livid. I'm not

21 pleased, but I'm not livid.

22 Anything else?

23 MR. FOUCHARD: Is that all? Thank you.

24 (Whereupon, at 3:44 p.m., the above-

25 entitled matter was concluded.)

CERTIFICATE OF TRANSCRIBER

This is to certify that the attached events of a meeting of the United States Nuclear Regulatory Commission entitled:

TITLE OF MEETING: PRESS CONFERENCE

PLACE OF MEETING: ROCKVILLE, MARYLAND

DATE OF MEETING: DECEMBER 21, 1992

were transcribed by me. I further certify that said transcription is accurate and complete, to the best of my ability, and that the transcript is a true and accurate record of the foregoing events.

Carol Lynch

Reporter's name: Peter Lynch

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS | ) | Docket No. 40-8027-EA |
| (Sequoyah Facility in Gore, Oklahoma) | ) | February 14, 1994 |

STATE OF OKLAHOMA )
)
COUNTY OF SEQUOYAH )

Reau Graves, Jr., being first duly sworn, deposes and says:

1. This Affidavit is submitted as part of the Motion of General Atomics for Summary Disposition or For an Order of Dismissal.

2. I am a member of the Board of Directors of Sequoyah Fuels Corporation.

3. Sequoyah Fuels Corporation ("Licensee") is the holder of Source Material License No. SUB-1010 (the "License") issued by the Nuclear Regulatory Commission ("NRC") pursuant to 10 CFR Part 40. The License authorized the Licensee to possess and use source material in the production of uranium hexafluoride ($UF_6$) and depleted uranium tetrafluoride ($DUF_4$). The License for $UF_6$ production was originally issued on February 20, 1970 by the Atomic Energy Commission.

4. Sequoyah Fuels Corporation is the <u>sole</u> licensee named in the License.

5. For several years, and until July 6, 1993, Sequoyah Fuels Corporation was engaged in the activities described above at its facility in Gore, Oklahoma (the "Sequoyah Facility").

6. On June 20, 1988, Sequoyah Holding Corporation ("SHC") was incorporated in the State of Delaware. SHC was, and is a wholly-owned subsidiary of General Atomics. From June 30, 1988 to January 28, 1992, I served as Chairman of SHC.

7. On or shortly after October 18, 1988, I forwarded a letter to Leland C. Rouse of the Nuclear Regulatory Commission Staff. A copy of that letter is attached hereto. That letter requested that NRC provide its advance consent to the transfer of control of Sequoyah Fuels Corporation, then a wholly-owned subsidiary of Kerr-McGee Corporation ("Kerr-McGee"), to SHC. In that letter, SHC also requested that NRC confirm that, through an amendment to Chapter 7.5 of the License, "Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility." (Letter from Graves to Rouse, at page 3). This amendment, along with several other revisions to the License, was reflected in SHC's application for amendment of the License, which was also dated October 18, 1988.

8. Sometime prior to the filing of my October 18, 1988 letter, I had met with representatives of the NRC in the Washington, D.C. area to discuss the acquisition of Sequoyah Fuels Corporation by SHC. We specifically discussed the question of whether or not the NRC would require a guarantee by General

Atomics of decommissioning costs. At the time, I was familiar with the guarantee of those costs that had been required of Kerr-McGee. It was my opinion then, as it is now, that if a guarantee had been required of General Atomics, the acquisition would not have taken place.

9. By letter to me dated October 27, 1988, NRC approved the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee to SHC. A copy of that letter is attached. By letter dated October 28, 1988, NRC also approved the proposed amendments to the License, including the revisions to Chapter 7.5 which effected the release of Kerr-McGee. The revisions to Chapter 7.5 approved by the NRC did not substitute General Atomics for Kerr-McGee and did not in any way impose an obligation on General Atomics that was similar to the one from which Kerr-McGee was being released. Moreover, no other conditions were placed upon the License which created any such obligation on the part of General Atomics.

10. On November 4, 1988, SHC purchased Sequoyah Fuels Corporation from Kerr-McGee.

11. On August 29, 1989 New Sequoyah Fuels Corporation ("NSFC") was incorporated in Delaware.

12. On December 29, 1989, NRC amended the Sequoyah License to authorize a change in the Licensee's name to NSFC, the incorporation of NSFC, and a transfer of assets to NSFC. On December 31, 1989, Sequoyah Fuels Corporation and NSFC entered into a Transfer Agreement in which Sequoyah Fuels Corporation

transferred its assets and ongoing business (excluding certain farm-related business and assets and certain conversion contracts with international customers) to NSFC.

13. On March 26, 1990, NRC amended the Sequoyah License to authorize the change of the Licensee's name from NSFC to "Sequoyah Fuels Corporation." The former Sequoyah Fuels Corporation changed its name to "Sequoyah Fuels International Corporation" ("SFIC").

14. Sequoyah Fuels Corporation is now a wholly-owned subsidiary of SFIC. SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics.

FURTHER, AFFIANT SAYETH NOT.

Reau Graves Jr

Reau Graves, Jr.

Subscribed and sworn to before me on this 14th day of February, 1994.

Jennifer Loyd

Notary Public

My commission expires on 9-28-95.

PI-137

40-8027
PDR/LPDR

# SEQUOYAH HOLDING CORPORATION

P.O. BOX 610 • I-40 AND HIGHWAY 10 • GORE, OKLAHOMA 74435
PHONE: (918) 489-5511 • FAX: (918) 489-5620

DOCKETED USNRC OCT 20 1988 NMSS MAIL SECTION DOCKETING & SERVICE BRANCH

RECEIVED OCT 20 1988 U.S. NUCLEAR REGULATORY COMMISSION NMSS Mail Section

October 18, 1988

Mr. Leland C. Rouse, Chief
U.S. Nuclear Regulatory Commission
Fuel Cycle Safety Branch
Division of Industrial and Medical Nuclear Safety
Office of Nuclear Material Safety & Safeguards
Washington, DC 20555

Re: License SUB-1010; Docket 40-8027
Transfer of Control of Licensee

Dear Mr. Rouse:

Sequoyah Holding Corporation ("Holding"), a corporation organized under the laws of the State of Delaware, hereby seeks the consent of the Nuclear Regulatory Commission ("NRC"), pursuant to the Atomic Energy Act of 1954 and the regulations promulgated thereunder, to a transfer of control of Sequoyah Fuels Corporation ("Sequoyah"), a corporation organized under the laws of the State of Delaware. Sequoyah presently is a wholly-owned subsidiary of Kerr-McGee Corporation ("Kerr-McGee"), a corporation organized under the laws of the State of Delaware. Sequoyah is the present holder of NRC Source Material License Number SUB-1010 (the "License"). Holding has entered into an acquisition agreement with Kerr-McGee, pursuant to which, subject to the approval of the NRC, Holding will acquire all of the outstanding stock of Sequoyah.

Holding is a wholly-owned subsidiary of General Atomics ("GA"), a corporation organized under the laws of the State of California, which is itself a wholly-owned subsidiary of General Atomic Technologies Corporation ("GATC"), a corporation organized under the laws of the State of Wyoming. The capital stock of GATC is owned 79.5% by Tenaya Corporation, a corporation organized under the laws of the State of Delaware, 20.01% by Linden S. Blue, a United States citizen and .49% by James N. Blue, a United States citizen. Tenaya is a holding company for investments of the family of James N. Blue. Mr. Blue owns 60.6% of the voting stock of Tenaya, his wife Anne P. Blue, a citizen of the Federal Republic of Germany, owns 18.2%, and 21.2% is held in trust for the benefit of their children. Holding is not

DF04
1/1

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owned, controlled or dominated by an alien, a foreign corporation or a foreign government. Further information concerning Holding is provided in Appendix A.

Holding has simultaneously filed, with the consent of Kerr-McGee and Sequoyah Fuels Corporation, an application for an amendment to the License seeking to delete references to Sequoyah's current parent company, Kerr-McGee, to reflect the new ownership of Sequoyah. As reflected in the letters from Mr. Randolph and Mr. Luke attached to the application for amendment, Sequoyah and Kerr-McGee consent to this request for consent to a transfer of control of Sequoyah.

Holding will acquire Sequoyah which owns and operates the Sequoyah facility situated near Gore, Oklahoma and consists of a uranium hexafluoride conversion facility and a depleted $UF_4$ facility (the "Sequoyah Facility") and the ranches in the vicinity owned by Sequoyah. Holding will not acquire the Cimarron Facility, the Wyoming properties and other properties which have been owned by Sequoyah and which have been transferred to other Kerr-McGee entities.

The Sequoyah Facility will continue to be operated in the same manner as it has been operated; nothing will change in the manner in which Sequoyah, as the licensee, conducts its operations and discharges its obligations under the License. No major changes are anticipated in the on-site operating and management personnel of Sequoyah, other than that the President of Sequoyah will no longer be an employee of Kerr-McGee. As set forth in Appendix A, the President of both Sequoyah and Holding will be Reau Graves, Jr. Mr. Graves is also a Senior Vice President and Director of GA.

The only other changes will be in the ownership of the stock of Sequoyah and the directors of Sequoyah as set forth in Appendix A. The oversight responsibilities and obligations of off-site personnel who are currently employees of Kerr-McGee will be assumed by employees of GA, as set forth in the application for an amendment to the License, filed simultaneously with this request for consent.

Sequoyah currently has numerous contracts with a number of utilities and other domestic and foreign corporations. These contracts will remain in place following the acquisition and will be the basis of Sequoyah's ability to finance its on-going operations and to comply with the safety and other requirements of the License. Holding will submit to the NRC copies of audited financial statements for itself and Sequoyah within 90 days of December 31, 1988, the close of Holding's and Sequoyah's fiscal years. Holding and Sequoyah will submit such financial statements to the NRC within 90 days of the close of each fiscal year, until the

time that Sequoyah files with the NRC a decommissioning funding plan pursuant to 10 C.F.R. § 40.36 (as published in the Federal Register on June 27, 1988). The License is currently scheduled to expire September 30, 1990. Sequoyah will submit to the NRC a decommissioning funding plan pursuant to 10 C.F.R. § 40.36 at the time it submits a renewal application for the License.

Sequoyah and Quivira Mining Company ("QMC") have executed a Source Material Toll Milling Contract, dated September 28, 1987 (the "Contract"), which provides that the Quivira Uranium Mill continue to accept the Sequoyah Facility's raffinate and fluoride sludges for uranium recovery. The Contract remains in effect through December 1, 1992, and provides for year by year extensions for so long as QMC is allowed to process source material. Sequoyah may terminate the Contract at any time; however, QMC may not terminate the Contract until December 1, 1992, and may do so only if QMC elects to permanently cease the operation of the mill. If QMC terminates the Contract, QMC will leave in place such portion of the mill facilities sufficient to handle Sequoyah's anticipated processing requirements and the parties will mutually agree upon a rental rate for the continued use of those facilities. The Contract and all its provisions shall inure to the benefit of, and shall be binding upon, the respective parties, their successors and assigns and, except for the sale or transfer of the mill, neither party can assign the Contract without the written consent of the other.

Sequoyah has established a policy of accruing decommission and reclamation expense for specific waste disposal projects and decommissioning activities, and intends to continue this policy upon transfer of ownership. These accruals are made based on units of production or a fixed monthly charge depending on the nature of the account. The sum of the balance of these accounts appears on Sequoyah's balance sheet as a Decommission and Reclamation Reserve. As work is performed on a specific project for which a reserve has been established, the related expense is funded from working capital and the balance of the reserve account is reduced. In the unlikely event the Sequoyah Facility would be required to decommission prematurely, the related cost would be funded from working capital.

Holding requests that the NRC confirm that, at the time an amendment to the License is issued pursuant to the application submitted on the same date as this letter, Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility, and, that in accordance with that release, the third paragraph in Chapter 7.5 will be deleted.

After the NRC has consented to the transfer of control of Sequoyah and has issued an amendment to the License, the transaction will be consummated. Holding will immediately notify the NRC of the closing when it occurs.

SEQUOYAH HOLDING CORPORATION

By Reau Graves Jr
President

STATE OF OKLAHOMA )
)
COUNTY OF SEQUOYAH )

On this 8 day of October 1988, before me, D. M. Clifton, a Notary Public for the State of Oklahoma, personally appeared Reau Graves, Jr. who being duly sworn, stated that he is President of Sequoyah Holding Corporation, that he has read the foregoing letter to Leland C. Rouse and that the information and statements therein are true and correct to the best of his knowledge and belief.

D. M. Clifton
Notary Public

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

OCT 27 1988

Docket No: 40-8027
License No: SUB-1010

Sequoyah Holding Corporation
ATTN: Mr. Reau Graves, Jr., President
P. O. Box 610
Gore, Oklahoma 74435

Gentlemen:

In accordance with your letter dated October 18, 1988, we have reviewed your request for NRC consent to the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee Corporation to Sequoyah Holding Corporation. We understand that the proposed transfer will be a purchase of the outstanding stock of Sequoyah Fuels Corporation.

In your letter, you have stated that there will be no change to operations or in the existing conditions of the license affecting health and safety requirements and no major changes for the current onsite operating and management personnel. The President of Sequoyah Fuels Corporation, who is presently a Kerr-McGee employee, will be replaced by an employee of General Atomics. Kerr-McGee corporate positions with oversight and audit responsibilities will be assumed by General Atomics corporate staff.

Based upon the information submitted, we have determined that the transfer of control is in accordance with the provisions of Title 10, Code of Federal Regulations, Section 40.46. We find that there will be no adverse impact on the public health and safety or the common defense and security as a result of the transfer of control of Sequoyah Fuels Corporation by virtue of the change in stock ownership. Accordingly, pursuant to 10 CFR 40.46, the Commission hereby consents to Sequoyah Holding Corporation acquiring control of Sequoyah Fuels Corporation. The consent is subject to the issuance of a license amendment and commitments to submit financial statements for Sequoyah Holding Corporation and Sequoyah Fuels Corporation and to maintain the decommissioning and reclamation reserves. Sequoyah Holding Corporation's commitment for Sequoyah Fuels Corporation to submit a decommissioning funding plan at the time Sequoyah Fuels Corporation submits a license renewal application will become a condition in the license.

By separate letter, a license amendment reflecting changes in ownership and corporate oversight is being issued prior to the stock transfer. The amendment will become effective at the time of stock transfer. We understand that you will notify NRC at the time the transaction is consummated.

OCT 2 7 1988



For your information, a copy of the staff assessment concerning this decision is enclosed. If you should have any questions regarding this matter, please contact Mr. Scott Pennington on (301) 492-0693 or me on (301) 492-0642.

FOR THE NUCLEAR REGULATORY COMMISSION

Leland C. Rouse, Chief
Fuel Cycle Safety Branch
Division of Industrial and
Medical Nuclear Safety, NMSS

Enclosure:
Staff Assessment of Acquisition

cc w/encl: Dr. John C. Stauter
Sequoyah Fuels Corporation

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| SEQUOYAH FUELS CORPORATION AND GENERAL ATOMICS | ) | Docket No. 40-8027-EA |
| | ) | February 14, 1994 |
| (Sequoyah Facility in Gore, Oklahoma) | ) | |

STATE OF CALIFORNIA )
) ss.
COUNTY OF SAN DIEGO )

J. Neal Blue, being first duly sworn, deposes and says:

1. This Affidavit is submitted as part of the Motion of General Atomics for Summary Disposition or for an Order of Dismissal.

2. I am the Chairman of General Atomics and I have served in that capacity since September 1986.

3. Sequoyah Fuels Corporation is a wholly-owned subsidiary of Sequoyah Fuels International Corporation ("SFIC"). SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics. Consequently, General Atomics is a third-tier parent company of Sequoyah Fuels Corporation.

4. General Atomics is not now and has never been a licensee of the Nuclear Regulatory Commission ("NRC") in connection with the facility in Gore, Oklahoma that was operated until July 6, 1993 by Sequoyah Fuels Corporation (the "Sequoyah Facility").

5. General Atomics is not engaged in licensed activities and it does not possess licensed materials in connection with the

it does not possess licensed materials in connection with the Sequoyah Facility.

6. Over a period of several weeks in the summer and fall of 1988, discussions were conducted between representatives of General Atomics and the staff of the NRC regarding the proposed transfer of ownership and control of Sequoyah Fuels Corporation from Kerr-McGee Corporation to SHC. The NRC did not require General Atomics to guarantee the decommissioning and reclamation expenses of the Sequoyah Facility as a condition of the transfer of ownership. The NRC ultimately approved the transfer of control.

7. The decision of the NRC not to place new conditions on the transfer of the control of the Licensee was critical to the consummation of the transfer. If the NRC had at that time required General Atomics to accept responsibility for providing funding, or financial assurance, or any form of guarantee of the decommissioning and remediation costs of the Sequoyah Facility, General Atomics would have ceased all negotiations with Kerr-McGee Corporation and the sale and transfer of control would not have taken place.

8. Subsequent to May 6, 1992, General Atomics considered entering into a contract with Sequoyah Fuels Corporation regarding the funding of decommissioning and reclamation costs relating to the Sequoyah Facility. No such contract was ever entered into.

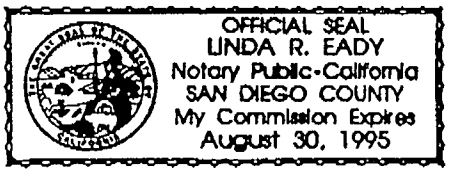
FURTHER, THE AFFIANT SAYETH NOT.

J. Neal Blue

Subscribed and sworn to before me on this 14th day of February, 1994.

Linda R. Eady
Notary Public

My commission expires on August 30, 1995.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS | ) | Docket No. 40-8027-EA |
| | ) | |
| (Sequoyah Facility in Gore, Oklahoma) | ) | February 17, 1994 |

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

**GENERAL ATOMICS' MOTION TO STAY DISCOVERY**

In accordance with the provisions of the Nuclear Regulatory Commission's Rules of Practice in 10 C.F.R. § 2.730, General Atomics respectfully moves the Presiding Officer of the Atomic Safety and Licensing Board ("Board") to temporarily stay discovery by all parties in this matter, until the Board rules on General Atomics' Motion for Summary Disposition or for an Order of Dismissal.

AS GROUNDS for the Motion, General Atomics submits the following:

1. The Order of the Nuclear Regulatory Commission ("NRC") which is the subject of General Atomics' Motion, was not filed until October 15, 1993.

2. On February 17, 1994, General Atomics filed (by mail) its (1) Motion for Summary Disposition or for an Order of Dismissal, (2) a Brief in support of its motion, and (3) supporting Affidavits.

3. Barring an extension of time by the Board, any party which opposes the motion is required to serve an answer within

twenty (20) days after service of the motion. Even if General Atomics should seek leave to file additional documents in connection with its motion, it is highly likely that the Board will render a ruling on the motion within a reasonably brief period of time.

4. At the Prehearing Conference on January 19, 1994, counsel for the NRC Staff expressed the view that discovery in this matter will take at least six months. In view of the fact that the corporate offices of General Atomics are located in California, that the facility of Sequoyah Fuels Corporation which is the subject of the NRC's October 15, 1993 Order is located in Gore, Oklahoma, that the representative of NACE resides in Oklahoma, that the NRC Staff has indicated an intent to conduct discovery against ConverDyne, and that the offices of counsel for all parties are located in the Washington, D.C. or Richmond, Virginia area, it is inevitable that the cost of discovery to the parties will be significant. All parties have a strong vested interest in minimizing litigation costs.

5. It is self-evident that if the Board grants General Atomics Motion, any discovery conducted up to that time by or against General Atomics will have been unnecessary.

6. A temporary stay of discovery by or against General Atomics only will not accomplish the desired ends, since General Atomics would incur unacceptable risks if discovery is permitted to continue in its absence by and among the remaining parties.

7. The desirability of minimizing unnecessary litigation

costs pending a ruling by the Board on General Atomics' Motion, far outweighs any objective that might be obtained by any party in conducting discovery prior to the Board's ruling.

Respectfully submitted,

By Stephen M. Duncan
Of Counsel

Stephen M. Duncan
Bradfute W. Davenport, Jr.
MAYS & VALENTINE
110 South Union Street
Alexandria, Virginia 22314

ATTORNEYS FOR GENERAL ATOMICS

February 17, 1994

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| SEQUOYAH FUELS CORPORATION | ) | Docket No. 40-8027-EA |
| and GENERAL ATOMICS | ) | |
| | ) | |
| (Sequoyah Facility in | ) | February 17, 1994 |
| Gore, Oklahoma) | ) | |

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing (1) General Atomics' Motion for Summary Disposition or For an Order of Dismissal, (2) Brief in Support of General Atomics' Motion for Summary Disposition or For an Order of Dismissal, (3) Affidavit of J. Neal Blue, (4) Affidavit of Reau Graves, Jr., and (5) General Atomics' Motion to Stay Discovery have been served upon the following persons by U.S. mail, first class, in accordance with the requirements of 10 C.F.R. Sec. 2.712:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attention: Docketing & Service Branch
(Original and two copies)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge James P. Gleason, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge G. Paul Bollwerk, III
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Steven R. Hom, Esq.
Susan L. Uttal, Esq.
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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c/o IEER
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Mr. Lance Hughes, Director
Native Americans for a Clean Environment
P.O. Box 1671
Tahlequah, Oklahoma 74465

John H. Ellis, President
Sequoyah Fuels Corporation
P.O. Box 610
Gore, Oklahoma 74435

Maurice Axelrad, Esq.
Newman & Holtzinger, P.C.
1615 L Street, N.W.
Suite 1000
Washington, D.C. 20036

Mr. John R. Driscoll
General Atomics
3550 General Atomics Court
San Diego, California 92121-1194

Dated at Alexandria, VA
this 17th day of February, 1994.

Stephen M. Duncan

Stephen M. Duncan

MAYS & VALENTINE
110 South Union Street
Alexandria, Virginia 22314
(703) 519-8000

COUNSEL FOR GENERAL ATOMICS