UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17 AND/OR MOTION FOR DIRECTED CERTIFICATION

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July 15, 1994

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The NRC Staff (Staff) hereby files its Answer to General Atomics' Petition for Review of LBP-94-17 And/Or Motion for Directed Certification (June 24, 1994) (Petition). For the reasons set forth below, the Staff opposes review by the Commission.

BACKGROUND

On October 15, 1993, the Staff issued an order (Order) to General Atomics (GA) and Sequoyah Fuels Corporation (SFC) regarding decommissioning funding for the SFC site in Gore, Oklahoma. GA, the corporate parent of SFC, was directed by the Order to provide, *inter alia,* financial assurance, in accordance with 10 C.F.R. § 40.36, in the amount of $86 million for remediation of the SFC site. On February 17, 1994, GA filed

a motion for summary disposition and motion for dismissal of the claims against GA,[1] seeking dismissal of the Order as it applied to GA based on arguments that the NRC lacks jurisdiction over GA, the Order fails to state a claim upon which relief could be granted, the NRC is estopped from ordering GA to provide financial assurance, and GA's due process rights would be violated if GA is forced to contest the Order before the Commission. On April 13, 1994, the Staff and Native Americans for a Clean Environment (NACE), an intervenor, filed answers[2] to the Summary Disposition Motion and Dismissal Motion. On April 28, 1994, the Atomic Safety and Licensing Board (Board) issued an order denying the Summary Disposition Motion and Dismissal Motion.[3] A memorandum detailing the reasons for the denial was issued by the Board on June 8, 1994 (LBP-94-17).[4]

In LBP-94-17, the Board held that, with respect to the jurisdictional issue raised by GA, the parties opposing the Summary Disposition Motion have provided sufficient

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[1] General Atomics' Motion for Summary Disposition or For an Order of Dismissal (Feb. 17, 1994) (Summary Disposition Motion or Dismissal Motion).

[2] NRC Staff's Answer In Opposition To General Atomics' Motion For Summary Disposition Or For An Order Of Dismissal (Apr. 13, 1994) (Staff's Answer); Native Americans For A Clean Environment's Opposition To General Atomics' Motion For Summary Disposition Or For An Order Of Dismissal (Apr. 13, 1994).

[3] Order (Denial of Motions for Summary Disposition, Order of Dismissal, Stay Discovery and Leave to File Reply) (Apr. 28, 1994).

[4] *Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, __ NRC __, slip op. (June 8, 1994).

evidence to show there are material facts in dispute, and that GA "has not carried its burden of proving that no genuine issues of material facts exist to be litigated." LBP-94-17, slip op. at 12 (June 8, 1994). On that basis, the Board also denied GA's Dismissal Motion to the extent that motion was premised on a lack of jurisdiction. *Id.* In so deciding, the Board recognized that the issue whether the Commission has jurisdiction over GA "cannot be resolved without an evaluation of the factual situation which gave rise to its assertion." *Id.* at 9. More specifically, the Board stated that "the central issues in this proceeding concern the role that GA performed in connection with its subsidiary's (SFC) licensed activities and whether that role constitutes GA as a de facto licensee or one whose conduct has affected activities within the Commission's subject matter jurisdiction." *Id.* at 11.

The Board also held, in response to GA's argument that the Order failed to state a legally cognizable claim and thus should be dismissed, that it was evident that the Order satisfied the necessary requirements of stating a claim. *Id.* at 15.

Further, the Board decided that GA's estoppel argument did not have merit. GA had claimed that it would not have acquired SFC in 1988 if required to accept responsibility for decommissioning funding for the SFC facility, and that the Staff had not placed such a condition upon GA in approving the acquisition. According to GA, the NRC should now be estopped from imposing decommissioning funding obligations at this time. In LBP-94-17, the Board opined that the promise of financial assistance by GA's chairman in 1992 "tends to negate" any (prior) NRC actions inconsistent with the Staff's

intention to hold GA liable for decommissioning financial assurance. Thus, the Board concluded that this issue "cannot be raised successfully." *Id.* at 16.

The Board also rejected GA's due process arguments. First, GA had argued that individual Commissioners had knowledge of material facts, but could not be called to testify under the Commission's rules, and had prejudged certain aspects of the case against GA. *See id.* In rejecting these arguments, the Board noted that Staff witnesses will be made available, that GA has not shown that the Board is incapable of fairly judging the case, and that the issue of prejudgment by the Commissioners is to be reserved until such time as this matter is before the Commission. *Id.* at 17. Second, GA had argued that its due process rights were violated by virtue of being held liable for decommissioning funding assurance without the NRC having first established clear standards of conduct that would subject one to such liability, and which conduct GA could choose to avoid. *See id.* at 17. The Board stated that there is "no due process requirement we are aware of that necessitates a regulatory agency detailing in advance the variety of conduct that a regulatory agency is authorized to assure or prohibit." *Id.* at 17. The Board further opined that GA "has had ample opportunity to be advised of the claims against it and time to prepare" defenses. In conclusion, the Board held that "[d]ue process requires no more." *Id.* at 18. Accordingly, the Dismissal Motion, as well as the Summary Disposition Motion, were denied by the Board.

DISCUSSION

I. The Standards For Commission Review

Insofar as the pending Petition is concerned, the focal point in deciding whether to grant review is 10 C.F.R. § 2.786(g).[5] Although the general rule is that interlocutory appeals[6] may not be taken to the Commission, *see* 10 C.F.R. § 2.730(f), the Commission has held that if a petitioner seeking interlocutory review can demonstrate that one of the criteria contained in 10 C.F.R. § 2.786(g) is met, review will be undertaken. *Georgia Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994); *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993). Section 2.786(g) provides in relevant part:

> A certified question or referred ruling will be reviewed if it either--
>
> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a

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[5] To the extent that considerations under 10 C.F.R. § 2.786(b)(4) may be relevant, the Board followed well-established law governing motions for summary disposition in denying GA's Summary Disposition Motion. In particular, as discussed above, the Board appropriately found that there were material facts in dispute. In such case, summary disposition should not be entered. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1961). In addition, with respect to the issues raised by GA of failure to state a claim, estoppel, and due process, the Board committed no error. *See generally* NRC Staff's Answer in Opposition to General Atomics' Motion for Summary Disposition or For An Order of Dismissal (Apr. 13, 1994) at 20-35, and cases cited therein.

[6] The decision to deny GA's Summary Disposition Motion, and likewise the Dismissal Motion, is interlocutory in nature. *See, e.g., Louisiana Power and Light Co.* (Waterford Steam Electric Generating Station, Unit 3), ALAB-220, 8 AEC 93, 94 (1974) ("That an order declining to grant a motion for summary disposition (or judgment) is interlocutory cannot, of course, be disputed.").

> practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g).

GA has framed the question for which it is seeking review or directed certification as:

> Does its enabling legislation vest in the Commission jurisdiction to retroactively impose an $86 million non-civil penalty financial liability upon the corporate parent of a licensee, where there is no claim of 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 Commission, and does not possess or use regulated source materials?

Petition at 2. At the outset, the Staff submits that GA's question is one that should be given no consideration for review at this time because it has not been squarely before the Board and there was clearly no ruling on it. The reason the Board could not address it is that the question contains one or more issues of fact that are in controversy. For example, the question posed assumes "the parent . . . is not engaged in activities within the subject matter jurisdiction of the Commission . . . ." As the Board made clear, material facts that directly bear on this assumption are in dispute. *See* LBP-94-17, slip op. at 12. Therefore, no purpose would be served, beyond engaging in a mere academic exercise, for the Commission to review the proffered question at this time. Whatever answer to the question the Commission may provide now would have no effect on the

basic structure of the proceeding, and would not threaten any party with any adverse impact, since the proceeding would still need to be undertaken to determine facts now in controversy.

GA argues more generally that the "threshold issue of the NRC's jurisdiction" over GA "is so fundamental and important to this matter that it affects the basic structure of the proceeding in a pervasive and unusual manner." Petition at 9. GA cites *Safety Light Corp., et al.* (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350 (1990) for the proposition that a "licensing board's view of its own jurisdictional boundaries goes to the basic structure of a proceeding and has a significant and pervasive effect upon the proceeding." *Id.* at 361; Petition at 11.

In *Safety Light*, a corporation, U.S. Radium, holding a byproduct material license for the safety lighting aspects of its business undertook a series of reorganizations beginning in 1980. By 1982, the net result was the creation of an independent spin-off, the Safety Light Corporation (Safety Light), which engaged only in the safety lighting business associated with the license (originally held by U.S. Radium), and several other companies (USR Companies). The NRC was not notified and did not approve of the transfer of the license to Safety Light. In 1989, the Staff issued two immediately effective orders to Safety Light and the USR Companies.[7] Among other things, the first order required the preparation of plans regarding site characterization, and the second

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[7] *See Safety Light Corp., et al.* (Bloomsburg Site Decontamination), LBP-90-7, 31 NRC 116, 118 (1990).

required the USR Companies to make deposits into a trust fund to finance the implementation of a site characterization plan. ALAB-931, 31 NRC at 358. After they filed hearing requests, the USR Companies moved to dismiss the Staff's orders, asserting the Commission lacked jurisdiction over the movants. The Licensing Board denied the motion, stating that the transfer of the license to Safety Light, pursuant to the corporate restructuring that resulted in the separate USR Companies, did not eliminate NRC jurisdiction over the USR Companies because statutory requirements involving notice to the NRC of the transfer of a license were not followed. *Id.* at 359. In considering whether to accept review of the Licensing Board's interlocutory ruling regarding jurisdiction over the USR Companies, the Appeal Board held that while threshold orders concerned with jurisdiction do not automatically give rise to review, the underlying Licensing Board ruling at issue had a "significant and pervasive effect" on that proceeding. ALAB-931, 31 NRC at 361. In so holding, the Appeal Board stated that "there is room for substantial doubt whether, and if so to what extent Safety Light will be an active participant in the proceeding.[8] Accordingly, the shape of the proceeding almost certainly is heavily influenced, if not wholly determined, by the Licensing Board's conclusion that the USR Companies are to remain as parties." *Id.* at 362. Thus, interlocutory review was granted. *Id.*

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[8] The Appeal Board had noted that there was some question as to the economic health of Safety Light, that counsel for Safety Light had filed a notice of withdrawal, and that Safety Light had not obtained substitute counsel. *Id.* at 361-62.

Generally speaking, in the case at hand, GA has likewise mounted a jurisdictional challenge which bears on its participation in this proceeding. However, in contrast to the Licensing Board's decision reviewed in *Safety Light*, LBP-94-17 did not confirm the NRC's jurisdiction over GA. Rather, the question of jurisdiction over GA simply still remains unanswered pending further development of the facts. Accordingly, LBP-94-17 is distinguishable from the Licensing Board's decision discussed in *Safety Light*. Moreover, the nature of the proceeding here has not changed in any significant respect as a result of LBP-94-17.[9] Thus, it cannot be said that the basic structure of the proceeding has been affected in a pervasive or unusual manner. Therefore, the standard under 10 C.F.R. § 2.786(g)(2) has not been met.

With respect to the criteria under 10 C.F.R. § 2.786(g)(1), GA claims that if it is required "to engage in protracted and expensive litigation," before a final determination is made on the jurisdictional issue raised, GA will suffer "immediate and serious irreparable impact." Petition at 10. The Petition explains that such impact will not be limited to "substantial costs," but will also include "substantial risks to General Atomics' credit rating, its ability to obtain financing, and its overall ability to carry on its work." *Id.* GA asserts that "[a]s a practical matter, these risks cannot be alleviated through a

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[9] *Cf. Safety Light Corp., et al.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79 (1992) (order of Licensing Board converting a license denial proceeding from an informal Subpart L proceeding, where a presiding officer's decision is based on written materials, to a formal trial-type Subpart G proceeding with discovery and cross-examination, affected the proceeding in a pervasive and unusual manner).

petition for review of the Presiding Officer's final decision." *Id.* GA provides no citation of authority or factual support for the proposition that litigation expenses or "risks" to its credit rating and ability to obtain financing constitute a "threat" of "immediate and serious irreparable impact." *See* 10 C.F.R. § 2.786(g)(1). To the contrary, at least with respect to litigation expenses, it would appear likely that the opposite would be true. *Cf. Metropolitan Edison Co., et al.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984) (substantial litigation expense does not constitute irreparable injury in deciding whether to grant request for stay of hearings). Furthermore, the net effect of the "ruling" at issue here -- denial of the Summary Disposition Motion and the Dismissal Motion -- certainly did not result in any new or different obligations on the part of GA. Thus, it cannot be said that this ruling threatens GA with "immediate and serious irreparable impact." Accordingly, the Staff believes that the standard set forth in subsection 2.786(g)(1) has not been met.

II. Recent Decisions of the U.S. Supreme Court Cited By General Atomics

GA argues that it is "not apparent" that the Board considered three recent decisions of the U.S. Supreme Court: *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S.Ct. 1439 (1994); *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994); and *Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994).[10] Whether or not

[10] Petition at 11. GA has not raised any factual matters in its Petition that were not raised earlier before the Board.

the Board considered the foregoing cases, those decisions are of little or no import here, and certainly do not provide a basis for the granting of the Petition.

GA cites *Central Bank* for the purpose of excerpting language that addresses rules of statutory construction.[11] The statute at issue was section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-- . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Securities and Exchange Commission may prescribe.

This statute, which is a proscriptive provision clearly targeting specific conduct, is in sharp contrast to section 161i of the Atomic Energy Act, as amended, which in relevant part provides:

> In the performance of its functions, the Commission is authorized to . . . order as it may deem necessary . . . to govern any activity authorized pursuant to this Act . . . in order to protect health and minimize danger to life or property.

42 U.S.C. § 2201i. As the Court of Appeals for the District of Columbia has noted regarding the Atomic Energy Act, "Congress [enacted] a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the

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[11] GA argued earlier in its Summary Dispositon Motion that the law regarding statutory construction supported its view that the NRC did not have jurisdiction over GA. *See, e.g.*, GA's Brief in support of its Summary Disposition Motion at 12.

administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C.Cir. 1968). The Court in *Central Bank* was simply not confronted with a question of interpretation of the Atomic Energy Act, or even a statute as broadly worded. Therefore, *Central Bank* is inapposite and would have been of no value to the Board in reaching its decision in LBP-94-17.

GA cites *Landgraf* and *Rivers* for the well-settled proposition that there is a presumption against retroactive legislation.[12] *See* Petition at 14-15. GA apparently believes that this principle has some applicability here because GA essentially states that the Order is an attempt to "impose a new duty and a new liability (upon General Atomics) with respect to a transaction (General Atomics' 1988 purchase of the Licensee) already past." *Id.* at 15. The Staff fails to see the relevance of *Landgraf* or *Rivers*, or the proposition relied upon by GA for which the cases are cited.

The Order was issued pursuant to, *inter alia,* section 161i of the Atomic Energy Act, a legislative enactment that has been in existence since before GA's acquisition of SFC in 1988. It is beyond dispute that section 161i provides for the imposition of requirements by order. GA became subject to the Commission's ordering authority by reason of its involvement with SFC's activities and operations, after the "transaction," and not because of it. The Staff does not rely upon any theory that the statute, and thus

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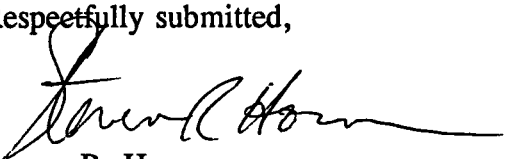
[12] GA did not explicitly raise the issue of retroactive legislation in its Summary Disposition Motion, and now provides no reason why such issue could not have been raised earlier.

the Commission's ordering authority, has suddenly become more expansive. The potential for the "duty" or "liability" of a parent of a licensee, depending upon the degree of involvement of that parent in activities over which the NRC has subject matter jurisdiction, has existed at all times during GA's ownership of SFC. Accordingly, the presumption against retroactive legislation, and thus the *Landgraf* and *Rivers* cases, are of no import here, and whether the Board considered them is irrelevant and provides no basis for GA's Petition. In any event, the substantive obligation imposed by the Order -- to provide decommissioning funding assurance -- is prospective in nature. And, wholly in keeping with GA's due process rights to challenge such prospective requirements, GA has been afforded an opportunity, of which it has availed itself, to contest its imposition.

CONCLUSION

In consideration of the foregoing, the Staff opposes review of the Petition.

Respectfully submitted,



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Dated at Rockville, Maryland
this 15th day of July 1994

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO GENERAL ATOMICS' PETITION FOR REVIEW OF LBP-94-17 AND/OR MOTION FOR DIRECTED CERTIFICATION" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by asterisk through deposit in the Nuclear Regulatory Commission's internal mail system this 15th day of July 1994:

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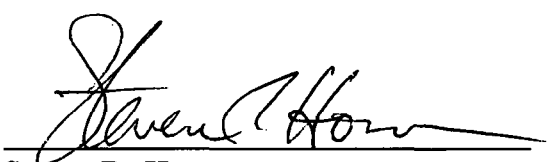

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