UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

Thomas D. Murphy
Alternate Board Member

In the Matter of	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	Source Material License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	ASLBP No. 94-684-01-EA
	June 30, 1995

MEMORANDUM AND ORDER
(Denying General Atomics' Motion Regarding NRC Staff "Reliance" Issues and Establishing Schedule for Bifurcated Issue of Agency Jurisdiction)

As part of this proceeding regarding an October 15, 1993 NRC staff enforcement order concerning the adequacy of decommissioning funding for the Sequoyah Fuels Corporation (SFC) Gore, Oklahoma uranium hexafloride facility, petitioner General Atomics (GA) has submitted a filing raising questions about the validity of certain bases cited by the staff in support of its order. Specifically, by motion filed June 6, 1995, GA has requested various forms of relief relating to staff claims in the October 1993 order

about purported reliance by the Commission or other agency officials on statements by GA Chairman J. Neal Blue concerning decommissioning funding for the SFC Gore facility. The NRC staff and intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation oppose GA's requests for relief.

For the reasons that follow, we deny GA's motion in toto. In addition, we bifurcate the jurisdictional issue of the agency's authority to subject GA to the decommissioning funding requirements set forth in the staff's October 1993 enforcement order and establish a schedule for discovery and summary disposition motions relating to that issue.

I. BACKGROUND

The genesis of the dispute now before the Board is a portion of our April 1995 decision in LBP-95-5, 41 NRC 253, 272 (1995), that established a discovery completion date of July 31, 1995. In response to that deadline, on April 28, 1995, GA counsel sent a letter to the Board Chairman in which he expressed the opinion that it was unlikely discovery could be completed by the end of July, in part because GA intended to take discovery from each of the NRC Commissioners. This letter, in turn, prompted the Board on May 15, 1995, to hold a telephone conference with the parties, including petitioners GA and SFC, the staff, and intervenors NACE and the Cherokee Nation, to discuss

discovery scheduling. Based on the parties' presentations during that conference, we asked them to confer and attempt to reach agreement on whether it would be more efficient to conduct discovery on, and then have the Board undertake to resolve, the issue of the agency's regulatory "jurisdiction" over petitioner GA before going forward with discovery and any evidentiary hearing on the other issues in this proceeding. See Tr. 243-45.

Subsequently, in letters to the Board dated May 17 and 19, 1995, the parties made it clear that they were unable to reach an agreement regarding bifurcation. The staff and intervenors NACE and the Cherokee Nation generally favored bifurcation, while GA and SFC opposed it. From the May 15 telephone conference and the parties' letters, a major point of contention appeared to be the exact nature of the staff's theory of regulatory jurisdiction.

In this regard, in the October 1993 enforcement order that is the focus of this litigation, the staff made the following statements relative to the agency's regulatory jurisdiction over GA:

> Although at the time of the purchase [of the Gore, Oklahoma uranium hexafloride facility] GA may have refused to guarantee SFC's obligation to decontaminate the facility, GA's actions in control over the day-to-day operations and business of SFC, and GA's representations of financial guarantees described above, on which the Commission has relied, make GA responsible, along

> with SFC to satisfy the NRC financial assurance requirements.
>
> . . . .
>
> After review of the responses to the Demands for Information, the NRC staff finds that there is no basis to change its conclusion that the degree of GA's control over the business of SFC and Mr. Blue's representations of financial assurance, on which the Commission relied, make GA responsible, along with SFC, for satisfying NRC financial assurance requirements.

58 Fed. Reg. 55,087, 55,091 (1993) (emphasis supplied). In an attachment to a January 13, 1994 memorandum discussing the agenda for our initial prehearing conference, we suggested that from these and other statements in the order, the staff appeared to be basing regulatory jurisdiction upon one or more of three theories: (1) GA is a de facto licensee; (2) GA is a "person otherwise subject to the jurisdiction of the Commission" in accordance with 10 C.F.R. § 2.202 and 10 C.F.R. Part 2, App. C; and (3) GA has a contractual obligation or legal duty to SFC or the agency flowing from, among other things, the Commission's purported reliance upon representations made by GA. See Memorandum (Posing Matters for Consideration at Prehearing Conference) (Jan. 13, 1994), attach. at 3-4 (unpublished).

Thereafter, during our initial prehearing conference on January 19, 1994, in response to a Board question about the staff's jurisdictional theory, staff counsel responded that

> to the extent that there is conceivably a quasi-contractual reliance theory, I will say again that that is not one that the Staff at this time intends to pursue, but I am not sure what need be done with the order, the order to the Staff clearly put General Atomics on notice that we were concerned with the day-to-day control of GA as we have alleged over the licensee, and that that principally is the angle that we were taking.

Tr. 109. During our May 15 telephone conference, staff counsel indicated that the staff continues to "stand by" this statement. Tr. 241. But, despite its own intimation that something might need to be done to the order to reflect this position, the staff has not taken any steps to amend or further clarify the order.

Notwithstanding the staff's representations that a "quasi-contractual reliance" theory is not a basis for the order, in its May 19 letter to the Board regarding bifurcation, GA continued to assert that without some staff action relative to the order it was unsure about the validity of any "reliance" theory. This, according to GA, had important implications for bifurcation of the regulatory jurisdiction question. GA contended that if it must still pursue this reliance theory, discovery will take substantially longer, which weighs significantly against bifurcation. See Letter from Stephen M. Duncan to Administrative Judge James P. Gleason, Chairman, Atomic Safety and Licensing Board (May 19, 1995) at 2-3.

By order issued May 23, 1995, we directed the staff to appear at a May 31, 1995 hearing and show cause why the Board should not declare that the "reliance" theory set forth in its October 1993 order had been abandoned such that any legal or factual statements in the order that relate solely to that theory would be deemed irrelevant to this proceeding. See Memorandum and Order (Order to Show Cause) (May 23, 1995) at 4 (unpublished). During the May 31 hearing, the staff stated that regulatory jurisdiction in this case was not based upon either theory two or theory three suggested by the Board in the attachment to its January 13 memorandum, which the staff described in shorthand, respectively, as the "wrongdoing" and "quasi-contractual/detrimental reliance" theories. See Tr. 252. Instead, the staff asserted that its theory of the case, which is more along the line of suggested Board jurisdictional theory one (i.e., GA as a de facto licensee), was set forth most fully in an April 13, 1994 pleading as follows:

> 1. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction, and has become subject to the NRC's broad authority to issue the Order to it, which under these facts constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill

its statutory mandate to protect health and minimize danger to life or property.

2. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction and has become a de facto licensee, fully subject to the NRC's regulations and NRC's broad authority to issue the Order to it, which under these facts constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill its statutory mandate to protect health and minimize danger to life or property.

3. By reason of GA's 100% ownership of SFC, and its direct involvement in certain activities of SFC going beyond the mere exercise of voting control over SFC, GA has affected or engaged in matters over which the NRC has subject matter jurisdiction, and has become subject to the NRC's broad authority to issue the Order to it, which under these facts, coupled with GA's voluntary commitment to guarantee financially the decommissioning funding for cleanup of the SFC site, constitutes a reasonable, necessary, rational, and lawful exercise of the NRC's broad authority granted by Congress to enable the NRC to fulfill its statutory mandate to protect health and minimize danger to life or property.

Tr. 254-56 (quoting NRC Staff's Answer in Opposition to General Atomics' Motion for Summary Disposition or for an Order of Dismissal (Apr. 13, 1994) at 26-27).

Further, in response to Board questions concerning the significance of the wording in the October 1993 order, referencing GA representations of financial assurance "on

which the Commission relied," the staff explained that this phrasing was not intended to pose a theory of regulatory jurisdiction (or GA liability) that depends upon actual reliance by the Commission or any other agency employee on such commitments. According to the staff, those commitments potentially are relevant in two contexts: first, as one of the indicia that GA had the requisite degree of control over SFC to establish that GA is subject to the agency's authority, perhaps as a de facto licensee; and second, as a discrete factor that, when considered in conjunction with circumstances showing GA control of SFC, establishes GA is subject to the agency's authority. See Tr. 265-57, 278-81.

The staff also asserted that an important step in establishing the relevance of those commitments is to show they were material to the agency in that there was regulatory reliance on the commitments. To demonstrate such reliance, however, the staff maintained it is not necessary to show "actual" reliance on the commitments by individual Commissioners or other agency personnel. Instead, drawing an analogy to the Commission's decisions on the nature of "material false statements" in Randall C. Orem, D.O., CLI-93-14, 37 NRC 423 (1993), and Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'd sub nom. Virginia Electric Power Co. v. NRC, 571 F.2d 1289 (4th Cir. 1978), the staff declared that the materiality of the commitments is a question of law

that requires a Board determination about whether the circumstances involved support the conclusion that a reasonable agency decisionmaker would take the commitment into account in doing his or her job. See Tr. 257-60, 281-82. As a consequence, the staff declared that GA's concerns about having to pursue extensive discovery of Commission members and agency officials to contest any staff "reliance" theory was groundless and so did not weigh against bifurcation of the jurisdictional issue. See Tr. 261.

In response, GA asserted that given the impact on GA's dealings with financial institutions and other business entities of the staff's allegations about commitments purportedly made by GA Chairman Blue and agency reliance on those commitments, it was unjust and unfair now to permit the staff to disavow reliance on those allegations without amending the October 1993 order. GA argued that all allegations about reliance and statements by Chairman Blue should be stricken from the record and that discovery should proceed on all remaining staff claims without bifurcation of the jurisdictional issue. See Tr. 262-64, 291. SFC supported GA's position. See Tr. 276-77. For their part, intervenors NACE and the Cherokee Nation agreed with the staff's substantive position regarding reliance, but now expressed skepticism that bifurcation would be efficient given that the staff's position obviated GA's supposed need

for extensive discovery regarding agency reliance. See Tr. 287-89.

At the conclusion of the hearing, the Board requested that GA put its request to strike portions of the October 1993 order in writing. See Tr. 292-93. GA did so in the June 6, 1995 motion now pending before the Board. In addition, GA requests summary disposition in its favor on all issues and claims in the October 1993 order that relate to any purported reliance by NRC officials on any statements or representations of GA Chairman Blue. Further, GA asks that the Board limit the staff's theories of liability to only the first two of the three theories specified by the staff in its April 1994 opposition to GA's motion for summary disposition and reiterated during the May 31 hearing. See [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order, and to Limit Issues in the Proceeding (June 6, 1995) [hereinafter GA Reliance Motion]. Both the staff and intervenors NACE and the Cherokee Nation oppose all aspects of GA's motion. See NRC Staff's Answer to [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993 Order and to Limit Issues in the Proceeding (June 12, 1995) [hereinafter Staff Reliance Response]; [NACE's] and Cherokee Nation's Opposition to [GA's] Motion for Summary Disposition, to Strike Language from the October 15, 1993

Order, and to Limit Issues in the Proceeding (June 12, 1995) [hereinafter NACE/Cherokee Nation Reliance Response].

II. ANALYSIS

In its motion, GA uses the same arguments to justify all three forms of relief requested. GA begins by asserting that the staff has conceded that under the October 1993 order agency regulatory jurisdiction over GA and GA decommissioning cost liability are not founded upon any quasi-contract, detrimental reliance theory. See GA Reliance Motion at 2. GA also declares that the staff has recognized that in the order GA is not alleged to have been involved in any wrongdoing. See id. at 3-4. GA further contends that the staff has acknowledged that it will not attempt to establish GA's liability based upon any statements made by GA Chairman Blue and relied upon by the Commission, but instead will use such statements to establish that GA exercised some degree of control over its subsidiary SFC. See id. at 4.

GA then declares that, in light of these various staff concessions, the Board should both reject any staff attempt to use the statements in this manner and strike any reference in the October 1993 order that relates to any statements or representations made by Chairman Blue. Such Board action is justified, according to GA, because (1) use of the statements is clearly wrong as a matter of law under

either (a) the case authority cited by the staff, or (b) the general legal concept of "materiality"; (2) use of the statements adds nothing to the case, but rather is so prejudicial to GA as to be inconsistent with any notion of fundamental fairness in the conduct of this proceeding; and (3) permitting the statements to be used will significantly and adversely affect the orderly conduct of this proceeding by prolonging discovery. See id. at 5-12. We address each of these arguments in turn.

A. Staff Legal Basis for Using the Statements.

GA declares that the North Anna and Orem cases cited by the staff in support of its use of the statements are irrelevant because both cases define the standard for determining in a civil penalty case whether a material false statement exists. Here, GA maintains, the staff already has stated that it is not contending Chairman Blue made material false statements. See id. at 6-7. In addition, equating the term "material" with the term "relevant" used in Federal Rule of Evidence 401, GA declares that Chairman Blue's statements cannot be considered relevant (i.e., material) to the factual question of corporate control because as "[v]oluntary, non-binding, true statements" that contained no directive content instructing its subsidiary SFC, they cannot constitute indicia of control that would support a determination to "pierce the corporate veil" and reach a parent corporation. Id. at 7-9.

In response, both the staff and the intervenors maintain that under the three theories identified by the staff as the conceptual basis for asserting regulatory jurisdiction and funding liability vis-á-vis GA, Chairman Blue's statements are certainly relevant as probative of the relationship between GA and its subsidiary SFC. Both also declare that the North Anna and Orem cases cited by the staff provide a framework for determining how the references to "reliance" in the October 1993 order should be understood in the context of those three theories. Specifically, the staff contends that the definition of "material" in these two cases illustrates its position that in utilizing the statements to support the staff's jurisdictional/liability theories, the pertinent question is not whether agency personnel, including the Commission, actually relied on the statements. Instead, as the analysis in these cases suggests, the issue is whether the staff is able to demonstrate reliance as an objective matter based on the pertinent factual circumstances. See Staff Reliance Response at 5-6.

From the various staff statements before us, it is apparent that any reference in the October 1993 order to "reliance" on Chairman Blue's statements was not intended to incorporate a quasi-contractual theory of regulatory jurisdiction and decommissioning funding liability. On the other hand, the staff has indicated that agency "reliance"

on those statements is a relevant concern because reliance is a valid consideration under the second and third jurisdictional/liability theories the staff has identified. Regarding those theories, however, based on the cursory GA arguments we have before us currently, we cannot say that the staff is precluded from pursuing either concept because agency "reliance" on statements by GA Chairman Blue forms a basis for each theory. Nor can we grant GA summary disposition relative to those theories.

For instance, based on what GA has presented thus far, we see no reason to preclude a staff argument that statements such as those of Chairman Blue may be relevant to the issue of control. GA suggests that a parent corporation's statement before the agency that supports a subsidiary but does not constitute a directive to the subsidiary is outside the realm of circumstances that will support imposing liability on a parent corporation. See GA Reliance Motion at 8-9. Yet, if parental control can be utilized as a means of establishing agency jurisdiction over a nonlicensee parent, the fact that a parent corporation's statements are directed to the agency rather than the subsidiary hardly seems dispositive.

GA also has not provided any convincing argument to counter the staff's position that one measure of the significance of those statements as an indicia of control would be their relevance to regulatory decisionmakers,

thereby making agency "reliance" on such a statement a matter "material" to the issue of control. Moreover, based on what GA has asserted, we do not see that the staff's "objective" approach to determining agency "reliance" is inapplicable. Certainly, the fact that the statements in question are not alleged to be "false" is not dispositive of the validity of the "objective reliance" approach outlined in the North Anna and Orem cases. This is particularly so, as the intervenors point out, given the judicial authority suggesting that attempts to probe the actual mental processes of agency decisionmakers generally are disfavored. See NACE/Cherokee Nation Reliance Response at 10 (citing, among others, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971)).

We thus find no basis in the present motion for rejecting or limiting any of the staff's jurisdictional/liability theories as a matter of law because they may be based on "reliance" on GA Chairman Blue's statements.

B. Prejudicial Nature of the Statements in the Order.

Besides seeking to eliminate any staff jurisdictional/liability based on reliance, GA also asserts that the statements in the order regarding Chairman Blue's statements and agency reliance on those statements should be stricken. According to GA, because the staff has admitted that its order is not based on a quasi-contractual reliance theory, the prejudice that inures to GA from having those statements

in the order warrants this relief. As GA describes it, the present wording of the order prejudices GA's ability to conduct business with its existing and potential customers, financial institutions, and its vendors and employees because they will be misled about the nature of the order and the fact that it is not based on any "wrongdoing" by GA. See GA Reliance Motion at 10-11. Both the staff and the intervenors respond that the nature of any prejudice is not clear and, in any event, the statements by Chairman Blue, which are a matter of public record, are indeed relevant to the jurisdictional/liability theories that underlie the staff's order. See Staff Reliance Response at 4-5; NACE/Cherokee Nation Reliance Response at 7-8.

The October 1993 order leaves much to be desired in terms of providing a clear explanation how and why Chairman Blue's statements and agency reliance on those statements provide a basis for the order. Nonetheless, as we indicated under section II.A. above, based on the information now before the Board and the parties, it appears that those statements and the issue of agency reliance on them do have an appropriate place in this litigation, only as evidence relevant to the issue of corporate control. Evidence concerning any claimed quasi-contractual liability will not be considered. However, this is not intended to rule adversely at this time concerning any of the staff's three theories supporting its claim of jurisdiction. Certainly,

in light of GA's amorphous claims of prejudice, we find no basis at present for striking any portion of the October 1993 order.

C. Prolonging Discovery.

GA also claims that the Board's general authority to maintain order in and regulate the course of this proceeding supports striking all portions of the October 1993 order relating to Chairman Blue's statements and agency reliance on those statements. According to GA, failure to exercise this authority will result in prolonged discovery that will have a significant adverse effect on the proceeding. If those statements remain, GA asserts, it will have to probe the relevancy of the statements in relation to the issue of its purported control over SFC, including seeking discovery from the Commission and staff personnel on the question of their reliance. See GA Reliance Motion at 11-12. Both the staff and intervenors label this argument a "threat" that is without substance because the staff's admission that its jurisdictional/liability theories are not based upon "reliance in fact" means that such discovery is irrelevant to the proceeding and so not appropriate. See Staff Reliance Response at 6-7; NACE/Cherokee Nation Reliance Response at 10.

In our discussion in section II.A. above, we have indicated that, based on the information now before us, we see no reason to preclude the staff from pursuing its second

and third jurisdictional/liability theories notwithstanding the fact that they may be based on an "objective" reliance theory. The need for discovery from individual agency personnel regarding their actual "reliance" that is the particular focus of GA's argument thus appears problematic. As such, we see no basis for granting this relief sought by GA.

III. BIFURCATION

Having ruled on GA's motion, we are back to the initial question that prompted its filing: Should the Board bifurcate and decide the issue of agency regulatory jurisdiction over GA before proceeding to the "merits" of the order as it relates to the adequacy of SFC decommissioning funding? After reviewing the positions of the parties on this question, we have concluded that, for reasons of economy and expedition, the central nature of the jurisdiction issue to this proceeding merits separate consideration at this time.

The parties thus should proceed with discovery on the question of the agency's regulatory authority to impose joint and several liability upon GA for providing site remediation funding and decommissioning financial assurance. Discovery and the submission of any additional motions for summary disposition relating to that issue will be in accordance with the following schedule:

Discovery Closes:[1]	Friday, September 15, 1995
Dispositive Motions Due:[2]	Friday, October 13, 1995
Dispositive Motion Responses Due:	Friday November 17, 1995
Dispositive Motion Replies Due:	Friday, December 8, 1995

If the Board finds on the basis of the motions filed that it is unable to grant summary disposition on this issue because there are material factual issues in dispute, it is the Board's intent to convene an evidentiary hearing promptly to resolve the regulatory jurisdictional issue.

IV. CONCLUSION

The June 6, 1995 GA motion provides no basis either for limiting the staff's theories of regulatory jurisdiction that are based upon "reliance" by agency personnel on statements made by GA Chairman Blue or for granting summary disposition in favor of GA on all issues or claims that

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[1] To be timely under this schedule, a discovery request must be filed or a deposition noticed on or before Friday, August 18, 1995.

[2] We establish this date based on the staff's previous representation that it intends to file a dispositive motion on the issue of jurisdiction once discovery on that question is completed. See Tr. 241. If the staff intent in this regard should change, it should notify the Board promptly.

relate to such "reliance." Nor does that motion provide support sufficient to cause us to strike any portion of the staff's October 1993 order relating to Chairman Blue's statements or representations. We thus deny the motion.

For the foregoing reasons, it is this 30th day of June 1995, ORDERED that

1. The June 6, 1995 motion of GA for summary disposition, to strike language from the October 15, 1993 order, and to limit issues in the proceeding is denied.

2. This proceeding is bifurcated to permit the jurisdiction issue herein to be resolved initially and separately.

3. The parties shall conduct discovery and file any additional motions for summary disposition on the issue of the agency's regulatory jurisdiction to impose joint and several liability upon GA for providing site remediation

funding and decommissioning financial assurance in accordance with the schedule set forth on page 19 supra.

THE ATOMIC SAFETY
AND LICENSING BOARD

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Bethesda, Maryland

June 30, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SEQUOYAH FUELS CORPORATION
GENERAL ATOMICS
(Gore, Oklahoma, Site Decontamination and Decommissioning Funding)

Docket No.(s) 40-8027-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO AND ORDER (LBP-95-12) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
30 day of June 1995

Kris Cater
Office of the Secretary of the Commission