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 Source Materials License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	June 12, 1995

NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO GENERAL ATOMICS' MOTION FOR SUMMARY DISPOSITION, TO STRIKE LANGUAGE FROM THE OCTOBER 15, 1993 ORDER, AND TO LIMIT ISSUES IN THE PROCEEDING

I. INTRODUCTION

Native Americans for a Clean Environment and the Cherokee Nation (hereinafter "Intervenors") hereby oppose General Atomics' Motion to Strike Language from the October 15, 1993 Order, and to Limit Issues in the Proceeding (June 6, 1995) (hereinafter "GA's Motion"). In its Motion, GA asks the Licensing Board to strike from the NRC's October 1993 Order any language referring to alleged commitments by GA to provide decommissioning funding for SFC, as well as language referring to the NRC's reliance on those commitments. GA also seeks to limit the legal theories of the case in a way that would exclude any claim that GA had made commitments to the NRC or that the NRC had relied on them.

This dilatory motion, which rehashes at least one claim that has already been rejected by the Board, is based on erroneous legal and factual arguments which fail to meet either the standard for a motion to strike or a motion for summary disposition.

Moreover, it is backed by an empty threat that GA will further delay this already-prolonged litigation through extensive discovery into the mental state of NRC Commissioners and staff. This proceeding has already suffered enough delay as a result of GA's motions, to the potential detriment of obtaining adequate decommissioning funding for the SFC site. The Board should soundly reject GA's motion and set a schedule which establishes firm time frames for completion of discovery and any further dispositive motions.

II. ARGUMENT

A. Standard for Disposition of GA's Motion

GA has styled its motion as both a motion for summary disposition and a motion to strike. As the proponent of a summary disposition motion, GA "carries the burden of demonstrating the absence of genuine issues of material fact to litigate." Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994), interlocutory review denied, CLI-94-11, 40 NRC 55 (1994), citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-4, 31 NRC 54, 67 (1990). If GA fails to make a requisite showing of a lack of genuinely disputed issues, the motion must be denied, even in the absence of any response by GA's opponents. No defense to an insufficient showing is required. Cleveland Electric Illuminating Co., supra, at 753-54, citing Adickes v. Kress and Co., 398 U.S. at 159.

The NRC rules contain no provision for motions to strike language from NRC enforcement orders. Thus, GA analogizes its motion to strike to a motion to strike under Federal Rule of Civil Procedure 12(f). GA's Motion at 5. Rule 12(f) provides that:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Motions to strike alleged redundant, immaterial, impertinent or scandalous material "are not favored." Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors, 647 F.2d 200, 201 (D.C. Cir. 1981). Language "will not be stricken from a pleading unless it is clear that it can have no possible bearing upon the subject matter of the litigation." Skadegaard v. Farrell, 578 F. Supp. 1209, 1221 (D.N.J. 1984), quoting 2A Moore's Federal Practice, par. 12.21 at 2429 (1983). See also Carlson Corporation/Southeast v. Sch. Bd. of Seminole County, Fla., 778 F. Supp. 518, 519 (M.D. Fla. 1991). To be deemed "scandalous," such "degrading charges [must] be irrelevant, or, if relevant, [must be] gone into in unnecessary detail . . ." Skadegaard v. Farrell, supra, quoting Moore's Federal Practice, par. 12.21 at 2429.

Here, GA has met neither the standard for summary disposition nor the standard for a motion to strike.

B. GA's Motion Should Be Rejected as Untimely and Redundant.

GA's Motion should be rejected because the issues it raises either were raised previously and rejected, or could have been raised previously. The Board has already addressed one of the issues raised by GA in its Motion. Moreover, Rule 12(f), on which GA bases its motion in part, generally contemplates that a motion to strike will be made prior to the time for responding to a pleading, or within 20 days of the filing of the pleading that is the subject of the motion. Similarly, the NRC's Rules of Practice provide specific time frames for responding to pleadings (i.e., contentions), and requiring a showing of good cause if those time frames are exceeded. See 10 C.F.R. § 2.714. Here, GA's motion is both redundant and untimely.

This proceeding began with GA's and NRC's request for a hearing in late 1993. On February 17, 1994, GA filed a combined Motion for Summary Disposition Or For an Order of Dismissal (hereinafter "GA's 1994 Motion"), seeking to dismiss all claims contained in the NRC's October 1993 Order. Like the instant motion, GA's 1994 Motion was based in part on the fact that the NRC's 1993 Order alleged no false statements or wrongdoing by GA. Brief in Support of General Atomics' Motion for Summary Disposition or For an Order of Dismissal at 36 (February 17, 1994). According to GA, because the NRC had claimed no wrongdoing by GA, it could not establish GA's liability based on a theory of corporate veil piercing. Id. GA's argument was rejected by the

Licensing Board in LBP-94-17, 39 NRC at 365-66. The Board found that the NRC had given GA "fair notice" of its claims and the grounds therefore, and that "there is no impediment to the NRC (and GA also) to develop additional facts and theories as a result of the discovery process." 39 NRC at 366. Thus, while it has been true from the beginning of this case that the 1993 Order does not claim wrongdoing by GA, discovery may yield evidence of wrongdoing which could be relevant to GA's liability for decommissioning funding.[1] GA has provided no basis, nor is there any, for excluding wrongdoing by GA as a potential issue in the case at this stage of the proceeding, before discovery has concluded.

When it filed its 1994 Motion, GA also had the opportunity to pursue the NRC staff's statements in January of 1994 that it was not relying on a contractual or quasi-contractual theory. See statements quoted in GA's Motion at 2-3. It is not clear, nor does GA attempt to explain, why it passed up that opportunity, and instead waited over a year to file yet another summary disposition motion, this time seeking disposition of the quasi-contractual theory.[2] Accordingly, having failed to chal-

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[1] For example, as discussed in NACE's Opposition to General Atomics' Opposition to General Atomics' Motion for Summary Disposition or for an Order of Dismissal at 30-31 (April 13, 1994), if GA tried to protect itself from liability for contamination that it knew or should have known existed at the site when it purchased SFC, such evidence would be relevant under a common law theory of piercing the corporate veil.

[2] As discussed below, even if the staff does not intend to rely on any quasi-contractual theory, that does not render irrelevant the statements in the Order which GA seeks to strike.

lenge the wording of the NRC's Order on a timely basis, or to show good cause for making its motion at such a late date, GA should be denied leave to make its motion now.

C. The Statements Which GA Seeks To Strike Are Relevant to This Proceeding, And Are Not Prejudicial to GA.

GA seeks to strike from the NRC's 1993 Order all statements referring to Mr. Blue's commitments that GA would provide decommissioning funding for the SFC site, and to the NRC's reliance on those commitments. In order to have this material stricken from the Order, GA must show that it has no bearing whatsoever on the case. Skadegaard v. Farrell, supra. This it cannot do. To the contrary, Mr. Blue's commitments strongly support the NRC's claim of jurisdiction over GA, because they show that (a) GA had control over SFC and was involved in SFC's activities to the extent that it was willing to take responsibility for decommissioning funding, and (b) GA acted as a surrogate for SFC and thus acted as a "de facto" licensee by taking on SFC's responsibility for providing adequate decommissioning funding.

Moreover, it is well established that voluntary commitments by licensees are enforceable by the NRC. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211, 1413-22 (1981). In that case, the Board found that commitments made by the licensee in exchange for permission to restart were enforceable, and that the only question was what mechanism the staff should use to ensure that they would be met. 14 NRC at 1422. See also Commonwealth Edison Co. (Zion Station,

Units 1 and 2), ALAB-616, 12 NRC 419, 424 and note 9 (1980) (license applicant's promise not to change or drop commitments without staff approval deemed enforceable and incorporated into Appeal Board order.) Thus, once its status as a de facto licensee is established, GA's commitments to the NRC are highly relevant because they constitute enforceable promises.[3] Accordingly, GA has failed utterly to meet the standard for a motion to strike based on relevance of the material.

In claiming that leaving the Order as is would be "prejudicial" to its interests, GA also appears to be arguing that the NRC's assertions regarding Mr. Blue's commitments constitute "scandalous" or "impertinent" material under Fed.R.Civ.P. 12(f). However, a motion to strike alleged scandalous or impertinent material must be denied unless that material has

> 'no possible relation' to the controversy, Gleason v. Chain Service Restaurant, 300 F.Supp. 1241, 1257 (1969), aff'd, 422 F.2d 342 (2d Cir. 1970), or 'has no bearing on the subject matter of the litigation . . . ' Fra S.p.A. v. Surf-O-Flex of America, Inc., 415 F. Supp. 421, 427 (S.D.N.Y. 1976).

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[3] The cases cited by the NRC staff in the May 31, 1995, hearing, Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), affirmed, 571 F.2d 1289 (4th Cir. 1978) (hereinafter "VEPCO"), and Randall C. Orem, CLI-93-12, 37 NRC 423 (1993) are also useful because they discuss the "basic concept of materiality." Orem, 37 NRC at 428. Under these cases, a statement is "material" if "'a reasonable staff member should consider the information in question in doing his job'; i.e., 'materiality depends upon whether information has a natural tendency or capability to influence a reasonable agency expert.'" Id., quoting VEPCO, 4 NRC at 486, 491. Moreover, the NRC "need not rely on a false statement in order for it to be material." Id.

Lumbard v. Maglia, Inc., 621 F.Supp. 1529, 1539 (D.C.N.Y. 1985) (motion to strike claim of wrongful bankruptcy filing denied because the circumstances of the bankruptcy filing were deemed relevant to the litigation). See also Skadegaard v. Farrell, supra, 578 at 1221 (denying motion to strike portion of complaint alleging that defendants had attempted to suborn perjury in furtherance of alleged civil rights conspiracy, and holding that fraud allegation was neither unnecessarily derogatory nor irrelevant to the charges). As discussed above, commitments made by Mr. Blue, which are well-documented in this record, are highly relevant to all three legal theories advanced by the NRC staff in this proceeding. If GA disputes the factual validity of the NRC's claims regarding Mr. Blue's statements, this dispute is not appropriately resolved in a motion to strike, but must wait for a resolution on the merits. See United States v. Articles of Food, Etc., 67 F.R.D. 419, 422 (D.Idaho 1975). Thus, GA's motion to strike should be denied.

D. The Statements Made in the NRC's Order Raise Material Issues of Fact Which Are Relevant To This Proceeding.

GA bases its motion for summary disposition on two alleged "admissions" which it claims are "unequivocal": (1) that the NRC "does not contend and will not seek to prove that General Atomics has made false statements to the Commission or engaged in any other form of wrongful conduct" and (2) that the NRC "does not contend and will not seek to prove that General Atomics is somehow liable for the decommissioning/remediation costs of the

Sequoyah Fuels facility as a result of any statements made by Mr. Blue and relied upon by the Commission." GA's Motion at 4 (emphasis in original). These claims are neither correct nor relevant.

First, the NRC has never claimed in the course of this proceeding that it will not seek to demonstrate that GA made any false statements or committed wrongful conduct. While the NRC's 1993 Order states that it is not based on misconduct by GA, the NRC has not ruled out the possibility that it will discover wrongful conduct that is relevant to this enforcement action. As the Board previously ruled in this case, such additional factual information and theories may be developed as the case progresses. LBP-94-17, 39 NRC at 366. Moreover, even assuming for purposes of argument that the NRC has indeed ruled out making any charges of false statements or misconduct by GA, such a fact would have no bearing on this case. As discussed above, Mr. Blue's commitments to the NRC are material to the enforceability of the NRC's order, regardless of whether they were made in good faith or not.

Second, nowhere in this record has the NRC stated that it will not attempt to demonstrate that GA's liability for decommissioning costs is based in part on factual statements made by Mr. Blue that were relied on by the NRC. In fact, at the hearing on May 31, 1995, the NRC staff confirmed that it considered Mr. Blue's commitments to be relevant. The alleged "unequivocal admission" by the staff is not based in fact at all, but constitutes a deduction by GA, based on the staff's statement that

it is not specifically pursuing a quasi-contractual theory with respect to demonstrating GA's liability. However, GA's deduction, even if accurate, misconceives the legal issues of this case. As discussed above, the commitments made by GA, and the NRC's reliance on those commitments, are relevant in the legal context of NRC regulation of licensed activities, without regard to any quasi-contractual theories.

Accordingly, GA has demonstrated neither that the allegedly "unequivocal admissions" were made by the NRC, nor that they are even relevant to GA's attempt to have language stricken from the 1993 Order regarding GA's commitments and NRC's reliance on them.

E. GA Is Not Entitled To Discovery Regarding the Commission's "State of Mind" Regarding Its Reliance on GA's Commitments.

Finally, GA raises the specter that "the order of the proceeding would be significantly and adversely affected" if the Board allows the current language of the 1993 Order to stand. GA's Motion at 11. According to GA, it would seek prolonged discovery on the actual reliance on Mr. Blue's statements by each member of the Commission and the NRC staff. GA's Motion at 11-12. This is an empty threat which should be summarily rejected by the Licensing Board. As stated by the Commission in Orem, the concept of materiality is based on reasonable reliance, not actual reliance. 37 NRC at 428.

Moreover, as established by the Supreme Court in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), and followed in this Circuit, absent a strong showing of bad

faith or the absence of any decisionmaking record at all, the state of mind of an agency decisionmaker is well beyond the scope of discovery. See San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 44 (D.C. Cir. en banc 1986), cert. denied, 479 U.S. 923 (1986) (examination of closed Commission transcripts "would represent an extraordinary intrusion into the realm of the agency," since "they record the frank deliberations of Commission members engaged in the collective mental processes of the agency"); Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997-98 (D.C. Cir. 1990) (request to depose Park Service official denied for failure to make "strong showing of bad faith" or demonstrate "the record is so bare as to frustrate effective judicial review); Saratoga Dev. Corp. v. United States, 21 F.3d 445, 457-58 (D.C. Cir. 1994) (denying discovery as to why each contract review board member voted for the contract recipient.) Here, there has been no showing or allegation of bad faith by the Commission in claiming to rely on GA's representations. Nor is the record devoid of documentary evidence regarding GA's commitments and their role in the NRC's decision to allow the restart of the SFC facility in 1992. Even a "curt" record is adequate for judicial review where "it surely indicate[s] the determinative reason for the final action taken." Camp v. Pitts, 411 U.S. 138, 143 (1973). Accordingly, GA has provided no plausible basis for its claimed entitlement to embark on a lengthy discovery process of the NRC's state of mind regarding its reliance on Mr. Blue's commitments.

III. CONCLUSION

For the foregoing reasons, GA's Motion should be denied in its entirety.

Respectfully submitted,

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June 12, 1995

CERTIFICATE OF SERVICE

I certify that on June 12, 1995, copies of the foregoing NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO GENERAL ATOMICS' MOTION FOR SUMMARY DISPOSITION, TO STRIKE LANGUAGE FROM THE OCTOBER 15, 1993 ORDER, AND TO LIMIT ISSUES IN THE PROCEEDING were served by fax and/or first-class mail on the following, as indicated below:

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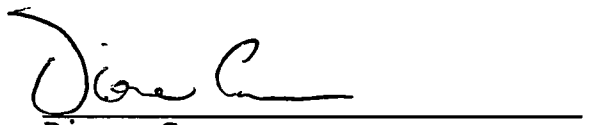

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