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BEFORE THE COMMISSION

OFFICE OF SECRETARY
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In the Matter of)

SEQUOYAH FUELS CORPORATION)
and GENERAL ATOMICS)

(Gore, Oklahoma Site)
Decommissioning Funding))

) Docket No. 40-8027-EA

) Source Material License
) No. SUB-1010

GENERAL ATOMICS' ANSWER TO
NRC STAFF'S PETITION FOR REVIEW
OF LBP-95-05

May 15, 1995

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
SEQUOYAH FUELS CORPORATION) Docket No. 40-8027-EA
and GENERAL ATOMICS)
)
(Sequoyah Facility in) May 15, 1995
Gore, Oklahoma))

**GENERAL ATOMICS' ANSWER TO
NRC STAFF'S PETITION FOR REVIEW
OF LBP-95-05**

General Atomics respectfully submits this Answer to the NRC Staff's Petition for Review of LBP-94-17 (May 3, 1995), hereinafter referred to as the "Petition." For the reasons set forth below, General Atomics opposes review by the Commission.

BACKGROUND

On October 15, 1993, the NRC Staff initiated this matter by filing a proposed Order that would purportedly hold Sequoyah Fuels Corporation (the sole licensee named in NRC License No. SUB-1010, Docket No. 40-8027, hereinafter referred to as the "Licensee") and General Atomics, the Licensee's third-tier parent company, jointly and severally liable for the funding of decommissioning activities at the Licensee's facility in Gore, Oklahoma.

Initial discovery requests were served by General Atomics, the Licensee, and the NRC Staff. On June 24, 1994, counsel for the

Licensee forwarded to counsel for the NRC Staff a proposed Protective Order. Counsel for General Atomics joined in the proposal. The proposed order was patterned after a protective order that the NRC Staff had agreed to the previous year in connection with access to an INPO document for a hearing in another matter. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275-OLA-2 and 50-323-OLA-2, Memorandum and Order (Protective Order Governing Non-Disclosure of INPO Report) (August 3, 1993). The purpose of the Protective Order proposed by the Licensee and General Atomics was simple and direct: the protection from public scrutiny (not the scrutiny of counsel for the NRC Staff involved in this proceeding) of certain confidential, proprietary, and private commercial information of General Atomics and the Licensee.

Over the course of the next several weeks, negotiations took place between General Atomics, the Licensee and the NRC Staff on the scope and the language of the proposed Protective Order. Ultimately, agreement was reached on every paragraph of the proposed Order except one, Paragraph 7. That paragraph relates to the possible disclosure of sensitive, private and proprietary commercial information by the NRC Staff to NRC personnel who are not involved in either the development or the litigation of this proceeding.

When it became clear that agreement could not be reached on the contested paragraph, the Licensee filed a Motion for Protective Order on December 2, 1994. General Atomics joined in that motion

and the parties subsequently filed various briefs in support of or in opposition to the motion.¹ The nature of the disagreement was apparent on the face of the respective paragraphs offered by the parties. The paragraph proposed by the Licensee and supported by General Atomics, was as follows:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order without first obtaining either the consent of the party whose Protected Discovery Material is being disclosed or the approval of the Licensing Board.

The paragraph proposed by the NRC Staff (joined in by the two intervening parties, Native Americans for a Clean Environment and the Cherokee Nation), was as follows:

7. Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from disclosing such to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff, but such NRC Staff shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order. Notwithstanding any other provision contained in this Protective Order, the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff may use or refer such Protected

¹ See, the Licensee's Motion for Protective Order (Dec. 2, 1994); General Atomics' Brief in Support of the Motion for a Protective Order (Dec. 22, 1994); the Licensee's Brief in Support of Motion for a Protective Order (Dec. 23, 1994); the NRC Staff's Response to Licensee's Motion for Protective Order (Dec. 23, 1994); the Licensee's Reply to NRC Staff's Response to Motion for Protective Order (Jan. 6, 1995); General Atomics' Reply to the NRC Staff's Response to Licensee's Motion for Protective Order (Jan. 6, 1995); the NRC Staff's Reply to General Atomics' Brief in Support of Motion for a Protective Order (Jan. 6, 1995).

Discovery Materials as is appropriate in the legitimate exercise of their respective duties.

Oral argument on the contested paragraph was presented to the Atomic Safety and Licensing Board on January 27, 1995. The Licensing Board invited supplemental written submissions and subsequently directed the NRC Staff to answer questions regarding certain NRC management directives which were cited by the NRC Staff at both oral argument and in its supplemental written submissions.²

In a lengthy Memorandum and Order issued on April 18, 1995,³ the Licensing Board issued a protective order which incorporated the draft provisions previously agreed to by the parties and the paragraph 7 which was prepared and offered by the Licensee and General Atomics. In doing so, the Licensing Board rejected the NRC Staff's claim of unilateral power to independently distribute -- for non-litigative purposes -- confidential materials obtained solely through discovery in this proceeding, to individuals not engaged in the present litigation. Instead, the Licensing Board ruled that the provisions of NRC Rule of Practice 10 C.F.R. § 2.740(c) require the Staff to abide by the same discovery procedures which govern the conduct of other parties.

² Memorandum and Order (Requiring Staff to Answer Board Questions) (February 24, 1995).

³ Memorandum and Order (Ruling on Motion for Protective Order) (April 18, 1995).

DISCUSSION

A. The Applicable Legal Standards

In its August 23, 1994 Order denying General Atomics' Petition for Review of the Licensing Board's denial of General Atomics' February 17, 1994 Motion for Summary Disposition,⁴ the Commission summarized the legal standards which apply to interlocutory review. Noting that it has a longstanding policy disfavoring interlocutory review (other than appeals pursuant to 10 C.F.R. § 2.714(a)), the Commission stated that it will undertake such review only in the most compelling circumstances.⁵ The Commission then concluded that the decision of the Licensing Board refusing to dismiss General Atomics from this proceeding did not constitute such a compelling circumstance -- despite the absence of even a claim of wrongdoing by either the Licensee or General Atomics; despite the fact that General Atomics is not a licensee, but rather the third-tier parent company of the Licensee; and despite the fact that the litigation theory advanced by the NRC Staff has no precedent whatsoever.

The Commission further declared that petitions for review of an interlocutory order may only be granted if the petitioner can

⁴ Order Denying Petition for Interlocutory Review and/or Motion for Directed Certification, CLI-94-11, 40 NRC 55 (1994).

⁵ Id., at p. 3. The Commission specifically cited Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983); and Pacific Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978).

satisfy one of the criteria under 10 C.F.R. § 2.786(g). That section allows interlocutory review only where the question presented either:

- (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a 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) (1), (2).

ARGUMENT

A. The Licensing Board's Ruling Does Not Threaten the NRC Staff With Immediate and Serious Irreparable Impact

The NRC Staff does not attempt to argue in its Petition that the Protective Order issued by the Licensing Board affects "the basic structure of the proceeding in a pervasive or unusual manner." No such argument could be seriously advanced or entertained. Having determined that the fundamental and threshold question raised by General Atomics' Motion for Summary Disposition (i.e., whether the NRC Staff even has jurisdiction to commence this proceeding against General Atomics) does not affect the basic structure of this proceeding, the Commission is hardly likely to believe that a minor discovery dispute has such an effect.

The NRC Staff is thus left with the difficult burden of arguing that the Protective Order actually threatens the Staff with immediate and serious irreparable impact. The absence of any factual support for this spurious proposition is evident from the

conclusory language that is offered as argument.

The Staff first asserts that the Protective Order will prevent it from referring matters of "potential wrongdoing" to Commission employees who are not involved in the proceeding. The fact is, however, that after several months of litigation, there is no evidence whatsoever of any wrongdoing by either the Licensee or General Atomics and no form of wrongful conduct has even been alleged by the Staff. This fact was expressly conceded by NRC Staff counsel during the January 27, 1995 oral argument before the Licensing Board. Questions were asked by a member of the Board and answered by Staff counsel as follows:

ADMINISTRATIVE JUDGE KLINE: At the moment, as the record stands before us though, the question of wrongdoing is not even hinted at in our record at present, is it?

MS. UTTAL: No.

ADMINISTRATIVE JUDGE KLINE: And in fact, the order that the Staff issued to General Atomics was not premised on any allegation of wrongdoing, isn't that correct?

MS. UTTAL: That's correct.⁶

It is speculation of the rankest order to suggest that sometime in the future, the Staff may find in the discovery materials of this proceeding, "matters of potential" wrongdoing which are so egregious that circumstances will not permit the Staff sufficient time to obtain the permission of the Licensing Board before the matters are referred to people who are not involved in

⁶ See pages 200, 212 of the excerpt of the transcript of the January 27, 1995 hearing ("Transcript") which is attached hereto as Annex A.

the proceeding at all. The weakness of this "argument" is compounded by two facts. First, even the Licensee has agreed that the Staff could proceed ex parte before the Licensing Board.⁷ Second, the Licensing Board has expressly suggested that it could act in 24 hours or less in the event the Staff should discover information it wishes to convey to persons outside of the proceeding.⁸

The Staff's argument that it theoretically might find evidence of "potential wrongful conduct" and that if it did it would not have time to seek the permission of the Licensing Board before releasing confidential proprietary information obtained in this proceeding, is simply not credible. There is no public safety concern in this proceeding nor has one been suggested. Indeed, by July 6, 1993, the Licensee had terminated the production of DUF₄ at its facility in Gore, Oklahoma and no operations have been conducted since that time.

General Atomics further denies that the NRC Staff could itself sustain any injury whatsoever by the mere issuance of a protective order by a Licensing Board, irrespective of the circumstances. The Staff has no independent institutional persona. No member of the Staff has been nominated by the President and confirmed by the Senate. The Staff simply carries out the administrative functions

⁷ Sequoyah Fuels Corporation Reply to Staff Response to Motion for Protective Order, p. 3.

⁸ See p. 196 of the Transcript which is attached hereto as Annex B.

of the Commission.⁹ Even if an argument could be credibly advanced that the Staff might suffer some injury from the Protective Order, the particular circumstances of this proceeding make it clear that injury could be neither immediate nor irreparable.

B. The Management Directives Do Not Take Precedence Over the Commission's Rules of Practice

The Staff next argues that certain management directives prevent the issuance of the Protective Order. The Staff concedes that the directives do not specifically address information received during the course of discovery and it is obvious that the directives say nothing about protective orders.¹⁰ The provisions of 10 C.F.R. § 2.740(c) do, however, specifically authorize the Licensing Board to issue orders to protect against discovery disclosures of a party's trade secrets, confidential research, development or commercial information or to require that disclosures of such information be made in a designated way.

It is elementary that sections, rules and acts in pari materia should be construed together because the object is to ascertain and carry into effect the policy intent which lay behind them.¹¹ This principle proceeds upon the supposition that the several rules were

⁹ See Reorganization Plan No. 1 of 1980, 45 F.R. 40561, 94 Stat. 3585.

¹⁰ See the comments of the Chairman of the Atomic Safety and Licensing Board which appear at p. 182 of the excerpt of the Transcript, attached hereto as Annex C.

¹¹ See, e.g., Sanford's Estate v. Commissioner of Internal Revenue, 308 U.S. 39, 60 S.Ct. 51 (1939), reh. den. 308 U.S. 637, 60 S.Ct. 513 (1940).

governed by one spirit and policy, and were intended to be free of confusion and consistent and harmonious in their several parts and provisions.

In order to give effect to both its published Rules of Practice and the management directives, the Commission must necessarily conclude that the specific provisions of 10 C.F.R. § 2.740(c), and not the more ambiguous provisions of the management directives, govern the issuance of the Protective Order. Since the Licensing Board reached the same conclusion, review by the Commission is unnecessary.

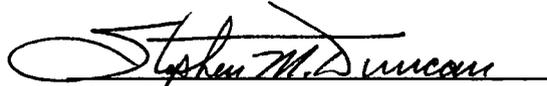
C. **Any Change in the Provisions of 10 C.F.R. § 2.740(c) Should Be Made in a Rule-Making Proceeding.**

A revocation by the Commission of the Protective Order or any modification of the Order, would necessarily involve a change in the interpretation and effect of 10 C.F.R. § 2.740(c). Such a change should only be made if at all, in a rule-making proceeding in which public comment is invited, and not in the context of an interlocutory review of a protective order issued in an isolated proceeding.

CONCLUSION

For the foregoing reasons, the Petition for Interlocutory Review of LBP-95-05 must be denied.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Stephen M. Duncan", is written over a horizontal line.

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May 15, 1995

1 CHAIRMAN GLEASON: Does that conclude your
2 presentation?

3 MS. UTTAL: Yes, Your Honor.

4 ADMINISTRATIVE JUDGE KLINE: At the moment, as
5 the record stands before us though, the question of
6 wrongdoing is not even hinted at in our record at present,
7 is it?

8 MS. UTTAL: No.

9 ADMINISTRATIVE JUDGE KLINE: And in fact, the
10 order that the Staff issued to the General Atomics was not
11 premised on any allegation of wrongdoing, isn't that
12 correct?

13 MS. UTTAL: That's correct.

14 ADMINISTRATIVE JUDGE KLINE: Yeah, okay.

15 CHAIRMAN GLEASON: Ms. Curran?

16 MS. CURRAN: I have a few comments. The
17 Cherokee Nation come to this from the perspective of
18 having an interest in seeing that the NRC is able to
19 fulfill its responsibility to ensure the safety of the
20 public in the best way that it can.

21 It seems to us that the fundamental purpose of
22 this protective order is to protect the trade secrets of
23 General Atomics and Sequoyah Fuels. And there's no issue
24 here as to whether trade secrets will be divulged as a
25 result of what the Staff wants to do. The question is

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ANNEX A

1 that -- one of the central issues here is the NRC's
2 jurisdiction over General Atomics. So to what extent
3 would your concern over the NRC's jurisdiction over
4 General Atomics affect your determination as to whether
5 the issue should be referred to the Office of
6 Investigation?

7 And I'm not 100% sure how that should be
8 resolved, but it gives me pause. And I guess I'll just
9 put that on the table.

10 CHAIRMAN GLEASON: One thing, that is not
11 speculation and I suppose should be mentioned again is
12 that, as I recall, it's been some time since I've read the
13 initial order. This case has not been achieving any marks
14 for rapidity. But as I recall, your -- it doesn't make
15 any allegations of misconduct on the part of either
16 General Atomics or Sequoyah Fuels Corporation, does it
17 not, Ms. Uttal?

18 MS. UTTAL: I don't believe there are any
19 allegations.

20 ADMINISTRATIVE JUDGE BOLLWERK: Can I just
21 repeat -- I just wanted to say. Again with Ms. Curran,
22 you understand that what you're arguing here for applies -
23 - could apply to an Intervenor as well who made
24 information available to the NRC? I mean, you're willing
25 to accept that if that's what flows from --

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1 that the Board can second guess the Staff's determination
2 that something has to be referred. So it's basically --
3 the matter should not go to the Board. It should go
4 directly to OI, because if the Staff determines that
5 something should be referred, then it's going to have to
6 be referred.

7 ADMINISTRATIVE JUDGE BOLLWERK: And I would
8 also say I take it if we disagree -- and again my -- with
9 my statement that I can't conceive of what you would give
10 us that we wouldn't say yes, but if we disagree, then in
11 theory you'd go to the commission. And gee whiz, it
12 wouldn't surprise me if you got review. So again, I don't
13 know what the problem is here. I mean, there's a process
14 here. All they're asking for is a minimal procedural
15 protection in the context of this adjudication.

16 MS. UTTAL: It would be -- I think it would be
17 an empty -- well, I can't say that, I take that back. One
18 of the concerns that some of these cases are talking about
19 is the time delay -- that investigations have to proceed
20 sometimes very quickly. And they --

21 ADMINISTRATIVE JUDGE BOLLWERK: It strikes me
22 this could all be done in 24 hours or less in some cases.

23 MS. UTTAL: That's one of the considerations.
24 The other consideration is that because the Staff has to
25 do what the commission directs us to do which is to refer

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ANNEX B

1 suggested by Mr. Axelrad, and with respect to coming
2 before the Board.

3 Or if one was concerned about -- on the part
4 of the Staff, that that information might give way to a
5 knowledge of a potential investigation which is not the
6 most desired thing from an investigative point of view,
7 one could ask for an ex parte session with the Board on
8 the part of the Staff.

9 MS. UTTAL: I don't believe that that is --
10 that was the intention of these management directives, and
11 the intention of the commission in --

12 CHAIRMAN GLEASON: But the management
13 directive just doesn't even talk about protective orders.
14 I mean, it doesn't -- you know, there are lots of
15 management directives that don't consider and haven't
16 considered everything else that happens in an agency. And
17 if it hasn't discussed it, that doesn't mean that it
18 doesn't get involved. It's certainly involved here.

19 MS. UTTAL: But I don't think it would serve a
20 purpose for the Board to interpose itself. If they don't
21 think there's a --

22 CHAIRMAN GLEASON: Well, the Board is not
23 interposing -- there is nothing that is inhibiting, as far
24 as we can determine, the Office of Investigations and the
25 Office of Inspector General from doing any kind of

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ANNEX C

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ATOMIC SAFETY AND LICENSING BOARD '95 MAY 16 P3:56

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(Gore, Oklahoma Site) May 15, 1995
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OFFICE OF SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing General Atomics' Answer to NRC Staff's Petition for Review of LBP-95-05 was served on May 15, 1995, upon the following persons by deposit in the United States mail, first class postage prepaid and properly addressed, and to those persons marked with an asterisk (*) by telecopy:

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 *
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U.S. Nuclear Regulatory Commission
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