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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

SERVED OCT 26 1995

Thomas D. Murphy
Alternate Board Member

In the Matter of SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS (Gore, Oklahoma Site Decontamination and Decommissioning Funding)	Docket No. 40-8027-EA Source Material License No. SUB-1010 ASLBP No. 94-684-01-EA October 26, 1995

MEMORANDUM AND ORDER
(Approval of Settlement Agreement)

Pending before the Board is a proposed Settlement Agreement (hereinafter Agreement) submitted by the Nuclear Regulatory Commission (Staff) and Sequoyah Fuels Corporation (SFC).[1] Native Americans For A Clean Environment and the Cherokee Nation (Intervenors) filed objections to the Agreement, and replies to the objections have been submitted

[1]Joint Motion For Approval Of Settlement Agreement (August 24, 1995).

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by the Staff and SFC.[2] The Board received objections to the Agreement submitted by the Tulsa District Corps of Engineers to the NRC Staff.[3] SFC, Intervenors and the Staff filed comments on the Corps of Engineers' concerns. The Staff's counsel has also forwarded a letter from the Office of the Attorney General of Oklahoma requesting additional time to review the Agreement.[4]

BACKGROUND

This proceeding involves an NRC October 15, 1993 Order to SFC and its parent corporation, General Atomics (GA), concerning fulfilling a regulatory obligation for asssuring decommissioning funding of SFC's licensed facilities located at Gore, Oklahoma. The Agreement, appended hereto, proposes to release SFC from liability under the Order and the pending litigation in exchange for SFC's agreement pledging all its net assets and revenues to the decommissioning completion.

Intervenors' objections are based on four assertions: first, that due to a provision in the Agreement that SFC's

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[2]Intervenors' Response to Joint Motion (September 8, 1995); NRC Staff Reply to Intervenors' Response September 22, 1995); SFC Reply to Intervenors' Response (September 15, 1995). In the interest of completeness, the Board grants, and considers herein, the Intervenors' Motion For Leave to Reply to SFC and NRC Staff (September 25, 1995) and SFC's Motion For Leave to Respond to Intervenors' Motion (September 29, 1995).

[3]Letter, Sanford to NRC Counsel (September 11, 1995).

[4]Letter, Hale to NRC Counsel (September 29, 1995).

obligations thereunder are "subject to the rights of senior lien-holders," the Board should authorize discovery concerning the particulars of such liens to prevent creditors from plundering SFC's assets. Intervenors, in particular, allege that a lien involving a note to the Kerr-McGee Corporation (Kerr-McGee) does not appear to be the sole responsibility, if any, of SFC (Intervenors' Response to Joint Motion at 4-8); second, the Agreement does not protect from SFC creditors funds from two accounts (decommissioning reserve and escrow) that have been previously set aside for decommissioning (id. at 8-14); third, that a review of the "reasonableness" of SFC's business contractual arrangements with an organization, ConverDyn, needs to be undertaken (id. at 14-15); and fourth, since the Agreement, based on SFC's commitments thereunder, rescinds the October 15, 1993 NRC Order against it, the NRC should not permit SFC to be exempt from future assessments for decommissioning in the event SFC resumes business operations. Nor should any successors in title to SFC's property be absolved from liability for decommissioning funding (id. at 14-16).

The Corps of Engineers, Tulsa District, complains that the Agreement limits financial commitments by SFC and GA for decommissioning costs and would foreclose future action on enforcement of such costs in the event of a failure to fully fund remediation of federally owned areas adjacent to the SFC facility. These areas presumably are under the jurisdiction

of the Corps of Engineers. On behalf of the Department of Wildlife Conservation, the Oklahoma Attorney General's Office expresses a concern that the Agreement may permit creditors to divert SFC resources and its letter hints of SFC's financial difficulty and a possible bankruptcy plan.

DISCUSSION

The Agreement defines SFC's net assets as the company's gross assets, subject to SFC's obligations to ConverDyn and the rights of senior lien-holders; net revenues are defined as SFC's gross revenues after paying necessary expenses subject again to SFC's obligations to ConverDyn and the rights of senior lien-holders. *See* Agreement, *Definitions* at d and e. The Staff and SFC stipulate that SFC cannot provide funds for decommissioning in excess of its net assets and net revenues, as those terms are defined, and cannot obtain financial assurances for decommissioning beyond pledging its net assets and revenues. *See* Agreement at 1. Intervenors' first question concerning the possible plundering of SFC's revenue and assets by creditors raises the issue as to what SFC can commit for decommissioning costs after it pledges all its possessions in terms of assets or revenues. Intervenors concentrate on a lien on SFC's property supporting a Kerr-McGee promissory note which is also an obligation of two other subsidiaries of GA. *See* Intervenors' Reply to SFC and NRC Staff at 2-6. In Intervenors' view, GA might influence SFC to

pay the indebtedness to Kerr-McGee alone thus diverting funds required for decommissioning for an obligation partially owed by GA's other subsidiaries. Id. at 3.

Intervenors do not present arguments of substance here. Whatever the legal status of creditor's claims against SFC, they are unaffected by the terms of the Agreement proposed. Such claims, if any, can only be resolved by action between the claimant and SFC. The NRC is neither impacted by nor involved in the resolution of other parties' legal disputations. And the same conclusion holds for the arguments advanced concerning the SFC debt to Kerr-McGee.[5] It is immaterial to the consideration of the Agreement before us. The legal rights and duties related to this obligation exist regardless of the action contemplated by the proposed Agreement and have no relevance to whether the Agreement should be ratified. The NRC is not left helpless in the event of any deception on the part of SFC. As the Staff points out, any transfer of SFC assets and revenues to claimants who had no legal entitlement to them would subject SFC to "an enforcement action (by the NRC) . . . for violating the Settlement Agreement." Under the Agreement, SFC must commit all of its net assets and revenues to the completion of

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[5]Although not relied on for this opinion, it should be noted that SFC has submitted a letter reflecting Kerr-McGee's intention not to seek legal action against the SFC until after the pending Settlement Agreement is approved and implemented and decommissioning completed. SFC's Motion for Leave to Respond to Intervenors' Motion, Attachment 1.

decommissioning. See Staff Reply to Intervenors' Response at 4-5. It is also noted that SFC is obligated to provide the Staff with copies of annual audited financial statements as well as make financial records available for Staff inspection. Agreement at 5.

The reasoning underlying the Board's conclusions concerning Intervenors' first objection, supra, also negates any validity to the second -- that concerning the protection of two decommissioning accounts from the claims of creditors. Both the Staff and SFC point out that the Intervenors misconstrue the nature of these accounts and that neither is affected in any manner by the Settlement Agreement. Suffice it to state that these accounts are required to be established pursuant to SFC's license and NRC regulations, and neither is impacted by the Agreement. The net assets and revenues of SFC are to be utilized for decommissioning expenses under the Agreement and, if any funds considered in either or both reserve accounts are secured for decommissioning, such allocations are not changed by the pending Agreement. The Agreement is not intended to, nor does it, permit any financial allocations or obligations for decommissioning previously committed by SFC to be obviated by the terms therein. The Agreement and SFC and Staff statements concerning this matter make it evident that any monies committed or obligated for such purposes would simply become part of the net assets and revenues which, after the payment

of reasonable and necessary expenses, are pledged by the licensee to decommissioning. _See_ NRC Staff's Reply to Intervenors' Response at 5-7; SFC's Reply to Intervenors' Renewed Opposition at 4-9.

In regard to Intervenors' third argument, that the "reasonableness" of SFC's arrangements with ConverDyn be reviewed, we fail to understand how the Board can undertake an analysis of the merits of SFC's business transactions or what objective such scrutiny would serve. Intervenors offer no suggestion as to the criteria the Board should utilize in any evaluation of SFC's contractual arrangement with ConverDyn. In the Agreement, SFC commits itself to "diligently pursue" its contractual rights with ConverDyn until decommissioning has been satisfactorily completed. And it should be noted that the Staff retains enforcement authority to compel SFC's compliance with the Agreement. _See_ Agreement at 4 and 7.

Finally, Intervenors' contentions raise the specter of the Agreement failing to obligate SFC for decommissioning expenses, if the Corporation pursues other profitable business activities and that successors in title to SFC's property would be absolved from decommissioning indebtedness. Intervenors' first argument has no foundation since it is clear, as the Staff points out, that the Agreement reaches SFC's present and future assets and revenues from all sources and with regard to the second, no provision of the Agreement

immunizes any successors in title from decommissioning expenses. See Staff Reply to Intervenors' Response at 8-9.

As indicated, supra, the Tulsa District Corps of Engineers in correspondence to the Staff has submitted objections to the proposed Agreement. Although the letter purports to reflect the participation of the Corps as a partner in "any Settlement Agreements," the Tulsa District is not a party in this proceeding. Consequently, the allegations contained in this correspondence cannot be considered in the evaluation of the Agreement. It does appear that a misunderstanding may exist on the part of the District Office concerning the provisions of the Agreement, since, despite allegations to the contrary, the Agreement does provide for financial commitments on the part of SFC and does not exempt General Atomics from the NRC October 25, 1993 Order. With respect to the letter addressed to NRC Counsel from the Oklahoma State Attorney General's Office, the correspondence indicates, on behalf of the State's Department of Wildlife Conservation, concern over certain terms of the Agreement and requests additional time to consider its effect on State interests. Similar to the opinion expressed above, the State of Oklahoma is not a party to the proceeding herein and consequently, the Board lacks jurisdiction to review the concerns raised in the State's communication.

In light of the foregoing, and all of the circumstances of this proceeding, the Board finds no basis for disapproving

the proposed Agreement. A settlement of contested proceedings has long been encouraged by the Commission. See 10 C.F.R. §§ 2.759, 2.1241. In guidance to Boards on licensing proceedings, the Commission's policy statement encourages Boards to conduct settlement conferences for the purpose of resolving contentions by negotiation. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456.

In evaluating agreements on enforcement orders, the Staff's position for settlement, under the Commission's prescriptions of 10 C.F.R. § 2.203, is required to be provided "due weight" by the Board but if required in the "public interest," an adjudication of the issues involved therein may be ordered. The premise underlying the terms of the Agreement appears to be that the Agency will receive from SFC all that the NRC would be entitled to receive in the absence of an agreement and a decision issued in NRC's favor. Even in the event of the financial failure of the organization producing a bankruptcy filing as intimated by the State of Oklahoma correspondence, *supra*, the Staff would be in no worse position than a bankruptcy filing during or after a decision in the present litigation. The result would be the same since the Agency would receive from the licensee all that a Bankruptcy Court Judge would allow under existing bankruptcy laws. It should be noted that the possibility of bankruptcy filings are always weighed in the development of settlement agreements and

we have no reason to suspect its impact -- or lack thereof -- has not been evaluated here.[6]

In summary, the avoidance of protracted and needless litigation is in the public interest and an objective of settlement negotiations.[7] The appropriateness of the Agreement submitted for our approval should be viewed in the light of the allegations made by the Staff in the October 15, 1993 Order that forms the foundation of this proceeding. The fundamental charge of that Order is that the funding plan SFC proposes for decommissioning its facility at Gore, Oklahoma is not adequate to meet the Commission's regulations and that GA, as an active parent organization, is responsible for providing for any deficiencies therein. Although settlement negotiations are currently being undertaken with GA,[8] there is no waiving of the Agency's claims against GA expressed or implied by the terms of the Agreement before us. Accordingly, since the charges against GA still exist and SFC pledges to furnish all of its assets and revenues that it would have to provide if a judgment were to issue against it in the

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[6]It should not be expected that environmental protection of the public health and safety can be vitiated by bankruptcy proceedings. See Midlantic Bank v. New Jersey Department of Environmental protection, 474 U.S. 494 (1986).

[7]The Staff indicates that settlement negotiations and deliberations have consumed a six-month period of time. See NRC's Staff Reply to Intervenors' Response to Joint Motion For Approval of Agreement at 1.

[8]See Board Order Extending Discovery Stay (October 13, 1995).

proceeding, we cannot conclude that there is an issue herein that requires an adjudication in the public interest.

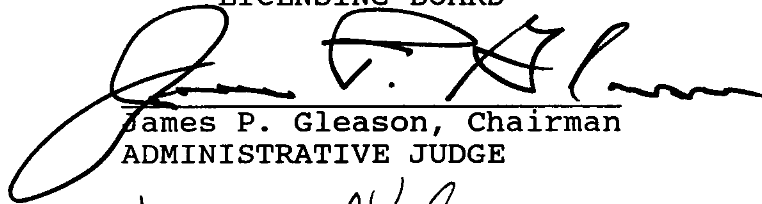
Pursuant to the Commission's regulations (10 C.F.R. § 2.203), and upon consideration of the Joint Motion for approval of the Settlement Agreement, we find that settlement of this matter as to Sequoyah Fuels Corporation's participation as a party, as proposed by the parties to the Settlement Agreement should be approved. Accordingly, upon consent of the parties to the Settlement Agreement, and giving due weight to the views of other parties to this proceeding, the Settlement Agreement is hereby approved and incorporated into this order, pursuant to Section 63 and subsections (b), (i), and (o) of Section 161 of the Atomic Energy Act, as amended, 42 U.S.C. §§ 2093, 2201(b), 2201(i), and 2201(o) and is subject to the enforcement provisions of the Commission's regulations and Chapter 18 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2271, *et seq*. Sequoyah Fuels Corporation is hereby dismissed as a party to this proceeding.

In accordance with 10 C.F.R. § 2.760 and § 2.786, this Order constitutes the final action of the Commission 40 days after the date of issuance, unless any party petitions for Commission review or the Commission takes review of the decision *sua sponte*. Commission review of this Order may be sought by filing a petition for review within fifteen (15) days after service of this Decision. Any other party to the

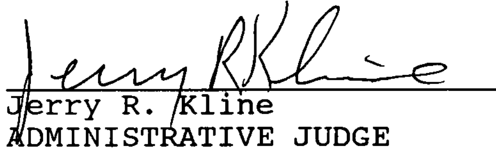
proceeding may, within 10 days after service of a petition for review, file an answer supporting or opposing Commission review. Requirements regarding the length and content of a petition for review of an answer to such petition are specified in 10 C.F.R. § 2.786(b)(2)(3).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING BOARD[9]



James P. Gleason, Chairman
ADMINISTRATIVE JUDGE



Jerry R. Kline
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 26, 1995

[9]Copies of this order are being sent this date to counsel for Sequoyah Fuels Corporation, General Atomics, and Intervenors NACE and the Cherokee Nation by facsimile transmisssion and to Staff counsel by E-mail transmission through the agency's wide area network system.

Separate Statement by Bollwerk, J.

Because I have concerns about certain aspects of the proposed settlement agreement between Sequoyah Fuels Corporation (SFC) and the NRC staff, I am not prepared at present to make the requisite "public interest" finding pursuant to 10 C.F.R. § 2.203. Specifically, I would ask for additional clarification from SFC and the staff regarding several matters.

I. Staff Enforcement Authority Under the Agreement. Paragraph 7 of the agreement states that "[n]othing in this Agreement shall limit the NRC Staff's ability to take appropriate enforcement action to enforce SFC's compliance with this Agreement . . . ." In responding to concerns expressed by intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation regarding the improper dissipation of SFC assets and revenues,[1] both SFC and the staff suggest that this provision gives the staff the necessary authority to rectify any problems in this regard. See SFC's Reply to Intervenors' Opposition to Settlement Agreement (Sept. 15, 1995) at 6-7 [SFC Reply]; NRC Staff's Reply to Intervenors' Response to Joint Motion for Approval of

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[1] Although none of the parties have raised or addressed the point, as a procedural matter there is a question whether the concerns about the settlement agreement expressed by NACE and the Cherokee Nation in response to the joint motion for approval of the settlement agreement should be considered as, and assessed under the standards governing the admissibility of, late-filed contentions. See 10 C.F.R. § 2.714(a)(1).

Settlement Agreement (Sept. 22, 1995) at 4-5 [Staff Reply]. According to the staff, this clause provides ample protection because it allows the staff to "bring an enforcement action against SFC seeking sanctions for violating the Settlement Agreement if SFC did not seek the return of such funds to be added to its pool of assets or revenues." Staff Reply at 5.

The October 1993 enforcement order at issue in this proceeding makes it apparent that an essential staff concern is the possibility that SFC revenues and assets will ultimately be insufficient fully to cover the costs of decommissioning SFC's Gore, Oklahoma facility. See 58 Fed. Reg. 55,087, 55,089 (1993). Consequently, a central component of the public interest assessment of the SFC/staff settlement agreement now before the Board must be the degree to which the agreement ensures that the already limited assets and revenues of SFC will be protected from inappropriate dissipation so as to be available for decommissioning. And if, as the staff's own description suggests, staff enforcement authority does not reach beyond requiring SFC to ask for the improperly disbursed funds back, a legitimate question seemingly exists about the degree to which the proposed agreement serves the public interest function of properly maintaining the pool of decommissioning funds.[2]

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[2] In considering the sufficiency of the protection afforded by the proposed agreement, the constraints on SFC's assets and revenues suggests that any staff enforcement (continued...)

Undoubtedly, this potential problem of improper disbursement and recapture of SFC funds would be of considerably less concern if the agency has the authority to maintain an action to recover improperly disbursed funds from the party receiving those funds. Whether this authority exists is, at best, problematic. Therefore, before approving the agreement, I would explore with the parties the question of the agency's authority in this regard. And, if it turns out that the agency's enforcement arsenal does not include this authority, the sufficiency of the staff's oversight efforts relative to the reasonableness of SFC expenditures and disbursements likely should be the subject of further scrutiny as well.[3]

II. Bankruptcy and Notice to the Staff. In responding to intervenor concerns about the dissipation of assets to repay the claims of SFC creditors, SFC indicates that it has

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[2](...continued) action against SFC for improperly disbursing assets is not likely to produce more decommissioning funds.

[3] Paragraph 5 of the proposed agreement provides that the staff will have the right to receive SFC annual audited financial statements and to have reasonable access to SFC financial records and books for audit purposes. The staff has declared that it did not seek further measures relating to oversight of SFC expenditures, such as prior staff approval, because of a concern about intrusion into the management of the daily affairs of SFC. See Staff Reply at 5 n.2. If the agency has no authority to recapture improperly disbursed funds, then the question of whether the staff oversight mechanisms included in the agreement are adequate seemingly is an issue that merits further exploration.

few secured creditors. The largest appears to be the Kerr-McGee Corporation, which holds a $10.6 million note giving Kerr-McGee a lien on SFC's property, plant, and equipment. See SFC Reply at 3-4. While SFC seemingly is in default on this note because it has not made any principal or interest payments since August 1993, Kerr-McGee apparently will not make any attempt to foreclose on or otherwise enforce the note until decommissioning is completed.[4]

The degree to which SFC's response puts these intervenor concerns to rest is tempered by a recent submission from the State of Oklahoma that SFC may be considering bankruptcy. The Board has not provided the parties with an opportunity to respond to the State's suggestion, leaving me unable fully to assess its validity.[5] On its face, however, it raises the

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[4] As part of an additional reply filing, SFC supplied a letter from a senior Kerr-McGee official stating that Kerr-McGee has no plans to initiate collection on the $10.6 million dollar note until decommissioning is completed. See SFC's Reply to Intervenors' Renewed Opposition (Sept. 29, 1995) at 3-4. Kerr-McGee's action in this regard is not particularly surprising, given that foreclosure on the note likely would bring the SFC property back into Kerr-McGee's hands, along with the accompanying responsibility for clean-up of contamination on the property.

[5] This submission is in an September 29, 1995 letter from the Attorney General of Oklahoma to staff counsel, a copy of which was provided to the Board by staff counsel by letter dated October 5, 1995.

The State of Oklahoma is not a party to this proceeding. Nonetheless, under the agency's rule governing interested governmental entities, it readily could become a participant in this case. See 10 C.F.R. § 2.715(c).

(continued...)

specter that, because the agency seeking decommissioning funds in a bankruptcy proceeding may well be only an unsecured creditor, see Dollar Savings Association v. Eisen (In re: METCOA, Inc., fdba The Pesses Co.), Case No. B83-00415, Adv. No. B85-0092, slip op. at 17-18 (Bankr. N.D. Ohio, Nov. 18, 1986), some SFC assets will fall beyond the agency's reach for dedication to funding decommissioning activities.

Current agency regulations require that a source materials licensee like SFC need only inform the staff of a bankruptcy after it has occurred. See 10 C.F.R. § 40.41(f). Prior to approving this agreement, however, I would seek information from SFC and the staff regarding the likelihood of bankruptcy. At the same time, I would explore with the staff the question of whether, if the agreement provided for reasonable prior notice from SFC of its intent to file for bankruptcy, the staff would be able to take any action prior to bankruptcy that would provide it with a preferential claim to secure SFC assets for the purpose of decommissioning.

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[5](...continued)
Moreover, the recognized limitation that the State must "take the proceeding as it finds it," see Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-600, 12 NRC 3, 8 (1980), likely would not preclude the State from commenting on the proposed settlement. Particularly in the context of the Board's "public interest" determination regarding the pending settlement proposal, giving the State's concerns minimal recognition by affording the other parties an opportunity to address them does not seem untoward.

III. Global Settlement. General Atomics (GA), the other object of the October 1993 enforcement order, and the staff currently are engaged in negotiations in an attempt to settle the staff's claims that GA is jointly and severally liable for decommissioning funding for the Gore facility. Based on the information now before me, I am unable to conclude that action now to approve a separate settlement between SFC and the staff -- as opposed to waiting to give "global" consideration to all settlements encompassing General Atomics (GA), SFC, and the staff -- is in the public interest.

Putting aside any jurisdictional questions about the extent and nature of GA control over SFC, there is a clear linkage between GA and SFC by reason of their parent-subsidiary relationship and the involvement of GA and its subsidiaries, including SFC, in the ConverDyn partnership agreements under which a substantial portion of any SFC revenue purportedly is to be generated. In light of these inter-relationships, it would seem that the Board's best opportunity fully to understand and assess the implications of any staff settlement with either GA or SFC would come when the Board has before it staff settlements with both parties that would resolve this case in toto.[6]

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[6] Also in this regard, in contrast to the stated conclusion in the staff' October 1993 order that the ConverDyn agreements were inadequate to fulfill the decommissioning funding requirements of 10 C.F.R. §§ 40.36, 40.42, in the absence of funding commitments from GA, see 58 (continued...)

Because of this concern, before approving this settlement agreement I would request additional briefing by the parties on the question of why delaying a Board ruling on the SFC/staff agreement until the conclusion of the ongoing settlement negotiations between GA and the staff is inconsistent with the public interest in ensuring that the settlements reached in this proceeding provide adequate funding for decommissioning SFC's Gore facility.

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[6](...continued)
Fed. Reg. 55,091-92, it is not now apparent whether the SFC/staff agreement is consistent with these regulatory requirements. The agreement does not provide any specific decommissioning funding figure for which SFC is liable, whether through the ConverDyn agreements or otherwise, and GA's contribution to decommissioning funding, if any, is still indeterminate because of the pendency of settlement negotiations. By decoupling the settlement agreements of GA and SFC, the Board has not abandoned its prerogative, in assessing whether the public interest will be served by any GA settlement, to consider whether the decommissioning funds generated under the SFC settlement agreement and the GA settlement agreement, in combination, will cover the total costs of decommissioning the Gore facility and the ramifications of any funding shortfall.

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 & ORDER (LBP-95-18) 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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Docket No.(s)40-8027-EA
LB MEMO & ORDER (LBP-95-18)

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Dated at Rockville, Md. this
26 day of October 1995

Office of the Secretary of the Commission