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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

NRC STAFF'S MOTION FOR LEAVE TO REPLY TO NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO JOINT MOTION FOR ADDITIONAL STAY OF DISCOVERY

The NRC Staff (Staff) hereby moves the Atomic Safety and Licensing Board (Board) for leave to reply to Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Joint Motion for Additional Stay of Discovery (Oct. 11, 1995) (Intervenors' Opposition). The Staff attaches its Reply hereto in the event leave is granted.

BACKGROUND

On August 24, 1995, General Atomics (GA) and the Staff filed jointly a motion to stay all activities in this proceeding for three weeks in order to permit GA and the Staff to engage in good faith settlement discussions.¹ Following the filing of an answer² by

¹ Joint Motion for an Expedited Order Temporarily Staying All Activities in the Proceeding in Order to Permit the Parties to Engage in Settlement Discussions (Aug. 24, 1995).

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Native Americans for a Clean Environment and the Cherokee Nation (Intervenors) and responses to the answer by GA³ and the Staff,⁴ the Board issued its Order (Ruling on Joint Motion for Stay of Proceeding) (Aug. 30, 1995), which, *inter alia*, temporarily stayed discovery activities through September 22, 1995. In response to the filing by GA and the Staff of a Joint Status Report and Motion for Extension of Stay Order (Sept. 15, 1995), to which there was no opposition by other parties to this proceeding, the Board extended the stay through October 13, 1995⁵, as requested by GA and the Staff. On October 6, 1995, GA and the Staff filed a status report on settlement negotiations which in essence informed the Board that the parties were continuing in good faith to engage in discussions, that concepts and information were being exchanged, and that additional meetings were contemplated, including a meeting that in fact took place on October 10, involving three executives from GA's San Diego headquarters, Staff members and Staff

² Native Americans for a Clean Environment's and Cherokee Nation's Response to GA's and NRC Staff's Joint Motion for an Order Temporarily Staying All Activities in the Proceeding in Order to Permit the Parties to Engage in Settlement Discussions (Aug. 28, 1995).

³ General Atomics' Opposition to the Intervenors' Response to the Joint Motion for an Order Temporarily Staying All Activities in the Proceeding In Order to Permit the Parties to Engage in Settlement Discussions (Aug. 29, 1995).

⁴ NRC Staff's Views on NACE's and Cherokee Nation's Modifications to GA's and NRC Staff's Joint Motion for an Expedited Order Temporarily Staying All Activities in the Proceeding in Order to Permit the Parties to Engage in Settlement Discussions (Aug. 29, 1995).

⁵ Order (Extending Discovery Stay) (Sept. 22, 1995).

consultants, and counsel for the parties.⁶ In addition, because it had become apparent to GA and the Staff that continued settlement discussions would involve a multitude of extremely far-reaching and complex issues, GA and the Staff jointly filed a motion to extend the stay beyond October 13, 1995 without suggesting a specific date to which the stay should be extended, given the parties' judgment that settlement discussions in all likelihood would continue beyond the three week limitation previously proposed by the parties and imposed by the Board.⁷ Intervenors then filed their Opposition, alleging that GA and the Staff "have failed to demonstrate that there is good cause for an additional stay of discovery beyond October 13, 1995." Intervenors' Opposition at 1. Intervenors also argue that should the Board decide that discovery between GA and the Staff should continue to be stayed, discovery activities should be permitted to resume between Intervenors and GA and Sequoyah Fuels Corporation (SFC). *Id.* In addition, Intervenors request that such discovery between those parties be broadened in scope to include matters relating to the merits of the Staff's October 15, 1993 Order against GA and SFC, as well as matters regarding GA's liability for decommissioning costs for facilities not the subject of the October 15, 1993 Order, and matters pertaining to "the relationship of this case with decommissioning funding issues at other GA facilities." Intervenors' Opposition at 1, 8.

⁶ NRC Staff's and General Atomics' Status Report on Settlement Negotiations and Joint Motion for Additional Stay of Discovery Beyond October 13, 1995 (Oct. 6, 1995).

⁷ *Id.*

DISCUSSION

Intervenors have made unwarranted assertions concerning the progress of settlement negotiations between GA and the Staff, and have gone far beyond providing their views on the specific request of GA and the Staff contained in the joint motion to extend the stay beyond October 13, 1995. Intervenors have now raised issues as to whether discovery should be permitted at this time relating to the merits, or second phase of this bifurcated proceeding; whether discovery into decommissioning issues regarding facilities which are not the subject of this proceeding should be permitted; and whether discovery should be permitted regarding "the relationship of this case with decommissioning funding issues at other GA facilities." Certainly, the most recent joint motion filed by GA and the Staff in no way can be viewed as having raised such issues. Rather, Intervenors have in effect filed their own motion, putting forth these new issues for the first time. The Staff should have an opportunity to respond to such issues, as well as correct the record as to the Intervenors' mischaracterization of the progress of settlement discussions and activities.

CONCLUSION

In consideration of the foregoing, the Board should grant the Staff's motion for leave to reply to Intervenors' Opposition, and fully consider the reply attached hereto.

Respectfully submitted,



Steven R. Hom
Counsel for NRC Staff



Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of October 1995

October 13, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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NRC STAFF'S REPLY TO NATIVE AMERICANS
FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S
OPPOSITION TO JOINT MOTION FOR ADDITIONAL STAY OF DISCOVERY

The NRC Staff hereby files its Reply to Native Americans for a Clean Environment's and Cherokee Nation's Opposition to Joint Motion for Additional Stay of Discovery.

BACKGROUND

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Native Americans for a Clean Environment and the Cherokee Nation (Intervenors) and responses to the answer by GA³ and the Staff,⁴ the Board issued its Order (Ruling on Joint Motion for Stay of Proceeding) (Aug. 30, 1995), which, *inter alia*, temporarily stayed discovery activities through September 22, 1995. In response to the filing by GA and the Staff of a Joint Status Report and Motion for Extension of Stay Order (Sept. 15, 1995), to which there was no opposition by other parties to this proceeding, the Board extended the stay through October 13, 1995⁵, as requested by GA and the Staff. On October 6, 1995, GA and the Staff filed a status report on settlement negotiations which in essence informed the Board that the parties were continuing in good faith to engage in discussions, that concepts and information were being exchanged, and that additional meetings were contemplated, including a meeting that in fact took place on October 10, involving three executives from GA's San Diego headquarters, Staff members and Staff consultants, and counsel for the parties.⁶ In addition, because it had become apparent to GA and the Staff that continued settlement discussions would involve a multitude of extremely far-reaching and complex issues, GA and the Staff jointly filed a motion to

³ General Atomics' Opposition to the Intervenors' Response to the Joint Motion for an Order Temporarily Staying All Activities in the Proceeding In Order to Permit the Parties to Engage in Settlement Discussions (Aug. 29, 1995).

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extend the stay beyond October 13, 1995 without suggesting a specific date to which the stay should be extended, given the parties' judgment that settlement discussions in all likelihood would continue beyond the three week limitation previously proposed by the parties and imposed by the Board.⁷ Intervenors then filed their Opposition, alleging that GA and the Staff "have failed to demonstrate that there is good cause for an additional stay of discovery beyond October 13, 1995." Intervenors' Opposition at 1. Intervenors also argue that should the Board decide that discovery between GA and the Staff should continue to be stayed, discovery activities should be permitted to resume between Intervenors and GA and Sequoyah Fuels Corporation (SFC). *Id.* In addition, Intervenors request that such discovery between those parties be broadened in scope to include matters relating to the merits of the Staff's October 15, 1993 Order against GA and SFC, as well as matters regarding GA's liability for decommissioning costs for facilities not the subject of the October 15, 1993 Order, and matters pertaining to "the relationship of this case with decommissioning funding issues at other GA facilities." Intervenors' Opposition at 1, 8.

DISCUSSION

I. Basis for Extension of Stay

Intervenors claim that GA and the Staff "have failed to demonstrate that there is good cause for an additional stay of discovery beyond October 13, 1995." Intervenors' Opposition at 1. As the Staff and GA have stated, both parties are continuing in good faith to pursue settlement. At least with respect to the Staff, time spent on this litigation outside of the preparation of formal pleadings is now being devoted to exploring settlement with

⁷ *Id.*

GA. As recently as this past Tuesday, the Staff and its consultants met with senior GA managers for most of the day for the sole purpose of discussing settlement. Prior to such meeting, the Staff has met with GA, has engaged in numerous internal discussions regarding settlement, and has spent a substantial amount of time analyzing various possible approaches and analyzing complex questions regarding what impact, if any, a settlement would have outside of this proceeding. The foregoing was all summarized in the joint motion filed by the Staff and GA on October 6. Several meetings among various divisions within the NRC have even been held within the last two days. Providing any more detail to support an additional stay extension would tend to compromise the sensitive nature of the ongoing settlement discussions, as well as internal deliberations.

Clearly, Intervenors have not been privy to settlement negotiations. Accordingly, the Staff cannot understand how Intervenors have any basis to assert that "GA and the Staff have made virtually no progress in their negotiations," and for that reason the stay should expire. Intervenors' Opposition at 8. Although the Staff cannot guarantee that a settlement will in fact be reached with GA, by reason of the heretofore described settlement activities, it should be readily apparent that progress is being made towards that goal. Moreover, it goes without saying that the Staff would not have joined in any motion to extend the stay if it did not believe that progress is being made towards settlement.

Intervenors note that the Staff and SFC were able to reach a proposed settlement while discovery was ongoing, and argue that settlement negotiations "should no longer be allowed to hinder the progress and resolution of this proceeding." Intervenors' Opposition at 6 n.9. In fact, the settlement reached by the Staff and SFC took over a half year to

negotiate, and no doubt might have been completed more quickly had the Staff, at least, been able to devote its full attention toward settlement. Also, the issues involved in the SFC settlement were much more circumscribed than the issues now facing GA and the Staff, in large part because the circumstances surrounding SFC and GA are markedly different. For example, from the beginning of this proceeding, SFC has acknowledged that it is clearly an NRC licensee with certain attendant responsibilities for decommissioning, while GA has steadfastly denied that it is a licensee with respect to the Gore, Oklahoma site, and thus has claimed it has no such responsibilities with respect to that site. In addition, SFC has clearly ceased operations and exists only for the purpose of decommissioning the Gore, Oklahoma site, whereas GA is an ongoing business with several NRC-licensed facilities for which GA has other responsibilities. The Staff must take into account any potential impact a settlement with GA in this proceeding may have on GA's other responsibilities regarding licenses it directly holds from the NRC. Needless to say, the Staff is engaged in a very complex process. If discovery were resumed now, particularly when the parties would need to factor in travel time and witness preparation time for depositions, settlement negotiations would, as a practical matter, cease. The Staff believes that it and GA have already made a sufficient showing that settlement negotiations are progressing in good faith, and that therefore the Board should continue the effectiveness of the stay.

II. The Scope of Potential Discovery Activities

The Intervenors not only argue that the existing stay should terminate, but also assert that the scope of discovery should be vastly broadened to include "merits" issues,

as well as matters relating to other GA facilities and the "relationship of this case with decommissioning funding issues at other GA facilities." Intervenors' Opposition at 8. The Staff opposes any such expansion of discovery at this time.

The "merits" portion of this litigation is now being held in abeyance by virtue of the Board's Memorandum and Order (Denying General Atomics' Motion Regarding NRC Staff "Reliance" Issues and Establishing Schedule for Bifurcated Issue of Agency Jurisdiction) (June 30, 1995). Whether or not parties engaged in settlement negotiations are discussing issues relating to costs of decommissioning the Gore facility should have no bearing on the existing bifurcation of this proceeding. Furthermore, GA's facilities for which it directly holds NRC licenses are clearly not within the scope of this proceeding. In addition, while the Staff may consider the possible impact settlement of this proceeding may have on other GA facilities as part of the Staff's internal deliberations in deciding whether to settle, this in no way can mean that Intervenors are entitled to discovery concerning these kinds of deliberations.

If and when a settlement is reached, Intervenors may have certain rights to provide "input" on the settlement;⁸ however, Intervenors have cited no authority, and the Staff is unaware of any, that provides that Intervenors have discovery rights to explore confidential


⁸ See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54, 66 n.8 (1994). Native Americans for a Clean Environment seems to have recognized early in this proceeding that "input" does not mean "prolonged litigation of an enforcement order after the principal parties, the NRC Staff and the licensee, have settled" Native Americans for a Clean Environment's Reply Brief Regarding the Appropriateness of Commission Review of LBP-94-5 and Whether Ruling in Section II.A Should Be Sustained (Mar. 17, 1994).

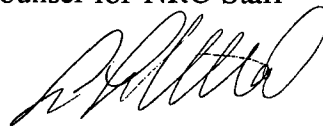
settlement discussions between GA and the Staff, which is in effect what the Intervenors now seek.

CONCLUSION

Based on the foregoing discussion, the Board should extend the existing stay to permit GA and the Staff to be able to meaningfully continue settlement discussions and activities. Moreover, should discovery be ordered to resume in whole or in part, the Board should not permit discovery at this time concerning the "merits" phase of this bifurcated proceeding, until the jurisdictional phase of this case is completed, and should not permit discovery into the confidential discussions between GA and the Staff, or into the internal deliberations of the Staff.

Respectfully submitted,


Steven R. Hom
Counsel for NRC Staff


Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of October 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Gore, Oklahoma Site)	No. SUB-1010	
Decontamination and)		
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR LEAVE TO REPLY TO NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO JOINT MOTION FOR ADDITIONAL STAY OF DISCOVERY" and "NRC STAFF'S REPLY TO NATIVE AMERICANS FOR A CLEAN ENVIRONMENT'S AND CHEROKEE NATION'S OPPOSITION TO JOINT MOTION FOR ADDITIONAL STAY OF DISCOVERY" in the above-captioned matter have been served on the following by deposit in the United States mail, first class; or as indicated by single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system; or as indicated by double asterisk by facsimile transmission; or as indicated by triple asterisk by hand delivery this 13th day of October 1995.

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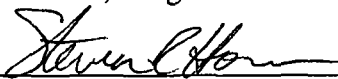
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