

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD '95 OCT 12 P2:42

In the Matter Of)

Sequoyah Fuels Corporation)
and General Atomics)
Gore, Oklahoma Site Decontamination)
and Decommissioning Funding)

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Docket No. 40-8027EA
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October 11, 1995

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

Introduction

Intervenors, Native Americans for a Clean Environment ("NACE") and the Cherokee Nation, hereby oppose the joint motion for an indefinite stay of discovery which was filed by the NRC Nuclear Regulatory Commission ("NRC") staff and General Atomics ("GA") on October 6, 1995.¹ As discussed below, the staff and GA have failed to demonstrate that there is good cause for an additional stay of discovery beyond October 13, 1995. Even if the Board decides that discovery between the NRC staff and GA should continue to be suspended, GA and Sequoyay Fuels Corporation ("SFC") SFC should be ordered to complete their answers to Intervenors' discovery on jurisdictional issues, and Intervenors should be allowed to commence discovery against GA and SFC on the merits of the staff's October 15, 1993, order. Finally, even if

¹ NRC Staff's and General Atomics' Status Report on Settlement Negotiations and Joint Motion for Additional Stay of Discovery Beyond October 13, 1995 (hereinafter "Joint Motion").

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the Board should decide to extend the stay, it should not be open-ended as requested by GA and the staff.

Background

On June 30, 1995, the Licensing Board issued an order which, inter alia, bifurcated this proceeding into two phases regarding jurisdictional issues and the merits of the NRC staff's October 15, 1993, decommissioning funding order against SFC and GA.² The Board limited current discovery to the jurisdictional issue, and set a schedule for conducting summary disposition and a potential hearing on jurisdiction before proceeding to the merits issues.

On August 24, 1995, SFC and the NRC staff jointly filed a motion seeking Board approval of a proposed settlement agreement between them.³ At the same time, GA, the staff, and SFC filed stay motions before the Licensing Board and the Commission. The staff and GA asked the Licensing Board to stay all activities in the proceeding in order to permit them to engage in settlement negotiations.⁴ GA and SFC asked the Commission to stay the effectiveness of the Board's August 21, 1995, order compelling

² Memorandum and Order (Denying General Atomics' Motion Regarding NRC Staff "Reliance" Issues and Establishing Schedule for Bifurcated Issue of Agency Jurisdiction).

³ Joint Motion for Approval of Settlement Agreement.

⁴ Joint Motion for an Expedited Order Temporarily Staying All Activities in the Proceeding in Order to Permit the Parties to Engage in Settlement Discussions (August 24, 1995).

answers to Intervenors' first set of interrogatories while they prepared an appeal.⁵

On August 30, both the Licensing Board and the Commission granted temporary stays of discovery. The Board's order stayed all discovery activities, with two exceptions. First, it ordered GA to make available to intervenors "those documents subject to production under intervenors' July 10, 1995 first document production request that are described in GA's August 29, 1995 filing as being 'available for examination on August 17, 1995.'" Order Ruling on Joint Motion for Stay of Proceeding) at 2. Second, the Board refused to stay the effectiveness of its August 21, 1995, order compelling answers to interrogatories by SFC and GA, on the basis that it lacked the authority to do so. Id. The Commission's order granted a "temporary housekeeping stay" of all discovery proceedings, including GA's obligation to answer the pending interrogatories, until the expiration of any Licensing Board stay order. Order at 1-2. On September 22, 1995, the Licensing Board granted GA's and the staff's motion for an extension of the stay through October 13, 1995.⁶

As a result of these orders, the following discovery by Intervenors remains outstanding: (1) neither GA nor SFC has com-

⁵ General Atomics' and Sequoyah Fuels Corporation's Application for a Stay of Order (Ruling on Intervenors' Motion to Compel Answers to First Interrogatories) and Request for a Temporary Housekeeping Stay) (August 25, 1995).

⁶ Order (Extending Discovery Stay).

pleted its answers to Intervenors' first set of interrogatories, as compelled by the Board's order of August 21, 1995, and the time for GA's intended appeal of that order has been tolled, thus further delaying resolution of the matter; (2) neither GA nor SFC has responded to, nor has the Board ruled on, Intervenors' August 17, 1995, motion to compel document production⁷; (3) GA has not answered Native Americans for a Clean Environment's and Cherokee Nation's Second Set of Requests for Production of Documents to General Atomics (August 11, 1995); (4) Intervenors' examination of SFC's document production in response to Intervenors' first document production has been suspended; and (5) GA has produced only a fraction of the documents that it agreed to produce in its August 9, 1995 response to Intervenors' first document production request.⁸

⁷ Intervenors' Motion to Compel General Atomics and Sequoyah Fuels Corporation to Answer Intervenors' First Set of Requests for Production of Documents.

⁸ Throughout this proceeding, GA has steadfastly ignored the requirement of 10 C.F.R. § 2.741(d) that where document production is uncontested, the requested documents must be produced within 30 days of the request. It also ignored the Licensing Board's August 8, 1995 order that this requirement must be complied with. Order (Establishing Schedule for Response to Intervenors' Motion to Compel) at 3-4. Thus, although in mid-August GA represented to counsel for Intervenors that the uncontested document production would be ready for inspection on August 17, in reality GA had prepared only three out of twenty-six boxes of GA files for inspection by Intervenors on that date, and did not intend even to begin complying with the regulations and preparing the other documents until Intervenors began their document inspection.

After the Board issued its order on August 30, GA made no further attempt to sort and produce uncontested documents. Thus, when Intervenors went to GA's counsel's office on October 4 to inspect the documents which should have been available for inspection on August 9, GA produced only three boxes which generally contained copies of SFC correspondence or

Although the Board's June 30, 1995, order contemplated that the jurisdictional phase of this proceeding would be completed before turning to the merits of the case, the proposed settlement between the staff and SFC, and the pending settlement negotiations between GA and the staff, have advanced the proceeding into the merits phase. While the staff had conducted some discovery on merits issues before the Board's June 30 order, and clearly has had informal discovery through the settlement process, Intervenor's have not yet had an opportunity to conduct discovery on merits issues, and have not been included in settlement negotiations which might have yielded such information. Moreover, the pending settlement negotiations between GA and the NRC staff appear to have broadened the scope of the proceeding to include GA's decommissioning liability for all of its facilities, not just the SFC plant. See Joint Motion at 2, which states that the staff engaged in "extensive deliberations" on "potential overall

(continued)

internal documents that had been copied to GA. These documents were only a small fraction of the uncontested documents that GA had agreed to produce. Most of the categories of requested documents that GA had not contested were still in boxes of GA files which counsel for GA had received from GA in 1994, but still had not sorted. These included GA's consolidated tax returns (document request no. 3), inter-company service agreements (document request no. 6), documents related to intercompany transfers (document request no. 9), documents related to a "draft agreement" which was referenced in GA's hearing request (document request no. 10), correspondence, minutes, audits and reports of the ALARA committee (document request no. 16), and documents related to a SFC proposal to the U.S. Department of Energy which referenced GA (document request no. 32).

impact" of GA settlement on the decommissioning of GA's other facilities. Obviously, this has not been a previous subject of discovery.

On September 8, 1995, Intervenors filed a response to the settlement agreement proposed by SFC and the NRC staff. Intervenors' Response to Joint Motion for Approval of Settlement Agreement. Many of the Intervenors' comments noted that Intervenors had insufficient information on which to base a complete and meaningful evaluation of the proposed agreement, and requested further discovery on a number of issues.

ARGUMENT

GA's and the staff's motion for an extension of the stay of discovery should be denied because they have failed to show any real progress in settlement negotiations that would warrant a further delay in this proceeding. Although GA and the NRC staff have now had an ample six weeks in which to conduct settlement negotiations, they are still at the preliminary stage of exchanging "concepts" or "potential frameworks for settlement." Joint Motion at 1. There is no indication that a settlement is even reachable, let alone close at hand. While GA and the staff may wish to continue their settlement negotiations, these negotiations should no longer be allowed to hinder the progress and resolution of this proceeding.⁹

⁹ Notably, the staff and SFC were able to reach a settlement while discovery was ongoing.

Even if the Board does not order the resumption of full discovery, it should at least allow Intervenors to resume discovery. In this regard, GA and SFC should be ordered to complete the discovery responses which remain outstanding, and the Board should take responses to and rule on Intervenors' August 17, 1995, Motion to Compel. The Board should also allow the stay to expire so that the filing and resolution of GA's expected appeal of the Board's August 21, 1995, discovery order can be resumed, and discovery on jurisdictional issues can be completed.

Moreover, because proposed or contemplated settlement agreements have now moved this case beyond jurisdictional issues into the merits issues of the costs of decommissioning and SFC's and GA's ability to pay those costs, the Board should allow discovery against SFC and GA on those merits issues. As discussed in Intervenors' Response to Joint Motion for Approval of Settlement Agreement, Intervenors' ability to make a meaningful evaluation of the proposed settlement between SFC and the NRC staff has been hampered by the lack of discovery into issues relating to SFC's ability to provide decommissioning funding for its facility. Intervenors anticipate that without such discovery relating to GA, they will be similarly hampered in attempting to evaluate any proposed settlement by GA and the NRC staff. Thus, in order to ensure that Intervenors have sufficient information in order to make an adequate evaluation of the reasonableness of the SFC settlement, any proposed GA settlement, and the relationship

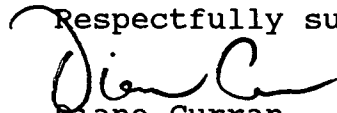
between them, the Board should permit discovery into issues related to the costs of decommissioning the SFC facility, the financial wherewithal of SFC and GA to finance those costs, and the nature of the corporate relationship between SFC and GA as it affects the allocation of revenues and expenses related to decommissioning. In addition, given that GA's liability for decommissioning funding for its other facilities now appears to be a pivotal consideration in the pending settlement negotiations, the Board should allow discovery against GA regarding these decommissioning costs, as well as GA's ability to pay them. In addition, the Board should permit discovery against the NRC staff regarding the relationship of this case with decommissioning funding issues at other GA facilities.

Finally, although Intervenors oppose any extension of a stay of discovery in this case, in the event that the Board does decide to extend the stay, Intervenors strongly oppose GA's and the staff's request that this stay be continued in effect "until such time as it appears to either party that settlement discussions have no further potential of being productive." Joint Motion at 2. Given that after six weeks GA and the staff have made virtually no progress in their negotiations, there is no justification for such an open-ended approach, which has the potential to slow the negotiations even further. The Board should continue to limit any stays to three-week periods, with a requirement for status reports by GA and the NRC staff, and an opportunity for other parties to respond.

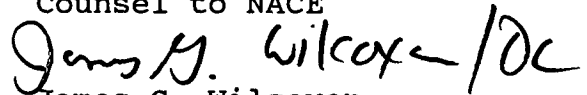
Conclusion

For the foregoing reason, the Board should deny the Joint Motion, order the resumption of discovery on jurisdictional issues, and commence discovery into the merits of the October 15, 1993 order, as well as new considerations regarding other GA facilities.

Respectfully submitted,



Diane Curran
6935 Laurel Avenue Suite 204
Takoma Park, MD 20912
(301) 891-2774
Counsel to NACE



James G. Wilcoxon
Wilcoxon, Wilcoxon & Primomo
P.O. Box 357
Muskogee, OK 74402
(918) 683-6696
Counsel to the Cherokee Nation

October 11, 1995

CERTIFICATE OF SERVICE

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I certify that on October 11, 1995, copies of the foregoing
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U.S. Nuclear Regulatory Commission
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*Administrative Judge James P. Gleason
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Administrative Judge G. Paul Bollwerk
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Administrative Judge Thomas D. Murphy
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Steven R. Hom, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Maurice Axelrad, Esq.
Morgan, Lewis & Bockius
1800 M Street N.W.
Washington, D.C. 20036

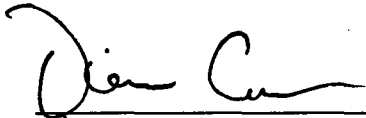
*Stephen M. Duncan, Esq.
Bradfute W. Davenport, Jr., Esq.
Mays & Valentine
110 South Union Street
Alexandria, VA 23314

*Office of the Secretary
Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

John R. Driscoll
General Atomics
3550 General Atomics Court
San Diego, CA 92121

John H. Ellis, President
Sequoyah Fuels Corp.
P.O. Box 610
Gore, OK 74435

Alan D. Wingfield, Esq.
Mays & Valentine
P.O. Box 112
Richmond, VA 23208



Diane Curran

* Also by FAX