UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman
Dr. Jerry R. Kline
G. Paul Bollwerk, III

Thomas D. Murphy
Alternate Board Member

SERVED NOV 13 1995

In the Matter of	Docket No. 40-8027-EA
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	Source Material License No. SUB-1010
(Gore, Oklahoma Site Decontamination and Decommissioning Funding)	ASLBP No. 94-684-01-EA
	November 13, 1995

MEMORANDUM AND ORDER
(Extending Discovery Stay Pending Submission of Additional Settlement Status Information)

The Board has before it the November 3, 1995 joint settlement negotiations status report and motion for an additional stay of discovery filed by General Atomics (GA) and the NRC staff. See Joint Status Report on Settlement Negotiations and Motion for Extension of Stay of Discovery Beyond November 13, 1995 (Nov. 3, 1995) [hereinafter Joint Stay Extension Request]. Intervenors Native Americans for a Clean Environment (NACE) and the Cherokee Nation oppose the joint request.[1] See [NACE's] and Cherokee Nation's

[1] Sequoyah Fuels Corporation (SFC) also filed a response in support of the joint request for extension of the discovery stay. See [SFC's] Response to NRC Staff-[GA] (continued...)

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Opposition to Joint Motion for Additional Stay of Discovery (Nov. 8, 1995) [hereinafter Intervenors Stay Extension Opposition]. For the reasons set forth below, we extend the discovery stay for a limited period to permit GA and the staff to provide us with additional information concerning the status of their settlement negotiations.

I. BACKGROUND

This proceeding concerns an October 1993 staff order directing GA and its subsidiary, Sequoyah Fuels Corporation (SFC), to take measures to provide financial assurance for the decommissioning of SFC's Gore, Oklahoma facility. See 58 Fed. Reg. 55,087 (1993). In a memorandum and order issued June 30, 1995, the Board decided that it would bifurcate the central issue of the agency's "regulatory jurisdiction" to issue that order and established a deadline of September 15, 1995, for the close of discovery on that issue. See LBP-95-12, 41 NRC 478, 486-87 (1994). During this period, the staff and the intervenors sought discovery

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(...continued)
Joint Motion for Extension of Stay of Discovery (Nov. 8, 1995). By memorandum and order dated October 26, 1995, the Board approved a settlement between SFC and the staff that resolved the controversy over that portion of the staff's October 1993 order relating to SFC. See LBP-95-18, 42 NRC __ (Oct. 26, 1995). SFC thus is no longer a party before the Board and we give no consideration to its pleading. If SFC wants to make any additional presentations to the Board regarding this litigation, it must seek leave to file as an amicus curiae.

from GA and its subsidiary, Sequoyah Fuels Corporation (SFC), while GA and SFC filed reciprocal requests.

Then, with a little over three weeks left in the discovery period, GA and the staff filed an initial joint request to stay discovery while they attempted to negotiate a settlement of this proceeding as it relates to GA. See Joint Motion for an Expedited Order Temporarily Staying All Activities in the Proceeding in Order to Permit the Parties to Engage in Settlement Negotiations (Aug. 24, 1995). Intervenors did not oppose this initial request, which we granted for the period through September 22, 1995. See Order (Ruling on Joint Motion for Stay of Proceeding) (Aug. 30, 1995) at 2 (unpublished). GA and the staff followed with two more stay requests, the second of which intervenors opposed. See Joint Status Report and Motion for Extension of Stay Order (Sep. 15, 1995); NRC Staff's and [GA's] Status Report on Settlement Negotiations and Joint Motion for Additional Stay of Discovery Beyond October 13, 1995 (Oct. 6, 1995); [NACE's] and Cherokee Nation's Opposition to Joint Motion for Additional Stay of Discovery (Oct. 11, 1995). These requests resulted in an extension of the discovery stay through November 13, 1995. See Order (Extending Discovery Stay) (Sept. 22, 1995) (unpublished); Order (Extending Discovery Stay) (Oct. 13, 1995) (unpublished) [hereinafter Stay Extension Order]. In granting the last extension, however, we declared that "absent some showing by

GA and the staff of (1) significant progress toward settlement by a date certain, and (2) substantial prejudice to the settlement process if the stay is not extended, the Board does not intend to grant any additional stay extension regarding discovery by or from intervenors NACE and the Cherokee Nation on the jurisdictional issue." Stay Extension Order at 4 (emphasis in original).

In response to this order, the most recent GA/staff joint stay extension request includes the following representations:

> (1) that both parties are negotiating diligently and in good faith, (2) that the discussions between the parties have involved face-to-face meetings, the most recent of which took place on November 1, 1995, (3) that senior executives of [GA] and senior NRC staff personnel have been personally involved in the preparation of the respective negotiating positions of the parties, (4) that significant progress is being made in the negotiations and the parties have resolved at least one aspect of the potential settlement framework, (5) that given the complexity and far-reaching nature of the many matters which are being discussed the negotiations are proceeding at a pace that is expeditious, [particularly as compared to the SFC/staff settlement negotiations that consumed more than six months,] and (6) that substantial prejudice will occur if the parties are permitted to resume pre-hearing discovery.

Joint Stay Extension Request at 1-2. In addition, in support of their request GA and the staff rely upon policy guidance from the Commission and other federal entities

extolling the merits of settling rather than litigating adjudicatory proceedings. They also assert that intervenors expressed interest in moving the proceeding forward is an "abstract procedural objective[]" that fails to show any injury to their interests or those of the public generally, including the public health and safety, that will support lifting the existing discovery stay. They further criticize the intervenors for attempting to broaden the scope of discovery into matters that go beyond the bifurcated regulatory jurisdiction issue now before the Board. Id. at 2-7

Finally, both GA and the staff make separate statements about prejudice to the settlement process from continued intervenor discovery. GA declares that such prejudice will exist because (1) there will be an "unreasonable and unacceptable" drain on the "limited" resources of GA if it is required simultaneously to manage its current major business challenges, conduct negotiations, and carry on this litigation; (2) a primary settlement incentive of preserving resources for decommissioning will be negated given the seemingly endless round of disputes over intervenors' pending discovery requests; and (3) the simultaneous conduct of discovery and settlement negotiations will "poison" the negotiating process. Id. at 8-10. The staff states its continued belief that "it is appropriate to focus its resources and to devote full attention to exploring various

settlement concepts and options free from the drain on resources that continued discovery would create." Id. at 10.

Intervenors oppose the joint stay extension request on the grounds that GA and the staff have not shown either significant settlement progress by a date certain or that permitting discovery to continue would result in substantial prejudice to the settlement process. Intervenors point out that there is no indication in the joint request about the "date certain" on which GA and the staff believe their negotiations will be concluded. As for the parties' representation about the resolution of one aspect of a potential settlement framework, intervenors declare this is meaningless given there is no indication of its significance or the number or significance of any remaining issues. See Intervenors Stay Extension Opposition at 2-3.

Intervenors also find the GA and staff showings regarding prejudice to the process to be inadequate. They characterize the staff's showing as indicating its belief that the process would not in fact be prejudiced by further intervenor discovery. They criticize GA's showing on several points as well. They declare it "patently incredible" that a corporation of GA's size and resources cannot conduct its business, negotiate with the staff, and respond to intervenor discovery at the same time. They also label as "disingenuous" GA's expressed concern about

preservation of assets for decommissioning given its consistent position that it has no decommissioning funding liability and its various attempts before the agency and in federal court to delay or undo this proceeding. Finally, they contend that GA's assertion that discovery activities will "poison" settlement negotiations is an "extortionist threat" of GA's own making that has nothing to do with intervenors' assertion of their legitimate discovery rights. Id. at 3-5.

II. ANALYSIS

GA and the staff are, of course, correct that Commission (as well as federal executive and judicial) policy favors the settlement of litigation. Indeed, we recognize and are attempting to implement that policy in this proceeding. But to favor settlement is not to say that it must become the overriding force in any adjudication such that "settlement negotiation" becomes a magic phrase the invocation of which must bring the proceeding to a complete halt until the participants decide that the negotiation process is exhausted.

This is particularly true when, as here, one or more of the parties to the proceeding has not been included as a participant in the settlement process. The staff and GA are, of course, free to seek to settle between themselves the staff's claims against GA. Further, they can then seek

Board approval of their efforts, subject to consideration of any objections by the intervenors. At the same time, as the Commission itself has recognized, see CLI-94-12, 40 NRC 64 (1994); CLI-94-13, 40 NRC 78 (1994), the intervenors are entitled to party status in this enforcement proceeding and have certain rights thereby. This includes the right to litigate the contentions they have put forth in an effort to see that the staff's order, as issued, is sustained.

The tension between these competing interests requires that we exercise careful oversight of the settlement process here to ensure that the resulting postponement of intervenors' discovery efforts is warranted. In requesting information from GA and the staff about the progress of their negotiation process and the impact of intervenor discovery on that process, we were attempting to gain the insight we need to make a reasoned determination about how the parties' differing interests should be balanced at this juncture.

Intervenors are correct that up to this point GA and the staff have not made the showing we sought in our October 13 order. Nonetheless, recognizing the importance of this matter to all the parties, and giving due consideration to the general policy favoring settlement efforts, we conclude that it is appropriate in this instance to provide GA and the staff with an additional opportunity to address the two factors set forth in that order.

So that there is no misunderstanding about what we are asking for in this regard, we note that in requesting evidence that GA and the staff have made significant progress toward settlement by a date certain, we are seeking information that would show these parties are putting forth a substantial, sustained effort to settle within a concrete time frame. This factor incorporates several concepts. The first is that the parties have established a procedural framework for the negotiation process that will keep the process moving forward at a steady pace. This can be established by showings that (1) in addition to litigation counsel, senior management and policy staff for both GA and the staff are involved on a continuing basis in both internal deliberations on settlement strategy and, as appropriate, the parties' negotiation sessions; (2) through their internal strategy sessions and negotiation sessions, the parties have identified the type and number of major issues that are in dispute; and (3) the parties have some kind of schedule (with dates, as appropriate) for internal strategy sessions and negotiating sessions that will bring them together on a regular basis to work to resolve the identified issues in an orderly manner. Additionally, included in this factor is the notion that GA and the staff have in mind at least a reasonable estimate of the amount of time they believe their negotiation process will take. This is important because it gives the Board (and the parties)

some benchmark against which to measure the parties' progress.

As to the question of substantial prejudice, we are aware that if GA is required to respond to intervenors' discovery requests, it will have to expend more resources. The question is what is the extent of that expenditure and how will it impact on the settlement process. Intervenors' make the point GA is a large corporation that, at least facially, appears to have significant resources that would permit it to undertake several litigation-related activities at once. GA has suggested that in reality this is not the case, but has not given us any specific information to support this conclusion. GA also has claimed that permitting intervenor discovery would "poison" the settlement process. Given that the process, at least at this point, includes only GA and the staff, it likewise is not apparent how discovery with the intervenors on the jurisdictional issue would impinge on negotiations to which the intervenors are not privy. We need more information from GA and the staff on the matter of prejudice to the process.

Consequently, the Board will extend the discovery stay for a limited period to provide GA and the staff with an opportunity to provide additional information on the two

factors set forth in our October 13 order.[2] Once intervenors have had an opportunity to respond to any additional showings, we will then decide whether any further extension of the discovery stay is appropriate and, if so, how long and under what conditions that stay should continue.

For the foregoing reasons, it is this thirteenth day of November 1995, ORDERED, that:

1. All discovery activities suspended in accordance with the Board's October 13, 1995 order are stayed through Friday, December 8, 1995.

2. On or before Monday, November 27, 1995, GA and the staff shall file any additional information they wish the Board to consider in determining whether to provide for a further stay extension beyond December 8.

3. Intervenors NACE and the Cherokee Nation shall have up to and including Monday, December 4, 1995, within which to respond to any additional information in support of a further stay extension submitted by GA and the staff.

4. If during the stay period established by this memorandum and order either GA or the staff informs the

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[2] The information we seek essentially is procedural rather than substantive in nature; therefore, providing it should not prejudice the discussions between GA and the staff.

Board that it does not wish to continue settlement negotiations, the stay entered by this memorandum and order shall be terminated immediately.

5. If the stay extended by this memorandum and order is terminated for any reason, all discovery activities shall recommence within five days of the date of termination under the same schedule that was in effect prior to entry of the Board's initial August 30, 1995 stay order.[3]

6. If the stay extended by this memorandum and order is terminated for any reason the discovery completion date for this phase of the proceeding will be the date that is sixteen days from the date of the termination of the stay.

7. Besides service by regular mail, copies of any GA/staff settlement information filings or stay termination declaration, or any intervenor response to a GA/staff settlement information filing, shall be sent to the Office of the Secretary, the Board, and counsel for the other

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[3] For example, if on the date of the Board's August 30, 1995 order a party had three days remaining within which to answer certain interrogatories, that party would have eight days after the stay is terminated to answer the interrogatories. Any activities that were due to be completed before the August 30, 1995 order was entered but were delayed because of the pendency of the initial stay request are due within five days of termination of the stay. The parties previously have recognized that depositions scheduled but delayed by the discovery stay will have to be rescheduled by the new discovery completion date established under this order.

parties by facsimile transmission or other means that will ensure its receipt by 4:30 p.m. EST on the day of filing.

THE ATOMIC SAFETY
AND LICENSING BOARD[4]

James P. Gleason, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 13, 1995

[4] Copies of this memorandum and order are being sent this date to counsel for GA, SFC, NACE, and the Cherokee Nation by facsimile transmission and to staff counsel by E-mail transmission through the agency's wide area network system.

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 M&O (EXTENDING DISCOVERY..) 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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Dated at Rockville, Md. this
13 day of November 1995

Office of the Secretary of the Commission