UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN SUPPORT OF AFFIRMATION OF LBP-96-24

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March 10, 1997

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES

ADMINISTRATIVE DECISIONS

MISCELLANEOUS

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Pursuant to the Commission's Memorandum and Order dated January 22, 1997 (CLI-97-01), the NRC Staff hereby files its responsive brief in support of affirmation of the decision of the Atomic Safety and Licensing Board (Board) in LBP-96-24,[1] which approved the settlement agreement between the Staff and General Atomics (GA).

BACKGROUND

Sequoyah Fuels Corporation (SFC) is the holder of Source Material License No. SUB-1010, originally issued by the Atomic Energy Commission in 1970. Under the license, SFC produced uranium hexafluoride and depleted uranium tetrafluoride at its conversion facility in Gore, Oklahoma. In mid-1993, SFC permanently ceased operations.

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[1] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-96-24, 44 NRC 249 (1996).

SFC is owned by Sequoyah Fuels International Corporation (SFIC), which in turn is owned by Sequoyah Holding Corporation (SHC). SHC is a wholly-owned subsidiary of GA, and acquired SFC from Kerr-McGee Corporation in late 1988, following the NRC's written approval. Neither SFIC, SHC, nor GA was or is named as a licensee on License No. SUB-1010. However, the license provides for GA to perform certain corporate oversight functions -- such as verifying SFC's compliance with state and federal regulations, NRC license conditions, corporate policies, and facility procedures -- which GA has done since the acquisition of SFC from Kerr-McGee.

SFC is presently engaged in decommissioning activities. Beyond a $750,000 escrow account, it does not have in place a financial assurance mechanism, as such is described in 10 C.F.R. § 40.36(e), to assure that adequate funds will be available for the completion of decommissioning. However, SFC has submitted a plan under which funding to complete decommissioning will be provided by revenues received through a contractual arrangement with ConverDyn, a joint venture between Allied-Signal Energy Services, Inc. (a wholly-owned subsidiary of Allied-Signal, Inc.) and General Atomics Energy Services, Inc. (a wholly-owned subsidiary of GA's parent company, General Atomics Technologies Corporation). In its Preliminary Plan for the Completion of Decommissioning, SFC estimated that its revenues from ConverDyn would be approximately $72 million through the year 2003, while it would also have income of more than $17 million from other sources. At the same time, SFC estimated that the cost of decontaminating and decommissioning the Gore site, assuming onsite disposal, would be a total of $86 million.

Because SFC lacked a financial assurance mechanism as described in 10 C.F.R. § 40.36, the Staff issued an Order[2] against SFC as well as GA in October 1993 (1993 Order) stating, *inter alia,* that SFC and GA shall be jointly and severally responsible for providing funding to continue remediation of existing contamination, providing financial assurance for decommissioning in accordance with the requirements of 10 C.F.R. § 40.36, and providing an updated detailed cost estimate and a plan for assuring the availability of adequate funds for the completion of decommissioning, in accordance with the requirements of 10 C.F.R. § 40.42(c)(2)(iii)(D). In addition, the 1993 Order stated that SFC shall carry out its funding plan, and that GA shall make up any shortfalls in projected SFC revenues to carry out decommissioning activities. Further, the 1993 Order specifically directed GA to provide financial assurance in the amount of $86 million in accordance with the requirements of 10 C.F.R. § 40.36.

The 1993 Order did not allege that GA or SFC had engaged in any deliberate misconduct. Rather, the basis of the 1993 Order was that SFC allegedly was not in compliance with the 10 C.F.R. §§ 40.36 and 40.42, and that GA could be held responsible for providing financial assurance because GA allegedly exercised *de facto* control over the day to day business of SFC with respect to the Gore facility. The Staff set forth in the

[2] 58 Fed. Reg. 55,087-92 (1993).

1993 Order certain facts which, the Staff asserted, indicated that GA exercised such control over SFC.[3]

SFC and GA requested a hearing on the Order. In its answer, SFC denied that the regulations, as then worded,[4] required that SFC provide a financial assurance mechanism in the amount of estimated decommissioning costs,[5] because SFC chose not to renew its license.[6] GA disputed the allegation that it controlled the day to day affairs of SFC, and asserted that the NRC has no jurisdiction over it with respect to the decommissioning of the SFC facility.[7]

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[3] Subsequent to the issuance of the 1993 Order, the Staff clarified that it was not pursuing a common law implied or quasi-contract theory to sustain the 1993 Order, notwithstanding assertions contained therein of the Commission's reliance on statements by GA's chairman Mr. J. Neal Blue. *See, e.g.*, NRC Staff's Answer In Opposition To General Atomics' Motion For Summary Disposition Or For An Order Of Dismissal (Apr. 13, 1994) at 33; *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-12, 41 NRC 478, 480-81 (1995).

[4] Following the issuance of the 1993 Order and the submittal of SFC's answer, portions of 10 C.F.R. §§ 40.36 and 40.42 relevant to this matter were clarified. *See* Clarification of Decommissioning Funding Requirements, 60 Fed. Reg. 38,235-40 (1995). A challenge to the regulation by SFC and GA is presently being held in abeyance in the Court of Appeals for the Ninth Circuit pending resolution of this proceeding.

[5] There is no dispute that SFC obtained a financial assurance mechanism in the amount of $750,000, as 10 C.F.R. § 40.36 required it to do as an initial step in providing financial assurance.

[6] In August 1990, SFC filed an application to renew its license, but subsequently decided to withdraw the application. The Commission sustained the Licensing Board's order allowing SFC to withdraw the application. *See Sequoyah Fuels Corp.*, CLI-95-2, 41 NRC 179 (1995).

[7] GA is an NRC licensee with respect to its TRIGA reactors and other facilities in San

(continued...)

In February 1994, GA filed a motion for summary disposition, seeking dismissal of the claims against it in the 1993 Order. The Board denied GA's motion, concluding, *inter alia,* that further developments in the proceeding are needed to address the issue of whether the NRC has regulatory authority over GA in this case.[8] The Commission declined to review the Board's decision.[9] GA also sought relief from the 1993 Order from the U.S. District Court for the Southern District of California in November 1994. The District Court dismissed the action due to lack of subject matter jurisdiction, or, in the alternative, because of the lack of a final NRC order.[10] On appeal, the Ninth Circuit held that appellate review of GA's claims is precluded because there has been no final agency action with respect to the 1993 Order.[11]

In a June 1995 Memorandum and Order, the Board bifurcated the proceeding so that the issue of jurisdiction over GA would be addressed at the outset, before moving, if

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[7](...continued)
Diego, California, and has never denied that it is subject to the NRC's jurisdiction with regard to these facilities.

[8] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359 (1994).

[9] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55 (1994).

[10] *General Atomics v. U.S. Nuclear Regulatory Commission, et al.*, No. 94-1734-K (LSP), slip op. (S.D. Ca. Mar. 3, 1995).

[11] *General Atomics v. U.S. Nuclear Regulatory Commission,* 75 F.3d 536 (9th Cir. 1996).

at all, to the merits of the ordering provisions against GA in the 1993 Order.[12] Following bifurcation, discovery was to be limited initially to the jurisdiction phase.

At about the same time, the Staff and SFC completed ongoing negotiations for a separate settlement, which was approved by the Board[13] and is now under review by the Commission. The Staff and GA then engaged in over ten months of intense settlement discussions. Discovery was initially stayed for a limited period of time at the request of the negotiating parties to allow them to devote full efforts to exploring a settlement. Through the duration of the settlement discussions the Board required the parties to file periodic status reports and motions to extend the stay, pending completion of settlement discussions.

On July 11, 1996, GA and the Staff filed a joint motion seeking approval by the Board of a settlement agreement. Following the receipt of briefs from the intervenors in this proceeding, Native Americans for a Clean Environment and the Cherokee Nation (Intervenors), as well as the State of Oklahoma (State), the Board approved the settlement on November 5, 1996, in LBP-96-24, leading to the instant review by the Commission.[14]

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[12] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-12, 41 NRC 478 (1995).

[13] *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-95-18, 42 NRC 150 (1995).

[14] At the time the settlement was submitted to the Board for approval, discovery had not been completed with respect to the issue of whether the NRC has jurisdiction over GA. Also, several discovery disputes were pending before the Board, which have never been resolved. In addition, the second phase of the proceeding relating to the merits of the specific ordering provisions in the 1993 Order had not yet begun.

In CLI-97-01, the Commission has directed the parties to address (1) the role of the Board in reviewing settlements; (2) the factors that the Board should consider when applying the "public interest" standard governing review of settlements; (3) the arguments set forth in the petitions for review; and (4) the questions raised by Judge Bollwerk in his dissenting statement.

DISCUSSION

I. The Board's Role In Reviewing Settlements and Factors To Be Considered

In connection with a settlement relating to the 1993 Order, reference may first be made to the Commission's regulation at 10 C.F.R. § 2.203 regarding settlement and compromise. *See* 10 C.F.R § 2.200. Section 2.203 provides in part:

> The stipulation or compromise shall be subject to approval by the designated presiding officer . . . according due weight to the position of the staff. The presiding officer . . . may order such adjudication of the issues as he may deem to be required in the public interest to dispose of the proceeding.

Section 2.203 thus provides that the role of the Board in reviewing settlements is to approve (or disapprove) the settlement, "according due weight" to the staff's views, and to order adjudication of unresolved issues raised by the 1993 Order if necessary to "dispose of the proceeding."[15]

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[15] While section 2.203 provides that the Board may order adjudication of "the issues" raised by the underlying order which initiated the proceeding, in order to dispose of the proceeding, it does not provide that adjudication may be ordered with respect to any issue that may arise in connection with the settlement. *See New York Shipbuilding Corp.* (Byproduct Material License No. 292204-2), 1 AEC 842, 845 (1961), which was codified in part by section 2.203. *See* Note by the Secretary (Atomic Energy Commission Amendments to 10 C.F.R. Part 2, "Rules of Practice"), AEC-R 4/13 (Dec. 28, 1961) and attachments and enclosure thereto.

While section 2.203 does not reveal much in the way of what factors enter into a "public interest" determination,[16] the Commission's regulation regarding settlements in initial licensing proceedings provides guidance:

> The Commission recognizes that the *public interest* may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, to the extent that it is not inconsistent with hearing requirements in section 189 of the Act (42 U.S.C. 2239), the *fair and reasonable* settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

10 C.F.R. § 2.759 (Emphasis added).[17] Although initial licensing and enforcement proceedings are distinguishable in some respects, standards regarding the resolution of both must clearly overlap since both types of proceedings must be consistent with the agency's overall statutory mandate. Thus, in considering whether the acceptance of a settlement under section 2.759 or section 2.203 serves the public interest, the Board should consider

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[16] Notably, although *New York Shipbuilding*, which led to the codification of section 2.203, *see supra* note 15, held that (1) the public interest, and (2) reasonable assurance of the protection of public health and safety, are two factors to be considered in approving a settlement, at least in a show cause proceeding, 1 AEC at 845, the Commission, in promulgating section 2.203, did not expressly include either as factors in the text of the regulation. The words "public interest" do appear in section 2.203, but only in connection with the Board's role in determining whether to order further adjudication of any remaining issues raised by the underlying enforcement order. Notwithstanding the foregoing, however, the Commission has articulated here that, with respect to the first *New York Shipbuilding* factor, "approval of [a] settlement is a matter that must give due consideration to the public interest." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994).

[17] Section 2.759 was promulgated in 1972, eleven years after the Commission promulgated section 2.203. *See* Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,137 (1972).

the express public interest factors articulated by the Commission, *i.e.*, whether the settlement is fair and reasonable.

What may be fair and reasonable is obviously dependent upon the particular facts and circumstances involved in a specific proceeding. In this case, the facility at issue has not operated since 1993, and is in the process of decommissioning. If this proceeding involved, for example, a robust business organization seeking the restart of the facility or renewal of the license, considerations may well be different in determining whether a settlement is fair and reasonable. There is a certain amount of flexibility that must be incorporated into the regulatory process in carrying out the agency's mandate. *See Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983). This flexibility should certainly carry over into the settlement process. As is more fully discussed below in the Staff's response to the arguments of the State of Oklahoma and the Intervenors, court decisions involving the approval of settlements roughly analogous to the instant proceeding, *i.e.*, involving monetary awards, may illustrate additional considerations which could be factored into a determination as to whether the specific settlement at issue here is fair and reasonable. *See infra* section II.

In addition to considering whether a settlement is fair and reasonable, and thus in the public interest, another factor that the Board must consider, and "accord due weight" to, is the Staff's position, as expressly provided for in 10 C.F.R. § 2.203. The Staff is unaware of any NRC decision which provides significant guidance as to how "due weight" is to be construed under section 2.203. However, the Staff believes that the Commission,

in specifically singling out the position of the Staff in the regulation, has thereby directed that the Board give significant deference to the Staff's views. In contrast, with respect to other parties, the Commission has clearly stated that they may not simply object to the settlement, but "must show some substantial basis for disapproving the settlement or the existence of some material issue that requires resolution." *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 71 n.10.

II. Petitioners' Arguments

A. The Intervenors' Arguments

The Intervenors introduce their arguments with assertions that the "adequacy of the settlement to protect public health and safety must be the paramount 'public interest' consideration," and that "an agency should not refuse consideration of a settlement that is facially consistent with the agency's statutory purpose." Intervenors' Brief at 9. From there, however, the Intervenors proffer a converse argument that a settlement should be rejected if it is inconsistent with the agency's statutory purpose. The Intervenors proceed to interpret this converse argument to mean that "[i]f the proposed settlement will not achieve the regulatory compliance sought in the enforcement order, then it must be rejected." Intervenors' Brief at 10. As discussed below, this proposition is flawed, and thus the arguments advanced by the Intervenors based on it should be dismissed.

Some background on the regulation on financial assurance under 10 C.F.R. § 40.36, which is at the heart of the 1993 Order, may be instructive. The regulation is a relatively recent rule, having been promulgated in June 1988, at about the time GA,

through SHC, was acquiring SFC from Kerr-McGee Corporation. *See* General Requirements for Decommissioning Nuclear Facilities -- Final Rule, 53 Fed. Reg. 24,018 (1988). Prior to the regulation, there was no requirement regarding financial assurance mechanisms referenced in the regulation. While it can be said that the regulation provides reasonable assurance of adequate protection of public health and safety, it does not necessarily follow that before the promulgation of the rule public health and safety was not adequately protected. Even now, 10 C.F.R. § 40.14 provides for specific exemptions to the regulation if it is determined that the exemption is authorized by law, will not endanger life or property or the common defense and security and is *otherwise in the public interest.* (Emphasis added)

As measured against the requirements of 10 C.F.R. § 40.36, and assuming *arguendo* that it could be established that GA is subject to such requirements with respect to the SFC facility,[18] the settlement falls short of the requirements in section 40.36. The Staff believes, however, that this is not the end of the inquiry. The ultimate question should be whether the settlement is in the public interest, taking into account more than the single consideration of whether the settlement "achieve[s] the regulatory compliance sought in the enforcement order." *See* Intervenors' Brief at 10.

Although the SFC settlement is not the subject of this pleading, it tends to illustrate a situation where the public interest is served by accepting a settlement, even if it does not provide for compliance with the financial assurance regulation. SFC has never denied its

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[18] This matter is within the ambit of GA's challenge to the 1993 Order.

obligation to clean up the Gore site, and has stated its intention to do so. However, as a business that has ceased operations, and exists only to decommission the site, SFC is simply not in a position to obtain a surety bond, letter of credit, or any other financial assurance mechanism specified in 10 C.F.R. § 40.36. The Staff and the Board majority rightfully determined that the public interest is served by accepting a settlement, rather than continuing wasteful litigation to enforce compliance with a regulation that SFC cannot meet.

In this case, again assuming it could be established that the requirements of sections 40.36 and 40.42 apply to GA with respect to the Gore site, the Staff acknowledges that the settlement at issue falls short of full compliance with the regulations. The Intervenors would have the Commission reject the settlement on this basis alone. The Staff believes many other factors need to be considered to evaluate whether the settlement is, in fact, fair and reasonable and thus is in the public interest.

There is no question that the Staff considered GA's financial condition when deliberating various settlement options. Certain limited proprietary information that GA shared with the Staff during settlement discussions was not disclosed to the Intervenors. However, both the Staff and the Intervenors[19] in their respective discovery requests to GA requested documents such as financial statements and tax returns. While a complete picture of GA's finances is known only to GA, sufficient information has been made

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[19] *See* Native Americans for a Clean Environment's and Cherokee Nation's First Set of Interrogatories and Requests for Production of Documents to General Atomics (July 10, 1995).

available such that it reasonably could be concluded that GA does not have "deep pockets." Thus, the Staff at least recognized that even if the 1993 Order was sustained in its entirety, there was a substantial question as to the practical value of such a judgment.

In reviewing settlements, however, courts have not necessarily required that the financial condition of the defendant be considered in assessing the adequacy of a settlement. *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993). Thus, while the Staff considered as a practical matter information regarding GA's financial condition, under *Gottlieb* the Board was not required to do so. On the other hand, consideration of litigative risks is something the courts hold is to be a factor in evaluating settlements. *Id.*

In this case, the Board has already denied GA's motion for summary disposition filed in February 1994. In addition, in connection with GA's federal court challenge, the Court of Appeals for the Ninth Circuit did not find that the NRC's jurisdiction is "plainly lacking." *General Atomics*, 75 F.3d at 541. Thus, the Board and the Court Appeals both appear to accept that there could be a set of facts which if proven could establish that the NRC has jurisdiction over GA with respect to the 1993 Order. On the other hand, there is no direct Commission precedent holding a parent company fully liable for providing financial assurance for a subsidiary licensee, particularly when there have been no allegations of wrongdoing, fraud, or other illegal conduct. There is no dispute that GA accepted certain oversight responsibilities for the facility, which previously had been performed by Kerr-McGee, at the time the license transfer was approved from Kerr-McGee to SHC. However, GA did so without being named as a licensee by the NRC, and the

NRC did not subject GA to a license condition which had previously existed, requiring the former parent to guarantee decommissioning of the facility.[20] GA has admitted that "three of the nine officers of SFC also hold positions with GA," and two other individuals held positions in both companies at the same time.[21] On the other hand, it is the general rule that a "parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers."[22] In short, it is apparent from the above discussion, which is by no means exhaustive, that there are factors which support each party, and thus there are litigative risks for both sides if the litigation was to continue. The Board's decision clearly considered the element of litigative risks. LBP-96-24, 44 NRC at 258.

The Board also considered revenues that have been projected to be available for decommissioning. LBP-96-24, 44 NRC at 257. In fact, the most recent information available to the Staff indicates that SFC's original projections of revenues from ConverDyn and other sources have not significantly changed to date, *i.e.*, $89 million through the year 2003. The Staff also understands that the ConverDyn venture has a current life of 99 years, and that after the year 2003, SFC may still be entitled to standby fees based on annual remediation costs if decommissioning is not yet completed.

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[20] *See General Atomics*, 75 F.3d at 538.

[21] General Atomics' Answer and Request for Hearing (Nov. 2, 1993) at 12.

[22] H. Henn, Handbook of the Law of Corporations and Other Business Enterprises 258 (1970).

In addition, the Board considered the factors articulated by the courts in considering settlements. LBP-96-24, 44 NRC at 257-58. *See Gottlieb,* 11 F.3d at 1014. In short, there was a more than adequate basis for the Board to approve the GA settlement.

The Intervenors complain that they have been improperly excluded from participation in the review of the settlement. *See* Intervenors' Brief at 10-14. They argue that they must be allowed to participate in the review because of their rights as full parties to the proceeding, the President's directive to consult with tribal governments, and the refusal of the Licensing Board in the proceeding concerning SFC's withdrawal of its renewal application to consider decommissioning funding conditions during that proceeding. *Id.*

The Staff does not dispute that the Intervenors may participate in the review of the settlement. In fact, the Intervenors have had every opportunity to comment on the settlement, as evidenced by the pleadings they have filed thus far. Furthermore, while they were not privy to the settlement discussions between GA and the Staff, they certainly have had an opportunity to review all of the data pertinent to the settlement, such as the amount of the settlement, the SFC cost estimates, the SFC revenue projections, and the conflicting positions of the parties on the issues in the proceeding. Although courts have held that the financial condition of a settling party is not necessarily a factor which must be considered in assessing the adequacy of a settlement, *Gottlieb,* 11 F.3d at 1014, the Intervenors requested documents during discovery almost two years ago which provide an indication of GA's financial status. The Intervenors cite *Girsch v. Jepson*, 521 F.2d 153

(3d Cir. 1975), for the proposition that the Board must assure that the Intervenors "have access to material information supporting the reasonableness of the settlement." Intervenors' Brief at 14. The Staff believes the Intervenors have had access to such material.

Next, the Intervenors argue that LBP-96-24 must be reversed because it fails to make a supportable finding that the settlement is adequate to protect public health and safety. Intervenors' Brief at 14-18. As explained earlier, the Staff believes that a public interest standard for a settlement should not necessarily consider only whether the settlement adequately protects public health and safety if that concept is interpreted to mean the settlement must eradicate all regulatory concerns underlying the enforcement order. In this case, to eradicate all possible regulatory concerns discussed in the 1993 Order, a settlement would have to provide for a complete guarantee of all decommissioning costs, as now or later determined, and there would have to be a guarantee that GA would forever have the financial capability to comply with such a settlement. To say that anything short of such a settlement can never be deemed to be in the public interest is patently unreasonable. However, the bulk of the Intervenors' arguments essentially rely on such a proposition. The Staff believes, of course, that the funds that are provided by the settlement should not be overlooked, and that a settlement should not be viewed in terms of all or nothing.

The Intervenors, at least at one point, do appear to acknowledge that it may be justifiable for the Board to approve a settlement "less than adequate to protect public health

and safety," but then complain that the Staff "failed to provide sufficient information to evaluate whether the settlement is 'the best bargain in the public interest.'" Intervenors' Brief at 19. As discussed earlier, all of the fundamental information underlying the settlement is information that the Intervenors already know, as did the Board when it approved the settlement, or to which they had access. Indeed, an assessment of the settlement could be based perhaps entirely on comparing "the certain recovery" of $5.4 million or $9 million, which can be invested for growth by an independent trustee, versus "a claim of indefinite liability," information of which the Intervenors are aware. *See* Intervenors' Brief at 19. In any event, the Intervenors' argument of lack of information is without merit.

The Intervenors' recurring theme of lack of information takes a slightly different turn when they allege that there was a global settlement and improper *ex parte* communications between the Staff and the Commission. Intervenors' Brief at 20-22. The Intervenors argue that "the Board erred in refusing to condition approval of the settlement upon disclosure of the terms of the global settlement" between GA and the Staff. *Id.* at 20. The simple response to this argument is that there was no "global settlement." As the Staff has already explained in response to the Intervenors' petition for review of LBP-96-24, the Staff has exercised enforcement discretion with respect to financial assurance requirements applicable to GA's licensed San Diego facilities.[23] While the

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[23] The Intervenors allege this to be illegal. Intervenors' Brief at 22 n.18. To the contrary, the NRC's ability to exercise enforcement discretion is well-recognized. *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983).

exercise of that discretion is conditioned upon the existence of a settlement in this proceeding under which GA is contributing funds towards the Gore site, the GA settlement at issue now is not conditioned upon any matter involving GA's San Diego facilities. An examination of the settlement documents demonstrate that the settlement is not contingent on anything that has occurred, or may occur, regarding GA's decommissioning responsibilities for its licensed facilities. Further, the Commission's Staff Requirements Memorandum dated July 8, 1996 pertaining to decommissioning requirements for GA's San Diego facilities (which was provided to the Intervenors), expressly provides that no matter relating to SFC is or has been prejudged. Accordingly, there was no error committed by the Board in concluding that matters involving GA's San Diego facilities were outside the scope of the proceeding and thus not subject to discovery by the Intervenors.

Finally, the Intervenors argue that "significant deficiencies" in the Staff-SFC settlement are not resolved by the GA settlement. The Commission has already accepted the parties' briefs on the SFC settlement last year.[24] The Staff, of course, is of the opinion that there are no deficiencies in the SFC settlement which the GA settlement needed to cure. Otherwise, it would not have agreed to it at that time. *See* NRC Staff's Brief Regarding Commission Review of Settlement Agreement Between Sequoyah Fuels Corporation and the NRC Staff (April 29, 1996). Therefore, the Intervenors' underlying

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[24] *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-96-3, 43 NRC 16 (1996).

premise to their argument is without foundation in the Staff's view, and thus their last argument should be rejected.

B. The State's Arguments

The "Brief in Support of Petition for Review Filed By State of Oklahoma" (Feb. 11, 1997) (State's Brief)[25] raises the following arguments against the affirmation of LBP-96-24. First, the State argues that the settlement agreement[26] and LBP-96-24 do not "set forth adequate information" to show that there is now "adequate financial assurance for funding decommissioning to completion as required by law." The State asserts that the 1993 Order "essentially amounts to a finding as to one very important material fact: that adequate financial assurance for decommissioning at the Gore facility had not been demonstrated by circumstances and fact at that time." State's Brief at 7. The State argues that no showing has been made as to "how the situation has changed." *Id.*

No one has ever claimed that the GA settlement now satisfies all of the regulatory requirements for financial assurance mechanisms in 10 C.F.R. §§ 40.36 and 40.42 in terms

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[25] The State's attempt to incorporate by reference a myriad of other pleadings, *see* State's Brief at 2, effectively violates the page limit set by the Commission, and should not be allowed. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-430, 6 NRC 457 (1977).

[26] The State refers to "settlement agreements and Board Orders" in its Brief. (Emphasis added) *See, e.g.*, State's Brief at 7. The opportunity for the State and the parties to the proceeding to file briefs regarding the SFC settlement has long passed. *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-96-3, 43 NRC 16 (1996). CLI-97-01 encompasses review of LBP-96-24 only. Accordingly, the Staff is responding only to arguments that bear on the GA settlement and LBP-96-24.

of the amount of funds being set aside.[27] If it did (and assuming GA had the requisite financial capability), it would not be a settlement; rather, it would be a complete concession by GA.

"The essence of settlement is compromise." *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). Further, courts have held a settlement should not be rejected solely because it does not provide a complete victory to the plaintiffs. *Isby v. Bayh*, 75 F.3d 1191 (7th Cir. 1996). In contrast, the State appears to believe that the GA settlement should not be approved unless it provides, in essence, a complete victory as measured against the 1993 Order. The Staff believes that "complete victory" cannot be the standard against which a "settlement" is to be measured. Otherwise, the Commission's regulations regarding settlements, 10 C.F.R. §§ 2.203 and 2.759, would be rendered meaningless. The Staff submits that the GA settlement should not be rejected simply because it does not provide for full compliance with the Commission's financial assurance regulations as if GA is the actual named licensee for the Gore facility.[28]

Under a heading stating that the settlement does not adequately protect the public interest, the State argues that the settlement violates due process, in that it provides for

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[27] The GA settlement is, however, an external sinking fund under 10 C.F.R. § 40.36(e)(3), and in fact possesses some features that are even more conservative than those contemplated by Regulatory Guide 3.66, Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 C.F.R. Parts 30, 40, 70, and 72 (June 1990).

[28] The State claims that the GA settlement is inconsistent with 42 U.S.C. § 2201(x), which deals with byproduct materials as defined in section 11e(2) of the Atomic Energy Act. The SFC facility did not handle section 11e(2) material; therefore, the citation to section 2201(x) is inapplicable.

something less than what the existing financial assurance regulations require. The State alleges that the settlement thus is tantamount to changing the financial assurance regulations without complying with the procedural requirements of the Administrative Procedure Act (APA). State's Brief at 11-12.

Implicit in the State's argument is the assumption that GA is subject to NRC financial assurance regulations with respect to the Gore site. The Staff has certainly alleged this to be true, but the burden is on the Staff to sustain the 1993 Order's allegations of fact and law. At this time, no findings have yet been made. Without a binding decision, it cannot necessarily even be said that with respect to the Gore site, any financial assurance regulations apply to GA. Thus, in this respect, measuring the settlement against any regulation to determine whether it falls short may be problematic.

The GA settlement, of course, does not, and cannot, change the Commission's regulations. Furthermore, the Commission's regulations at 10 C.F.R. § 40.14 already provide for the granting of specific exemptions to existing rules. Thus, the GA settlement fits within the existing regulatory framework which allows for noncompliance with certain regulatory requirements in specific cases. The State's attempt to somehow equate the settlement with a violation of the APA's requirements on rulemaking is simply void of any merit.

Next, the State argues that no settlement should be approved until the completion of an analysis of the alternatives for cleaning up the site. State's Brief at 13-15. According to the State, "the NEPA [National Environmental Policy Act of 1969,

42 U.S.C. 4321 *et seq.*] process is undermined by approval of the agreements which are based upon estimated costs of on-site disposal of contaminated soils. It is unlikely that other more costly alternatives will be given serious consideration by NRC staff during the NEPA process, when a less expensive alternative has already received final Commission 'approval' by virtue of a settlement which funds the cheaper alternative, where the licensee does not have adequate assets to fund a more expensive alternative, action against the parent company is barred by the agreement and there is no other funding source." *Id.* at 14.

If anything, it is probably more unlikely that "other more costly alternatives will be given serious consideration" if the GA settlement is not approved. The settlement provides cash now, which can be invested for growth. Without the settlement, the Staff could only speculate that after the litigation process has run its course, there *may* be a judgment, which in turn *may* be collectible to some uncertain degree. It would seem to make much more sense if cleanup alternatives are analyzed with as much non-speculative information as possible, particularly regarding the availability of funds for cleanup. Thus, the State's argument that the NEPA process will be undermined if the GA settlement is approved is unpersuasive.

The State next argues that the GA settlement affects persons or states not involved in this proceeding, and that before any approval is granted, "due process considerations warrant notice and a meaningful opportunity to comment be given" to such persons or states "likely to be directly affected." State's Brief at 15. Further, the State submits that

the settlement "is certainly a major federal action affecting the human environment subject to NEPA which deserves full analysis of alternatives." *Id.* at 16. The State cites no authority in support of the foregoing.

The GA settlement involves the payment of up to $9 million to resolve this proceeding. Thus, it is conceded that GA's ability to fund other obligations and debts is reduced by that amount. However, the State's argument, if accepted, could lead to requiring that every creditor of GA be given notice and an opportunity to comment on the settlement. The fact of the matter is that any person who met standing requirements under the law could have sought intervention in this proceeding over three years ago, when a $9 million or $5.4 liability was not at stake, but an $86 million liability. The State has failed to demonstrate that due process, as that concept is embodied in the law, now requires notice to and comment by nonparties to this proceeding. The State has also failed to show how the acceptance of a settlement in an enforcement proceeding triggers NEPA requirements. To the contrary, the Commission's own regulations implementing NEPA provide that administrative enforcement actions are not subject to NEPA. 10 C.F.R. § 51.10(d). Accordingly, the State's arguments in this regard should be dismissed.

Finally, the State argues that "the public interest requires disclosure of information underlying the agreements to the States and persons directly affected." State's Brief at 16-17. Although the State is vague as to what information it has in mind, the Staff assumes that it is referring to proprietary information regarding GA's financial condition, since information "underlying" the GA settlement, including estimates of cleanup costs, SFC's

projected revenues, the amount of the GA settlement, and the nature of the case against GA have all been disclosed.

The State cites no authority for the proposition that the disclosure of information relating to GA's finances is a predicate to a finding that the settlement is in the public interest. To the contrary, courts have held that the financial condition of a party is not necessarily a consideration in assessing the adequacy of a settlement. *Gottlieb v. Wiles*, 11 F.3d 1004, 1014 (10th Cir. 1993). While it may be more obvious that the settlement is in the public interest if details of GA's finances were disclosed to the public, as the Court of Appeals has stated, such disclosure is not an absolute prerequisite to evaluating a settlement.

Furthermore, to the extent the State seeks the disclosure of all of the "information" the Staff or even GA considered in its settlement deliberations, any such information that would be subject to an attorney-client, attorney work product, or other privilege should not be subject to disclosure. In addition to violating well-established rules of confidentiality, to force disclosure of such "information" would clearly undermine the bargaining position of each respective party. For example, although the 1993 Order alleges certain facts and conclusions, there have been no findings as to any fact or legal conclusion. The Staff may be aware of certain information that GA is not, and vice versa, going not only to the assertions in the 1993 Order, but also perhaps to likely affirmative defenses. Such information may have been factored into the parties' evaluation of litigative risks and the settlement itself, during each party's internal deliberations and consultation with legal

counsel. Since discovery has not been completed, and indeed one of the reasons behind settlements is to avoid the time and expense of discovery and the litigation process, it would make no sense to now require discovery of such information.

In summary, the State has made no argument that would warrant a rejection of the GA settlement.

III. Judge Bollwerk's Questions

A. What is the Staff's best estimate of the total costs of decommissioning the facility?

The Staff has not independently made an assessment of the total costs of decommissioning the SFC facility, and will not be in a position to due so until after completion of the environmental impact statement process in another one to two years. SFC has provided cost estimates for various cleanup alternatives, which range from $24 million in "direct" costs to $174 million in "direct" costs.[29] In addition, as set forth in the Preliminary Plan for the Completion of Decommissioning and subsequent updates, SFC has estimated that there would be about $65 million in "indirect" costs from 1993 to 2003, some of which indirect costs have now been reduced over the past several years. If the groundwater is classified in the next several months as potable, the cost of decommissioning would be driven upwards substantially, due to additional remediation efforts that would be required with respect to the groundwater.

B. What is the Staff's present best estimate of (a) the maximum revenue that will be generated for facility decommissioning work under the ConverDyn

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[29] Decommissioning Alternatives Study Report, Enclosure 1, Vol. 1, Chapter 4, at 4-1 -- 4-9, attached to letter from J. Ellis to J. Hickey (Dec. 18, 1996).

agreement; and (b) the amount that would be available from other sources (not including funds generated by the proposed GA/staff settlement agreement)?

The Staff's best estimate of ConverDyn revenues remains approximately $72 million through the year 2003, and $17 million from other SFC sources. The Staff notes that these figures are based on updated numbers provided by SFC, even though the Staff has had an opportunity to examine some documentation regarding ConverDyn. The Staff further understands that SFC potentially could receive additional revenues after 2003, in amounts based on remediation expenditures as long as remediation is not completed, for the life of the ConverDyn arrangement, which is 99 years.

C. If the total funds available for decommissioning under the SFC and GA settlement agreements with the staff ultimately are insufficient to cover the total costs of decommissioning the Gore facility, (a) what, if any, additional cleanup mechanisms are available to complete decommissioning (e.g., Superfund); and (b) if there are additional cleanup mechanisms, would anything in the provisions of the GA/staff settlement agreement have an adverse impact on GA's liability, if any, under those cleanup mechanisms?

The Staff is unaware of additional cleanup mechanisms, based on a federal statute, to complete decommissioning beyond the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 42 U.S.C. §§ 9601-9675.[30] The Staff is aware of nothing in the GA settlement that would have any adverse impact on GA's liability, if any, with respect to Superfund.

D. To the best of the staff's knowledge, what is the status of the GA request for an IRS determination and when is an IRS determination expected?

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[30] There may be, however, actions based on the law of torts or other state law which could conceivably be brought by a private party.

The Staff's best information is that request for a IRS determination on the taxability of the funds contributed pursuant to the GA settlement is presently pending before the IRS. The Staff has no further information, directly or indirectly, concerning when an IRS opinion will be rendered. GA may be in a better position to respond to this question.

E. Why does [repayment of the outstanding lines of credit extended to SFC from GA] have an impact on payments due under the settlement agreement between GA and the staff?

The Staff's understanding is that repayment of the lines of credit may have a material impact on GA's cash position, which thus may have an impact on its ability to fund the trust provided for in the settlement on the applicable schedule attached to the settlement agreement.

CONCLUSION

The Staff continues to believe that the GA settlement is in the public interest, considering all of the facts and circumstances, and notwithstanding the arguments of the Intervenors and the State. Accordingly, LBP-96-24 should be affirmed by the Commission.

Respectfully submitted,

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Susan L. Uttal
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Dated at Rockville, Maryland
this 10th day of March 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE COMMISSION

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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN SUPPORT OF AFFIRMATION OF LBP-96-24" 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 hand delivery this 10th day of March 1997.

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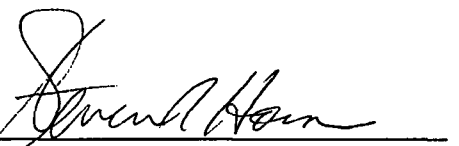

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