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November 12, 1996

John C. Hoyle, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

BY FAX: 301/415-1672

SUBJECT: Appeal From Initial FOIA Decision

Dear Mr. Hoyle:

On behalf of Native Americans for a Clean Environment ("NACE"), and pursuant to NRC regulations at 10 C.F.R. § 9.29, I hereby appeal the Nuclear Regulatory Commission's ("NRC's") October 10, 1996, denial decision in FOIA-96-336. That decision denies in part my request for copies of all documents in the NRC's possession which the Commission considered or reviewed in connection with its preparation of a Staff Requirements Memorandum ("SRM"), SECY-96-124, re: Financial Assurance for General Atomics Facilities (July 8, 1996).[1] The decision document in FOIA-96-336 withholds parts of two documents and the entire contents of five other documents on the grounds that they constitute confidential business (proprietary) information and/or predecisional information. The released documents contain only the barest information about the secret agreement. Virtually all substantive information has been blacked out or withheld.

As discussed below, the decision document fails to demonstrate that the requested documents are in fact exempt under Exemptions 4 and/or 5. Moreover, whether the documents satisfy the requirements for exemption from disclosure, the Commission nevertheless should exercise its discretion to order their disclosure, in order to cure the unmistakable and disturbing appearance that the NRC, in collusion with a licensee, is making secret law affecting the health and safety of the public.

Description of Known Information About Withheld Documents

NACE, along with the Cherokee Nation, is an intervenor in an enforcement proceeding before the Atomic Safety and Licensing

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[1] You released the SRM itself on September 23, 1996, in response to my appeal of September 6, 1996.

Board, in which General Atomics ("GA") and Sequoyah Fuels Corporation ("SFC") have contested a 1993 NRC enforcement order against them. The order requires GA and SFC to guarantee sufficient funding for the cleanup of the severely contaminated site of SFC's uranium processing operation. SFC and the NRC staff settled in 1995, and the Licensing Board approved the settlement. After about a year of negotiations, GA and the NRC staff submitted a proposed settlement agreement in July of 1996. The settlement recently was approved by two members of the Licensing Board, with a dissenting opinion by Judge Bollwerk. See LBP-96-24, Memorandum and Order (Approval of Settlement Agreement and Dismissal of Case) (November 5, 1996).

During the course of the litigation over the enforcement order, GA and the NRC staff repeatedly requested stays of discovery to provide them with more time to conduct settlement negotiations. Several of their motions for stays of discovery referred to the need to consider the impact of any proposed settlement between GA and the staff on the availability of decommissioning funds for GA's facilities in San Diego, California. For instance, in a May 6, 1996, joint motion for extension of the discovery stay, GA and the staff stated that:

> As has been discussed in earlier proceedings before the Board, the resolution of this litigation may have a spillover effect on matters which are outside the scope of this proceeding and which are outside the jurisdiction of this Board. To reiterate, GA holds NRC licenses for a number of facilities in San Diego, California, including two TRIGA reactors, and hot cell and fuel fabrication facilities, for which GA has uncontested decommissioning liabilities. Any commitment of funds by GA to the Gore facility in settlement of this proceeding may impact GA's responsibilities for its San Diego facilities. Any such impact must be weighed and considered by Staff not involved in the instant litigation, including Staff in the Office of Nuclear Reactor Regulation, as well as the Office of Nuclear Material Safety and Safeguards. Ensuring that the agency as a whole is aware of the larger picture involving GA has required, and continues to require, a significant amount of resources, and consequently, time. Thus, in addition to devoting energies to drafting settlement documents and negotiating final points, the Staff has been involved in focusing the agency as a

> whole on the various broader issues that the agency faces by reason of a settlement on the Sequoyah Fuels litigation. In particular, the agency must decide what may be appropriate courses of action if GA's voluntary contribution of resources to settle this litigation reduces its ability to comply fully with the regulations on financial assurance regarding the San Diego facility.

NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through June 14, 1996 at 2-3 (May 6, 1996) (emphasis added). In a subsequent discovery stay motion, GA and the staff represented that "the Commission has been provided a description of, and has until June 24, 1996, to object to the Staff's proposed course of action regarding the San Diego facilities." NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through July 1, 1996 at 2 (June 14, 1996).

GA and the staff asserted that although the issues raised in the staff's correspondence with the Commission are "outside the scope" of the enforcement proceeding, they "must be resolved" before the proposed settlement between GA and the staff could be executed. Id. at 3. They also contended that "[b]y presenting to the Commission issues relating to the San Diego facilities, the Staff is not seeking any prejudgment of any matter currently in litigation, including any potential settlement that may be offered concerning the Sequoyah Fuels Gore facility." Id. at 2, note 3.

On July 11, 1996, GA and the NRC staff presented a joint motion for approval of a settlement in the contested enforcement proceeding. NRC Staff's and General Atomics' Joint Motion for Approval of Settlement Agreement. The motion asserted, inter alia, that "because GA holds NRC licenses for facilities in San Diego, California, and thus has regulatory financial obligations with respect to those facilities, consideration had to be given to any impact a settlement in this proceeding might have on GA's responsibilities with respect to the California facilities." Id. at 2. GA and the staff also continued to assert "that matters involving the California facilities are outside the scope of this proceeding and the jurisdiction of this Board." Id., note 3.

In their comments on the proposed settlement agreement, NACE and the Cherokee Nation argued for disclosure of what appears to be a

global settlement which establishes the amount of decommissioning funding that GA will allocate to each of its several facilities. Intervenors' Opposition to Joint Motion for Approval of Settlement Agreement Between NRC Staff and General Atomics (August 9, 1996). As NACE and the Cherokee Nation pointed out, if factual assertions regarding GA's liability for its San Diego facilities and GA's ability to pay those costs have had any effect on the amount of the settlement regarding the SFC site, the accuracy and reliability of those assertions is directly relevant to the validity of the GA-NRC settlement agreement, and must be subject to evaluation by the Board and parties. Id. The Licensing Board rejected NACE's and the Cherokee Nation's arguments, however, finding that the NRC staff's consideration of GA's "license responsibilities" at its San Diego and other facilities was not within the Board's jurisdiction. LBP-96-24, slip op. at 16-17.

NACE also tried to obtain documents related to the NRC's secret global settlement with GA through the FOIA. On July 12, 1996, NACE filed a request for disclosure of the SRM. Although disclosure was initially refused, on appeal the document was released as a matter of agency discretion. Letter from John C. Hoyle, Secretary of the Commission, to Diane Curran, attorney for NACE (September 23, 1996).

On August 22, 1996, NACE filed a request for all documents which the Commission considered or reviewed in connection with its preparation of the SRM. The request was denied on October 10, 1996. It is not clear whether, in denying the August 22 request, the NRC FOIA office was aware of your September 23 decision to release the SRM.

Argument

In partially denying NACE's FOIA request, the NRC has failed to demonstrate that the withheld documents are exempt from disclosure under Exemptions 4 and 5. The denial decision is deficient in the following respects and must be reversed:

1) It is well-established that Exemption 5 does not protect instructions by high-level agency officials to their staffs. Schlefer v. United States, 702 F.2d 233 (D.C. Cir. 1983) (holding that authoritative opinions by agency's chief counsel, which affected agency's relationship with public and were binding on agency staff, were not exempt.) Here, the SRM conveys the Commission's approval of a staff proposal to implement SECY-96-124.

Thus, in effect, the SRM constitutes the Commission's instructions to the staff to carry out a certain plan regarding the distribution of GA's resources for decommissioning funding. However, although the SRM has been released, the document itself contains no instructions. Instead, it refers the reader to SECY-96-124. Thus, the contents of SECY-96-124 must be disclosed in order to reveal the nature of the Commission's instructions to its staff, and the basis for those instructions.

2) The decision documents states that documents withheld or partially withheld under Exemption 5 are exempt from disclosure because "[d]isclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process." However, by adopting SECY-96-334, the Commission turned it into a decision. That decision relaxes decommissioning funding requirements for GA's San Diego facilities.

The FOIA does not countenance the making of "secret law," as the Commission appears to have enacted here. Schlefer v. United States, 702 F.2d at 244. GA, like all other nuclear facilities, is subject to the NRC's decommissioning funding regulations. Until now, licensee compliance with those requirements has been an important matter of public disclosure and accountability. In this case, the limited information released under FOIA-96-124 indicates that GA is being excused from full regulatory compliance without any public accountability.

Although some documents have been withheld altogether and others are largely blacked out, the disclosed portions contain enough information to reveal that the NRC has agreed to a cap on GA's liability for the decommissioning of its San Diego facilities, regardless of what the cleanup may actually cost, and regardless of what GA's resources might be. This effectively constitutes a waiver of the decommissioning funding requirements, for which the NRC gave the public no notice or opportunity to request a hearing.

Under FOIA, the Commission may not keep a separate set of secret books for GA while publicly it claims to enforce the regulations fully. In compliance with FOIA, the Commission must disclose the details of the deal it made with GA to relax its decommissioning funding regulations. Moreover, Section 189a of the Atomic Energy Act and the Administrative Procedure Act require the Commission to publish public notice of the decision and the basis for the

decision. The Commission must also provide the public with an opportunity for a prior hearing before the decision is implemented.

3) To the extent that the NRC's denial decision was based on the rationale that documents related to the SRM are predecisional to the outcome of the SFC-GA enforcement proceeding, that rationale is inconsistent with LBP-96-24. As the Licensing Board has ruled, decommissioning funding issues related to GA's San Diego facilities are outside the "jurisdictional boundary" of the Licensing Board. LBP-96-24, slip op. at 16-17. In addition, in proposing the settlement, the staff and GA explicitly stated that they did not seek Commission "prejudgment" of the SFC-GA enforcement proceeding. NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through July 1, 1996 at 2. Thus, if the Licensing Board, GA, and the staff are correct, the SRM-related documents bear no relation to the outcome of the SFC-GA enforcement proceeding.

4) NACE believes that in fact, the disposition of decommissioning funding for the GA San Diego facilities is directly relevant to the GA-NRC staff settlement. Moreover, by secretly briefing the Commission on the total decommissioning funding "package" for GA's San Diego and SFC facilities, the staff engaged in illegal ex parte contacts which could influence the Commission's ultimate review of the SFC settlement. These unlawful and prejudicial contacts must be remedied by full disclosure of the documents presented to the Commission by the staff.

Although much of the documents have been blacked out, it is clear that the NRC staff and the Commission view the San Diego and SFC settlements as related. See letter from Seymour H. Weiss, NRC, to Keith E. Asmussen, GA at 2 (July 9, 1996) (staff apparently agrees to forbear from enforcement of decommissioning funding requirements against GA San Diego facilities, "provided" that GA enters into a settlement with respect to SFC site.) (A partially blacked out copy of this letter is included as Document 2 in Appendix B to FOIA-96-336.) While the Weiss letter appears to condition the San Diego settlement on GA's commitment to settle with the staff over SFC decommissioning costs, it is clear from GA's and the staff's delay in submitting the SFC settlement agreement that GA was unwilling to enter the SFC settlement until the Commission had approved the settlement regarding the GA facilities. See NRC Staff's and General Atomics' Joint Motion for Extension of Stay of Discovery Through June 14, 1996 at 2-3,

cited above at pages 2-3. Thus, the two settlements are inextricably related.

As the ultimate judges in this proceeding, the Commission may not make secret decisions about issues material to the outcome of the pending enforcement proceeding, based on secret information conveyed by the staff and GA in illegal ex parte contacts. As the U.S. Court of Appeals for the D.C. Circuit has observed, such ex parte contacts are:

> offensive in two fundamental respects: (1) They violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking [footnote omitted], and (2) they foreclose effective judicial review of the agency's final decision. [footnote omitted].

National Small Shipments, Etc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978). The agency must "inquire into the nature and source of all ex parte communications had in this controversy and to assure that any material so communicated is subjected to adversarial review at the hearing." Id. Accord, State of North Carolina, Environmental Policy Institute v. EPA, 881 F.2d 1250, 1258 (4th Cir. 1989), quoting United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519, 540, 542 (D.C. Cir. 1978) ("Only through disclosure of ex parte communications may we protect the public's 'right to participate meaningfully in the decisionmaking process' and 'the critical role of adversarial comment in ensuring proper functioning of agency decisionmaking and effective judicial review.'")

To remedy the fundamental taint to the fairness of the proceeding caused by such ex parte contacts, you must disclose all documents related to the SRM that were submitted to the Commissioners, and all documents that were generated by the Commission as a result of those unlawful contacts. See 10 C.F.R. § 2.781(f).

5) The NRC cites Exemption 4 as grounds for withholding a great deal of material, apparently related to the actual costs of decommissioning each facility, GA's resources, and the process and schedule for paying decommissioning costs. According to the NRC's boilerplate form, this information constitutes "confidential business (proprietary) information." However, the decision document gives no indication why the NRC has decided in this instance that all of this information -- which has traditionally

been available to the public, and which is highly important to public safety -- is now being withheld.

In fact, there appears to be little or no reason for withholding information about GA's decommissioning costs or its plan of payment. The SFC facility is now shut down, and thus the cost of decommissioning it can have no competitive significance for GA. Moreover, the San Diego facilities are due to close in 2 and 4 years, according to one of the disclosed documents. Thus, if GA ever had a competitive interest in hiding the cost of cleaning up those facilities, that interest is quickly waning if not gone.

6) In releasing the SRM, you cited the Justice Department's policy of maximizing openness and disclosure in government decisionmaking. That policy cries out for disclosure of the secret decommissioning funding deal the NRC made with GA. Whether or not the ex parte briefing of the Commission that is reflected in FOIA-96-336 ultimately influences the Commission's review of LBP-96-24, the entire adjudicatory process has been tainted by the appearance that the Commission has prejudged the case in a secret deal with GA. That secret arrangement affects not only the neighbors of the SFC facility, but the neighbors of GA's San Diego facility. It also generally undermines public confidence that the NRC is committed to fully enforcing the regulations, or to notifying the public when it intends to waive them. GA's unsubstantiated claim to a proprietary interest in keeping its decommissioning funding information a secret is heavily counterbalanced by the public's far greater and longer-term health and safety interest in knowing what the costs are of decommissioning GA's facilities, and how GA plans to pay those costs. Finally, the public, which has heavily subsidized GA's operations over the years (the exact amount of the subsidy is blacked out of SECY-96-124) deserves to know whether it must also pay GA's cleanup costs, as a result of the NRC's secret agreement to forbear from fully enforcing decommissioning funding requirements.

Conclusion

Accordingly, we ask that you exercise your discretion to order the release of all documents identified in FOIA-96-124.

Because it may bear on the pending enforcement proceeding, which NACE and the Cherokee Nation intend to appeal to the Commission, I have also mailed copies to the parties to that proceeding, as well as the Commissioners.

I look forward to receiving your response within twenty working ten days, as required by the FOIA.

Sincerely,

Diane Curran

cc: Lance Hughes, Director, NACE
Service list, ASLB enforcment proceeding