UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SEQUOYAH FUELS CORPORATION and GENERAL ATOMICS	)	Docket No. 40-8027-EA
	)	
	)	
(Sequoyah Facility in Gore, Oklahoma)	)	February 17, 1994
	)	

BRIEF IN SUPPORT OF GENERAL ATOMICS' MOTION FOR SUMMARY DISPOSITION OR FOR AN ORDER OF DISMISSAL

In support of its Motion for Summary Disposition or for an Order dismissing all claims against it that are contained in the Nuclear Regulatory Commission's Order of October 15, 1993, and pursuant to the Commission's Rules of Practice in 10 C.F.R. § 2.749 and § 2.730(d), General Atomics respectfully submits this brief.

INTRODUCTION

The Rules of Practice in 10 C.F.R. § 2.749 authorize a presiding officer to consider a party's motion for a decision in that party's favor on part of the matters involved in the proceeding. The NRC's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure.[1] Decisions arising under the Federal Rules thus may serve as

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[1] See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974).

guidelines to licensing boards in applying 10 C.F.R. § 2.749.[2] Under the Federal Rules, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[3] "Factual disputes that are irrelevant or unnecessary will not be counted."[4] Accordingly, a disputed factual issue in and of itself does not preclude summary disposition.

Facts that are material to the Board's determination of whether the NRC has jurisdiction over General Atomics are set forth in Annex A to General Atomics' Motion for Summary Disposition or for an Order of Dismissal and in the Affidavits of J. Neal Blue and Reau Graves, Jr. None of the facts is in dispute. When there is no genuine issue to any material fact, summary disposition is appropriate.[5] An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[6] There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for

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[2] Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 419 (1982), citing ALAB-443, supra, at 754.

[3] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[4] Id.

[5] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-660, 15 NRC 987, 1003 (1981), citing Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 453 (1980).

[6] Anderson, 477 U.S. at 248.

that party.[7] Accordingly, a dispute over a fact material to the decision does not preclude summary judgment in favor of the moving party unless the evidence could support a decision in favor of the non-moving party.

In its January 13, 1994 Memorandum (Posing Matters for Consideration at Prehearing Conference), the Atomic Safety and Licensing Board ("Board") noted that the October 15, 1993 Order ("October 15 Order") of the Nuclear Regulatory Commission ("NRC") "does not delineate the specific legal theory under which the agency has the authority to place this non-civil penalty financial liability upon [General Atomics]." At the January 19, 1994 Prehearing Conference, Judge James P. Gleason reiterated the point with the comment that "we do have some questions in our own mind about the theories supporting this case with respect to the participation of General Atomics . . . ." When given full opportunity to cite the legal basis for the NRC's assertion of its claim against a non-licensee -- a claim which he conceded is not based upon any deliberate misconduct by General Atomics -- counsel for the NRC responded that the NRC's "theory can be developing based upon facts that are later discovered . . . ." (See the excerpt from the Official Transcript of Proceedings of the January 19, 1994 Prehearing Conference, p. 106, attached at Tab A of this Brief).

The Board was correct in raising the fundamental issue of

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[7] Id. at 249.

jurisdiction. General Atomics submits that the NRC lacks jurisdiction to compel General Atomics to guarantee the financial obligation of Sequoyah Fuels Corporation and that for the reasons set forth below, General Atomics is entitled to a decision that as a matter of law the NRC lacks such jurisdiction.

The NRC's Rules of Practice in 10 C.F.R. § 2.730 also authorize a party to file motions addressed to the presiding officer. In addition to its Motion for Summary Disposition, General Atomics has filed a motion seeking a dismissal of the claims against it on the grounds that the NRC has otherwise failed to allege a legally cognizable claim against General Atomics, and that the NRC can prove no set of facts that would entitle it to impose a non-civil penalty financial liability upon General Atomics.

General Atomics further submits that the NRC is estopped from seeking a guarantee by General Atomics of the decommissioning and remediation costs of the Licensee and that if General Atomics is required to contest the NRC's October 15, 1993 Order in this proceeding, the results of which are likely to be ultimately reviewed by the NRC, it will be deprived of procedural due process rights guaranteed to it by the Constitution, the Administrative Procedure Act, and the NRC's own Rules of Practice.

Finally, General Atomics submits that this Board can and must resolve these threshold issues of law before the matter can proceed.

ARGUMENT

I. THE COMMISSION LACKS JURISDICTION TO COMPEL GENERAL ATOMICS TO GUARANTEE THE FINANCIAL OBLIGATION OF THE LICENSEE.

A. The statutory provisions upon which the NRC relies do not authorize it to assert the jurisdiction over non-licensees which is claimed here.

It is a fundamental principle of administrative law that an agency may exercise "only the powers granted by the statute reposing power in it." Pentheny, Ltd. v. Gov't of Virgin Islands, 360 F.2d 786, 790 (D.C. Cir. 1966). The principle has been repeatedly adopted by the U.S. Supreme Court:

> First, an agency literally has no power to act . . . unless and until Congress confers power upon it. Second, the best way of determining [agency authority] . . . is to examine the nature and scope of the authority granted by Congress to the agency.

Louisiana Public Service Commission v. F.C.C., 476 U.S. 355, 374-375, 106 S. Ct. 1890, 1901 (1986).[8]

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[8] See Lyng v. Payne, 476 U.S. 926, 937, 106 S. Ct. 2333, 2340 (1986) (same); Stark v. Wickard, 321 U.S. 288, 309-10, 64 S. Ct. 559, 571 (1944) ("[w]hen Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted"). See also, Killip v. Office of Personnel Management, 991 F.2d 1564, 1969 (Fed. Cir. 1993) ("An agency is but a creature of statute. Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress"); Sealed Air Corp. v. United States Int'l Trade Comm'n, 645 F.2d 976, 993 (3d Cir. 1981) ("Any authority delegated or granted to an administrative agency is necessarily limited to the terms of the delegating statute."); Gibas v. Saginaw Mining Co., 748 F.2d 1112, 1117 (6th Cir. 1984) (administrative agencies are vested only with

The Supreme Court has also recently emphasized that in any case involving the construction of a federal statute, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklow Drilling Co., 112 S. Ct. 2489, 2594, 120 L. Ed. 2d 379-388 (1992). Appropriate respect for legislative authority thus requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress. Office of Consumers Counsel v. Federal Energy Regulatory Comm'n, 655 F.2d 1132, 1152 (D.C. Cir. 1980); State of New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969).

Whatever may be the scope of the NRC's authority and discretion on matters over which it has undisputed subject matter jurisdiction over its licensees, the question presented here is whether, under the unique circumstances that exist in this proceeding, the NRC has jurisdiction over General Atomics. In short, does the authority delegated by Congress to the NRC to issue orders, give the NRC such broad power over its licensees, that it can impose an $86 million non-civil penalty financial liability upon the corporate parent of a licensee, when there is no claim of

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the authority given to them by Congress), cert. denied, 471 U.S. 116, 105 S. Ct. 2357 (1985); Atchison, Topeka & Santa Fe Ry. Co. v. Interstate Commerce Comm'n, 607 F.2d 1199, 1203 (7th Cir. 1979) (same).

illegal or intentional misconduct against either the licensee or the parent, and where, with respect to the licensee's regulated site and activities, the parent is not a licensee, is not engaged in activities within the subject matter jurisdiction of the NRC, and does not possess or use regulated source materials?[9] Clearly, it does not.

In its October 15 Order, the NRC alleged as a matter of fact that it has jurisdiction over General Atomics for two reasons. First, the NRC asserted that the individual members of the Commission reasonably relied upon statements in the form of "guarantees" made by the Chairman of General Atomics (October 15 Order, pp. 3, 13, 16, 19-21). Apparently, the NRC is seeking to enforce the alleged "guarantees" under some form of estoppel theory. At the Prehearing Conference on January 19, 1994, however, counsel for the NRC advised the Board that "the Staff at this time is not relying upon a contract or quasi-contract theory stemming from purported reliance by the Commission on statements of General Atomics" (see Tab A, pp. 106-107).

Second, the NRC asserted in its October 15 Order that for the purposes of this matter, General Atomics and Sequoyah Fuels Corporation ("Licensee") are one and the same because General Atomics has "de facto control" over the day-to-day business of the

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[9] General Atomics does have a license from the NRC for its TRIGA reactors, used in training, research and isotope production, and for its use of source materials in research and development, but it is not a licensee of the NRC in connection with any aspect of the Sequoyah Fuels Corporation Facility in Gore, Oklahoma, nor does it possess or use regulated source materials in connection with that facility.

Licensee (October 15 Order, pp. 14-15, 19-21). While the Order is not entirely clear, the NRC is presumably seeking to "pierce the corporate veil" that separates the Licensee and General Atomics in order to compel the latter to guarantee the financial obligation of the former. This was made slightly more clear by counsel for the NRC at the January 19, 1994 Prehearing Conference when he stated that the NRC's legal theory is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . . ." (See Tab A, p. 107).

The NRC, significantly, has not alleged any form of illegal conduct or intentional misconduct by General Atomics. The October 15 Order is devoid of any such claim. At the January 19, 1994 Prehearing Conference, counsel for the NRC declared that the NRC is "not charging deliberate misconduct on the part of any party . . ." (See Tab A, p. 106).

As the basis in law for its assertion of jurisdiction over General Atomics, the NRC cites sections 62, 161b, 161c, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and its own regulation in 10 C.F.R. § 2.202 and 10 C.F.R. Part 40 (Order, p. 23). Of the seven statutory provisions relied upon by the NRC, four are simply inapposite to the claims asserted against General Atomics in this proceeding.

Section 62 requires a license for the transfer of source materials. The NRC has made no allegation whatsoever, that in

connection with the Licensee's Facility, General Atomics has engaged in the activities described in Section 62 or that it has failed to obtain any required license.

Section 161 generally relates only to the general subject matter jurisdiction of the NRC, and not with its personal jurisdiction. It deals with the matters the NRC has been authorized to regulate and how they will be regulated, not the individuals or companies that are subject to that regulation. Section 161c merely grants the NRC authority to conduct investigations. Section 161o addresses the subject of inspections and records of licensed activities. It is undisputed that with respect to its ownership of Sequoyah Fuels Corporation, no activity of General Atomics is licensed by the NRC. Section 182 defines certain requirements which must be met by applicants for a license authorized by the NRC, including submission of technical and other information. Section 186 authorizes the NRC to revoke a license already issued for any material false statement made in the application for the license. It further authorizes revocation on the basis of facts which would have caused the NRC to refuse to grant the license originally, or because a particular licensee has failed to comply with a condition upon which its license was issued, a regulation of the NRC, or another term and provision of the statute. Neither provision authorizes the NRC to take punitive action against or to otherwise regulate non-licensees.

The two remaining statutory bases upon which the NRC purports to find jurisdiction over General Atomics are Sections 161b and

161i of the Atomic Energy Act. In relevant part, Section 161b authorizes the NRC to establish

> . . . by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and by-product material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

In addition, the NRC is authorized to

> . . . prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235; . . . .

42 U.S.C. § 2201(b) (emphasis added). That part of the statute first quoted dates to the original enactment of the Atomic Energy Act in 1954. The second part quoted was added by Congress in 1990. Neither part delegates to the NRC authority to regulate non-licensees in the circumstances that exist here. Even if the assertion in the Order that the NRC reasonably relied on statements made by the Chairman of General Atomics were true -- which General Atomics emphatically denies -- the assertion cannot conceivably be construed to be part of an order governing General Atomics' "possession and use" of nuclear material, or "control, ownership, or possession" of nuclear equipment or devices. At the most, the October 15 Order relates to an alleged (contractual or equity) obligation of General Atomics to pay money.

An allegation of personal jurisdiction under a "piercing the corporate veil" or "de facto control" theory is equally unsupported

by Section 161b. The NRC does not even allege that General Atomics possesses or owns or uses regulated source material in connection with the Licensee's Facility at Gore, Oklahoma. In fact, it does not. In order to make Section 161b fit its control theory, therefore, the NRC would have to contend that General Atomics, as a result of its purported control over the Licensee, had constructive "possession and use" of nuclear material, subjecting it to NRC jurisdiction. This argument in turn would require a construction of the words "possession and use" in a fashion that would make them apply to not only those who have actual, tangible "possession and use" of nuclear material, such as licensees and their employees, but also to all others who, in the subjective judgment of the NRC, stand in sufficiently close legal relationship with a licensee who does have actual physical possession and use of such material.

Any such interpretation of the statute would require the disregard and outright breach of settled rules of statutory construction. In amending Section 161b in 1990 to give the NRC jurisdiction over certain nuclear devices and equipment, Congress used substantially different language to describe the scope of the activity it wished to be regulated. The "control, ownership or possession" of devices or equipment is what is now subject to regulation. In contrast, the first prong of Section 161b only covers "possession or use." Under the forced interpretation urged by the NRC, the words "possession and use," in the first prong and the use of the words "control" and "ownership" in the second prong,

would be redundant. The word "possession" would already bring with it those concepts.

The Supreme Court has adopted the black-letter principle of statutory construction requiring that "effect" be given, "if possible, to every word Congress used." Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S. Ct. 2326, 2331 (1979). More specifically, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983), quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

The application of the principle in this matter is clear. Legal control by one corporate entity over another which possesses regulated material, cannot be equated with "possession" of the material under Section 161b. Otherwise, the "control, ownership and possession" language of that section would necessarily be either a meaningless redundancy, or a drafting mistake.

The relevant part of Section 161i authorizes the NRC to prescribe regulations and orders that it deems necessary

> to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property; . . .

42 U.S.C. § 2201(i)(3). By its own terms, Section 161i is limited to "any activity authorized pursuant to this chapter," i.e., to licensed activities. The inevitable implication is that Section

161i is also limited to the licensees who engage in the licensed activities. One court has unequivocally ruled that the "very language of section 161(i)" as well as the "whole of the legislative history" demonstrates that it deals only with those who are subject to the authority of the Atomic Energy Commission (and its successor, the NRC), i.e., to licensees. Reynolds v. United States, 286 F.2d 433, 438 (9th Cir. 1960).

Even if the Ninth Circuit in Reynolds had found the parameters of Section 161i to be broader than it did, i.e., that the section permitted a cause of action against at least some classes of non-licensees in some circumstances, none of the connections alleged by the NRC in its October 15 Order would be sufficient to satisfy the requirement of a nexus between the statute and an "authorized (licensed) activity." While it is undisputed that the Licensee, Sequoyah Fuels Corporation, has engaged in licensed activities, none of the conduct attributed to General Atomics in the October 15 Order involved a licensed activity.

Not one word of the Atomic Energy Act addresses the conduct of a licensee's parent company which does not itself involve a violation of the NRC regulatory scheme. Not one word of the statute authorizes the enforcement as a matter of contractual obligation, of statements made to the NRC by a representative of a non-licensed parent of a licensee. The October 15 Order contains no allegation that either the alleged "de facto control" of its licensee-subsidiary by General Atomics or the refusal of General Atomics to voluntarily accept without condition the responsibility

of "guaranteeing" the financial obligations of its licensee-subsidiary, constitutes a breach of an existing NRC regulation.

A refusal by a non-licensee parent company to voluntarily provide a financial assurance (guarantee) of a very large financial obligation of one of its subsidiary companies cannot, under any conceivable construction, be sufficient to constitute a violation of the statute. It is the conduct of licensees that is regulated by the statute. Any other conclusion must presume a grant of authority never even imagined, much less intended, by Congress.

General Atomics recognizes, of course, that on occasion in the past, the NRC has asserted that its enabling statute is similar to that of the Federal Communications Commission ("FCC") and that the NRC has further relied on certain judicial interpretations of the Federal Communications Act of 1934, as evidence that its own authority is very wide in scope. This bootstrap argument has no merit here. The cases usually cited are either limited to FCC rulemaking authority applicable to its licensees, or to the authority of the FCC to issue interim relief and interim orders to its licensees, or to the FCC's general ordering authority over its licensees, or the authority of the FCC (based upon the plain language of its enabling statute) over non-licensees which are themselves clearly engaged in activities within the FCC's subject matter jurisdiction.[10]

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[10] In United States v. Southwestern Cable Co., 392 U.S. 157, 88 S. Ct. 1994 (1968), for example, the Court described the broad authority over all forms of electrical communications which was delegated to the FCC by the Communications Act of 1934. It was undisputed that the respondent community antenna television system

Whatever may be the power of the NRC over its licensees and activities which fall clearly within its subject matter jurisdiction, the statute upon which it relies for its claim against General Atomics does not authorize it to assert jurisdiction over non-licensees in the circumstances which are present in this matter.

B. Congress never intended to delegate the authority which the NRC seeks to assert over General Atomics.

The words of the NRC's enabling statute regarding the scope of its authority are not ambiguous, but even if they were, the NRC could take no comfort from an analysis of congressional intent regarding its passage. It was not and could not be the intent of

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companies were engaged in "communication by wire or radio," but the respondents had argued that they were neither common carriers nor broadcasters and did not, therefor, fall within the regulatory categories created by the Act. Observing that when Congress passed the Communications Act it could not have foreseen the development of community antenna television systems, the Court nevertheless held that since the activities of the respondents were admittedly communications, those activities fell within the FCC's regulatory authority.

In the instant matter, of course, it is undisputed that with respect to the Licensee's Facility, General Atomics is not a licensee of the NRC and that it has not filed an application to become one. The NRC has not even alleged that General Atomics is engaged in activities in connection with Sequoyah Fuel Corporation's Facility that normally require a license. Rather, General Atomics is merely a third-tier parent company of a licensee which is engaged in such activities. Moreover, in passing the Atomic Energy Act of 1954, Congress did foresee the investment of companies like General Atomics in the nuclear industry and it drafted the Act to encourage such investment by limiting the scope of the NRC's (AEC's) jurisdiction over non-licensees.

Congress to delegate to the NRC unrestrained authority to prosecute administrative claims that involve monetary obligations only, that are based on common law theories of liability, and that are asserted against non-licensees in the circumstances that exist here.

The Atomic Energy Act of 1954 does give the NRC power to authorize private industry to participate in developing peaceful uses of atomic energy. The importance of this legislative policy objective is apparent from the Ninth Circuit's opinion in Reynolds v. United States, supra:

> The first event leading to the passage of the Atomic Energy Act of 1954 was a message from the President of the United States to Congress on February 17, 1954.
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> * * *
>
> Speaking of domestic development of atomic energy the President said 'in this undertaking, the enterprise, initiative and competitive spirit of individuals and groups within our free economy are needed to assure the greatest efficiency and progress at the least cost to the public.'
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> * * *
>
> He went on to say that . . . 'I recommend amendments to the Atomic Energy Act which would: . . . 2. Permit private . . . ownership . . . of atomic reactors and related activities, subject to necessary safeguards and under licensing systems administered by the Atomic Energy Commission.'
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> * * *
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> Thus it appears that one of the two major purposes of the proposed new act was to provide for increased private participation in the atomic energy program.

286 F.2d at 435-436.

The legislative policy objective is also apparent from a proposed draft of the 1954 amendments to the Atomic Energy Act which is quoted with approval by the court in Reynolds:

> Widespread participation and investment will speed the

> Nation's progress toward this objective [the development of industrial applications of atomic energy].

286 F.2d at 436 (emphasis added).

It is not surprising, therefore, that the only statutory provisions cited by the NRC as the legal basis of its October 15, 1993 Order, are devoid of any reference to either parent companies of licensees or to non-licensees who do not engage in conduct that constitutes a licensed activity. It could not be otherwise. If the words of the Act permitted a broad exercise of jurisdiction by the NRC over non-licensee parent companies such as that alleged by the NRC in its October 15 Order, the Act's legislative purpose -- i.e., "widespread participation and investment" by private industry in the peaceful uses of atomic energy -- would be defeated ab initio. No member of private industry could be reasonably expected to invest and participate in the peaceful uses of atomic energy if, by making such an investment, it would (1) subject itself to the actions of a federal agency seeking to expand its jurisdiction in an adjudicatory proceeding, rather than through the more predictable mechanism of the rule-making process, and (2) be governed and regulated in the same manner and to the same extent as a licensee engaged in an activity that Congress clearly intended to regulate. Indeed, if the authority now claimed by the NRC had been delegated by Congress, few companies would have the courage to enter or to remain in the nuclear industry at all, since it would be impossible to predict just what legal relationships with a licensee would fall within the scope of the NRC's jurisdiction.

The NRC does not rely upon Section 234 of the Atomic Energy Act (42 U.S.C. § 2282) for its claim of jurisdiction over General Atomics, but that section is relevant to any discussion of legislative policy regarding the NRC's authority over non-licensees. Section 234 was passed by Congress in 1969, some 15 years after the Act first became law. The provision authorizes the NRC to issue civil monetary penalties and, in contrast to Section 161, it specifically addresses the jurisdiction of the NRC over non-licensees.

> Any person who (1) violates any licensing provision of section 2073, 2077, 2092, 2093, 2111, 2112, 2131, 2133, 2134, 2137, or 2139 of this title or any rule, regulation or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 2236 of this title, shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed $100,000 for each such violation.

42 U.S.C. § 2282(a)(emphasis added).

On its face, the provision obviously applies to persons who do not have licenses. It does not, however, give power to the NRC to issue orders to non-licensees.[11] Moreover, even the jurisdiction over non-licensees that was conferred by the new provision was limited. Congress was clearly concerned only with certain specific types of non-licensees, namely, those who violate the licensing

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[11] It is noteworthy that the NRC previously amended its regulations in 10 C.F.R. Part 2 to allow the issuance of notices of violation and civil penalties to certain unlicensed persons under Section 234. At the time, it did not revise 10 C.F.R. § 2.202, relating to orders. Thus, while notices to non-licensees can be issued, orders (such as that involved here) cannot.

provisions of the Atomic Energy Act. In explaining why the new legislation was necessary, the Joint Committee on Atomic Energy declared that:

> . . . Several points concerning the bill as reported are worthy of special note. For one thing, this new authority of the AEC to impose civil monetary penalties would not be confined to AEC licensees. Any person, whether or not an AEC licensee, would be subject to such a penalty if he committed a violation of the type covered by this legislation . . . . Otherwise it would be possible, for example, for a person who neglected to obtain a license, or who once had a license but allowed it to expire, to be immune to any penalty under the legislation.

S. Rep. 553, 91st Cong., 1st Sess. (1969) (emphasis added), reprinted in 1969 U.S.C.C.A.N. 1607, 1618. The new authority is limited to circumstances in which a non-licensee has committed a violation "of the type" covered by the legislation. In the instant matter, of course, the NRC does not seek any form of monetary penalty. Rather, it seeks nothing less than the power to take private property of a non-licensee which is not even alleged to have committed some form of "violation."

The fact that Congress did not intend to grant the NRC any broader authority is also apparent in the Joint Committee's reference to the NRC's pre-existing authority, which was clearly limited to the suspension or revocation of a previously issued license or the issuance of a cease and desist order.

> In some instances, for example, the revocation of a license or suspension thereof may be too harsh a penalty under the circumstances. Moreover, in certain cases suspension may penalize the licensee's employees through the loss of income without having any significant impact on the licensee itself. At the present time, the AEC in

> such cases essentially must choose between issuing a revocation or suspension order, on the one hand, or, on the other hand, issuing a cease and desist order.

Id. at 1616.

The limited jurisdiction over non-licensees that was delegated by Congress also restricted the enforcement power of the NRC. Civil penalties can only be enforced by the initiation of a civil action in an Article III court by the Attorney General, and, in such actions, the penalized party is entitled to a trial de novo. NRC v. Radiation Technologies, Inc., 519 F. Supp. 1266, 1277-1286 (D.N.J. 1981).

Because it was not the intent of Congress to delegate to the NRC the kind of authority over non-licensees which it seeks in this proceeding, no such authority can be fairly implied from the Atomic Energy Act. See Walker v. Luther, 830 F.2d 1208, 1211 (2d Cir. 1987) ("As a matter of statutory construction, statutes granting power to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication."). Congress has repeatedly considered the scope of the NRC's jurisdiction, and after consideration, it has narrowly crafted and expressly defined the limited situations in which the NRC has personal jurisdiction over non-licensees. It is a fundamental rule of statutory construction that when a statute refers to certain persons, all omissions must be understood as exclusions. 2A Sutherland Statutory Construction § 47.23 at 216 (5th ed. 1992). Moreover, implied exceptions to a statutory scheme will be found only to prevent absurd results or consequences

obviously at variance with the policy of the enactment as a whole. United States v. Rutherford, 442 U.S. 544, 551-552, 99 S. Ct. 2470, 2475 (1979).

Notwithstanding its current position in the instant proceeding, the NRC has previously recognized that its jurisdiction has definite limits. In State of New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir. 1969), the court was asked to review an order of the Commission granting a construction permit for a nuclear power reactor. New Hampshire had challenged the order on the ground that the Commission erred when it refused to consider, as outside its regulatory jurisdiction, evidence of possible thermal pollution of the Connecticut River as a result of the discharge of cooling water by the applicant's facility. Relying on the legislative history of the Atomic Energy Act, the Commission had rejected the challenge.

Acknowledging that the Atomic Energy Act is replete with many broad references to "health and safety of the public" and that the case presented a serious gap between the dangers of modern technology and the protections afforded by law, the court nevertheless concluded that the atomic safety and licensing board and the Commission properly refused to act beyond the authority granted by Congress. The analysis employed by the court is particularly relevant here:

> Tempting as it may be, we do not presently feel that we fulfill our function responsibly by simply referring to the dictionary [for definitions of 'health' and 'safety']. This is perhaps a more legitimate occasion than most for invoking Mr. Justice Holmes' aphorism that 'A page of history is worth more than a volume of logic.'

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> Tempting as it may be, we do not presently feel that we fulfill our function responsibly by simply referring to the dictionary [for definitions of 'health' and 'safety']. This is perhaps a more legitimate occasion than most for invoking Mr. Justice Holmes' aphorism that 'A page of history is worth more than a volume of logic.'

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> Or, conceding that there is a gap . . . between the law . . . and a demonstrable social interest, we may well be mindful of Mr. Justice Cardozo's admonitory gesture, "Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action."
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> . . . the very fact that complex questions of jurisdiction among federal agencies, of federal-state relations, of procedure, and even of specialized staff and appropriations must be resolved indicates the inappropriateness of any judicial fiat . . ..

406 F.2d at 173, 176.

A similar recognition of the importance of resisting a tendency to exceed the intent of Congress was made by Judge Learned Hand in his dissenting opinion in Spector Motor Service v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944). Judge Hand observed that it is not desirable for a lower court to "embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." It is even less desirable for an administrative agency to unreasonably imply broad, new parameters on its jurisdiction -- especially when the implication does not have, and is very unlikely to ever have, legislative sanction.

It is not clear from the allegations of the October 15 Order just what social interest the Order seeks to advance, other than the generalized desire to have someone, somewhere guarantee the Licensee's decommissioning and related costs. Nor has it been demonstrated that there is a gap between the law and this (or another) social interest. Even if there had been such a showing, it is beyond the power of the NRC to eliminate the gap by an

assertion of jurisdiction over non-licensees in circumstances such as these, unless and until Congress elects to give it such power.

The analysis thus far has focused on the words and legislative history of the Atomic Energy Act. Additional evidence that Congress did not intend for the NRC to exercise the kind of jurisdiction over non-licensees which it claims here, may be found in an analysis of the Energy Reorganization Act of 1974 (the "Reorganization Act"). Section 206 of that Act, 42 U.S.C. § 5846, includes a unique reporting and penalty provision which is applicable to certain, specified non-licensees ("Any individual director, or responsible officer of a firm constructing, owning, operating or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended, or pursuant to this [Act]").

If the NRC's existing authority had included the power to issue orders to and to penalize all non-licensees, it would have been unnecessary for Congress to adopt Section 206. The legislative history of section 206 makes clear, however, that "[t]he Atomic Energy Act contains no similar provisions requiring the reporting of defects and noncompliances, subject to civil or criminal penalties." 1974 U.S.C.C.A.N., 93rd Cong., 2d Sess., vol. 3 at 5528. Neither the rulemaking authority nor the ordering authority of the NRC was expansive enough to reach the non-licensees who are now the subject of Section 206.

The fact that Section 206 of the Reorganization Act is nothing more than a limited departure from the narrowly crafted

jurisdiction delegated to the NRC by the Atomic Energy Act was fully recognized by the NRC in a 1983 rule-making issuance of notices of violations to non-licensees:

> in general, the Commission's regulatory authority is limited to NRC licensees or persons who are required to obtain a license under the Atomic Energy Act of 1954, as amended, or the Energy Reorganization Act of 1974 (ERA). However, in some regulatory areas, the Congress has extended the Commission's statutory authority to include non-licensees as well as licensees.

48 Fed. Reg. at 44,170 (Sept. 28, 1983). The NRC noted that some commentators to the proposed rule making had been concerned about the use of the open-ended phrase "any person subject to the jurisdiction of the Commission," and responded by stating that the intent of the regulation was not to attempt to "expand" existing authority granted by Congress, but rather to provide for issuance of notices to "those entities, in addition to those licensed by the Commission, which must comply with certain regulations promulgated by the Commission pursuant to its statutory authority." Id. at 44,171. It is also important to note that since Congress passed Section 206, it has not elected to expand the limited personal jurisdiction which that section confers.

Additional evidence of the desire of Congress to carefully limit the jurisdiction of the NRC over non-licensees may be found in Section 210 of the Reorganization Act, 42 U.S.C. § 5851(a). That carefully crafted "whistleblower" protection provision authorizes the NRC to regulate the conduct of unlicensed "employers" engaged in certain specified activities. The language of the statute is measured, however, and nothing in that section

would support a broader claim by the NRC of personal jurisdiction over other types of non-licensees.

For all of these reasons, the absence in those statutes which govern the NRC's limited jurisdiction of the kind of authority over non-licensees which the NRC seeks in this proceeding must be understood and treated as an intentional exclusion by Congress. No exception to the statutory scheme over non-licensees that was adopted by Congress can be reasonably or fairly implied by this Board or by the NRC. Any such implication would not only not prevent, it would actually require, absurd results and consequences obviously at variance with the policy objectives of Congress.

C. By their own terms the NRC's regulations do not apply to General Atomics and to any extent that they appear to, the regulations are void since they cannot confer any greater authority than that granted by Congress.

In addition to the sections of the Atomic Energy Act discussed above, the NRC relies upon its own regulations in 10 C.F.R. § 2.202 and 10 C.F.R. Part 40 for its assertion of personal jurisdiction over General Atomics. In 1991, the NRC amended the regulation at § 2.202 to revise its procedures for issuing orders to non-licensees who are "otherwise subject to the Commission's jurisdiction." The amendment was further designed to put non-licensees on notice that "they may be subject to enforcement action (1) for willfully causing a licensee to violate any of the Commission's requirements or (2) for other willful misconduct that

(a) arises out of activities within the jurisdiction of the NRC and (b) places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety." 56 Fed. Reg. 40,664 (Aug. 15, 1991).

In promulgating the new rule, the NRC claimed broad authority over any corporation which "engages in conduct within the Commission's subject matter jurisdiction." Id. The examples which it gave to illustrate the scope of its claimed jurisdiction, however, required a direct link to a licensed activity,[12] and included those who possess or use regulated material as defined by Section 161b of the Atomic Energy Act, id. at 40,666; employees of a licensee or other persons who perform activities at a licensee site, id. at 40,669; those persons who in the past had engaged in licensed activities, id.; and certain persons who deliberately engaged in misconduct which caused, or threatened to cause, a licensee to violate NRC regulations. Id. at 40,666. The final rule adopted by the NRC expressly limits its effect to a limited class of non-licensees, namely, "any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, or a licensee." 10 C.F.R. § 40.10.

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[12] "Licensed activity" was defined broadly to encompass "all of those activities that a licensee, employees of a licensee, or a licensee's contractors, subcontractors and employees of contractors or subcontractors, perform to permit the licensee to carry out activities licensed by the Commission . . . ." 56 Fed. Reg. 40,665.

The 1991 amendments are thus grounded upon a tangible connection between specifically defined classes of non-licensees and conduct which could cause a violation of NRC regulations regarding a licensed activity. The NRC's October 15 Order alleges no such link. The NRC has not alleged that General Atomics caused the violation of any NRC regulation, nor has it alleged that General Atomics is itself engaged in any willful misconduct in a licensed activity. Thus, by their own terms, and irrespective of any challenge to their basis in law and applicability to other non-licensees in other circumstances, the NRC's regulations at 10 C.F.R. § 2.202 do not give it jurisdiction over General Atomics.

To any extent that the NRC's regulations appear on their face or otherwise serve to give it apparent jurisdiction over General Atomics, the regulations are invalid. No rule or regulation can confer on an agency any greater authority than that conferred under its governing statute. Killup v. Office of Personnel Management, 991 F.2d at 1569; Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S. Ct. 468, 471 (1988); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14, 96 S. Ct. 1375, 1391 (1976); Office of Consumers Counsel v. Federal Energy Regulatory Comm'n.

D. The attempt by the NRC to stretch its jurisdiction far enough to encompass a non-licensee in these circumstances is arbitrary and so unreasonable as to be unlawful even if it were not obviously beyond the NRC's statutory authority.

It requires no great citation of authority to state that arbitrary powers may not be conferred on an administrative agency. In conferring adjudicatory and rulemaking powers, Congress cannot leave the determination of matters to the uncontrolled discretion of the agency. Rather, it must declare a policy and fix a limit to control the agency's discretion, and the absence of guiding standards may render a statute unconstitutional. A statute that reposes authority in an administrative agency to make determinations affecting important rights of individuals must necessarily, therefore, be sufficiently definite and clear to warn those potentially affected of the conduct to which the statute attaches serious consequences. Jordan v. De George, 341 U.S. 223, 71 S. Ct. 703-04 (1951). Otherwise, the statute is "void for vagueness." Similarly, conduct which will violate an administrative rule or regulation must be defined in advance with sufficient specificity to warn potential offenders of the proscribed conduct.

By its October 15 Order, the NRC attempts to hold General Atomics jointly and severally liable with the Licensee for (1) providing "funding to continue remediation of existing contamination" at the Licensee's facility, and (2) providing "financial assurance for decommissioning." The Order further

purports to require General Atomics to provide "financial assurance for decommissioning and remediation in the amount of $86 million" through one of three specific methods. The only factual bases relied upon for the assertion of such broad authority are (a) allegations by the NRC that the individual members of the NRC reasonably relied upon statements in the form of "guarantees" by the Chairman of General Atomics of such funding, and (b) allegations that for the purposes here, General Atomics and the Licensee are one and the same because the former has "de facto control" over the latter.

Four conclusions are beyond dispute. First, neither the Atomic Energy Act nor the Energy Reorganization Act expressly authorize the NRC to assert personal jurisdiction over a non-licensee in circumstances such as those which are present in this matter. Second, no court of law has held that the NRC has the personal jurisdiction which it is attempting to assert over General Atomics here. Third, no rule or regulation of the NRC expressly identifies any conduct as the type of conduct which, if engaged in under the circumstances that exist in this matter, will subject a non-licensee to the jurisdiction of the NRC. Fourth, the NRC has not engaged in any form of rule-making process which would define in advance, and with sufficient specificity, the kind of conduct by non-licensees that would subject then to the kind of liability claimed here by the NRC against General Atomics. The attempt by the NRC to hold General Atomics jointly and severally liable for a major financial obligation of the Licensee, without first creating

in advance clear standards by which General Atomics and other non-licensees could gauge and control their conduct, is, therefore, arbitrary, and so unreasonable as to violate the due process rights of General Atomics.

E. The NRC's decision in the Safety Light Corporation case does not, and could not, independently establish its jurisdiction over General Atomics.

In its February 8, 1994 Supplemental Petition to Intervene, Native Americans for a Clean Environment ("NACE") has argued broadly that the NRC has jurisdiction over General Atomics as a result of the NRC's own decision in Safety Light Corporation (Bloomsbury Site Decontamination), ALAB-931, 31 NRC 350 (1990). The NRC cannot, of course, carve out new parameters of its jurisdiction independent of a legislative delegation of authority. Moreover, the facts and jurisdictional grounds of the Safety Light case were so different from those in the instant matter that it raises the question of why the case was cited at all.

In Safety Light, an NRC license was unlawfully transferred through an "elaborate and complex corporation restructuring" and a subsequent sale. A licensing board found that "there was not even an attempt [by the companies involved] to comply with the mandatory requirements" of Section 184 of the Atomic Energy Act, which prohibit the transfer of a license without NRC consent. The NRC was not notified of the sale prior to its consummation and it never gave its approval to the transaction. The NRC concluded that that

fact, coupled with the 100 percent ownership of the licensee by the newly formed "parent" company, brought the parent within the jurisdiction of the NRC.

In the instant matter, no part of the NRC's October 15 Order is based on Section 184 and there is no claim whatsoever of any illegal transfer of a license. Nor could there be. It is undisputed that for several weeks prior to the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee Corporation to Sequoyah Holding Corporation, the NRC Staff and representatives of General Atomics discussed the subject. It is also undisputed that as part of its review of the proposed transfer the NRC performed a financial review to determine whether the change would affect the financial resources of the Licensee for safely operating the plant and for the future decommissioning of the Sequoyah Facility (see Appendix 1 attached to Annex "A" of General Atomics' Motion for Summary Disposition or for an Order of Dismissal.). By letter of October 18, 1988 (attached to Annex A of General Atomics' Motion as Appendix 2), Mr. Reau Graves, Jr., the President of Sequoyah Holding Corporation, formally and expressly asked for the consent of the NRC to the transfer of the control of Sequoyah Fuels Corporation. It is undisputed that the NRC approved the transfer of control. (see Appendix 4 to Annex "A" of General Atomics' Motion).

For all these reasons, the NRC clearly lacks jurisdiction to compel an unlicensed company -- which is not engaged in licensed activities, which does not use or possess regulated source

materials in connection with the activities of a licensee, and which has not engaged in deliberate misconduct -- to guarantee the financial obligation of the licensee. In order to reach this conclusion, it is not necessary for the Board to reach, much less decide broader issues, such as whether the NRC has power to order a non-licensee to cease deliberate conduct which is causing a licensee to breach a NRC regulation or order; or whether it has power to order a non-licensee to cease deliberate conduct which threatens to cause a licensee to breach a NRC regulation or order; or whether it has power to order a non-licensee to cease a deliberate breach of some obligation directly imposed by the NRC's statutes or regulations. It would only have to rule, as it must now, that the NRC has not been vested by Congress with personal jurisdiction over non-licensees in the circumstances that are present in this matter.

II. THE NRC HAS FAILED TO STATE A LEGALLY COGNIZABLE CLAIM AGAINST GENERAL ATOMICS AND IT CAN PROVE NO SET OF FACTS THAT WOULD ENTITLE IT TO IMPOSE A NON-CIVIL PENALTY FINANCIAL LIABILITY AGAINST GENERAL ATOMICS.

Not deterred by either the absence in its enabling statute of any delegation of the authority which it seeks to assert here, or by strong evidence that Congress never intended such a delegation, the NRC Staff asserts in its October 15 Order that because the Licensee's decommissioning funding plan "does not provide the level of assurance" required by the Commission, "supplemental financial

assurance is required" from General Atomics (Order, pp. 11-12). Citing no legal authority for its conclusion, the NRC alleges broadly that General Atomics "exercised and exercises de facto control over the day-to-day business of" the Licensee and that General Atomics' "representations of financial guarantees . . . on which the Commission has relied, make [General Atomics] responsible, along with [the Licensee] to satisfy the NRC financial assurance requirements." (Order, pp. 19, 21). As noted earlier, counsel for the NRC advised the Board at the Prehearing Conference that in making this allegation, the NRC hopes to advance a theory that is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . . ." (see Tab A, p. 107).

General Atomics recognizes that federal agencies routinely claim authority to ignore the formalities of corporate law if the observation of those formalities would somehow -- at least in the minds of agency representatives -- interfere with the broad regulatory power they seek. The NRC's attempted reliance on a common law doctrine does not, however, vest the NRC with jurisdiction that Congress has not elected to give it. Nor does it relieve the NRC from its obligation to plead a legally cognizable claim and facts that would support it.

There is absolutely nothing in the legislative history of the Atomic Energy Act that suggests that Congress intended to expand the liability for decommissioning and remediation costs at the

expense of the limited liability conferred by the corporate veil. Nor is there any statute or controlling opinion of a court of law that establishes a "de facto control" doctrine for the definition of the NRC's jurisdiction.

Substantial authority exists, however, for the proposition that liability cannot arbitrarily be based on a theory of corporate veil piercing. In American Bell, Inc. v. Federation of Tel. Workers, 736 F.2d 879 (3d Cir. 1984), the U.S. Court of Appeals for the Third Circuit stated the proposition this way:

> A court may not disregard at will the formal differences between affiliated corporations, and in fact the requirements for corporate veil piercing, although rather imprecise in their various formulations, are demanding ones. This court has stated that 'the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality, or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime.' Zubik v. Zubik, 384 F.2d 267, 272 (3d Cir. 1967). The court may only pierce the veil in 'specific, unusual circumstances', lest it render the theory of limited liability useless. Id. at 273. Regarding the 'alter ego' theory of veil piercing, we have endorsed the Fourth Circuit's list of factors that must be considered. In addition to gross undercapitalization, these factors are
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> > failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.
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> DeWitt Truck Brokers, Inc v. W. Ray Flemming Fruit Co., 540 F.2d 681, 686-87 (4th Cir. 1976), quoted with approval in United States v. Pisant, 646 F.2d 83, 88 (3d Cir. 1981).

736 F.2d at 886.

There are obvious reasons why theories of corporate veil piercing are disfavored. In structuring their financial transactions, businessmen depend on state corporate law and other established commercial rules to provide the stability in the marketplace which is essential for the reliable evaluation of the risks involved. United States v. Kimbell Foods, Inc., 440 U.S. 730, 739, 99 S. Ct. 1448, 1464 (1979). If the NRC were free to expand its jurisdiction by arbitrarily extending liability to the parent companies of its licensees in an adjudicatory proceeding, those companies which justifiably rely on settled corporate law and predictable rule-making procedures in making a decision to invest in the nuclear industry, would consistently have their expectations thwarted. That would clearly be contrary to the intent of Congress. As the court said in International Brotherhood of Painters v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988):

> limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in the legislative history.

856 F.2d at 1550.

Even if Congress did intend to expand liability for decommissioning costs to non-licensees by piercing corporate veils, the NRC would still have to properly state a claim against General Atomics. A complaint in an action at law may, of course, be dismissed for two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. 2A J. Moore, Moore's Federal Practice ¶ 12.07 at 2271 (2d ed. 1993). If

the allegation of additional facts consistent with a challenged pleading cannot possibly cure the deficiency, then a dismissal without leave to amend is proper. Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988).

With respect to its "piercing the corporate veil" theory, the NRC's October 15 Order contains nothing more than conclusory allegations and unwarranted inferences, both of which are insufficient. To establish that the corporate identity of a company has ceased to exist, i.e., that it is a mere instrumentality and alter ego of its corporate parent, a claimant must at least plead and prove some form of fraud, illegality or other improper conduct by the parent. The NRC has made no such allegations against General Atomics. It has not alleged, for example, that corporate formalities have not been observed by General Atomics and the Licensee, or that General Atomics has siphoned funds from the Licensee. Nor has it alleged the presence of any other factor that is necessary to state a legally cognizable claim based upon a theory of veil piercing. Indeed, as noted above, counsel for the NRC stated unequivocally at the Prehearing Conference that the NRC is "not charging deliberate misconduct on the part of any party . . . ."

On December 29, 1992, the NRC issued a Demand for Information to which General Atomics responded. The NRC then issued its October 15 Order and made a broad non-civil penalty financial liability claim against General Atomics. It now appears that its claim is based upon either a "de facto control" doctrine which has

no basis in law, or a corporate veil piercing theory which could not be supported by the facts the NRC alleges under any circumstances. Contrary to the assertion of its counsel, the NRC cannot use the October 15 Order as a point of departure for a fishing expedition for any facts upon which it might somehow base some claim that meets the tests of the law. Having failed to state both a legally cognizable claim against General Atomics and any facts that would entitle it to impose such financial liability, the NRC cannot be permitted to engage in what it has itself characterized as "fairly extensive" discovery (Tab A, pp. 120-121) in the hope of developing a theory "upon facts that are later discovered . . . ." (Tab A, p. 106).

III. THE NRC HAS ADMITTED THAT GENERAL ATOMICS IS NOT LEGALLY OBLIGATED TO PROVIDE ASSURANCE OF DECOMMISSIONING AND REMEDIATION COSTS, AND IT IS ESTOPPED FROM ATTEMPTING TO COMPEL SUCH ASSURANCE.

The Licensee is the holder of Source Material License No. SUB-1010 (the "License") which was issued by the NRC pursuant to 10 C.F.R. Part 40. The license authorized the Licensee to possess and use source material in the production of uranium hexaflouride (UF_6) and depleted uranium tetraflouride (DUF_4). The License for UF_6 production was originally issued on February 20, 1970 by the Atomic Energy Commission. Sequoyah Fuels Corporation is the sole licensee named in the license.

The 1988-1990 Transactions

On June 20, 1988, Sequoyah Holding Corporation ("SHC") was incorporated in the State of Delaware. SHC was and is a wholly-owned subsidiary of General Atomics.

On July 7 and August 2, 1988, meetings were held between the NRC Staff and representatives of General Atomics to discuss the consent of the NRC to (1) the transfer of control of the Licensee from Kerr-McGee Corporation ("Kerr-McGee") to SHC, a subsidiary of General Atomics, and (2) the license amendment application of the Licensee to reflect a change in ownership. As part of its review of the situation, the NRC Staff performed a financial review of the proposed transfer of ownership to determine whether the change would affect the financial resources of the Licensee for safely operating the plant and for future decommissioning of the Sequoyah Facility. The review concluded that "the proposed transfer of ownership will not impair [the Licensee's] ability to perform decommissioning and reclamation activities or to safely operate the plant." (See the October 27, 1988 internal NRC Memorandum of W. Scott Pennington, and the September 19, 1988 internal NRC Memorandum from Robert S. Wood to Leland C. Rouse, attached to Annex "A" of General Atomics' Motions as Appendices 1 and 2 respectively).

Even though he had concluded that SHC was financially qualified to assume control of the License through stock ownership of the Licensee, Robert S. Wood recommended to the NRC that as an additional safeguard, the NRC "[a]sk for a guarantee from [SHC's]

parent, General Atomics Corporation, for decommissioning and reclamation expenses." Mr. Wood recognized that General Atomics would probably be unwilling to give such a guarantee and he advised the NRC that "if they refuse, we shouldn't make an issue of it . . . ."

On or shortly after October 18, 1988, and as required by Section 184 of the Atomic Energy Act, the then President of SHC (Reau Graves, Jr.) wrote to the NRC expressly seeking NRC consent to the transfer of control of the Licensee from Kerr-McGee to SHC. In the letter, Graves also requested that the NRC confirm that, through an amendment to Chapter 7.5 of the License, "Kerr-McGee will be released from its obligation to provide the NRC assurance of proper decommissioning and reclamation of the Sequoyah Facility." (See the Graves Affidavit, letter from Graves to Rouse, at page 3). This amendment, along with several other revisions to the License, was reflected in SHC's application for amendment of the License, which was also dated October 18, 1988.

Sometime prior to the filing of his October 18, 1988 letter, Graves had met with representatives of the NRC in the Washington, D.C. area to discuss the acquisition of Sequoyah Fuels Corporation by SHC. They specifically discussed whether the NRC would require a guarantee by General Atomics of decommissioning costs. At the time, Graves was familiar with the guarantee of those costs that had been required of Kerr-McGee. (See the Graves Affidavit.) If a guarantee had been required of General Atomics, the acquisition would not have taken place. (See the Affidavit of J. Neal Blue.)

By letter to Graves dated October 27, 1988, the NRC approved the transfer of control of Sequoyah Fuels Corporation from Kerr-McGee to SHC. (See the Graves Affidavit.) By letter dated October 28, 1988, the NRC also approved the proposed amendments to the License, including the revisions to Chapter 7.5 which effected the release of Kerr-McGee. The revisions to Chapter 7.5 approved by the NRC did not substitute General Atomics for Kerr-McGee and did not in any way impose an obligation on General Atomics that was similar to the one from which Kerr-McGee was being released. Moreover, no other conditions were placed upon the License which created any such obligation on the part of General Atomics.

On November 4, 1988, SHC purchased Sequoyah Fuels Corporation from Kerr-McGee. On August 29, 1989, New Sequoyah Fuels Corporation ("NSFC") was incorporated in Delaware as a wholly-owned subsidiary of Sequoyah Fuels Corporation. On December 29, 1989, the NRC amended the Sequoyah license to authorize a change in the Licensee's name to NSFC, the incorporation of NSFC, and a transfer of assets to NSFC. On December 31, 1989, Sequoyah Fuels Corporation and NSFC entered into a Transfer Agreement in which Sequoyah Fuels Corporation transferred its assets and ongoing business (excluding certain farm-related business and assets and certain conversion contracts with international customers) to NSFC.

On March 26, 1990, the NRC amended the Sequoyah license to authorize the change of the Licensee's name from NSFC to "Sequoyah Fuels Corporation." The former Sequoyah Fuels Corporation changed its name to "Sequoyah Fuels International Corporation" ("SFIC").

Sequoyah Fuels Corporation is now a wholly-owned subsidiary of SFIC. SFIC is a wholly-owned subsidiary of Sequoyah Holding Corporation ("SHC"). SHC is a wholly-owned subsidiary of General Atomics. Consequently, General Atomics is a third-tier parent company of Sequoyah Fuels Corporation.

The decision of the NRC not to place new conditions on the transfer of the control of the Licensee was critical to the consummation of the transfer of the control of the Licensee. If the NRC had at that time required General Atomics to accept responsibility for providing funding, or financial assurance, or any form of guarantee of the decommissioning and remediation costs of the Licensee's Facility, the sale and transfer of control would not have taken place (see the Affidavit of J. Neal Blue).

The 1992 Transactions

Having abandoned all attempts to obtain a guarantee from General Atomics two years earlier, the NRC, in a Staff Requirements Memorandum dated March 27, 1992 (attached to Annex "A" of General Atomics' motion as Appendix 5), recognized and referred to certain "gaps in the current license which should be remedied, but not as a precondition to [the] restart" of the Licensee's facility (p. 1). The NRC further referred to "certain financial commitments" allegedly made by General Atomics in a March 19, 1992 letter to the Commission (see the October 15 Order, pp. 3, 12-13, 16, 18-20) regarding the cleanup of the facility and it directed the NRC staff to "make these commitments legally binding on General Atomics if it is practicable and advisable to do so." The Staff Requirements

Memorandum was obviously prepared ten days after the March 17, 1992 public meeting of the Commission at which the Chairman of General Atomics is also alleged to have made certain verbal financial commitments to provide financial assurance for the decommissioning and reclamation costs of the Licensee.

By letter dated May 6, 1992 (attached to Annex "A" of General Atomics' Motion as Appendix 6), to the Licensee, Mr. Richard E. Cunningham (on behalf of Robert M. Bernero, Director of the NRC Office of Nuclear Material Safety and Safeguards) acknowledged "the Commission's direction to the Staff to take all practicable and advisable steps to make legally binding the financial commitments of General Atomics (GA) regarding cleanup of the Sequoyah Fuels Corporation (SFC) facility." Mr. Cunningham went on to propose "a contract between Sequoyah Fuels Corporation (SFC) and GA, or other suitable arrangement making GA's commitments legally binding," and that the proposed contract contain terms that would permit it to be enforced by the NRC. It is undisputed that no such contract was ever entered into.

At the public meeting of the NRC on December 21, 1992, over nine months after the comments of the Chairman of General Atomics were made (i.e., at the March 17, 1992 public meeting and in the March 19, 1992 letter) -- comments upon which the NRC now alleges that it relied, thereby placing some form of legal obligation upon General Atomics -- the Chairman of the NRC admitted that no binding legal commitment had ever been made by General Atomics.

> CHAIRMAN SELIN: "Permission to restart was granted after a Commission meeting in which we received what sounded like

> firm assurance from General Atomics that they would stand squarely behind Sequoyah Fuels in providing for decontamination and decommissioning funding.
>
> However, the staff's concerted efforts to translate this apparent commitment into a binding written agreement have been repeatedly frustrated . . . ."

(Transcript of the December 21, 1992 public meeting, pp. 3-4, attached at Tab B).[13]

At least two conclusions are unavoidable. First, despite repeated opportunities in 1988-1990 to require a financial guarantee by General Atomics (of the decommissioning and reclamation expenses of the Licensee) as a condition of the transfer of control of the license, the NRC decided not do so. Second, the NRC has repeatedly and publicly admitted that whatever comments the Chairman of General Atomics made in the NRC's public meeting of March 17, 1992 and in his letter of March 19, 1992, those comments were not and are not, legally binding.

For all of these reasons, the NRC is estopped in this proceeding from seeking to compel a financial guarantee by General Atomics of the decommissioning and reclamation costs of the

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[13] The transcript of the March 17, 1992 public meeting was prepared by the Court Reporters and Transcribers Firm of Neal R. Gross and Co., Inc. It is accompanied by a "Certificate of Transcriber" in which the transcriber certified that the transcript is complete and is a "true and accurate record" of the meeting. The transcript also includes a one page "Disclaimer" which appears to prohibit the use of the transcript in proceedings before the NRC. Whatever right, if any, the NRC may have had previously to object to the use of this transcript, or the transcripts of certain other meetings, that right was waived when the NRC based its October 15 Order in substantial part on matters that took place and subjects that were discussed at those meetings. Moreover, any attempt to prohibit the use of the transcripts by General Atomics would clearly violate its rights to procedural due process of law.

Sequoyah Facility.

IV. IF GENERAL ATOMICS IS REQUIRED TO CONTEST THE ORDER BEFORE THE COMMISSION OR THIS BOARD, IT WILL BE DEPRIVED OF PROCEDURAL DUE PROCESS RIGHTS GUARANTEED TO IT BY THE CONSTITUTION AND THE ADMINISTRATIVE PROCEDURE ACT.

A. Each of the individual NRC Commissioners must be disqualified since they have personal knowledge of disputed evidentiary facts and must be material witnesses in the matter in controversy.

Few doctrines of American law are as well established as that which applies the requirements of procedural due process to the deprivation of interests encompassed by the Fifth and Fourteenth Amendments' protection of liberty and property. The Supreme Court has eschewed rigid or formalistic limitations on the protection of procedural due process, Board of Regents of State College v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972), and Supreme Court decisions in an unbroken line of cases from the first decade of the twentieth century have interpreted due process to require a trial-type hearing when sufficient interests are at stake in an administrative proceeding. Kenneth C. Davis, Administrative Law Treatise § 12:1 (2d ed. 1979).

Just how the concept of "due process" applies to particular proceedings, can, of course, vary with the nature of the proceedings, but it has long been the law that when governmental agencies make adjudications that affect legal rights, it is imperative that the agencies use procedures "which have

traditionally been associated with the judicial process." Amos Treat & Co. v. Securities and Exchange Commission, 306 F.2d 260, 263 (D.C. Cir. 1962). At the very least, quasi-judicial proceedings entail a fair trial and "with respect to agency adjudicatory proceedings, due process might be said to mean at least 'fair play.'" Id. at 264. A due process violation may be established without a showing of actual bias where it can be determined from the special facts and circumstances present in a case that the "risk of unfairness is intolerably high." Greenberg v. Bd. of Gov. of Federal Reserve System, 968 F.2d 164 (2nd Cir. 1992).

An essential requirement of fair play in the judicial process is the disqualification of individual members of a tribunal who have personal knowledge of disputed evidentiary facts concerning the proceeding, 28 U.S.C. § 455(b)(1) or who have been a material witness concerning it. Id. at § 455(b)(2). So important is this requirement that recusal of a judge is warranted where the judge is a personal friend of a witness who is not even a party to an action, if the witness' testimony is likely to be pivotal and the credibility of the witness is a major factor to be resolved by the judge. Hadler v. Union Bank and Trust Co. of Greensburg, 765 F. Supp. 976 (S.D. Ind. 1991). It is self-evident that recusal or disqualification of a judge is required where the judge is, himself, a witness in the proceeding. It is inconceivable that a jurist should be permitted the authority to weigh his own credibility.

That the testimony of the members of the Commission is pivotal to the resolution of critically important factual issues raised by the Commission itself, is apparent both on the face of the Commission's October 15 Order[14] and from the public statements of the Commission's chairman.

The Order commands General Atomics to accept financial liability for the decommissioning and remediation of the Licensee's Facility. The purported imposition of such broad liability on a company that is admittedly not a licensee of the Commission, is based in material part upon the Commission's own factual allegations, allegations which are totally denied by General Atomics At page 13, for example, the Order states that "The Commission relied on the above General Atomics financial commitments in authorizing restart of the SFC Facility . . . ." At page 16, the Order states that "Mr. Blue's March 17 statements to the Commission and March 19 letter to Chairman Selin were clear and unconditional financial assurance guarantees." At page 20, the Order states that "[t]he Commission reasonably took Mr. Blue at his word" and that Mr. Blue's purported promise "reassured the Commission that SFC's cleanup effort was creditable."

Certain of Chairman Selin's comments at the December 21, 1992

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[14] The terms "Nuclear Regulatory Commission," "NRC" and "Commission" are used interchangeably throughout the Order (Order, p. 1). The term "Commission" is further used in both a general or institutional sense, and in reference to the individual commissioners. For example, at page 2, the Order refers to "[t]he Commission's regulations" and states that "on October 3, 1991, the Commission issued an Order." Elsewhere, the Order states that "The Commission reasonably took Mr. Blue at his word." (Order, p. 20).

meeting of the Commission also related directly to matters that are currently disputed issues of material fact.[15] The following comments are illustrative:

> . . . the assurances that you gave and that Mr. Sheppard asked and you agreed on March 17th were clearly a lot more than an arm's length financial. I mean we were given to understand -- I specifically asked you and you certainly answered that GA's management resources, its technical resources, its financial resources were behind Sequoyah, that you're not a passive investor that's protected from further commitments by the corporate structure as far as I'm concerned and I'm sure the other Commissioners are concerned.

(Tab B, p. 51). Later in the meeting, the Chairman stated that:

> In April of 1992, . . . the [Licensee's] plant was permitted to restart operations. But a second major ingredient in that decision was the public meeting that we held on March 17th, 1992 with officials . . . who gave us a number of assurances and those assurances were critical to that restart.
>
> * * *
>
> I want to emphasize that these assurances were very important to the Commission when we reached our decision to permit resumption of operation.

(Tab B, pp. 62-63).

Each of these and almost certainly other equally contested material facts cannot be fairly determined without the personal testimony of each of the Commission's individual Commissioners. Only they can testify to the truth of the allegations that Mr. Blue's comments were "clear and unconditional" and that they were interpreted by the Commissioners as a "guarantee" of General

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[15] The transcripts of this and the other meetings that are referenced elsewhere in this brief, contain identical certifications of accuracy, as described in Footnote 13.

Atomics' financial support of the Licensee. Only they can testify as to whether or not they each "relied" upon and "reasonably" interpreted Blue's comments. Only they can testify as to whether or not any of Mr. Blue's statements were interpreted as "assurances" and whether the alleged assurances were "very important to the Commission when [the individual Commissioners] reached [their] decision to permit resumption of operation."

It is no expression of disrespect to either the NRC collectively, or the individual Commissioners, to assert that neither the Commission nor any of its inferior administrative tribunals can be permitted to adjudicate such disputed evidentiary facts when the Commissioners themselves have personal knowledge of matters which are directly relevant to those facts.

B. The NRC's own rules prohibit the attendance and testimony of witnesses whose personal knowledge of disputed evidentiary facts is essential to the adjudication of the issues raised by the October 15 Order.

Almost no aspect of the trial or hearing is so indispensable to the fundamental fairness associated with due process, as is the right of cross-examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970). It is for such reasons that the Administrative Procedure Act mandates "such cross-examination as may be required for a full and

true disclosure of the facts." 5 U.S.C. § 556(d) (1977). When administrative judges resolve credibility issues such as those that appear in this case, they must consider several factors, including the contradiction of a witness' version of events by other evidence or its inconsistency with other evidence; the demeanor of the witnesses; the inherent probability or improbability of a witness' version of events; any prior inconsistent statement by a witness; and, other factors. In his classic The Art of Cross-Examination, Francis Wellman succinctly summarized the importance of cross-examination: ". . . no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions." Francis L. Wellman, The Art of Cross-Examination 22 (1904).

Despite the critical importance of each Commissioner's testimony on contested issues of fact like those described above, the Commission's own rules prohibit General Atomics from exercising its right to cross-examine these witnesses. The rule that appears at 10 C.F.R. § 2.720(h)(2)(i) states unequivocally that "[t]he attendance and testimony of the Commissioners . . . at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise."

Under Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, the process that is due depends on three factors: first, the private interest affected by the official action; second, the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional procedures; and third, the

government's interest, including the function involved and the fiscal and administrative burden that additional procedures would entail. 424 U.S. at 335, 96 S. Ct. at 903.

In this case, the private interest of General Atomics that would be adversely affected if this panel or ultimately the Commission is permitted to adjudicate the matters in dispute, is the economic survival of the company itself. Should the Commission ultimately rule against General Atomics on the contested issues, the Order would impose upon General Atomics, among other liabilities, the obligation to provide immediate financial assurance for decommissioning and remediation in the amount of $86 million through a mechanism that meets the requirements of 10 C.F.R. § 40.36 (Order, p. 25). The risk that General Atomics will be erroneously deprived of that interest, i.e., economic survival, if the October 15 Order is adjudicated here, is very high. If General Atomics' instant motion is granted, however, an alternative to the attempted issuance and enforcement of the October 15 Order is immediately available, namely, the initiation by the NRC of civil litigation in the appropriate federal court asserting such claims as the NRC believes it can prove against General Atomics. The fiscal and administrative burden of litigating these issues in federal court, rather than here, would be inconsequential to the Commission.

Due process also calls for such procedural protections as a particular situation demands. Matthews v. Eldridge, 424 U.S. at 334, 96 S. Ct. at 902. This particular situation demands that

General Atomics be permitted to cross-examine each Commissioner on the matters that are relevant to several contested issues of fact which are set forth in the October 15 Order and in General Atomics' November 2, 1993 Answer.

C. The actions of the NRC suggest that it has prejudged the contested matters raised by the October 15 Order.

When hearings are required, as in the instant matter, due process requires a hearing that is fairly conducted by an impartial tribunal. Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 652, (1912). Only last month the Supreme Court reaffirmed the elementary principle that "a fair trial in a fair tribunal is a basic requirement of due process." Weiss v. United States, 62 U.S.L.W. 4047, 4052 (U.S. Jan. 19, 1994). There can hardly be a more important component of fair procedure than the requirement that the decider in an administrative proceeding be neutral toward the parties and issues before him or her. In re Murchison, 349 U.S. 133, 136-37, 75 S. Ct. 623, 625 (1955); Richard J. Pierce, Jr., Sidney A. Shapiro, Paul R. Verkuil, Administrative Law and Process (§ 9.2, 1985). Indeed, a fair trial is of the essence of the adjudicatory process, whether the judging is done in an administrative forum or in a court by a judge. Bernard Schwartz, Administrative Law § 6.18 (2d ed. 1984); H. Friendly, "Some Kind of Hearing," 123 Pa. Law Rev. 1267 (1975). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law

has always endeavored to prevent even the probability of unfairness.'" Withrow v. Larken, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975), quoting Murchison 349 U.S. at 136, 74 S. Ct. at 625.

When adjudicatory proceedings reach a predetermined end, they may be fair in form only. It thus took little insight for the Preceptor in Ivanhoe to observe that: "The trial moves rapidly on when the judge has determined the sentence beforehand." Scott, Ivanhoe, ch. 36; see Continental Box Co. v. NLRB, 113 F.2d 93, 96 (5th Cir. 1940). So fundamental to fairness is the requirement of an impartial tribunal, that one who prejudges adjudicative facts that are in dispute may be disqualified. 3 Kenneth C. Davis, Administrative Law Treatise § 19.4 (2d ed. 1980).

General Atomics recognizes that mere exposure to adjudicative facts prior to a hearing may not require the disqualification of agency heads or administrative judges within an agency. But, advance knowledge of such facts, coupled with a public statement of position about them, demonstrates more than procedural irregularity. They suggest an insensitivity to the requirements of due process and perhaps, a closed mind.

In Cinderella Career and Finishing Schools, Inc. v. F.T.C., 425 F.2d 583 (D.C. Cir. 1970), the court vacated an order of the Federal Trade Commission on due process grounds which are relevant here. While the appeal of an F.T.C. hearing examiner's decision was pending before him, the Chairman of the Commission gave a public speech that addressed those same matters. The court was unequivocal in its response:

> It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in public statements of government officers, but we are charged with the responsibility of making certain that the image of the administrative process is not transferred from a Rubens to a Modigliani.
>
> We indicated . . . that 'there is in fact and law authority in the Commission, acting in the public interest, to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act . . ..
>
> * * *
>
> This does not give individual Commissioners license to prejudge cases or to make speeches which give the appearance that the case has been prejudged. Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deemed it necessary to do so after consideration of the record. There is a marked difference between the issuance of a press release which states that the Commission has filed a complaint because it has 'reason to believe' that there have been violations, and statements by a Commissioner after an appeal has been filed which give the appearance that he has already prejudged the case and that the ultimate determination of the merits will move in predestined grooves.

Id. at 590 (emphasis in original).

In ordering the disqualification of the Commission Chairman from all further proceedings in the matter, the court adopted the rationale that "Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." 425 F.2d at 592, quoting Berkshire Employees Ass'n. of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941). The court also cited with approval the following test for disqualification of an administrative agency:

whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 425 F.2d at 591, quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896, 80 S. Ct. 200 (1959).

The comments of the Chairman of the NRC at the Commission's December 21, 1992 public meeting (attended by all five members of the Commission), his comments at the Press Conference that he conducted immediately thereafter, as well as the NRC's direction to the staff to make legally binding the purported "financial commitments of General Atomics regarding cleanup" of the Licensee's facility, strongly suggest and give the appearance, that the contested matters raised by the NRC's October 15 Order have been prejudged by the NRC. The Chairman's adversarial tone is apparent to anyone who reads the transcripts of the two meetings, especially pages 48-65 of the transcript of the NRC meeting, and the transcript of the Press Conference (see the excerpts from the transcript of the December 21, 1992 public meeting, pp. 48-65, and the entire transcript of the December 21, 1992 press conference, attached respectively at Tabs B and C of this Brief).

Chairman Selin opened the public NRC meeting with the comment that the NRC Staff's "efforts to translate this apparent commitment into a binding written agreement have been repeatedly frustrated by Sequoyah Fuels and General Atomics." (See Tab B, p. 4). During the meeting, he stated to the Chairman of General Atomics that

> . . . the assurances that you gave and that Mr. Sheppard asked and you agreed on March 17th were clearly a lot

more than an arm's length financial. I mean we were given to understand -- I specifically asked you and you certainly answered that GA's management resources, its technical resources, its financial resources were behind Sequoyah, that you're not a passive investor that's protected from further commitments by the corporate structure as far as I'm concerned and I'm sure the other Commissioners are concerned.

(Tab B, p. 50-51). He concluded the meeting with the following comment:

> The message I want you to leave with, that I want to make sure you have absolutely clearly, is that the Commission considers the obligation on licensees and on people running NRC licensed plants to assure proper decontamination and decommissioning to be a very serious one and one which we intend to see is properly carried out. In my view, the Commission should direct Sequoyah Fuels and General Atomics promptly to provide a specific proposal to assure adequate funding for timely and satisfactory decontamination and decommissioning and if such a proposal is not soon forthcoming, to initiate appropriate legal steps to compel such measures.

(Tab B, p. 65).

At the Press Conference which followed the public meeting, the Chairman made further comments which suggest at least his own conclusive prejudgment of the issues involved in this matter:

> CHAIRMAN SELIN: ". . . we have considerable authority. We can issue a demand for information ourselves and, if we don't get satisfactory answers to that demand, we can shut down operations immediately and take steps to go for the assets." (Tab C, pp. 2) (emphasis added).

> CHAIRMAN SELIN: ". . . in my opinion, a flow of funds which is based on the future prospects for an unknown business is completely inconsistent with our regulations and what's to be expected." (Tab C, pp. 3-4).

> QUESTION: "Do you feel euchred?"

> CHAIRMAN SELIN: "No. Well -- do I feel euchred? Well, a smart leader is never euchred, of course, but there were

assurances given to us which do not seem to be holding up under pressure and we intend to make sure that those assurances are followed up on. . . [General Atomics and the Licensee] have a commitment and a responsibility that's independent of ConverDyn or anything else." (Tab C, p. 5) (emphasis added).

CHAIRMAN SELIN: "Well, we think we've got a very good shot at General Atomics' resources based on a whole set of actions that have opened up -- ". (Tab C, p. 6) (emphasis added).

CHAIRMAN SELIN: "Now, if you ask me a different question, do I wish that the Commission five years ago had done different things with McGee and General Atomics at the time the deal went through, the answer is I don't know, but maybe." (Tab C, p. 11).

CHAIRMAN SELIN: "You see, I'm not really livid. I'm not pleased, but I'm not livid." (Tab C, p. 11).

The public comments of the Chairman of the Commission and documents prepared by the NRC Staff would strongly suggest to a disinterested observer that the NRC has already determined the result which it seeks in this matter. The Chairman's comments leave the impression that his ability, and the ability of the entire Commission to act in a totally disinterested manner, have been impaired. Chairman Selin has not merely made abstract public remarks about a perceived need to extend the NRC's jurisdiction over non-licensees generally. He has specifically identified General Atomics as a target of the NRC's frustration and displeasure. Some ten months before the NRC issued its October 15 Order, he specifically mentioned the allegations which later appeared in the Order. Because many of his comments were made at the December 21, 1992 public meeting of the NRC, because he continuously used the word "we" in his comments at the Press Conference, thereby implying that he was speaking for the entire

Commission, and because his public comments at the Press Conference presumably came to the attention of the other members of the Commission, there is no way in which General Atomics can know or can quantitatively measure whether the comments and actions of the Chairman have influenced the other members of the Commission. Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, supra.

Since the NRC can seek to prosecute its claim against General Atomics in a court of law, General Atomics should not, and cannot be forced to contest the allegations set forth in that Order here, or in any other forum which is inferior to the NRC.

For all of the foregoing reasons, General Atomics will be deprived of procedural due process rights guaranteed to it by the Constitution and by the Administrative Procedure Act if it is required to contest the NRC's October 15 Order before the Commission or this panel.

CONCLUSION

It is not entirely clear what theory the NRC relies upon for its claim that General Atomics can be compelled to satisfy the NRC's financial assurance requirements for the decommissioning and remediation of the Licensee's Facility. At the Prehearing Conference, the NRC Staff Counsel stated that the NRC is "not charging deliberate misconduct on the part of any party," that it

is "not relying upon a contract or quasi-contract theory stemming from purported reliance by the Commission on statements of General Atomics," and that its theory is "more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent . . .." There is, however, no policy of federal nuclear energy law, either legislative or judge-made, that a corporate parent of an NRC licensee can be compelled to guarantee or otherwise assume the financial liability of its subsidiary, simply because it controls the subsidiary's stock and exercises general "management oversight" of the licensee.

Whatever may be the NRC's theory of the case, and whatever may be the authority of the NRC over licensees or non-licensees in other circumstances, it has no jurisdiction to hold General Atomics -- a company which is not a licensee of the NRC for any activity relating to the Gore, Oklahoma facility, which does not use or possess regulated source materials in connection with the facility, which is not engaged in licensed activities in connection with that facility, and which is not charged with any deliberate misconduct -- jointly and severally liable for the $86 million cost associated with the decommissioning and remediation of the Licensee's Facility.

General Atomics further submits that the NRC has recognized and admitted that General Atomics is not legally obligated to guarantee or pay such costs and that as a consequence, the NRC is

estopped from seeking to compel such a guarantee.

For these reasons, the NRC has failed to state a legally cognizable claim against General Atomics, and the NRC can prove no set of facts that would entitle it to impose this non-civil penalty financial liability upon General Atomics.

Finally, General Atomics submits that the testimony of the individual members of the NRC is essential to the adjudication of the contested issues raised by its October 15 Order, that the actions of the NRC strongly suggest that it has prejudged those issues, and that if General Atomics is forced to contest those issues before the NRC itself or in any administrative forum which is inferior to the NRC, it will be deprived of the fairness traditionally associated with any form of judicial process and of due process rights guaranteed to it by the Constitution.

Respectfully submitted,

By Stephen M. Duncan
Of Counsel

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ATTORNEYS FOR GENERAL ATOMICS

February 17, 1994

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

- - - - - - - - - - - - - - - - - - -X

In the Matter of: :

SEQUOYAH FUELS CORPORATION :

AND GENERAL ATOMICS : Docket No. 40-8027-EA

(Gore, Oklahoma Site :

Decontamination and :

Decommissioning Funding) :

- - - - - - - - - - - - - - - - - - -X

Nuclear Regulatory Commission

Hearing Room 521

4320 East West Highway

Bethesda, Maryland

Wednesday, January 19, 1994

The above-entitled matter came on for prehearing conference at 9:32 a.m.:

BEFORE:

JAMES P. GLEASON, Chairman

THOMAS O. MURPHY, Administrative Judge

G. PAUL BOLLWERK, III, Administrative Judge

APPEARANCES:

On behalf of the Sequoyah Fuels Corporation:

MAURICE ALEXRAD, ESQ.
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On behalf of General Atomics:

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On behalf of the Native Americans for a Clean Environment:

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PAULA MESKY, ESQ.
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Takoma Park, Maryland 20910

APPEARANCES [Continued]:

On behalf of the Nuclear Regulatory Commission:

RICHARD G. BACHMANN, ESQ.
STEVEN R. HOM, ESQ.
GIOVANNA LONGO, ESQ.
SUSAN UTTAL, ESQ.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

as amicus for this purpose or as to anything else, but I don't think we want to preclude her from making any comments if she has some to make.

Essentially, I think this is a matter that goes between you and the Staff -- or not between you and the Staff but between General Atomics and the Staff, and those are the comments we would like. In fact, if you didn't want to even discuss your theory, that would be all right with me, but there are some members of the Board that are concerned about it, and it is my responsibility to raise it.

Mr. Hom?

MR. HOM: Your Honor, without getting into very, very specific matters and, again, with the caveat that the Staff's theory can be developing based upon facts that are later discovered, I think the Staff is willing to make some comments in this area.

We do have the three theories so to speak that came with the January 13 memorandum and the Staff will say that the theory of this case will not be based on, as I read Item Number 2, we are not charging deliberate misconduct on the part of any party at this time and, therefore, that does not provide a basis in support of the Staff's theory.

With respect to Item Number 3, the Staff at this time is not relying upon a contract or quasi-contract theory stemming from purported reliance by the Commission on

statements of General Atomics.

The Staff's theory is more akin to, with obvious factual distinctions, but more akin to the common law, corporation/contract, sometimes tort action involving parent-subsidiary relationships where a claimant attempts to pierce the corporate veil between the subsidiary and the parent to reach the parent based fundamentally on day-to-day or intimate control of the parent over the subsidiary.

JUDGE GLEASON: Does that do it, Mr. Hom?

MR. HOM: Pardon me?

JUDGE GLEASON: Does that do it?

MR. HOM: Yes.

JUDGE GLEASON: Mr. Duncan, I think we will ask you to go next, please.

MR. DUNCAN: You will appreciate, Judge Gleason, as you already have twice and I thank you for that, that we are relatively new to the case and I am not prepared to argue the merits of the jurisdictional issue this morning except to say that thus far I can represent that we have searched diligently in all of the statutes that we can find that would appear to be relevant at all as well as all other applicable law, and we can find nothing that poses jurisdiction in the NRC to make this kind of claim against a non-licensee and to purport to oppose non-civil penalty financial liability upon a non-licensee in the circumstances

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Title: BRIEFING ON STATUS OF GENERAL ATOMIC-SEQUOYAH FUELS FACILITY

Location: ROCKVILLE, MARYLAND

Date: DECEMBER 21, 1992

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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BRIEFING ON STATUS OF
GENERAL ATOMIC - SEQUOYAH FUELS FACILITY

- - - -

PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Monday, December 21, 1992

The Commission met in open session, pursuant to notice, at 2:00 p.m., Ivan Selin, Chairman, presiding.

COMMISSIONERS PRESENT:

IVAN SELIN, Chairman of the Commission
KENNETH C. ROGERS, Commissioner
FORREST J. REMICK, Commissioner
JAMES R. CURTISS, Commissioner
E. GAIL de PLANQUE, Commissioner

STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE:

SAMUEL J. CHILK, Secretary

WILLIAM C. PARLER, General Counsel

NEAL BLUE, Chairman of the Board and CEO, General Atomics

JAMES SHEPPARD, President, Sequoyah Fuels Corporation

JAMES EDWARDS, Vice President, General Counsel, General Atomics Board of Directors, SFC

MAURICE AXELRAD, Esquire, Newman & Holtzinger

JACK NEWMAN, Esquire, Newman & Holtzinger

P-R-O-C-E-E-D-I-N-G-S

2:00 p.m.

CHAIRMAN SELIN: Good afternoon. The Commission is meeting at this time to receive a briefing on matters concerning the status and future of Sequoyah Fuel Corporation's uranium processing facilities near Gore, Oklahoma. The briefing will be provided by the licensee, Sequoyah Fuels and by its parent company, General Atomics.

The Commission awaits this briefing with keen interest. Recent events have served to worsen a situation that was already of great concern to the Commission. The Gore facility has terminated its uranium hexafluoride production and it appears to have only a short-term need to continue its depleted uranium production, if and when that process is restarted at all. In the longer term, this facility must be properly decommissioned in full accordance with all applicable NRC requirements.

Earlier this year, the Commission deliberated on the question of whether or not to allow the plant to restart after serious contamination, management deficiencies and other problems were recognized. Permission to restart was granted after a Commission meeting in which we received what sounded

like firm assurance from General Atomics that they would stand squarely behind Sequoyah Fuels in providing for decontamination and decommissioning funding.

However, the staff's concerted efforts to translate this apparent commitment into a binding written agreement have been repeatedly frustrated by Sequoyah Fuels and General Atomics, including a letter that we just received this morning. And now, continued productive facility operation, which was promised to be the revenue producer for decommissioning funding, is but ended.

The Commission is quite concerned over the situation. There's a current multi-million dollar decommissioning liability. There is a Commission requirement that once decommissioning starts that it be carried out as promptly as possible. As far as we can see, there's virtually no assurance that the needed funding will be made available on a timely basis. These are obviously the questions that are first and foremost in our minds this afternoon and we are very interested to hear from Sequoyah Fuels and from General Atomics on this matter as well as some operational matters.

Do any of the Commissioners have remarks

conviction that a satisfactory resolution of the issues associated with cleanup of the Sequoyah site can best be accomplished through a cooperative effort with the NRC which assures that these revenues are effectively applied to accomplishing work at the site for its safe and orderly decommissioning.

Finally, I appreciate the opportunity to discuss these matters with you and Mr. Sheppard will summarize the overall presentation and then I would be very happy to answer further questions.

CHAIRMAN SELIN: Well, we behaved reasonably well in allowing you to finish statements before we came in, but I can't wait for Mr. Sheppard. I have a few things I must say to your remarks, Mr. Blue.

First of all, I completely disagree with your characterization of who shot John, you know, why the place closed down, et cetera. I don't think that's all that germane to where we come from here, but I can't just let that stand. It's sort of like driving a car off the cliff and blaming a rigorous application of the law of gravity for the problem of the accident. I think your company steps had led to the regulatory environment which made things so difficult. I don't ask you to agree. It's not really

necessary for where we go from here.

The second is that our unhappiness is not to do with the timing of when we learned about the ConverDyn deal. I don't think we would have felt any different in July or August, except we would have understood a little bit better than we did at the time why the negotiations on financial assurances didn't happen. It's the substance of the arrangement. It's not the ConverDyn deal per se, it's the use of that as the basis for financial assurances.

Our regulations, our understanding call for two things. One is a very high assurance that decommissioning will be paid for and even if I don't add any provisos or contingencies to the one you went through, you went through a whole lot if this happens, if that happens, if the deal holds up, if the revenues are in, if the business is there it will produce money, which if we looked at your proprietary figures would tell us that maybe there will be enough money for decommissioning, except we don't know quite how much that is yet. The assurances aren't there and the timing is not there. Our rules call for approval of a decommissioning plan provided that it's responsible, protects the health and safety of the workers and that it's as -- well, I could read it, but it says rapid as

possible and 12 years is not as rapid as possible. You're clearly proposing a plan that is neither satisfactory assurances, nor is based on a technical or a reasonable rate of spending from the point of view of are we asking to do inefficient things. It's based on an ability of an as yet untested deal to produce the revenues that will allow you to finance the deal, which is completely inconsistent with the sense of our regulations and I think what common sense calls for in a decommissioning.

Third is that --

MR. BLUE: May I respond to that point?

CHAIRMAN SELIN: Well, I didn't interrupt you. Why don't you let me go through the list and then you can take them.

MR. BLUE: All right.

CHAIRMAN SELIN: Third is at one point you laid out your position as an arm's length financial owner but the assurances that you gave and that Mr. Sheppard asked and you agreed on March 17th were clearly a lot more than an arm's length financial. I mean we were given to understand -- I specifically asked you and you certainly answered that GA's management resources, its technical resources, its financial resources were behind Sequoyah, that you're

not a passive investor that's protected from further commitments by the corporate structure as far as I'm concerned and I'm sure the other Commissioners are concerned.

The fourth point is that the assurances that you gave us on March 17th are a lot more than you seem to recognize today. I have the transcript in front of me. I'm not completely surprised that the conversation took this turn. I asked you, among other things, is GA committed to dealing with the residual magnitude of the problem that has to be faced.

"Yes, we're committed to dealing with the residual when it has to be faced," and there's a long discussion of how you hoped a lot of the remediation will come along the way. But the bottom line was that whether or not the remediation is done under operation, that GA is committed to supporting, financially supporting Sequoyah Fuels when decontamination has to be done.

The last point is the idea that a letter of credit which is useful only if Sequoyah is operating should be used to finance decommissioning is completely inconsistent on itself. You don't decommission when you're operating. You put up the Citicorp letter of credit as a further example of a

concrete piece of support that says, "Yes, we have not only our own resources but these financial resources to support decommissioning." And then to say that, "Well, they'll only make the money for decommissioning available as long as we don't have to decommission, i.e. as long as we're still operating, that's just quite internally inconsistent.

That's sort of the top five items on my list. I'd be very pleased to hear whichever ones you'd care to respond to.

MR. BLUE: Very good. Well, first of all, as has been earlier stated, we're operating under a license approved by the Commission in 1985 and approved by the Commission's approval of the transfer of ownership from Kerr-McGee to the holding corporation actually that owns Sequoyah Fuels in 1988. As you are aware, there is a decommissioning funding plan which was submitted and approved by the NRC at that time. Of course, the letter of credit in that particular instance provided in connection with the NRC's approval is in force and effect. So, as we operate under that current license, that's the basis, I would presume, that we're operating.

Now, it is also the case, as I've indicated earlier, that all of us contemplated and

very much hoped that it would be feasible to relicense the Sequoyah facility so that it could continue to contribute what amounts to about $100 million of economic activity to Sequoyah County. We made great efforts to achieve that objective. It was in the context of that relicensing and all of my comments which are explicit on the 17th and then memorialized on the 19th, two days after that, to try to even be more clear in terms of what our approach would be. It was explicit in all of that discussion that the issue of determining and quantifying the amount of guarantees to be provided by third parties, not necessarily even GA, would be done in the context of the relicensing process and obviously if a satisfactory agreement couldn't be reached pursuant to that relicensing process, then the NRC would not grant a license which would enable the facility to continue to be operated. It's the fact that this relicensing upon which all of those comments and those letters and my statements of the 17th were based became impossible to implement that we have circumstances which are different.

But I don't want to miss making the really important point that notwithstanding this very unfortunate, if not devastating set of circumstances,

regardless of who might have been -- what the reasons might have been, the fact is we've been able to conclude an arrangement which will provide an alternative source of funding so that the licensee can accomplish and fulfill its obligations. That is the fundamental spirit and context of my comments to you on the 17th of March and as attempted to be elaborated upon in the subsequent correspondence.

Sometimes you don't -- in business, you're not able to plan forward without making material changes. The point here is that we've been able to bring something to the table which I'm very pleased about and which very materially improves the ability of the licensee to discharge its obligations, to satisfy you and to fulfill the remediation requirements. I think it's also important for me to reemphasize the fact that one reason why we didn't wish to move directly to the approach of an immediate decommissioning, which I understand from counsel doesn't provide for financial assurances, a reason why we didn't wish to move precipitously in that direction and instead wished to have a measured period of time to consider our alternatives and discuss them with you, is that we're very conscious of the fact that the closure of the plant at Sequoyah has created an

economically devastating effect on that county in that part of Oklahoma.

To the extent that we can be resourceful, although perhaps not embarking upon the plans of several months ago, but resourcefully find an alternative means of reconstituting economic activity which would provide jobs at that site, then we want to do that. I don't know whether we can be successful and I don't know how long it will take and I'm sure we'll be conferring or our people will be conferring with the staff in respect to what the chances are, how much time it may take. But I can assure you of our good faith efforts in that regard. Yes, indeed, that will impact the way this issue of immediate reclamation or some sort of a variation of standby licensing should occur.

I think if we work the problem, we will develop the solution.

CHAIRMAN SELIN: I need to say two things about your remarks. The first is that when a plant goes into operation, in other words when it first becomes contaminated, we do not require that enough cash be available on day one to shut the plant down if its stops operating on day two. The cash we require is separate from the liability that the licensee

incurs. We try to be reasonable and match the cash to a reasonable set of needs. But the amount of cash put up, say the $750,000.00, bears no resemblance to the liability of the licensee. The licensee is liable to clean up the site and the cash is a good faith piece, assuming things go well. But if things don't go well, then other --

The second point I'd like to make is nobody has asked you to decontaminate the plant immediately. What I have said, and I think what the Commission would say is we would like to see a plan that, first of all, has much higher assurances of funding than the fees from ConverDyn and, secondly, which is based on a reasonable cleanup plan. Mr. Sheppard went through a set of steps which sound plausible about first we do this and then we do that. But we want, at least I want and I think we want the pace to be set by what is reasonable from a technical point of view, not when you happen to get some cash in from an iffy future deal to pay for it. That's the point. You have the 60 days. That's not the problem. But that's the point that we expect to emphasize in our discussions about the rate and structure of the decontamination, the decommissioning work.

MR. BLUE: I don't know that I would

characterize it -- feel that the characterization of the ConverDyn transaction to be an iffy future deal is accurate. I don't think that properly characterizes that arrangement. That's why we invited and would request a proprietary session, so that you could take a more studied -- make a more studied assessment of that issue.

Fundamentally, however, I would say that the period of reclamation, if it were to take 10 or 12 years, for example, which is pretty heavily front end loaded because of the removal of the raffinate and calcium fluoride sludges loaded on the front end, would appear to be a rational and very reasonable, sensible approach from any point of view you would consider.

My experience with the reclamation of mill sites, for example, is that before you've completed the planning and final sign off and all of the arrangements, even though the expenses may be more heavily loaded in the front, it takes of that general order before the work is done.

In any case, I would think that that's the sort of thing that we ought to present to you our view as to how this ought most efficiently to be done from a technical point of view, and then we'll show you

what we've been able to do, which was responsive to those technical requirements. It was not, was not the function of some other consideration than addressing this problem.

CHAIRMAN SELIN: Commissioner?

COMMISSIONER ROGERS: Are you going to give us some kind of a detailed schedule that matches these numbers that you -- total of $20 million for the surface decontamination and then the other decontamination activities? Are you going to give us a schedule, rough schedule of when those will take place?

MR. SHEPPARD: We're developing that schedule now, yes, sir.

COMMISSIONER ROGERS: And you've mentioned how important it is to you to keep jobs in that area. Will you also give us what your staffing level would be from the 300 that you have now through the decommissioning period and so we see what that amounts to, at least to appreciate the significance of your remarks?

MR. SHEPPARD: Yes, sir, we'll be able to provide that.

COMMISSIONER ROGERS: That's all.

CHAIRMAN SELIN: Commissioner Remick?

COMMISSIONER REMICK: Is Mr. Sheppard going to give us a summary?

CHAIRMAN SELIN: He will. He will.

COMMISSIONER REMICK: I can wait.

CHAIRMAN SELIN: Okay. Mr. Sheppard, the floor is yours.

MR. SHEPPARD: Just to kind of make sure we know where we've traveled for the last hour and 25 minutes, with respect to the plant, the plant status, the UF6 process is shut down and we expect it to remain shut down. Intermediate products are being removed from the bins. The chemicals are being offloaded. It's being cleaned out. The UF4 facility is awaiting to go back into operation. We hope that that decision would be imminent. We are continuing to conduct the cleanup and remediation activities that we've been discussing with the staff and committed to as late as January of '92.

With regard to the November 17th event, we conducted thorough investigations of that event. I think that our conclusions coincide very closely with those of the augmented inspection team from Region IV. Corrective actions have been designed to meet all those concerns and those actions have been taken. As I said before, we're awaiting regional concurrence for

the restart of that facility.

With regard to the new business arrangements, as Mr. Edwards discussed, they call for the long-term shutdown of the UF6 process and in return for that there is a substantial flow of revenues to Sequoyah Fuels to be used for remediation and cleanup and decommissioning of the site.

With regard to the status of the license, the present license remains in effect in timely renewal. Sequoyah Fuels is a licensee that continues to meet the requirements of the license. We are reviewing the license to determine if there are any portions of the license which need to be revised based upon the new status and would submit license amendment requests for any of those conditions. We will be meeting with the staff in early February to discuss both the outcome of our business activities reviews and our decisions with respect to where we want to go with respect to the license.

Finally, with regard to decommissioning planning, we have been conducting decommissioning planning in support of license renewal. We are making some revisions based upon the new business developments. Again, that will be part of the discussions in early February.

With that, we'd be pleased to answer any other questions the Commission might have.

CHAIRMAN SELIN: Commissioner Remick?

COMMISSIONER REMICK: Just a comment. I think the meeting that you talked about in February in my mind is extremely crucial in better defining what you intend to do. If we would continue a long time with the existing license based on a renewal application that was submitted on a timely basis but which no longer meets the actual situations, I would be very concerned. So, I hope that in February you can clarify where you're heading and what you're going to do about renewal of the license or a modified license, what amendments and so forth so that we aren't in limbo.

MR. SHEPPARD: Yes, sir.

COMMISSIONER REMICK: Thank you.

CHAIRMAN SELIN: Commissioner de Planque?

COMMISSIONER de PLANQUE: No.

CHAIRMAN SELIN: Well, as you know, we have been concerned for some time about what we consider spotty operation and, of course, the extent of contamination of the Sequoyah Fuels Facility. Since the summer of 1990, there was an event that led to close scrutiny by Region IV. A number of operational

and managerial weaknesses were identified, leading to the issuance of several enforcement actions.

These culminated in October 1991 when we issued an order requiring the plant to remain shut down to take specific actions to improve operations. In April of 1992, based in large part on your reference, Mr. Sheppard, we were satisfied that progress was being made and the plant was permitted to restart operations. But a second major ingredient in that decision was the public meeting that we held on March 17th, 1992 with officials, most of whom are here today, who give us a number of assurances and those assurances were critical to that restart.

At that meeting, the Commission expressed its concern about the operational weaknesses and the contamination of the facility. We also expressed our concern about Sequoyah Fuels' resources and your ability not only to operate but to guard against contingencies and to do decontamination, as well as your personnel resources. On both of these counts, the Commission was given assurances at the highest level of Sequoyah Fuels and General Atomics, both of whom are here today, that General Atomics' personnel were providing close oversight of the operation and would provide needed personnel and financial

resources. Mr. Blue, who as he said is the Chairman and Chief Executive Officer of General Atomics, committed that with the full backing of General Atomics' financial and technical, Sequoyah is addressing the regulatory requirements for the plant.

I want to emphasize that these assurances were very important to the Commission when we reached our decision to permit resumption of operation. The staff indicates that there have been improvements at the facility since restart, but operation was still plagued by preventable errors. On two occasions, in May and in November, as Mr. Sheppard discussed, incidents occurred which required the shutdown of operations. Now, for your own corporate business reasons, the owners of the facility have decided to sharply curtail operations and, as we've been given to understand, apparently to close it down completely, at least the UF6, within the next few months.

I wish to stress that that's a business decision. It's your obligation and your authority to make such decisions, not for the NRC to decide. However, it is a matter of NRC's responsibility to assure that termination of operation is carried out safely and promptly and to ensure that the responsible parties properly clean up the radioactive

contamination of the site. This is a responsibility that we will take very seriously and will pursue with vigor.

Today, I'm very sorry to say that we have not heard a reaffirmation of the ringing commitments of March 17th, of full backing of General Atomics' financial and technical. Mr. Blue: "We, Sheppard and Kemp have had numerous conversations about the resources that are required for cleanup and decontamination. There is a strong commitmen' coming to me, Mr. Sheppard, from General Atomics that the resources are available. We, General Atomics are committed to dealing with the residual contamination when it has to be faced."

Rather, today's discussion of General Atomics' support for cleanup of Sequoyah is full of contingencies and is based on expectations extending over a decade into the future. Our regulations require more than this. They require an explicit plan to both fund and implement prompt decommissioning.

Further, there are a number of important questions about the licensee's proposal to fund the Sequoyah Fuels' continuing remediation efforts and eventual decommissioning based on the currently unknown ability and success of a new commercial

enterprise, ConverDyn, an organization which does not appear to have any direct corporate affiliation with SFC. There are also questions about a proposal for decommissioning that would be carried out over a 12 year period.

The message I want you to leave with, that I want to make sure you have absolutely clearly, is that the Commission considers the obligation on licensees and on people running NRC licensed plants to assure proper decontamination and decommissioning to be a very serious one and one which we intend to see is properly carried out. In my view, the Commission should direct Sequoyah Fuels and General Atomics promptly to provide a specific proposal to assure adequate funding for timely and satisfactory decontamination and decommissioning and if such a proposal is not soon forthcoming, to initiate appropriate legal steps to compel such measures.

Thank you very much for your appearance.

The meeting is adjourned.

(Whereupon, at 3:31 p.m., the above-entitled matter is concluded.)