

July 16, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE PRESIDING OFFICER

July 23, 2002 (1:25PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket No. 030-03754-MLA
ABB Prospects, Inc.)	
)	ASLBP No. 02-799-01-MLA
(Combustion Engineering Windsor Site))	

ABB RESPONSE TO REQUEST OF THE PRESIDING OFFICER

This responds to Administrative Judge Young's request for additional information at the June 26, 2002 telephone conference, as confirmed by Judge Young's July 3, 2002 Order.

I. The Connecticut Department of Environmental Protection Lacks Standing to Intervene or Request a Hearing.

At the June 26 conference, applicant-licensee ABB Prospects, Inc. ("ABB") observed that the Connecticut Department of Environmental Protection ("CTDEP") Reply to ABB's and NRC Staff's oppositions to its intervention petition and hearing request emphasized CTDEP's alleged standing to represent the environmental resources and citizens living near the Windsor site. At the June 26 conference, ABB argued that such an assertion of a *parens patriae* interest was incompatible with NRC Staff's decision to participate as a party and thereby to represent those same interests in this proceeding. The proposition that a state may not assert a *parens patriae* interest when the federal government is involved in the proceeding and thereby necessarily represents those same

interests is established in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) at 610, note 16.

In any event, as ABB noted during the June 26 conference, any recognition of a *parens patriae* interest on the part of CTDEP merely expands the scope of interests which CTDEP may seek to protect in the proceeding; it does not establish that those expanded interests will be injured as a result of the license amendment at issue in the proceeding. CTDEP has failed to allege, let alone establish, how any of its asserted interests will be affected by any distinct new harm or threat from the limited additional decommissioning which the amendment would authorize. This failure constitutes a critical flaw in CTDEP's intervention and hearing request, and is ground for denial regardless whether CTDEP may assert a *parens patriae* interest.

II. The Scope of ABB's Amendment Request and Prior NRC Precedent.

ABB noted at the June 26 conference that the Commission had previously approved of a limited decommissioning request similar to that of ABB's in this proceeding. It is important in this regard to understand the scope of the application for license amendment filed by ABB on January 7, 2002 and referenced in the Federal Register notice that controls the scope of this proceeding. 67 Fed. Reg. 17472, April 10, 2002. ABB's application was filed only after substantial discussion and interaction with NRC Staff, and to a lesser extent with CTDEP and other interested stakeholders. An important part of this background is described in Exhibit 2 to ABB's Answer in Opposition to CTDEP's intervention and hearing request. Specifically, ABB intended,

subject to NRC approval, to engage in an approach whereby ABB's license would be amended from time to time to authorize source reduction activities that would minimize on-site radiological risks from contamination and contribute to ABB's eventual goal to terminate the license and release the site for unrestricted use. Applications for these license amendments would be filed while ABB prepared (and NRC Staff reviewed) a full decommissioning plan for license termination and site release. The first step in this decommissioning approach was accomplished when NRC amended the license on November 2, 2001, to authorize ABB to do substantial decontamination in Building Complexes 2, 5, and 17. Virtually all hazardous and licensed radioactive residues are accordingly being removed from these Building Complexes. Thus substantial decommissioning work in the three Complexes already has been accomplished under the license. This is why, in opposing CTDEP request for hearing and petition to intervene, both ABB and NRC Staff stressed CTDEP's failure to identify a distinct new harm or threat from the requested amendment.

However, under ABB's license additional amendments are needed before certain additional decommissioning work in the three Complexes can be undertaken (for example remediation of underground piping and contaminated soils). ABB understood, from its prior discussions with NRC Staff and other stakeholders, that only one decommissioning plan should be filed for the site, but that this plan would be limited initially to matters relevant to the additional activities to be undertaken in Building Complexes 2, 5, and 17, and be amended from time to time (by applications for license amendments) whenever further approval is needed and sought for additional

decommissioning work. The plan would eventually evolve into a full decommissioning plan that would support license termination and site release. The full plan would be subject to NRC approval, and be the subject of a future Federal Register notice and hearing opportunity as applications for license amendments are submitted to NRC.

Accordingly, ABB filed the application that is the subject of the Federal Register notice and this proceeding in order to continue making progress in decommissioning of the three Complexes. The January 7, 2002 application for license amendment that is the subject of this proceeding requests NRC review and approval of a document entitled "Decommissioning Plan Building Complexes 2,5, and 17," which ABB has referred to as a limited decommissioning plan or "LDP" because it applies only to the three identified Building Complexes as opposed to the entire site subject to NRC jurisdiction, and *does not request license termination or site release*. It was and remains ABB's intention to limit the application to its January 7, 2002 request to be allowed to continue making progress in decommissioning these three Complexes by authorizing certain work that cannot be done under the current license. *ABB's amendment application does not request any NRC "sign-off" or decision that the three Complexes are sufficiently remediated to assure their release, and the amendment would not foreclose the possibility that additional decommissioning work in the three Complexes could be required if, when the final plan is submitted and approved, more work is needed to accomplish ABB's ultimate goal to terminate the license and release the site for unrestricted use.*¹ To the extent

¹ Development and approval of DCGLs are necessary parts of the review and approval of a full decommissioning plan but DCGLs are generally formulated on a site-wide basis. Moreover, actual release of a remediated portion of a site from the license could raise the potentially difficult issue of allocating the contributions to offsite dose from residual materials among various parts of the site. These considerations

there could be any doubt in this regard, the application could easily be amended to incorporate the above italicized language.

Consistent with its prior discussions with NRC Staff and interested stakeholders, ABB structured its "Decommissioning Plan Building Complexes 2, 5, and 17" as a framework document that could be amended from time to time, and that would evolve eventually into a full decommissioning plan to support license termination and site release. ABB's submittals of February 22, 2002 (relating to DCGLs) and March 8, 2002 (relating to the ALARA analysis required by 10 CFR §1402) were in accord with the decommissioning approach described above whereby the LDP would be amended from time to time as ABB completed additional decommissioning analyses for submittal to NRC. *However, it was not and is not ABB's intention that the February 22, 2002 and March 8, 2002 submittals be considered within the scope of the application that is the subject of this proceeding, since NRC approval of them is not essential to the January 7, 2002 request, which asks only that decommissioning work in Building Complexes 2, 5, and 17 be permitted to continue.* When NRC Staff accepted ABB's January 7, 2002 application for review, it noted (in a letter to ABB dated April 4, 2002, attached as Exhibit 1) that the DCGLs and ALARA analysis (and final site survey) were not included and that "we will review the DP without regard to these sections so that limited work may proceed on the building complexes." Indeed, since the DCGLs and the ALARA analysis contained in those two submittals pertain only to the calculation of

also favor ABB's approach whereby the limited decommissioning work to be undertaken under the amendment would be without prejudice to the need to undertake further removal of residual materials, and there is no partial site release or license termination until the full decommissioning plan is submitted, approved, and implemented.

residual dose associated with termination of the license and release of the site, NRC approval of them is not needed in order for NRC to act on an amendment request that does not ask for license termination and site release. ABB expects that the DCGLs and ALARA analysis, as well as future submittals such as a final survey plan, will be the subject of separate, future opportunities for CTDEP to comment informally and request a hearing as they became relevant to one or more future applications for license amendments.²

Accordingly, when CTDEP sought to raise issues about DCGLs and other matters relevant only to license termination and site release, both ABB and NRC Staff objected. NRC Staff was and remains correct when it explained in its Notice of Intent to Participate and NRC Staff Response to Connecticut Department of Environmental Protection's Request for Hearing and Petition to Intervene (at page 5), that this amendment request "does not ask for approval of all site assessments and surveys, off-site dose modeling, Derived Concentration Guideline Levels ("DCGLs") or other actions necessary for full site decommissioning."

ABB's approach to decommissioning of its Windsor site is generally referred to as a phased decommissioning approach. Such an approach has the highly desirable result

² The amendment at issue would authorize ABB to decommission certain underground portions of the three Building Complexes (for example underground piping) and remediate any related contaminated soils. In doing this work (especially soils), ABB would as a practical matter use the DCGL's as submitted to NRC for review. However, since the DCGL's are the subject of separate NRC review, it would be understood that NRC approval of the amendment request would not constitute approval of the DCGLs, and that ABB's use of them in this context would not preclude NRC from requiring their modification and re-application to the three Complexes such that additional decommissioning of the Complexes would be needed for license termination and site release. In effect, ABB has made the business judgment that the advantages of proceeding at its own risk to continue limited decommissioning, subject to the possibility of NRC mandated additional work, outweigh the disadvantages of postponing further progress in decommissioning pending final NRC approval of the DCGL's.

of reducing radiological risks to persons and the environment, including on-site personnel, while studies and analyses pertaining to other site areas, and plans for eventual license termination and site release, are under preparation or review. For example, remediation of contaminated soils in the three Building Complexes will eliminate a possible source of groundwater contamination. As we noted in the June 26 Conference, this concept of a phased decommissioning is consistent with 10 CFR §30.36(d) which, in appropriate circumstances, requires decommissioning of a "separate building or outdoor area" before a decommissioning plan is prepared or approved for the remainder of the site.

The Commission specifically approved of this phased decommissioning approach in *Kerr-McGee Corporation (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232 (1982) ("*West Chicago*"). In *West Chicago*, as here, the licensee Kerr McGee was already authorized by license amendment to undertake limited decommissioning on its site. In *West Chicago*, as here, the licensee sought permission by license amendment to undertake additional limited decommissioning, including remediation of certain buildings on the site, prior to NRC review and approval of a decommissioning plan for the entire site. The City of West Chicago objected to Kerr McGee's plans on several grounds, including an objection that Kerr McGee's plans constituted an impermissible piecemeal approach to decommissioning while the decommissioning plan for the entire site was not approved. *West Chicago* at pg. 244. The Commission rejected all of the City's contentions. *West Chicago* at pp. 262-272, and the U.S. Court of Appeals for the

Seventh Circuit affirmed. *City of West Chicago v. NRC*, 701 F. 2d 632 (7th Cir. 1983).

Thus there is ample precedent for ABB's decommissioning approach.

III. The Applicable Regulations Are Set Forth In 10 CFR 30.36(g)(4) and (5).

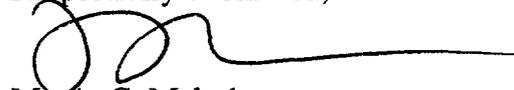
The regulatory requirements applicable to the contents of ABB's application are set forth principally in 10 CFR §30.36(g)(4)(i) - (vi). Accordingly, Section 3 and 4 of the LDP include a description of the three Building Complexes sufficient to evaluate the acceptability of ABB's proposed LDP (10 CFR §30.36(g)(4)(i)); Section 8 includes a description of the planned decommissioning activities (10 CFR §30.36(g)(4)(ii)); Sections 9, 10, 11, 12, 13, and 14.0 through 14.3 include descriptions of methods to protect workers and the environment from radiological hazards during the decommissioning planned to be undertaken under the amendment (10 CFR §30.36(g)(4)(iii)); Section 14.4 includes a description of the planned final radiation survey sufficient to understand ABB's plans and the relationship between the final survey and the more limited survey proposed to be undertaken during the limited decommissioning of the three Building Complexes (10 CFR §30.36(g)(4)(iv)); and Section 15 (and the Decommissioning Funding Plan, Surety Bond and Standby Trust Agreement referenced therein) include an updated cost estimate for decommissioning, a comparison with the financial assurance available, and a plan for assuring the availability of funds for complete decommissioning sufficient to assure that expenditures for the limited decommissioning to be undertaken under the amendment will not affect adversely ABB's

ability to fully fund complete decommissioning (10 CFR §30.36(g)(4)(v)).³ The standards applicable to the grant or denial of the application are set forth principally in 10 CFR §30.36(g)(5). Since ABB is not requesting license termination or site release, it would be premature to apply the requirements of 10 CFR Part 20, Subpart E "Radiological Criteria for License Termination."

IV. Conclusion.

In sum, there is ample precedent for ABB's phased decommissioning approach and the applicable NRC standards are set forth in 10 CFR §30.36 as described above. However, these matters are relevant principally to the merits of CTDEP's areas of concern. At this early stage of the proceeding, CTDEP's standing allegations are more properly ripe for decision. As noted above, at the June 26 conference, and in ABB's opposition to CTDEP's intervention and hearing request, ABB believes that CTDEP has failed to allege or establish any injury to its interests from the grant of the license amendment that is the subject of this proceeding.

Respectfully Submitted,



Martin G. Malsch
Counsel for ABB Prospects, Inc.

Dated at Washington D.C this
16th day of July, 2002.

³ 10 CFR §30.36(g)(4)(vi) does not apply here since the limited decommissioning to be undertaken under the LDP (as well as decommissioning of the three Building Complexes) is proposed to be completed within 24 months of approval of the LDP.



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION I
475 ALLENDALE ROAD
KING OF PRUSSIA, PENNSYLVANIA 19406-1415
April 4, 2002

Docket No. 03003754
Control No. 130824

License No. 06-00217-06

John F. Conant
Senior Project Manager
ABB Prospects, Incorporated
CEP 880-1403
2000 Day Hill Road
Windsor, CT 06095-0500

SUBJECT: ABB PROSPECTS, INCORPORATED, DECOMMISSIONING PLAN, BUILDING
COMPLEXES 2, 5 AND 17 FOR THE CE WINDSOR SITE, CONTROL NO.
130824

Dear Mr. Conant:

The U.S. Nuclear Regulatory Commission has initiated the review of the Decommissioning Plan (DP), Building Complexes 2, 5 and 17 for the CE Windsor Site, Windsor, Connecticut, and your request for a license amendment dated December 31, 2001. We will issue a Federal Register Notice, in accordance with our administrative procedures, stating that we are commencing the review. We note that several sections of the DP were omitted for later submittal. These were the DCGL Analysis (Dose Modeling) Section, the ALARA Analysis Section and the Final Status Survey Plan. We will review the DP without regard to these sections so that limited work may proceed on the building complexes.

We have conducted an acceptance review and have determined that the information provided is sufficient to begin the technical review. This acceptance review does not reflect the technical adequacy of the information provided. We may request additional information as a result of our technical review.

Should you have any questions, please feel free to contact me at (610) 337-5200, or James Kottan of my staff at (610) 337-5214.

Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink that reads "Ronald R. Bellamy".

Ronald R. Bellamy, Chief
Decommissioning and Laboratory Branch
Division of Nuclear Materials Safety

cc:
State of Connecticut

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

_____)	
In the Matter of)	
ABB Prospects, Inc.)	Docket No. 030-03754
(Combustion Engineering Windsor Site))	ASLBP No. 02-799-01-MLA
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ABB Response to Request of the Presiding Officer", dated July 16, 2002, have been served upon the following persons by U.S. mail, first class.

Office of Commission Appellate
Adjunction
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
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Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Lester S. Rubenstein
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Martin G. Malsch

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July 16, 2002

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemaking and Adjudications Staff

In the Matter of ABB Prospects, Inc. (Combustion Engineering Windsor Site),
Docket No. 030-03754 - MLA

Dear Madam:

Enclosed for filing please find an original and two conformed copies of "ABB
Response to Request of the Presiding Officer."

Respectfully submitted,



Martin G. Malsch

cc: Service List