the nuclear law center

1724 NORTH LA BREA AVENUE • LOS ANGELES, CALIFORNIA 90046 • 213/851-9201

Elizabeth S. Bowers, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

July 15, 1981

In the Matter of
The Regents of the University of California
(UCLA Research Reactor)
Docket No. 50-142
Proposed Renewal of Facility License

RE: CLARIFICATION OF CBG MAY 13, 1981, MOTION FOR SANCTIONS

Dear Administrative Judges:

On May 29, 1981, your Board granted Intervenor's Third Motion to Compel and directed Applicant to "'show cause' why it is not appropriate under 10 CFR § 2.707 to impose a sanction." Applicant was also directed to "show cause" why counsel for Licensee should not be cited under 10 CFR 2.713 for failure to comply with a Board direction. This occurred after two previous Board Orders and a clear warning in the second order that failure to "fully cooperate in responding to discovery requests in the future may well result in the imposition of sanctions by the Board under 10 CFR § 2.707."

The May 29 Order summarized CBG's motion for sanctions as asking "that a sanction be imposed on UCLA for costs incurred by UCLA due to UCLA's failure to comply with Board orders."

As it appears there may be some confusion as to the nature of the requested sanctions, Intervenor herewith attempts clarification of its May 13 Motion.[1]

1/ On July 14, Intervenor left a phone message with a secretary to the Board indicating said clarification would be forthcoming.

In that Motion, Intervenor requested, pursuant to 10 CFR 2.707 and F.R.C.P. Rule 37, 1) an immediate favorable ruling on the contention in question (Contention II), and 2) an Order causing Applicant to pay the reasonable expenses incurred by Intervenor because of Applicant's failure to comply with Board orders.

As the sanction suggested in item 1 above is the only sanction specifically mentioned in 10 CFR 2.707 ("Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order"), Intervenor wishes to make clear its request that such a sanction be considered.

Intervenor argued at the time that the requested sanctions were very modest indeed when considering:

a) that three CBG Motions to Compel and three Board Orders had been necessary, taking eight months and imposing a substantial burden on CBG and the Board.

b) that Applicant had, under oath, denied the existence, first of financial data relevant to the reactor and second of reactor use data relevant to commercial and other uses of the reactor, when in fact both sets of data were in Applicant's possession and Applicant had, in fact, sent the reactor use data to NRC Staff some months previous

c) that Applicant repeatedly failed to provide definitions for requested terms, at first claiming that the sole function of the reactor was "education" and that no other activity occurred there, then providing CBG with financial data in response to interrogatories as to terms when no such definitions could possibly be found in said accounting records.

d) that both Intervenor and Staff had, at the time of the 2nd Motion to Compel, discussed in separate filings the possible appropriateness of sanctions at that time; and that the Board in its 2nd Order had put parties on notice that continued "gamesmanship" in discovery could well lead to imposition of sanctions.

and e) that no response whatsoever was forthcoming from Applicant in response to the Board's 2nd Order. (The claim that Applicant merely thought it was ordered to provide documents, not written answers, cannot be supported; the documents provided were all produced prior to the 2nd Board Order.) In fact, counsel for Applicant wrote on May 1 that Applicant was under no obligation to provide further information because the 3rd order did not say "The Motion to Compel is...GRANTED" and that merely "The Board was admonishing the University for what the Board considered 'less than frank' past interrogatory responses and directing the University to be fully responsive to future discovery requests." (emphasis added).

Intervenor wishes to also make clear that nothing has transpired in the two months since its initial Motion for Sanctions to indicate to Intervenor that the requested sanctions are anything but extremely modest, given the circumstances. To the contrary, recent events suggest more severe action may be in order:

a. The "gamesmanship" over discovery appears to Intervenor to be continuing, threatening the Board's ability to obtain a complete record on which to base a decision and also the rights of Intervenor to information necessary for the presentation of its case. Of the extensive questions submitted in Interrogatory Set Two, only a very small fraction were, in Intervenor's view, answered candidly and fully, necessitating the renewed burden on CBG and Board of dealing with yet another Motion to Compel. The Board has already been forced, in its July 1 Order, to direct UCLA to answer certain questions in the Second Set; still pending before it is the CBG Motion to Compel on questions for which no protective order was requested. Problems have likewise continued in obtaining complete production of documents.

b. The proceedings are getting delayed because of these discovery problems, and Intervenor, with its very limited resources, is finding that the burden imposed on it by being forced to spend so much of its energy, time and financial resources attempting to obtain Applicant's compliance with discovery obligations and Board Orders is so great that its ability to concentrate its resources on preparation of its case for Board consideration is severely affected. Board has no doubt noted the incompleteness of CBG's most recent Motion to Compel as to 2nd Set Interrogatories. CBG does not have the resources of the University of California and simply cannot succeed in presenting an adequate evidentiary record for Board consideration if it must spend so much of its time and other resources on Motions to Compel discovery and subsequent attempts to obtain Applicant's compliance with said Orders regarding discovery.

c. The credibility of Applicant's "show cause" response has been called into question by remarks attributed to UCLA's representative in a prestigious scientific journal. As Intervenor's views have not been solicited, Intervenor does not attempt herein to respond to statements made by Applicant in the article in question, the affidavit filed relative to that article, nor Applicant's "show cause" response and its memorandum in opposition to the Motion for Sanctions. However, the Board should not conclude that by its silence Intervenor takes no exception to the remarks and assertions made therein. Quite the contrary.

As a final note of clarification regarding CBG's request for sanctions, Intervenor wishes to make clear that by its specific suggestions as to sanctions it in no way intended to restrict Board's consideration of appropriate sanctions in this matter. Intervenor notes that the Atomic Energy Act, the NRC regulations, and NRC practice all view failure to carry out discovery obligations and failure to obey Board Orders relative to discovery as extremely serious matters and contemplate sanctions of major consequence; likewise as to untruthful statements submitted in NRC license proceedings.

Intervenor notes that sanctions of immediate ruling favorable to the aggrieved party as to most of the contentions put at issue were imposed recently by a Licensing Board in a case involving failure to obey only one Board Order compelling discovery and not involving allegations of untruthful statements made under oath in interrogatory answers. In that case the moving party had requested dismissal of the offending party from the proceedings, and the Board chose instead an action nearly as severe. Metropolitan Edison Company (Three Mile Island Nuclear Station Unit I) LBP-80-17, 11 NRC 893 (1980).

In sum, Intervenor wishes to make clear that it has requested two sanctions against Applicant (immediate favorable ruling as to contention II and payments of costs incurred[2]), views these requests as very modest given the circumstances and the seriousness of thediscovery problems and the prospective threat to Board authority, and in no way intended to limit Board's consideration of sanctions to those proposed by Intervenor in its May 13 Motion, as far stronger sanctions may now be in order, given the events which have transpired since Intervenor's initial Motion.

Respectfully submitted,

Mark Pollock
Attorney for Intervenor
COMMITTEE TO BRIDGE THE GAP

cc: service list

2/ It should also be made clear that the estimate of $500 incurred costs was, as stated in my declaration at the time, an underestimation of actual costs, and that the continuation of these discovery problems in the two months since that Motion has necessitated considerable additional cost to Intervenor.