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5/21/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 50-142
THE REGENTS OF THE UNIVERSITY)	(Proposed Renewal
OF CALIFORNIA)	of Facility License)
(UCLA Research Reactor))	
_____)	

CEG RESPONSE TO NOTICE OF INTENT TO PARTICIPATE
BY THE CITY OF SANTA MONICA

I. INTRODUCTION

On May 6, 1982, the City of Santa Monica, California, (hereinafter the "City") served notice of its intent to participate in the above-captioned proceedings as an interested municipality pursuant to 10 CFR 2.715(c). CEG has no objection to the City's participation but does object to certain restrictions on that participation proposed by Staff. CEG views those proposed restrictions as without basis and contrary to NRC practice and the regulations applicable to interested governmental agencies.

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II. DISCUSSION

A. The City Clearly Meets the Requisite Standards for Participation Under 10 CFR 2.715(c) and Its Participation Will Contribute to the Evidentiary Record in the Proceeding

CBG has no objection to the City's participation as an interested municipality. 10 CFR 2.715(c) directs the presiding officer of proceedings such as this one to afford representatives of interested governmental entities such as municipalities a "reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue." The only requirement is one of interest, which the City of Santa Monica clearly has met.

Portions of the City are only a few miles from the UCLA reactor, significant portions of the City's water system are nearby, and a substantial number of the City's residents attend school or work at UCLA or in the immediate vicinity. Those interests could clearly be affected by health and safety problems at the reactor and the other matters at issue in this proceeding. The City has clearly established its interest, and, thereby, its right to participate in said proceedings under 10 CFR 2.715(c).

(CBG notes that the City has been diligent in attempting to exhaust available remedies prior to determining it had no remaining recourse but direct participation in these proceedings. Not noticed of the requested licensing action

by the Applicant, who apparently did provide such notice to the City Attorney of Los Angeles, the City Council held two long and detailed hearings on the matter when the matter was first brought to its attention by a citizen of the City. Several dozen individuals testified at said hearings.^{1/} The hearings resulted in a resolution passed by the City Council calling on the Regents to withdraw the application now pending before the NRC and indicating the City's intent to participate in the proceedings should the Regents decline to take such action. The resolution was sent to each and every member of the Board of Regents. According to the City's Notice of Intent, not one responded. The sole response was from the General Counsel to the Regents, who declined to withdraw the application. Only after providing the Regents themselves a reasonable opportunity to respond in some other fashion did the City take the action identified in its May 6 Notice.)

It is CBG's impression that the involvement of the City will be beneficial in providing a more complete decisional record for the Board. The City has perspectives, information sources, and interests different from those of any other party to the proceeding. No existing participant in the proceeding can represent those interests nor provide those inputs. The proceeding can, it would appear, only benefit by the participation of the City of Santa Monica.

^{1/} Intervenor notified by phone several officials of the Applicant of the November 3, 1981, hearing before the Santa Monica City Council and suggested they consider sending representatives to testify at said hearing. CBG was informed Applicant's representatives met prior to the hearing on November 3 to determine whether to send representatives, but apparently decided not to, as none did testify.

B. The Proposals by Staff to Restrict the City's Participation Are Without Foundation and Are Contrary to NRC Practice and Procedures

Staff, among other things, proposes that the City not be permitted discovery in this proceeding.^{2/} No precedent is cited to support such a radical proposal, and no case law reviewed thereto. The sole citations are 10 CFR 2.714 and 2.715(c)--the provisions for intervention as a full party and for entry as an interested governmental entity--and neither rule in any fashion prohibits discovery by an interested municipality. The Staff proposed restrictions on the City's participation in these proceedings are without merit, are contrary to NRC practice in this regard, can only result in reducing the quality of the evidentiary record placed before the Board, and should be summarily rejected.

Staff asserts that "only those who are parties to the proceeding pursuant to 10 CFR 2.714 may engage in discovery."^{3/} No citation whatsoever is given for this assertion. No help may be found in 10 CFR 2.714--nothing therein says that only participants who have intervened under those provisions may have discovery. In fact, 10 CFR 2.714 does not even address discovery.

The Staff continues, "The City, as an interested municipality, is limited to the manner of participation described in 10 CFR 2.715(c), namely, to introduce evidence; to interrogate witnesses, to advise the commission, to file proposed findings, exceptions, and petitions for review. Discovery is not included in these procedures." No support is given for the assertion that

^{2/} "NRC Staff Response to Notice of Intent to Participate by the City of Santa Monica", May 13, 1982

^{3/} id., p. 2

interested governmental entities' participation is limited to the items mentioned by Staff.^{4/} In fact, a close reading provides the contrary conclusion.

Staff's summary of 10 CFR 2.715(c) is not quite exact. The first sentence states that entities such as interested municipalities will be afforded

a reasonable opportunity to participate and to introduce evidence, interrogate witnesses and advise the Commission without requiring the representative to take a position with respect to the issues.

The second sentence reads:

Such participants may also file proposed findings and exceptions pursuant to 2.754 and 2.762 and petitions for review by the Commission pursuant to 2.786.

The first sentence essentially guarantees full participational rights to an interested governmental entity prior to initial decision, and the second sentence full rights thereafter (e.g., on appeal), with the sole difference between participation under 2.715(c) and 2.714 being that under 2.715(c) the contention requirement is lacking, permitting interested sovereigns to participate without taking a position on all or any of the issues. They are free to do so, but not so required.

^{4/} CBG notes that Staff takes precisely the opposite tack, where it argues that Applicant can take any action it wishes so long as it is not explicitly forbidden by the regulations. (See, for example, Staff Motion for summary disposition on Contention XX, deferred). With the City, the Staff appears to argue that it cannot take any action not explicitly permitted by the regulations. Fortunately, this apparent double standard need not be resolved at present, for the regulations and case law would appear to clearly guarantee the City the disputed discovery rights.

The second sentence was added when the first sentence of 2.715(c) was expanded a few years ago to include counties and municipalities.^{5/} The second sentence was added, says the accompanying Statement of Consideration, not to reflect a change in NRC practice but to "conform to present practice."^{6/} It had been well settled that participation under 2.715(c) guaranteed full participational rights, and the additional sentence was added to make explicit what was present practice, that those full participational rights continued even after hearing.

The case law here is instructive. In Gulf States^{7/}, the Applicant in that proceeding made an argument virtually identical with the one raised now by Staff in the UCLA proceeding. That Applicant claimed that an appeal by the State of Louisiana of an initial decision was not permitted :

This claim is founded on the fact that the State had not intervened in the proceeding as a "party" under the provisions of Section 2.714 of the Rules of Practice, 10 CFR 2.714. Rather, the State had invoked instead Section 2.715(c), 10 CFR 2.715(c), which directs licensing boards to "afford a representative of an interested State which is not a party a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issues" (emphasis supplied). This being so, the applicant reasons, an appeal by the State is foreclosed because Section 2.762(a), 10 CFR 2.762(a), authorizes only a "party" to take such a step.^{8/}

^{5/} 43 FR 17801, April 26, 1978.

^{6/} ibid., at 17798

^{7/} Gulf States Utility Company (River Bend Station, Units 1 and 2), ALAB-317, 3 NRC 175 (1976)

^{8/} footnote omitted, deals with partial initial decisions. Note that the version of 10 CFR 2.715(c) cited in the quotation has since been amended to include counties and municipalities and no longer includes the phrase "which is not a party" emphasized by the Gulf States applicant.

Staff in the UCLA proceeding now argues that discovery rights, like appeal rights, are only granted parties and that the City, under 10 CFR 2.715(c), is not a party.

The Appeals Board responded to the applicant's arguments in the Gulf States case by stating, "we encounter little difficulty in answer it in the State's favor." Arguing that unless there was a "clear manifestation of a Commission intent to achieve that result," the Appeals Board would be very reluctant to impose the restriction proposed by the applicant in that case. Searching to determine whether such a "clear manifestation" of Commission intent existed, the Appeals Board continued:

Is there, then, some concrete indication that the use of the word "party" in Section 2.762 was intended to bar an appeal by a State which intervened in the proceeding under Section 2.715(c) and thereafter participated in the hearings? The applicant has called our attention to none and, moreover, our own independent inquiry has disclosed none. To the contrary what meager evidence there is of the likely purpose of the framers of Section 2.762 looks, if anything, in precisely the opposite direction.

The Appeals Board continued to suggest that were the narrow interpretation of "party" suggested by the applicant to prevail, it would put the regulation "into necessary collision" with the Atomic Energy Act, which mandates that interested States be provided reasonable opportunity to advise the Commission in such proceedings. The Appeal Board gave further reasoning as follows:

There is still a further consideration which assists the conclusion that, although not a "party" on the licensing board level, an "interested State" nonetheless should be deemed a "party" for appellate purposes. It seems quite apparent that the Section 2.714-Section 2.715(c) sponsored dichotomy between a "party" and a non-party" is rooted in the fact that, to obtain intervention as a "party" under the former Section, one must put forth specific contentions; in contrast, an "interested State" intervenor under the latter Section "need not take a position with respect to the issues." In other words, the non-party status of an "interested State" when before the Licensing Board simply reflects the fact that the State is not required, as is normally expected of a party, to take a positive stand on the issues to be decided.^{9/} (emphasis added)

The Board concluded: "For all of these reasons, we decide that a State which has intervened under Section 2.715(c), and thereafter participated in the licensing board hearings, is to be treated as a "party" for the purposes of the appellate rights conferred by Section 2.762(a)."^{10/} (emphasis added.)

As the Appeals Board decided, the party/non-party distinction between 2.714 and 2.715(c) is simply a matter of freedom under 2.715(c) to not take a position on all or any of the issues. It does not limit participation rights. CBG can see no reason why, and staff has put forward no authority to suggest why, the Appeals Board decision in Gulf States does not apply equally to discovery rights. It should be noted that the case discussed above was decided before 10 CFR 2.715(c) was amended to explicitly add appeals rights.

^{9/} Gulf States, supra, at 179
^{10/} ibid

The most telling argument is the regulation itself. 10 CFR 2.715(c) affords representatives of interested municipalities "a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission..." The regulation was written to embody the requirement in the Atomic Energy Act that full opportunity be provided to interested States to advise the Commission regarding these licensing decisions. A municipality such as the City of Santa Monica cannot reasonably be expected to be able to participate in these proceedings if normal trial preparation rights are denied them. How can the City interrogate witnesses if it cannot prepare for cross-examination through discovery? How can the City introduce evidence if its experts cannot review documents, inspect a facility, or otherwise be provided with the facts on which to base an opinion or provide a judgment? How can it advise the Commission without access to the facts on which such advice must be founded?

To deny the City discovery would be to deny the City "a reasonable opportunity to participate." The regulations, and for States, the Atomic Energy Act, forbid such an extreme departure from normal practice.

Intervenor notes that, to the best of its knowledge, normal practice runs counter to the proposed restriction by Staff. Intervenor knows of no NRC proceeding--and Staff has cited none-- wherein a representative of an interested governmental entity

participating under 10 CFR 2.715(c) has been denied discovery. Indeed, the opposite is true. Of the cases about which Intervenor has been able to make inquiry, in each, interested governmental entities appearing under 2.715(c) have had discovery rights.^{11/}

In fact, the Appeals Board case upon which access to the most sensitive portion of discovery in the UCLA case is to be, in part, based (ALAB-600, security plan decision regarding Diablo discovery), clearly directs discovery on the security plan to be opened to the Governor of California as well as the Intervenor. As stated in that decision, permitting the entry of the Governor as the representative of an interested State, the Board ruled:

Subject to the protective order and provided that their non-disclosure affidavits in the form attached are executed and filed with us by July 25, 1980, the Governor's counsel may examine the "sanitized" security plan to the extent and under the terms and conditions afforded the intervenor's representatives.

The Governor of California had discovery in areas beyond security in the Diablo proceeding; the Commonwealth of Pennsylvania had discovery in the TMI restart proceedings; and apparently other interested governmental entities have as well. Staff has made no case why normal practice should be altered with regards the City of Santa Monica, and the Staff's proposed restriction should thus be denied.

^{11/} phone inquiry with Chris Hanback, one of the attorneys for Governor Brown in the Diablo case, confirmed by Joel Reynolds, Intervenor's attorney in said case and by Richard Hubbard, principal technical consultant for the Governor on Diablo; phone conversation with Ellyn Weiss, attorney for Union of Concerned Scientists in TMI Re-Start Proceedings, regarding participation and discovery by Commonwealth of Pennsylvania, confirmed by NRC Counsel in that case; Ms. Weiss also indicated State of Maine has similar discovery rights in a current NRC proceeding.

C. Staff Request that the City be Required to Indicate the "Manner" in which it Intends to Address the Matters in Controversy Goes Beyond 10 CFR 2.715(c) Requirements.

The Staff makes an additional request that appears to CBG to be at variance with 10 CFR 2.715(c):

Further, the Staff believes the City should be required to indicate with more specificity, the manner in which it "intends to address those matters which have already been placed in controversy by Intervenor." (Notice, p. 6)

10 CFR 2.715(c) does provide that the presiding officer, at his or her discretion, "may require such representative [e.g., of an interested municipality] to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate." This is a far cry from describing the "manner in which it 'intends to address...'" those subjects.

The presiding officer may require the City, sometime in advance of the hearing, a date for which has not even been set yet, to indicate with reasonable specificity the subjects it wishes to participate regarding, but the manner in which it intends to address those subjects does not appear a matter for Board-directed disclosure.^{12/}

^{12/} Staff indicates that the City "does not propose to broaden the issues" in the proceeding. CBG reads the City's Notice slightly differently. The City's actual statement is, "As recognized previously, however, the City understands that, as an interested Municipality, it takes these proceedings as it finds them, and its participation will therefore neither serve to broaden the matters at issue herein nor to delay these proceedings." CBG sees this as an understanding that the City cannot relitigate matters decided prior to its entry into the case. Although it would appear the City has no intention of attempting to broaden the matters at issue in the proceeding, its concerns about some of those matters may well be different than specific concerns of other participants.

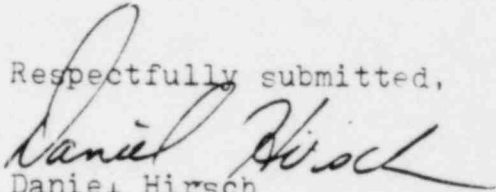
III. CONCLUSION

CBG welcomes the entry of the City of Santa Monica as an interested municipality under 10 CFR 2.715(c). CBG has placed the City on its service list and will serve it all documents served in the proceeding.

CBG opposes the proposed restrictions on participation in the proceeding put forward by Staff as at variance with the regulations and NRC practice and as without foundation. CBG also opposes Staff's request that the City be required to specify the "manner" in which it intends to participate on the subjects it wishes to address. A requirement that at some point prior to hearing the City specify its "subjects" is not opposed.

dated at Ben Lomond, CA
May 21, 1982

Respectfully submitted,


Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

(UCLA Research Reactor)

Docket No. 50-142

(Proposed Renewal of
Facility License)

DECLARATION OF SERVICE

I hereby declare that copies of the attached: CEG Response to Notice
of Intent to Participate by the City of Santa Monica

in the above-captioned proceeding have been served on the following by
deposit in the United States mail, first class, postage prepaid, addressed
as indicated, on this date: May 21, 1982.

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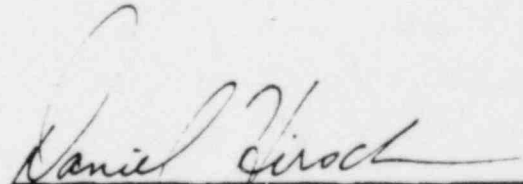
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