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	Docket No. 50-142 (Proposed Renewal of Facility License Number R-71)
(UCLA Research Reactor)	October 8, 1982

UNIVERSITY'S RESPONSE TO CBG'S MOTION OF SEPTEMBER 20, 1982

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I. INTRODUCTION

In its Order dated September 28, 1982 the Board suspended the schedule for responses to summary disposition motions and directed the parties to respond to CBG's "Motion to Summarily Dismiss Staff and Applicant Motions for Summary Disposition, or Alternative Relief as to Same," (the Motion) dated September 20, 1982. The parties were also directed to respond to the City of Santa Monica's letter of September 20, 1982 requesting an extension of time to respond to the summary disposition motions. The Board requested that the parties' responses be received by October 8, 1982.

University objects to all manner of specific relief requested by CBG in its Motion as unwarranted under the Commission's Rules of Practice considered in light of the particular circumstances of this proceeding. Properly construed the Commission's rules preclude the summary dismissal of the Staff and University motions since those motions have not been submitted shortly before a hearing that is set to commence or which has commenced, but instead according to the schedule specifically set by the Board for the filing of such motions.

Moreover, dismissal of the University and Staff motions would deny University a determination, to which it is entitled under long-standing principles of law, that there actually are disputed issues of material fact in this proceeding which require an evidentiary hearing to resolve. The other forms of relief requested by CBG would be unmanageable by the Board and would impermissibly require that the Board refashion the rules of summary disposition to accommodate CBG. Notwithstanding its objections to the specific relief requested, University would not be opposed to a reasonable extension of the period of time to respond to the summary disposition motions. University submits that November 15, 1982 would be a reasonable date to set for the submission of responses to such motions.

The City of Santa Monica has requested only that it be granted an extension of time to respond to the motions but has not as yet made any specific extension request. Since it may be reasonably assumed that the City Attorney of Santa Monica has been anticipating the need to change counsel in this proceeding for many months now and has therefore planned the transition so as not to unreasonably delay these proceedings, the November 15, 1982 date proposed for CBG should also be a reasonable date for the City of Santa Monica.

II. DISCUSSION

A. Legal Standards

It is well-settled under the Commission's rules of practice that an applicant in an NRC licensing proceeding has the right to move the licensing board for summary disposition as to matters it contends do not present disputed issues of material fact. 10 C.F.R. Sec. 2.749. The summary disposition rules as interpreted in Commission proceedings and the summary judgment standards of the analogons Rule 56 of the Federal Rules of Civil Procedure as interpreted by the federal courts has been discussed at length in the summary disposition motions of Staff and University. In its Motion, however, CBG misconstrues both the purpose and application of the summary disposition rules and certain matters bear repeating.

Averments in pleadings (and statements of contentions) may be sufficient in law on their face, but actually be sham or frivolous, and thereby raise no genuine triable issue of fact. The summary judgment procedures of Rule 56 (and summary disposition procedures of the Commission's rules) are designed to discern between real issues deserving a trial (or hearing) and feigned issues which merely delay the final decision. 6 Moore's Federal Practice, p. 56-63. As succinctly stated by Judge (later Justice) Cardozo: "The very object of a motion for summary judgment is

to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the later may subject a suitor to the burden of a brial." Richard v. Credit Suisse, 242 NY 346, 152 NE 110 (1926).

According to the general summary judgment standards courts are authorized to examine proferred materials extraneous to the pleadings, not for the purpose of trying an issue, but to determine whether there is a genuine issue of material fact to be tried. If there is no such genuine issue, the parties are not entitled to a trial and the court applying the law to undisputed material facts may render summary judgment. Mourning v. Family Publications Service, Inc., 411 U.S. 356, 93 S. Ct. 1652 (1973). Gutor International AG v. Raymond Packer Co., 493 F 2d 938 (CA 1st, 1974). The fact that issues of law remain to be decided is no barrier to a summary judgment.

Under Anglo-Saxon principles of jurisprudence, formalized since at least 1855 in the summary judgment rules, no party-litigant can be required to bear the burdens and delays of trial unless and except so far as there are issues of material fact to be determined. The summary judgment rules prescribe the means for determining that such issues exist. The party-litigant is entitled to have the court sift the issues and to specify which material facts are

really in issue and what are not, so as to concentrate the controversy upon only those questions which should control the result. Fidelity and Deposit Co. of Maryland v. U.S., 187 U.S. 315, 22 S. Ct. 120 (1902); Ex Parte Peterson, 253 U.S. 300, 40 S. Ct. 543 (1920).

The main purpose behind the Commission's summary disposition rules is found in these legal principles: a party in an NRC proceeding should not be required to bear the expense, delays and other burdens of hearings where it can be demonstrated that no disputed material facts exist. The use of summary disposition as an administrative tool to expedite proceedings is actually a secondary purpose of the rule. The Commission has expressly urged Boards to use this tool:

> In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to involve the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981). Necessarily, the scheduling of time for summary disposition motions and responses in licensing proceedings will delay the time when the hearing or hearings can begin. However, when properly used the summary disposition procedures can greatly reduce the time and expense spent on hearing and in preparation for hearing.

B. CBG's Motion to Dismiss University and Staff Motions

CBG claims that the University and Staff motions for summary disposition are "frivolous, harassing, a misuse of the summary disposition process which is designed to expedite proceedings, and a delaying tactic which can cause irreparable damage . . ." CBG also claims that responding to such motions "would divert very substantial resources of CBG and the Board from preparation for hearing." Motion, at 1. CBG urges the Board to exercise its authority under 10 C.F.R. Sec. 2.749 to summarily dismiss such motions, asserting that

> (t)he Rules of Practice provide that a presiding officer must summarily dismiss summary disposition motions that occur shortly before a hearing when such motions would require a party and/or the Board to divert substantial resources from preparation for hearing.

Motion, at 6; emphasis supplied.

Further, CBG implies that the Board has actually set a hearing date for sometime in December or January and that because University and Staff have failed to heed a Board "directive" not to seek summary disposition on all contentions the scheduled hearing will be delayed. Motion at 2, 3, 6 and 7.

There is no merit to CBG's Motion. CBG misapplies the applicable law, misconstrues the Board's advice to the parties and contradicts itself in claiming to be disadvantaged in having to respond to University and Staff motions.

Under Sec. 2.749(a) the Board may, not "must" as CBG states, dismiss summary disposition motions if filed shortly before the hearing commences or during the hearing and a party could not respond without a substantial diversion of its resources. Clearly, that provision is not intended to provide a remedy in the present situation. First of all, the Board has not set a hearing date implying, rather, that summary disposition matters would have to be resolved before a firm hearing date could be established. Also, CBG cannot claim to be surprised that summary disposition motions were filed since the parties have been anticipating the date set by the Board for the filing of such motions for over eighteen months now. Moreover, Staff and University's September 1, 1982 motions were submitted three to four months before the tentative hearing schedule suggested by the Board at the June Prehearing Conference, which is certainly not "shortly before" or "during" any hearing. More to the point, the motions of University and Staff were submitted within the first period authorized by the Board for such submissions. During the past year CBG has repeatedly opposed the setting of a time for submitting summary disposition motions. CBG cannot now fairly be heard to complain that such motions, which University and Staff would otherwise have a right to file, have been submitted too near the time for hearing where the requested relief will foreclose University and Staff from having its motions heard at all.

CBG relies on the Prehearing Conference transcript record for its assertion that University and Staff have disregarded a Board "directive." In fact, CBG has mischaracterized that record. The Board is invited to review the context of the remarks made by the Board during the Prehearing Conference. Tr. 535-36 and 760-969. As understood by University, the Board was advising the parties of the strict pleading requirements that apply to parties bringing motions for summary disposition. The parties were reminded that the resolution of summary disposition matters could delay the hearing and, therefore, the Board urged that such motions only be brought where the case for summary disposition was very strong. Contrary to CBG's assertions, the Board did not provide any specific directives to the parties respecting the filing of summary disposition motions except the dates for submitting, supporting and responding.

Furthermore, CBG contradicts itself on seemingly an essential point. On the one hand, CBG claims that the University and Staff motions are "frivolous," that they "consist of vague denials of material disputes in motions of only a couple of pages and vaguer assertions in two page affidavits," and that they are "extremely flimsy." Motion, at 7 and 9. On the other hand, CBG claims that responding to the motions would require "substantial diversion of resources" and "a several

thousand page response," an apparent threat directed to the Board. CBG cannot have it both ways: if the motions of Staff and University are frivolous then CBG's response is a trivial exercise and it has no cause to complain; but if CBG believes that it needs a several thousand page response then it must regard the motions as meritorious on their face.

Finally, CBG has not raised its motion in a timely manner and should not be permitted to gain by the procedural delay it is causing while its motion is considered. By its own admission (Motion, at 5) CBG has been aware for almost a year that summary disposition would be moved as to all contentions in the proceeding. In letters of August 16, 1982 Staff and University each informed the Board and other parties that summary disposition would be moved as to all outstanding contentions. And, the summary disposition motions were discussed by the Board and parties during the August 25, 1982 conference call. CBG had ample opportunity to raise its objections and suggest any alternatives before Staff and University submitted their motions. As it stands, CBG can scarcely avoid the conclusion that its present motion has been brought for purposes of delay and because it cannot manage an adequate response on the merits to the motions of Staff and University.

C. The Requests for Alternative Relief

No doubt recognizing the weakness of its arguments for outright dismissal of the University and Staff motions, CBG proposes several alternative forms of relief. How each of these alternative procedures would be expected to work in practice is not made explicit. However, further explanation of these procedures is not necessary. As explained below, the forms of relief proposed would introduce unnecessary complexity to these proceedings and are otherwise unacceptable. Moreover, CBG's poorly articulated argument that the burdens it is facing are extraordinary and unfair is monumentally unimpressive.

CBG persists in misrepresenting the nature of the issues properly before the Board in this relicensing action and grossly exaggerates the burden of responding to the summary disposition motions. CBG's predicament is no different from any other party-litigant who chooses to respond to a summary disposition or summary judgment motion. The length of the motions of Staff and University is not a true reflection of the quantity or complexity of the issues properly presented in this proceeding but is a consequence, instead, of the overly-elaborate statement of contentions which CBG has succeeded in having admitted to this proceeding under the easily-satisfied standard that each contention be clear, specific and reasonably related to the activity being licensed. CBG has had its extensive list of

allegations admitted to this proceeding thereby requiring that each of its claims be considered by the other parties. CBG now complains that it is burdened because the other parties have availed themselves of the first opportunity to address those allegations item-by-item on the merits. CBG's complaint is not entitled to serious consideration. To grant the relief requested would confound the principles of procedural fairness.

Furthermore, CBG's exaggerated description of what its response to the motion will entail, which appears as an unseemly threat to the Board and other parties, is not entitled to consideration by the Board. CBG chooses the form and content of its response. University notes, however, that in the two years during which discovery has been conducted in this proceeding, CBG has not produced admissible documentary evidence related to any of the key issues raised in the summary disposition motions nor has it identified any experts who might be expected to present such evidence except possibly for those used to support its own motion for summary disposition. CBG's explanations and analyses, where clear and understandable, are unscientific and, for the most part, unqualified. That portion of the "voluminous documentary evidence" purportedly relied on by CBG which University has been shown or is aware of is largely irrelevant and immaterial to the issues to be decided. Much of that "evidence", when properly considered, actually supports University's position. University sees no reason for

a response of the length suggested by CBG. But if CBG believes that a several thousand page response will impress, or that the Board will be overwhelmed or otherwise unable to discern the substantial from the extraneous, or that any of these matters will go unremarked by the other parties, that is a matter for CBG to decide. However, it would be entirely appropriate for the Board to limit the length of CBG's response. After all, the burden of proof on summary disposition motions rests with the movant; the responding party's task is much simpler. A summary disposition phase for this proceeding has been described in the Board's schedule for over eighteen months. CBG, by its own admission, has been on notice that eventually it would be required to respond to summary disposition on all contentions for the past year. Certainly, CBG cannot now claim that it will (unexpectedly) have to divert its resources to make an adequate response.

1. First Alternative: Defer Consideration

CBG proposes that the Board "defer consideration" of the summary disposition motions "until such time as it views particular ones to be genuinely ripe for consideration." Motion, at 8. This is a nonsensical and wholly impracticable alternative, one which provides the Board with no guidance at all. If it makes sense to speak of summary disposition

motions as "ripening" for consideration, such motions would "ripen" only when they are responded to by the opposing party and the Board is able to weigh the counter-pleadings. No doubt with this alternative available CBG would seek to defer all summary disposition matters until after the hearing is conducted.

2. Second Alternative: Simplify the Process

CBG propose. that the response process be bifurcated in any one of three suggested ways. The suggested alternatives would involve the Board in impermissibly refashioning the summary disposition rules and in a way that would defeat the very purpose of the rule. In the first place, CBG would have the Board provide its coaching and counsel to assist CBG in the framing and presenting of its arguments in stages, trying one approach then another until it hit upon something that appealed to the Board. Although the Board is not limited to just "calling balls and strikes" for the parties in an NRC proceeding, the level of Board involvement being suggested by CBG would most likely lead to an impermissible confusion of the proper roles of Board and party and could risk compromising the integrity of the proceeding.

Further, to the extent that the Board would not be considering only strictly admissible evidence, including CBG's

sworn counter-affidavits, the procedure would defeat the rule which is designed to get behind the mere formal pleadings of the parties and permit an examination of qualified proof. For two years now the Board and parties have been listening to CBG's hollow and long-winded claims of what "facts, documents, witnesses and so on . . . which it would put forth as evidence" at a hearing (Motion, at 12). It is time for CBG to produce. University has an absolute right to know at this stage what, if anything, CBG is able to adduce in the form of proof.

Much of what CBG is apparently advancing in argument in connection with this alternative is argument that CBG can advance in a proper response to this motion. It should be noted however, with respect to CBG's alternate "2.b.", that each of CBG's contentions has been addressed individually by University and Staff in its motion and although it is necessary that CBG overcome with proof the proof provided by University on the "central issue", would not be sufficient to preserve its contentions since as University points out in its motion, there are independent grounds for dismissing each of CBG's contentions.

3. Third Alternative: Extend the Time to Respond

As University has pointed out, CBG has been aware of its impending pleading responsibility for some time and must be

charged with having begun the preparations of its case. CBG has had the actual motions in hand for over six weeks. Moreover, CBG did not come forward with its request for relief until the last possible moment when the Board would be forced to suspend the schedule set by the parties without objection at the prehearing conference. The extension of time proposed by CBG would acceptably delay the proceedings and is unwarranted. Extending the time for parties to respond to the motions to November 15, 1982 is reasonable under the circumstances.

4. Fourth Alternative: Relief as to Exhibits

University is not clear what CBG is proposing here. However, University would be opposed to any changed procedure that would permit CBG to have arguments considered that are not properly supported by admissible evidence. Through this proceeding CBG has been mischaracterizing documentary material, misquoting or quoting out of context, or otherwise falsely coloring information presented for the Board's deliberation. If nothing else this practice has resulted in unnecessary obfuscation of the issues. Reference to generic NRC documents which CBG knows are in the possession of University would not present the same problem.

III. CONCLUSION

The proper response to CBG's motion and the only course sanctioned under the Commission's Rules of Practice is for the Board to direct CBG to respond to the summary disposition motions according to the standards for such motions.

CBG is not entitled to any further special consideration on account of its present predicament. Since CBG was admissed as a party, scheduling in this proceding has been conducted largely for CBG's convenience. Moreover, CBG has imposed exceptional discovery burdens on University which have gone unrelieved. Except for the Board's recent curtailment of facility inspections, CBG has conducted its discovery of University without limitation: University has responded to in excess of 3500 interrogatory questions, has made available for examination over 40,000 pages of documents and records, has permitted a detailed inspection, and discovery has not concluded yet.

CBG's remarks impugning the motions of University's (and Staff's) Counsel in bringing the summary disposition motions do not deserve a response. However, University is reminded of the legal maxim: when the facts are against you, argue the law; when the law is against you, argue the facts; when both are against you, attack the lawyers on the other side. CBG has survived to this stage of the proceedings on

the basis of unsupported and unexamined pleadings. CBG's arguments to delay this proceeding further are unpersuasive. It is entirely appropriate to investigate the merits of CBG's case by use of the summary disposition procedures. University fully expects that with the patience and discernment of the Board most, if not all, of the issues in this proceeding will be dismissed and the expense and delay to the parties and the Commission of long drawn-out hearings will be avoided.

Dated: October 8, 1982.

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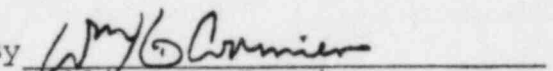
By 
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	)	
(UCLA Research Reactor)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S RESPONSE TO CBG'S MOTION OF SEPTEMBER 20, 1982.

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: October 8, 1982.

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