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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 OL Proposed Renewal of Facility License

MOTION TO SUMMARILY DISMISS STAFF AND APPLICANT MOTIONS FOR SUMMARY DISPOSITION, OR ALTERNATIVE RELIEF AS TO SAME

I. INTRODUCTION

Despite direction from the Board to the contrary, the Staff and Applicant have both moved for summary disposition as to every contention in the above-captioned proceeding (except Emergency Planning, which is not yet ripe for such action), as well as each and every subpart of said contentions. The motions 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 because of the unique situation of this case wherein the Applicant is permitted to continue the activities for which it has requested its license for as long as it can manage to prevent the matter coming to hearing. Furthermore, response to each and every of said motions would divert very substantial resources of CBG and the Board from preparation for hearing. CBG thus moves the presiding officer to exercise his authority under 10 CFR 2.749 to summarily dismiss said motions. In the alternative, certain other

partial remedies are identified.

II. BACKGROUND

This proceeding is unique in that the Applicant in this case is able to conduct the activities for which it has requested, but not yet been granted, a license until such time as the Atomic Safety and Licensing Board convened to rule on the application rules otherwise. Thus, there is a tremendous incentive for delay. In theory, at least, the UCLA reactor could operate through the period for which the Regents have requested renewal of the license without that license renewal ever being granted, so long as UCLA can prevent the matter from going to hearing.

Such delays have characterized this proceeding. In March of 1980, the Board opened a discovery period which was to end three months thereafter, were all parties to meet their discovery obligations. However, such obligations were not obeyed, necessitating numerous Board Orders compelling compliance and numerous discovery conferences ordered by the Board to occur among the parties in efforts to move the proceeding forward. It took a full year to get even partial answers from NRC Staff to interrogatories, and the same time to have the Applicant finally comply in part to its discovery obligations.

In part to attempt to expedite the proceedings, the Board convened on June 29 and 30, 1982, a prehearing conference designed to resolve any remaining discovery disputes and set a tentative date for hearing. At least twice during that prehearing conference, the Board, in extremely clear language, requested the parties not to move for summary disposition except on those few items "that are amenable to that process that could be handled very quickly." TR 535

Saying that the Board doesn't "look upon it [misuse of summary disposition procedures] very kindly," the presiding officer estimated that an extended summary disposition procedure would delay the hearing three to four months, and furthermore that the Board's decision "would be on a much sounder basis after an evidentiary hearing," given the detailed contentions and the wealth of discovery and information, much of which the Board has not been privy to. TR 535 Similar statements were made the following day of the conference, urging the parties "not to do this in a shotgun, broadside fashion." TR 764. Unfortunately, that is precisely what the Staff and Applicant have done.

CBG took the Board's statements at the prehearing conference as Board direction, and therefore filed summary disposition motions only on those limited matters which, by admissions of the other parties, seemed to most clearly meet the standard of no genuine dispute about the material facts. Furthermore, in an effort to further expedite the proceeding and in absence of any indication from the other parties of an intention on their part not to comply with the Board's request, CBG voluntarily gave up its discovery rights as to the amendments to the Application (aside from the emergency plan), amendments which had only been provided the day before the prehearing conference.

Yet, despite the apparent acquiescence of Staff and the comments on the record by Applicant indicating compliance would be forthcoming with the Board's attempt to get the license application to hearing, the Staff and Applicant in concert have moved for summary disposition on each of the score of contentions and each of the 140 or so subparts thereto. Failing to provide any indication of any selectivity or genuine belief that a particular matter is truly beyond factual dispute, the Staff and Applicant

have apparently decided they would rather risk the Board's displeasure over this delaying tactic than face the prospect of the matters at issue going to hearing in December or January, the time tentatively set by the Board, where evidence and witnesses of questionable probative value would be subject to thorough questioning by CBG, the City of Santa Monica, and the Board.

Summary disposition is designed to expedite proceedings by permitting an early decision on matters where no genuine factual dispute exists and where such decision can be readily made on the pleadings without need for questioning of witnesses and weighing of evidence as at hearing. It is not to be used to delay a proceeding, to attempt to overwhelm a financially weak opponent shortly before hearing by forcing substantial diversion of resources; nor is to be used as a means of "flight-testing" drafts of testimony for hearing, nor for trying to create a default by an opposing party inundated by the sheer weight of multitudinous summary disposition motions, nor for "shotgunning" in a hope that the moving party will get lucky on at least some of the items. Such an approach makes a mockery of the process, of a Board's authority to regulate a proceeding, and of the interests of justice, which are best served by a speedy trial and decisions based upon a full record, thoroughly examined by probing questions and careful weighing of the merits of opposing opinion and contradictory facts. Summary disposition is only to be used in the opposite situation--where it will not divert substantial resources from preparation for hearing, where it will not cause an unjustifiable delay in that hearing, and most importantly, where there are no genuine disputes as to any material facts. Staff and Applicant clearly attempt to misuse the procedure.

Counsel for NRC Staff, as early as a year ago, made clear its intention to move for summary disposition as to each and every matter in dispute. At a discovery conference in San Francisco on November 24, 1981, which with permission of the parties was tape-recorded, Counsel for Staff indicated her intention to move on all issues and to simply use drafts of proposed testimony for her affidavits. Indeed, several of the affidavits submitted in support of her motions are not even modified from draft testimony form--see Affidavit of Harold Bernard Regarding Contention X, for example, wherein at paragraph o he says, "I prepared the Environmental Impact Appraisal for the proposed renewal of the UCLA reactor license which I hereby adopt as my testimony." As Staff has already prepared its testimony, the matter would be most expedited and justice best served were the issues where there are clear disputes to go to hearing, where the affiants could be questioned. Using summary disposition as a means of 'flight-testing' drafts of testimony is inappropriate. Furthermore, Counsel for Staff has in other cases where she represented Staff followed precisely the same course of moving for summary disposition on all contentions, hoping for a default from a financially weak intervenor unable to respond to an avalanche of such motions because of lack of time and financial resources. No pretense is even made that there are no factual disputes about any of the matters; the action is simply a harassing tactic.

In summary, CBG took the Board's statements at the prehearing conference as direction and complied; Staff and Applicant, silent as to other intentions when scheduling was discussed at that conference, have not complied and are attempting to delay the proceeding, divert CBG's resources from preparation for hearing, and to the extent permitted by the Board, prevent matters from being heard in a hearing where cross-examination will occur. The Board's authority to regulate the proceeding

is being challenged by Staff and Applicant, who have essentially said by their motions, so what if the Board has determined that the hearing should be in December or January and that summary disposition motions should only be made where they truly meet the standards for such motions? Staff and Applicant have essentially put all on notice that it is they who will control when (and perhaps even if) the disputes that are already three years old ever get to hearing. That is, if their refusal to comply with Board desires and summary disposition standards is permitted.

III. THE RELIEF REQUESTED AND ALTERNATIVE REMEDIES

1. The Staff and Applicant motions should be summarily dismissed as per 10 CFR 2.749.

The NRC 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. It should do so in this case.

The Board has set a tentative hearing date for sometime in December or January. There is no way that CBG can possibly prepare for that hearing and respond to the incredible stack of summary disposition motions placed upon it.

That the hearing can be delayed does not resolve the problem; in this proceeding, because the facility continues to perform the functions which the Board is mandated to determine if they represent an unacceptable risk to public health and safety, a matter not yet resolved because there has been no hearing, an unacceptable risk to public health and safety may result from such a delay. This is not the case in virtually any other licensing proceeding, where such a delay means inconvenience but no public health and safety threat.

Furthermore, were a party permitted to suspend a hearing date by making a mass of summary disposition motions, it would undermine Board authority to regulate such proceedings and contravene the intent of the provisions of 10 CFR 2.749, because no such motions could be summarily dismissed if the hearing date could constantly be put off in response to such motions.

The motions are frivolous. They consist of vague denials of material disputes in motions of only a couple of pages and even vaguer assertions in two page affidavits. No discrimination whatsoever has been employed by either Staff or Applicant to, as the Board directed, "do so on items that you feel you have got a very strong case for summary disposition." TR 536. Instead, blanket motions have been made, whether or not the parties genuinely believe a material dispute exists. This abuse should not be permitted.

The parties have been given by the Board ample opportunity to move for summary disposition on those items amenable to such a process and which meet the legal standards thereon. Staff and Applicant have failed to take advantage of that opportunity, and instead attempt to misuse it. Even where their own evidence blatantly contradicts their own motions, the parties have had no hesitation to go forward. For example, the last two inspection reports for the UCLA reactor issued by the NRC Staff and the Notices of Violation thereon totally and completely contradict Staff and Applicant's positions on several contentions. They are scathing attacks on Applicant's knowledge of its own calibration techniques, failure to monitor correctly, failure to calibrate correctly, failure to have proper procedures, failure of the NEL Director to be at the facility enough and to exercise his responsibilities regarding managerial and administrative controls. One of the reports, IE # 82-01, is perhaps the most blistering

critique of a licensee's radiation control program ever to be found in such a report. Yet Counsel for Staff, representing in part the authors of that report and Notices of Violation, and Applicant, the subject of said report and violations, have both moved for summary disposition as to the contentions dealing with radiation control program, administrative controls, calibration accuracy, and so on. No pretense whatsoever is made of selectivity, of discrimination of issues where there are genuine disputes as opposed to areas where the other parties might feel that their position on the disputed matters may be the stronger of two disputed positions. Summary disposition, of course, is not appropriate in the latter situation.

Therefore, because of the tremendous drain of resources response to each and every of these motions would be to CBG, taking away from its preparation for hearing shortly before said hearing is tentatively scheduled to commence, CBG respectfully requests that the Board summarily dismiss the motions, as mandated by 10 CFR 2.749.

A. ALTERNATIVE REMEDIES

1. Defer Consideration of the Summary Disposition Motions

Should the Board determine it will not summarily dismiss said Motions, CBG requests that the Board, exercising its authority to regulate scheduling, defer consideration of said motions and defer responses to said motions. The Board is not required to rule on said motions at any particular time; in this case, it would be appropriate for the Board to defer consideration of such motions until such time as it views particular ones to be genuinely ripe for consideration, at which time it may direct CBG to respond to those motions viewed as ripe for such consideration.

2. Simplify the summary disposition process

Should the Board determine that the motions must be responded to now and considered now, CBG respectfully requests the Board consider methods of reducing the burden to both CBG and the Board. Although the motions are extremely flimsy, consisting of short generalizations asserting without substantive facts in the main that no genuine disputes exist, CBG cannot afford to risk matters being prevented from going to hearing by responding in a brief manner. This is the biggest burden imposed by Staff's and Applicant's misuse of the procedure: they can force, with extremely short motions (i.e. 2 pages per contention) that no material facts are in dispute, whereas CBG, to ensure the matters are given a hearing, must respond with extremely detailed argument, affidavits, and other documentary evidence. Staff and Applicant lose nothing if their motions are denied, so they have no disincentive to making vague, weak arguments, based on generalized assertions that there is no issue. CBG loses a great deal, however, if its responses are denied as proving that the matter should go to hearing. Therefore, as CBG indicated at the prehearing conference, CBG's responses to such motions are likely to be roughly thirty pages of response each and 70-100 pages of exhibits, for every contention. CBG will be faced with the burden, timewise and financially, of producing a several thousand page response, when all the exhibits and each of the contentions are taken together. And the Board will be faced with the burden of reading the material and making a judgment. Unlike most Intervenors, CBG has voluminous evidence of a documentary nature to present in this case, based on the fact that this reactor has an existing operating history (it is, of course, on the basis of that operating history that CBG has, in large measure, based its opposition to relicensing.) Unless some mechanism is provided to simplify response to summary disposition, CBG will have to put into its responses the bulk of that documentary evidence,

in order to protect what it has fought for so long, an opportunity to present that evidence to the Board in a public hearing and to demonstrate the flaws in opposing evidence and opinion through cross-examination. The burdens of so doing will be immense, to all concerned. The burdens could be reduced and the process simplified if it were in some fashion bifurcated.

Summary disposition, when not abused, is designed as a screening process. Bifurcation of the response process would permit screening of those motions, enabling CBG to make a threshhold showing as to the motions and permitting the Board to determine thereafter which of the contentions would require detailed and extensive summary disposition responses. In other words, let CBG make a preliminary showing in a way that reduces both Board and CBG burdens; the Board can then direct CBG to make more detailed showing about those contentions and motions where additional information would be necessary for the Board's judgment as to whether there exist material disputes. The rights of Staff and Applicant would be protected in that they would get what they have requested--a determination by the Board as to whether certain issues should go to hearing. And voluminous responses would only be necessary as to those specific contentions and motions which the Board determined CBG had not met the threshhold showing in its preliminary response. Several alternative ways of doing this follow.

a. Showing of Insufficiency in the Motions Themselves

Summary disposition motions can be defeated in two ways: by opposing facts and by the insufficiency of the motions themselves. Even when no opposing facts are put forward, motions for summary disposition

must be denied if they are internally contradictory, if affiants' qualifications are not clearly commensurate with the testimony, if facts upon which assertions rely are missing. The vast bulk of the Staff and Applicant's motions can be summarily resolved on these bases alone. The Board could, under this alternative, permit CBG to file pleadings demonstrating the insufficiency and contradictory nature of the motions; the Board could then direct affirmative responses to those portions of the motions that cannot be resolved on such a basis alone.

b. Response to the "central issue" identified by Applicant

Applicant argues that one central theme runs through the entire proceeding, and that because there is, in its view, no factual dispute as to that matter, summary disposition should be granted as to the full case. That theme, Applicant asserts, is CBG's belief that an accident with serious off-site consequences is possible at the UCLA reactor. Applicant contends it is not possible, and thus summary disposition should be granted as to all contentions based upon that premise.

CBG could brief the arguments raised by Staff and Applicant and provide opposing evidence demonstrating that there are material disputes as to that matter. A finding by the Board that there is genuine dispute as to the potential and consequences of an accident at the facility could thus dispose of the bulk of the Summary Disposition motions, and any residual matters the Board could then direct CBG to respond to further.

c. Convene a prehearing conference where CBG would orally outline those matters it views in dispute and what evidence it can put forward at hearing that show there are such genuine disputes as to the facts.

The biggest burden faced by CBG in providing full written responses with attached exhibits and affidavits as to each of the detailed contentions is the sheer weight of producing such voluminous filings. The Board's burden in reviewing such filings would likewise be very great. Since the purpose of summary disposition is to determine if a party has evidence warranting a hearing, CBG respectfully suggests that the easiest way for all concerned, and perhaps the way in which the Board could make the most informed judgment, would be to convene a prehearing conference wherein CBG responds verbally to the summary disposition motions, identifying the facts, documents, witnesses and so on which, if a firm hearing date were kept to, it would put forth as evidence. This would permit the Board to determine whether "live" issues of fact exist as a threshhold determination. The Board could ask questions during the presentation, which it could not with affidavits filed in written responses; and any issue which, after such oral presentation, could not be determined to have met the threshhold test, CBG would be directed to file detailed written responses to.

This would amount to a screening procedure, whereby the Board could determine that certain matters, on the basis of the oral presentation alone, were in genuine dispute, and could order detailed written presentation on those remaining matters where such a threshhold determination could not be made.

2. Extension of Time to Respond

The Board gave CBG forty-five days to respond to what were anticipated to be only a very few summary disposition motions. The Board, at the prehearing conference, indicated that if CBG were inundated with "a stack of motions" that that time frame would be modified. CBG has been inundated with far more than a stack of motions; both Staff and Applicant have filed motions with regards every single issue. If the Board neither summarily dismisses the motions nor defers response and consideration, a major extension is necessary.

CBG estimates, for the Staff's motions alone, approximately one week would be required per contention for the writing of each response. This assumes no additional matters related to the proceeding intervene and does not account for the time necessary in working with affiants and acquiring necessary exhibits not already in hand. If one assumes only one week per motion, five months would be needed for response, just for the Staff motion. The Applicant's motions will take additional time.

Thus, if the Board does not bifurcate the process in some fashion, CBG respectfully believe a minimum of six additional months will be needed to provide the full, voluminous responses necessary to thoroughly respond to the assertions made in the Staff and Applicant motions. This will, in addition to delaying the proceedings, cost CBG nearly half of its annual budget.

The Board indicated at the prehearing conference that a delay of three or four months would in all likelihood be necessitated by anything more than a minimal summary disposition procedure. The motions by Staff and Applicant will thus take substantially longer to respond to. CBG thus respectfully requests a six month extension if

bifurcation of response is not established as suggested above. CBG would attempt, because of its overriding interests in the proceeding coming to hearing, to respond in much less than that time, but the six month period seems at this point in time necessary.

Should bifurcation be permitted along the lines indicated above, CBG respectfully requests six weeks from date of decision to so do in order to prepare its threshhold presentation. (Alternative "b", responding to the "central issue" posed by Applicant, might take 1-2 weeks longer.)

3. Relief from Burden as to Exhibits

One of the major financial burdens, and to a certain extent, time burdens is the inclusion of extensive exhibits as attachments to each response. CBG notes Staff included no such exhibits in its motion, and Applicant only a few.

It would reduce CBG's burden considerably, if ordered to fully respond to the entire sets of motions, for CBG to be able to cite documents relied upon without having to include copies of the relevant portions as attachments. The total size of the response would likely be reduced by approximately 1500 pages, with commensurate financial savings and reduction in workload for CBG and the Board. Those documents cited which the Board wished to see directly and which were not already available at NRC could be readily provided upon request.

IV. CONCLUSION

CBG respectfully prays for relief in the forms identified above from the harassing, frivolous, extraordinarily and unduly burdensome, motions by Staff and Applicant. Justice would be best served by the matters at issue in this proceeding getting to hearing expeditiously. Permitting such misuse of the procedure would cause irreparable damage

to CBG's interests, perhaps to public health and safety, and undermines the ability of the Board to regulate the proceeding as necessary. CBG took the Board's statements at the last prehearing conference as direction; the other parties have not; whether intended as a binding direction or not, some relief is in order so that these matters which have already dragged on several years can be resolved, and with an adequate decisional record.

Lastly, CBG respectfully suggests the Board consider convening a conference call to hear responses to this motion from the other parties and to issue a decision so as to avoid the delay that would otherwise be occasioned by having to wait for written responses.

Respectfully submitted,

Daniel Hirsch

Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP

dated at Los Angeles, California
September 20, 1982

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: MOTION TO SUMMARILY DISMISS STAFF AND APPLICANT MOTIONS FOR SUMMARY DISPOSITION, OR ALTERNATIVE RELIEF AS TO SAME

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: September 20, 1982.

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