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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Dr. Emmeth A. Luebke
Dr. Oscar H. Paris

OFFICE OF SECRETARY
REGULATORY & SERVICE
BRANCH

SERVED OCT 22 1982

In the Matter of
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA
(UCLA Research Reactor)

Docket No. 50-142-0L
(Proposed Renewal of
Facility License)

MEMORANDUM AND ORDER
(Ruling on CBG's Motion to Summarily
Dismiss Staff's and UCLA's Motions
for Summary Disposition, or for
Alternative Relief)

On September 1, 1982, Staff and UCLA filed motions for summary disposition of all admitted contentions in this proceeding except Contentions XX (concerning the security plan which is already the subject of a Staff motion for summary disposition) and XXI (concerning emergency planning). On September 7, 1982, CBG moved for summary disposition of Contentions XIII (concerning UCLA's special nuclear materials license) and XVII (concerning seismic matters). Subsequently, on September 20, CBG moved to summarily dismiss Staff's and UCLA's September 1 motions. As a result of CBG's September 20 motion, on September 28, this Board suspended the schedule which had been established for responses to motions for summary disposition and set a deadline for responses to that motion. In this Memorandum and Order,

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we rule on CBG's most recent motion and set out new procedures and a schedule for consideration of the September 1 and 7 motions for summary disposition.

CBG's September 20 Motion

Proper understanding of CBG's unusual motion to summarily dismiss motions for summary disposition filed against it requires an understanding of the posture of this proceeding. Because the application in question seeks renewal of an operating license and was filed prior to the expiration date of the present license, UCLA is entitled to operate the reactor pending disposition of the application. Consequently the usual motivation on the part of applicants to conclude proceedings on an application as expeditiously as possible is not present. Despite its expiration, the old license remains effective until the application for renewal is granted or denied. For this reason, the intervenor, CBG, finds itself in an unusual position for an intervenor, that of seeking a speedy resolution of its contentions.

In this situation it is not surprising that CBG views the UCLA and Staff motions as ". . . frivolous, harassing, a misuse of the summary disposition process which is designed to expedite proceedings, and a delaying factor" (CBG Motion, p. 1.)

To support its motion CBG relies on a Board statement made at the June Prehearing Conference urging the parties to limit their motions for summary disposition to those contentions on which they

felt there was a good probability of success. CBG interprets this statement as a "direction" to the parties and asserts that UCLA and Staff have ignored it. CBG points out that 10 CFR § 2.749 permits a board to deny summarily motions for summary disposition which occur shortly before a hearing where the motions would require the diversion of parties' or the board's resources from preparation for the hearing. CBG asserts that the hearing date has been tentatively set for December or January and that, if a response by it is required, that date will have to be postponed. Consequently, CBG views this provision as applicable.

CBG has also set forth certain alternative requests for relief if the motions are not summarily denied. These are:

1. Defer consideration of the motions until they are genuinely ripe;
2. Simplify the process by:
 - a) permitting CBG to attack the motions as indicating on their face that they are not meritorious with an opportunity to subsequently respond on the merits where the first attack is insufficient;
 - b) permitting CBG to respond initially on the merits to the "central issue" which UCLA maintains underlies all the contentions, with a subsequent opportunity to respond to any residual matters; or
 - c) permitting CBG to respond orally at a prehearing conference in which it would outline the matters it views to be in

dispute, with a subsequent opportunity to respond in writing where the oral response was insufficient;

3. Extend CBG's time for a full written response by six months; or

4. Relieve CBG from the burden of having to include documents as exhibits to its response by permitting it to simply cite the documents.

The Other Parties' Responses

Santa Monica supports CBG's request for relief and alternate relief. The City views the motions as filed in disregard of the Board's directives, as filed primarily for purposes of delay, and as constituting an impermissible attempt to shift the burden of proof.

Staff takes sharp issue with CBG's motion. It asserts that it has indeed followed the Board's direction to limit its summary disposition motion to contentions on which it has a strong case, and cites the Commission's Statement of Policy on the Conduct of Licensing Proceedings (CLI-81-8, 13 NRC 452 at 457 [1981]) to the effect that summary procedures should be used where no genuine factual issues exist. Staff also points out that no hearing has yet been scheduled, so that CBG's reliance on 10 CFR § 2.749(a) is misplaced.

Staff views CBG's first request for alternate relief, deferral of the motions until they are ripe, as baseless.

Staff attacks CBG's second request for alternative relief, to simplify the procedure by bifurcating it, on several grounds.

First, Staff points out that the burden is on it as movant; CBG should thus be able to dispense with Staff's "short generalizations" (Motion, p. 9) without a lengthy response. Next, Staff questions whether CBG has complied with the requirement of the discovery rules that it supplement its answers, pointing to the fact that CBG has not identified the voluminous amount of material it now says it has to present. Staff also argues that CBG's requested relief would in effect require the Board to counsel it in the presentation of its case.

Staff views CBG's request, that it be allowed to respond initially to UCLA's "central issue," as requiring the Board to make findings of fact with respect to that issue and hence as legally unsupportable. Additionally, Staff seems to argue, on the basis of logic, that the contentions are unsupportable.

Finally, Staff indicates that while it opposes CBG's request for six additional months to respond to the motions, it would not oppose an extension of time to November 15, 1982. Staff does not address CBG's request for relief as to exhibits.

UCLA's response raises the same arguments as Staff's. Additionally, UCLA asserts that as a party-litigant, it is entitled to have a ruling identifying which, if any, factual issues are in dispute thus requiring a hearing.

Discussion

1. Request that Motions for Summary Disposition be Summarily Dismissed.

Initially, we must comment on our remarks which CBG has characterized as a "direction" to the parties not to follow the course adopted by Staff and UCLA. While we clearly would have preferred that Staff and UCLA not file such all encompassing motions, we cannot conclude that they have ignored a Board "direction." The Board may not dictate to any party the manner in which it presents its case. Staff and UCLA believe that they have a strong case for summary disposition of virtually all contentions. We as a Board may not substitute our judgment for theirs on the merits of their case in order to summarily dismiss their motions. Rather, we must deal with the motions on the merits before reaching a conclusion. Our so-called "direction" was in fact an admonition to realistically view the chances for success in selecting the subject matter of the motions in order to avoid needless delay occasioned by the filing of groundless motions. Our judgment whether Staff and UCLA have heeded that admonition will have to await our ruling on the merits of their motions.

Secondly, we agree with Staff and UCLA that the provisions of 10 CFR § 2.749(a) relied on by CBG are not here applicable. No firm hearing date has been set. While it may well be that allowance of the motions will make it impossible to schedule a hearing to commence in December or January as the Board had suggested to the parties, the fact remains that these provisions of § 2.749(a) can only come into play

once a hearing has been scheduled or is already in progress. Finally, we note that the provision is not mandatory, but rests in the sound discretion of the Board. Grounds to exercise that discretion are not here present.

2. Requests for Alternative Relief.

While we agree with CBG that some means of segmenting or bifurcating the responses to the motions for summary disposition would be advisable, we do not consider CBG's suggestions workable.

First, we fail to understand what CBG may have in mind in suggesting that the motions be deferred until they are ripe for decision. We consequently reject this alternative.

Second, CBG's proposals to bifurcate the response process (Motion, pp. 9-12) are inappropriate. Staff's and UCLA's criticisms of these proposals are, in large part, well taken. Particularly, we believe that CBG's proposed course of a preliminary showing, followed by a complete briefing on issues where the Board found the preliminary showing insufficient, would accord CBG a preferred procedural status which is not in accord with the rules. Consequently, we reject these requests.

However, we believe that the summary disposition process can be managed better by adopting another bifurcation of that process which we discuss below. Because this bifurcation will affect the schedule for responses and the nature of those responses, we will discuss CBG's requests for relief with regard to the time for its response and the need to furnish copies of exhibits with that response in connection with bifurcation.

3. Bifurcation of Response to Summary Disposition Motions.

The purpose of summary disposition is to resolve, on the merits, matters which involve no factual disputes. The procedure therefore permits issues to be resolved without the necessity of a hearing. As UCLA points out, it is entitled to use the procedure to determine whether there are any factual disputes which require hearing.

Two steps are thus involved in deciding motions for summary disposition. The first is a determination of facts about which there is no genuine dispute. Once these facts are determined, the second step is to apply the law to them to determine what legal result is called for. The Board wishes the parties to focus on the first step of this procedure initially, and to defer their consideration of the second step until the first is completed.

To facilitate the first step, movants are required to attach to their motions a statement of facts which they allege are not in dispute. Staff, CBG, and UCLA have all attached statements of fact to their motions for summary disposition. These statements provide a basis for the parties to address the question of which facts are in dispute and which are not.

The statements do not contain any citations to the documents which the movants maintain establish the facts recited. The rules do not require such citations. However, because the motions in question address all contentions save two, it is necessary that such citations be provided. Consequently, as a first step, the

Board requires Staff, CBG, and UCLA to furnish citations to the documents on which each relies for its facts. Each separate statement of fact is to include a specific citation to the authority on which the movant relies for its existence.^{1/}

The Board notes that while Staff's and CBG's statements of facts are broken down by contention, UCLA's statement is not. UCLA is to indicate with its citations which of its facts apply to which of the contentions.

Once these citations are served, opponents of the motions are to address each of the facts listed by the movants. Opponents are to indicate whether they agree or disagree that each fact listed by the movants is not in dispute. If an opponent disagrees, it is to cite to documents which it maintains establish that a dispute exists.^{2/}

Opponents may also submit a list of facts, broken down by contention and with citations, which they maintain are relevant to a contention, not listed by the movant, and may be in dispute.

The Board notes that some of the facts which the movants have listed may in reality be conclusions of law. These are inappropriate for inclusion in the lists. Therefore an opponent may choose to respond to any particular listed fact on that basis.

^{1/} Contentions XIII and XVII are the subject of cross-motions. Therefore, Staff, CBG, and UCLA may wish to stipulate the facts as to these contentions. Santa Monica may or may not choose to join in any such stipulation. Citations to lengthy documents shall include appropriate page and/or paragraph references.

^{2/} If an opponent cannot furnish such citations, it is to indicate why.

With these submissions in hand, the Board will, in accord with the rules and precedents, make a determination of the facts which are not in dispute and the facts which are in dispute. Further proceedings will then be scheduled. These further proceedings will, among other things, address legal issues incident to the facts not in dispute including arguments as to the relevance of any particular fact and the legal consequences of any set of facts. At this stage, the parties are to confine themselves to identifying facts and factual disputes. Arguments not specifically aimed at identifying such facts are to be avoided now, but will be entertained at a later time.

CBG has requested relief with respect to the necessity to file exhibits. While its request is vague, we believe a ruling on this matter is necessary. The Board sees no need to file and serve copies of documents to which citation is made which have already been filed and served in this proceeding, or which are published material readily available from NRC or other public sources. Other material should be filed and served.

Because the procedures which we have adopted are novel and have not been addressed by the parties, the parties are afforded an opportunity to move for reconsideration. Should such a motion be filed, the Board will attempt to dispose of it by telephone conference call.

The procedures which we hereby adopt moot CBG's request for a six-month extension of time to respond to Staff's and UCLA's motions. However, a new schedule must be adopted. That schedule is set forth in the following order.

ORDER

In consideration of the foregoing, it is this 22nd day of October, 1982

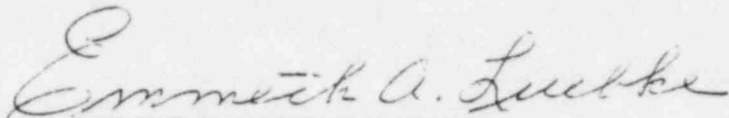
ORDERED

1. CBG's motion to summarily dismiss Staff's and UCLA's motions for summary disposition or for alternative relief is denied.
2. Not later than five days after service of this Memorandum and Order, any party may move for reconsideration thereof.
3. Not later than ten days after service of this Memorandum and Order, UCLA, Staff, and CBG are to furnish citations to the lists of material facts which each has submitted with its motion for summary disposition. Additionally, UCLA is to indicate which of its specific facts apply to which contention.
4. Not later than 20 days following service of the material required by Paragraph 3, above, each party opposing a motion for summary disposition is to respond by indicating which facts recited by movant it agrees are not in dispute and which facts it maintains are in dispute. With respect to the latter facts, opponents are to furnish citations to documents which they maintain establish that a dispute exists. Opponents also are to submit a list of facts, broken down by contention and with citations, which they maintain are relevant to a contention, not listed by movant, and may be in dispute. Argument is to be directed solely to the question of whether a given fact is in dispute.

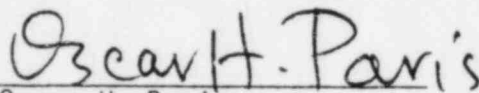
5. Citations to documents which have not been previously filed and served in this proceeding or which are not published material readily available from NRC or another public source are to be accompanied by a copy of the cited document. Citations to lengthy documents shall include appropriate page and/or paragraph references.

6. Further proceedings on the motions for summary disposition will be scheduled in a future order.

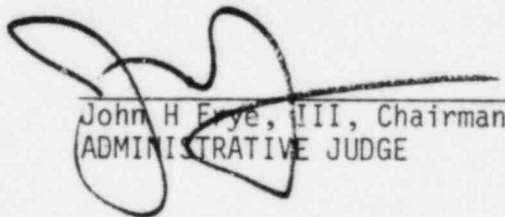
THE ATOMIC SAFETY AND
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John H. Eyré, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland