

April 22, 1983

Note to: Harold R. Denton  
Office of Nuclear Reactor Regulation

John G. Davis, Director  
Office of Material Safety and Safeguards

From: Guy H. Cunningham, III  
Executive Legal Director

SUBJECT: GENERAL ELECTRIC COMPANY (VALLECITOS TEST REACTOR AND SPECIAL  
NUCLEAR MATERIALS LICENSE RENEWALS) ATOMIC SAFETY AND LICENSING  
BOARD'S MEMORANDUM AND ORDER

On April 8, 1983, the Licensing Board in the captioned proceeding issued a Memorandum and Order (Ruling on Petition to Intervene and Related Matters). The Board ruled on petitions to intervene which had been pending since October, 1977, and set up a schedule to move ahead with the hearing process.

General Electric's applications for (1) renewal of the General Electric Test Reactor (GETR) license and (2) renewal of the special nuclear materials license at Vallecitos were originally noticed in the Federal Register in September, 1977. Intervention petitions were filed by several individuals and groups. These renewal proceedings were interrupted by a show cause proceeding in October, 1977, which shut down the reactor pending a hearing on seismic issues. The hearing in the show cause proceeding was conducted during the summer of 1981 and the Licensing Board issued its decision which authorized the restart of GETR after certain modifications were made in August, 1982. (LBP-82-64, 16 NRC (1982)). This decision was recently affirmed by the Appeal Board in ALAB-720, dated March 23, 1983.

In its April 8, 1983 Memorandum and Order, the Licensing Board ruled on the pending intervention petitions regarding the application for renewal of licenses. Specifically, the Licensing Board denied the petitions to intervene of all but one of the original petitioners. Those petitioners whose petitions were denied had not responded to the Licensing Board's previous request for their views on the status of the proceeding.

The Licensing Board also ruled upon and rejected General Electric's assertion that the application for materials license renewal be referred to the Director, NMSS for informal proceedings. By this ruling, the Licensing Board retains jurisdiction on the application for renewal of the special materials license with the possibility of a formal

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Certified By DSOY GR

adjudicatory hearing in the event the remaining petitioner files, and the Licensing Board admits, at least one contention.

The Licensing Board has ordered General Electric to indicate within 30 days whether it desires to pursue its application for renewal of the GETR license. General Electric must also state its position on consolidation of the two renewal proceedings.

Finally, the Licensing Board has ordered that thirty days after General Electric's submissions, the remaining petitioner is to amend his petition to propose contentions. Both the Licensee and the Staff will then have an opportunity to respond to the petitioner's filing.

Original signed by  
Guy H. Cunningham, III

Guy H. Cunningham, III  
Executive Legal Director

Attachment:  
ASLB Memorandum and Order

cc w/attachment:  
W. J. Dircks  
John B. Martin

DISTRIBUTION:  
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NAME	:Bachmann/rb	:STreby	:EChristenbury	GCunningham	:	: : :
DATE	:4/15/83	:4/18/83	:4/21/83	:4/27/83	:	:

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
John H Frye, III, Chairman  
Dr. Harry Foreman  
Gustave A. Linenberger

SERVED APR 08 1983

In the Matter of  
GENERAL ELECTRIC COMPANY  
(GETR Vallecitos)

Docket No. 50-70-OLR/70-754-SNMR

ASLBP No. 83-481-01 OLR

April 8, 1983

*Turk / Bachmann  
Korman / Treby  
FF*

MEMORANDUM AND ORDER

(Ruling on Petition to Intervene and Related Matters)

On September 15, 1977, there was published in the Federal Register (42 Fed.Reg. 46427) a notice that the NRC had under consideration applications to renew the operating license for the General Electric Test Reactor (GETR) at the Vallecitos Nuclear Center and the special nuclear materials license for the Vallecitos Nuclear Center. That notice provided an opportunity for interested persons to file requests for hearing by October 17, 1977.

A timely request and petition to intervene was filed by Jed Somit, Esq., on behalf of Nancy L. Lyon, Jack Turk, Alameda County Citizens Against Vallecitos, Joseph Buhowsky, Jr., East Bay Women for Peace, and California Public Interest Research Group. Applicant, General Electric Company (GE), and NRC Staff filed responses to this petition. An Atomic Safety and Licensing Board was established to rule on the petition on October 21, 1977. That Board has since been reconstituted three times,

most recently on October 14, 1982. That Board, whose members at that time were also members of the Board presiding in the related show cause proceeding on the GETR, orally granted the petition at a Prehearing Conference of March 16, 1978 (Tr. 6-7). However, no written ruling was ever issued, nor were acceptable contentions identified.

The related show cause proceeding was initiated by an Order to Show Cause issued by the Staff on October 27, 1977. That Order required that the GETR be placed in a cold shutdown condition and that GE show cause why its operating license should not be suspended. A hearing was held on this Order and an Initial Decision (LBP-82-64, 16 NRC \_\_\_\_, August 16, 1982; aff'd, ALAB-720, 17 NRC \_\_\_\_, March 23, 1983) issued which authorized GETR to be restarted after certain modifications were made. The proceedings on this Order, and the modifications required by the Board, are concerned with the ability of GETR to withstand seismic events. The persons who filed the petition in this license renewal proceeding were not parties to the proceeding on the Order to Show Cause, although many of their contentions are related to the subject matter of the latter proceeding.

In light of the amount of time that had passed and the intervening Initial Decision in the show cause proceeding, the Board requested that GE advise of its intentions with respect to the applications here in question. On November 5, 1982, GE responded, requesting deferral of consideration of the GETR license renewal application pending completion of the Appeal Board's sua sponte review of the Initial Decision issued

in the show cause proceeding and indicating its desire to pursue the SNM license renewal applications.

With respect to the latter application, GE requested that the Board:

1. Refer the application to the Director, Nuclear Material Safety and Safeguards (NMSS), for disposition;
2. Alternatively, commence proceedings before the Board with respect to the application; and
3. Rule that consolidation of proceedings on this application with the GETR application is not appropriate.

The Board then requested the views of Petitioners/Intervenors and NRC Staff on GE's requests, which have now been received.

Initially, the Board notes that of the six individuals and organizations who petitioned to intervene in 1977, only one, Jack Turk, has responded to the Board's request. The Board interprets this silence as indicating that of the six, only Mr. Turk has a continuing interest in these proceedings. The petitions of the remaining five are therefore denied.

#### Informal Proceedings - SNM License Renewal

As noted above, GE has requested that its application to renew its SNM license be referred to the Director, NMSS, for disposition. GE bases its request on two recent Commission decisions dealing with hearings in connection with materials licenses. These are Kerr - McGee Corp. (West Chicago Rare Earth Facility) CLI-82-2, 15 NRC 232 (1982);

CLI-82-21, 16 NRC \_\_\_\_\_, 373 CCH Nuclear Regulation Reports ¶ 30, 699 (Aug. 6, 1982). Subsequent to GE's submission, CLI-82-2 was affirmed in City of West Chicago, Illinois v. United States Nuclear Regulatory Commission, et al. \_\_\_\_\_ F.2d \_\_\_\_\_ (No. 82-1575 & No. 82-1684, 7th Cir., March 1, 1983).

In its response, Staff takes the position that, unlike Kerr-McGee, ". . . here it has been determined that opportunity for a hearing is required in the public interest (see Notice of Hearing . . . and 10 CFR § 2.104(c))." (Staff Response of 1/17/83, p. 5-6.) Staff goes on to argue that public interest in this application makes it appropriate for this Board to continue to preside, rather than refer the matter to NMSS.

GE responded to Staff's position on January 24, 1983, noting that Staff was simply incorrect in asserting that a notice of hearing under 10 CFR § 2.104 had issued. According to GE, a notice of opportunity for hearing under 10 CFR § 2.105 had issued. GE argues that § 2.105 permits the Board to refer this application to NMSS under the Kerr-McGee rational.

GE's response prompted a further response of February 2, 1983, from Mr. Turk in which he points to a need to amend 10 CFR § 2.105(a) to remove what he perceives as an inconsistency, and takes issue with GE's interpretation of that section of the regulations. Mr. Turk requests that we: 1) hold that CLI-82-2 is not applicable to this application, 2) ". . . inform [him] of [our] opinion and action regarding [his] request to modify 10 CFR 2.105(a) . . .," and 3) continue to preside

over the renewal proceedings ". . . for due process considerations."  
(Turk Response, p. 5.)

We agree with Staff and Mr. Turk that GE's position is not well taken. In CLI-82-2, the Commission clearly sets out the proposition that a notice issued under 10 CFR § 2.105 provides interested parties the opportunity to obtain a formal hearing under Part 2. No such notice was required or issued in the Kerr-McGee case, and hence the City of West Chicago was not entitled to a formal hearing. 15 NRC at 246.

In affirming this interpretation of the regulations, the Court of Appeals specifically noted that "NRC agrees that a party who requests a hearing pursuant to the notice of opportunity for hearing issued under Section 2.105 is entitled to a notice of hearing under Section 2.104 and a formal hearing will be convened." (Slip Op. p.9.)

Moreover, GE overlooks the fact that the Rules of Practice do not provide latitude to a board to convene an informal hearing following a § 2.105 notice of opportunity for hearing. Section 2.700 provides:

The general rules in this subpart [Subpart G - Rules of General Applicability] govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3). (emphasis supplied)

Thus the issuance of the notice pursuant to § 2.105 in this case (42 Fed.Reg. 46427, September 15, 1977) requires this Board to follow the formal procedures of Subpart G of the Rules of Practice in passing on

Mr. Turk's request for hearing and in conducting any proceeding resulting therefrom.

In response to Mr. Turk's request to modify § 2.105(a), we can only point out that the Commission has not empowered us to revise its rules. Indeed, we are bound to follow those rules as written. (See 10 CFR § 2.758.) However, we wish to invite Mr. Turk's attention to 10 CFR § 2.802 which provides a procedure through which he may seek the revision which he proposes.

#### Mr. Turk's Standing

As noted at the outset of this Memorandum and Order, no formal ruling has been issued with regard to Mr. Turk's standing to request a hearing on the two applications in question although an oral ruling was issued upholding his standing at a March, 1978, prehearing conference. We hereby affirm that oral ruling.

In his petition, Mr. Turk avers that he lives within approximately 30 miles of the facilities in question, and that he is concerned for the safety and health of his family.

In its answer of November 23, 1977, Staff takes the position that Mr. Turk has not sufficiently particularized his interest in these proceedings, citing Allied-General Nuclear Services, et al. (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 421 (1976). GE, in its response of December 16, 1977, concurs and states that petitioners must state some particulars concerning the amount of radiation which concerns them.



We do not believe that the Barnwell case cited by the Staff is dispositive of Mr. Turk's petition. In Barnwell, a chapter of the American Civil Liberties Union sought to intervene to protect against the possible infringement of the civil liberties of its members. However, it was unable to specify how those liberties might be threatened by the grant of the license which was the subject of the proceeding. In contrast, Mr. Turk has expressed a concern for his health and safety and that of his family. It is well settled that concern for health and safety is sufficient to confer standing on those individuals residing in proximity to a nuclear facility for purposes of giving party status to NRC proceedings. The protection of the public's health and safety is, after all, the primary mandate of the NRC. Neither GE nor Staff aver that Mr. Turk is too far removed from the facilities here in question to make that interest too remote to be cognizable. Therefore, Mr. Turk is granted party status subject to the acceptance by the Board of at least one contention. An order and notice of hearing, if appropriate, will be issued following receipt of revised contentions and responses thereto as set out below.

Contentions and Other Matters Raised by the Petition

In addition to stating certain contentions, the petition requested other relief. Among these are requests for:

- 1) preparation of environmental impact statements for both applications;
- 2) orders revoking both the operating license for GETR and the SNM license, and denying the applications for renewal;

3) orders awarding attorneys fees and expenses;

4) conduct of hearings in San Francisco, and that these hearings encompass the geologic, seismic, and environmental aspects of the applications; and

5) consolidation of the two license renewal proceedings.

Much time has passed since the contentions and requests were stated. Additionally, as noted above the related Show Cause proceeding was concluded and the result reached therein has now been affirmed.

GE has requested that we defer any further consideration of its license renewal application for the GETR until completion of the Appeal Board's review, and that we deny the request to consolidate the two proceedings. In view of the fact that the Appeal Board's review is now complete, we again call on GE to indicate its intent with respect to the GETR license renewal.<sup>1</sup> In the event that GE wishes to pursue that renewal, it is to once again address the request for consolidation.

With respect to Contentions, the passage of time has not only witnessed a decision in the Show Cause proceeding but a change in the regulations as well. As Staff points out, 10 CFR § 2.714 now permits the amendment of petitions to intervene and contentions up to 15 days

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<sup>1</sup> Should the Commission elect to review ALAB-720, we would of course grant GE an extension of time until the completion of that review.

prior to the first prehearing conference. The presiding board may, of course, set a different time period pursuant to 10 CFR § 2.711. We therefore set a deadline for accomplishing these steps following the receipt of GE's advice with respect to the GETR application.

Mr. Turk's revision of his contentions must address the decision in the Show Cause proceeding to the extent that they may bear on issues decided therein. In particular, if any contentions challenge any of the findings and conclusions in that proceeding, Mr. Turk is to specifically indicate which findings and conclusions and indicate the basis for the challenge. With this information in hand, the Board will set a schedule for briefing by all parties of the effect which should be given to the decision in the Show Cause proceeding.

With respect to the first and second requests for relief (summarized from Mr. Turk's petition) stated above, we point out that the scope of the proceeding and consequently any relief that may prove to be appropriate will be governed by the admitted contentions. Thus to have these matters considered, Mr. Turk must state acceptable contentions encompassing this relief.<sup>2</sup>

With respect to the third request, we note that we are prohibited by § 502 of Public Law 96-367 from paying the expenses of or otherwise

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<sup>2</sup> We do not mean to imply that we have formed an opinion as to the acceptability of any of the contentions stated in the petition. We have not.

compensating parties intervening in our proceedings. Hence, this request must be denied.

Part of the fourth request seeks hearings in San Francisco. It is our intent, in line with customary practice, to conduct all prehearing conferences and hearings in the vicinity of the facility. So much of this request that concerns the scope of the hearings is covered by the comments on the first and second request.

The fifth request, that the two license renewal proceedings be consolidated, will be addressed in the event GE indicates that it desires to pursue the license renewal application for the GETR.

The schedule for accomplishing the steps outlined above is set out in the following Order.

In consideration of the foregoing, it is this 8<sup>th</sup> day of April, 1983,

ORDERED:

1. The petition to intervene and request for hearing filed on behalf of Mr. Jack Turk is hereby granted subject to the acceptance by the Board of at least one contention;
2. The petitions to intervene and requests for hearing filed on behalf of Nancy L. Lyon, Alameda County Citizens Against Vallecitos, Joseph Buhowsky, Jr., East Bay Women for Peace, and California Public Interest Research Group are hereby denied;
3. GE's request to refer its SNM license renewal application to the Director, NMSS, for informal proceedings is hereby denied;

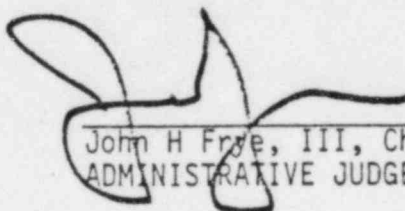
4. Within 30 days following service of this Memorandum and Order, GE is to indicate whether it desires to pursue its application to renew its operating license for the GETR and whether, in the event it does wish to pursue the application, it still opposes consolidation;

5. Within 30 days following service of GE's advice under ¶ 4 above, Mr. Turk is to file amendments to his contentions and petition, indicating which of his proposed contentions may bear upon the Initial Decision (LBP-82-64, 16 NRC \_\_\_\_, August 16, 1982) issued in the Show Cause proceeding as provided above; and

6. Within 15 days (20 days for Staff) following service of Mr. Turk's amended contentions and petition, responses to these documents are to be filed.

Judges Foreman and Linenberger concur.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD



John H. Frye, III, Chairman  
ADMINISTRATIVE JUDGE

Bethesda, Maryland  
April 8, 1983