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May 9, 1984

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 Number R-71)

CBG RESPONSE TO APPLICANT'S REQUEST FOR REVERSAL OF THE BOARD'S APRIL 13 FINDING OF MATERIAL FALSE STATEMENTS

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Introduction

In its Memorandum and Order of February 24, 1984, the Atomic Safety and Licensing Board raised concerns that the Staff and Applicant counsel had made substantial misrepresentations before the Board. Staff and Applicant were directed to respond by March 9 why action should not be taken against counsel and why the license should not be revoked, suspended, or modified for material false statements.[1]

Responses were submitted on March 9, and on April 13 the Board issued an Order concluding, inter alia, that material false statements had indeed been made by Applicant and that its attorney William H. Cormier should be formally reprimanded.[2] The Board also concluded that information it had in its February 24 Order directed be provided had not, in fact, been provided, and gave the Applicant an additional opportunity to provide the required information.[3]

On May 1, the University responded to the April 13 Order, requesting, inter alia, that the Board overturn its holding therein, and that a hearing be held should the Board not reverse its ruling. CBG, the party injured by the representations the Board has determined to be materially false, files in opposition to the request for reversal of the finding of material false statements.

Furthermore, because of the seriousness of the questions that remain unanswered in the Applicant's responses, and the cloud that thus hangs over the entire record in this case, CBG joins in the request for a hearing, should the Board not adhere to its April 13 determination.

1/ Memorandum and Order of February 24, 1984, at pp.7-8

2/ Memorandum and Order of April 13, 1984, at 29

3/ id. at 30

Since so much of the record to date is based upon representations made by the counsel for Applicant who has been found to have made material false statements, and since the question of whether Applicant's key people (and key witnesses in both past and prospective hearings) participated in the misrepresentations remains unresolved, the integrity of the entire proceeding and the past and any future record obtained therein is potentially tainted.

The statements found by the Board to be materially false deal with representations by Applicant that research reactors like UCLA's had never been required to provide protection against sabotage, and that the UCLA security plan was not designed to provide such protection. It is now agreed that UCLA's security plan in the latter half of the 1970s included sabotage protection measures as required by 10 CFR 73.40.[4] The basic protective equipment and hardware were not changed when the plan was redrafted in late 1979 and early 1980, and two response procedures relating to radiological sabotage were added.[5] Thus, UCLA had been required to provide protection against sabotage, and both its 1970s and 1980s plans contained such measures. Furthermore, many persons within the University involved with the security plan throughout the last decade had to be aware of this fact.

Unfortunately, despite two Board Orders directing such

4/ See, e.g., Carlson affidavit of 1/10/84, paragraph 9; also Carlson affidavit of 5/1/84, paragraph 39 **

5/ See Ashbaugh affidavit of 5/1/84, paragraphs 5 and 15 **

** footnote by J.H.Bay

response, to date none of said individuals, as will be discussed below, have fully indicated the extent to which they were aware of the long-standing representations in this proceeding on these matters, nor whether they approved of said representations or attempted to make changes in them. Additionally, questions remain as to what information counsel for Applicant possessed when the repeated representations were made on these matters over the last several years. These matters are addressed below.

HISTORICAL SETTING

In order to appreciate the context in which the sabotage protections at the UCLA facility were implemented and the context in which the current questions have arisen, it is helpful to set out a brief review of the history of sabotage protection at the facility.

In 1967, prior to the promulgation of security regulations for licensed facilities, the Atomic Energy Commission held that licensees must protect against sabotage, a matter to be dealt with at the operating licensing stage.[6]

In 1970, the AEC's Appeal Board, ruling in the first contested research reactor case, Trustees of Columbia University,[7] held that University reactors must take measures to protect against sabotage. No subsequent adjudicatory decision by a Licensing Board, Appeal Board, court, or the Commission itself has disturbed the Columbia decision in this regard.

In 1973, regulations came into effect requiring all licensed facilities to provide protection against sabotage and theft. 10 CFR 73.40 read in pertinent part:

> Each licensee shall provide physical protection against industrial sabotage and against theft of special nuclear material at fixed sites where licensed activities are conducted.

6/ Florida Power & Light Company (Turkey Point Nuclear Generating Station, Units 3 & 4) 3 AEC 173

7/ 4 AEC 349

That regulation has not been repealed in the decade since it first came into effect, although the term "industrial sabotage" has been replaced with the newer term "radiological sabotage."

In 1983, the UCLA Licensing Board, citing the above history, ruled that the provisions of 10 CFR 73.40 and the holdings of the Appeal Board in Columbia provide a long-standing requirement that research reactors provide protection against sabotage.[8] That is the law of this case.[9]

Sabotage Protection Has Consistently Been Required at UCLA

When the 1973 regulations were adopted by the AEC, UCLA was notified of the new regulations and told that they were required to submit a physical security plan to the Commission by January 7, 1974.[10] The AEC letter to UCLA included the new regulations as well as a copy of Regulatory Guide 1.17, "Protection of Nuclear Power Plants Against Industrial Sabotage."[11] UCLA was informed, further, that the Regulatory Guide "states an acceptable Regulatory position" for complying with the new regulations, and that nonpower reactors should use the position in the Regulatory Guide to the extent practicable.[12]

8/ LBP-83-25A (May 11, 1983) 17 NRC 927, and LBP-83-67 (October 24, 1983) 18 NRC ____

9/ Memorandum and Order of April 20, 1984, page 12

10/ Letter from Donald J. Skovholt, AEC Directorate of Licensing to the UCLA Nuclear Energy Laboratory, November 30, 1973, attached.

11/ It is somewhat ironic that six years later the NRC Staff and UCLA should be asserting, in an attempt to dismiss CBG's contentions about inadequate security at the facility, that CBG was attemtping to apply power reactor standards to the UCLA case, when both Staff and Applicant apparently did so a few years previous.

12/ Skovholt letter, supra

On January 14, 1974, UCLA submitted the required security plan. On July 15, 1974, Karl Goller, AEC Assistant Director for Operating Reactors, informed UCLA by letter that its security plan was inadequate and gave the University 30 days to submit a revised plan. Goller included two enclosures: (1) "Interim Guidance - Organization and Content of Security Plans for Low Power Research and Training Reactors," and (2) an identification of deficiencies in the UCLA plan with respect to the interim guide, against which the plan was said to have been evaluated by AEC.

The Interim Guidance, dated April 1974, states that it is applicable to low power research and training reactors, and states its purpose as follows:

> The purpose of the security plan developed according to this guidance is to protect the reactor against acts of sabotage. It is intended for use by the licensee to demonstrate compliance with 10 CFR 50.34(c) and 10 CFR 73.40. Conformance with this guide will not assure compliance with 10 CFR 73.50 and 10 CFR 73.60, if these parts are applicable to the licensee.
>
> (page 1, emphasis added)

The Interim Guidance goes on to discuss identification of "essential equipment," and mandates security systems of locks and keys, and communications, as well as administrative controls, arrangements with local law enforcement, access control, and procedures such as responses to breaches of security, bomb threats, and acts of civil disorder.[13/]

13/ It is worth noting for the discussion which follows that there is no mention of armed guards, design basis threats, or entry searches, and it requires the plan to "protect" against acts of sabotage in compliance with 10 CFR 73.40, precisely what UCLA later claimed its approved plan did not do and was not required to do. Note also that this guidance, like the Sample Plan UCLA followed in producing its 1980 plan with its sabotage provisions, was "interim."

On August 21 (and revised August 29), 1974, UCLA submitted the revised plan, designed to correct the deficiencies in the previous version (deficiencies related to sabotage protection).[14/] The Commission still found the plan to be "not acceptable" and told UCLA that "you may be in violation of Title 10, Code of Federal Regulations, Part 73."[15/] The problems centered around possession of an SNM inventory above the formula quantity specified in Part 73. UCLA eventually gained acceptance of its security plan[16/], and then there proceeded a period of time in which the basic plan was amended from time to time.

The public docket is thus filled with correspondence to and from the Commission involving Ivan Catton, Neill Ostrander, Charles Ashbaugh, Walter Wegst, James Hobson, James Miller, John Barber, among others, largely transmitting amendments to the security plan. The plan continued to be based on the sabotage protection requirements of 10 CFR 73.40. Those individuals were certainly aware of the character and purposes of the plan.

For example, Ivan Catton (then as now the Director of the Nuclear Energy Lab) submitted to the NRC on September 30, 1976, changes to the security plan, to replace the existing, approved Plan and Amendments thereto.[17/] Catton wrote:

> The Draft Plan is believed to be in conformity with the requirements of 10 CFR Part 73.40.
>
> (emphasis added)

14/ See letter of January 8, 1975, from George Lear, Chief of Operating Reactors Branch #3 to UCLA's Nuclear Energy Lab, attached, and Skovholt letter

15/ See letter of November 18, 1974, from George Lear to NEL, attached.

16/ See Lear letter of January 8, 1975.

17/ Transmitted by letter of same date by Ivan Catton. NRC's Goller had requested on August 6, 1976, that UCLA's next proposed change to its security plan incorporate all previous changes so that the plan would be one document.

On July 11, 1977, the NRC's Lear wrote to UCLA, responding[18] to a question in a letter of May 19, 1977, from Ivan Catton, NEL Director. Catton had inquired regarding the status of the UCLA security plan with regard to the operating license for the facility, and whether the Security Plan was conceived as having radiological safety aspects that interact with the license. Lear responded:

> With regard to radiological safety aspects of your Security Plan, implementation of the plan provides reasonable assurance that sabotage and theft of Special Nuclear Material (SNM) will not take place. Theft of SNM can have radiological implications far in excess of those activities for which your license was issued. The security plan, thus, is similar to other safety related components of your facility in that it provides reasonable assurance that occurences which have unacceptable consequences will be prevented.
>
> (emphasis added)

Note that the Plan is to provide reasonable assurance that sabotage and theft will not take place; that reasonable assurance of prevention of sabotage and theft is required.

The Current Plan was Required and Intended to Protect Against Sabotage

In July, 1979, new regulations were promulgated affecting UCLA, in addition to the existing 73.40.[19] The NRC's James Miller wrote to UCLA about the new regulations, inviting the University to send a representative to a meeting the NRC Staff was convening in Glen Ellyn, Illinois on August 27, 1979 to explain the new safeguards upgrade regulations and their impact on nonpower reactors. UCLA sent Neill Ostrander to that meeting. There Ostrander heard the

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18/ letter attached.

19/ See June 28, 1979 Memo from Miller to Burnett indicating that facilities with less than a formula quantity would have to comply with the new 73.47 (now 73.67) and the existing 73.40. Memo attached.

NRC Staff remind the audience that sabotage requirements had been required since 1974[20], that these reactors were required to protect against sabotage under 10 CFR 73.40 and 50.34(c)[21], that to be exempt from 10 CFR 73.60 fuel must be continuously irradiated at over 100 rem/hour per fuel element[22], and that contiguity between sites was to be assumed if the two locations were less than a mile apart.[23]

By letter dated August 9, 1979, Frank G. Pagano, Chief of the Reactor Safeguards Development Branch, wrote nonpower reactor licensees informing them of the new regulation (then called 73.47) regarding theft.[24] He stated in the letter:

> Applicable non-power reactor licensees [those with less than a formula quantity of SSNM] must meet these requirements for detection of theft in addition to previous regulatory requirements for protection against sabotage. As a result of discussions with the non-power reactor licensees, we have drafted the attached Sample Plan as an aid to uniformity and completeness in the preparation of physical security plans.
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> (emphasis added)

Thus, just as occurred right after 10 CFR 73.40 and 73.60 were adopted in 1973, the Commission Staff sent out to licensees

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20/ Transcript of "Impact of the Safeguards Upgrade Rule on Nonpower Reactor Licensees" held at Glen Ellyn, Illinois, August 27, 1979, at 143

21/ TR 143. 10 CFR 50.34(c) requires all facilities to have a security plan addressing vital areas, vital equipment, and isolation zones. The first two items are associated with the risk of sabotage.

22/ TR 101-2

23/ TR 23. R. Burnett directly responded to a question by Ostrander, and said that moving fuel to the campus police station was not "fair," i.e., the police station would probably not be considered non-contiguous. TR 74-5.

24/ letter attached.

guidance as to how to meet the new regulations. The Sample Plan made clear at the outset that its Purpose included that of the previous plans as indicated in the 1974 Interim Guidance: protection against sabotage. It states at the beginning:[25]

> Purpose
> This security plan describes the physical protection system and security organization which will provide protection against radiological sabotage and detect the theft of special nuclear material at the Sample Facility. It demonstrates compliance with 10 CFR 50.34(c), 10 CFR 73.40 and 10 CFR 73.47.

The Sample Plan includes numerous provisions to achieve this purpose. It, apparently like the Interim Guidance in 1974, was not subsequently altered by the Staff. It appears to have merely replaced the 1974 Interim Guidance subsequent to publication of the new additional specific theft protection regulations in 10 CFR 73.47.

UCLA received a copy of the Sample Plan, and used it to draft its revised security plan.[26] UCLA submitted its proposed revised plan on March 10 or 11, 1980, as part of its application for license renewal.[27]

The Pre-1979 Plan, With Its Admitted Sabotage Protection Provisions, Was In Effect Until November 9, 1983

The NRC Staff did not formally approve UCLA's new plan until November 9, 1983.[28] Until November of 1983, therefore, when UCLA's current license was amended to include the new plan, UCLA

25/ "Sample Physical Security Plan for Non-Power Reactor Facilities Possessing Special Nuclear Material of Moderate Strategic Significance," Revision 1, June 14, 1979, page 1, emphasis added.

26/ Declaration of Charles E. Ashbaugh, III, of March 9, 1984, para. 2

27/ Ashbaugh, ibid., indicates March 11; the Amendment itself indicates March 10, 1980. The fact that the Plan was late-filed first came to light when the letter of approval, citing the date of submission, was issued in Nov 1983.

28/ Approval was transmitted by letter of November 9, 1983, from Cecil O. Thomas, Chief, Standardization and Special Projects Branch to Walter Wegst.

operated under the old security plan under color of the timely renewal application provisions of 10 CFR 2.109. Thus, until November 9, 1983, UCLA's operative security plan, and the only one officially approved by the NRC Staff, was UCLA's pre-1979 security plan. That plan, all parties now agree, contained sabotage protection provisions, was required to under the regulations, and was reviewed by NRC Staff for compliance with sabotage protection requirements.[29/] This fact will become very important in the discussion below.

The Sabotage Protection Requirement was Never Revoked

As indicated in the Pagano letter, the Sample Plan, the Miller-Burnett Memo of 6/28/79, and other documents, the sabotage protection requirement of 10 CFR 73.40 was not withdrawn by the Commission when the additional theft protections of 10 CFR 73.47 (now 73.67) came into effect.

The regulatory situation at the time that the UCLA relicensing proceeding began is summarized in an NRC Staff report to the Commission.[30/] The report was prepared in part to answer Commission questions as to "what physical protection is presently in place" at nonpower reactors. The document includes a section on both the history of nonpower reactor safeguards and the current safeguards in force, pertinent parts of which appear below:

29/ See especially Carlson affidavit of 1/10/84, para. 9; also Norderhaug affidavit of 3/6/84, para. 6; and Schuster affidavit of 3/6/84, para. 5: "Up until 1979 we inspected for sabotage protection." In fact, the NRC Staff continued to inspect for sabotage protection after 1979, as will be shown in a separate pleading.

30/ SECY 79-187C, dated December 19, 1979, relevant portions attached. Note that this report comes after publication of the final new rules for theft precautions at nonpower reactors (July 24, 1979) and after their effective date (November 21, 1979).

Current NPR Safeguards Measures in Force

> Since late 1973 NPR licensees have been required to submit a physical security plan as part of their application for a license to operate. NPR licensees who possessed less than a formula quantity of SSNM were subject to the provisions of 50.34(c) and 73.40 and those who possessed more than a formula quantity of SSNM were subject to the provisions of 73.50 and 73.60, as applicable, in addition to 50.34(c) and 73.40. In 1974, the staff developed guidance in support of the foregoing requirements to aid applicants and licensees in the development of security plans to protect reactors against acts of sabotage.
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> (page 4, emphasis added)

A little later in the same document Staff says:

> All of the currently approved security plans for the reactors in question [UCLA is identified as one] were reviewed and analyzed with respect to preventing sabotage and a few were evaluated by NRR to determine the adequacy of their physical protection system to protect against the theft or diversion of SNM. All NPRs have been inspected against their security plans for noncompliance during the period 1975-1979.
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> (page 4, emphasis added)

Thus, as of the end of 1979, after the implementation of new regulations, the Staff reported to the Commission that since late 1973 nonpower reactor licensees have had to comply with 10 CFR 73.40 and had to have security plans "to protect reactors against acts of sabotage." Furthermore, Staff indicated that all plans had been evaluated "with respect to preventing sabotage" and that all research reactors had been inspected for compliance with their security plans.

The Commission informed the Congress to that effect in March of 1981, for example, in its Annual Report:

> Status of Safeguards at Non-Power Reactors
>
> All licensed non-power reactors have operative security plans as required by 10 CFR 73.40 ("Physical Protection: General Requirements at Fixed Sites") for protection against sabotage. In addition, licensees possessing less than formula quantities of SSNM have submitted security plans in accordance with the requirements of 10 CFR 73.67....31/

Thus, one year after UCLA applied for license renewal and this proceeding began, the Safeguards Chapter of the Commission's Annual Report to the Congress, written by the staff of the Safeguards Branch and formally approved by the Commission, stated clearly that all research reactors were required under 10 CFR 73.40 to protect against sabotage, all had such sabotage protection plans. Those licensees with less than a formula quantity of SSNM had to meet 10 CFR 73.67 theft protection measures in addition to 10 CFR 73.40 sabotage protection requirements. We shall shortly see, however, what the Board was being told during the same time.

31/ March 17, 1981, "1980 Annual Report" of the U.S. Nuclear Regulatory Commission, pp. 120-121, emphasis added. The Annual Report for 1981 similarly states the requirement to comply with the general physical security requirements of 10 CFR 73.40(a), saying that all licensees of non-power reactors have implemented those requirements. The Annual Report for 1982 identifies no change in regulations in effect for non-power reactors from the previous two years, discussing only the new proposed amendments to 73.67 which have to this date still not been approved.

Summary of Status as of 1980, When the Relicensing Proceeding Began

What, then, was the situation in early 1980 when the UCLA reactor license expired and renewal proceedings began?

Research reactors had been required to have sabotage protection since at least the 1970 Columbia University decision[32] and the 1973 promulgation of 10 CFR 73.40.[33] Both of UCLA's security plans-- its then operational one[34] and its newly proposed revised plan[35] -- contained as their performance objectives protection against sabotage, and provisions therefor. Both were written in response to Staff direction that their facilities must protect against sabotage under 10 CFR 73.40.[36] Both were written using interim guides prepared by Staff requiring such sabotage protection.[37] Staff had told UCLA throughout that it must protect against sabotage and obey 73.40[38] and UCLA said it intended to comply with 73.40.[39] The Staff routinely inspected UCLA for sabotage protection.[40] Staff told others within Staff and told UCLA that the new 73.67 theft regulations must be complied with in addition to the existing 73.40 sabotage protection requirements.[41] The Staff, after the new rules became effective, told the Commission that all nonpower reactors were required to have sabotage protection plans under 10 CFR 73.40 and had been so inspected,[42] and the Commission so informed the Congress.[43]

32/ 4 AEC 349

33/ 38 FR 30537; Skovholt letter, 11/30/73; Carlson affidavit, 1/10/84, paragraph 9; Transcript of Glen Ellyn meeting, 8/27/79, at 143.

34/ Skovholt letter, 11/30/73; April 1974 Interim Guidance; Lear letter 7/11/77

35/ Board Order of 2/24/84 at 6; Sample Plan of 6/14/79; Ashbaugh declaration of 3/9/84, paragraph 2

36/ Skovholt letter of 11/30/73; Pagano letter of 8/9/79

37/ April 1974 Interim Guide; 6/14/79 Sample Plan; Ashbaugh decl. of 3/9/84

38/ Skovholt letter; Lear, 7/11/77; Carlson 1/10/84 at 9; Glen Ellyn Transcript at 143; Pagano letter of 8/9/79

39/ e.g. Catton letter 9/30/76

footnotes continued next page

What Did UCLA and Staff Tell the Board?

We have seen above that from 1973 onwards, the Staff had repeatedly told UCLA it had to protect against sabotage under 10 CFR 73.40; UCLA wrote two plans that did so; Staff inspected UCLA for sabotage protection; Staff told the Commission that all research reactors had sabotage protection plans and were complying with 73.40 sabotage requirements; and the Commission likewise told the Congress. What, however, did UCLA and Staff tell the Board?

In her first pleading in the case, Ms. Woodhead argued that the security contention should be dismissed because, she claimed, the only safeguards regulation applicable to UCLA was 10 CFR 73.67.[44]

(footnotes continued from preceding page)

40/ See, e.g., Inspection Report No. IE-V-264 (10/30-31/78), and No. IE-V-340 (9/24-25/79)

41/ Miller to Burnett Memorandum of June 28, 1979; Pagano letter of 8/9/79; Sample Plan of 6/14/79 at page 1

42/ SECY 79-187C, dated December 19, 1979

43/ See, e.g., March 21, 1981 Annual Report of the NRC

44/ December 1, 1980 "NRC Staff Position on Unstipulated Contentions" This pleading contained the first reference to any regulation regarding the contention, which as drafted merely alleged that sabotage and theft precautions were inadequate. Subsequent argument as to whether 73.67 or 73.60 applied for theft protection to this facility (related to quantity of SSNM on site) led the Board to insert -- on its own motion -- those two qualifying regulations into the contention passage dealing with protection of SSNM against theft and diversion, which now reads "protection against theft and diversion of the special nuclear materials it possesses pursuant to 10 CFR 73.60 and 73.67..."

Mr. Cormier, on behalf of UCLA, expressed unqualified support for the Staff argument:

> Staff has gone through and indicated where they [CBG] are unaware of what regulations in the security area apply to Applicant's facility.
>
> I think we certainly concur in every comment that Staff has made and the response that the Staff has made to this.[45]

Throughout the rest of the February 1981 prehearing conference, Mr. Cormier and Counsel for Staff argued that 10 CFR 73.67 only requires detection of theft, and that no requirement for sabotage protection exists for research reactors.[46] They made this argument one month before the Commission told the Congress that all nonpower reactor licensees were in fact fulfilling the sabotage protection requirements of 10 CFR 73.40(a).[47] Also at that prehearing conference, Staff proposed a stipulated schedule calling for summary disposition at the close of discovery, to which all parties agreed.

The Board admitted the security contention[48] and accepted the stipulated discovery and summary disposition schedule. Three weeks later, and one week before the first set of interrogatories were to be submitted according to the stipulated schedule,[49] Staff moved for summary disposition, of only one contention, security.[50] The Board found the motion to violate the stipulated schedule, and

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45/ February 1981 prehearing conference, TR 376-77

46/ See TR 376-398

47/ March 17, 1981 Annual Report, pp. 120-21

48/ Board Order of March 20, 1981

49/ the interrogatories on security were nonetheless submitted, but remain unanswered to this date.

50/ April 13, 1981 NRC Staff Motion for Summary Disposition

ruled it untimely.[51] Had the untimely motion succeeded, CBG and the Board would have been prevented from seeing the plan and inspection reports.

The Staff motion for summary disposition stated, inter alia, "Intervenor's assertion that the Licensee's security plan must protect against sabotage is legally incorrect and should be dismissed."[52] The Motion went on repeatedly to say that the only portion of the Part 73 safeguards regulations applicable to the UCLA research reactor facility is 10 CFR 73.67, specifically leaving out 73.40. An Affidavit from Donald Carlson said that there were no explicit regulations for protection of nonpower reactors against sabotage. (Carlson had written the Sample Plan on which the UCLA proposed plan was based, which included as its purpose "... protection against radiological sabotage and... compliance with 10 CFR 50.34(c), 10 CFR 73.40, and 10 CFR 73.47"[53]).

UCLA repeatedly told the Board that it totally supported the Staff motion, and that no hearing of the security contention should be permitted, nor any discovery of the security plan or related documents. On May 28, 1981, in a pleading signed by attorney Glenn R. Woods, UCLA said:

> Applicant requests that the Board defer consideration of any discovery related to the physical security of Applicant's facility until the NRC Staff Motion for Summary Disposition of the physical security contention is decided by the Board. Applicant fully supports the Staff motion and concurs with the Staff analysis that this contention can be disposed of without requiring further evidentiary proceedings. [54]

51/ Board Orders of April 30, 1981 and June 9, 1981

52/ Staff Motion at 11

53/ Sample Plan of 6/14/79 at page 1

54/ Applicant's Motion for a Protective Order, 5/28/81, emphasis added

The UCLA motion thus requested that no security discovery be had prior to the resolution of the summary disposition motion, and that the summary disposition motion be granted so that there would be no discovery at all.

On March 15, 1982, Mr. Cormier, on behalf of Reidhaar, Woods, and Helwick, again argued that the summary disposition motion should be resolved prior to any discovery commencing on security, and once again endorsed the Staff motion[55]:

> Respecting security matters, the NRC Staff has argued in its motion that much of Intervenor's security contention is based on a mistaken interpretation of the physical security regulations that apply to Applicant's research reactor facility. Applicant agrees with the Staff's argument. A ruling on the summary disposition motion at this time will resolve the question of the material facts, if any, that are in dispute.
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> (emphasis added)

Parties filed proposed protective orders under which the security information was to be released. Before the disputes about the contents and applicability of the protective orders could be resolved by the Board, and thus discovery actually commence, Staff and UCLA renewed their requests[56] that discovery be deferred until the "threshold" issues in the summary disposition motion were resolved. At a prehearing conference June 29-30, 1982, the "threshold" issues to be resolved were defined as (1) whether, as UCLA and Staff claimed, UCLA was exempt from 73.60 and thus only required to meet 73.67 theft provisions, and (2) whether, as UCLA and Staff claimed, no sabotage protection was required for research reactors like UCLA's.[57]

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55 / "Current Status Report on Discovery Proceedings", March 15, 1982; at 10; It should be noted that CBG objected, of course, to having to respond to a summary disposition motion when it had not been provided access to the fundamental basis of the contested issue-- the security plan itself.

56 / University's Response to CBG's Motion for Deferral, 5/10/82, at 11-12; Staff Motion of 5/13/82

57 / TR 773, 779, for example.

CBG was directed to address these "threshold" issues contained in the motion for summary disposition without discovery of sensitive information; access to the security plan and related information would only occur after, and be contingent upon, survival of that stage of summary disposition.

Counsel for UCLA once again gave unqualified support for the Staff motion, particularly those portions on sabotage and 73.60 to which CBG was now directed to respond[58]:

> MR. CORMIER: I don't think we need to respond to the motion. We ought to be onrecord as supporting the motion. That should be clear already. If we can do that in the record here, as opposed to filing a statement in support, that would be the only thing we would need to do. I think the Applicant ought to be on record on how it comes out on the issues, and that is clearly one of supporting the motion, but I don't think we need to add additional information.

The record was indeed clear: ever since the proceeding had begun, UCLA had fully and totally provided independent support for the assertions that CBG was improperly attempting to impose sabotage protection provisions on the UCLA security plan when no sabotage precautions were required, and furthermore, that the only safeguard regulation UCLA need comply with was 10 CFR 73.67.

The Board rejected the positions of UCLA and Staff, ruling that 10 CFR 73.40(a) clearly applied in addition to 10 CFR 73.67, and that it and the Columbia decision required University reactors to take some measures to protect against sabotage.[59] What those specific measures were in the UCLA case was a matter for the parties to address at hearing.[60]

The Staff petitioned for reconsideration on August 15, 1983,

58/ TR 774, emphasis added

59/ Board Order of May 11, 1983, LBP-83-25A

60/ id. at 25

supported in full by UCLA on August 25, 1983. The Staff, in its Petition, quoted the Board's Order:

> Where the Commission has set down detailed requirements, we conclude that these are intended to satisfy the general requirements of §73.40. Where no detailed requirements have been set out, we conclude that some measures nonetheless must be taken to satisfy the §73.40(a) general requirements.
>
> In the instant case, assuming that there is (or will be) less than a formula quantity of SNM on hand at the NEL, this means that UCLA must institute some means of providing physical protection against sabotage.
>
> (emphasis added by Staff)

The Staff petition "submits that this interpretation is incorrect."[61] Staff continued, "The Board errs in believing that a general but unspecified requirement for protection against sabotage exists in §73.40(a) which would provide ad hoc regulating authority to Staff and/or Licensing Boards."[62] This despite the fact that the Staff had been inspecting and requiring sabotage protection at UCLA and other research reactors for years on the basis of the 73.40 general, unspecified language, and many within the NRC Staff and UCLA knew it, as shall be shown below.

The Petition, fully supported by UCLA, went on to say "sabotage protection was and is not required for non-power reactors."[63] The Petition said further that "nonpower reactors have never been subject to §73.40(a)."[64] (This despite the affidavit by Carlson of 10 January 1984, paragraph 9, which indicates that research reactors were required to comply with 73.40 at least as early as 1974; and the fact that, as the Board says in its May 11, 1983 Order, the provisions of §73.40(a) "have remained unchanged over a period of almost ten years."[65]

61/ Petition for reconsideration, page 9
62/ Petition, page 10
63/ Petition, page 11, emphasis added
64/ emphasis added
65/ Board Order, at 25

UCLA filed its response in support of the Staff Petition for Reconsideration on August 25, 1983.[66] As stated therein,[67]

> University fully supports the Staff petition for reconsideration for the reasons discussed in Staff's petition to which brief mention is made below.

Thus, UCLA once again provided total endorsement of the Staff statements from the independent perspective and with the independent information of the University.

The University pleading, signed by Mr. Cormier on behalf of Messrs. Reidhaar and Woods and Ms. Helwick, also states, "The Board's Ruling Concerning the Applicability of Sec. 73.40 to the UCLA Facility is Incorrect."[68] UCLA goes on to dispute the following:

> In its Memorandum and Order the Board concluded that Sec. 73.40 imposes a generalized requirement that the UCLA facility be protected against sabotage. The Board ruled further that the specific means of providing physical protection against sabotage at the UCLA facility was properly a subject for the parties to address in this adjudicatory proceeding.

And then, in the passage that has received the most attention recently because it most explicitly states what the University had been saying consistently since the proceeding began:[69]

> University wishes to note that its security plan, which is not designed to provide protection against sabotage, has been approved by the Commission's safeguards branch; and that the low-power university research reactor licensees have never been required to adopt security plans designed to protect against sabotage. Surely the Commission's consistent practice in interpreting and applying its own safeguards regulations to licensees such as University is entitled to considerable weight in this proceeding.

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66 / University's Response in Support of NRC Staff Petition for Reconsideration of the Licensing Board's Memorandum and Order Ruling on Staff's Motion for Summary Disposition

67 / page 1, emphasis added

68 / page 2

69 / pp. 2-3, emphasis added

This August 1983 statement by UCLA is extraordinarily explicit, tying together the representations of three years into one paragraph. The Counsel for the Regents state, in the context of an attack on the Board's holding that 73.40 requires some measure of sabotage protection for research reactors like UCLA's, that:

> (1) low-power university research reactors have never been required to adopt security plans designed to protect against sabotage;
>
> (2) that has been the consistent Commission practice;
>
> and, as "proof" that (1) and (2) are correct, UCLA informs the Board and CBC-- neither of which had seen the plan-- that:
>
> (3) the UCLA plan is not designed to provide sabotage protection yet
>
> (4) nonetheless has been approved by the NRC Staff.

These are factual assertions designed to support a legal argument. Unfortunately, when the Board finally obtained the unexpurgated security plan and inspection reports, serious question was raised as to whether these several statements were not, in fact, materially false.

HOW THE BOARD WAS FINALLY MADE AWARE OF THE CONTENTS OF THE SECURITY PLAN AND THE INSPECTION REPORTS

We have seen above how both UCLA's operational (approved) security plan and its proposed plan (not approved until Nov 1983) contained sabotage provisions, had been written at direction of Staff to comply with 73.40, using guidance prepared by Staff indicating requirement of providing protection against sabotage, and how UCLA was routinely inspected by the NRC for sabotage compliance. We have also seen above how the Board was told just the opposite: that there had

never been a requirement to protect against sabotage, 73.40 never applied to low power research reactors, and UCLA's plan was not designed to provide sabotage protection and yet had been officially approved by the NRC Staff. As the Board described the situation as of February, 1984:[70]

> Throughout these proceedings until February 15, 1984, we had been led to believe by Counsel that, first, Staff saw no requirement in the regulations that UCLA provide such protection and imposed no such requirement, and second, that UCLA's security plan indeed provided no such protection.

What, then, happened on February 15, 1984, that so markedly affected the course of this proceeding? The Board was finally provided the unexpurgated security plan and inspection reports and, it writes, was "astounded" by what it saw.[71] How the unexpurgated plan and reports reached the Board, over three years into the proceeding, is itself of some note.

The January 25, 1984 Conference Call

The Board arranged for a conference call with the parties to be held on January 25, 1984, to make arrangements for final discovery of the security plan, inspection reports, and related information.[72] Counsel for UCLA, during that conference call, attempted to reargue once again the sabotage requirement matter, asserting it was grave error and that UCLA might seek interlocutory review. He was told that the sabotage rulings were the law of the case and discovery would proceed. He argued that discovery of the

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70/ Memorandum and Order of February 24, 1984, at 3, emphasis added

71/ id., at 6, 7

72/ Board Order of December 23, 1983 at 12; errata Order of 1/10/84

security plan could not occur if CBG failed to qualify an expert witness, and asserted he might attempt to certify any ruling qualifying any CBG security witness in order to prevent "unnecessary" disclosure of the plan. Mr. Cormier was reminded that Intervenors could build their cases defensively and thus, whether any expert witnesses were approved or not, the security plan and inspection reports must be turned over to CBG's attorneys.

Mr. Cormier then indicated that he might expurgate portions of the security plan and inspection reports if required to disclose them, which produced considerable debate. Mr. Hirsch insisted that the unexpurgated versions be provided, at least to the Board. And the Board ordered that this be done.[23/]

What the Board Saw When the Security Plan and Inspection Reports Were Finally Revealed

What the Board found, when it was finally provided the unexpurgated materials, was (1) that the plan did contain, both as its design objective and in specific provisions to carry out that objective, sabotage protection measures; (2) that what the Staff had approved and ordered UCLA to comply with was a plan with sabotage provisions; and (3) that the security inspection reports indicated UCLA had been routinely inspected for sabotage protection by the Staff.

23/ Memorandum and Order of January 27, 1984, at 2-3

The Board's astonishment at reading the documents was due to the consistent representations made over a period of years of directly the opposite of what the actual documents contained. Describing the many years of assurances of no sabotage protection, the Board says:[74]

> It was thus clear to us, based on the representations of Counsel, that UCLA's physical security plan was not designed to provide protection against sabotage and that Staff did not require that such protection be provided. However, the security plan and security inspection reports furnished by UCLA indicate that the opposite is true.

What the Board Did After the Facts Were Finally Revealed

The Board took a number of actions upon becoming aware of the apparent "substantial misrepresentations" on the sabotage matter. The Board first suspended the security proceeding until the matter of the potential misrepresentations had been resolved.[75] The Board then directed NRC Staff Counsel and four named Counsel for the University (Christine Helwick, Glenn R. Woods, William H. Cormier, and Donald L. Reidhaar) over whose names the various representations had been made, to demonstrate why action should not be taken against them pursuant to 10 CFR 2.713 for violations of the Model Rules of Professional Conduct.[76] In addition, the Board directed "others within their respective organizations," i.e. within the University and the NRC Staff, to inform the Board to what extent the written representations

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74/ Board Order of February 24, 1984, at 6, emphasis added

75/ Message read to parties by Board's law clerk on February 17, 1984, repeated in Memorandum and Order of February 24, at 1. It should be noted that suspension of the proceedings penalized only CBG, which had been trying with great effort to get the security proceeding resolved before the summer Olympics.

76/ 2/24/84 Order at 7

of these attorneys had been reviewed and approved by them. The Board explicitly reminded the parties that 10 CFR 50.100 provides[77] in part that the UCLA license stood in jeopardy of being

> ... revoked, suspended, or modified, in whole or in part, for any material false statement in the application for the license or in the supplemental or other statement of fact required of the applicant....

Under threat of that sanction, the Regents of the University of California and the NRC Staff were directed to indicate by March 9, 1984[78]

> the extent to which they were aware of the representations being made by counsel, whether they approved of these representations, and whether they sought to make any corrections to them.

We shall explore below the extent to which UCLA complied with the Board's Order for responses by the identified individuals to the specific questions addressed in the Order and, in those areas where there was response, he extent to which those responses resolve the matter of potential isrepresentations.

77/ 2/24/84 Order, at 8, emphasis added

78/ ibid.

UCLA's March 9 Response to the Board's Order: Incomplete, Unsatisfactory

The University responded to the Board's Order on March 9. Two of the four named attorneys failed to respond at all, none of the Regents nor any other individuals within the University provided any response, with the exception of Mr. Ashbaugh, whose affidavit did not address the matters specifically sought by the Board: whether he was aware of the long-standing representations made and whether he approved or attempted to make changes in them. As we shall see, the omissions in the University response-- the missing affidavits and the missing information from the affidavits that were provided-- are very serious.

The Board, in its Memorandum and Order of April 13, 1984, found Mr. Cormier's explanation unsatisfactory and ruled that he had indeed made material false statements and should be reprimanded. Before issuing the reprimand, it gave Mr. Cormier an additional chance to explain himself and, further, noting the omissions referred to above, gave the University a second chance to provide the missing information on the knowledge and actions of other within the University.

It withheld ruling on the issue of whether license revocation, suspension, or modification should result until the University had a second chance to provide the omitted information. We shall see later whether the second response is any more satisfactory than the first.

The Omissions: A. The Attorneys

Throughout the proceeding, and during the long pendency of the repeated representations called into question by the Board's

Order of February 24, 1984, representations have been made on behalf of the Regents of the University of California by a team of four attorneys appearing on behalf of the Applicant. Virtually every pleading filed on behalf of the Regents in the last four years has had all four names on the pleading. Those attorneys for the Applicant are: Donald L. Reidhaar, Glenn R. Woods, Christine Helwick, and William H. Cormier. All four were explicitly named in the Board's 2/24/84 Order, accused of violations of the Model Rules of Professional Conduct, and offered an opportunity to explain why action should not be taken against them pursuant to 10 CFR 2.713.[79]

Two of the four named attorneys-- Glenn R. Woods and Christine Helwick-- made no response whatsoever, offered no explanation for their conduct, and made no showing why the action threatened by the Board against them should not be taken. The representations were made in their name, and in several cases, over their signatures.[80] They were present at prehearing conferences where the representations were made orally[81]; and they are on the service list for all parties for all the pleadings and Orders that have been served on this issue over the last many years. They have previously been accused of lack of candor by this very Board[82], and of failing to respond to Board Orders[83]. In the past, the sanctions threatened against them for misrepresentation and failure to comply with Board Orders (based in

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79/ 2/24/84 Order at 7

80/ See, for example, a 5/28/81 Motion signed by Woods, in which Applicant "fully supports" the Staff's motion for summary disposition, which argued that 10 CFR 73.67 was the only applicable regulation, and that sabotage protection was not required.

81/ Both were present at the February 1981 conference, for example, at which University and Staff argued that there was no requirement for UCLA to protect against sabotage.

82/ See Orders of 12/22/80, 3/10/81, 5/29/81

83/ See Orders of 3/10/81, 5/29/81

part on a letter from Mr. Woods, refusing to respond to an Order, which the Board termed "greatly insulting from a great University to this Board"[84]) were dropped based only on the conclusion of inexperience with NRC practice by these attorneys in the early days of the proceeding. Surely the excuse of inexperience can not be used a second time, years later.

Helwick and Woods are Responsible for Supervision of Mr. Cormier's Pleadings

Mr. Reidhaar's affidavit indicates that Woods and Helwick were directly responsible for supervising the actions of Mr. Cormier.[85] Thus, in addition to their own actions or inactions, they are responsible for Mr. Cormier's activities.

Mr. Reidhaar indicates in his affidavit that he had reviewed the security plan.[86] We do not have any denial from Woods or Helwick that they did so as well. They certainly cannot claim ignorance of the long-standing claims that no sabotage protection was required--those claims were made at prehearing conferences at which they were present,[87] and in pleadings and Board Orders served on them.

Their failure to respond in their own defense speaks volumes; the Board gave them an opportunity to demonstrate why action should not be taken against them pursuant to 10 CFR 2.713; they have not done so.

84/ Board Order of 5/29/81, at 2

85/ Affidavit of Donald L. Reidhaar of March 8, 1984, paragraph 1

86/ Reidhaar affidavit paragraph 4. In addition, the University, in its January 25, 1984 pleading, identifies Woods and Helwick as authorized to have access to protected security information.

87/ Including the February 1981 and June 1982 prehearing conferences.

Omissions: B. The Regents

The Board, warning that material false statements could result in license revocation or similar action, wanted to know who besides the four named attorneys was aware of the representations made; the Regents of the University were specifically directed to respond:[88/]

> The Regents of the University of California and the NRC Staff are to indicate, by March 9, 1984, the extent to which they were aware of the representations being made by counsel, whether they approved of these representations, and whether they sought to make any corrections to them.

NONE OF THE REGENTS RESPONDED.

The Regents hold the license for which renewal is requested and of which revocation or suspension has been threatened. The statements in question made over the last four years were made legally on behalf of the Regents. Did they approve said representations, did they try to change them, were they even aware of them? What the Board wanted to know is not a trivial matter. For years an extraordinary public position has been taken on behalf of the Regents, that their reactor, situated a few hundred yards from a major site of the upcoming Olympic Games, was not required to have any sabotage protection. It was wrong-- and dangerous. Did the Regents know? Was this indeed the position of the Regents? Did the Regents exercize the level of control and supervision necessary to assure that representations made on their behalf to a federal agency about important public health and safety matters were not materially false? If Mr. Cormier has been making the representations on his own, without approval and checking by others, then what assurance is there that any of the representations made are correct? If others approved and reviewed,

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88/ Board Order of February 24, 1984, at 8

then who are they and why didn't they notify the Board that the plan and inspection reports, and all the other history and records identified earlier, showed 73.40 sabotage protection was included and required?

Is it possible that Mr. Cormier never even showed the Board Order to the Regents, that they still don't know they were directed to respond, nor that they were accused of material falsehoods and threatened with license revocation? None of these questions are answered, because the Board's directive that the Regents respond to the identified questions was disobeyed.

CBG recognizes that not every member of the Regents need provide an affidavit-- although that might be useful, given the fact that they have legal responsibility and may not even be aware of the case nor the accusations against them and their counsel. But at least those subcommittee members with direct responsibility for the reactor, or the Chairman of the Regents, should have provided the information sought. All of the Regents should, at minimum, have been notified of the charges and been provided the Order. The question becomes: is Mr. Cormier (and his colleagues if they indeed provide the supervision Reidhaar claims) genuinely <u>representing</u> the Regents, or do the Regents know nothing about this and is Mr. Cormier representing only himself?

In any case, the Regents have failed to comply with the Board Order; no response whatsoever was forthcoming; they have defaulted and license revocation or similar action is called for.

Omissions: C. Others Within the University Organization

The failure of others within the University organization to indicate the extent of their awareness and approval or disapproval of the long-standing representations is an important omission. These were people who appear to have had in their possession the information that would have contradicted the representations that were being made to the Board. They had individually written the plan, reviewed it, approved it, transmitted it and the amendments to it to the Commission, received communications from the Staff on these sabotage and other security matters, been present at inspections when sabotage precautions were checked, and received, reviewed, and responded to inspection reports. Some of these people were sitting next to Mr. Cormier at prehearing conferences when he made the remarks in question, or when he claims to have reviewed the plan. These are the University "staff" upon whom Mr. Cormier had to rely for any factual representations made. Thus, it is important to know directly whether they approved of his representations either before or after he made them, and whether they suggested he make changes in them. These are crucial questions-- but, alas, like the questions to Woods and Helwick, and to the Regents, the directive by the Board to provide answers to them is ignored.

An examination of what is known about who knew what follows, demonstrating the seriousness of the failure to comply with the Board Order and disclose the matters requested.

A useful place to begin examining who should have responded to the Board Order but didn't is in Mr. Cormier's January 25, 1984, list of University staff authorized by the University to have access to protected information on security (attached).

UNIVERSITY'S PROPOSED LIST OF AUTHORIZED PERSONS

1. Persons Anticipated to be Primarily Responsible for the Preparation of UCLA's Case.

NEL Staff: Dr. Ivan Catton, Director; Mr. Neill C. Ostrander, Laboratory Manager; Mr. Charles E. Ashbaugh, Senior Reactor Operator and Security Officer; Mr. Tony Zane, Reactor Supervisor; Ms. Jule Bishop, Administrative Assistant.

Other Staff: Dr. Walter F. Wegst, Director, Office of Research and Occupational Safety.

Lead Attorney: Mr. William H. Cormier.

Other Counsel: Mr. Glenn R. Woods; Ms. Christine Helwick.

Clerical Support Staff: Ms. Dolores Armstrong; Ms. Darlene Otten; Ms. Toni Stewart.

2. Persons Who May Require Access by Virtue of Their Managerial or Supervisorial Responsibilities or to Perform Duties in Connection with UCLA's Ongoing Security Responsibilities.

Dr. Charles E. Young, UCLA Chancellor; Mr. James W. Hobson, Administrative Vice Chancellor; Mr. Allen Solomon, Assistant Vice Chancellor, Facilities; UCLA Facilities personnel (engineers, technicians, craftsmen) responsible

for installation and maintenance of security devices; Mr. John C. Barber, Assistant Vice Chancellor, Community Safety; Mr. Patrick M. Connolly, Director, UCLA Police Services; UCLA Police Officers and dispatchers; Professor George L. Turin, Dean, School of Engineering and Applied Science; Professor A. R. Frank Wazzan, Associate Dean, School of Engineering and Applied Science.

3. University's Designated Facility: Nuclear Energy Laboratory, Boelter Hall, UCLA.

4. University's Designated Office: 2241 Murphy Hall, UCLA

As indicated by the University itself in January, at least twenty people within the University organization were authorized by the University to have access to security information related to the reactor. None of these answered the Board's questions as to the extent they were aware of the sabotage representations that had been made over the years and whether they approved or attempted to alter said representations. Let us examine some of the key individuals.

NEL STAFF

Dr. Ivan Catton, Director

Dr. Catton has been Director of the Nuclear Energy Lab since the mid-1970s, and supervises all staff at NEL, including Messrs. Ostrander, Ashbaugh, and Zane. It was his letter in 1977 to the NRC inquiring about radiological sabotage aspects of the security plan that brought the response from the NRC's Lear that implementation of the security plan is to provide "reasonable assurance" that sabotage and theft "will not take place," that such incidents will be "prevented."[89] In his letter to the NRC transmitting a new proposed security plan, he indicated his belief that it complied with 10 CFR 73.40.[90] Much of the security correspondence between the Commission and UCLA for the last decade was sent to or from Dr. Catton. Dr. Catton is listed in many of the security inspection reports for which sabotage protection was inspected as one of the NEL staff contacted during the inspections, and/or attending the exit interview in which the inspection conclusions were discussed.[91] He was responsible for responding to

89/ letter of Lear to UCLA, July 11, 1977

90/ letter of Catton to NRC, September 30, 1976

91/ See, e.g., inspections of 9/21-22/77, 10/30-31/78, 9/24-25/79

Notices of Violation on security matters, and thus for reviewing inspection reports when received. See, for example, his letter of January 18, 1979, to L.R. Norderhaug, Chief of Safeguards Branch, Region V, regarding security deviations noted in the course of a recent security inspection. Note also that when the NRC wrote to UCLA about the new security regulations, it was Dr. Catton who responded.92/ When the proposed plan was amended, as in the case of the previous plans, it was often in Dr. Catton's name that the amendments were transmitted.93/ There was no response whatsoever to the Board's Order from Dr. Catton, Director of the Nuclear Energy Lab for the last decade, the top man in charge at NEL.

Neill Ostrander, Reactor Manager

Mr. Ostrander has been employed at the UCLA reactor facility since 1974, according to the statement of qualifications enclosed in the University's January 25, 1984, letter proposing him as an expert witness on the security of the UCLA reactor. He asserts in the statement of qualifications that, "In connection with my responsibilities as Manager of the NEL I review the physical security plan and approve the changes made in the plan and its implementation." He thus obviously was aware of the contents of the plan written in 1974 in response to the new sabotage regulation 73.40, and the continued sabotage protection provisions throughout the decade. By his own admission he reviewed and approved both plans and thus knew of their contents. He was present

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92/ See letter, Catton to Reid, August 29, 1979

93/ See letters of 20 February 1981, 1 June 1981, and 21 April 1981 to the NRC from Dr. Catton, transmitting amendments to the physical security plan.

at prehearing conferences where these matters were discussed. He was present at the August 1979 Glen Ellyn conference in which those present were reminded that they had always been required to protect against sabotage, and always had to met 73.40. He is listed as one of the key persons contacted at NEL during most of the security inspections; his administrative duties are such as to make it likely he received the inspection reports and was required to review them and help draft responses thereto. His name appears on much of the correspondence between UCLA and Staff on security matters during the last decade. (Ostrander's declaration submitted with Mr. Cormier's May 1, 1984 response will be discussed below.)

Charles Ashbaugh, Reactor Security Officer

Mr. Ashbaugh has been the Security Officer at the reactor since 1974, and associated with the facility actively for a number of years previous. His responsibilities include: "drafting and coordination of the security plan and its amendments, interfacing with the proper authorities on security matters, responsibility for checking the functions of all the security devices, and coordinating the control of personnel access to NEL." He is thus obviously aware of the contents of the security plan(s) and inspection reports and has been for ten years. Mr. Ashbaugh drafted the proposed plan with reliance on the Sample Plan and the draft Reg Guide. By his own admission he included new response procedures directed toward radiological sabotage. Indeed in August 1979, according to Mr. Ashbaugh, an NRC inspector, inquiring about UCLA's progress in complying with

the "Upgrade Rule", told him that taking a certain security measure would improve the sabotage protection at the facility. The suggested measure was actually implemented in November 1980. Thus, it is apparent that Mr. Ashbaugh knew of the sabotage protections in the plan and thus it was important to get his direct comment on the question of what he told Mr. Cormier, and what he knew of Mr. Cormier's representations.

Tony Zane, Reactor Supervisor

Mr. Zane has been at the facility for much longer than a decade. The University's January 25, 1984, letter identifies him as one of the NEL Staff authorized to have access to protected security information, and the inspection reports indicate he was present at several of the sabotage inspections; thus he can be expected to be familiar with the security plan(s) in existence during much of the time he has been at the facility.

OTHER UCLA STAFF

Dr. Walter Wegst, Director of the Office of Research and Occupational Safety

The University also indicates that Dr. Wegst is authorized to have access to protected security information and is put forward as an expert on security at the reactor. Inspection reports, and responses thereto, go through his office. The proposed security plan in question was transmitted to NRC by him on March 10, 1980. His statement of professional qualifications asserts he is "quite familiar... with various aspects of the security of the facility." And it says

further that he is "actively involved with planning for security for the reactor during the Olympic Games."

James Hobson, Administrative Vice Chancellor

Mr. Cormier's immediate superior on the UCLA campus. Mr. Cormier is an assistant to Mr. Hobson, who has supervisorial responsibilities for Mr. Cormier's work. Mr. Hobson's name also appears on some of the security correspondence over the last decade.

John Barber, Assistant Vice Chancellor, Community Safety

Barber was Chief of Campus Community Safety at the time the proposed security plan was sent to NRC and, according to the letter of transmittal of the plan by Dr. Wegst, he received a copy of the plan at that time. He is in charge of campus security, among other matters, and is quoted in the UCLA Daily Bruin of February 3, 1984, as one of the key figures in security planning for the reactor for the Olympics and as aware of the response plans in case of threatened sabotage.

Patrick Connolly, Director, UCLA Police Services

Identified by UCLA as authorized to have access to the reactor security information, and must be cognizant of the security plan, and likely the security inspection reports.

What Does Mr. Cormier Say About Who Was Aware of His Representations?

We have seen above that a number of NEL and other University Staff had access to the security plans and inspection reports, had participated in the drafting and review of the plans and been present for the inspections. However, none answers the Board's questions of the extent to which they were aware of Counsel's contrary representations on the sabotage matter, and whether they approved or tried to correct said representations. What does Mr. Cormier say on the matter?

Mr. Cormier states that certain statements in his pleadings of August 25 and December 13, 1983 were not reviewed prior to their submission by Messrs. Reidhaar or Woods, Ms. Helwick, or any other "representative" of the Regents.[94/] That assertion, so narrowly circumscribed, leaves unanswered three matters central to the Board's Order: (1) Were the Regents, other attorneys for the Regents, or other UCLA employees aware of the representations made in the August 25 and December 13, 1983, pleadings after they were filed?, (2) Were the Regents, other attorneys for the Regents, or other UCLA employees aware of the repeated representations made over the last 3½ years on the sabotage matter, in addition to the August and December 1983 pleadings?, and (3) If no one was aware of the representations, from whom did Mr. Cormier (and Ms. Helwick and Mr. Woods) obtain the factual information about which they made representations to the Board? If the answer to either of the first two questions is affirmative, it remains unanswered whether they approved of the representations--and are thus associated with the asserted material false statements--

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94/ Affidavit of William H. Cormier of 3/9/84, paragraph 2

or whether they attempted unsuccessfully to make changes in the representations, in which case Counsel for UCIA may have knowingly made statements he was warned were false. It is an important question, which the Board directed be answered; it is unfortunate that the University failed to comply with the Order. The failure of most of the individuals with access to the plan and reports to comply with the Order and respond is regrettable, as is that of the Regents, and Mr. Woods and Ms. Helwick (who were certainly aware of many of the representations on the matter over the years, having been present at the prehearing conferences where they were made, and receiving service of the pleadings in which they were made, and on occasion submitting the pleading themselves.) Mr. Cormier's answer on the subject appears evasive-- he merely says no one reviewed two of the many statements in question prior to their submission. Furthermore, he says nothing one way or the other as to whether anyone ever approached him and tried to make changes in his representations on the matter.

The Board's directive that the Regents, their attorneys, and others within the University organization respond as to their knowledge of and response to the long-standing representation was not complied with. The Board noted this failure-- in particular, that all that had been addressed was whether anyone reviewed Mr. Cormier's pleadings before he filed them-- and once again directed that the awareness of the representations, and approval or disagreement with them, be addressed. We shall next see if the University adequately responded thereto.

THE MAY 1 RESPONSE

The Ostrander Statements

Mr. Ostrander attests that (1) Mr. Cormier did provide him copies of the August 25 and December 13, 1983, UCLA pleadings, (2) but he did not recall reading those documents prior to the time the Board raised the question of possible misrepresentation in its February 24 Order, and (3) he did not ask any other member of his staff to review those documents.

What remains unanswered, from the narrowly circumscribed Ostrander response, is (1) whether other UC personnel besides Mr. Ostrander obtained copies of the pleadings, (2) whether Mr. Ostrander or other UC personnel reviewed other documents (such as CBG's Curtailment Motions I and II, and its December 13, 1983 pleading, which prominently quote the August 25 statement in question, (3) whether Mr. Ostrander or other UC personnel were aware of the representations made in the August 25 or December 13 UC pleadings, whether by reviewing the documents or by some other means such as verbal communication or news reports, and (4) whether Mr. Ostrander or other UC personnel were aware of the repeated representations on sabotage matters made over the last three and a half years, besides the statements in the August 25 and December 13, 1983 pleadings.

It is noted that Mr. Ostrander and other UC personnel in question were present at times at the prehearing conferences where these matters were discussed, that Staff's motion for summary disposition and the various UCLA statements of support occurred over

a period of years, and that it is difficult to believe that a primary, long-standing representation so much at the heart of the litigation and the public controversy could go on for 3½ years without any UC personnel besides Mr. Cormier being aware of the representations.

It is further noted that the representations that the reactor security plan was not designed to provide protection against sabotage, and that UCLA claimed it was not required to, was widely publicized in the press.[95/] It is difficult to believe that matters the public could read about in the newspaper were unknown to those intimately involved with the reactor's security.

Furthermore, it is noted that numerous UC personnel with access to the plan and inspection reports are not located at NEL-- for example, Vice Chancellor Barber and Dr. Wegst. Security correspondence generally goes through Dr. Wegst's office. Was he unaware of 3½ years of representations on the subject?

And, finally, if no one with access to the facts about UCLA security was aware of the representations being made on their behalf, on what factual basis were those representations made? Counsel spoke for UC staff-- did it do so without speaking to UC staff?

Unfortunately, these matters are not answered, because the Ostrander response is so narrowly drawn.

Mr. Cormier's Response

Mr. Cormier's response is equally narrow. He claims-- although there is no confirmation of this provided by the individuals involved-- that Mr. Cormier's August 25, 1983, pleading was not

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95/ See, for example, the UPI wire item of 4 January 1984, attached

reviewed by any of the attorneys in the Office of the General Counsel nor by any other "representatives"-- a term not defined-- of the Regents. He does not however include in that denial his December 13 pleading. Furthermore, he does not indicate-- nor do the key individuals likely to be involved-- whether any UC personnel were aware of the representations contained in either pleading. In particular, he omits mention of whether any UC personnel became aware of the August 25 statements via CBG's Curtailment Motions I and II or December 13 pleading, or the press reports on the matter. And there is no indication whether any UC personnel were aware of the other related representations on sabotage matters that had occurred consistently over 3½ years. Did Mr. Cormier discuss CBG's Motions for Curtailment with any UC personnel-- motions based largely on the August statements? Finally, it is inadequate to rely upon the statement of the individual accused of material false statements on these matters; one should have, as the Board directed, responses from the others involved. In particular, it is most disturbing that while Mr. Cormier repeatedly makes assertions about what Mr. Ashbaugh and he did or did not discuss, in two affidavits we have not a single word from the reactor's security officer, the person who wrote the security plans, as to what he was aware of regarding these representations and what he told Mr. Cormier. Thisraises significant unresolved questions.

Summary Regarding Omissions

Despite two Board Orders, we still do not know what UC

personnel were aware of what representations made throughout this proceeding, whether they approved of the representations or attempted to make changes therein. We know that a good many UC personnel had access to information which calls into serious question the representations made on their behalf. But we still have not been fully told whether Mr. Cormier made representations about facts he did not possess or despite facts he did possess, or in some other fashion. We still have not been provided answers, despite the clear language of the two Board Orders.

THE AFFIRMATIVE DEFENSE

Mr. Cormier's Assertion that He was Unaware of the Contents of the Plan and Inspection Reports When He Made His Representations

Mr. Cormier asserts that he had only skimmed the security plan at the time he made representations about its contents, and likewise had not studied the security inspection reports when he made his representations about the Staff practice with regards sabotage practice at UCLA. It is difficult to believe that for 3½ years Mr. Cormier had been defending a plan he had barely looked at. But more importantly, if true, Mr. Cormier's representations about the plan's contents would indeed be materially false, because he made representations to the Board about the contents of a document with which he was unfamiliar. If he knew the co ntents of the plan, then his statement was false when he described those contents; if he was unaware of the contents, he had no business making representations about them. The statements in question could have no purpose

but to have the Board rely upon them as accurate characterization of the document in question; ignorance of the document's contents is no defense for mischaracterizing your own knowledge and the document itself.

The Assertion that the Plan was "Basically" Designed to Comply with 10 CFR 73.67 and Relied Largely Upon the Draft Reg Guide

Mr. Cormier asserts that the security plan was "basically' designed to protect against theft and to comply with 10 CFR 73.67. This would appear to not fully accurately state the case.

Mr. Ashbaugh indicates in his March 9, 1984 declaration in paragraph 5 that the facility is protected against theft and "deliberate attempts to damage the reactor, its equipment, or other parts of the facility." He goes on to say that the "basic means of providing such protection is to control access to the facility and to have a means of detecting unauthorized access should it occur."[96] He admits that the plan was designed to provide "protection against an intruder whatever his purpose may be." Id. He merely says that while the plan is designed to protect against theft and sabotage, it was not designed with "any specific design basis raiological sabotage threat in mind" nor with "armed guard presence at the facility at all times" nor"mandatory personnel searches and explosives detection devices."[97]

Mr. Cormier asserts that the plan was based on the Draft Reg Guide for 10 CFR 73.67-- but Mr. Ashbaugh says he used both the 73.67 Draft Reg Guide and the Sample Plan, which says in its introductory

[96] emphasis added

[97] all emphases added

statement of purpose that it creates compliance with 73.67 and 73.40, theft and sabotage protection. The cover letter to the Sample Plan, included by the NRC Staff, but not by UCLA, tells licensees that they must meet 73.67 in addition to the existing 73.40 sabotage protection requirements.[98] The pre-1980 plan is now admitted to have been designed to comply with 73.40 sabotage requirements, and the post-1980 plan maintained those provisions and added additional sabotage provisions.[99]

Mr. Cormier claims that a review of the table of contents of the plan indicates that it follows closely that of the Draft Reg Guide for 73.67, but careful examination indicates substantial differences. Those differences are that Mr. Ashbaugh has added to the 73.67 table of contents "identification of essential equipment" and"surveillance of vital areas", matters related exclusively to sabotage protection. In fact, if one compares the table of contents of the Sample Plan (for theft and sabotage protection) with that of the UCLA plan, one finds that the UCLA plan follows more closely the Sample (sabotage) Plan than the Draft Reg Guide. The table of contents items are almost identical between the UCLA plan and the Sample Plan, but differs somewhat from the Draft Reg Guide table of contents-- where the two differ, it is in the addition of sabotage contents to the UCLA plan.

98/ Pagano letter of August 9, 1979

99/ See footnotes 4 and 5 on page 2 above

The Assertion That When the Staff Approved the 1980 Plan in 1983 With Sabotage Provisions, One Could Argue Only the Theft Provisions Required Compliance

Mr. Cormier argues that by approving in November 1983 the UCLA plan, with its sabotage references, Staff really intended to only approve the theft portions and UCLA was not bound to obey the sabotage portions. First of all, that is not correct-- 10 CFR 73.40 requires licensees to obey their security plans. But secondly, it misses the point of the accusation of misrepresentation on this matter.

UCLA told the Board that sabotage protection had never been required, and as proof of this asserted that its plan had no sabotage provisions and yet had been approved by the Staff. If it did have sabotage provisions-- as is now evident-- then its approval by Staff demonstrates the opposite of what UCLA claimed, Staff practice of approving plans with-- not without-- sabotage protection. More importantly, the dates are wrong.

The Security Plan Approved by the Staff at the Time of the Cormier Representations was the Prior Plan, the One All Admit was Designed to Provide Sabotage Protection

The most explicit UCLA statement about its plan was made in August 1983. It said that the plan was not designed to provide protection against sabotage, and yet had been approved by the NRC Staff. Yet the plan written after 1979, and submitted with the 1980 application, was not approved by Staff until November 1983, three months after the Cormier representations. The plan in effect, i.e., the only one approved, at the time of all the representations

in question over the years was the pre-1979 plan, one now admitted was designed for sabotage protection, to comply with 73.40, and which was required to be so written, and was evaluated by Staff therefor.[100/] Thus the statement in question was apparently doubly false-- UCLA's security plan at the time of all the representations and the only one approved by the NRC Staff, was a plan that was designed, evaluated, and required to provide sabotage protection under 73.40. The proposed plan-- not yet approved by Staff-- was also written to comply with 73.40 (at the direction of the Pagano letter mandating it, using the Sample Plan detailing it, based on the Upgrade Meeting direction Ostrander heard). So when Staff finally did approve the second plan-- after the representations about their approval-- they approved a plan whose author says was designed to protect against sabotage and theft, and that says so itself in its statement of purpose and performance objectives, as well as its provisions. The key, of course, is to compare the pre-1980 plan, agreed to be required to protect against sabotage, with the post-1980 plan, asserted by some to not have sabotage protections, and see if anything of significance has been removed. Staff admits, in fact, that sabotage provisions were retained from the previous plan[101/] and Mr. Ashbaugh says additional sabotage measures were added.[102/] The plans Staff approved both had sabotage provisions; both say their purpose includes sabotage protection; and Staff approval demonstrates, if anything, the converse of the proposition asserted by UCLA's counsel.

100/ See Skovholt letter of 11/30/73; Carlson affidavit, 1/10/84, para. 9; Inspection Report No IE-V-264; etc.

101/ See Staff pleading of May 1, 1984

102/ See Ashbaugh affidavit of May 1, 1984, paragraphs 5 and 15

The Assertion That Cormier Meant Something Different than the Board Did When He Said the UCLA Security Plan "Is Not Designed to Provide Protection Against Sabotage"

This argument runs through both pleadings in various forms. UCLA asserts at various times that the Cormier statement that the plan "is not designed to provide protection against sabotage" is meant in the sense that (a) the plan is not designed to be able to protect against all conceivable acts of sabotage; (b) the plan does not require full time armed guards or mandatory personnel entrance searchers; (c) the plan is not designed with a specific design basis threat in mind; (d) there are no measures wholly separate from theft protection measures; (e) in the sense that detection is different thatn protection; (f) in the sense that UCLA doesn't have the specific measures required of power reactors; (g) in the sense that it wasn't UCLA's intent to protect against sabotage; (h) in the sense that it is a general statement and doesn't imply anything in particular about specific components of the plan; (i) in the sense that "radiological sabotage" is meant to include the Part 73 definition plus non-radiological sabotage protection; and so on.

Applicant has advanced at one time or another in defense of its original statement each of the above explanations. The problem is that UCLA did not say any of the above, none of the above would have made any sense in the context of the rest of the pleading (which argued that the Board erred in holding that 73.40 required some measures to protect against sabotage, measures to be debated by the parties).

The Applicant stated very clearly that the plan is

(a) not designed (despite the explicit statement in its design objective that it is), (b) to provide (i.e., have provisions), (c) protection (the exact language of the plan, inspection reports, Sample Plan, 1974 Interim Guide, Pagano and Skovholt letters, Lear letter to Catton, and on and on), (d) against sabotage (precisely what is said to be its purpose in the plan, defined by Ashbaugh as including "any sabotage which could lead to radioactive contamination or radiological release that could pose a danger to students, staff or members of the public"). All of the University's competing explanations of what was meant by the statement are directly at odds with what it actually said.

The Board had ruled that some measures to protect against sabotage were necessary under 73.40. UCLA argued that this ruling was error, asserting instead that sabotage protection had never been required (wrong), this was the consistent Staff practice (wrong), UCLA's plan didn't have any sabotage measures (wrong), and yet had been approved by the Staff (wrong). Particularly in the context of the previous paragraph in the August 1983 pleading, the statement can only be taken to mean what it so clearly says-- and the plan clearly says the opposite, in precisely the same words. Mr. Cormier claims the reactor is not designed to provide protection against sabotage-- the plan says its design objectives are to protect against radiological sabotage, precisely what the parties had been debating and precisely what the Board had ruled was necessary.

(It should be noted in passing that CBG's contention makes no mention of armed guards, continuous presence at the facility, or the like, and the sabotage precautions listed include the full gamut of access controls, keys and locks, supervision and the like that

Mr. Ashbaugh, in his March 9, 1984 declaration says in paragraph 5 are the "basic means" of providing protection against deliberate attempts to damage the reactor, its equipment, etc.)

The tortured linguistic explanations are not convincing, and always amount to adding a modifier to the sentence (e.g., "of the kind required at power reactors," "like entrance searches and armed guards," "in the sense of preventing all conceivable acts of sabotage") that were not included in the representations made and would have undermined the argument being made-- against the Board's ruling that some measures must be in place, which measures to be resolved later.

The same Orwellian linguistic argument was advanced regarding the true meaning of the phrase "low-power research reactors have never been required to adopt security plans designed to protect against sabotage." Applicant now says "never" means "since 1979." However, Applicant didn't say "since 1979," and, in fact, the admission that sabotage protection was required before 1979 and the assertion that something changed in 1979 have only been advanced since the misconduct charges were leveled, six months after the statements in question. Furthermore, the assertion that "since 1979" was somehow indicated by the previous paragraph's reference to 73.67 is problematic, because the same paragraph refers to 73.40, in existence since 1973, not 1979, and UCLA was objecting to the Board's ruling that 73.40 applied.

The Assertion that Mr. Cormier's Arguments were Legal Arguments, Not Factual Arguments

Mr. Cormier, in his May 1 response, argues that the

August 1983 statements found to be materially false were legal, not factual assertions (and therefore, he appears to argue, could not be materially false). However, the statements are all factual arguments in support of a legal position. If the facts are wrong, then the legal position resting on said facts no longer has support. The Board has already ruled that the facts asserted to be facts were clearly material-- its legal decision could have been affected by the asserted facts.

Let us recall for a moment what the four assertions were: (1) that the low-power research reactors were never required to adopt security plans to protect against sabotage (now admitted to be factually incorrect); (2) that consistent Staff practice was to not require sabotage protection (also admitted now to be incorrect); (3) that UCLA's plan was not designed to provide protection against sabotage (denied by its author, its stated design objectives, and the Pagano letter and Sample Plan according to which it was written); and (4) that Staff had approved the plan without sabotage protection (clearly false-- Staff now merely argues it ignored the sabotage provisions in approving the plan, months after the assertion was made, and that the approved plan at the time had been evaluated for required sabotage protections).

THESE ARE NOT MERELY LEGAL ARGUMENTS: THEY ARE FACTUAL REPRESENTATIONS IN SUPPORT OF AN ERRONEOUS LEGAL ARGUMENT. Mr. Cormier contradicts his own assertions about these not being factual statements in paragraph 3 of his May 1 affidavit when he says his statements were "as much legal as factual."

The Assertion that Mr. Cormier Was Relying upon Staff

Mr. Cormier argues that his statements should not be viewed as materially false beacuse he has throughout this proceeding relied "on what I understood to be the NRC Staff legal interpretation of the applicable Part 73 requirements." May affidavit, paragraph 3. Yet Mr. Cormier seems to miscomprehend the nature of one party submitting argument in support of another party. The fact that one party has taken a position in the interests of the other party does not entitle the second party to assert facts it either knows to be false or does not know to be true. A representation in support of someone else's argument is an independent assertion of its correctness. If one has no basis for making that assertion, or bas ' for knowing it not to be true, it is impropoer to make such assertions, no matter what position might be taken by others.

Mr. Cormier was telling the Board to agree with Staff's position, and cited four asserted facts in support thereof. Those facts appear to have been materially false. The fact that they were offerred in support of someone else's motion-- a motion in one's own interest-- does not justify the making of statements not known to be true or known to be other than true.

The Assertion that Mr. Cormier was Not Referring to Specific Provisions of the Plan, but to a Design Objective

In his March response, Mr. Cormier asserted that the plan had no specificsabotage provisions, only a design objective to protect against sabotage. In his May response, he reverses this, saying his August statement was a general one of design objective, not a specific one of actual provisions. Besides the obvious contradiction, neither was what

was actually said. Additionally, if his assertion were indeed about the design objective of the plan, then the assertion was materially false, because the plan itself says its design objective is "for the protection of the reactor, protection of the staff and the general public against radiological sabotage...."

The Argument that Cormier Based his Representations of the Plan Not on the Plan, but on Reg Guide 5.59 and his Tours of the Facility

Mr. Cormier's August representation was clearly about the plan. To assert now that he was not familiar with the Plan at the time he made his assertions, and that the fact that he was wrong about the plan's contents should be excused somehow by his asserted lack of reliance on its contents for his representations about its contents is problematic. The Board clearly took the statements-- as they can only be taken-- as a representation of the plan's contents from one who knew the plan's contents. That his representation was based on ignorance of the plan itself is not a defense but a further criticism, because the implicit fact in the statements involved is that the speaker knew them to be a fact. That, Mr. Cormier asserts, is not correct.

Additionally, it is difficult to understand how Mr. Cormier "knew" the UCLA security plan followed Reg Guide 5.59 very closely if he was unfamiliar with the plan. It turns out from the author of the plan that it follows both 5.59 and the Sample Plan very closely-- as it must, because both sets of guidance were sent out simultaneously to licensees, with instructions to use both (see Pagano letter of transmittal) so as to comply with both 73.67 and 73.40. How Mr. Cormier could have "known" that the plan followed 5.59 very closely, without knowing the plan, and how he could not know it also followed the Sample Plan closely

(for sabotage and theft protection, compliance with 73.67 and 73.40) is not explained.

The Assertion that "radiological sabotage" Means Armed Guards and Entry Searches

Mr. Cormier asserts in paragraph 35 of his May 1 response, that "Nowhere is the expression 'protection against radiological sabotage' defined." However, 10 CFR 73.2(p) provides the legal definition:

> "Radiological sabotage" means any deliberate act directed against a plant or transport in which an activity licensed pursuant to the regulations in this chapter is conducted, or against a component of such a plant or transport which could directly or indirectly endanger the public health and safety by exposure to radiation.

This is almost identical to Mr. Ashbaugh's definition of the term as he used it in the security plan, except that his use is more general, including the above definition plus non-radiological forms of sabotage. Ashbaugh declaration of 3/9/84, para.1. The words "radiological sabotage" are defined in the appropriate regulation, the phrase is used in the plan in a fashion which includes the Part 73 definition, and surely in an NRC proceeding if one uses the phrase in a legal pleading one must presume it will be understood according to the definition in the regulation.

Furthermore, nowhere in CBG's contention can it be found that sabotage protection is equated with armed guards and entry searches. CBG lists a dozen or so security measures it contends are inadequate at the facility for sabotage protection. The Board

explicitly ruled that it would not decide which measures were or were not necessary at this stage; it merely resolved the threshold issue that some as yet unidentified measures were required. Mr. Cormier repeats that conclusion of the Board in the preceding paragraph of his August 1983 pleading, argues it is in error, and asserts once again no protection is required whatsoever.

Mr. Cormier bases this argument on the assertion that sabotage means access controls, and access controls means armed guards and entry searches. However, his own security officer, Ashbaugh, in paragraph 5 of his March 9, 1984, declaration, says that the reactor is protected against deliberate attempts at destruction, and that "the basic means of providing such protection is to control access to the facility and to have a means of detecting unauthorized access should it occur." Thus, the person on which he must rely for information about the plan-- because he wrote it-- says the plan is designed to protect against sabotage, does so by access controls, but does not do so with continuous armed guard presence nor mandatory personnel searches (id.). The affidavit of the author of the security plan would appear to indicate that equating sabotage protection with access controls is partly correct, but to equate it with searches and guards is not.

The basic problem is that Mr. Cormier's argument asserts essentially that it is appropriate to make representations about a security plan without really having seen it-- if that assertion is correct. Nowhere do we hear from anybody else, besides the individual most directly accused of misconduct, as to whether they told Cormier

that the plan did or did not protect against sabotage. This omission colors the entire defense. If there is a hearing, it must be remedied.

Mr. Cormier's Assertion That There was "No Institutional Advantage to be Gained" in Making the Allegedly False Statement

The Board has already ruled that "by making a material false statement, Mr. Cormier has put his client, the other parties, and this Board to needless effort and controversy." (Order of April 13, 1984, at 28). By insisting on resolving a "threshold" issue which was not a threshold issue, based on assertions which were false, a hearing that could have commenced years before now may not even be able to be concluded in time to redress identified weaknesses prior to the Olympics, a period of vastly escalated sabotage risk. Had the Board been told that the current plan, approved by Staff, contained sabotage provisions, as did the proposed plan; and that UCLA had been informed by Skovholt in 1973 and by Pagano in 1979 that it must have plans to protect against sabotage under 73.40; and that Ostrander had been reminded of this at the August 1979 Upgrade Meeting, we could have gone to hearing years ago and long ago resolved the matter. That resolution might not have been favorable to Applicant, whereas the delay occasioned by the material false statements has given the University three additional years of operation without a ruling that might have been against it. The delay ensured continued operation, without new license conditions; had the "threshold" issues not been asserted, or false bases for them put forward, hearing would have occurred long ago and continued operation, without new license conditions, could not be guaranteed.

There was clearly an institutional advantage in making material false statements, and clearly an injury to CBG-- three costly additional years of litigation-- and to the public-- three additional years of operation with a security plan that might be found, upon scrutiny, to have sabotage provisions, but insufficient ones.

Mr. Cormier Asserts HE Pointed Out the Proposed Expurgations

It was because Mr. Hirsch insisted that the Board be provided the unexpurgated version of the security plan and inspection reports that the Board saw the sabotage provisions.

The Arguments About Whether the Board Should Take the Action It Indicated

In its February 24, 1984, Memorandum and Order, the Board identified two appropriate actions under the regulations for material false statements: 2.713 action against counsel and 50.100 against the licensee. It directed counsel to indicate why 2.713 action should not be taken against them, and the Regents and others within the University to indicate the extent of their supervision and involvement in the representations made on their behalf, under penalty of license suspension, revocation or modification pursuant to 50.100.

Two of the four attorneys did not respond at all, despite their apparent involvement in and supervisorial or other responsibility for the representations made, and despite a second opportunity to respond. The response made by Mr. Cormier failed to address their involvement in the 3½ years of representations on the matter, and we have no independent verification that they did not, in fact, review even the August and December 1983 pleadings they were sent and charged

with supervising. No case has been made for action not being taken against them, despite two opportunities provided to do so.

Mr. Reidhaar's declaration states that he was not involved in the case, but had instead assigned that duty to Mr. Cormier and the supervision of Mr. Cormier to Mr. Woods and Ms. Helwick, Whereas the adequacy of Reidhaar's supervision of the latter may be called into some question, he asserts no involvement in any of the representations made over the last 3½ years, having left that to the three others, and no action against him seems appropriate.

As to Mr. Cormier, he has filed two responses. The Board found the first unconvincing, and determined that material false statements had been made and that he should be formally reprimanded. (4/13/84 Order at 29). The Board extended to Mr. Cormier additional opportunity to demonstrate why such action is not appropriate, and his arguments have been addressed in detail above. They essentially boil down to (a) he didn't know the contents of the plan about which he was making representations; (b) he really meant the term "provide protection against radiological sabotage" in one of approximately a dozen different ways, all of which differ from the Part 73 definition or the nearly identical way the author of the plan used it; (c) his assertions were not statements of fact but arguments of law; and (d) he followed the position of Staff.

We have indicated above that ignorance of the contents of the plan is difficult to believe, not independently corroborated despite Board Order to do so, and no excuse for amking assertions which were not known to be true. There were two components to the assertions

involved, the factual representations themselves and the representation that he knew the facts of which he spoke. To assert that the second aspect was not true is in some ways an admission of material false statements.

As to the second defense, that he meant the phrase "provide protection against radiological sabotage" in one of a number of different ways, that is not what he said. He omitted any qualifier. In fact, the argument being advanced in August, that the Board erred in finding that some as yet undetermined means for sabotage protection were required under 73.40, would have been nonsensical had the now-asserted qualifiers been added.

As to the assertion that the representations were assertions of law, not fact, that is not true on the face of it, and he elsewhere in his declaration (P 3) acknowledged that they were fact statements. He claimed that the plan was not designed to provide sabotage protection, when it was; that the Staff had approved UCLA's plan without sabotage provisions, when they didn't; that low-power research reactors had never been required to adopt security plans to protect against sabotage, when they had; and that the Staff had consistently not required sabotage protection, when that wasn't so.

The facts to the contrary were all in the licensee's possession, yet it failed to disclose them. The Board was not informed of the provisions of either security plan, of the Pagano or Skovholt letters requiring 73.40 sabotage protection at UCLA, of the 1974 and 1979 interim guidance and Sample Plan which included 73.40 sabotage protection and which UCLA used in producing its plans, of the conclusions now stated in the Ashbaugh affidavit that the UCLA facility is protected against

theft and deliberate attempts to damage the reactor and its essential equipment, of the inspection reports which routinely involved sabotage protection, of the Catton or Lear correspondences. Security Officer Ashbaugh, NEL Manager Ostrander, NEL Supervisor Zane, NEL Director Catton, among others, had been at the facility for a decade and had long-term access to, and involvement with (via drafting, reviewing, approving, transmitting) the plan and related documents. Yet none of these facts were brought to the Board's attention.

The question of who knew of the representations made over 3½ years remains almost entirely unanswered. But there are only three alternatives: (1) Those in a position to know the true security situation and requirements at the facility so informed Cormier, and he made his assertions to the contrary anyway; (2) Those who were in a position to know the true situation knew of his representations but failed to tell him the facts , in which case they withheld material facts from the Board; or (3) Mr. Cormier's representations were not based on requesting the facts from those who knew them, and those who knew were not aware of his representations, and thus his assertions of facts were baseless. It would appear that any of the above explanations lead to the conclusion of material falsehoods: either through the assertion by Cormier of facts he did not possess, or misrepresentation of facts he did possess, or misrepresentation or material omissions by others who did possess the facts.

The same is true regarding the supervision for Mr. Cormier. Material facts in the possession of the University, who Mr. Cormier

purportedly represented and spoke for before the Board, were for many years not provided the Board. Representations were made, for many years, which were not true. The license holder is responsible for the truthfulness-- and lack of material omissions-- in the information provided on its behalf to Licensing Boards. The Regents failed-- for three and a half years-- to fulfill that obligation under section 186 of the Atomic Energy Act. Scienter is not required for the statement to be materially false, and omissions of material facts is likewise a "material falsehood" subject to the Section 186 (and 10 CFR 50.100) standard of license revocation for material false statements. See Virginia Electric & Power Co (North Anna Power Station, Units 1 & 2) ALAB-234, 3 NRC 347 (1976) and CLI-76-22, 4 NRC 480 (1976). One should note a distinction between the situation at hand and the VEPCO cases-- there no injury resulted, because the VEPCO case was an initial licensing and thus occurred prior to operation and thus any public risk. In the UCLA case, it is not an initial licensing, and thus the delay occasioned by the material false statements over many years, and the insistence of resolving so-called "threshold" issues despite information in Applicant's possession contrary to the position it had taken, created three additional years of risk and operation with the adequacy of the security plan unresolved. More particularly, it has led to a situation where additional protective measures, if found necessary for the extraordinary risks associated with the upcoming Olympics, may be impossible to put in place in time, given the risks of release of long-lived isotopes unaffected by shutdown in the event of sabotage involving incendiaries or arson. Tremendous injury has resulted to CBG's interests, as well as its resources, and

significant damage done to the integrity of the proceeding. Much of the record established to date on Contention II and safety-- based as it is significantly on testimony by Ostrander, Wegst, and Ashbaugh, and representations made by UCLA counsel-- is now tainted and called into question, as is any future record resting to any significant degree on testimony of those three or others potentially involved in this matter or on representations made in the future by Messrs. Cormier or Woods or Ms. Helwick. To ensure that the integrity of the record was maintained, the Board demanded full disclosure by these and other individuals. It received none. The Board gave the University another chance to comply, and still it received the most partial of responses. The Board still has not been told who knew of the long-standing representations, who approved and who tried to make changes. None but the accused Mr. Cormier has done more than graze the surface of answering that directed question, and it affects the integrity of the entire proceeding.

What Should Be Done?

The Board told UCLA what the regulations mandate if adequate explanations were not forthcoming: 2.713 actions against counsel, 50.100 license suspension, revocation, or modification for material false statements or omissions by the institution. Two of the four attorneys named, Helwick and Woods, made no defense; the; the 2.713 actions identified by the Board are thus appropriate. One of the four attorneys, Mr. Reidhaar, swears that he was not personally involved; no basis for action exists, although the adequacy of his supervision can be questioned. Mr. Cormier the Board has already found to have made

material false statements; nothing in his second response provides adequate basis for reversal-- to the contrary. The only adequate action, in light of the Board's three prior findings of failure of candor and failure to obey Board orders in 1980-81, and accompanying threat of action, is suspension from the proceeding. The integrity of any future record, and the effectiveness of the incentive to the institution that permitted these material misrepresentations to be made on its behalf, as well as the severity of the injury and materiality of the falsehoods suggest no less for the counsel involved.

IT MUST BE NOTED THAT HAD THE MATERIAL FALSEHOODS SUCCEEDED, THE BOARD WOULD HAVE DISMISSED THE SABOTAGE CONTENTION AND THUS FAILED IN ITS ASSIGNED DUTY OF RESOLVING SERIOUS PUBLIC HEALTH AND SAFETY ISSUES LEGALLY COGNIZABLE. IF THE FALSE STATEMENTS HAD FULLY SUCCEEDED, MAJOR SABOTAGE DEFICIENCIES AT A REACTOR IN A HIGHLY POPULATED AREA WITH NO CONTAINMENT STRUCTURE OR BUFFER ZONE COULD RESULT IN PREVENTABLE RADIOLOGICAL SABOTAGE. THE FALSE STATEMENTS PARTIALLY SUCCEEDED-- YEARS OF ADDITIONAL PUBLIC RISK RESULTED, WHICH ONLY LUCK PREVENTED FROM LEADING TO A RADIOLOGICAL INCIDENT. AND THE DELAY RESULTING MAY STILL RESULT IN AN UNTOWARD INCIDENT, PERHAPS DURING THE OLYMPICS, THAT COULD HAVE BEEN PREVENTED BY TIMELY ASSESSMENT OF THE EFFECTIVENESS OF UCLA'S SABOTAGE PROTECTIONS, RATHER THAN SO MUCH TIME WASTED UNNECESSARILY DEBATING THE EXISTENCE OF SUCH PROTECTIONS AND REQUIREMENTS.

As to the licensee itself, it was its long-standing failure to appropriately supervise its representatives that contributed to these material false statements. Information and documents in the possession

of the Applicant, material to matters before the Board and which delayed it performing its required hearing duties on the real issues before it, were withheld from the Board and parties. Had the information in Applicant's possession been provided-- the Pagano letter, the Sample Plan, the Catton, Lear, and Skovholt letters, the 1974 Interim Guidance, to name just a few, then the applicability of 10 CFR 73.40 sabotage provisions would have been rapidly resolved. Had the Board & parties been provided the above documents, had the knowledge in the possession of UCLA security personnel been brought forward, had the existence of sabotage protection in UCLA's then-current and then-proposed plans been revealed, the Board would have had a very different record upon which to base its determinations. The Regents had an obligation to ensure that maerial facts were brought before the Board. It had such an obligation even had no one asked the University for such information.

However, CBG did ask for it. On July 20, 1982, CBG submitted a request for production of documents regarding the limited issue of applicable security regulations on which the Board had opened discovery and directed UCLA to respond. Item 7 was as follows:

> All documents referring or relating to NRC requirements for procedures, structures and other measures designed to minimize the potential for radiological sabotage at the reactor facility. If any of the documents requested in this Request No. 7 contain protected information please identify each such document and produce those portions which do not contain protected information.
>
> (emphasis added)

The UCLA response, signed by William Cormier and dated August 9,

1982, was as follows:

> University objects to the request on the grounds that the only document responsive to the request is the physical security plan for the facility, which consists of protected information and such information is not relevant to and is not reasonably calculated to lead to the discovery of evidence admissible on the question of the applicability of 10 CFR Part 73 safeguards regulations, which is the extent of the scope of discovery that has been permitted by the Board.
>
> (emphasis added)

We now know that that response by the University, made by Mr. Cormier who was required to check with the custodian of security records for the facility, was materially false. First of all, the University possessed numerous other documents, protected or not, relevant to the question of NRC requirements for sabotage protection (e.g., the Sample Plan, the Skovholt letter and Interim Guidance, the Catton, Lear, and related correspondence). Had the University identified and produced those documents, the current situation would not obtain in the proceeding. Secondly, the passages in the one document that was identified as responsive to the request, the security plan, was deemed not relevant, despite the clear relevance and the explicit request to produce the relevant portions which did not contain protected information. Had the University simply provided the Design Objective and Purpose passages, or not denied that they were relevant, the entire proceeding would have been different. How Mr. Cormier can now assert that he was unaware of the existence of any of the relevant documents and the sabotage passages of the plan at the time he made his August 1983 statements is difficult to understand inlight of his August 1982 assertions-- for which he was required to check with his security staff and custodian of records-- that no other document relevant to NRC sabotage requirements for the UCLA reactor existed, and that

those portions of the security plan responsive to the request were not relevant to the question of applicability of Part 73 sabotage safeguards for the facility in question. To make that assertion, he must, one would think, know the contents of the document he asserts is irrelevant to the issue. Its relevance-- and those of numerous other documents in UCLA's possession neither identified nor produced-- is no longer in question.

Conclusion

Three years ago this Board accused the Regents institutionally and these attorneys personally of lack of candor (Board Orders of 12/22/80, 3/10/81, 5/29/81). The Board directed that such behavior cease. Applicant continued todeny the existence of documents it knew existed and facts in its possession, and the Board a second time directed the behavior cease, threatening sanctions:

> This Board is charged with the responsibility of obtaining a complete record on which to base a decision. We will not allow this duty to be compromised, or the proceeding to be further delayed, by gamesmanship. Failure of the parties to fully cooperate in responding to discovery requests in the future may well result in the imposition of sanctions by the Board under 10 CFR 2.707.
>
> (Order of 3/10/81, emphasis added)

UCLA still did not comply, failing this time, as in the situation before us now, to respond as directed to. (In the present instance, none of the Regents, two of the attorneys, and essentially none of the key personnel answered the basic question posed by the Board. By narrowing what little response there was to the most circumscribed of answers, the Board still does not know who was aware of the representations made over the years, and whether they approved or

attempted to alter. If the proceeding continues, those questions cannot go unanswered; third chances at narrowly limited affidavits will no longer suffice.) The University's refusal to comply was called "unacceptable and blatantly insulting," and the Board cried "Enough is enough." The Board threatened sanctions under the same 2.713 provisions they now face. The attorneys asserted it was all a misunderstanding, and apologized. The Board finally ruled that no sanction was appropriate under the circumstances given the lack of experienced counsel for Applicant. (Order of August 24, 1981, at 3-4).

Certainly, three years later, lack of experience can be no excuse. The Board said then, "Enough is enough!" but it has not been. Lack of candor on material matters persists. The Board said three years ago that it "will not allow" its duty of obtaining a complete record "to be compromised, or the proceeding to be further delayed, by gamesmanship." Three years later, it appears clear the duty of obtaining a complete record has indeed been compromised, and the proceeding much delayed by continued gamesmanship.

There are only so many times presiding bodies can threaten sanctions and not enact them before the adjudicators lose the authority necessary to regulate the proceedings, ensure a full and complete record, and avoid delay. CBG submits this is such a turning point.

CBG opposes the Applicant's plea that it reverse its findings of material false statements. CBG urges the Board to adhere to its ruling, and to impose the sanctions it put the parties on notice of on February 24, and about which it gave Applicant one last chance on April 13-- 2.713 action against counsel, and 50.100 license

revocation or suspension for the Regents. Material false statements, as well as material omissions, have been made, gravely putting at risk the integrity of the proceeding, its evidentiary record, and its ability to timely resolve-- safely-- matters of significant public health and safety and common defense and security import. Continued license possession in the face of these material falsehoods and needless delays, and failure once again to impose sanctions it has itself identified can only result in the Board's duties to timely rule based on a truthful record to be compromised, as the Board presaged three years ago, by "gamesmanship."

Should the Board not take 2.713 action against Mr. Cormier and 50.100 action against the licensee, both of whom are responsible, in their own way, for these material false statements and years-long delays, CBG respectfully requests, as the party injured by the misrepresentations and delays, a hearing in which the questions unanswered by the two UCLA responses (and the failure to respond by so many of its representatives and staff) can thoroughly explored.

Respectfully submitted,

Daniel Hirsch

Daniel Hirsch
President
CBG

Executed at Ben Lomond, CA on this 9th day of May, 1984

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
(UCLA Research Reactor)	(Proposed Renewal of Facility License)

DECLARATION OF SERVICE

I hereby declare that copies of the attached: CBG RESPONSE TO APPLICANT'S REQUEST FOR REFERSAL OF THE BOARD'S APRIL 13 FINDING OF MATERIAL FALSE STATEMENTS

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 9, 1984.

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U.S. Nuclear Regulatory Commission

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