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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'95 SEP -5 A11:20

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)
)
GEORGIA INSTITUTE OF TECHNOLOGY) Docket No. 50-160-Ren
)
(Georgia Tech Research Reactor))
)
(Renewal of License No. R-97))

NRC STAFF'S RESPONSE TO LICENSING BOARD'S
MEMORANDUM AND ORDER OF AUGUST 1, 1995

INTRODUCTION

On August 1, 1995, the Atomic Safety and Licensing Board ("Licensing Board") issued a "Memorandum and Order (Consideration of Mootness of Contention 5)," in which it directed Georgia Institute of Technology ("Georgia Tech" or the "Licensee") and Georgians Against Nuclear Energy ("GANE"), and the NRC Staff (if it wishes), to confer and to file their positions on mootness and other matters.¹ The NRC Staff ("Staff") hereby files its response to the Licensing Board's Memorandum and Order.

BACKGROUND

In its Memorandum and Order (at 1-2), the Licensing Board reviewed several recent statements by the Licensee, concerning its intent to remove the high-enriched

¹ The Licensing Board directed the parties to file their responses by August 28, 1995; on August 23, 1995, the Licensing Board granted the Staff's unopposed request for a three-day extension of time, to permit its response to be filed by September 1, 1995.

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uranium (HEU) fuel from the Georgia Tech Research Reactor prior to the start of the 1996 Olympic Games, and to replace that fuel with low-enriched uranium (LEU) after the Olympic Games have concluded.² The Licensing Board further noted that on July 26, 1995, the Commission vacated the Licensing Board's prior admission of GANE's Contention 5, and remanded the contention for the Licensing Board to consider whether it was mooted by the Licensee's statements.

As summarized by the Licensing Board, the Commission directed it to consider the following questions: (1) Whether any HEU or LEU fuel or other materials of concern to GANE will be onsite during the Olympics; (2) whether removal of the HEU fuel renders moot GANE's concern that "bomb-grade" uranium constitutes a tempting target to terrorists requiring special security during the Olympic Games; and (3) whether, in light of Georgia Tech's proposed changes, GANE's Contention 5 "continues to satisfy the Commission's standards for admissibility of Contentions" set forth in 10 C.F.R.

² In particular, the Licensee most recently stated its intentions as follows:

This will confirm that Georgia Institute of Technology will remove the HEU fuel from its reactor before the start of the Olympics in July 1996 and will not bring LEU fuel to its facility until after the conclusion of the Olympics. The estimated date for removal of the HEU fuel is late January/early February 1996. In any event, there will [be] no nuclear fuel at the Georgia Tech site during the Olympics.

Letter from Patricia Guilday (Assistant Attorney General, State of Georgia) to Sherwin E. Turk (Office of the General Counsel, NRC), dated July 25, 1995.

§§ 2.714(b)(2) and (d)(2). *Id.* at 2, citing *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-10, 42 NRC ___ (July 26, 1995), slip op. at 3-4.³

In light of these developments, the Licensing Board directed the Licensee and GANE, and the Staff if it wishes, to state their positions on whether the Licensee's offers "do indeed make the contention moot" and, if not, to "delineate what issues remain concerning this Contention." *Id.* at 3. The Licensing Board further directed the parties to address the following matters (*Id.*):

In addition, GANE should specify what materials, if any, it seeks to have removed but which may not be included in the Applicant's offer. If the parties disagree on mootness, they should delineate whether any of the materials not proposed to be withdrawn are within NRC's jurisdiction to consider -- in particular whether Georgia Tech has authority

³ In CLI-95-10, the Commission framed Question 1 as follows -- although it recognized that some of these issues may indeed be answered by the Licensee's filings of July 12 and July 25, 1996:

1) Whether Georgia Tech's statement that it will remove the fuel from the reactor means that no fuel will be onsite during the Olympic Games. The NRC staff has suggested four pertinent questions: (a) What specific materials will be removed from the facility and what materials will remain onsite? (b) Will the high-enriched uranium (HEU) fuel be removed from the site, or only from the reactor, prior to the Olympics? (c) Does the licensee's statement that it "plans to remove the fuel" signify its intent to replace the current HEU fuel with low-enriched (LEU) fuel? (d) Will the replacement fuel for the reactor be brought onsite for storage, although not placed in the reactor, before the Olympics have concluded? Two other questions may also prove pertinent: (a) When will removal of the HEU fuel and any other materials take place? (b) What assurances exist that removal will be accomplished in a timely fashion?

Id., slip op. at 3, and 4 n.3.

over such materials. They also should specifically address the matters addressed by the Commission in its three questions of its Memorandum and Order that we have summarized above.

Finally, the Licensing Board directed that if GANE wishes to submit a revised contention, taking into account the new facts, it should do so by August 28, 1995. *Id.*

DISCUSSION

As more fully set forth below, the Staff submits that the Licensee's recent statements render moot GANE's Contention 5, and that no further issues remain to be litigated concerning this matter. Further, the Staff submits that the Licensing Board should dismiss Contention 5, subject to the Licensee's timely performance of the commitments set forth in its letter of July 5, 1995.

A. The Licensee's Statements Render Moot GANE's Contention 5.

As framed by GANE itself, Contention 5 challenged the adequacy of security systems at the Georgia Tech site during the Olympic Games, stating, in pertinent part, as follows:

The presence of the Olympics in Atlanta in 1996 creates a specific situation which has historically attracted terrorist activity and threats. The reactor uses highly enriched uranium as fuel. During refueling this bomb-grade uranium fuel is a tempting target for terrorists. The presence of fissionable and highly radioactive fission byproducts at the reactor, make the reactor not only a tempting target for theft of bomb-grade or hazardous materials, but a target for a World Trade Center-type bombing

While Contention 5 is somewhat vague (GANE included in the contention unexplained references to the presence of "fissionable and highly radioactive fission byproducts" and unspecified "hazardous materials" at the site), the clear thrust of its contention involved the presence of HEU fuel ("bomb-grade uranium") at the facility and the "tempting target" this allegedly presented for potential terrorists. Further, the Licensing Board's decision to admit the contention focused upon the risk associated with the presence of HEU at the site and operation of the facility during the Olympics -- citing UCLA's decision to shut down its reactor during the 1984 Olympic Games.⁴ Nowhere in the Licensing Board's decision to admit this contention was any reliance placed on the presence of other radioactive materials at the site.

In a recent telephone conversation held in accordance with the Licensing Board's instruction (Order at 2), GANE's representative indicated to Staff Counsel that GANE is concerned about the presence of certain radioactive byproduct materials at the site -- specifically, Cobalt-60. However, that material is licensed by the State of Georgia, an "Agreement State" to which the NRC has relinquished its regulatory authority over such materials pursuant to § 274 of the Atomic Energy Act, as amended (the "Act"), 42 U.S.C. § 2021. Accordingly, the Cobalt-60 located at the facility is not covered by the NRC license and is not an appropriate subject for consideration in this NRC license

⁴ *Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 290, 294, 295 (1995).

renewal proceeding.⁵ The only matters at issue in this license renewal proceeding are those which are within the scope of Georgia Tech's NRC license -- and only those matters may form an acceptable basis for a contention challenging the renewal of Georgia Tech's NRC license. The Licensee's decision to remove all fuel from the site prior to the Olympics (*i.e.*, all fuel in the core as well as any fresh or spent fuel now onsite) and to replace that fuel with LEU after the Olympics have concluded, will result in the removal of all radioactive materials covered by the NRC license which were previously stated in the contention to be of concern to GANE.⁶

In its Order (at 3), the Licensing Board also inquired as to whether "any of the materials not proposed to be withdrawn are within NRC's jurisdiction to consider -- in particular, whether Georgia Tech has authority over such materials." In this regard, the Staff notes that while Georgia Tech appears to have control over various byproduct materials licensed by the State of Georgia (such as the Cobalt-60 of concern to GANE), the presence of such materials at Georgia Tech is not now subject to NRC regulatory

⁵ GANE has not asserted that the presence of Cobalt-60 on-site jeopardizes the safe operation of the reactor. Moreover, even if such a claim had been made, the Licensee's decision to remove all fuel from the site (and, thereby, not to operate the reactor) during the Olympics eliminates any basis for such a claim.

⁶ Pursuant to the NRC license whose renewal is at issue in this proceeding, Georgia Tech is only authorized to possess (a) up to 13.5 kg of contained uranium-235, (b) a 50-curie antimony-beryllium sealed neutron source, and (c) such byproduct material as may be produced by operation of the reactor. See License R-97, at 2, attached to letter from Sherwin E. Turk to the Licensing Board, dated December 9, 1994. Accordingly, as a result of the Licensee's decision to remove all HEU fuel from the site, the only NRC-licensed radioactive materials which would remain onsite during the Olympics are the sealed neutron source and any residual radioactive waste products that may still be onsite following reactor shutdown.

authority, in accordance the agreement entered into by the NRC and the State of Georgia pursuant to § 274 of the Atomic Energy Act.

In sum, in response to the first two questions posed by the Commission, the Staff submits that (1) based on the Licensee's commitment, no HEU or LEU fuel or other materials of concern to GANE -- to the extent that such materials are licensed by the NRC -- will be onsite during the Olympics; and (2) removal of the HEU fuel renders moot GANE's concern that "bomb-grade" uranium constitutes a tempting target to terrorists requiring special security during the Olympic Games. Further, in response to the Licensing Board's question (at 3), the Staff submits that the Licensee's recent statements committing that all reactor fuel will be absent from the site during the Olympic Games do indeed make the contention entirely moot.

With respect to the additional questions posed by the Commission concerning the mootness issue (CLI-95-10, slip op. at 3), the Staff submits, as the Commission suggested, that most of these questions have indeed been answered by the Licensee's recent submittals. In particular, the Licensee's submittals indicate that (a) all reactor fuel will be removed from the facility, but the sealed source and radioactive waste products will remain onsite; (b) the HEU fuel will be removed from the site, not just from the reactor, prior to the Olympics; (c) the licensee intends to replace the current HEU fuel with LEU fuel; (d) the replacement fuel will not be brought onsite for storage before the Olympics have concluded; and (e) removal of the HEU fuel is currently planned to take place in late January or early February 1996.

Finally, in response to the Commission's sixth question on this issue, it must be noted that the Licensee has stated that "there will be no nuclear fuel at the Georgia Tech site during the Olympics."⁷ It is unclear whether any further assurance could be provided by the Licensee that the HEU fuel will be accomplished "in a timely fashion" -- *i.e.*, before the commencement of the Olympics -- inasmuch as the proposed schedule largely depends upon the actions of third parties such as the U. S. Department of Energy (DOE). In this regard, therefore, it may be appropriate for the Licensing Board to require further assurances from the Licensee prior to dismissing GANE Contention 5, or to expressly condition its dismissal of the contention on the Licensee's performance of its commitment to remove the fuel from the site in a timely fashion.

B. In Light of Georgia Tech's Proposed Changes, GANE's Contention 5 Fails to Satisfy the Commission's Standards for Admissibility of Contentions Set Forth in 10 C.F.R. §§ 2.714(b)(2) and (d)(2).

The final question raised by the Commission in CLI-95-10 suggested that the Licensing Board should consider "[w]hether, in light of the proposed changes at the GTRR, GANE's security contention continues to satisfy the Commission's standards for admissibility of contentions" set forth in 10 C.F.R. § 2.714(b)(2) and (d)(2). In response, the Staff submits that the contention clearly does not satisfy those standards, for the reasons set forth below.

⁷ See n.2, *supra*.

1. Legal Standards Governing the Admission of Contentions.

The Staff has previously described the Commission's standards governing the admission of contentions in an NRC licensing proceeding.⁸ As pertinent here, these standards require that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law.⁹ Pursuant to 10 C.F.R. § 2.714(b)(2), each contention must provide "a specific statement of the issue of law or fact to be raised or controverted" -- and the following information must be provided in support of each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources that and documents of which the petitioner is and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the

⁸ See "NRC Staff's Response to Amended Petition for Leave to Intervene and Supplement Thereto Filed by Georgians Against Nuclear Energy," dated January 25, 1995, at 12-15.

⁹ See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), *aff'd sub nom. BPI v. Atomic Energy Commission*, 502 F.2d 424, 429 (D.C. Cir. 1974).

specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. . . .¹⁰

See generally, Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991).

In amending 10 C.F.R. § 2.714 in 1989 to incorporate these requirements,¹¹ the Commission recognized that the amended rules "raise the threshold for the admission of contentions." Statement of Consideration, *supra*, 54 Fed. Reg. at 33,168. Under the revised rule, a petitioner must provide a "clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention. *Palo Verde, supra*, 34 NRC at 155-56. The Commission has summarized the revised rule as follows:

¹⁰ These requirements are intended, *inter alia*, to insure that a petitioner reviews the application and supporting documentation prior to filing contentions; that the contention is supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute between the petitioner and the applicant before a contention is admitted for litigation -- so as to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery.

¹¹ *See* Statement of Consideration, "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168 (Aug. 11, 1989), *as corrected*, 54 Fed. Reg. 39,728 (Sept. 28, 1989).

These sections demand that all Petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected.

Id. at 155. Further, pursuant to 10 C.F.R. § 2.714(d)(2), a contention must be rejected if:

- (i) The contention and supporting material fail to satisfy the requirements of [§ 2.714(b)(2)]; or
- (ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

See generally, Palo Verde, supra, 34 NRC at 155; Shoreham, supra, 34 NRC at 167.

In this regard, it is well established that the purpose for the basis requirements of 10 C.F.R. § 2.714(b)(2) is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry in the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom, supra, 8 AEC at 20-21; Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).* The *Peach Bottom* decision largely remains relevant -- and requires that a contention be rejected if:

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21.

2. The Licensee's Recent Statements Eliminate Any Basis That May Previously Have Been Perceived to Support the Admission of GANE Contention 5.

As discussed *supra* at 4-6, GANE Contention 5 focused primarily on the risk posed by the presence of HEU fuel at the reactor during the Olympics and the "tempting target" for terrorists presented by such fuel. The Licensee's announced decision to remove all such fuel from the site prior to the start of the Olympics eliminates this concern as a basis for the contention.

GANE's contention did not specify any other radioactive materials which were of concern to it, although it did make a vague reference to other materials, asserting that "the presence of fissionable and highly radioactive fission byproducts at the reactor, make the reactor not only a tempting target for theft of bomb-grade or [unspecified] hazardous materials, but a target for a World Trade Center-type bombing" However, the clear thrust of GANE's contention involved the presence of HEU fuel ("bomb-grade uranium") at the facility, and GANE provided no information concerning the risk presented by materials other than HEU -- failing even to identify the radioactive or "hazardous" materials which are of concern to GANE. Having provided no specific

information concerning the risk presented by -- or even the identity of -- any materials other than the HEU fuel, the contention's references to such materials clearly fail to satisfy the requirements of 10 C.F.R. § 2.714(b)(2) and (d)(2). Contrary to the Commission's requirements, GANE failed to provide "a concise statement of the alleged facts or expert opinion which support the contention and on which [it] intends to rely in proving the contention," nor did it provide the required "references to those specific sources or documents" upon which it intends to rely to establish those facts or expert opinion. Further, GANE did not provide sufficient information "to show that a genuine dispute exists with the applicant on a material issue of law or fact," nor did it make any references to "the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."¹²

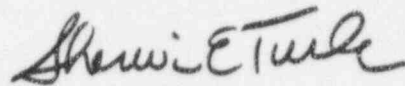
Accordingly, the Staff submits that in light of the Licensee's recent statements concerning its intent to remove all HEU fuel from the site during the Olympics, any residual issues that may be perceived to be embraced by GANE Contention 5 fail to satisfy the Commission's requirements governing the admission of contentions.

¹² Further, GANE's current reference to the presence on-site of Cobalt-60 or other byproduct materials licensed by the State of Georgia, and its apparent attempt to litigate those matters in this proceeding, is prohibited under the *Peach Bottom* decision, in that (1) it constitutes an attack on applicable statutory requirements; (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; and (3) it seeks to raise an issue which is not proper for adjudication in the proceeding and does not apply to the facility in question. *Peach Bottom, supra*, 8 AEC at 20-21.

CONCLUSION

For the reasons set forth above, the Staff submits that GANE Contention 5 has been mooted by the Licensee's recent statements, and that the contention should be dismissed as moot.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sherwin E. Turk".

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of September 1995

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LICENSING BOARD'S MEMORANDUM AND ORDER OF AUGUST 1, 1995" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system on this 1st day of September 1995.

Charles Bechhoefer, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board
Panel*
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of the Secretary* (2)
Attn: Docketing and Service
Mail Stop: OWFN-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Office of Commission Appellate
Adjudication*
Mail Stop: OWFN-16 G15
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

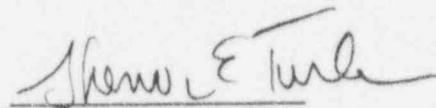
Randy A. Nordin, Esq.
Manager, Legal Division
Office of Legal Affairs
Georgia Institute of Technology
400 10th Street, N. W.
Atlanta, Georgia 30332-0420

Alvin Lenoir, Esq.
c/o Greenpeace
Twenty 13th Street, N. E.
Atlanta, Georgia 30309

Patricia Guilday, Esq.
Assistant Attorney General
Georgia Department of Law
40 Capitol Square S. W.
Atlanta, Georgia 30304

Georgians Against Nuclear Energy
P. O. Box 8574
Atlanta, Georgia 30306

Ms. Glenn Carroll
GANE
139 Kings Highway
Decatur, Georgia 30030



Sherwin E. Turk
Counsel for NRC Staff