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September 22, 1995  
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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'95 SEP 22 P3:25

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

GEORGIA INSTITUTE OF TECHNOLOGY )

(Georgia Tech Research Reactor) )

(Renewal of License No. R-97) )

Docket No. 50-160-Ren

NRC STAFF'S RESPONSE TO LICENSING BOARD'S  
MEMORANDUM AND ORDER OF SEPTEMBER 7, 1995

**INTRODUCTION**

On August 1, 1995, the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding issued a "Memorandum and Order (Consideration of Mootness of Contention 5)," in which it directed the parties to confer and file their positions on mootness and other matters. Responses to that Order were filed by Georgia Institute of Technology ("Georgia Tech" or the "Licensee"), Georgians Against Nuclear Energy ("GANE"), and the NRC Staff ("Staff").<sup>1</sup> On September 7, 1995, the Licensing Board issued a further Memorandum and Order, requesting the parties' views on a matter raised

<sup>1</sup> See (1) "Georgia Institute of Technology's Statement as to Issue of Mootness of Contention 5," dated August 28, 1995 ("Licensee's Response"); (2) "Georgians Against Nuclear Energy (GANE) Comments on Security at the Georgia Tech Reactor Facility Following Georgia Tech's Decision to Remove the Reactor Fuel Before the 1996 Olympic Games," dated August 31, 1995 ("GANE's Response"); and (3) "NRC Staff's Response to Licensing Board's Memorandum and Order of August 1, 1995," dated September 1, 1995 ("Staff's Response").

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in GANE's Response to the Licensing Board's previous Order, wherein GANE urged the Licensing Board to "override" the State of Georgia's regulatory authority over the Cobalt-60 located at the Georgia Tech Research Reactor ("GTRR") site.

In its Memorandum and Order (at 1-2), the Licensing Board noted that GANE's August 31 Response defined Cobalt-60 "as the only material with respect to which its contention is not moot," and further noted that "GANE recognizes that the Commission has transferred regulatory authority over this material to the State of Georgia but cites authority for the Commission to override this transfer." *Id.* at 2. Accordingly, the Licensing Board requested that Georgia Tech and the Staff submit their views with respect to the following question (*Id.*):

Prior to advising the Commission as to its mootness inquiries, we invite the Applicant and Staff to respond to GANE's claims in this regard and to delineate whether the Commission, and this Licensing Board as its delegee, has authority to take any action with regard to overriding the State's control of the Cobalt-60. . . . After receiving these responses, we will decide whether GANE's claims constitute a valid contention.<sup>2</sup>

The NRC Staff hereby files its response to the Licensing Board's Memorandum and Order. For the reasons set forth below, the Staff submits that the Licensing Board lacks the authority to consider GANE's claims concerning the Cobalt-60 and lacks the "authority to take any action with regard to overriding the State's control of the

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<sup>2</sup> As noted by the Licensing Board, the Commission has directed the Licensing Board to consider whether the Contention is moot in light of the Licensee's statements that it will remove all nuclear fuel from the site prior to the 1996 Olympic Games. *See Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-10, 42 NRC 1, 2-3 (July 26, 1995).

Cobalt-60." Accordingly, for the reasons set forth below and in the Staff's Response of September 1, 1995, the Licensing Board should dismiss GANE's Contention 5 as moot.

### DISCUSSION

A. The Cobalt-60 Issue Is Beyond the Scope of GANE's Admitted Contention.

In GANE's response to the Licensing Board's Order of August 1, 1995, GANE stated that "GANE cannot find our contention that security at the Neely Nuclear Research Facility is inadequate to be moot as long as Georgia Tech plans to retain the 250,000 curies of cobalt-60 on the site."<sup>3</sup> Thus, although the Licensing Board's Order of August 1 afforded GANE an opportunity to file a new contention concerning security at the GTRR facility (Order at 3), GANE chose not to do so, arguing instead that the issue of security posed by the Cobalt-60 is embraced within its original Contention 5.

GANE's attempt to fit the Cobalt-60 issue into its original contention should be rejected. GANE never mentioned or discussed Cobalt-60 in Contention 5, it never discussed the purported risk posed by this material, and it never presented any facts or expert opinion to support the admission of this issue for litigation as part of its contention, as it is required to do pursuant to 10 C.F.R. § 2.714(b)(2). Further, the clear thrust of the contention involved the risk posed by potential terrorism at the facility due to the presence of high-enriched uranium (HEU) fuel at the GTRR site, not the risk posed by Cobalt-60. Accordingly, GANE's belated reference to the presence of Cobalt-60 at the GTRR site should be rejected at this time.<sup>4</sup>

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<sup>3</sup> GANE's Response of August 31, 1995, at 2.

<sup>4</sup> See Staff Response of September 1, 1995, at 4-5, 12-13.

B. The Licensing Board Lacks Jurisdiction to Consider the Cobalt-60.

1. The Cobalt-60 Is Licensed by the State of Georgia, Which Presently Has Exclusive Jurisdiction Over Such Materials Consistent With § 274 of the Act.

Aside from GANE's failure to raise the Cobalt-60 issue in its contention prior to raising it in its filing of August 31, 1995, there is an even more fundamental reason why this issue should be rejected by the Licensing Board: The Cobalt-60 located at the Georgia Tech site is licensed to Georgia Tech by the State of Georgia,<sup>5</sup> pursuant to an agreement entered into by the State and the Atomic Energy Commission under § 274 of the Atomic Energy Act of 1954, as amended (the "Act"), 42 U.S.C. § 2021.<sup>6</sup> Indeed, GANE concedes that the NRC currently lacks regulatory authority over the Cobalt-60, arguing instead that "the cobalt-60 which is licensed by the State of Georgia as an agreement state *should* be placed immediately under temporary NRC jurisdiction" (GANE Response at 3; emphasis added).

Accordingly, regulatory authority over the Cobalt-60 currently resides within the State of Georgia. The Commission presently lacks jurisdiction over the Cobalt-60 unless and until the Commission, itself,<sup>7</sup> makes the findings required by § 274j of the Act and reasserts its regulatory authority over such materials.

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<sup>5</sup> Georgia Radioactive Material License No. GA. 147-1 (SNM), Amendment No. 50 (June 23, 1993).

<sup>6</sup> "Agreement Between Atomic Energy Commission and State of Georgia; Discontinuance of Certain Commission Regulatory Authority and Responsibility Within the State," 34 Fed. Reg. 20225 (Dec. 24, 1969).

<sup>7</sup> See discussion *infra* at 14-18.

The State of Georgia's regulatory authority over the Cobalt-60 is a product of a Congressional determination that such materials be regulated by those States that desire and are able effectively to regulate such materials. The purposes for this statutory mandate are summarized in § 274 of the Atomic Energy Act, in pertinent part, as follows:

**Sec. 274. Cooperation With States.**

a. It is the purpose of this section --

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this Act of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States; . . .

With these goals in mind, Congress established a statutory scheme whereby States that seek to exercise regulatory authority over byproduct, source and special nuclear materials may do so by entering into an appropriate agreement with the Commission for discontinuance of the Commission's regulatory authority over such materials. The Act

permits the Commission to "cede" or "relinquish" its "exclusive pre-emptive Federal jurisdiction" over such materials to the State, if the Commission finds the State program is in accordance with § 274o, is compatible with the Commission's regulatory program, and is adequate to protect the public health and safety.<sup>8</sup>

Significantly, pursuant to § 274b, an Agreement State is to have exclusive jurisdiction over the materials covered by the agreement, while that agreement remains in effect. The statute provides (*Id.*):

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

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<sup>8</sup> *Petition of Sunflower Coalition*, CLI-81-13, 13 NRC 847, 850 (1981), citing § 274d(2) of the Act. Section 274d provides:

d. The Commission shall enter into an agreement under [§ 274b] with any State if --

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is in accordance with the requirements of [§ 274o] and in all other respects compatible with the Commission's program for regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

*See generally In re State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 44 (1995).

The Commission and Agreement States do not share "dual or concurrent jurisdiction" over such materials.<sup>9</sup>

Accordingly, where -- as here -- a State and the Commission have entered into an agreement for the Commission to relinquish, and for the State to assume, regulatory authority over radioactive byproduct materials, the regulatory authority to protect the public health and safety with respect to such materials effectively passes from the Commission to the State. *In re State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 44, 46 (1995).

2. The Commission May Suspend or Terminate an Agreement State's Regulatory Authority Pursuant to § 274j of the Act, If It Determines Such Action Is Required to Protect the Public Health and Safety.

In enacting § 274 of the Act, and in subsequent amendments thereto, Congress recognized that following the execution of an agreement transferring regulatory authority from the Commission to a State instances could arise in which the Commission may lose confidence in the State's willingness or ability to protect the public health and safety. To address this concern, Congress enacted additional provisions, pursuant to which the Commission is empowered to suspend or terminate a State's regulatory authority over some or all of the materials covered by the agreement. The statute thus provides as follows (*Id.*, § 274j):

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<sup>9</sup> See Sen. Rep. No. 870, 86th Cong. 1st Sess. (Sept. 1, 1959), quoted in SECY-95-112, "Final Policy Statement on Adequacy and Compatibility of Agreement State Programs" (May 3, 1995), at 10.

j. (1) The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection b. has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this Act, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to insure compliance with the provisions of this section.

(2) The Commission, upon its own motion or upon request of the Governor of any State, may, after notifying the Governor, temporarily suspend all or part of its agreement with the State without notice or hearing if, in the judgment of the Commission:

(A) an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside of the State, and

(B) the State has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.

A temporary suspension under this paragraph shall remain in effect only for such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger.<sup>10</sup>

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<sup>10</sup> See generally *In re State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 46 (1995). Additional authority, not relevant here, was created pursuant to § 274m of the Act, for the Commission to act to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material, even in the presence of a State agreement.



The question of when the Commission should act to assert its regulatory authority over matters that are subject to an Agreement State's jurisdiction was addressed by the Commission in a decision concerning the State of Colorado's "Agreement State" program. *Petition of Sunflower Coalition*, CLI-82-34, 16 NRC 1502 (1982). There, the Commission declined to reconsider its decision to approve an amended agreement with the State of Colorado, despite the State's lack of civil penalty authority. The Commission reviewed Congressional intent in enacting § 274 of the Act, and concluded that a State's authority to regulate radioactive materials under an agreement with the Commission should not be "revoked lightly," and that the Commission's authority to suspend or terminate a State's regulatory authority should be exercised only as a last resort:

The NRC retains the authority under section 274j of the AEA to terminate or suspend an agreement with a State and to reassert its own licensing authority. However, Congress' clear intent was that Agreement States were to regulate agreement materials and that *once granted, their authority is not to be revoked lightly*. The legislative history of this section states that this authority to terminate "represents a reserve power, to be exercised *only under extraordinary circumstances*." . . . An agreement is not to be permanently terminated or revoked for minor technical failures to comply with Section 274 or for single incidents of State inaction, but only in exceptional circumstances.<sup>9</sup> *Rather, the NRC is to cooperate with Agreement States and through its review process obtain compliance by States. The power to terminate the agreement is to be one of last resort where all others fail.*

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<sup>9</sup> However, to offset the original lack of Commission authority to act in single instances of State inaction, Congress in 1980 amended Section 274j to provide for temporary suspension of all or part of an agreement. The emergency power to terminate without notice or hearing is limited to those cases where (1) an emergency

situation exists which requires immediate action to protect the health and safety of the public, *and* (2) the State has failed to take steps necessary to contain or eliminate the dangers within a reasonable time. The temporary suspension is to remain in effect only for as long as the emergency exists. . . . Congress stated that this authority would be only rarely needed by NRC and that it intended the emergency power to be used only as a last resort. . . .

*Id.* at 1508 (emphasis added; citations omitted); *accord*, *Petition of Sunflower Coalition*, CLI-81-13, 13 NRC 847, 859 (1981).<sup>11</sup>

As the Commission observed in *Sunflower Coalition*, Congress has authorized the Commission to reassert its regulatory authority over materials previously regulated by an Agreement State, upon finding that such action is required to protect the public health and safety, either in the course of its regular oversight of the State program or in an emergency, pursuant to § 274j(1) and (2).

The Commission has issued several statements of policy, which provide guidance on its implementation of the Agreement State program under § 274 of the Act.<sup>12</sup> As

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<sup>11</sup> Similarly, in one case reported recently, the Director of the Office of State Programs declined to reassert the Commission's regulatory authority over certain materials regulated by the State of Utah, finding that the State's regulatory program was compatible with NRC regulations and provided adequate protection for the public health and safety. *In re State of Utah* (Agreement Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended), DD-95-1, 41 NRC 43, 47, 53-54 (1995).

<sup>12</sup> Two such policy statements are currently in effect. *See* (1) Statement of Policy, "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," 46 Fed. Reg. 7540 (Jan. 23, 1981), *as revised*, 46 Fed. Reg. 36969 (July 16, 1981) and 48 Fed. Reg. 33376 (July 21, 1983); and (2) "NRC Review of Agreement State Radiation Control Programs: Final General Statement of Policy," 57 Fed. Reg. 22495 (May 28, 1992) (portions of this policy statement may be suspended in the near future).

(continued...)

indicated in these policy statements, in non-emergency situations, a full panoply of cooperative measures may be utilized to secure improvements in the State's program (including notification of the State, bilateral discussions, and providing the State an opportunity for hearing).<sup>13</sup> However, even in an emergency situation under § 274j(2) of the Act, cooperative discussions with the State might be pursued, unless immediate action by the Commission is required to protect the public health and safety.<sup>14</sup> Thus, the Commission has indicated it would attempt to obtain the State's cooperation to the

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<sup>12</sup>(...continued)

In addition, the Commission recently approved, in principle, two policy statements, which the Commission is to review in final form upon the Staff's submission of final implementing procedures. See "Status and Notice of Availability of Two Policy Statements Concerning the Agreement State Program," 60 Fed. Reg. 39463 (Aug. 2, 1995), and Staff Requirements Memorandum ("SRM") from John C. Hoyle (Secretary) to James M. Taylor (EDO), dated June 29, 1995, *approving in principle* (1) SECY-95-115, Final "Statement of Principles and Policy for the Agreement State Program" and "Procedures for Suspension and Termination of an Agreement State Program" (May 5, 1995), and (2) SECY-95-112, "Final Policy Statement on Adequacy and Compatibility of Agreement State Programs" (May 3, 1995). The policy statements were previously published for comment in draft form at 59 Fed. Reg. 40058 (Aug. 5, 1994), and 59 Fed. Reg. 37269 (July 21, 1994), respectively.

<sup>13</sup> See, e.g., SECY-95-115, *supra*, Attachment 1 at 7-8, and Attachment 2 ("Procedures for Suspension of a Section 274b Agreement," and "Procedures for Termination of a Section 274b Agreement"); "Draft Policy Statement on Agreement State Program," 59 Fed. Reg. 40058, 40061, 40062-063, 40066 (Aug. 5, 1994); "NRC Review of Agreement State Radiation Control Programs: Final General Statement of Policy," 57 Fed. Reg. 22495, 22498 (May 28, 1992).

<sup>14</sup> In an emergency situation, the Commission could limit its suspension of an Agreement State's authority with respect to a single licensee, if necessary. See Conference Report (to accompany S. 562), House Rep. No. 96-1070, 96th Cong. 2d Sess., at 33 (indicating that § 274j(2) was proposed in part because under § 274j, as it existed previously, "the NRC cannot limit the termination or suspension to a particular licensee but rather must apply the termination or suspension to an entire category of nuclear material covered by the agreement" and, in an emergency, the statutory mechanism was "too cumbersome and slow to protect the public health and safety."

extent possible, before declaring a "temporary suspension of all or part of an agreement."<sup>15</sup>

The Commission's agreement with the State of Georgia similarly indicates that a cooperative approach is to be followed by the Commission and the State,<sup>16</sup> while recognizing the Commission's authority to suspend or terminate the agreement "upon its own initiative after reasonable notice and opportunity for hearing to the State, or upon request of the Governor of the State . . . if the Commission finds that such termination or suspension is required to protect the public health and safety."<sup>17</sup>

Accordingly, any decision to suspend or terminate the State of Georgia's regulatory authority over the Cobalt-60 located at the GTRR site properly would be made

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<sup>15</sup> See *Petition of Sunflower Coalition, supra*, CLI-82-34, 16 NRC at 1508 n.9 (stating that Congress believed the emergency power to terminate without notice or hearing "would be only rarely needed by NRC and that it intended the emergency power to be used only as a last resort"). See also Office of State Programs, "Policy, Procedures and Information Manual," Procedure D.13 ("Guidelines for Temporary Suspension of Section 274b Agreement"), at 1; see generally SECY-95-115, Attachment 2 ("Procedures for Suspension of a Section 274b Agreement," "Procedures for Emergency Suspension of a Section 274b Agreement," and "Procedures for Termination of a Section 274b Agreement").

<sup>16</sup> See 34 Fed. Reg. at 20225 (Preamble) (recognizing "the desirability and importance of cooperation between the Commission and the State in the formulation of standards for protection against hazards of radiation and in assuring that State and Commission programs for protection against hazards of radiation will be coordinated and compatible"); *Id.* at 20226 (Article V) (committing the Commission and State to use their best efforts "to cooperate . . . in the formulation of standards and regulatory programs[,] . . . to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible[,] . . . to keep each other informed of proposed changes in their respective rules and regulations and licensing, inspection and enforcement policies and criteria, and to obtain the comments and the assistance of the other party thereon."

<sup>17</sup> *Id.* at 20226 (Article VII).

by the Commission, itself, and then only "as a last resort" after making reasonable efforts to secure the State's cooperation.<sup>18</sup>

Here, GANE does not contend that the State of Georgia is incapable of regulating byproduct materials such as the Cobalt-60, or that its Agreement State program is inadequate or incompatible with the Commission's regulations. Rather, GANE complains that "the State of Georgia . . . has been unresponsive to GANE's concerns" over the Cobalt-60, and that an "emergency" exists in view of the upcoming 1996 Olympic Games (GANE's Response at 6). However, regardless of whether GANE is satisfied with the State of Georgia's responsiveness to its concerns over the Cobalt-60, it is undisputed that the State of Georgia exercises exclusive jurisdiction over the Cobalt-60 at this time. Unless and until the Commission determines that the State cannot or will not adequately protect the health and safety of the public, or has not complied with one or more of the requirements of § 274 of the Act, the State's exclusive jurisdiction to regulate such materials remains in effect. GANE's attempt at "forum shopping," whereby it asks the Licensing Board to reassert the Commission's authority over the Cobalt-60 in the hope that the Licensing Board will be more "responsive" to it than the State of Georgia, should be rejected.

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<sup>18</sup> In practice, where the Commission has reasserted its regulatory authority over materials subject to an Agreement State's jurisdiction, it has done so only in cooperation with and at the request of the Governor of the State. See, e.g., (1) *In re Governor of Idaho* (Request to Return to the United States the Idaho Program for the Licensing and Regulation of Byproduct Material as Defined in Section 11e(1) of the Atomic Energy Act of 1954, as Amended, Source Material and Special Nuclear Material in Quantities Not Sufficient to Form a Critical Mass), CLI-91-6, 33 NRC 242 (1991); and (2) "Reassertion of Certain Regulatory Authority in the State of New Mexico," 51 Fed. Reg. 19432 (May 29, 1986).

3. The Licensing Board Lacks Authority to Act as the Commission's "Delegee" to Suspend or Terminate the State of Georgia's Jurisdiction Over the Cobalt-60.

Any decision to suspend or terminate an Agreement State's regulatory authority over materials covered by an agreement would clearly raise an important question of Federal-State relations, which has been entrusted to the Commission by Congress. The Commission, in turn, has established an appropriate Office to administer its Agreement State program -- the Office of State Programs -- which would assist and advise the Commission in making any decision to suspend or terminate an Agreement State's regulatory authority.<sup>19</sup>

Specifically, the Commission has delegated to the Office of State Programs the responsibility to review Agreement State programs under § 274j of the Atomic Energy Act. Thus, 10 C.F.R. § 1.41 provides, in pertinent part, as follows:

**§ 1.41 Office of State Programs.**

The Office of State Programs --

(a) Plans and directs NRC's program of cooperation and liaison with States . . .

(b) Participates in formulation of policies involving NRC/State cooperation and liaison;

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<sup>19</sup> In addition, the Commission recently approved the establishment of a Management Review Board ("MRB"), which would participate in evaluating the adequacy of Agreement State programs and recommending actions with respect thereto. See SECY-95-047, "Staff Analysis and Recommendations on the Integrated Materials Performance Evaluation Program," dated February 28, 1995, *approved as modified*, Staff Requirements Memorandum from John C. Hoyle (Secretary) to James M. Taylor (EDO) dated June 27, 1995.

(c) Develops and directs administrative and contractual programs for coordinating and integrating Federal and State regulatory activities;

(d) Maintains liaison between NRC and State . . . organizations on regulatory matters;

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(i) Administers the State Agreements program in a partnership arrangement with the States;

(j) Develops staff policy and procedures and implementation of the State Agreements program under the provisions of section 274b of the Atomic Energy Act, as amended;

(k) *Provides oversight of program of periodic routine reviews of Agreement State programs to determine their adequacy and compatibility as required by section 274j of the Act and other periodic reviews that may be performed to maintain a current level of knowledge of the status of Agreement States programs; . . .*

*Id.*, emphasis added. Thus, responsibility for review of the adequacy of an Agreement State's measures to protect the public health and safety against radiation hazards posed by materials covered by agreements under § 274b of the Act has been specifically delegated to the Office of State Programs.<sup>20</sup>

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<sup>20</sup> See 10 C.F.R. § 1.41, *as amended*, 57 Fed. Reg. 1638 (Jan. 15, 1992). A detailed set of procedures has been developed by the Office of State Programs, providing guidance, *inter alia*, for the review of Agreement State programs, and for determining whether to temporarily suspend an Agreement State's regulatory authority. See, e.g., Office of State Programs, "Policy, Procedures and Information Manual," Procedures D.2 ("Scheduling, Conducting and Reporting Review Visits of Agreement State Regulatory Programs"), D.7 ("Procedure for Reviewing State Regulations"), and D.13 ("Guidelines for Temporary Suspension of Section 274b Agreement"). See also SECY-95-115, Attachment 2 ("Procedures for Suspension of a Section 274b Agreement," "Procedures for Emergency Suspension of a Section 274b Agreement," and "Procedures for Termination of a Section 274b Agreement").

To be sure, § 191 of the Atomic Energy Act, as amended, provides broad authority for the Commission to establish one or more Atomic Safety and Licensing Boards as it deems appropriate:

**Sec. 191. Atomic Safety and Licensing Board.**

a. Notwithstanding the provisions of sections 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more atomic safety and licensing boards . . . to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder. *The Commission may delegate to a board such other regulatory functions as it deems appropriate. . . .*

While this broad provision suggests that the Commission could appoint a Licensing Board to consider whether an Agreement State is adequately protecting the public health and safety with respect to materials covered by its agreement, it is clear that any such assignment of authority must be made specifically. No such delegation to the Licensing Boards appears to have been made.

It is fundamental that the scope of the Licensing Board's authority in this proceeding was established by the terms of the *Federal Register* notices pursuant to which the proceeding was initiated.<sup>21</sup> This Licensing Board has been assigned the

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<sup>21</sup> See "Georgia Institute of Technology; Consideration of Application for Renewal of Facility License," 59 Fed. Reg. 49088 (Sept. 26, 1994); "Georgia Institute of Technology, Atlanta, GA; Establishment of Atomic Safety and Licensing Board," 59 Fed. Reg. 60849 (Nov. 28, 1994); and "Georgia Institute of Technology, Atlanta, GA, Georgia Tech Research Reactor (Renewal of Facility License No. R-97); Notice of Hearing," 60 Fed. Reg. 24934 (May 10, 1995).



responsibility, and the authority, to adjudicate contested issues concerning whether the Commission should renew the operating license for the GTRR, held by the Georgia Institute of Technology. The Licensing Board lacks jurisdiction to consider any matter other than whether Georgia Tech's operating license should be renewed: That is the purpose for which this Licensing Board was created, and that is the scope of its authority. Nowhere was the Licensing Board assigned responsibility to consider whether the Commission should suspend or terminate the State of Georgia's regulatory authority over byproduct materials.

Moreover, in issuing its SRM provisionally approving SECY-95-115 (*see* n.12, *supra*), the Commission indicated its view that a decision to suspend or terminate an Agreement State's regulatory authority should not to be the subject of a formal evidentiary hearing, but should be considered in "informal hearings" -- and any such hearings on suspension or termination decisions are to be conducted either by the Commission, itself, or by a "Special Agreement State Board" to be appointed by the Commission.<sup>22</sup> GANE's request that the Licensing Board assert the Commission's

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<sup>22</sup> As set forth in SECY-95-115, provisionally approved in the Commission's SRM dated June 29, 1995, the "Special Agreement State Board" is to consist of the Deputy Director of an NRC Regional Office, the Chairman of the Organization of Agreement States, and an official from the Office of the General Counsel; the Commission rejected one commentator's suggestion that such hearings be conducted as informal Subpart L proceedings by a Licensing Board, and it declined to use the § 2.206 process for requests by members of the public to suspend or terminate an Agreement State's authority. *See* SECY-95-115, at 2-3, Attachment 1 at 30-31, and Attachment 2 at 3. *See also State of Utah, supra*, DD-95-1, 41 NRC at 54 n.5 (finding that "[n]either the AEA nor the Commission's regulations provides for a hearing on the evaluation of an Agreement State program"); *accord*, SECY-95-115, Attachment 1 at 31.

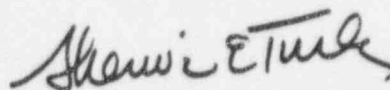
authority to divest the State of its jurisdiction, in this operating license renewal proceeding, is totally inconsistent with these principles.

In sum, the Licensing Board lacks the authority to consider whether the State of Georgia's regulatory authority over Cobalt-60 should be suspended or terminated. In the event that the Commission decides to terminate or suspend all or part of the State's regulatory authority over byproduct materials pursuant to § 274(j) of the Act, any such action would properly be taken in a separate Commission action, not by the Licensing Board in this license renewal proceeding.

#### CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board may not consider the issue of Cobalt-60 raised by GANE in its filing of August 31, 1995. Accordingly, for the reasons set forth herein and in the Staff's Response of September 1, 1995, the Staff submits that GANE Contention 5 has been mooted by the Licensee's recent statements that all fuel will be removed from the GTRR site during the pendency of the Olympic Games, and the contention should therefore be dismissed as moot.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 22nd day of September 1995

DOCKETED  
USNRC

'95 SEP 22 P3:25

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BOARD BRANCH

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LICENSING BOARD'S MEMORANDUM AND ORDER OF SEPTEMBER 7, 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 22nd day of September 1995.

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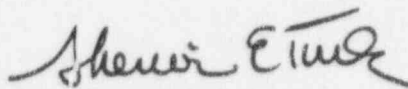
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