

July 2, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD ^{'84 JUL 10 11:19}

In the Matter of)	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA)	Docket No. 50-142
(UCLA Research Reactor))	(Proposed Renewal of Facility License)

NRC STAFF RESPONSE TO THE REQUEST
BY THE UNIVERSITY OF CALIFORNIA TO
WITHDRAW THE APPLICATION FOR RENEWAL
OF THE LICENSE FOR THE UCLA RESEARCH REACTOR

I. INTRODUCTION

On June 14, 1984, counsel for UCLA filed on behalf of the Regents of the University of California, a request to withdraw the pending application for the second license renewal for the UCLA research reactor with the Atomic Safety and Licensing Board (Board) pursuant to 10 CFR § 2.107(a). The request notified the Board of the University's intent to seek permission from the Commission to voluntarily relinquish the license for the UCLA reactor, and to dismantle the facility and dispose of the component parts in accord with 10 CFR § 50.82. The NRC Staff does not object to the request for withdrawal of the application and recommends the Board grant the request on the conditions discussed below.

II. BACKGROUND

The original license for the UCLA research reactor was issued for a ten year term in 1960. The license was renewed by the Commission in

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1971 for a second term of ten years. In February, 1980 the University again applied for renewal of the license and requested a twenty year term. Notice of opportunity for hearing was published, intervention was granted, and twenty contentions were admitted for litigation by the Licensing Board appointed to the proceeding. The adjudicatory proceeding began in late 1980 and continued until suspension of proceedings by Board Orders of June 18 and June 22, 1984 after receipt of the withdrawal request from UCLA. During the four years of the proceeding one of the contentions was summarily dismissed by the Board. Motions for summary disposition were denied for nine issues and held in abeyance for ten issues. Hearings were held on several issues but completed for only one issue. No decision has been issued on any contention, except that for which summary disposition was granted (concerning the financial qualifications of the University of California).

The reactor has been shutdown since February, 1984 due to a mechanical problem. The Board's Order of June 22, 1984 directed UCLA to ship all nuclear fuel to a suitable recipient as soon as reasonably practicable and to assure that no water could enter the reactor core.

III. DISCUSSION

A. Legal Standards for Withdrawal of Applications and Termination of License

As noted by UCLA in its request, the Board has jurisdiction over the request for withdrawal of the license renewal application, pursuant

to Section 2.107(a)^{1/} of the Commission's Rules of Practice which provides that withdrawal of an application, after issuance of a notice of hearing, shall be on such terms as the presiding officer may prescribe.

In considering appropriate terms for granting requests for withdrawal of applications, reference should be made to two applicable Appeal Board decisions in which the Appeal Board established standards for dismissal of the proceeding and for ordering terms of withdrawal.^{2/} In these decisions the Appeal Board noted that dismissal "without prejudice" signifies that no disposition on the merits was made, whereas dismissal "with prejudice" suggests otherwise (Fulton, ALAB-657 at 973), but the usual rule is that dismissal should be without prejudice. North Coast,

^{1/} 10 CFR § 2.107, entitled "Withdrawal of application", states as follows:

(a) The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

(b) The withdrawal of an application does not authorize the removal of any document from the files of the Commission.

(c) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, will cause to be published in the Federal Register a notice of the withdrawal of an application if notice of receipt of the application has been previously published.

^{2/} Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981); Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981). Although these decisions address withdrawal of construction permit applications, the principles set out are applicable equally to withdrawal of application for license renewal. Several nonpower reactors and nine power reactors have been decommissioned and licenses terminated. However, none has been the subject of litigation concerning withdrawal of application.

ALAB-562, 14 NRC at 1135. Conversely, dismissal with prejudice is harsh and punitive, and must be found warranted by comparable harm which must be more than a possibility of future litigation from a new application. North Coast, ALAB-662, 14 NRC at 1132, 1135.

As to the authority granted licensing boards by 10 CFR § 2.107(a), the Appeal Board has noted that:

[o]n its face this provision [§ 2.107(a)] gives the boards substantial leeway in defining the circumstances in which an application may be voluntarily withdrawn. But as in all other areas, the boards may not abuse this discretion by exercising their power in an arbitrary manner. See Le Compte v. Mr. Chip., 528 F.2d 601, 604 (5th Cir. 1976); 5 Moore's Federal Practice ¶ 41.05[1] at 41-58. The terms prescribed at the time of withdrawal must bear a rational relationship to the conduct and legal harm at which they are aimed. And, of course, the record must support any findings concerning the conduct and harm in question. (Citation omitted.)

Fulton, ALAB-657, at 974. The Appeal Board also stated that "Mere allegations, of course, cannot serve as a basis for a finding of hardship or legal harm." Fulton, ALAB-657, at 979. The guidance has been implemented by several licensing board decisions granting withdrawal of construction permit applications, which are briefly discussed below.

When considering requests to withdraw construction permit applications in accord with § 2.107(a), licensing boards often must address actions taken as a result of the proceeding, such as preliminary site preparation completed under a limited work authorization granted during the construction permit proceeding. In such a case, licensing boards normally grant the withdrawal of the application upon condition that the applicant restore the site according to criteria and final approval of NRC Staff.^{3/}

^{3/} E.g. Public Service Co. of Oklahoma et al. (Black Fox Station, Units 1 and 2) LBP-83-10, 17 NRC 410 (1983); Toledo Edison Co. et al. (Davis-Besse Nuclear Power Station, Units 2 & 3), LBP-81-33, 14 NRC 586 (1981).

Where no preliminary action related to construction was taken, the boards rule on any procedural matters requiring resolution, vacate any partial initial decisions reached, grant withdrawal, and dismiss the proceeding.^{4/} Similarly, in considering withdrawal of an application for license renewal, any actions authorized or taken as a result of the proceeding should be addressed, any matters pending should be resolved, if not moot, and the consequence of withdrawal of the application for license renewal with regard to actions necessary for termination of licenses should be considered.^{5/} A request to withdraw a license renewal application differs from withdrawal of a construction permit application since a license is required to possess a reactor and SNM. Therefore, withdrawal of an application for license renewal raises a question of authorized possession pending license termination.

License termination procedures are described in 10 CFR § 50.82 of the Commission's regulations which provides that:

(a) Any licensee may apply to the Commission for authority to surrender a license voluntarily and to dismantle the facility

^{4/} E.g. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-81-81, 16 NRC 1128, 1143 (1982). Requests for costs have been submitted by intervenors in several cases. The Perkins board found no prohibition on payment of intervenor costs but found intervenors were not harmed by withdrawal and dismissal so there was no reason for such payment. Perkins, at 1141. The licensing board in Stanislaus denied the intervenors' request for payment of costs finding no legislative authority granted to the Commission empowering such an order. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 54 (1983). Another licensing board found no authority under § 2.107(a) for award of attorneys fees and costs, pointing out that only the Commission could institute such a policy. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762, 766-68 (1982).

^{5/} Section 101 of the Atomic Energy Act requires a license to possess, as well as to operate, a nuclear reactor. 42 U.S.C. § 2131. Section 53 of the Act requires a license to possess special nuclear material (SNM) 42 U.S.C. § 2073.

and dispose of its component parts. The Commission may require information, including information as to proposed procedures for the disposal of radioactive material, decontamination of the site, and other procedures, to provide reasonable assurance that the dismantling of the facility and disposal of the component parts will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public.

(b) If the application demonstrates that the dismantling of the facility and disposal of the component parts will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public, and after notice to interested persons, the Commission may issue an order authorizing such dismantling and disposal, and providing for the termination of the license upon completion of such procedures in accordance with any conditions specified in the order.

It is evident that this regulation requires considerable time and effort by the licensee in order to (1) initiate an action by applying to the Commission for permission to relinquish the license, (2) develop a method to dismantle the reactor and dispose of materials in a manner approved by the Commission, and (3) receive an order terminating the license. Thus, although a separate action is required for license termination, the license and the requirements thereunder must be retained for the time necessary to obtain an order of termination, and may not be unilaterally terminated.^{6/}

B. The UCLA Request for Withdrawal of the License Renewal Application

At present the research reactor at UCLA is shutdown due to a mechanical problem and UCLA was ordered by the Board on June 22, 1984 to prevent

^{6/} See Nuclear Engineering Co. Inc. (Sheffield Illinois Low Level Radioactive Waste Disposal Site) CLI-79-6, 9 NRC 673 (1979), where the Commission affirmed a show cause order prohibiting unilateral withdrawal of license.

entry of water into the core, so that reactor operation after dismissal of the adjudicatory proceeding is not an issue. In addition, the Board's June 22, 1984 Order requires shipment of the nuclear fuel at UCLA to an appropriate recipient as soon as reasonably practicable.

Presently, also, the license renewal issued in 1971 remains effective due to UCLA's timely renewal application in accord with 10 CFR § 2.109.^{7/} The recent request for withdrawal of the application is based on University's written notice of intent^{8/} to seek termination of the license according to 10 CFR § 50.82 which raises a question of the status of the license if the renewal application is withdrawn prior to termination. However, apparently recognizing the necessity of continuing the validity of the 1971 license, UCLA acknowledges in the request for withdrawal, that an appropriate condition of withdrawal would be that application be submitted to the Commission to terminate the license. Request, at 2.

1. Matters Related to the License Renewal Proceeding

No actions affecting the environment or the reactor facility were taken by UCLA as a result of the license renewal proceeding. Consequently, there are no matters to address in this regard. In addition, no decisions on the evidence presented at hearings or on the

^{7/} This rule continues the effectiveness of an existing license while the proceeding on the renewal application is completed.

^{8/} The Commission was notified of this intent by letters dated June 14, 1984 to the Chairman from the Chancellor of UCLA, and to the Director of NRR from the Director of Research and Occupational Safety at UCLA.

summary disposition motions held in abeyance were made so that none need be vacated.^{9/} The reactor has been shutdown for four months and cannot be operated both because of the mechanical problem which prevents operation and the Board's Order prohibiting introduction of water into the core. Since the intervenor sought the termination of the license for the UCLA reactor, no adverse consequence has occurred to intervenor.

Therefore, the adjudicatory proceeding can be dismissed without preliminary actions. The only matter remaining to be addressed by the Board is the consequence of withdrawal of the application for license renewal prior to license termination.

2. The Effect of Withdrawal of the Application

A significant legal consequence of withdrawal of the application for license renewal is the lapse of the 1971 license since the renewal application prevented its expiration. Yet, the University must retain a valid license to possess and maintain the reactor and special nuclear material, pending completion of the license termination procedure. This can be accomplished by a conditional authorization to withdraw the application for license renewal by the Board. The condition would require application for license termination by the University and compliance with the provisions of 10 CFR § 50.82 before final effect of the order granting withdrawal of the license renewal application. This

^{9/} The Board's summary disposition of the financial qualification contention is now moot and should be vacated. See Perkins and Black Fox, supra.

action by the Board would retain the validity of the 1971 license pursuant to § 2.109 while UCLA develops and implements an approved dismantling plan and obtains an order terminating the license from the Director of NRR. Upon satisfaction of the conditions of withdrawal, the license renewal proceeding would end, concurrently with termination of license.

Staff knows of no other matter related to withdrawal of the renewal application which should be considered by the Board. According to 10 CFR § 50.82, the changes in the facility necessary for dismantling and disposing of the reactor are subject to the Staff's approval in an action separate from this proceeding.^{10/}

Based on the discussion above, the Staff concludes that application of the relevant legal standards to the request for withdrawal of the license renewal application for the UCLA research reactor presently before the Board, requires two orders. The Board should (1) grant the request for withdrawal with the condition that UCLA promptly apply to the Commission for termination of license pursuant to 10 CFR § 50.82 and comply with the procedures necessary to obtain an order terminating the license, and in the interim, to maintain the reactor in a shutdown condition and to pursue measures to suitably dispose of the SNM as soon as reasonably practicable, and (2) vacate the ruling on Contention XVIII

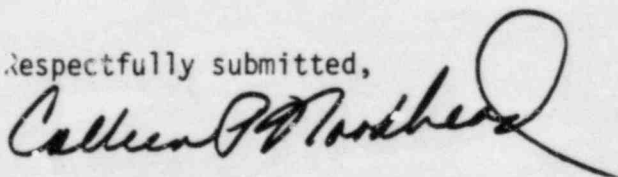
^{10/} Section 189 of the Atomic Energy Act does not provide hearings for voluntary license termination proceedings. 42 U.S.C. § 2239. Additionally, licensing boards possess only such powers as conferred on them by regulation, notice of hearing, or order. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514 (1980).

(financial qualifications) and dismiss the adjudicatory proceeding without prejudice. The Staff believes these are the appropriate actions to be taken by the Board since no matters related to or authorized pursuant to the adjudicatory proceeding on license renewal require redress, no reason exists to dismiss the proceeding with prejudice, and because the conditional grant of the request to withdraw would properly maintain the license for the UCLA reactor according to § 2.109 until terminated by the Director of Nuclear Reactor Regulation.

IV. CONCLUSION

For the reasons explained, the Board should conditionally grant the request for withdrawal of the license renewal application for the UCLA research reactor requiring that UCLA promptly apply for termination of license pursuant to 10 CFR § 50.82 and comply with the procedures therein, to become effective at such time as an order terminating the license issues. The Board should also dismiss the adjudicatory proceeding without prejudice.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of July, 1984

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(UCLA Research Reactor))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE REQUEST BY THE UNIVERSITY OF CALIFORNIA TO WITHDRAW THE APPLICATION FOR RENEWAL OF THE LICENSE FOR THE UCLA RESEARCH REACTOR" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 2nd day of July, 1984:

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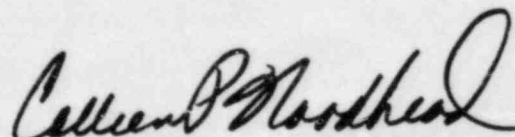
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