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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

! SERVED OCT 31 1995

In the Matter of

GEORGIA INSTITUTE OF
TECHNOLOGY,
Atlanta, Georgia

Georgia Tech Research Reactor

(Renewal of Facility License
No. R-97)

Docket No. 50-160-Ren

ASLBP No. 95-704-01-Ren

October 31, 1995

PARTIAL INITIAL DECISION
(Mootness of Security Contention)

Georgia Institute Of Technology (Applicant) and the NRC Staff each appealed to the Commission this Board's admission (by majority vote) of Contention 5 of Georgians Against Nuclear Energy (GANE) (Intervenor), concerning security of the site during the forthcoming 1996 Olympic Games. LBP-95-6, 41 N.R.C. 281 (April 26, 1995). By its Memorandum and Order dated July 26, 1995, CLI-95-10, 42 NRC 1, the Commission vacated our decision on this contention and remanded it to us for reconsideration in light of newly emerging circumstances.

The newly emerging circumstances arose as a result of the Applicant's advice to the Commission, by documents dated

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June 21, 1995, July 12, 1995 and July 25, 1995, that it would remove the high-enriched (HEU) fuel currently in the reactor prior to the Olympic Games and replace it with low-enriched (LEU) fuel after the Olympic Games are concluded.¹ In its remand, the Commission inquired as to whether the contention is now moot. By Memorandum and Order (Consideration of Mootness of Contention 5), dated August 1, 1995, we directed the parties (and permitted the Staff) to confer on this subject and report back to us as to whether Contention 5 is indeed moot, together with some related inquiries. All three parties responded.

A. Positions of the Parties. GANE claims that its contention encompasses "all of the radioactive materials" at the site.² GANE commends the Applicant for offering to remove both the HEU fuel and a Cesium-137 source but it claims that its contention is not moot "as long as Georgia Tech plans to retain the 250,000 curies of Cobalt-60 on the site." GANE goes on to describe some of the dangers that

¹By Order dated June 16, 1995, the Staff ordered Georgia Tech to convert from HEU fuel to LEU fuel. In response to a Notice of Opportunity for Hearing on that Order, published at 60 Fed. Reg. 32516 (June 22, 1995), GANE has petitioned to intervene in that proceeding to challenge certain procedural aspects of the change, although not the change itself. That proceeding is pending before a Licensing Board with the same members as this Board.

²Georgians 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 (GANE Response), dated August 31, 1995.

the Cobalt-60 may pose to Olympic visitors. GANE recognizes that the Cobalt-60 is under the jurisdiction of the State of Georgia but claims that NRC has authority to override that authority under "special circumstances," such as the occurrence of the Olympic Games.

For their parts, the Applicant and Staff each took the position that Contention 5 is indeed moot, inasmuch as Georgia Tech will remove from the site all the radioactive materials of concern to GANE other than the Cobalt-60 and this Board has no jurisdiction over the Cobalt-60.³ As set forth by the Staff, "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 renewal proceeding."⁴ In addition, both the Applicant and Staff take the position that the security of the Cobalt-60 was not part of the initial contention, which (they claim) was focused solely on the HEU fuel.

The Staff further asserts that the residual materials which GANE generally references (most particularly, the Cobalt-60) are not sufficient to comprise an admissible contention, under the generally applicable contention

³Georgia Institute of Technology's Statement as to Issue of Mootness of Contention 5, dated August 28, 1995 [Applicant 8/28/95 Response]; NRC Staff's Response to Licensing Board's Memorandum and Order of August 1, 1995, dated September 1, 1995 [Staff 9/1/95 Response].

⁴Staff Response, at 5-6.

requirements of 10 C.F.R. §§ 2.714(b)(2) and (d)(2), which require that contentions must fall within the scope of matters appropriate for hearing in a particular proceeding and that they cannot constitute an attack on applicable statutory requirements. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Staff asserts that we should dismiss Contention 5, subject to the Licensee's timely performance of the commitments set forth in its letter of July 25, 1995.⁵

In response to our further inquiry concerning the scope of NRC's authority to override an agreement State,⁶ both the Applicant and Staff opined that this Licensing Board, for varying reasons, has no authority to do so.⁷ The Applicant essentially rested its response on its previously expressed view that the Cobalt-60 is not encompassed within Contention 5. The Applicant additionally provided examples of how the State is exercising control over the Cobalt-60, through ongoing inspections. For its part, the Staff reiterated its view that Cobalt-60 is not within the scope

⁵Id., at 4, 8.

⁶Memorandum and Order (Responses Concerning Mootness), dated September 7, 1995.

⁷Georgia Institute of Technology's Response to Board's Memorandum and Order of September 7, 1995, dated September 18, 1995 [Applicant 9/18/95 Response]; NRC Staff's Response to Licensing Board's Memorandum and Order of September 7, 1995, dated September 22, 1995 [Staff 9/22/95 Response].

of Contention 5 but, additionally, provided a reasoned and thorough discussion of circumstances under which NRC has taken action to override or take back State authority, concluding that no such circumstances exist here.

B. Board Ruling. At the outset, we reject the Applicant's and the Staff's position that Cobalt-60 was not intended to be part of GANE's contention. We construe GANE's reference to "hazardous materials" in its Contention 5 as intended to encompass the on-site Cobalt-60--that material was explicitly referenced in other proposed contentions (1 and 2) and was thoroughly discussed at the first prehearing conference (e.g., Tr. 65-68, 70, 75, 81, 109-112, 116, 126-27, 132, 138). Our opinion on mootness, therefore, is not based on the alleged failure of Contention 5 to include Cobalt-60.

But we agree with the NRC Staff that this Licensing Board has no jurisdiction at this time to consider the security protection of the Cobalt-60 to be provided during the Olympic Games. As set forth by the Staff, the Cobalt-60 is licensed to Georgia Tech by the State of Georgia, under Georgia Radioactive Material License No. GA. 147-1 (SNM), Amendment No. 50 (June 23, 1993).⁸ To the extent that GANE seeks to have us consider the security of the Cobalt-60

⁸Staff September 22, 1995 Response, at 4.

during the Olympic Games, therefore, we must deny that request.

In our view, as set forth by the Staff, the Commission and Agreement States (such as Georgia) do not share "dual or concurrent jurisdiction" over such materials. Full authority rests with the State. The Commission, however, would have authority to override the transfer of authority to Georgia in extraordinary circumstances. Under § 274.j of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(j), the Commission is empowered to suspend or terminate a State's regulatory authority over materials if the Commission were to find that such action is required to protect the public health and safety.

The Olympic Games appear to present a circumstance where the Commission might choose to exercise such authority were Georgia providing inadequate protection. We have no indication, however, that such is the case here, although GANE claims that the State has been unresponsive to its concerns.⁹ Although we express no conclusion on this question, the State inspection reports that Georgia Tech provided us with its September 18, 1995 Response could be deemed to suggest that Georgia is taking its regulatory responsibilities seriously. In any event, we must leave it to the Commission to take any additional action that it

⁹GANE Response, at 6.

considers appropriate. As the Staff has observed, a full panoply of cooperative measures, including discussions, are available to the Commission to enhance the protection to the public from radioactive materials provided by a State.¹⁰

Mootness, in our view, is not necessarily dependent upon a party's view that its claims have been satisfied but, rather, occurs when a justiciable controversy no longer exists. See, generally, Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993). That is the case here, notwithstanding GANE's view that the Cobalt-60 also should be removed from the site during the Olympic Games--relief which we are not authorized to grant.

We agree with the Staff, however, that timely performance by the Applicant of its commitments to remove fuel and other materials from the site (including the Cesium-137 source but excluding Cobalt-60) prior to the Olympic Games is necessary to assure mootness of GANE's claims. As a condition of our resolution of Contention 5, and subject to enforcement by the Staff, we are conditioning any license renewal that may be warranted upon the successful completion of commitments made by Georgia Tech to

¹⁰Staff September 22, 1995 Response, at 11-12. The Staff acknowledges the broad authority of Licensing Boards and concludes that the Commission could appoint Boards to oversee State agreements but asserts that the Commission has instead delegated such authority to the Office of State Programs. Id., at 15-16. We see no reason to disagree.

remove the fuel and other radioactive materials (as described above) from the site prior to the Olympic Games and not bring the new LEU fuel and other removed radioactive materials back until the Games have been completed.

In the meantime, we call upon the Staff to provide assurance that the Applicant's commitments are carried out in a timely fashion. We are separating our decision on the security contention from that on the remainder of the proceeding and, to assure applicability prior to the Olympic Games, we find good cause for making this condition immediately effective.

C. Order. Based on the entire record, and for the reasons stated, it is, this 31st day of October, 1995

ORDERED:

1. Contention 5, concerning security of the site during the 1996 Olympic Games, is resolved, subject to the condition outlined above, requiring the removal of fuel and other radioactive materials (including a Cesium-137 source but excluding Cobalt-60) from the site prior to the 1996 Olympic Games and barring return of such materials until after completion of the Olympic Games.

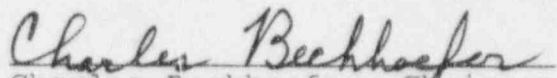
2. The security provided for the only residual radioactive material as to which GANE seeks further action (Cobalt-60) is not within our authority to resolve and hence cannot comprise an acceptable contention under 10 C.F.R. §§ 2.714(b) and (d).

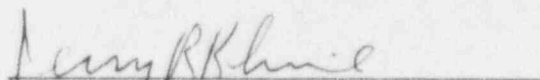
3. A copy of this Partial Initial Decision will be transmitted to the Commission, for its information or further action, as appropriate.

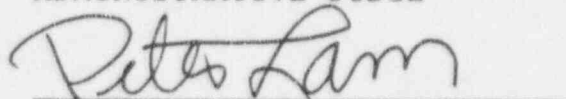
4. For good cause shown, and as set forth in 10 C.F.R. § 2.764, this Partial Initial Decision shall be immediately effective.

5. This Partial Initial Decision is subject to review by the Commission pursuant to 10 C.F.R. § 2.786. To seek review, any party may file a petition for review within fifteen (15) days after service of this Decision. Such petition must comply with the requirements spelled out in 10 C.F.R. § 2.786.

The Atomic Safety and
Licensing Board


Charles Eechhoefer, Chairman
ADMINISTRATIVE JUDGE


Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE


Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 1995

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

GEORGIA INSTITUTE OF TECHNOLOGY
ATLANTA, GEORGIA

Docket No.(s) 50-160-REN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PID (LBP-95-19) DTD 10/31 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)50-160-REN
LB PID (LBP-95-19) DTD 10/31

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Dated at Rockville, Md. this
31 day of October 1995


Office of the Secretary of the Commission