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September 7, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

('UCLA Research Reactor)

Docket No. 50-142 OL

(Proposed Renewal of Facility License)

RESPONSE TO BOARD ORDER OF AUGUST 6

(Part A)

I. Introduction

By Memorandum and Order of August 6, 1984, the Board provided the parties the opportunity to respond to each others' previous responses to UCLA's motion for withdrawal of its renewal application and the various 10 CFR 2.107 conditions proposed thereto. The Board also noted that the Staff had asserted in its July 2 initial response to the UCLA motion that Section 189 of the Atomic Energy Act does not provide for hearings in voluntary license termination proceedings; however the Board indicated that this assertion appeared to be contradicted by the June 12, 1984, notice of proposed action and offer of hearing to interested persons with respect to the application of the Tuskegee Institute to dispose of the component parts of its research reactor and to terminate its license. This matter was to be addressed as well. CBG's response follows (Part B, dealing with protective order matters, is being filed separately by an attorney subject to the.

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II. Background

On June 14, 1984, UCLA moved the Atomic Safety and Licensing Board to accept withdrawal of UCLA's application for license renewal upon imposition of two conditions, as per 10 CFR 2.107: (1) that the reactor never operate again, and (2) that it be dismantled, decontaminated, and disposed of pursuant to a Commission-approved plan. Simultaneously, UCLA requested suspension of the then-forthcoming security hearings, which the Board granted, ordering as well (after revising previous conditions) that the reactor fuel be removed from the site "as soon as reasonably practicable" and that the the reactor be made functionally unable to operate. UCLA announced it had permanently disabled the reactor, and committed to "expeditiously" comply with the Board Order regarding prompt off-shipment of the highly enriched uranium.[1/]

Staff and CBG both responded to the motion for application withdrawal with certain proposed modifications of the conditions put forward by UCLA; the parties were then provided an opportunity to respond to each others' proposed conditions. The Board has now provided an opportunity to respond to the responses to the responses to UCLA's motion.

Objection to Portion of August 6 Order

UCLA is the moving party with regards application withdrawal and proposed conditions. Those conditions are solely for the protection of the Intervenor, by applicable law:

> When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.
>
> LeComte v. Mr. Chip (528 F. 2d 601, 604, 5th Cir. 1976)

1/ See Shaefer letter of June 25; Wegst letter of June 22.

The Perkins Board, citing LeCompte, makes clear that a dismissal that is without prejudice in any regard must have conditions attached by the Board "so as to protect intervenors and the public from legal harm," and if conditions on a withdrawal without prejudice, in part or in total, cannot avoid legal harm, dismissal with prejudice must be ordered. Duke Power Company (perkins Nuclear Station, Units 1,2, and 3), LBP-82-81, 16 NRC 1128, 1134-5 (1982). Perkins similarly makes clear that the Intervenor in an NRC proceeding is in the position of the defendant in a Federal case where the plaintiff requests voluntary dismissal, and that like that situation, conditions are for the protection of the Intervenor.

Therefore, it seems quite inappropriate for the moving party to receive the last word--i.e., to be permitted to raise additional, new arguments in support of, or in revision to, its pending motion, particularly when it is the intervenor the conditions are to protect. Therefore, CBG will request, should new or supplementary arguments be submitted by UCLA, the moving party, or revisions made to the original motion, the right of last response.

The Proposed Conditions in Brief

UCLA, as discussed above, proposes the conditions be: (1) the reactor not operate again, and (2) it be dismantled and disposed of according to a Commission-approved plan. Two other conditions have already been established: prompt off-shipment of HEU, and permanent disabling of the reactor.

Staff proposes deferral of application withdrawal until completion of decommissioning, as well as the requirements to maintain the reactor in a non-operable condition and removal of the SNM as soon as reasonably practicable. (Staff July 2 response, at 9.)

CBG proposes that the conditions be made explicit, that dates certain for initiation and completion of off-shipment and decommissioning be included, and that certain document preservation and reporting requirements consonant with the case law for for withdrawals be included. Certain clean-up matters related to the protective orders are also identified.

The Case Law in Brief

As discussed above, voluntary withdrawal is generally permitted, without prejudice if appropriate conditions are attached for the protection of the Intervenor. Prejudice is defined in NRC practice as being foreclosed from applying for a different reactor at the same site. Fulton (ALAB-657, 14 NRC 967, 973). This is essentially the standard proposed in UCLA's June 14 Motion: permanent disabling and decommissioning of this reactor, but not foreclosing the right to apply for a different reactor at the same site in the future.

Because many of the issues in contest in this proceeding (site suitability, managerial controls and Applicant competence issues, past record of regulatory non-compliance, and so on) could thus be re-litigated were UCLA to exercise the without prejudice right it requests as to a different reactor at the UCLA site, the case law requires conditions to protect the Intervenor if that occurs. One such condition often imposed is document and discovery preservation. Pacific Gas and Electric Company, Stanislaus Nuclear Project, Unit 1, CLI-82-5, 15 NRC 404 (1982); LBP-83-2, 17 NRC 45 (1983). Continued service of all material related to the facility in question is required the final disposition of the application is legally effective. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183. This service must continue until the period for appeal of any final disposition of the

application has lapsed. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1,2,3, and 4) ALAB-184, 7 AEC 229, 237 (1974). If conditions are attached to the withdrawal that must be accomplished after the Withdrawal Order issues, Intervenors are provided right to reporting and inspection to assure compliance with the conditions until the conditions are finally accomplished. Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LB-82-29, 15 NRC 762 (1982); LBP-82-37, 15 NRC 1139 (1982). Thus, until the withdrawal is legally effective, and through any appeal of the withdrawal matters, continued service on all matters related to the facility in question is required; if conditions are attached that are to be completed thereafter, continued service, reporting, and inspection rights prevail.

In all cases where site restoration was necessary--whether the environmental effects to be corrected occurred by virtue of the presiding Board or not--site restoration conditions were to be added by the Board (not Staff) presiding over the withdrawal request pursuant to the Board's 10 CFR 2.107 authority and responsibility to attach conditions to withdrawal requests. Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979); Toledo Edison Company, et al (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667 (1980); LBP-81-33, 14 NRC 586 (1981); Bailly supra; Public Service Company of Oklahoma, et al (Black Fox Station, Units 1 and 2), LBP-83-10. Note that Bailly and Sheffield were both renewals/extensions where the environmental effects to be corrected had occurred previously and had not been authorized by the presiding Board, which had yet to rule on the renewal requests, but which had both the power and the duty to impose site restoration conditions, pursuant to 2.107.

In no case, be it a renewal or otherwise, has the effective date of application withdrawal been deferred until completion of site restoration or any other conditions. In each case, withdrawal was immediately effective with conditions that were legally bi nding attached thereto. This issue has been squarely addressed in the case law, where the concern that the facility needed to have an active license or permit and thus a pending application was rejected, citing sufficient authority through 10 CFR 2.107 conditions to ensure compliance with all applicable requirements as the site is restored. Bailly, supra, citing the procedure sanctioned by the Appeal Board in Davis-Besse, also supra.

In no case were site restoration matters not included as withdrawal conditions, but left instead to the Staff or to license termination procedures applicable for facilities with an active license and no pending renewal proceeding. In each case, site restoration plans were approved by the Board after input from the parties, and included as 2.107 conditions.

Initiation and completion dates for conditions are routinely imposed in the withdrawal conditions. See Bailly and Black Fox. Bailly explicitly addressed the fact that site restoration conditions without initiation and completion dates could lead to indefinite postponement of compliance with the conditions, which would be, the Board there ruled, unacceptable, and thus imposed dates.

In all withdrawal cases, all existing permits and licenses are immediately terminated, whether granted in the proceeding at hand or whether extant through timely application rule 2.109. Rochester Gas and Electric Corporation, et al (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980); Davis-Besse; Bailly; Black Fox. Sterling was quite explicit: "Surely, the applicants cannot improve their position--i.e., insure the retention of the permit--by having us terminate the proceeding...." (emphasis added). Davis-Besse was likewise explicit, spelling out in the Withdrawal Order that the permits in effect due to 10 CFR 2.109 timely

application rule were, automatically by operation of law, terminated (by 2.109 expiration, not any separate termination procedure) and could not be revived. This is very important in the instant proceeding.

In no case has a Board deferred the effective date of withdrawal. In fact, Board's are directed not to retain on their dockets applications that have become academic, i.e., that the applicants have abandoned. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980).

Lastly, dismissal without prejudice can be made contingent upon payment of attorneys' fees, costs, and other disbursements of the Intervenor. Perkins, supra. Such conditions for withdrawal without prejudice are not awards of costs for winning, generally prohibited by the American Rule, nor Intervenor funding by the NRC, but rather an established exception of conditioning withdrawal without prejudice upon payment of costs. id. The general rule is that voluntary withdrawal is permitted, upon payment of costs. Cone v. West Virginia Pulp & Paper Co. 67 S. Ct. 752; Jones v. Securities and Exchange Commission, 56 S. Ct. 654. Most voluntary dismissal cases in Federal practice have involved conditions that require payment of costs and attorney's fees. LeCompte, supra, at 603, and citations therein. The NRC has established certain exceptions to the granting of fees and costs as withdrawal conditions, following the Federal practice therein, but none of these apply in the UCLA case. See discussion in CBG previous pleading, and the standard (which CBG does fit) for granting of such a condition set by the Appeal Board in North Coast and in Perkins).

In short, the case law is consistent: withdrawals are effective immediately, with conditions of site redress to be carried out thereafter. Dates certain are established, continued document preservation and reporting requirements are imposed, extant licenses and permits immediately terminated by the Board. Conditions are included as legally binding commitments, enforceable by the NRC Commission and the courts (see Bailly.) This is all

true whether the proceeding is an initial application, a renewal or extension request. Conditions to protect the Intervenor are to be imposed; if such conditions cannot make the Intervenor whole or remedy any loss of substantive right, the withdrawal is not to be granted, at least not without prejudice.

III. The Staff Response

Staff Confuses 10 CFR 50.82 License Termination Procedures for Facilities With Active License and No Pending Renewal Proceeding with 10 CFR 2.107 and 2.109 Renewal Application Withdrawal Procedures

If there were no Board, and no renewal proceeding on the docket, a decision to decommission a reactor would normally be conducted under 10 CFR 50.82 procedures. However, when there is a Board established to rule on a renewal application, and the expired license is in effect only by virtue of that renewal application pursuant to 10 CFR 2.109, termination occurs automatically, by operation of law, upon acceptance of the withdrawal by the Board, and therefore site restoration conditions must be approved and imposed by the Board as 10 CFR 2.107 conditions. The Bailly case--an extension proceeding whereby the existing permit was in effect solely by virtue of the pending application for which withdrawal was requested--is explicit on this point.

10 CFR 50.82 simply does not apply. It is for the Board to determine decommissioning conditions to be attached to the withdrawal Order, for that Order will, by operation of law pursuant to 10 CFR 2.109, terminate the license. 10 CFR 50.82 has nothing to do with 10 CFR 2.107 withdrawal requests where there is an active Board.

The Staff's argument that withdrawal conditions are outside the Board's authority because they were not included in the notice of hearing issued when the request for renewal was filed by UCLA is particularly weak.

The Board's authority is established by Part 2 of the NRC Regulations, which give to the presiding officer the authority to attach such conditions as are necessary for accepting withdrawal of any application. It is clear that a Board empowered to act on an application is also empowered to act on a request to withdraw that application, and to set such conditions are are necessary. 10 CFR 2.107. Those conditions, as discussed above, have consistently been site restoration requirements; never have site restoration matters in an application withdrawal been restricted to a separate license termination proceeding over which the Board did not have jurisdiction.

Staff Errs in Asserting Cases Where Site Restoration Conditions Were Matters of Board Authority Were Only Where Board's Had Taken the Actions for Which Redress Was Needed

First of all, Staff provides no authority whatsoever for its assertion that Boards do not have authority to impose site redress conditions if the environmental effects were not undertaken pursuant to their decisions. Furthermore, Staff cannot cite a single case of a renewal or extension where site redress was not permitted as a condition on this base.

More importantly, Staff omits two renewal/extension cases where site restoration matters were clearly within the jurisdiction of the Boards as they considered 2.107 withdrawal conditions. Bailly and Sheffield both were situation where the presiding Boards had not authorized any permit or environmental effect; both were permit extension or renewal proceedings; and in both cases site restoration was within the Board's authority, as was license termination because of 10 CFR 2.109.

Staff thus has no authority whatsoever for its assertion that license termination and site restoration matters are outside the Board's 2.107 responsibilities and authority; all the case law goes against Staff, in fact.

Staff Errs in Its Discussion of Document Preservation and Continued Service

Staff tries to make a distinction with the Appeal Board requirement in Vermont Yankee that service continue through the pendency of judicial review of any licensing board rulings by claiming no initial decision has issued. The Board's final Order disposing of the withdrawal request will be appealable by CBG if conditions sufficient to protect CBG's interests are not included (although generally not appealable by the Applicant, who can take or leave the Withdrawal Order by declining to accept withdrawal on those conditions.). Thus, until the Board's Order is finally effective, and the period of judicial review thereof has lapsed, Vermont Yankee requires continued service. (Staff leaves out mention of Shearon Harris, which requires continued service of all material related to the facility in question). Furthermore, Bailly requires continued service after withdrawal until the conditions are finally met; Stanislaus requires document preservation after withdrawal if the withdrawal is to be in any fashion without prejudice to another application.

In summary, Staff attempts to usurp Board authority to establish site redress conditions pursuant to 10 CFR 2.107, and confuses the overriding Board 2.107 authority and responsibility with the totally inapplicable 10 CFR 50.82, which applies only when there is an existing license and no renewal proceeding pending before a Board which the applicant wishes to withdraw. 10 CFR 2.107 and 2.109 are the operative regulations when an applicant wishes to withdraw a renewal application, not 50.82.

IV. THE UCLA RESPONSE

UCLA Likewise Confuses 50.82 Procedures for Situations Where There is No Pending Renewal Proceeding with 10 CFR 2.107 and 2.109 Procedures for Condition Withdrawals of Renewal Applications

This matter has been addressed above. 10 CFR 50.82 does not apply in the instant situation. Where no Board exists, and no renewal application is thus pending before the Board, 50.82 procedures provide a means of terminating existing licenses upon completion of dismantlement, decontamination and disposal. Where a Board exists, and license termination will be automatic by operation of law pursuant to 2.109, site redress conditions are to be approved by the Board and established as a 2.107 withdrawal condition. The dismantlement, decontamination, and disposal plan must go to the Board for approval, after input from the parties, and be imposed as a binding condition, enforceable by the NRC Commission and the courts.

UCLA Claims CBG Has No Right to Participate in the Termination Procedure-- The Termination Conditions are for the Protection of CBG and the Public, Are Totally a Part of the Board's Jurisdiction to Determine Withdrawal Conditions, and CBG is Fully a Party to That Application Withdrawal Consideration

What is pending is a motion before this Board to accept withdrawal of UCLA's renewal application, and thus termination of its license via the timely application rule, as well as UCLA's proposal for 2.107 withdrawal conditions, including decommissioning according to a Commission-approved plan. The Board represents the Commission when it comes to site redress conditions for renewal application withdrawal; license termination is automatic, via 10 CFR 2.109, as part of this withdrawal consideration. We can well understand UCLA's desire to have no scrutiny of its dismantlement plan by either CBG or this Board, and no binding commitments as to completion, but that is contrary to law and the requirements for acceptance of withdrawal of such applications.

UCLA Misrepresents Bailly--Site Restoration Conditions Were Not Imposed Only Where Work Had Been Conducted Under Limited Work Authorizations (LWA) Granted in the Proceeding from Which Withdrawal is Requested

Unable to find a single authority to support the assertion that site restoration conditions cannot be imposed by the Board in this case, UCLA attempts to draw a non-existsnt distinction between the UCLA case and those where site redress was required. UCLA claims they all involved situations where the work to be redressed had been conducted under LWAs given by the Boards in question. UCLA goes so far as to claim that was the case in Bailly, which of course it was not. Bailly was solely a permit extension proceeding--i.e. a renewal of the permit. No LWA had been granted by that Board; the Board had not reached the one issue that was in its jurisdiction, whether to extend the expired permit--precisely the situation in this case, where the original license had been granted separately, and this Board was to determine whether to extend the expired license. In Bailly, as in UCLA, site redress as a 2.107 condition of withdrawal was a Board responsility, as part of the withdrawal action.

The same situation pertains in Shefield. That was a license renewal proceeding; no Board action had occurred, and before the Board could rule on the renewal application, the applicant requested to withdraw the application. Site redress conditions were a matter of Board jurisdiction, with the parties able to litigate those matters in the withdrawal proceeding. There, as in Bailly and UCLA, the license would terminate upon withdrawal, so site restoration/stabilization conditions were to be resolved by the Board. (Note that the Commission inclusion of the show cause issue of whether Staff had appropriately restrained the licensee from walking off the site prior to the Board accepting the withdrawal does not changes matters at all; the decisions make clear that the Board had site redress jurisdiction independently.)

UCLA Says It is Not Opposed to Condition #1, That the Reactor Remain Out of Operation

This is as it should be, as UCLA proposed this condition. UCLA may feel the condition it has proposed is unnecessary because it intends to comply with it anyway; CBG's interests will be damaged if the intention is not legally binding, which will cause UCLA no inconvenience. Since they do not oppose it, and since they proposed it, it should be included explicitly in the withdrawal Order.

UCLA's Claim That Off-Shipment of the Fuel is Outside This Proceeding Is At Odds with the Boards June 22 Order

There already is a condition that the fuel be off-shipped as soon as reasonably practicable. Thus any condition that makes that condition more explicit cannot be outside this proceeding.

UCLA Has the Burden of Demonstrating Why It Cannot Comply with Off-shipment and Decommissioning Dates and to Propose Alternative Dates

No reasons whatsoever have been given to demonstrate why off-shipment cannot be accomplished by January 1. That is six months from when the Board ordered it be removed "as soon as reasonably practicable." If there is some real reason--not just stubbornness or some attachment to weapons-grade materials--a factual showing is required, with affidavits and supporting material and an opportunity to challenge them. CBG has no interest in unreasonable dates for completion being required, and if UCLA can put forward dates for completion it can demonstrate are reasonable, there will be no problem. But that burden is on UCLA, and dates certain are absolutely essential. Without dates certain, the conditions are meaningless and indefinite renewal of portions of License R-71 would have been impermissibly granted by the act of withdrawal, in violation of Sterling, the AEA requirements for hearing and findings on applications

for renewals. UCLA stubbornly refuses to commit to any date whatsoever; it is its burden to put forward a reasonable date if it has good cause for not being able to complete that obligation under the June 22 Order by next year. BUT WITHOUT COMPLETION DATES, THE CONDITION IS LARGELY MEANINGLESS. BAILLY supports the necessity of completion dates on such conditions.

The argument that it would be imprudent to include a date certain for security reasons is totally fraudulent--one isn't asking that the date of shipment be included in the Order, but rather that some reasonable deadline be included by which the fuel would have long since been gone, and the SSNM possession license lapse and that portion of the application be withdrawn for purposes of 2.109 final determination. Figure out when the stuff will be out, consistent with "as soon as reasonably practicable", add a margin of time to it, so that there is an expiration time on the SSNM license and a final determination on the SSNM request in License R-71 renewal application.

It isn't that UCLA can't commit to removing the fuel by next year--it is that it won't. Set a reasonable completion date, or CBG is faced with indefinite license authority for weapons-grade material with totally unresolved security issues.

UCLA Claims It Cannot Submit Its Decommissioning Plan by January 1--But Has Already Submitted It

On July 26, UCLA submitted its plans for dismantlement, decontamination and disposal. There are some problems with it, and these should be addressed by the Board before accepting withdrawal and determining that UCLA's condition #2, proper decommissioning application approved by the Commission, is appropriate and should be imposed as a binding condition. But the plan is there in its essentials already.

The one thing that is essential is that a completion date for removal of the metallic components (Phase 2 of the plan). UCLA should be required to make a factual showing of what that completion date should be. Otherwise, there is no legally binding commitment whatsoever, if there is no requirement that it be completed by any set time. Once again, one can be quite reasonable about what the specific completion date should be, upon a factual showing and responses thereto (this is all something that reasonable parties ought to be able to work out themselves), but without a Bailly-type completion date for at least Phases 1 & 2 of the dismantlement plan, UCLA's proposed condition #2 (submission of a decommissioning plan and compliance with its requirements) is meaningless. Please note also that the plan as submitted does not call for completion of "Phase 4" until many years in the future, with the option retained of not removing the contamination and never making the facility available for unrestricted use. For that reason, license possession must end with completion of Phase 2, if not sooner; once the metallic components have been removed and the facility dismantled, it no longer needs a reactor license and can get by with a Part 40 by-product license.

Mr. Cormier claims that the "imposition of conditions related to University's decommissioning plans is unreasonable and unwarranted." But Mr. Cormier himself proposed that the withdrawal be conditioned on submission of an acceptable plan and compliance with its requirements. The plan must be approved by the Board, as modified as necessary, and be a binding condition with binding dates for compliance.

UCLA Creates a Non-Existent Distinction With Stanislaus Regarding Document Preservation

Stanislaus requires, as a condition of withdrawal without prejudice, preservation of discovery and documents. The premise is, long accepted in dealing with voluntary withdrawals, that if the withdrawal is to be in any fashion without prejudice to an additional litigation, the opposing party should not suffer loss of documents because of the withdrawal.

UCLA rightly indicates that Stanislaus was a withdrawal without prejudice. But UCLA wrongly implies that the UCLA withdrawal is with prejudice. UCLA's motion for withdrawal clearly indicates it is requesting withdrawal without prejudice. It is true that UCLA says it has abandoned its plans for this Argonaut--and it is for this reason that that aspect of withdrawal that is with prejudice must be explicitly delineated in the Withdrawal Order. But UCLA requests that it retain the right to apply at a future time for another reactor at the UCLA site, and since such a large fraction of the contentions in this case, for which discovery was very extensive, deal with past compliance history, managerial competence issues, Applicant qualification and site adequacy issues which would arise if UCLA did exercise its requested right to apply for a non-Argonaut at UCLA, then all that discovery materials must be retained. UCLA cannot have it both ways--either the withdrawal is with prejudice to any application at the UCLA site, in which case Stanislaus would indeed not apply, or document preservation must be ordered because Stanislaus does apply, a portion of the case being without prejudice. If documents are not preserved, and the application is in some measure withdrawn without prejudice, the question of costs as a condition becomes much stronger, as it does if any of Staff's proposal of deferral and license possession is granted.

UCLA's Rejecti on of the Bailly Requirement that Conditions be Legally Binding is Unexplained and Legally Indefensible

Without the conditions being legally binding, CBG suffers cognizable legal harm from withdrawal. Whereas UCLA must obey NRC regulations, the conditions contemplated for the Board's withdrawal order are specific matters not touched upon in the regulations. If they are to be imposed, the conditions must be legally binding requirements, or they have no force.

V. AEA 189(a)

Section 189a of the Atomic Energy Act Requires Hearing if Requested on These Decommissioning and Termination Matters

First of all, as discussed above, application withdrawal and site redress matters as conditions thereto are part of the application proceeding currently at bar, to which CBG is already a party. There is no separate proceeding--UCLA's license is in force because of the renewal application, it now wishes to withdraw that application, which would terminate the license by operation of law, and it is up to this Board to determine what site redress and other conditions are necessary if such withdrawal is to beaccepted.

Secondly, even were there such a thing as a separate proceeding for these dismantlement issues--and there most emphatically is not--the Atomic Energy Act still requires opportunity for hearing. Section 189a reads as follows in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control...the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

A latter part of Section 189a states that a hearing shall be mandatory, whether there is a request for one or not, in any application for a construction permit. Staff may have merely meant by its statement that

no hearing is required absent a request, as is the case in a CP proceeding, but a hearing is clearly required for any alteration of a license, including revocation, amendment, and transfer of control. Dismantlement, decontamination and disposal clearly fits within these categories.

Dismantlement, Decontamination and Disposal Require License Amendments and Therefore Trigger Right to Hearing

In order to change the facility as described in the technical specifications, and to undertake dismantling and related decommissioning actions not authorized by the license, license amendments are required. UCLA recognizes this, as it has already submitted two requests for license amendments to begin the decommissioning process. More will follow as the process goes along. The current proposed amendments to the technical specifications, identifying certain preliminary decommissioning steps, are, like all such amendments, subject to right to hearing and party status as indicated in Section 189.

(The issue of whether hearing must occur before or can occur after grant of such amendments--i.e., whether the Sholly amendments permitting no significant hazards considerations in the timing of hearings--is tangential. First of all, even were the Commission authorized under the Sholly amendment to employ no significant hazards considerations in research reactor amendments, there would still have to be a hearing. All Sholly amendments did was affect whether the amendments could go into effect before the hearing was completed. Secondly, in promulgating the Sholly amendments, the Congress required the NRC to come up with standards for no significant hazards determinations within a set period. The Commission did for power reactors, but put off coming up with such standards for research reactors. Therefore, the Sholly amendments do not apply to research reactors, and the Sholly decision does, requiring a hearing whether there is a significant hazard

consideration or not. Lastly, dismantlement of the facility, its decontamination and disposal clearly have significant hazards considerations anyway; importantly, UCLA has not applied for sigrificant hazards consideration for any of the preliminary decommissioning amendments it has already proposed. (See 48 FR 14864 for Commission decision not to bring research reactors into the Shollly amendment no significant hazards consideration option.)

Transferring control of the HEU to DOE, which UCLA claims is part of its decommissioning plan, is clearly "application to transfer control" as included in 189a hearing opportunity rights, as is disposal of the contaminated component parts by transfer to an authorized recipient. These too are within 189a. Additionally, as discussed below, a construction permit is required for the dismantlement, and CPs are included within 189a.

Material Alteration of a Licensed Facility Requires Issuance of a Construction Permit--10 CFR 50.92(a)

UCLA's current license does not authorize it to remove component parts or disable safety systems, except for certain testing modes. To do so requires amendmen of its technical specifications, extensive preliminary amendments are already proposed.

UCLA's decommissioning actions involve the material alteration of the licensed facility. 10 CFR 50.92(a) requires, in addition to license amendments, a construction permit for such material alterations. 50.92(b) says further, "The Commission will be particularly sensitive to a license amendment request that involves irreversible consequences..." Dr. Wegsts' proposed amendments specifically indicate that some of the changes identified are irreversible.

Even Were One to Accept for the Sake of Argument that 50.82 Decommissioning and Licensing Termination Applications do Not Have a Requirement for Hearing Upon Request--Which is Very Much in Error--the Board Still Has Authority to Modify any Staff Order Issued Thereon Pursuant to 10 CFR2.717(b)

10 CFR 2.717(b) gives the Board the authority to modify any Order issued by Staff related to the facility in question. This has been interpreted to include Orders on other matters than that directly included in the notice of hearing, so long as there is a cognizable relationship (i.e., a Board has the authority to alter an Order by Staff approving a request for a Part 70 materials license even if the Board were only convened to rule on a separate Part 50 license. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Statiopn) LBP-29-24, 10 NRC 226, 228 (1979)

Thus even were one to accept the wildly erroneous argument that this Board pursuant to 10 CFR 2.107 and 2.109 does not have the authority to deal with site redress conditions of withdrawal and license termination, it still has the authority to modify any Order the Staff might issue on those matters pursuant to 2.717(b) and the Zimmer case.

Even Were On to Accept for the Sake of Argument that 50.82 Applies--and it doesn't--50.82 itself Mandates Requirement for Hearing

10 CFR 50.82(b) that notice to interested persons be provided regarding the proposed dismantling actions. Clearly the Commission did not intend its requirement to mean that no action on the decommissioning request can be taken prior to notice to interested persons, but denying those interested persons right to do anything once they have been given notice. Notice has always been notice of right to hearing and intervention.

That the notice requirement is a requirement of notice of right to hearing is clear from the past notices that have been routinely given of 50.82 applications. The Board correctly noted the contradiction in the Tuskegee case between Commission action there and Staff position here that no hearing is permissible. But a review of the Federal Register

indicates that notice of right to hearing and intervention in proposed 50.82 license termination and decommissioningcases is NRC practice, and that notice as used in 50.82 is notice of right to hearing:

* North Carolina State University, 46 FR 20338-9; 46 FR 31394-5; 48 FR 28372-3
* Stanford University, 43 FR 3634; 48 FR 30227-8
* California Polytechnic State University, 46 FR 33148, 46 FR 50632
* Babcock & Wilcox, 46 FR 53821-2
* Oregon State University, 43 FR 52305, 44 FR 16508-9, 46 FR 57208

In each case, plus Tuskegee, notice as required by 50.82 was detailed notice of right to request hearing and to intervene.

It is clear that 50.82 itself provides right to hearing and to intervention.

Even were one to accept the argument that this is all discretionary--and there is no basis whatsoever for that, given the AEA and 50.82 itself and 2.105 and 50.92--it is clear that the Commission would be guilty of abusing its discretion by arbitrary and capricious action were it to offer opportunity for hearing in the above six research reactor decommissionings, where it was not aware of controversy or public interest, and deny it in the UCLA case. In particular, if the Commission offered a hearing in the Tuskegee case, where the reactor had never operated and therefore there was no contamination whatsoever to deal with, no fission products or activation products to decontaminate and dispose of, it would be arbitrary and capricious to the extreme to deny the same right in a case of a facility that had operated for 24 years.

V. CONCLUSION

CBG respectfully requests the Board carefully consider the matters identified in this pleading and in the previous two dealing with UCLA's request to withdraw its application upon certain conditions.

The Board should be aware, at the same time, that CBG has undertaken to resolve amicably with Staff and UCLA remaining disputes so as to remove the potential for extending this already lengthy litigation. All parties agree that the application be withdrawn, facility decommissioned and HEU removed off-site, and license terminated. Some of the proposals for doing that have ambiguities that have created difficulties. Staff has clarified for CBG its intention with regards some of those ambiguities in its proposal, which may go a long way to resolving the principal remaining stumbling blocks to final resolution. CBG will be reporting to the Board shortly on progress in this regard.

In the meantime, CBG respectfully requests, should amicable resolution not turn out possible, to find the law and the facts as proposed by CBG so that explicit, binding conditions are established for the withdrawal that adequately protect CBG and the public.

Respectfully submitted,

Daniel Hirsch
President
Committee to Bridge the Gap

dated this 7th day of September, 1984,
at Ben Lomond, California

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

I hereby declare that copies of the attached CBG Response to Board Order of August 6 in the UCLA proceeding have been served on the following by deposit in the U.S. mail, first class, postage prepaid, addressed as indicated, 9/7/84:

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