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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 *DL*
(Proposed Renewal of Facility
License Number R-71)

September 7, 1984

UNIVERSITY'S REPLY TO CBG'S AUGUST 1, 1984 RESPONSE
CONCERNING UNIVERSITY'S REQUEST TO WITHDRAW THE APPLICATION

I. INTRODUCTION

On June 14, 1984, University submitted a request to withdraw its application for renewal of the license for the UCLA research reactor. Responses to University's request were filed by the NRC Staff and CBG on July 2 and 3, 1984, respectively. In its July 6, 1984 Order the Board indicated that University and Staff could reply to CBG's response. Accordingly, University and Staff submitted replies to CBG's response on July 20 and 27, 1984, respectively. On August 1, 1984, CBG submitted a further response which purports to address the conditions of withdrawal proposed by Staff in its July 2, 1984 response. In its Order of August 6, 1984, the Board indicated that the parties could respond to each other's reply by September 7, 1984. University hereby submits a reply to CBG's further response of August 1, 1984.

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II. BACKGROUND

University's June 14, 1984 request to withdraw the license renewal application¹ was based on its decision to voluntarily relinquish the license for the UCLA reactor. University proposed that the Board approve the request, which was made pursuant to 10 C.F.R. §2.107, on condition that the UCLA reactor remain out of operation and that application be made under 10 C.F.R. §50.82 to decommission the reactor. On June 27, 1984, UCLA informed the Commission² that the UCLA reactor had been rendered permanently inoperable and requested that its operating license be amended to a "possession-only" license. In related actions, on July 25, 1984, UCLA requested³ amendments to its license to reflect the fact that all unirradiated fuel had been removed from the site and to delete certain "Tech-Spec" requirements not applicable to a reactor being dismantled. Also, on July 26, 1984, UCLA submitted its application to terminate its reactor license in accordance with 10 C.F.R. §50.82.⁴ The application outlined UCLA's decommissioning plans.

On July 2, 1984, Staff responded⁵ in support of the

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- 1 University's Request to Withdraw Application ("Withdrawal Request")
 - 2 Letter, W. Wegst to H. Denton, dated June 22, 1984
 - 3 Letter, W. Wegst to H. Denton, dated July 25, 1984
 - 4 Letter, W. Wegst to H. Denton, dated July 26, 1984
 - 5 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 ("Staff's Response")

withdrawal request and recommended that the Board grant the request on condition that the University promptly apply for termination of the license pursuant to 10 C.F.R. §50.82 and comply with the procedures therein required for obtaining an order from the Director of NRR terminating the license. Staff pointed out that the University must retain a valid ("possession-only") license pending completion of the license termination procedure. Accordingly, Staff indicated that the Board conditionally grant the request for withdrawal of the license renewal application, with the withdrawal becoming effective at the time of the termination order. Staff also indicated that the Board should dismiss the adjudicatory proceeding without prejudice. CBG also responded⁶ in support of the request, but urged the Board to impose certain conditions in accepting the withdrawal. CBG proposed that the Board order that UCLA ship its special nuclear material offsite by January 1, 1985; that UCLA submit a plan for dismantlement of the UCLA reactor by January 1, 1985; that UCLA provide progress reports to the NRC Staff and to CBG every six months; that CBG continue to be served with staff-applicant correspondence and that the local public document room be maintained until dismantlement is completed; that until the year 2000 UCLA provide notice to CBG of any intended change in licensing status of the reactor; that CBG be given an opportunity to copy for its records the security plan and other security documents comprising the security file for the UCLA reactor; and that UCLA be required to preserve and permit copying of essentially all documents related to the reactor facility until final dismantlement of the reactor occurs.

⁶ Committee to Bridge the Gap's Response to University's Request to Withdraw its Application for License Renewal ("CBG's July 3rd Response")

On July 20, 1984, University replied⁷ in opposition to the conditions which CBG sought to impose and demonstrated that there was no legal basis for such conditions. University's reply expressed concurrence with the legal analyses contained in Staff's response. Staff replied in opposition to CBG's proposed conditions on July 27, 1984. Staff referred to the demonstration contained in its earlier response that CBG had misapplied the decisions in the construction permit proceedings it cited in support of its conditions. Staff explained that the conditions proposed by CBG would make the dismantling and termination a continuation of the license renewal proceeding, whereas license termination pursuant to 10 C.F.R. §50.82 was a separate procedure. CBG filed its response⁸ in opposition to Staff's proposed conditions on August 1, 1984.

III. DISCUSSION

CBG's Response takes issue, generally, with Staff's proposal that the withdrawal request be granted conditionally pending completion of the termination procedures in accordance with 10 C.F.R. §50.82. As characterized by CBG, Staff proposes that the withdrawal of the UCLA application for license renewal be "indefinitely postponed", that UCLA be "permitted to keep. . . the license which expired in 1980", and "that

⁷ University's Reply to CBG's Response to University's Request to Withdraw the Application ("University's Reply")

⁸ CBG Response to Staff's Proposed Conditions for UCLA Application Withdrawal ("Response"). University is unaware of any request CBG may have made to submit such a response. If such a request was made it was not communicated to University and University has not been informed that the request was ever granted by the Board.

the functions of establishing conditions for withdrawal mandated to the Board by 10 C.F.R. §2.107 be usurped by Staff". (Response, at 12.) CBG asserts that Staff's proposal "violate[s] the full range of NRC practice and procedure regarding withdrawals, would be massively injurious to CBG's rights and those of the public, and is totally unnecessary to boot." (Response, at 13.) CBG provides a lengthy "Legal Discussion" intended to support its opposition to Staff's proposal. (Response, at 13-59.) Much of that legal discussion consists of re-argument for the conditions proposed in its previous response. However, CBG also argues for a new condition of withdrawal, that CBG be compensated for its costs and attorneys' fees, in the event that the Board accepts Staff's proposal. (Response, at 73.)

CBG's Response is based on a misperception of the nature of the license termination process. Staff has explained that license termination under §50.82 is separate from the license renewal proceeding. (Staff Response, at 5-6; Staff Reply, at 6.) Staff has also pointed out that, in UCLA's circumstances, until a termination order is issued by the Director of NRR a ("possession-only") license must be retained.⁹ CBG's conclusion that this circumstance works to

⁹ University understands that the license it is to retain is a "possession-only" license, authorizing the possession of the fuel, the by-product material, and the reactor, but not operation of the reactor. The "possession-only" license would preserve certain surveillance, monitoring and reporting requirements during the pendency of the decommissioning process. See, Regulatory Guide 1.86, "Termination of Operating Licenses for Nuclear Reactors" (June, 1974). University is aware that the Commission intends to soon publish additional guidance relevant to an application to terminate a non-power reactor facility operating license. University has requested a "possession-only" license. See, note 2.

the benefit of UCLA, that UCLA thereby gets "precisely that which it has not been able to get by the application itself" (Response, at 12) is obviously incorrect. UCLA had been seeking the renewal of a license to operate its 100 kW Argonaut-type research reactor. UCLA has voluntarily relinquished its operating license; has applied to terminate that license; has rendered the reactor permanently inoperable; and has begun its dismantlement. By these actions, UCLA is forever foreclosed, both practically and legally, from reviving or reinstating its application to renew the operating license for its Argonaut reactor. Retaining a possession-only license until a termination order is issued produces no benefit to UCLA and is of absolutely no value to UCLA. On the contrary, the temporary retention of the license will burden UCLA with NRC surveillance, monitoring, and reporting requirements. There are no apparent benefits to UCLA in what Staff proposes and CBG has failed to identify any.

CBG complains that if the license does not expire immediately UCLA will have the right to retain its nuclear fuel indefinitely. (Response, at 65.) CBG is mistaken. UCLA has already committed, and the Board has ordered, that UCLA is to ship its fuel as soon as reasonably practicable consistent with its obligations as licensee.¹⁰ UCLA has acted expeditiously in returning its unirradiated fuel to the

¹⁰ See, Memorandum and Order (June 22, 1984). CBG again urges the Board to set a specific date for shipment of the fuel to be completed. University has previously responded on this matter and notes here only that CBG has yet to provide a reason why, in view of the Board's June 22nd Order, a specific date must be set. In order for such an order to have practical effect the Board would have to require similar specific commitments from several government agencies, including the NRC, the owner/custodian of the shipping cask that is to be used, and the carrier.

Department of Energy. Shipping the irradiated fuel is considerably more complicated, but will be carried out in accordance with the Board's order. CBG assumes that the license to possess the fuel can lapse and that the NRC can immediately re-take possession of the fuel. (Response, at 63.) CBG misses the point. UCLA is not opposed to efforts by the NRC, or the DOE, to immediately re-take the remaining nuclear fuel at UCLA. Such actions would relieve UCLA of the significant responsibilities for continuing possession and return of the fuel, responsibilities which are exceedingly burdensome and confer no benefits. Moreover, if UCLA's Part 50 license lapses it is University's understanding that it no longer qualifies for a general license under Part 71 of the regulations to act as a licensed "shipper" of radioactive materials, including the fuel and any by-product material which may require off-site disposal during decommissioning. (10 C.F.R. §§71.12, 71.14, 71.16, et seq.) In its response, CBG provides no reason why UCLA would want to retain the remaining irradiated fuel any longer than necessary.

CBG claims that 10 C.F.R. §50.82 procedures are not applicable in application withdrawal proceedings, that Staff's position that §50.82 is applicable to the UCLA circumstances is "contrary to all the case law, the clear language of the regulation and fundamental equities." (Response, at 72.) CBG cites no case law in support of this claim and the clear language of the regulation supports Staff's position.¹¹ CBG

¹¹ At pages 20-25 of its Response CBG discusses the Sheffield proceeding [Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979); ALAB-606, 12 NRC 156 (1980)], apparently in the belief that

confuses the termination of the license renewal proceedings, that is, the adjudicatory proceedings, with the termination of the reactor operating license. The termination of the license renewal proceeding is the responsibility of the licensing board under §2.107. However, the Commission has delegated the responsibility for terminating the operating license to the Staff under §50.82. As a practical matter, no record exists in the UCLA proceeding that would enable the Board to decide technical matters related to dismantlement, decontamination, and

[FOOTNOTE CONTINUED]

Sheffield, which was not a construction permit proceeding, provides significant support to its argument that §50.82 procedures are not applicable in the UCLA situation. The Sheffield decision was originally cited by Staff, but only for the proposition that licenses cannot be unilaterally terminated. (Staff Response, at 6 and n. 6) CBG misreads Staff's use of the case (unreasonably, in view of the clarifying footnote 6) and attempts to draw other conclusions from the proceeding. In the first Sheffield proceeding, CLI-79-6, the Commission reviewed and affirmed the decision of the Director, NMSS, issuing an immediately effective show-cause order to Nuclear Engineering Company, Inc. (NECO), a materials licensee, to resume its responsibilities under its license after NECO served notice of its unilateral withdrawal and termination of license. The Commission also ordered a hearing on the show-cause order which it assigned to the Licensing Board. (Sheffield, 9 NRC 673, at 676, 678-79.) In the second Sheffield proceeding, ALAB-606, approximately a year later, the Appeal Board affirmed the Licensing Board's order granting NECO's request to withdraw its application to expand its waste burial site. (Sheffield, 12 NRC 156, at 163.)

CBG's representation of the facts of the two Sheffield proceedings is not supported by CBG's citations to those proceedings. (In particular, the facts described by CBG at footnotes 30 and 32 do not agree with decisions there cited.) The only NECO application withdrawn was an application to expand the facility; the underlying license did not expire since the Licensing Board expressly denied NECO's motion to withdraw its license; and the "specific site redress measures" were apparently conditions proposed by Staff, in connection with the "show-cause" proceeding, to bring NECO into compliance with its obligations as a licensee of a radioactive waste burial site. (Sheffield, 12 NRC 156, at 157-58, 161-62.) In any event, the unusual circumstances of the Sheffield proceedings have little relevance to the UCLA situation, except for Staff's point that unilateral withdrawal is prohibited. Production and utilization facility licensee termination procedures under §50.82 would not be expected to arise in the case of a materials licensee, such as NECO.

disposal at the facility. CBG relies on a line of construction permit withdrawal proceedings for the proposition that Boards can set the conditions of site-restoration. University and Staff have already demonstrated that CBG has misapplied these cases. In addition, University notes that "site-restoration" is not an issue in the UCLA proceeding. Once the reactor is dismantled and the facility decontaminated, the University will decide whether its facility is "restored" to its pre-existing condition or converted to some other use.

University is entitled to a withdrawal without prejudice since no decisions on the merits were reached in this proceeding. CBG apparently does not dispute that University is entitled to a withdrawal without prejudice. However, CBG now asserts that if the Board grants the withdrawal of the application without prejudice and conditionally, until a termination order issues, as Staff proposes, CBG will suffer "extremely substantial injury" and, as a result, it is entitled to be compensated for its attorneys' fees and expenses as a condition of the withdrawal. (Response, at 38.) CBG cites the North Coast, Bailly, and Perkins decisions in support of its argument.¹² CBG's reliance on these proceedings is misplaced.

In North Coast the Appeal Board affirmed a Licensing Board decision granting termination of a construction permit proceeding

¹² Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125 (1981); Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762 (1982); Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), LBP-82-81, 16 NRC 1128 (1982).

without prejudice. The issue of fees for intervenors did not directly arise in North Coast. However, in a footnote the Appeal Board suggested that conditioning the withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers in certain circumstances. (North Coast, at 1135, n. 11.)

Relying on the North Coast footnote, intervenors in the Bailly proceeding requested attorneys' fees and expenses as a condition of the withdrawal of a construction permit extension proceeding. (Bailly, at 766.) The Licensing Board declined to impose the condition explaining that the "American Rule", that each party bears its own attorneys' fees and expenses, applies to administrative agencies as well as to courts. (Id.) The Board rejected intervenor's attempt to carve an exception in the rule based on the similarity between Federal Rule of Civil Procedure 41(a)(2) and 10 C.F.R. §2.107(a) of the Commission's Rules of Practice. The Board reasoned that whether the termination is with or without prejudice, where the effect of the termination is to finally determine applicant's rights to an application such that the application cannot be further litigated, there is no basis to award fees and expenses. In other words, where the effect of the termination is equivalent to a determination on the merits payment of fees is not warranted. (Bailly, at 767.) As an example, the Board described a situation (the situation in the Bailly proceeding) where the statute of limitations had run on the filing of an application for a construction permit extension, which operated as a final determination of applicant's right to the permit even though the dismissal of the application had been without prejudice. (Id.) The withdrawal of the UCLA license renewal application is a final

determination of that application. The University has applied to terminate that license. UCLA has taken actions and is taking actions such that it can be said that it no longer possesses the "reactor" which was the subject matter of the application. The application cannot be revived nor reinstated and it cannot be further litigated. There is no basis to impose fees and costs under the Bailly holding.

Perkins was another proceeding in which the Licensing Board authorized applicant's withdrawal of a construction permit without prejudice and denied intervenor's claim for fees and expenses. (Perkins, at 1143.) Relying on guidance provided by the Appeal Board in the Fulton proceeding, the Licensing Board concluded that in a withdrawal without prejudice intervenors may seek to impose conditions on the withdrawal to the extent that they have been exposed to legal harm by the withdrawal. (Perkins, at 1137.) The withdrawal of the UCLA license renewal application does not result in any legal harm to CBG or the public. With UCLA's withdrawal, CBG gets more than it could have expected to get if the application had been prosecuted to a final decision on all issues on the merits. CBG's response fails completely to identify any legal harm or injury that will result from the withdrawal of the application, decommissioning of the reactor, and termination of the license. Perkins does not provide CBG with any basis for an award of attorneys' fees and costs.

University also notes that CBG claims fees in the event the Board adopts Staff's proposal that the withdrawal be granted conditionally and a license be retained until a termination order is

issued. Presumably, CBG expects the fees to be paid by University. However, such a result would be particularly unfair. University has not requested that the withdrawal of the application be deferred nor that it retain a license. Certainly nothing in Staff's proposal will result in any improvement of University's position.¹³ Although University concurs in Staff's analysis of what the Commission's termination procedures require, those procedures provide no benefit to UCLA but instead ensure that the Commission retains control over UCLA's decommissioning actions until such time as the facility can be returned to unrestricted use.

Much of CBG's Response re-argues the conditions for withdrawal proposed in its earlier response and refers to the same NRC proceedings previously cited. University and Staff have replied in opposition to the conditions proposed in CBG's earlier response. Those matters do not require re-examination here. This reply is intended to incorporate University's reply of July 20, 1984.

¹³ In this regard, CBG's discussion on pages 25-28 of its Response of the Sterling proceeding [Rochester Gas and Electric Corporation, et al. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980)] is irrelevant.

IV. CONCLUSION

Despite its lengthy response, CBG has failed to specify any legal harm or injury to its interests that will result from granting the withdrawal request on the conditions proposed by Staff. Conversely, CBG has failed to specify any legal harm or injury to its interests that would support the imposition of any of the conditions it proposes. For the reasons above, University respectfully requests that the Board approve the withdrawal of the application and terminate the adjudicatory proceedings on the conditions proposed by Staff and that the Board reject the conditions proposed by CBG in its two responses.

Dated: September 7, 1984.

DONALD L. REIDHAAR
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Representing UCLA

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
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OF CALIFORNIA)
(UCLA Research Reactor))

Docket No. 50-142
(Proposed Renewal of Facility
License Number R-71)

OFFICE OF THE SECRETARY
LICENSING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S REPLY TO
CBG'S AUGUST 1, 1984 RESPONSE CONCERNING UNIVERSITY'S REQUEST TO WITHDRAW
THE APPLICATION.

in the above-captioned proceeding have been served on the following by
deposit in the United States mail, first class, postage prepaid, addressed
as indicated, on this date: September 7, 1984.

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Administrative Judge
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Washington, D.C. 20555

Dr. Emmeth A. Luebke
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