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5/13/81

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 (Proposed Renewal of Facility License No. R-71) THIRD MOTION TO COMPEL ANSWERS; REQUEST FOR SANCTIONS

I. THE MOTION

Intervenor hereby moves the Atomic Safety and Licensing Board for two related actions: 1) to issue a Third Order compelling Applicant to answer certain interrogatories on Contention II first propounded by Intervenor in October, 1980, and 2) to impose sanctions upon Applicant for failure to respond to Intervenor's interrogatories with a complete disclosure of all relevant information, as twice ordered by the Board in response to Intervenor's previous Motions to Compel.

This Third Motion to Compel argues that, despite the Board's Order of March 10, 1981, no further answers to Interrogatories 4,5,6, and 9 of Intervenor's First Set of Interrogatories as to Contention II have been forthcoming from Applicant. Intervenor thus moves the Board to once again compel full and complete answers to those Interrogatories.

The request for sanctions, pursuant to 10 CFR 2.707 and F.R.C.P. Rule 37, moves the Board for 1) an immediate favorable ruling on the contention in

question (Contention II), and 2) an Order causing Applicant to pay the reasonable expenses, in the amount of $500, incurred by Intervenor because of Applicant's failure to comply with the previous Board Order.

II. INTRODUCTION

On March 10, 1981, the Atomic Safety and Licensing Board issued its "Order Relative to Intervenor's Supplemental Motion to Compel." Determing that, "It appears to the Board that UCLA has, in fact, been less than frank in its responses to CBG's interrogatories related to reactor usage and financing," it ordered "That UCLA shall respond to CBG interrogatories with a complete disclosure of all relevant information." The Board further stated:

> This Board is charged with the responsibility of obtaining a complete record on which to base a decision. We will not allow this duty to be compromised, or the proceeding to be further delayed, by gamemanship. Failure of the parties to fully cooperate in responding to discovery requests in the future may well result in the imposition of sanctions by the Board under 10 CFR § 2.707.

In addition to ordering that "UCLA shall not hold back any information it possesses which is relevant to the Intervenor's interrogatories," the Board also ordered the Intervenor to "take advantage of the opportunities provided it by UCLA to inspect and copy relevant documents," which Intervenor has done (see "BACKGROUND" below).

However, despite the Second Board Order, no responses to the CBG Interrogatories in question have been forthcoming from Applicant. On April 24, 1981, Intervenor wrote to Counsel for Applicant (copy of which was sent to the service list), informing Applicant that CBG was not in

receipt of further answers to the Interrogatories and that should no answers be forthcoming within ten (10) days, Intervenor would find it necessary to submit to the Board a Third Motion to Compel. By letter dated May 1, 1981, Counsel for Applicant, arguing that the Board had not in fact compelled further answers, informed Intervenor that no further answers would be forthcoming.

Intervenor thus finds itself with no choice but to request further Board action. Despite two Board Orders and the passage of over six months since initial service of the Interrogatories in question, Applicant's answers to those Interrogatories remains essentially as evasive and incomplete as when first answered. No answers whatsoever to those interrogatories have been provided by Applicant in response to Board Order of March 10, 1981.

III. BACKGROUND

Because Intervenor's repeated efforts to obtain complete answers to the Interrogatories in question have been forced to stretch over many months, a summary of the relevant events to date is unavoidably lengthy.

On September 25, 1980, the Board admitted as an issue in the proceedings Contention II, which alleges that Applicant has applied for the wrong class of license because the UCLA reactor is assertedly used primarily for commercial rather than educational and research purposes. On or about October 20, 1980, Intervenor propounded its First Set of Interrogatories as to Contention II, and on November 25 Applicant served answers to those Interrogatories. Intervenor found the responses to be incomplete, non-responsive and evasive, and moved the Board for an Order compelling further answers.

On December 22, 1980, the Board issued an order granting Intervenor's Motion to Compel. In so doing, the Board stated:

> The interrogatories are without doubt relevant to the admitted contention. All relate to Intervenor's contention that more than half of the operating time is commercial and more than half of the funding is from sources other than UCLA.

The Board stated further:

> We find it difficult to believe a sophisticated university does not have in its accounting records the information being sought.

And as to Applicant's failure to provide information on commercial and other functions of the reactor by claiming that the reactor's only function is education, the Board stated:

> While it might be true that everything concerned with the operation of the reactor or the University is "educational," we do not think this simple answer is responsive to the information being sought.

Board thus ordered Applicant "simply to be open and candid" and directed Intervenor to "pursue all records offered to date or records offered in the future," and granted the motion to compel.

On December 30, 1980, Intervenor requested of Applicant those records offered by Applicant in its Answers to Intervenor's First Set of Interrogatories. On January 19, 1981, Applicant notified Intervenor it was prepared to make available the relevant financial and accounting records, offer of which Intervenor immediately availed itself, but Applicant made no mention of nor provision for making available the other records requested and previously offered by Applicant (operating logs, scheduling data, specialized Annual (Activity) Reports, and graduate student theses and dissertations.)

On February 5, 1981, Counsel for Intervenor contacted Counsel for Applicant and renewed request for those records previously offered and not yet made available; Intervenor provided Applicant with a list of those records. On March 12, from 1:00 - 5:00 p.m., Applicant permitted Intervenor to review some of those records. Intervenor requested copies of portions of the reviewed records, copies which were provided on March 23. On April 24, Intervenor requested time to review the remaining documents (operating logs

for 1960-1975 and for 1981) on May 5 and 6. On May 4 Intervenor received word from Applicant those the proposed dates were not good due to the custodian of records being on vacation and proposed instead May 14 and 15.*

On January 22, 1981, Applicant made further answers to Interrogatories Nos. 4,5,6, and 9, in response to the Board's Order compelling such answers. Intervenor found these "Further Answers" as fully inadequate as the previous set of answers and made a Supplemental Motion to Compel answers that were adequate. Intervenor argued that the "Further Answers" were virtually identical with the original answers and, to show that Applicant indeed had in its possession information it denied having, attached two documents. One demonstrated that whereas Applicant had informed Intervenor it could only break reactor usage into three categories (research, classroom instruction, and maintenance), Applicant had some months earlier provided NRC Staff with a table breaking down reactor usage into virtually the precise categories requested by Intervenor, including commercial use. Additionally, whereas Applicant claimed that its financial records did not permit breaking reactor income down into categories such as commercial, Intervenor contended such information was readily available from Applicant's financial ledgers and billings. Finally, requests for definitions of terms went unanswered.

Intervenor stated in its Supplemental Motion to Compel:

> Intervenor believes that Applicant's continued failure to be responsive and forthcoming in meeting its discovery obligations, even after issuance of a compelling Order by the Board, would make a request for sanctions pursuant to F.R.C.P. 37(b) appropriate under these circumstances. However, since this is the initial stage of discovery, we would prefer to attempt once more to have these problems corrected without resorting to requests for punitive measures. We reserve the right, nonetheless, should an additional compelling Order be granted by the Board and

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* In Applicant's April 30 letter, informing Intervenor that May 5 and 6 were not convenient for reviewing documents due to vacation of custodian of records, Mr. Cormier proposed May 14 and 15 and stated that the custodian of records "will confirm these dates with your client /CBG/ when the custodian returns next week." As of 5:00 p.m. May 13, no such confirmation had been received, despite two calls to Mr. Cormier. Intervenor will write Mr. Cormier requesting viewing time on May 21 and 22, as it has received no confirmation nor location for May 14 and 15.

> Applicant continue to be nonresponsive, to request sanctions at some future point if these problems are not solved.
>
> (Supplemental Motion, p. 15)

On February 27, 1981, the NRC Staff answered in support of Intervenor's Motion to Compel. Staff stated:

> As the Intervenor demonstrates, interrogatories 4,5,6, and 9 are inquiries into terms used by the University personnel to designate reactor uses so that records of reactor use, costs, and funding may be understood in relation to these records.
>
> The Applicant has indicated in its answers that it has no records categorized into areas of Intervenor's inquiry but the letter to NRC Staff provided by Intervenor shows the contrary, as to definition of terms, and records of specified uses. Thus, it seems to Staff that there is merit to the Intervenor's assertion that the University has not fully answered discovery requests for information.
>
> (Staff Answer, p. 3-4)

Staff stated further:

> In the Staff's view, the Intervenor has raised a question of a failure by Applicant to comply with the Commission's rule of practice 10 CFR § 2.740(b) requiring each interrogatory to be answered fully on oath or affirmation unless objected to, as well as the general discovery rules set forth in 10 CFR § 2.740. 10 CFR § 2.707 provides authority to impose sanctions for failure to comply with any discovery order entered by the presiding officer pursuant to § 2.740.

On March 10, 1981, the Atomic Safety and Licensing Board issued its "Order Relative to Intervenor's Supplemental Motion to Compel." It ordered "That UCLA shall respond to CBG interrogatories with a complete disclosure of all relevant information," and reiterating its duty to obtain a complete record on which to base a decision, threatened the imposition of sanctions if failure to fully cooperate in responding to discovery requests continued in the future.

IV. DISCUSSION

Despite the requirements of 10 CFR 2.740b(b), requiring interrogatories to be answered fully, and despite two Board Orders compelling such full disclosure, Applicant's answers remain as fully incomplete and evasive as when the first Board Order was granted. As 10 CFR 2.740(f)(1) states regarding Motions to Compel, "an evasive or incomplete answer or response shall be treated as a failure to answer or respond."

The Board has twice ordered Applicant to respond to Intervenor's interrogatories with a complete disclosure of all relevant information, while also directing Intervenor to pursue all records offered to it. Intervenor has actively pursued the records offered; Applicant has not fully answered the interrogatories. In particular, there has been no response whatsoever by Applicant to the Board's second Order.

The information requested is clearly relevant to the contention in question. Intervenor has demonstrated that, despite assertions by Applicant to the contrary, Applicant has in its possession the information being sought. Yet that information remains solely in Applicant's possession, depriving Intervenor of information necessary for active participation in the proceeding and depriving the Board of information necessary to making a final judgment on the matter at issue, whether Applicant is engaged to such an extent in commercial use of the reactor so as to require Applicant to apply for a different class of license.

Applicant cannot argue in this instance that by providing Intervenor access to operating logs and certain financial records and by Intervenor independently having acquired a copy of Applicant's May 13, 1980, letter to Staff regarding commercial and other usage of the reactor, that Applicant's

duty to fully answer the interrogatories in question has been met.

First of all, two of the interrogatories in question (4 and 9) request definitions of terms necessary for the interpretation of Applicant's records. No definitions can be found in financial records or operating logs, yet definitions must exist, for Applicant's letter to Staff divides reactor usage into virtually the categories for which Intervenor has requested definitions, and Applicant has provided Staff in that letter examples of the kinds of reactor usage included in each category. If Applicant can divide usage into categories it must have some definition for those categories. For example, in the above-mentioned letter to Staff, Applicant uses as one of its categories for reactor usage "Commercial" and gives examples of "Commercial users" as including "geochemists, gem dealers and engineering firms." If Applicant can provide Staff with the number of hours per year (port hours) for Commercial Use and give examples of such use, it clearly must be able to define its own category. Interrogatory 9 asks for definitions both for "commercial rental" and for "any other activity not included above which accounted for greater than five hours in any given year." Applicant indicates in letter to Staff that its "Commercial" category represents 264 port-hours in 1979. A definition is in order, for commercial use and for the other categories requested.

Secondly, Intervenor in requesting these definitions is not asking Applicant to re-shape its records to fit Intervenor's categories. These are Applicant's categories, used either in the letter to Staff or in the Application (pages 5, II/7-1, and III/1-5, for example).

Additionally, the interrogatories request data not provided to date. For example, although the letter to NRC Staff divides reactor usage into certain categories for 1976-1979, figures for post-1979 are not provided. If they are available for 1976-1979, it is reasonable to assume they are available for post-1979. Furthermore, the interrogatories request the same kind of breakdown for reactor income that Applicant has provided Staff regarding port-hours of reactor usage. Since users are charged on a port-hour basis and since the financial records breakdown NEL income into categories of user and identify the specific user (i.e. Emil Kalil, whom Intervenor contends is the primary commercial user), Applicant is clearly in possession of the requested information, which has not been provided to date.

The interrogatories, in part, are in the nature of requests for admissions. Intervenor can submit to the Board its interpretation of Applicant's financial records and operating logs, but it is important that Applicant's interpretation of those records and definitions related to those records be provided. One element of the interrogatories not answered to date is thus Applicant's interpretation and definitions of its own records.

Detailed arguments about the incompleteness and evasiveness of Applicant's last set of answers can be found in Intervenor's Supplemental Motion to Compel, arguments which still hold because Applicant has provided no further answers.

Applicant, in its May 1, 1981, letter to Intervenor, refusing to provide further answers to the interrogatories, states that the Board's "Order Relative to Intervenor's Supplemental Motion to Compel" of March 10 did not grant Intervenor's Motion and did not "contemplate further answers

to Intervenor's past interrogatories dealing with Contention II." Intervenor responds that that Order did in fact require further answers from Applicant and, further, that the Order strongly suggested that sanctions be imposed upon Applicant should they persist in failing to participate in these discovery requests. In pertinent part the Order of March 10 states:

> UCLA shall respond to CBG interrogatories with a complete disclosure of all relevant information...we direct UCLA to be open and candid as to the details of all existing records... UCLA shall not hold back any information it possesses which is relevant to the Intervenor's interrogatories

Applicant has exhibited bad faith in repeatedly refusing to comply with Intervenor's discovery requests and the Board's Orders. Applicant has in the past and continues to withhold information that could be useful to Intervenor in moving forward on its contentions and useful to the Board in making a decision on those contentions. Discovery on the four contentions admitted by the Board in September of 1980 has been held up for half a year as Intervenor has been forced to repeatedly request Board assistance in having its very first set of interrogatories adequately answered. Considerable cost to Intervenor, and considerable time and energy for both the Board and Intervenor, have been wastefully spent in trying to get compliance with discovery requests and Board Orders. Applicant has been obstructionist in its behavior. Applicant has blatantly challenged the authority of the Board by Applicant's May 1 letter claiming they are not compelled to provide further answers.

10 CFR 2.707 and F.R.C.P. Rule 37 make clear, as did the Staff and the Board in their statements regarding Intervenor's previous Motions to Compel, that sanctions may be appropriate when Motions to Compel are granted and full and complete disclosure still does not take place. 10 CFR 2.707 makes clear that sanctions may include the following Board action:

> Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate;

F.R.C.P. Rule 37 indicates that in addition to the above sanction, the following sanction may also be imposed:

> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Because two previous Board Orders have been disobeyed, because six months of efforts to obtain compliance have failed to secure the desired information, and because all future discovery is at stake if Applicant is not at this time effectively required to act responsively to discovery requests, Intervenor requests both sanctions: an immediate favorable ruling as to Contention II, and payment of reasonable costs, including attorney's costs, incurred by Intervenor by Applicant's failure to obey the Board's Order.

Intervenor can only wonder what information it is that Applicant is so strenuously resisting disclosing. Despite asserting that the sole function of the reactor is "education," and despite asserting that records of commercial usage of the reactor were non-existent, the data on commercial usage that Applicant provided to Staff on May 13, 1980, indicates that for the last year they provide data for (1979), far more than 50% of the port-hours of reactor usage were, in Applicant's own terms, "commercial," and furthermore, that "commercial" usage has been increasing each year. Intervenor can only speculate that the information Applicant continues to withhold likewise supports Intervenor's contention that the reactor is primarily commercial.

The breakdown of reactor usage provided by Applicant to NRC Staff on May 13, 1980, the existence of which was denied in response to CBG interrogatories, strongly supports CBG's contention. Of the 446 total port hours of reactor usage for the last year reported, only 1 hour went to experiments by the Nuclear Energy Lab, only 31 hours for Engineering classes, and 264 (or 60%) were for purposes Applicant itself has labelled as "Commercial."

The financial records provided to Intervenor by Applicant (after Applicant initially claimed data could not be obtained from those records about reactor income) likewise support the contention. Financial ledgers and billings show that the primary user of the reactor is a commercial ore assaying company. All other uses--research and instruction--are but a small fraction of the use to which this one commercial company puts the reactor.

Thus, the information known to be withheld by Applicant supports Intervenor's contention, and because of Applicant twice violating Board Orders mandating full disclosure, a finding as to the issues raised in Contention II by Intervenor is appropriate.

As to the second sanction, payment of the costs incurred by Intervenor due to Applicant's failure to obey those Orders, the attached Declaration details the unnecessary burdens placed upon Intervenor. Discovery on the first four Contentions admitted by the Board on September 25, 1980, has been held up while Intervenor has been forced to repeatedly request Board assistance in gaining compliance with Intervenor's very first set of interrogatories. And now, at a time when Intervenor should be able to devote its entire energies to answering Staff and Applicant's Interrogatories to Intervenor, Intervenor finds it must expend significant resources in once again requesting of the Board a Motion to Compel. Intervenor is an organization with very limited resources, financial and otherwise;

to be forced to expend those resources in such a manner is wasteful and makes Intervenor's attempts to provide the Boa· with information useful in rendering a judgment on the relicensing application most difficult.

Finally, Intervenor requests clarification from the Board regarding future Motions to Compel, should they prove necessary. 1) How long does a party have to respond to a Board Orde· granting a Motion to Compel against it? and 2) Should Motions to Compel follow the responses to interrogatories served April 20, 1981, and due May 20, what effect will those Motions have on the discovery schedule? Does the second set of interrogatories and answers wait until Motions to Compel and Requests for Protective Orders are resolved? If not, is the right to a follow-up set of interrogatories protected in some fashion if the first set of answers are somehow delayed (through Motions to Compel or Requests for Protective Orders)? Clarification of these matters would be helpful.

V. CONCLUSION

Despite a Board Order of March 10, 1981, mandating that "UCLA shall respond to CBG interrogatories with a complete disclosure of all relevant information," Applicant has provided no such information to Intervenor in response to that Order. Intervenor has actively pursued what records have been previously offered, but the interrogatories remain as inadequately answered as before the Board's Orders. Applicant's lack of response despite two Board Orders is a defiance of the Board as well a violation of Intervenor's rights to relevant information. Sanctions appear in order at this juncture. The entire course of future discovery is at stake if Applicant is not successfully compelled to meet its discovery obligations.

As the Board noted in its previous Order,

> This Board is charged with the responsibility of obtaining a complete record on which to base a decision. We will not allow this duty to be compromised, or the proceeding to be further delayed, by gamemanship. Failure of the parties to fully cooperate in responding to discovery requests in the future may well result in the imposition of sanctions by the Board under 10 CFR § 2.707.

The Board's ability to obtain a complete record on which to base its decision has been compromised and the proceedings extensively delayed by Applicant's failure to cooperate fully in responding to Intervenor's interrogatories. Intervenor submits that Board action is once again necessary.

Respectfully submitted,

Mark Pollock
Attorney for Intervenor
COMMITTEE TO BRIDGE THE GAP

Dated: May 13, 1981

DECLARATION OF MARK S. POLLOCK

I, MARK S. POLLOCK, declare:

1. I am an attorney licensed to practice law in the State of California and in the courts of the United States, and the attorney of record for the Intervenor in the present action, Campus Committee to Bridge the Gap.

2. This hearing before the Atomic Safety and Licensing Board regards the application of the Regents of the University of California to the U.S. Nuclear Regulatory Commission for the renewal of the operating license of the research reactor sited on the campus of the University of California at Los Angeles.

3. Failure of Applicant to fully respond to Intervenor's First Set of Interrogatories as to Contention II has placed an extensive burden on Intervenor and Intervenor's Counsel, requiring extensive expenditure of time, energy, and money in attempting to obtain answers to those Interrogatories and compliance with Board Orders relative to those Interrogatories.

4. In particular, failure of Applicant to comply with the Board's Order of March 10, 1981, has required Intervenor to prepare, despite two previous Motions to Compel, a Third Motion. Intervenor has first contacted Applicant's Counsel in hopes of obtaining compliance without necessitating a Third Motion.

5. These efforts by Intervenor and Intervenor's counsel have necessitated costs in excess of $500 in attorney's costs, legal assistants, copying and mailing costs. This has been especially burdensome because Intervenor and Counsel are currently in the midst of responding to Interrogatories from both Staff and Applicant, due in one week. Work on the Motion to Compel has thus necessitated much overtime work.

6. Sanctions of $500 for Intervenor's and Counsel's expenses caused by Applicant's failure to comply with the Board Order of March 10,1981, are reasonable estimation of the burden imposed upon Intervenor by Applicant's said failure.

Dated: May 13, 1981

MARK S. POLLOCK
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COMMITTEE TO BRIDGE THE GAP

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 (Proposed Renewal of Facility License)

CERTIFICATE OF SERVICE

I hereby certify that copies of "INTERVENOR'S THIRD MOTION TO COMPEL ANSWERS; AND REQUEST FOR SANCTIONS" in the above-captioned proceeding have been served on the following by deposit in the Unitd States mail, first class, this 13th day of May, 1981:

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