COMMITTEE TO BRIDGE THE GAP
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May 25, 1982

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)

CBG'S REPLY TO CERTAIN AFFIRMATIVE "REQUESTS" CONTAINED IN "UNIVERSITY'S RESPONSE TO CBG'S MOTION FOR DEFERRAL"

I. INTRODUCTION

By pleading dated May 10, 1982, Applicant filed "University's Response to CBG's Motion for Deferral" (hereinafter "Response"). Contained in said Response were several "requests" for affirmative relief, to which CBG herein replies.

A. The Requests

(1) At page 11 of Applicant's Response, Applicant states:

> University requests that the Board defer the identification and qualification of CBG's security contention experts for the sole of [sic] considering

> Staff's Motion, at least to the extent needed to determine whether any material facts remain in dispute and whether discovery of security information is necessary to resolve such disputes.[1]

(2) At page 12, Applicant states:

> ...University requests that CBG be required to limit its submission to the minimum number of individuals necessary to a fair consideration of the security contention and that each of those individuals express a commitment to remain until the security contention is resolved.

(3) And at page 10, Applicant appears to ask that CBG be required now to enter notices of appearance for attorneys who may at some point in the future represent it. The text is somewhat confused, and CBG is not certain here if Applicant was intending the passage as a request for Board direction.

II. DISCUSSION

A. Procedural Reply

At page 5 of its April 16, 1982, Memorandum and Order, the Board directed that parties

> ...should not incorporate requests for affirmative relief in responsive pleadings. Rather, a separate motion should be submitted.

Applicant has ignored that direction.

Furthermore, as noted in CBG's May 18, 1982, Response to Certain "Requests" Contained in Applicant's "Memorandum Concerning Additional Discovery Matters," every filing in which immediate affirmative relief is requested is expected to reference that fact explicitly by adverting to the relief sought and captioning the pleading as a motion.[2]

As CBG noted in its May 18 Response, supra,

> Applicant has repeatedly "thrown in" so-called "requests" in the midst of other pleadings, making it difficult for CBG to know whether a response is required and the Board to know whether Board action is mandated.

1/ By "Staff's Motion," Applicant refers to the NRC Staff Motion for Summary Disposition, dated April 13, 1981, not the Staff Motion for revocation of the Board Orders suspending consideration on said Motion until discovery on security was complete. The latter was served a couple of days after Applicant's Response.

2/ Duke Power Company (Cherokee Nuclear Station, Units 1,2, and 3), ALAB-457, 7 NRC 70,71 (1978)

Again the Applicant fails to follow proper motion procedure as mandated by both the rules of practice and the Board's explicit direction. By attempting to obtain relief from the Board without filing a formal motion to that effect, Applicant creates the impression that it hopes to obtain favorable Board action without having to face opposing argument by the other parties. This runs counter to 10 CFR 2.730(c), which guarantees parties the right to respond to motions requesting affirmative relief. Such practice certainly makes it very difficult for the other parties to know, when faced with a few phrases appearing to request relief scattered in the midst of a pleading otherwise denominated, whether to respond to the apparent "requests." Likewise, it must make it difficult for the Board to schedule its decisions on motions before it, not knowing whether it must await responses to affirmative requests contained in responses to the original motion prior to ruling thereon.

Furthermore, one of Applicant's current "requests," the one for summary disposition as to the security contention to be permitted to commence prior to the start of discovery thereto, neglects to mention that such relief is tantamount to a motion for reconsideration or revocation of three previous Board Orders, two of which explicitly denied the same relief requested now.[3/] 10 CFR 2.730 requires a party to state with particularity the relief sought; with regards this particular request, Applicant fails to so state.

3/ Board Orders of March 20, 1981, (p. 15); April 30, 1981; and June 9, 1981

Finally, Applicant's current "Response", at page 11 under "Alternative Remedy," makes a request, argues for the request, and then states it "does not intend here to formally petition the Board for this relief," then suggests the Board provide said relief "on its own motion," and then ends, on page 12, by requesting the very relief it said it would not "formally" request. This is, to say the least, extremely confusing. Either one is requesting relief or one is not; if not, one should not argue for the relief. The inartful suggestion that the Board provide the requested relief "on its own motion" again appears an attempt to obtain a desired Board action without necessity of formal argument for it nor the right of other parties to respond to it.4/

B. Substantive Reply

(1) Staff, virtually simultaneous with the filing of Applicant's requests has filed a "Motion for Revocation of Board Order Suspending Consideration of Staff's Motion for Summary Disposition of Contention XX," which requests the identical relief and puts forth virtually identical arguments as does Applicant in its May 10 Response. Because Staff has filed a formal Motion (which, furthermore, makes clear that the relief sought is revocation of a previous Board Order), CBG will respond to the substance of Applicant's request regarding summary disposition on security by responding, in a separate pleading, to the identical relief sought in Staff's formal motion.

4/ At pg. 11 of Applicant's Response, it is stated: "University discussed this request in its status report of March 15,1982, and does not intend here to formally petition the Board for this relief." CBG notes that said request was likewise inappropriate in the March 15 status report and, furthermore, that Applicant had thereafter agreed not to raise said request until the proposed amendments to the Application had been filed. See letter, Mr. Cormier to ASLB, Marsh 23, 1982. Of course, the promised amendments have still to be put forward.

No such response is necessary here.[5/]

(2) In its conclusion on page 12 of its Response, Applicant makes a double request: that CBG's proposed "authorized persons" be limited to a minimum number and that each said individual be required to remain in the proceeding until the security contention is resolved.

The first part of the request is premature and speculative. Applicant should await submission of proposed "authorized persons" and the areas of protected information to which they are requested access before asking the Board for relief it does not yet know it needs. CBG is aware of the sensitive nature of the protected information and is voluntarily attempting to limit both the number of people who have access and the scope of their access. Not all, for example, of the proposed "authorized persons" contemplated at present would need access to the full security plan. Applicant's requested relief is premature.

Furthermore, if Applicant has a genuine concern about the number of people with access to protected information, some flexibility on its part with regards scheduling would go a long way to resolving the matter. For example, were review of the security plan by attorneys for CBG to occur prior to a determination as to which experts to call as witnesses, the list of prospective witnesses who must be granted access to protected information could be significantly reduced, or at least the scope of their access could be minimized. Without knowing the contents or scope of the protected information, counsel or representatives for CBG cannot know in advance what expertise is necessary for review of said information and thus must propose an extensive list of proposed experts on the contingency that certain matters <u>may</u> be included and thus would require review.

5/ CBG notified the Board by phone that a response to the requests in Applicant's Response would be forthcoming. A few days thereafter, Staff's Motion was received, mitigating the necessity of responding to that portion of Applicant's requests.

Lastly, CBG believes that were such an attempt to limit the number of "authorized persons" imposed, which at present it views as premature and without basis, such a limitation would, of course, have to apply to all participants to the proceeding. If there is something injurious about the number of authorized persons--as opposed to the identity of said persons--affiliation with one party or another is irrelevant. Access of Applicant's authorized persons to discovery responses, pre-filed testimony, legal briefs and the like by CBG would likewise have to be limited in number.

Applicant gives no citation in case law or regulation to support its requested relief, nor, aside from the single phrase in the "Conclusion" on page 12, any argument thereon. CBG sees no basis for the requested relief, and no merit therein.

The second part of the request--that CBG's "authorized persons" be required to commit themselves to remaining in the proceeding until the security contention is resolved--is likewise of doubtful foundation. CBG can find no basis in NRC practice for such a suggestion, and Applicant cites none. Practice, in fact, is quite the contrary. These proceedings have a tendency to drag on over many years, and it is quite common for attorneys in such proceedings to withdraw and be replaced by new counsel. In fact, in the UCLA proceeding itself, there have been three different sets of attorneys to date representing NRC Staff. Mr. Cormier himself has, on at least one occasion, expressed to CBG that he is contemplating not remaining with the case until final resolution. No special showing has been made with regards CBG and personnel turnover--until last summer,

CBG was represented by Mark Pollock, and since then by Daniel Hirsch (representing CBG pro se). The foundation for such a request thus seems fanciful.

(3) Lastly, Applicant appears to request that attorneys CBG may intend to have represent it in the security proceeding, subsequent to resolution of the protective order and affidavit of non-disclosure matters, be required to now enter notices of appearance. CBG sees no logic in such a request. As noted above, CBG was initially represented by attorney Mark Pollock, who had filed a notice of appearance in the case. Eight months ago Mr. Pollock filed a notice withdrawing as counsel because he was closing his law practice in Los Angeles and moving out of the area. Simultaneously, CBG served notice that its President, Daniel Hirsch, would represent it pro se, indicating that an attempt to provide replacement counsel would be made. In its pleadings of April 23, 1982, CBG indicated it had contacted several attorneys who would be willing, pro bono, to represent CBG on the security matter, contingent upon emplacement of a protective order and affidavit of non-disclosure that they felt they found acceptable. Should that condition be met, they will commence representing CBG on the security contention and will, of course, file notices of appearance at that time. But until they actually have CBG's power of attorney on the security matter and actually start providing legal representation, Mr. Hirsch is the CBG representative and the only person authorized to serve pleadings on its behalf. No notices of appearance will be served until counsel commences legal representation for CBG, and that will not occur, CBG is advised by these individuals, until they receive some assurance as to the conditions under which they will have to work with regards protective orders and the like.

III. CONCLUSION

CBG objects to the interposition by Applicant of "requests" in the midst of a responsive pleading and the failure to denominate its requests as motions. CBG views such failure to follow proper motion form as an attempt to deny other parties the right to respond as guaranteed in 10 CFR 2.730. CBG particularly objects to Applicant's requests to the Board regarding summary disposition with the associated suggestion that the Board take the requested action "on its own motion." Furthermore, CBG objects to Applicant's failure to particularize its summary disposition request as a request for reconsideration or revocation of previous Board Orders.

CBG objects to the substance of the requests as being without basis, premature, and/or unnecessary. CBG will respond to the substance of the summary disposition request in its response to Staff's motion for the identical relief.

Respectfully submitted,

Daniel Hirsch

Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP

dated at Ben Lomond, CA
May 25, 1982

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DECLARATION OF SERVICE

I hereby declare that copies of the attached: CBG'S REPLY TO CERTAIN AFFIRMATIVE "REQUESTS" CONTAINED IN "UNIVERSITY'S RESPONSE TO CBG'S MOTION FOR DEFERRAL"

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: May 25, 1982.

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