

COMMITTEE TO BRIDGE THE GAP
1637 Butler Avenue, Suite 203
Los Angeles, California 90025
(213) 478-0829

May 28, 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 REPLY TO STAFF MOTION FOR REVOCATION OF BOARD ORDERS

I. INTRODUCTION

By Order of March 20, 1981, the Board, inter alia, admitted as an issue in the above-captioned proceeding Contention XX, which asserts that the physical security plan for the UCLA reactor facility and Applicant's implementation of security precautions are inadequate.^{1/} The Board also in that Order put in place a schedule for discovery and summary disposition which mandated that the latter would not commence until thirty days after completion of the former.^{2/} This schedule had previously been

^{1/} Order Subsequent to Second Prehearing Conference, dated March 20, 1981, at page 12. The Board added the phrase "pursuant to 10 CFR 73.60 and 73.67" to the contention by its Order. (Note that "73.76" is a misprint in the original).

^{2/} March 20 Order at 15.

stipulated to by the parties.^{3/}

Less than a month later--and prior to even the commencement of discovery as per the above schedule--Staff moved for summary disposition on Contention XX. CBG, citing the language of the stipulation and the Board's Order thereon, moved the Board to strike the Staff motion as untimely.^{4/} On April 30, 1981, the Board ruled that the motion did indeed violate the stipulation and Board Order and was therefore premature; parties were directed to treat the motion as if filed thirty days after the close of discovery and respond thereafter.^{5/}

On May 12, Staff filed a Motion for Reconsideration of the above Board Order. The Board, on June 9, reconsidered its previous ruling and affirmed it, once again directing that the motion need not be responded to until after the close of discovery.^{6/}

We do not discount the sincerity of the Staff and the UCLA intentions but we are bound by the language in the transcript quoted in our April 30 Order. It is our determination that the language supports the CBG's position that motions for summary disposition are not to be filed prior to July 30, 1981. (emphasis in original)

(July 30 was the date the Board had directed, in its March 20 Order, for discovery to be completed; that date was subsequently suspended by the Board in response to numerous discovery disputes). The Board concluded in its June 9 Order:

It would be patently unfair to hold CBG to the "terms" of a stipulation that are not those to which it had agreed. Our Order of April 30, 1981 is AFFIRMED.

^{3/} The stipulation was proposed--by Staff--at the February 5, 1981, prehearing conference, agreed to there by Applicant, and thereafter by CBG. See TR. 487-8, also Board Order of April 30 and CBG Motion to Strike of April 24, 1981, wherein the stipulation is quoted. (Transcript sections are attached to CBG Motion of April 24, and the full relevant passages quoted therein).

^{4/} CBG Motion of April 24, 1981.

^{5/} Order Relative to Intervenor's Motion to Strike; (Order dated April 30)

^{6/} Order Relative to NRC Staff's Motion for Reconsideration of Board Order of April 30, 1981; (Order dated June 9)

On April 20, 1981, the date stipulated for submission of first interrogatories, CBG submitted said interrogatories, including sixty-six interrogatories as to Contention XX. Applicant objected to providing answers to any of the sixty-six interrogatories thereto, and on May 28, 1981, filed a motion for a protective order on these and other interrogatories. In its July 1, 1981, "Order Relative to Applicant's Motion for a Protective Order, Other Requests, and an Adjusted Discovery Schedule," the Board temporarily suspended discovery as to the security contention until certain preliminary matters necessary for the protection of information relative to the security plan were resolved. These matters have not yet been resolved, and therefore, no discovery whatsoever has yet taken place with regards Contention XX. The Board, by Order of April 16, 1982, has scheduled a prehearing conference for June 29 and 30 to, among other things:

...resolve any remaining discovery disputes, set a schedule for the completion of discovery which has been deferred, set a schedule for the filing of motions for summary disposition and responses, and set a tentative date for the beginning of the evidentiary hearings. ⁷

Thus, discovery on the security contention has been deferred, and Staff's motion for summary disposition thereon has likewise remained suspended.

However, on May 13, 1982, Staff moved for revocation of the Board Orders which determined the summary disposition motion on security to be premature and directing parties not to respond until completion of discovery. CBG opposes said revocation, as detailed below.

⁷/ Notice of Prehearing Conference, dated April 28, 1982.

II. DISCUSSION

In order to present a viable argument for revocation of three duly-authorized Board Orders^{8/} and a stipulation which it had proposed and to which it had agreed, Staff must meet a substantial burden in demonstrating that the situation has somehow altered significantly since the previous Orders were imposed. Staff has not met that burden and the requested revocation of previous Board directives should be denied.

In presenting its Motion, Staff puts forward the following arguments: (1) that discovery is now nearing completion, (2) that discovery efforts are not now burdensome, (3) that CBG "wishes to defer procedures" to allow access to security information, and (4) that revocation of the Board Orders in question could "forstall (sic) the difficulties" it asserts Intervenor is facing with regards protective orders and affidavits of non-disclosure as to the security contention. Additional arguments are raised at greater length in Staff's "Response to Intervenor's Motion". The Staff arguments will be addressed seriatim.

(1) Discovery is not now "nearing completion"; it has not even begun with regards the security contention. Were discovery on the security contention indeed "nearing completion," a primary reason for staff's motion for summary disposition thereto being deemed "premature" would indeed be mitigated. But the opposite is true: there has been no discovery as to Contention XX to date. Discovery on the security matter has not even begun. Thus, the situation in effect when the Board issued its previous Orders is unchanged, and the Orders should remain in effect.

^{8/} Board Orders of March 20, April 30, and June 9, 1981.

(2) Discovery "burdens" are irrelevant to whether summary disposition on the security contention should be permitted prior to discovery commencing thereon. Staff argues that the "Board's determination that summary disposition motions could only be filed at the end of discovery" was made "presumably" because Intervenor was "overburdened at the time with producing discovery documents."^{9/} (emphasis added). The word "presumably" was used by Staff because there is absolutely nothing in the record to indicate that that was indeed the Board's reasoning; it is simply a presumption, which is contradicted by the record. The March 20, 1981, Order mandating summary disposition thirty days after completion of discovery was issued to accept a stipulation among the parties thereto.^{10/} The April 30 Order ruling that Staff's motion for summary disposition was premature was issued because, "A schedule was stipulated and approved by the Board" that calls for summary disposition thirty days after close of discovery.^{11/} And the June 9 Order denying Staff's request to revoke the April 30 Order (essentially the same request pending once again before the Board) was issued because, "It would be patently unfair to hold CBG to the 'terms' of a stipulation that are not those to which it had agreed."^{12/} No support whatsoever can be found in the record for Staff's presumption regarding Intervenor's supposed burden in producing discovery documents. (CBG's reasoning for accepting the stipulation was in a different direction--that it was not reasonable to determine whether there are no material facts in dispute prior to a party having full access to those facts).

^{9/} "NRC Staff Response to Intervenor's Motion for Deferral of Identification...", May 13, 1982, p. 4, under heading "The Motion for Deferral Should be Granted to Permit the Board to First Determine Whether the Staff's Motion for Summary Disposition of Contention XX Should be Granted"

^{10/} March 20 Order at 15

^{11/} April 30 Order at 2

^{12/} June 9 Order at 3

(3) CBG's Motion that all parties be required to obey protective order and non-disclosure provisions and identify proposed "authorized persons" is irrelevant to whether summary disposition should be permitted to occur prior to discovery in this case. CBG's request that the Board rule on CBG's due process concerns in no way alters the fact that a discovery/summary disposition schedule was stipulated to by the parties and ordered by the Board. Staff has demonstrated no nexus between CBG's Motion and its own; the attempt to tie Staff's Motion to CBG's is purely an artifact to attempt to relitigate a matter to which the Board has several times previously addressed itself, in Staff's disfavor.

(4) Staff's assertion that revocation of the Board's Orders would "forestall" difficulties faced by CBG is spurious; Staff should let CBG request its own relief. Staff asserts CBG has difficulties "in obtaining experts and counsel who would agree to a protective order and nondisclosure obligations."^{13/} Staff mischaracterises CBG's statements. CBG's difficulty is in obtaining experts and counsel who would agree to a protective order and nondisclosure affidavit they had not seen. In any event, revocation of the stipulation and Board Orders in no way provides CBG with relief for these concerns and, in fact, would result in a substantial injury to CBG's interests in this proceeding.

Thus, as demonstrated above, none of the arguments advanced by Staff in support of its Motion justify revocation of the Board's Orders and the parties' stipulation. The situation today remains unchanged from when the Board previously denied Staff's motion for revocation. Staff has failed to meet its burden and its motion should, once again, be denied.

^{13/} Staff Motion at 3

There are, in addition, strong affirmative reasons why the Board Orders in question should stand. The Commission has determined that the adequacy of a nuclear facility's physical security plan may be a proper subject for challenge by intervenors in an operating license proceeding. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775 (1980); Consolidated Edison Company of New York (Indian Point Station, Unit 2), 7 AEC 947,949 (1974). Commission regulations mandate that information about such plans may be turned over to intervenors under appropriate safeguards. 10 CFR 2.744(e) and 73.21. There is perhaps no more important issue for the Board to resolve in this proceeding than the adequacy of Applicant's security plan and its implementation thereof, given the potential consequences of sabotage and theft of the special nuclear material, given its enrichment. For the Board to reverse itself and now permit summary disposition on such a crucial matter when the party against whom the motion is directed has not yet been provided access to any of the protected information (e.g. the plan itself, related documents, interrogatories thereon, and physical inspection of the safeguards features) would risk unjustifiably requiring the Board to rule on a matter of great public health and safety significance (not to say, additionally, common defense implications) without an adequate evidentiary record.

For what the Staff is proposing is essentially to have the Board render judgment on Contention XX prior to the time the Intervenor has access to the facts necessary to present its case. The security contention is different than any other matter before the Board in that, because of the protected nature of the information, at present only Staff and Applicant have access to it. To permit summary disposition

at this stage would be to permit a contest when one party is forced to have both hands tied behind its back and be blindfolded in addition. Such a proposal would violate due process and be extraordinarily inequitable. Particularly when the contention directly alleges that the security plan is inadequate and when only the other two parties have had access to that plan. How can Intervenor reasonably be expected to put forth affirmative facts fully about a plan it has not yet been permitted to see? Staff attempts to short-circuit the deliberative process by attempting summary disposition prior to discovery on a contention where discovery is inescapably essential.

Because discovery has not commenced on Contention XX, we are essentially at Day 1 after admission of the contention. As such, Staff's proposal amounts to an effort to relitigate the admissibility of Contention XX, already decided against it by the Board. It attempts to raise the standard for admissibility of contention, a challenge to the current regulations. If an Intervenor can present sufficient basis to a Board that a security plan is inadequate, it must be granted access to those portions that are relevant to that contention. If, after access to the necessary information, it is determined that there are no material facts in dispute, the matter need not go to hearing. But it is difficult for Intervenor to understand how a Board could determine there are no material facts in dispute when an opposing party has not yet been provided access to those facts.

Staff appears to assert that discovery cannot possibly provide any information useful to Intervenor in responding to the summary disposition motion, because the only matters raised by the motion and CBG's contention are, it asserts, Staff's legal argument that CBG is attempting to impose power reactor standards on research reactors^{14/} and the dose rate of irradiated fuel (for which, CBG would assert, discovery is required.) However, Staff's motion for summary disposition addresses a great many factual disputes in addition--adequacy of key control, whether vital equipment is found in certain areas, whether doors and locks are of sufficient strength, whether alarm systems are adequate, whether windows are in certain restricted rooms, and so forth.^{15/} CBG cannot be expected to adequately respond with affirmative evidence without access to such evidence, and the Board would be denied the opportunity to make its judgment on an adequate evidentiary base.

Even were there no stipulation among the parties, and even had the Board not repeatedly denied the substance of the Staff motion to permit summary disposition at this stage, 10 CFR 2.749(c) permits Boards to "refuse the application for summary disposition" or order a continuance until the opposing party is given an opportunity to obtain the "facts essential to justify his opposition." The facts essential to CBG's opposition have not yet been made available to CBG; as previously ordered by the Board, summary disposition should await CBG's access to said information.

^{14/} CBG's contention is that UCLA fails to meet either 10 CFR 73.60 or 73.67, the standards applicable to research reactors. Staff misstates CBG's contention. Furthermore, Staff's assertion that the security plan is irrelevant to CBG's contention is baffling--the contention alleges that the security plan is inadequate, making the plan of central relevance.

^{15/} See summary disposition motion, particularly attached affidavits. All six material facts asserted by Staff to be not at issue on page 17, for example, require discovery to adequately rebut.

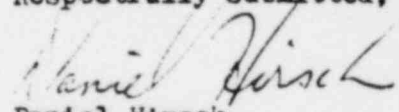
III. CONCLUSION

In February, 1981, on the record of the prehearing conference, Staff proposed a stipulation that required summary disposition motions to be submitted thirty days after close of discovery. All parties agreed to said stipulation, and the Board accepted it in an Order of March 20, 1981. Board reaffirmed that ruling on April 30, 1981. Staff moved for reconsideration on May 12 in a pleading asking for the same relief as now requested again--revocation of the Board Order. The Board denied that relief then and should deny it again.

Staff has failed to meet its substantial burden to show a significant change in circumstances that would merit revocation of three duly authorized Board directives and a stipulation entered into by all parties. Discovery has not even begun with regards the security contention--to permit summary disposition on that matter, in the face of the Orders and stipulation to the contrary, would undermine the stipulation process and be significantly prejudicial to Intervenor. It would raise serious due process problems if CBG were required to present affirmative evidence of facts in dispute without being provided access to said facts. CBG respectfully urges denial of the Staff motion for revocation of the previous Board Orders.

dated at Ben Lomond, CA
May 28, 1982

Respectfully submitted,


Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP

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DECLARATION OF SERVICE

I hereby declare that copies of the attached: CBG REPLY TO STAFF MOTION
FOR REVOCATION OF BOARD ORDERS

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 28, 1982.

John H. Frye, III, Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission

Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Oscar H. Paris
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chief, Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

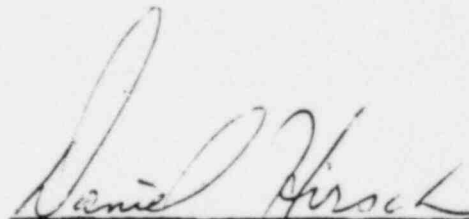
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
attention: Ms. Colleen Woodhead

William H. Cormier
Office of Administrative Vice Chancellor
University of California
405 Hilgard Avenue
Los Angeles, California 90024

Christine Halwick
Glenn R. Woods
Office of General Counsel
590 University Hall
2200 University Avenue
Berkeley, CA 94720

Mr. John Bay
3755 Divisadero #203
San Francisco, CA 94123

Sarah Shirley
Deputy City Attorney
City Hall
1685 Main Street
Santa Monica, CA 90401



Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP