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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	)	Docket No. 50-142 OL
OF CALIFORNIA	)	(Proposed Renewal of
(UCLA Research Reactor)	)	Facility License)
	)	

MOTION TO STRIKE CERTAIN PORTION OF STAFF'S AND APPLICANT'S  
APRIL 4 RESPONSES TO CBG'S REQUEST FOR AN EXPEDITED  
RULING ON CONTENTION XIII

I. Introduction

By motion dated March 15, 1983, CBG requested an expedited ruling on its September 7, 1982, Motion for Partial Summary Disposition of Contention XIII, and the setting of a May hearing date for any remaining issues as to that contention. In its March 23 Memorandum and Order, the Board directed responses to said Motion be filed within the time specified in the Rules of Practice (later extended by request from Applicant to April 4).

On April 4, both Staff and Applicant served responses to the CBG motion. The "responses," however, are not responsive to the motion before the Board, which deals with when the issues involved with Contention XIII should be considered, but instead raise new arguments

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not put forth by Staff and Applicant in their summary disposition motions (but arguments that were raised, and rejected by the Board, at the February 23, 1983 prehearing conference) as to why the opposing parties believe the contention should be summarily dismissed.

CBG herein moves the licensing board to strike said portions of the Applicant and Staff responses for the following reasons: (1) they are not responsive to the motion before the Board, (2) they amount to motions without following proper motion format, (3) they are essentially new motions for summary disposition, the deadline for which has long since past, and (4) the matter they raise has already been resolved by the Board at the prehearing conference.

CBG herein does not address the substantive issue raised in the objectionable portions of the Staff and Applicant responses. Should the Board not strike said portions, CBG respectfully requests the right to respond to the substance.

## II. Background

In August, 1980, CBG submitted Supplemental Contentions to its May 22, 1980, Petition for Leave to Intervene. Those Supplemental Contentions identified the concerns CBG wished to litigate, including its concern that the amount and enrichment of SNM requested by UCLA was excessive, due to the weapons-grade nature of the material and the attendant proliferation threat thereof. That contention was admitted by the Board in its Order of March 20, 1981.

All parties requested an opportunity to move for summary disposition regarding the issues raised by Contention XIII (as well as other contentions), and the Board set a final date for such motions of September 1, 1982, ruling that a showing of good cause would be required for motions submitted after the deadline.<sup>1/</sup> TR768; Memorandum and Order of July 26, 1982.

All parties submitted motions for summary disposition as to Contention XIII by the early September deadline. After submission of first phase responses, the Board ruled on an aspect of the Contention deemed related to inherent safety considerations, but deferred ruling on the remaining portions of the Contention. Memorandum and Order, February 8, 1983.

On March 15, 1983, CBG, citing new information recently provided by Staff which appears to resolve certain disputes as to the summary disposition motions for Contention XIII, requested that the Board proceed with ruling on the deferred portions of Contention XIII summary disposition motions (1st phase and, if necessary, 2nd phase) and set for a May hearing those remaining matters of Contention XIII not resolved by summary disposition. The Board, in its March 23, 1983, Memorandum and Order, directed the parties to respond to the CBG Motion regarding scheduling of Contention XIII in the time provided by the rules.

The replies by both Staff and Applicant, however, go far beyond response to the Motion's scope--which deals with when the Contention should be addressed. The responses,

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<sup>1/</sup> The Board, upon request by UCLA and CBG, extended by a few days the deadline.

as indicated in the discussion that follows, go far beyond the simple matter of when the summary disposition motions on Contention XIII should be ruled upon and when the remaining issues should go to evidentiary hearing. Instead, Staff and Applicant argue the substance of the contention and, more importantly, Staff "requests" the Board dismiss the Contention in its entirety, on grounds not raised by Staff in its summary disposition motion, but already ruled upon by the Board at the prehearing conference. These tactics, which both delay and frustrate due process in this case and violate the basic procedural requirements of the Rules of Practice, are impermissible and must not be tolerated.

### III. Discussion

Staff argues at pages 6-10 of its April 4 pleading, assertedly in response to CBG's motion, that the Board has no jurisdiction to even consider the contention and that it should be summarily dismissed. In so doing, Staff raises arguments for dismissal not raised in its September 1, 1982, summary disposition motion (which is among the motions CBG has requested the Board complete its rulings upon). Staff claims this is an issue of jurisdiction "noted, in part, by the recent Prehearing Conference Order." Staff response, p. 6. However, no such reference can be found in the Order in question. The Board had, however, as shall be discussed below, already ruled on the matter of jurisdiction at the Prehearing Conference and provided an opportunity for relief to those parties disagreeing with its ruling, an opportunity to which neither Staff nor Applicant has availed itself.

Applicant, in its "response," again goes beyond the Motion to which it is to respond, which deals merely with when the contention should be considered, and instead argues the merits of the issue itself. Neither Applicant nor Staff are appearing without benefit of legal counsel; their attorneys cannot be said to be ignorant of the Rules of Practice; yet they are ignoring the Rules of Practice. The entire process will unravel unless the Rules of Practice are strictly obeyed and enforced.

The portions of Staff's response to be struck are contained on pages 5-10; CBG requests all but the first sentence of the section on Contention XIII (on page 5) and the last three sentences of that section (on page 10) be struck, along with the attached memorandum. The portions of Applicant's response to be struck are: (1) the phrase "and because the specific relief requested is beyond the scope of that which can be granted in this proceeding" at the end of the second paragraph on page 1, and (2) all material from "University does note..." on page 2 through the bottom of page 4. The reasons for striking these portions are as follows.



A. The Staff and Applicant "Responses" are not Responsive to the Motion Before the Board

CBG's Motion made two requests: prompt ruling on the summary disposition motions on Contention XIII, and prompt scheduling of evidentiary hearing on matters not resolved by summary disposition on that contention.

Staff and Applicant's replies stray far from the Motion at hand, arguing not when the matters dealt with in the contention should be resolved, but whether they should be resolved, and if so, how.

B. The Staff and Applicant "Responses" Amount to Motions Without Following Proper Motion Format

CBG has been required numerous previous times to object when parties have, in the guise of a "response" to a motion, put forth new requests of their own without resort to proper motion procedure. The due process concerns in such violation of the requirements of 10 CFR 2.730 are that such failure to obey the Rules of Practice in this regard can result in a party pleading for an action by the Board with the opposing party denied a right to respond. The "responses" at issue here are not responses at all but rather motions (and, as shall be seen, actually motions for reconsideration, or for permission to late-file new summary disposition motions).

C. The "Responses" are Essentially New Motions for Summary Disposition, the Deadline for Which Has Long Passed

The Board set as final dates for filing of summary disposition motions September of 1982. Order and Memorandum, July 26, 1982. The reasons that Staff (and, to some extent parroted by UCLA) has put forth in its April 4 pleading for asserting that the substantive matters raised by Contention XIII not be considered by the Board were not raised in the Motions for Summary Disposition. In response to CBG's request that those motions be now decided, Staff raises new issues. This is untimely; it is in violation of the Board Order of July 26; it is dilatory and obstructive.

D. The Matter Raised by Staff and Applicant Has Already Been Resolved by the Board

These issues raised in the April 4 pleadings were raised by Applicant at the February 23, 1983 prehearing conference. Applicant raised the same issues Staff is raising now--that the matter of HEU use by research reactors is generic, rule-making issue; that all UCLA is applying for is an HEU license; and that the Board doesn't have the authority or jurisdiction to consider denying the HEU license or requiring conversion to LEU as a license condition. The Board rejected all of these arguments and told UCLA that if it wished recourse from that determination, it should prepare a motion for certification to the Commission. Neither Staff nor UCLA has submitted such a motion.

For example, Mr. Cormier at the prehearing conference argued

Whether it is within the Board's prerogative to make a determination for Argonaut reactors or for our Argonaut reactor that high-enrichment fuel is inherently unsafe -- I do not know what that phrase means -- or just unsafe and therefore whether you can deny a licensing on that basis.

To which Judge Frye responded:

Well, I think we have the answer to that one. That is the purpose of the hearing.

Mr. Cormier: Yes.

JUDGE Frye: I mean, that is why we are here.

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After which Judge Frye told counsel for Applicant that if he had trouble with that decision, he should submit a motion for certification to the Commission. None has been forthcoming.

For the above reasons, the portions of the April 4 pleadings identified at page 5 herein should be struck.

#### IV. ARGUMENT

Staff and Applicant's violation of proper procedure identified above are symptomatic of the desperate attempts by both parties to prevent the Board from hearing evidence on the most important issue of this case. The parties raise one argument after another, make one false assertion after another, and each time the argument is found incorrect or the assertion patently untrue, a new one is put forth to prevent the Board from ever reaching a decision on the matter. This is simply irresponsible and must not be tolerated. There is a time for bringing forth motions to summarily dismiss an issue; after that time has passed, the Board should speedily hear



evidence on the remaining issues and render a decision. Because of the timely application rule of 10 CFR 2.109, a tremendous incentive exists for parties fearing the outcome of an evidentiary hearing to put forth seriatim and ad nauseum objections to the issue being heard at all. Every time one objection is ruled to be spurious, a new and equally spurious objection is introduced, preventing the Board from hearing evidence and ruling on the contested matter. To prevent this abuse, the Rules of Procedure require submission of objections in a special format (that of summary disposition motions) and in a timely fashion. This Board has set a deadline for filing of all such motions. Permitting Staff or UCLA to continue to raise new objections to contentions being heard, to continue to raise new arguments for summary dismissal of the contentions, violates CBG's due process rights and the Board's responsibilities under 10 CFR 2.718 to regulate the proceedings. The Board set a procedure for summary disposition motions, set deadlines for their submission, and absent the good cause showing directed by the Board, these new matters raised are untimely and dilatory.

CBG cannot understand the passion with which both the Applicant and the NRC Staff have attempted to keep this matter from reaching the Board for final decision. We are talking about material from which nuclear weapons can be manufactured if stolen or diverted. Staff and Applicant have argued that no security precautions whatsoever are required to protect against its theft. Now they attempt to prevent the Board from carrying out Commission policy in reducing the availability of HEU for theft or diversion.

Have they no conception of what that HEU could do if stolen? Do they not realize that they send a signal by such obstructionist behavior that there is weapons material available for the taking when neither the licensee nor its regulator will either protect the material nor permit Congressional statute and agency policy to be carried out by reducing the enrichment? Are they really ignorant of how little HEU is needed for a clandestine fission explosive if an implosion device is used?

UCLA first claimed that it couldn't run its reactor on LEU. Dr. Wegst, TR 272. CBG then demonstrated, and no party disputed, that other Argonauts have indeed run on LEU, that in fact the original Argonaut ran on LEU. They put that argument aside and then argued that no LEU was available. CBG demolished that argument, showing that TRIGA LEU fuel is currently available and advanced plate fuel will be ready by the end of the year. Staff denied those facts, putting forth a letter from the RERTR program which in fact confirmed CBG's allegations. UCLA then asserted the Board had no jurisdiction to consider the Contention; the Board rejected that argument, giving the Applicant an opportunity to request certification, an opportunity not taken. UCLA then claimed it didn't have the financial ability to convert to LEU, no matter the degree of safety or proliferation protection the Board might determine such a license condition would have. And now, in the guise of a response to a scheduling motion, Staff re-raises the jurisdiction issue, seven months after the deadline for summary disposition motions.

The Board should not permit Staff and Applicant to be wrong seriatim. The other parties should have to "put up or shut up." They cannot be permitted to raise one argument why the contention should be dismissed, be found wrong; try another argument, be found wrong again; try another, and so on, in hopes of either "striking it lucky" or at least delaying the proceedings so long that the intended action is granted by default through preventing the Board from ever hearing the evidence and ruling on the application for relicensing.

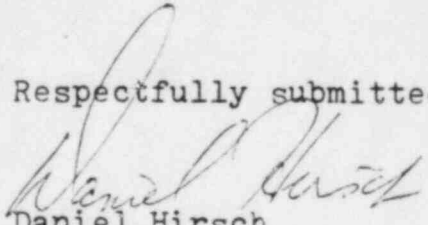
Justice deferred in this case is very much justice denied. Every year (:) that Staff and Applicant can prevent the Board from reaching this matter is another year where weapons material is lying around unprotected at the Applicant's facility, awaiting diversion for purposes so awesome as to cause pause to any thinking person. These delays must not be tolerated. Neither UCLA nor the Staff is above the law; they too must obey the Rules of Practice; they too must submit to scheduling orders; they too must obey motion practice; they too must at some point face the consequences of being wrong in a setting where their evidence is weighed and judged. In the many years of this proceeding, there has yet arrived the time when a decision before the Board for ruling affects the ultimate interests of any party but CBG. All matters so far have been whether a contention will even be heard, or certain discovery be had. If Applicant or Staff loses a dispute up until now, nothing ultimate has been lost, because it can always have the opportunity to win on an evidentiary basis at hearing.

So long as the other parties prevent the Board from reaching the evidentiary stage, it is only CBG that is at risk. Delaying tactics through abuse of the rules of practice must not be tolerated; Staff and Applicant must face the day when their evidence is heard and weighed and judgment forthcoming.

V. Conclusion

CBG respectfully moves the ASLB to strike certain identified portions of the Staff and Applicant April 4 pleadings as non-responsive, contrary to required motion procedure, untimely in violation of Board Orders about summary disposition, already decided by the Board, and otherwise violating due process. Should the Board decline to strike the objectionable material, CBG requests the right to respond to their substance.

Respectfully submitted,

  
Daniel Hirsch  
President  
COMMITTEE TO BRIDGE THE GAP

dated at Ben Lomond, CA

this 14th day of April, 1983