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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
(Proposed Renewal of Facility
License Number R-71)

February 16, 1984

UNIVERSITY'S RESPONSE TO CBG'S
MOTION FOR CURTAILMENT (III)

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I. INTRODUCTION

In its motion of January 9, 1984,^{1/} CBG requests that the Board shut down the UCLA reactor or, in the alternative, severely limit reactor power to 0.1 watt and excess reactivity to 40¢ to 50¢. CBG's motion was prompted by the Board's statement at the October 14, 1983 session of the "inherent safety" hearing that "(I)f for some reason we cannot adhere to that schedule and close the record no later than December 10, we would at that point be willing to entertain motions on a showing of good cause that operations at UCLA should be curtailed." Tr. 3112-13. CBG argues that UCLA is responsible for extending the hearing beyond December 10, that the Board has legal authority to shut down the UCLA reactor and that the factual record in the proceeding supports a finding of good cause for shutting down the reactor. There is no factual nor legal basis to support the extreme remedy which CBG seeks, which would be equivalent to revoking UCLA's license to operate the reactor. The motion must be denied.

^{1/}Motion for Curtailment (III) (Irreparable Injury Associated With Any Further Delay). Similar motions were filed by CBG on December 14 and 27, 1983, Motion for Curtailment of Activities (I) and Motion for Curtailment of Activities (II), respectively. The Board denied these motions in its Order of January 18, 1984. University applied for extension of time to February 16, 1984, to respond to the instant motion which was granted by the Board in its Order of January 27, 1984.

II. DISCUSSION

In its motion CBG asserts that UCLA has delayed the proceedings and that irreparable harm could result to the people of Los Angeles because none of CBG's contentions concerned with the safety of the UCLA reactor have been resolved. Motion, at 2-3. CBG claims that UCLA failed to meet the December 10 deadline set by the Board primarily because of "the untimeliness and insufficiency of the safety analysis submitted by Applicant on the key safety issues before the Board." Motion, at 4. CBG argues the application submitted by UCLA in 1980 was insufficient because it failed to contain an analysis of water expulsion by means of the deflector plates during a fast transient, because the proposed Emergency Response Plan was "rejected" by the NRC Staff, because the Security Plan was filed ten days after the deadline for timely renewal applications, and because of numerous other deficiencies in the 1980 Application. Motion, at 7-19. CBG also complains about UCLA's use of the discovery and summary disposition procedures in the proceeding and accuses UCLA of withholding key information and purposely delaying the proceedings. Motion, at 21-22.

Relying on these allegations, CBG asserts that "good cause" exists for curtailment and that the Board is obligated to order curtailment. Motion, at 22-23. In arguing that the Board has the legal authority to grant the relief requested, CBG cites the Commission's Statement of General Policy and Procedure (10 CFR Part 2, Appendix A) for the proposition that proceedings are to be conducted expeditiously, Section 2.718 of the Rules of Practice giving Licensing Boards broad powers to avoid delay, Section 2.717(b) of the Rules of Practice giving Licensing Board authority to modify existing licenses, and ALAB-348 for the proposition that Licensing Boards can suspend a license in a case pending before them without requiring that a new procedure be instituted under Section 2.206 of the Rules of Practice. Motion, at 24-28.

CBG then attempts to dispose of the "potential barriers" to the Board action it proposes, the timely renewal provisions of 10 CFR Sec. 2.109 and 5 U.S.C. 558, by asserting that UCLA's 1980 license application was neither timely nor sufficient. Motion, at 29-47. CBG asserts that the only remedy permitted under the regulations is to shut down the reactor. As an alternative remedy CBG proposes reducing power to 0.1 watt and limiting excess reactivity to the 40-50¢ range. Motion, at 47-60.

A. CBG's Legal Arguments Lack Merit

Shutting down the UCLA reactor or reducing power to 0.1 watt, as CBG requests, would be an action tantamount to revoking UCLA's license to operate. CBG's several arguments that the Board has the authority to summarily revoke the UCLA license are without merit.

1. The UCLA License Renewal Application was Timely and the Existing License does not Expire until the Application has been Finally Determined.

CBG argues that UCLA did not comply with the requirements of 10 CFR Sec. 2.109 for the continued effectiveness of licenses because the application submitted was neither "timely" nor "sufficient." CBG's argument is contrived and is itself untimely. In the first place, the UCLA license renewal application was docketed and noticed in the Federal Register and UCLA has been informed

by the Commission that the requirements of 10 CFR 2.109 have been satisfied.^{2/} Secondly, CBG's complaint that the proposed UCLA security plan was not submitted on time has already been considered by the Board and was rejected.^{3/} Thirdly, CBG complains that because changes have been made in the application since it was submitted in 1980 and, specifically, because the 1980 accident analysis failed to answer questions recently raised during the safety hearings, the 1980 application was insufficient. CBG's argument is utter nonsense. The sole support CBG advances for its extreme position concerning the sufficiency of applications is the Bankers Life case.^{4/} Bankers Life concerned the application of the license renewal provision of the Administrative Procedure Act (5 U.S.C. Sec. 551 et seq.), a provision analogous to Section 2.109 of the Commission's Rules of Practice.

CBG's reliance on Bankers Life is entirely misplaced. The case involved a company, Bankers Life and Casualty, which sought an order in federal court to

^{2/} Letter from Robert W. Reid, Chief, Operating Reactors Branch #4, Division of Operating Reactors (NRC) to Walter F. Wegst, Ph.D., Director of Research and Occupational Safety, Department of Community Safety (UCLA), dated April 17, 1980, stating, in part: "Since your application has been submitted at least 30 days prior to the expiration date of your license, you have satisfied the requirements of 10 CFR Part 2, Section 2.109, entitled "Effect of Timely Renewal Application." Accordingly, pursuant to 10 CFR 2.109, the existing license will not be deemed to have expired until the application has been finally determined."

^{3/} This argument was first made in CBG's Motion for Curtailment of Activities (I), dated December 14, and corrected December 27, 1983. In denying this motion and the related motion submitted by CBG on December 27, 1983, the Board specifically rejected this argument as untimely. Memorandum and Order (Ruling on CBG's Motion for Curtailment of Activities (I) and (II)), dated January 18, 1984.

^{4/} Bankers Life and Casualty Co v. Callaway, 530 F.2d 625 (5th Cir.: 1976).

require the United States Army Corps of Engineers (Howard W. Callaway, Secretary of the Army) to hold a hearing on an application for renewal of a dredge and fill permit which had first been issued to the company in 1957 and was extended in 1960 for three years by the Corps pursuant to the Rivers and Harbors Act of 1899. The permit expressly stated that if the work authorized under the permit was not completed by December 31, 1963 the "permit if not previously revoked or specifically extended, shall cease and be null and void." The Corps refused to extend the permit a second time because of "local opposition." A dispute had arisen between the company, the State of Florida, and the Village of North Palm Beach concerning title to the submerged lands sought to be filled which prompted the Village to deny the company a local fill permit.^{5/}

The narrow issue presented the Court of Appeals in the Bankers Life case was whether 5 U.S.C.A. Section 558(c) (Section 9(c) of the APA) prevents the expiration of rights under a Rivers and Harbors Act permit in a situation where local authorities have indicated that a local permit is necessary and it is denied.^{6/} The Corps defended its refusal to renew against the company's request for a hearing asserting that at the time the application for renewal was filed it was insufficient because it lacked the required local consents and further, that it failed to satisfy the subsequently enacted requirements of the National Environment Policy Act and the Federal Water Pollution Control Act. The Court refused to grant the company a hearing before the Corps holding that Section 558(c)(2) of the APA contemplates use of the notice and hearing

^{5/} Id., at 627 to 629.

^{6/} Id., at 632.

procedure only when some sanction is to be imposed on the licensee. The Court also noted, as a possible alternative ground for its holding, that Bankers Life was engaged in a project under a fill permit that was to end as soon as all the land was filled in and hence was not engaged in an activity of a "continuing nature" and thus the company could not invoke Section 558(c) which applies only to activities of a continuing nature.^{7/}

It is hardly necessary to point out that the circumstances presented in the Bankers Life case are not at all the circumstances presented in the instant proceeding. UCLA's license has been extended by the agency where a provision that clearly is intended to protect the rights of the licensee. UCLA's renewal application is not insufficient because of the lack of any local permit or other substantive problem. UCLA's application has been deemed sufficient by the Commission notwithstanding that it is being challenged in accordance with the agency's procedures for contesting applications. The holdings of the Bankers Life case are irrelevant.

In arguing that the UCLA renewal application is "insufficient" CBG has confused the determinations made by the Commission's Staff and the decisions made by the Licensing Boards. Clearly, it is the Licensing Board's function to decide the sufficiency of the application, as supported by the Staff's review and evaluation and any evidentiary record, to support a decision to approve the application. However, the Boards adjudicatory functions are to be

^{7/} Id., at 634 and fn. 13.

distinguished from the determinations made by the Staff that the application is timely and sufficient for docketing under Section 2.109.

If, as CBG suggests, renewal applications were required to anticipate every amendment the Staff would impose as a result of its review and every argument that could be raised by intervenors, no real purpose would be served by the Commission's hearing procedures. Certainly the Commission's procedures contemplate that a renewal application sufficient for the purposes of continued effectiveness under Section 2.109 may ultimately be denied by the Commission on the basis of the Staff's evaluation and an evidentiary record compiled, in the first instance, by a Licensing Board. The purpose of Section 2.109 is to insure that the licensee's rights are protected until such a final determination is made.

UCLA's responsibility at the time of filing its renewal application was to submit information sufficient for the Staff to conduct its detailed review and evaluation to support the relicensing and then to amend or modify its application consistent with the Staff's evaluation. UCLA has discharged that responsibility. But for CBG's intervention in the proceeding, UCLA would not have incurred the additional responsibility of having to defend its application before the Licensing Board. As a result of that intervention UCLA must now respond to matters raised by CBG in its contentions or by the Board sua sponte. It is simply absurd to propose that the responsibility to respond to intervenor's allegations had to be met at the time the application was submitted.

2. The Applicable Provisions of the APA Preclude Revocation of the UCLA License.

Section 9(c) of the Administrative Procedure Act^{8/} prohibits revocation, suspension or annulment of licenses by agencies without notice in writing of the facts which may warrant the action and opportunity to achieve compliance except in cases of willful violations or threats to public safety.

There is no support to CBG's vague allegations that UCLA has willfully delayed these proceedings. However, delays in litigation, wilful or not, do not amount to violations of the license and hence are irrelevant to Section 558(c) of the APA. As the licensee in an agency adjudication and the party who bears the ultimate burden of proof, UCLA has procedural rights both under the APA as well as the Commission's Rules of Practice. The reasonable exercise of these rights cannot be the occasion for imposing sanctions simply because delays are caused thereby.

CBG's allegation that "irreparable injury on a large scale" could result if an accident were to occur merely repeats the allegation it has been making at the safety hearings. Substantial evidence of record contradicts these allegations. It is the Board's responsibility to ultimately decide the safety questions based on the whole record. CBG's specific allegations concerning the sufficiency of that evidentiary record are entitled to no weight in this collateral matter.

^{8/5} U.S.C.A. Section 558, made applicable by Section 2.718(m) of the Commission's Rules of Practice.

Finally, CBG's claim that the Board's statement at the October 14, 1983 session of the hearing concerning the December 10 deadline for closing the record constitutes notice under Section 558(c)(1) of the APA is baseless.

3. Board's Authority to Regulate Course of a Proceeding and Avoid Delay Does Not Imply the Authority to Revoke a License.

There is no support for CBG's argument that the Commission's Statement of Policy and Procedure in 10 CFR Part 2, Appendix A authorizes Licensing Boards to revoke licenses in order to avoid delay.

There is no support for CBG's argument that the broad powers of the Board is given under 10 CFR Sec. 2.718 to avoid delay and maintain order include the power to revoke licenses. The two cases cited by CBG for this proposition are inappropriate.^{9/} In fact, the Offshore Power Systems case suggests the opposite. In that case the Staff petitioned the Appeal Board for a determination whether the Licensing Board below had the authority, under Section 2.718, to direct the Staff to publish certain environmental documents by a specific date. Siding with Staff the Appeal Board overturned the Licensing Board's order finding that the Board has not properly ascertained whether the Staff's inability to meet the date set by the Board was justified. In short, the Licensing Board had abused its discretion under Section 2.718.^{10/}

^{9/}Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978); Kansas Gas and Electric Company and Kansas City Power and Light Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 NRC 293 (1976).

^{10/}Offshore Power Systems, supra, at 205.

In discussing the broad discretion granted licensing boards to shape the course of proceedings, the Appeal Board noted that that discretion is "not unbridled," that "licensing boards may neither ride roughshod over the parties nor dance attendance on them," and that although "boards have broad and strong discretionary authority to 'conduct their functions with efficiency and economy' . . . they must exercise it with 'fairness to all the parties'."^{11/}

The Wolf Creek case holds simply that a Licensing Board is empowered to rule, in the nature of a "declaratory order," on the extent of its own subject matter jurisdiction to consider a particular matter.^{12/} That holding is irrelevant to CBG's claim that Boards have the authority to summarily revoke licenses.

There is no support for the claim made by CBG that the authority to revoke licenses can be found in Section 2.717(b). That section of the Commission's Rules of Practice simply states that certain NRC officers can issue orders or take actions with respect to a licensee in a pending proceeding and that the Board may modify such orders. CBG has not specified what action taken by the Staff during the pendency of this proceeding it would seek to have the Board modify. Nevertheless, it is clear that this Board authority does not extend to the revocation of a license in the absence of a fair, complete and final adjudication of the renewal application.

^{11/} Id., at 206, quoting from the Commission's Statement of General Policy and Procedure (10 CFR Part 2, Appendix A).

^{12/} Wolf Creek, *supra*, at 303.

Finally, CBG's assertion that resort to the "show cause" procedure of 10 CFR 2.206 is not necessary when there is a pending case, citing the Callaway case,^{13/} is irrelevant. Nothing in the Callaway case suggests that its holding was intended to eliminate the hearing requirements that would normally apply to matters arising during a pending adjudication although, except for the pendency of the adjudication, such matters would have to be considered under Section 2.206. However, the Callaway case stands for a narrow proposition. In that decision, the Appeal Board declared its authority, ancillary to its appellate jurisdiction to stay a decision authorizing issuance of a construction permit where that decision rested, in part, on fuel cycle regulations subsequently invalidated in a collateral action.^{14/}

B. CBG's Factual Allegations are Baseless

CBG's legal arguments fail to establish the authority of the Board to impose the sanctions CBG specifically requests. As a result, it is unnecessary to address in detail CBG's numerous factual allegations. But generally, CBG's allegation that irreparable harm could result to the public is based on speculation and CBG's view of the evidence which fails to establish the likelihood

^{13/}Union Electric Company (Callaway Plant, Units 1 and 2), ALAB-348, 4 NRC 225 (1976).

^{14/}Id., at 232. As a result of two federal cases invalidating the AEC's fuel cycle regulations the Commission issued a policy statement specifically directing Boards to decide whether previously granted licenses should be suspended, modified or set aside while extended rule-making was in progress. See, Environmental Effects of the Uranium Fuel Cycle, 41 Federal Register 34707 (August 16, 1976).

of any harm to the public from the continued operation of the UCLA reactor. Substantial evidence of record contradicts the specific allegations made by CBG and its witnesses at hearing which are repeated in its motion. With respect to these allegations, UCLA is entitled to a decision by the Board based on the complete record. The following should also be considered.

The basis of CBG's motion is that UCLA caused the delay in the "inherent safety" hearing beyond the December 10, 1983 deadline set by the Board. In fact, the direct cause of the cancellation of the hearing scheduled for November 29, 1983 was CBG which raised objections to essentially all of the rebuttal testimony that had been prefiled by UCLA and Staff in accordance with the schedule for filing set by the Board. The Board stated it was unable to consider CBG's objections prior to the scheduled hearing. The specific supplementation which the Board requested could easily have been provided without affecting the scheduled hearing. Indeed, in UCLA's view, CBG's objections could be disposed of the first day of the hearing as scheduled, as objections to testimony were considered and disposed of at previous sessions of the hearing.

CBG's other general and vague allegations that UCLA has deliberately delayed these proceedings are also baseless. A cursory review of the course of the proceeding shows that CBG has been the cause of the major delays. UCLA has acted in accordance with the procedures authorized in the Commission's Rules of Practice and in the case law. By contrast, CBG has repeatedly sought special relief from those procedures. The result has been numerous delays in the proceedings. CBG requested and was granted deferral of all summary disposition

motions for nearly two years. At the time it was finally required to respond to such motions CBG requested and was granted special relief from the rules that apply to summary disposition motions. Contrary to the usual practice, CBG requested and was granted the right to present its affirmative case last, which necessitated a two-month adjournment in the safety hearing. CBG also delayed the proceedings on the security contention for two and one-half years by first failing to comply with the Board's order of July 1, 1981 concerning the procedures established by the Appeal Board for the qualification of security witnesses and, then requesting special modifications of those procedures.

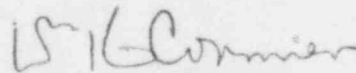
It is also to be noted, most importantly, that CBG did not reveal its affirmative case until January 1983 when it finally submitted responses (but only part responses in accordance with the "bifurcated" response procedure established by the Board for CBG's convenience) to UCLA's and Staff's summary disposition motions of the previous September. CBG's response contained 26 affidavits from 18 different proposed expert witnesses. CBG had not identified any of those witnesses and the substance of their testimony in response to UCLA's legitimate discovery requests for such information and for supplementation of CBG's discovery responses. As a result of this voluminous matter which was disclosed by CBG for the first time in January 1983, UCLA was prejudiced in its ability to properly prepare its case in response for the then upcoming hearing on the central safety issue. In order not to delay those hearings UCLA did not seek any special scheduling relief which in fairness it would have been entitled. In light of CBG's record its charge that UCLA has delayed the proceedings is simply preposterous.

III. CONCLUSION

For the reasons above, CBG's motion should be denied.

Dated: February 16, 1984.

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By 
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Representing UCLA

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S
RESPONSE TO CBG'S MOTION FOR CURTAILMENT (III).

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: February 16, 1984.

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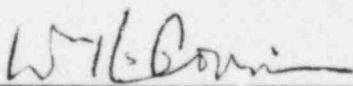
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