801

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

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 10L (Proposed Renewal of Facility License)

CBG RESPONSE TO STAFF'S PROPOSED CONDITIONS FOR UCLA APPLICATION WITHDRAWAL

I. Introduction

Pending before the Atomic Safety and Licensing Board is UCLA's Motion of June 14, requesting that in light of the University's decision to permanently close and dismantle its reactor[1], the Board accept, pursuant to 10 CFR 2.107, withdrawal of UCLA's license renewal application and terminate the renewal proceedings on the following conditions: (1) that the reactor not operate again, and (2) that the reactor be dismantled, decontaminated, and disposed of, pursuant to an NRC approved plan.[2] Two related conditions have already been imposed by the Board in accepting UCLA's request (also of June 14) that the then-forthcoming evidentiary hearings on security be suspended while the Board acts on the withdrawal requests.[3] These two additional conditions are:

1/ See letters of Chancellor Young to Chairman Palladino and from Walter Wegst to Harold Denton, both dated June 14, 1984.

2/ University's Request to Withdraw Application, dated June 14; also, Wegst letter, supra.

3/ University's Motion to Suspend Proceedings Pending Board Action on University's Request to Withdraw Application.

D503

801

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

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 10L (Proposed Renewal of Facility License)

CBG RESPONSE TO STAFF'S PROPOSED CONDITIONS FOR UCLA APPLICATION WITHDRAWAL

I. Introduction

Pending before the Atomic Safety and Licensing Board is UCLA's Motion of June 14, requesting that in light of the University's decision to permanently close and dismantle its reactor[1], the Board accept, pursuant to 10 CFR 2.107, withdrawal of UCLA's license renewal application and terminate the renewal proceedings on the following conditions: (1) that the reactor not operate again, and (2) that the reactor be dismantled, decontaminated, and disposed of, pursuant to an NRC approved plan.[2] Two related conditions have already been imposed by the Board in accepting UCLA's request (also of June 14) that the then-forthcoming evidentiary hearings on security be suspended while the Board acts on the withdrawal requests.[3] These two additional conditions are:

1/ See letters of Chancellor Young to Chairman Palladino and from Walter Wegst to Harold Denton, both dated June 14, 1984.

2/ University's Request to Withdraw Application, dated June 14; also, Wegst letter, supra.

3/ University's Motion to Suspend Proceedings Pending Board Action on University's Request to Withdraw Application.

D503

(1) that the fuel on-site be shipped to a suitable recipient as soon as reasonably practicable consistent with applicable regulations and with its security, public health and safety obligations, and (2) that the reactor be immediately functionally disabled from being capable of going critical.[4] UCLA has committed to expeditiously carrying out the former of these conditions,[5] and states that it has already disabled the reactor by severing the control blade drive shafts so that the reactor has been made "permanently inoperable."[6]

CBG responded[7] to UCLA's motion for withdrawal and proposed conditions by not opposing the proposed withdrawal provided, inter alia, that the various conditions and associated commitments made by UCLA be explicitly included as conditions in the Order withdrawing the application, and that, pursuant to NRC practice for such withdrawals, completion dates be included,[8] documents be preserved and a reporting requirement instituted[9], the protective orders be dissolved,[10] and that the conditions be explicit, binding commitments, enforceable by the Commission and the courts.[11]

4/ Order of June 22. The revised language vacated an oral stipulation of June 15 and an Order of June 18 after UCLA refused to comply with it. This incident exemplifies why the withdrawal conditions discussed herein must be made explicit and clearly binding.

5/ See, e.g., letter of June 25 from William D. Schaefer, UCLA Executive Vice Chancellor to the Honorable Gray Davis, Assemblyman, 43rd District, transmitted to the Board on June 26 by UCLA attorney Cormier.

6/ See Wegst letter of June 22 to Harold Denton; and p. 8, UCLA's July 11 pleading to the Commission regarding the Olympics.

7/ Committee to Bridge the Gap's Response to University's Request to Withdraw Its Application for License Renewal, July 3, 1984.

8/ See, e.g., Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762 (1982) & LBP-83-37, 15 NRC 1139 (1982); and Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), LBP-83-10, 17 NRC 410 (1983).

9/ See Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1) LBP-83-2, 17 NRC 45 (1983); and Bailly, supra

10/ See 10 CFR 73.21(i)

11/ See Bailly, supra

The Staff, however, in its response[12], opposes immediate withdrawal of the application and suggests an approach to UCLA's Motion for Withdrawal that would appear to violate well-settled standards for dealing with withdrawals. The Staff proposal, furthermore, contains major ambiguities that could create serious problems later.

The Board granted UCLA and the Staff opportunities to respond to CBG's proposed modification of UCLA's proposed withdrawal conditions, and subsequently granted CBG similar opportunity to respond to Staff's proposal. Said response follows.

II. Background

This hotly contested license renewal proceeding commenced in 1980, when UCLA's License R-71 expired. Shortly before the date of expiration (there remains debate as to whether it was within the time prescribed by the rules[13]), UCLA filed its "Application for a Class 104 License for a Research Reactor Facility." At page 5 of the Application, UCLA identified the license(s) it was requesting via the Application: (1) a Class 104 license for its reactor for use in the education of students in nuclear engineering, and (2) Special Nuclear Material to be used in connection with the facility. Initially the latter request was for 4700 grams U-235 at 93% enrichment in irradiated fuel, 4700 grams in fresh, and a 32 gram plutonium-239-Berylium source. The request was later amended to essentially 5 kilograms U-235 at the same enrichment and the Pu-Be source. Thus, the renewal application was for a reactor and for SNM associated therewith, and by virtue of the application and 10 CFR 2.109, operations at the facility utilizing the reactor and SNM

12/ NRC Staff Response to the Request by the University of California to Withdraw Application, July 2, 1984

13/ In January 1984, CBG filed a motion with the Licensing Board alleging, inter alia, that based on information just recently received the Application had been filed after the date mandated by 10 CFR 2.109, thus not permitting operation after license expiration.

possessed by virtue of License R-71, now expired, continued while the application was litigated.

CBG petitioned for leave to intervene on the proposed renewal of License R-71, was granted intervenor status, and subsequently twenty contentions with numerous subparts were admitted. These contentions addressed a wide range of issues: (1) that the Argonaut reactor and associated weapons-grade nuclear materials for which relicensing were requested were unacceptably risky from a public safety and security standpoint, e.g. by lack of inherent safety, making destructive power excursions, fire, or other accidents a substantial risk, unacceptable in a training device without containment or exclusion zone, (2) that the Applicant is not qualified to operate a nuclear reactor, e.g. by virtue of a long history of violations of NRC regulations, sloppy administrative and managerial controls, numerous radiation spills and security breaches, major calibration errors and inadequate past maintenance and the like, (3) that the UCLA site was unacceptable for a research reactor, e.g. because of its high population density and proximity to major earthquake faults, and (4) that the Application itself failed to meet the regulatory standards, e.g., by containing material false statements and inadequate emergency response and security plans.

Discovery was lengthy and extensive. After CBG had conducted extensive discovery of UCLA's Safety Analysis contained in its Application, and after UCLA had been informed through CBG's contentions and discovery of CBG of CBG's detailed criticism of said Safety Analysis, UCLA, right before evidentiary hearings were to be scheduled, withdrew its entire Safety Analysis in response to those criticisms and replaced it with Staff's. (Ironically, CBG had to introduce UCLA's original safety analysis from the Application itself at hearing, over UCLA's objections.)

Summary disposition motions[14] were filed by UCLA and Staff on essentially all contentions, and CBG answered (filing hundreds of pages of declarations by approximately two dozen experts.) Summary disposition was denied for most contentions, and deferred for all the rest, with the exception of financial qualifications, where partial summary disposition was granted.[15] In the process, the Board made numerous legal rulings[16] and rulings as to facts in dispute (determining, for example, that there was genuine dispute as to virtually all facts as to whether the UCLA device was inherently safe.)

Hearings were held on a number of issues. Full evidentiary hearings before an Alternate Board Member were held on Contention II ("Wrong Class of License") in May of 1983, regarding CBG's contention that the reactor had lost its usefulness as an educational or research tool, was being used only a few hours per year for a handful of students and performing no research, being used instead primarily for commercial purposes, in violation of its license. Those hearings, the evidentiary record for which was closed a year ago, resulted in a proposed decision by Alternate Board Member Laurensen affirming CBG's contention that for at least one year UCLA had been in violation of the regulations regarding commercial activity, and proposing that the application for renewal not be granted unless certain conditions were attached regarding this matter. UCLA announced its decision to withdraw its application prior to the time a decision was made by the Board as to final determination of whether to issue the Alternate Board Member's proposed Order, which in certain key

---

14/ In keeping with the Board's direction that parties not "shotgun" summary disposition motions and delay the proceeding, CBG also filed summary disposition motions, but only as to two contentions as to which there was essentially no dispute. Responses by Staff and UCLA indicated that the facts as to these two matters were generally agreed to (these matters were seismic Contention XVII and SNM Contention XIII), but no ruling issued prior to the time UCLA withdrew.

15/ Aspects of the contentions alleging UCLA had devoted insufficient funds to proper maintenance were to be dealt with in the safety hearings.

16/ E.g., as to legal standards for class 104 licenses.

respects went against the Applicant and were vigorously objected thereto.

Very extensive hearings were held, after considerable delay, as to inherent safety questions. These were held in summer and fall of 1983. Great doubt was cast on the sufficiency of UCLA's (new) Safety Analysis and the inherent safety of the device for which license renewal was requested. The day before the evidentiary hearings were to close on these inherent safety matters, UCLA requested a brief recess of the hearing to try to meet the serious questions raised and to submit new analyses of the safety issues that would attempt to rectify the substantial doubts casts over the Safety Analysis through the evidentiary hearing. The Board granted the delay, asserting it would not permit the delay to extend beyond December 10 in lieu of the serious safety questions raised and the continued license possession by virtue of the timely application rule.

The new material submitted was found by the Board both to be insufficient and untimely, particularly the shutdown analysis which the Board said should have been submitted with the Application. Close of the hearing record was thus delayed considerably beyond the December 10 deadline set by the Board, and withdrawal of the application by UCLA occurs thus prior to a determination whether those substantial doubts as to the inherent safety of the facility could be met. The Board ruled that, as of the evidence in the record, there had been a "nonchalant approach to the substantive issues raised in this proceeding by both UCLA and Staff,"[17] asserting further that the record supporting Staff and Applicant consisted merely of analyses the Board described as "superficial" and "cursory", demonstrating "at best UCLA's cavalier attitude toward this proceeding."[18] As to the Wigner issue, the Board determined, "On balance, there was not much in the record to support UCLA."[19]

17/ Memorandum and Order of March 22, 1984, at 10.
18/ id. at 10, 12
19/ id. at 13

Thus, withdrawal of the UCLA application at this stage occurs with an evidentiary record in support of the application described by the Board as "superficial" and "cursory", and on key matters "there was not much in the record to support UCLA." Withdrawal would prevent an adverse ruling to UCLA, and a determination that would be of tremendous importance as to the inherent safety of the remaining four Argonaut-type reactors in this country, with the same design and potential problems, for example, $3.50 of excess reactivity and nowhere for the water to go. Withdrawal prior to the measurement of the Wigner energy stored in the graphite, which UCLA only recently agreed to permit after much reluctance, likewise prevents determination of a safety matter about which there was little in the record to support UCLA, according to the Board, and which would be very important to a safety determination regarding the other still-operating reactors. Withdrawal at this stage prevents a ruling by the Board on fundamental safety questions over which it (and CBG) have labored for four years and about which the evidentiary record casts serious doubts about the Application and the reactor's inherent safety.

After numerous delays, caused in part by statements found by the Board to have been materially false (although the Board was unable to affirm intentionality to the statements), hearings on security issues were scheduled to begin June 21, 1984, with the pledge by the Board to complete the hearings and issue a decision prior to the Olympics, the focus of such additional security concern. One week before those evidentiary hearings were to commence, and a few days before the bulk of the testimony was due to be filed[20], the University announced its intention to close the facility permanently, decommission it, and withdraw the application, requesting that the evidentiary hearings on security be suspended. This has resulted in the Olympics having come without the promised prior

---

20/ Five of CBG's seven witnesses had not yet filed. The Board had been provided, at its request and over CBG's objection, the uncorrected deposition transcripts of three of the five; the Board saying it would use them for the sole purpose of scheduling cross & CBG could appeal if used for any other purpose.

evidentiary hearings and determination of what, if any, additional measures are necessary to protect the reactor and SNM on site adequately from theft or sabotage, both of which risks remain. Withdrawal would prevent a ruling on these matters, of relevance at least as long as the SNM remains on site.

The June 14 Decision To Withdraw Application, Decommission Reactor

As indicated above, one week before the scheduled start of the evidentiary hearings on security, Chancellor Young informed Chairman Palladino that he had decided to permanently close the UCLA reactor and to decommission it. He announced further that he had decided to

> ...withdraw the application for renewal of the license for the UCLA research reactor (Docket No. 50-142; License No. R-71), currentlypending before the Atomic Safety and Licensing Board...

Note that the full application, and the full license R-71, were the subject of the withdrawal. This will be important in the discussion that follows. Young further announced that he had asked the University's attorneys to "terminate the relicensing proceedings."

By Motion of same date, counsel for UCLA submitted a motion pursuant to 10 CFR 2.107 that the

> ...UCLA license renewal application be withdrawn on condition that the UCLA reactor remain out of operation and that application be made to the Commission to decommission the reactor.

Note again the two conditions proposed by UCLA: (1) the reactor remain out of operation, and (2) the reactor be decommissioned via a Commission-approved plan. Note also that regarding withdrawal conditions, the Commission is represented by the Board, not the Staff (the former sets the conditions via 2.107, the latter enforces the conditions ordered by the Board once withdrawal is effective.)

Again on June 14, UCLA's Walter Wegst wrote to NRC's Harold Denton informing him of the decision to withdraw the application for renewal of License R-71 (again, the full application, the full license, and the full

docket). Wegst committed the University further to immediate plans for:

> ...returning the fuel (both fresh and irradiated) to the DOE; dismantling the reactor structure; decontamination and disposal operations; and the ultimate disposition of the facility (building, etc.).

Wegst further committed UCLA "to make no attempt to fix the existing control blade problem, and the reactor will not operate again." (emphasis added) Note the latter phrase is UCLA's proposed condition 1 for acceptance of its withdrawal of its application, which CBG in its response agrees and insists must be explicitly included as a withdrawal condition.

Finally, also on June 14, UCLA requested that the evidentiary hearings scheduled to commence the following week on security be suspended, pending resolution by the Board of the withdrawal motion. In a conference call with the presiding officer and parties, UCLA agreed to, as a condition of suspending the hearings prior to the Olympics (where a ruling had been promised to be in hand within weeks), remove the SNM on site as soon as possible, before the Olympics if possible. All parties were instructed to assist in expeditiously carrying out that stipulation, and the Board issued an Order on June 18 suspending the hearings on those conditions. Staff did its part in assisting--NMSS director Burnett personally committed to expediting all paper-work and approvals, saying he would assure they took a few days at best, and identified for UCLA available shipping casks, saying he simply awaited formal request from UCLA to push the approvals through. UCLA refused to submit said request and to comply with the stipulation and June 18 Board Order, and on June 22 the Board vacated the Order of the 18th, requiring instead as conditions for suspension of the security hearings that the SNM be removed offsite as soon as reasonably practicable, consistent with applicable regulations and UCLA's security, public health and safety obligations. The entire incident of UCLA's

refusal to comply with its own stipulation and the Board's directed conditions in this matter underscores the absolute necessity that all commitments UCLA has made regarding application withdrawal be explicitly spelled out in the withdrawal order and be binding commitments, enforceable by the Commission and the courts, as is the usual practice with withdrawal conditions, as shall be seen below.

On June 25, 1984, UCLA Executive Vice Chancellor William Schaefer, in a letter served on the Board and parties by UCLA Counsel Cormier on June 26, committed UCLA as follows regarding removal of the reactor fuel, quoting the Board's June 22 Order to remove the fuel as soon as reasonably practicable:

> I assure you we will move as expeditiously as possible in complying with the June 22 order of the Atomic Safety and Licensing Board.
>
> (emphasis added)

UCLA further informed the Board and parties that, in compliance with the Board's directive that, also as a condition of hearing suspension, it render functionally inoperable the reactor, it had severed the control blade shafts and taken other actions to make the facility "permanently inoperable." (emphasis added)

UCLA's Proposed Conditions

UCLA thus essentially proposed four conditions: (1) the reactor not operate again, (2) it be dismantled, decontaminated and disposed of according to a Commission-approved plan, (3) fuel be removed as expeditiously as reasonably practicable, (4) the facility, prior to complete dismantlement, be rendered permanently inoperable. UCLA proposes immediate withdrawal of the application on those conditions, and termination of the proceedings, "without prejudice." The phrase "without prejudice" is not defined, but appears to conform with the Appeal Board's definition in Fulton

(ALAB-657, 14 NRC 967, 973) that the Applicant is free to apply for a new license at the same site or another site for a reactor of any type other than the type for which this application was submitted. Since UCLA's proposed conditions are that this reactor not operate again and be decommissioned and since Argonauts have long-since ceased being available[21] the withdrawal would constitute res judicata for its Argonaut application but would be without prejudice to applying in the future for a new reactor of some other sort at UCLA or another site. This needs to be spelled out explicitly in the withdrawal order (See Board's criticism of lack of specifity by lower licensing board in Fulton, supra, regarding prejudice, and its definition therein.) With that spelled out and certain additional specificity included as to the other proposed conditions (e.g. completion dates, reporting requirements, etc.) UCLA's proposed withdrawal conditions for approval by the Board fit generally the requirements of 2.107 and applicable case law. CBG's proposed modifications did precisely that--bringing UCLA's proposed conditions into compliance with 2.107 and the case law.

The Staff's Response

The Staff, however, in opposing immediate withdrawal of the application, suggests a rather astonishing approach to UCLA's Motion for Withdrawal that could be seen to suggest granting, through withdrawal, what UCLA did not receive through applying for renewal. While these problems may be merely due to inartful and inexact crafting of the language of its proposal, if not more carefully written it could be seen as having that effect.

21/ See CBG introductory panel on inherent safety, at P 27

The Staff proposes that the withdrawal of the application for license renewal be indefinitely postponed, despite Applicant's abandonment of all plans for renewal. This indefinite postponement is to be open-ended, unspecified and unlimited in duration but extending at minimum many years. Staff proposes, in addition, that UCLA be permitted to keep--also indefinitely--the license which expired in 1980 and which has been in effect these many years since then only by virtue of the application for renewal UCLA now requests to withdraw. And lastly, Staff appears to propose--despite indefinite postponement of withdrawal of the application--removal of all involvement by the Board, and the Intervenor, in any matter related to the reactor.

IN SHORT, STAFF PROPOSES THAT UCLA BE GIVEN, IN RESPONSE TO ITS REQUEST FOR WITHDRAWAL OF ITS APPLICATION, PRECISELY THAT WHICH IT HAS NOT BEEN ABLE TO GET BY THE APPLICATION ITSELF--LONG-TERM EXTENSION OF ITS LICENSE, WITHOUT RESOLUTION OF ANY ISSUE OR ISSUANCE OF ANY FINAL DECISION ON THE MERITS. Furthermore, Staff proposes that the functions of establishing conditions for withdrawal mandated to the Board by 10 CFR 2.107 be usurped by Staff, and that, despite indefinite deferral of withdrawing the application over which CBG has intervened, CBG be removed from all participation and all of its rights occuring through that participation be stripped. Under the Staff proposal, UCLA would be granted, in response to its request to withdraw its application, more than it could possibly have received by the application itself--indefinite continued possession of its license, without an expiration date, without need to prevail on the merits through evidentiary hearing that such grant is justifiable on grounds of public health and safety, and with the removal of the troublesome (from UCLA's standpoint) Board and Intervenor. This effect, whether due to poor craftsmanship or otherwise, would violate

as shall be discussed below, well-settled standards for dealing with withdrawals as well as the most fundamental and elementary principles of fairness and due process, in addition to being totally unnecessary. As shall be discussed in detail below, Staff's proposal violates the full range of NRC precedent on this matter--that withdrawals are effective immediately, with conditions a legal commitment to be followed thereafter, that Boards (not Staff) are responsible for approving site restoration conditions for withdrawal under 2.107, ordering their implementation as a condition after withdrawal, leaving residual rights to the Intervenor and Staff to ensure those conditions are enforced. The Staff's proposal can thus be read to violate the full range of NRC practice and procedure regarding withdrawals, would be massively injurious to CBG's rights and those of the public, and is totally unnecessary to boot. The longstanding, proper procedure for application withdrawal, as mandated in the regulations and case law, takes care of any problems identified by Staff without any of the injuries its proposal would occasion.

III. Legal Discussion

UCLA has applied for withdrawal of its application pursuant to 10 CFR 2.107(a). That regulation provides in pertinent part:

> Withdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

That language is essentially the same as that of Rule 41(a)(2) of the Federal Rules of Civil Procedure. As stated in Stanislaus[22], "It is abundantly clear that the Appeal Boards favor following the Federal practice in Commission proceedings." Virtually all published decisions in NRC/AEC case law regarding withdrawals rely on the Federal interpretation

---

22/ Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-32-2, 17 NRC 45, 49-50 (1983) (discussing F.R.C.P. 41(a)(2) and the Federal practice regarding voluntary dismissals)

of rules for voluntary dismissal.[23/]

The NRC practice, consistent with the Federal practice generally, is to permit voluntary withdrawal without prejudice if no substantial right of the Intervenor is injured by such withdrawal that cannot be made whole by attaching appropriate conditions and terms to the withdrawal. If such rights cannot be made whole by attaching appropriate conditions and terms to the withdrawal, it must be with prejudice to the Applicant. Prejudice has been defined by the Fulton Appeal Board as foreclosing the right to apply for a different kind of reactor at the same site.[24/] If granted without prejudice, conditions are to be attached to eliminate or compensate for inconvenience or injury occasioned the Intervenor by the withdrawal. Conditions are thus to protect the rights of the Intervenor--not, as Staff seems to be suggesting, to add rights to the withdrawing Applicant and remove them from the Intervenor.

In Federal practice, conditions granted if withdrawal is permitted without prejudice are usually payment of costs, attorneys' fees, and other disbursements made necessary by having to face the possibility, due to withdrawal without prejudice, of having to litigate some or all of the same issues a second time. Whereas the mere prospect of having to face a second litigation is insufficient to prevent withdrawal without prejudice, that is because conditions such as payments of fees and other disbursements, as well as document preservation, generally can make whole the prospect of a second litigation by not forcing the defendant to pay twice to litigate the same matter and assuring no loss of rights acquired through the first litigation, such as loss of documentary evidence necessary if the matter goes to a second litigation. Furthermore, if the injury is beyond the mere prospect of a second litigation, and involves loss of

---

23/ See, e.g., Rochester Gas and Electric Corporation (Sterling Power Project, Nuclear Unit 1), ALAB-596, 11NRC 867, 869 (1980); Fulton, supra; Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1135 (1981); Duke Power Co. (Perkins Nuclear Power Station, Units 1,2, and 3), LBP-82-81, 16 NRC 1128 (1982)

24/ See Fulton, supra at 923

rights or inconvenience caused which cannot be remedied by imposition of conditions such as payment of fees, costs, and related disbursements, or document preservation, then dismissal must be with prejudice. The defendant has the right to preservation of or compensation for any rights acquired through the proceeding that might otherwise be lost due to the withdrawal.

In NRC practice, Intervenors are protected against inconvenience or injury by withdrawal without prejudice by document preservation, post-withdrawal reporting requirements and rights of inspection to assure compliance with conditions, site restoration (by dates certain), and revocation of any residual licenses associated with the withdrawn project. Withdrawals are effective immediately, with the conditions a binding commitment enforceable by the Commission and the courts, with residual rights to Intervenor and Staff to ensure compliance with the legally binding commitments. Fees, costs and other disbursements to compensate for having to go through the expense a second time if the dismissal is without prejudice are permitted, but the same Federal standards must be met in order for an intervenor to qualify (due to their case particulars, no intervenor to date has met the standard): the dismissal must be effectively without prejudice, and the case must have progressed far enough along into and beyond the discovery phase that the injury occasioned by withdrawal without prejudice cannot be compensated for merely by document preservation, yet not progressed far enough that there were final decisions (in which case the American rule would apply.) The Appeal Board has essentially established a "window" for granting of fees--not met to date in previous cases at bar, but fully applicable in the UCLA case, particularly if any part of the Staff's proposal is accepted: that fees and related costs and disbursements may be appropriate

where the case "got off the ground" in that it progressed substantially into extensive discovery, entered into the trial stage, and where intervenors developed information which case doubt upon the application. North Coast, supra, 14 NRC 1125, at 1135, n. 11.

In short, in NRC as well as general Federal practice, withdrawal without prejudice is on such terms and conditions as to prevent inconvenience or injury to Intervenors (not the Applicant, as Staff would propose); are responsibilities of the presiding officer (not the Staff, as Staff would propose); are effective immediately upon ruling on the conditions (not after the conditions are met, sometime far in the future, as Staff would propose); require removal of existing licenses for which the application has been withdrawn (not indefinite granting of the license for which the application has been withdrawn, as Staff would propose); and are legally binding, with residual rights left to the Intervenor to assure compliance and obtain enforcement through the courts if necessary (not a gentleman's agreement between Staff and Applicant, based on "good faith" and no legal force preventing later refusal to carry through, as Staff would propose). Most importantly, Applicants cannot obtain through withdrawing applications that which was not finally granted through applying, as Staff would propose.

The relevant case law, the conclusions of which are summarized above, is discussed below.

NRC CASE LAW

Continued Service of all Documents--Vermont Yankee, Shearon Harris[25/]

These first two cases define rights of Intervenors to service of all Staff-Applicant correspondence related to the facility in question until the application is finally determined.

25/ Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, 7AEC 159, 183; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1,2,3, and 4) ALAB-184, 7 AEC 229, 237 (1974)

In Vermont Yankee, the Appeal Board ruled that the required service of all Staff-Applicant correspondence and other documents related to the facility at issue in an adjudicatory proceeding

> ...must continue unabated during the period allowed for judicial review; thereafter, during the pendency of judicial review, those practices must continue unabated with respect to those parties who participate in the judicial review proceedings.[40]

---

[40] Nothing we say here, of course, is intended to preclude some or all of the parties from entering into voluntary arrangements to continue serving documents after judicial review has been concluded. And, the issue not having been presented here, we express no opinion as to whether a party is entitled, after judicial review has been concluded, to personal service of those documents which relate to a continuing reporting or monitoring requirement imposed in connection with the resolution of an issue as to which the party had played an active role in the hearing.

The issue left open was later resolved in Bailly and Stanislaus, supra, where continued reporting and monitoring requirements imposed as conditions to application withdrawal required continued service. In Vermont Yankee, however, it was determined that a right to continuing service exists through the entire judicial review period. It should thus be noted that were Staff's proposal to be accepted of deferring the effective date of application withdrawal until the completion of decommissioning some many years hence, continued service on CBG would be required, just as CBG is proposing with its conditions for immediate effective withdrawal.[26]

In Shearon Harris, the Appeal Board expanded the standard set in Vermont Yankee to include all Staff-Applicant correspondence whatsoever about the facility, even when it involves an application addressed to Staff, not the Board, for an action in the purview of the Staff outside the matters directly at issue in the license proceeding.

---

[26] The Appeal Board also ruled that whereas the Local Public Document Room need be maintained during the course of the adjudicatory proceeding, it need not be maintained thereafter through the life of the plant, again leaving open the issue whether it may be so required as part of a continuing reporting or monitoring requirements imposed as a condition. Furthermore, if one accepts Staff's proposal of indefinite deferral of application withdrawal effective date so as to keep alive the timely application provision, then the LPDR must likewise be kept alive until the application is effectively withdrawn.

In Shearon Harris, a contested construction permit proceeding, the Applicant in that proceeding requested, and the Staff granted, an exemption permitting the commencement of certain on-site construction activities. No prior notice that the request for an exemption had even been filed was afforded the Intervenor. The Licensing Board and Appeal Board suspended in part work under the exemption pending the outcome of a full hearing on the merits of the exemption. The Intervenor, among other complaints, complained to the Appeal Board about the lack of service of the correspondence requesting the exemption from the Staff. As the Appeal Board stated the problem

> ...the applicant did not give notice to CCNC that it had applied for an exemption. A consequence of this failure was that CCNC did not learn of the application until after the regulatory staff had granted it. [footnote omitted]

It was argued by the Applicant in that case that adversary hearings are not required for applications for 50.12 exemptions. The Appeal Board ruled, however

> ...we find nothing in that Section (or in any of the Commission's Rules of Practice) which purports to relieve an applicant for a Section 50.12 exemption of whatever obligation it may otherwise have with respect to the giving of notice to other parties in a pending licensing proceeding involving the identical reactor. (emphasis added)

The Appeal Board continued:

> Among other things, the fact that there is no right to an adversary hearing on the exemption application does not mean that an intervenor in the licensing proceeding may not submit to the regulatory staff an opposition to the application--setting forth the reasons why he believes that the Section 50.12 standards are not met. There is every reason to assume that the regulatory staff would deem itself under an obligation not merely to accept such a submission, but also to give it consideration in making the determination as to whether an exemption should be granted (and, if so, what construction activities should be encompassed within it.)

The Intervenor had contended that adversary hearings should be held on the exemption application under 50.12. The Applicant had disagreed. (In this case, the Commission ruled that adversary hearings may not be required under 50.12, but should be held given the circumstances of the case and directed the Licensing Board to hold such a hearing.[27]) But the notice issue was independent, concluded the Appeal Board:

> In short, the resolution of the notice issue does not hinge upon a determination of either the validity or the thrust of Section 50.12. Rather we think it turns upon whether considerations of fairness--quite possibly rising to the dignity of procedural due process--require that, once a reactor has reached the point of an adjudicatory licensing proceeding, the parties to the proceeding are entitled to prompt notice of any significant development within the regulatory framework (such as the filing of an exemption application) which has an incontrovertible bearing upon the subject matter of the proceeding. To us, the answer manifestly is in the affirmative.[9]

> [9] We recently had occasion to discuss another aspect of the question concerning the right of the participants in an on-going administrative proceeding to personal service of "all applicant-staff correspondence relating to the facility". [citation to Vermont Yankee] In that decision, we held that the intervenors' right to insist that they be personally served with all correspondence between the applicant and regulatory staff related to the exercise by the regulatory staff of its ongoing regulatory responsibility remained in existence not just until the conclusion of administrative proceedings but throughout the period during which our decision, or the Commission's, was subject to judicial review. If anything, the reasons which led us to reach that result are even more compelling here, where agency proceedings are still under way. (emphasis added)

In conclusion, the Board said "we can see no possible justification" in which a party which has opposed an application for a permit or license for a particular facility is not "promptly informed" of other applications being filed, or other action being taken, with regards the same facility.

---

[27] Thus, even were Staff's argument that decommissioning is not a condition under 2.107 within Board jurisdiction but solely within the Staff's jurisdiction--a matter dead wrong, as shall be discussed below--and even were its additional argument correct that there is no right to intervene in a 50.82 decommissioning application--likewise dead wrong--the responsibility to serve "all correspondence between the applicant and regulatory staff related to the exercise by the regulatory staff of its ongoing regulatory responsibility" is a right for the Intervenor which remains in existence "not just until the conclusion of the administrative proceedings" but throughout the period of judicial review. If Staff's proposal is accepted to defer indefinitely withdrawal of the application CBG contests, service must indefinitely continue, as well as prompt notice, of all matters related to the facility.

Even were one to accept the wildly erroneous argument that site clean-up conditions to be attached to the application withdrawal are matters outside the Board's jurisdiction and outside the proceeding to which CBG is a party, which, as shall be seen below, is radically wrong, continued prompt notice as well as service of all staff-applicant correspondence related to the facility in question, be it on decommissioning matters or otherwise, must continue until the application is effectively withdrawn and the period of judicial review completed. Since Staff proposes indefinite delay in application withdrawal--so UCLA may keep a license it neither needs nor has right to--notice and service of all facility-related applications, correspondence, progress reports and the like must continue indefinitely. If one follows the practice required by the case law--site restoration conditions approved by the Board, withdrawal effective immediately with conditions legally binding--continued service and reporting requirements for purpose of monitoring completion of the conditions is necessary and a right of the Intervenor, as shall be seen in discussing certain withdrawal cases, later.

Sheffield[28]--Applicants Cannot Unilaterally Withdraw; Boards Must Rule on Withdraw Requests and Attach Appropriate Conditions Thereto

Given the wealth of cases to the contrary, it is perhaps not surprising that Staff cites to only one case in its entire brief assertedly supporting its contentions that the Board is prohibited from requiring specific site clean-up measures as a condition for withdrawal, that a separate action controlled exclusively by the Staff (and from which the Intervenor is excluded) is required, and most creatively, that the Board, rather than accept (with decomissioning conditions) UCLA's request to withdraw its application, must keep the application indefinitely so as to grant, without ruling on the applicatio

28/ Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673 (1979)

unlimited extension of the very license for which renewal is no longer being sought. The case relied upon by Staff is the first of two decisions about the proposed withdrawal of a renewal and expansion application for the Sheffield, Illinois, radioactive waste disposal site. Interestingly, Staff does not cite to the second of the two Sheffield cases, which, like all the other NRC precedent, appears at odds with the position advanced by Staff. So, too, however, is the first Sheffield case.

Staff relies on the 1979 Commission Order in Sheffield for the following assertions:

> Thus, although a separate action is required for license termination, the license and the requirements thereunder must be retained for the time necessary to obtain an order of termination [said in the previous sentence to require "considerable time" and occur only after dismantling and disposal operations are completed] and may not be unilaterally terminated. [footnote citing to the 1979 Sheffield case.]

Staff thus makes three assertions based on Sheffield: (1) termination of an expired license, kept alive solely by virtue of a timely renewal application for which withdrawal is requested, is a matter outside of the jurisdiction of the Licensing Board convened to rule on the renewal application, and conditions to permit said termination are solely the responsibility of the Staff to determine, (2) that the Board convened to rule on the renewal application cannot accept it, because that would terminate the license by virtue of its having expired, but must effectively grant (without a finding on the merits) the now-disavowed application for renewal, and (3) that licenses may not be unilaterally terminated. While the problem may simply be due to poor drafting of the sentence, close reading of the case and the footnote citing Sheffield make clear that Sheffield provides authority only for the last of these three assertions. Staff has no authority in the case law whatsoever for the first two--Staff's key premises--and in fact, all the case law goes against it.

In Sheffield, the Nuclear Engineering Company (NECO) was holder of a license to operate a low-level radioactive waste disposal site in Illinois. NECO had filed an application for renewal and expansion of its facility. Under 10 CFR 2.109, NECO (like UCLA in this proceeding) was permitted to continue its licensed activities even after expiration of the license by virtue of its pending renewal application. Shortly after a Licensing Board was established to rule on the application, NECO filed notices with the Board and the Director of Nuclear Materials Safety and Safeguards (NMSS) that it was, as of the date of the notice, unilaterally withdrawing its application and terminating its license which had continued in effect by virtue of that application.[29/]

In response, the Licensing Board informed NECO that it could not urilaterally withdraw its application, that that required Board approval, and set a date for a hearing with all parties to hear whether the withdrawal should be accepted and, if so, under what conditions pursuant to 10 CFR 2.107. At the same time, the Director of NMSS responded to NECO's letter to him by similarly informing NECO that, since the Board had not yet accepted the withdrawal nor determined what conditions should be attached thereto, NECO's license remained in effect pursuant to 10 CFR 2.109 and likewise could not be unilaterally terminated.[30/]

29/ Sheffield, 9 NRC 673, 674-5

30/ Sheffield, at 675

NECO informed NMSS that it was immediately (i.e., prior to Board ruling on its withdrawal pleading, which the Board was treating as a motion for withdrawal) ceasing to comply with the terms and conditions of its license, which was confirmed by NRC inspections. NMSS ordered NECO to show cause why it should not resume its responsibilities under its license, pending disposition of its request to withdraw, and provided NECO twenty days to request a hearing if it wished on the show-cause order. NECO subsequently requested such a hearing, but asked that it be combined with the Licensing Board's already-scheduled hearing on the withdrawal motion, and asked the Commission in the interim to stay the immediate effectiveness of the Director's show-cause order. The Commission declined to do so, ruling that the Director of NMSS had acted within his authority in issuing the order, that the show-cause hearing requested by NECO should be consolidated with the already-scheduled Board hearing to determine if the withdrawal should be accepted and under what conditions, and that the requirement to comply with the license responsibilities "remain in effect at least until the issues have been resolved by a Licensing Board."31/

Thus, the issue in Sheffield was whether a licensee, whose license remained in force by virtue of a pending renewal application pursuant to 10 CFR 2.109, could walk away from the responsibilities of that license prior to the time the Board determined whether to permit, and if so, under what conditions, withdrawal of the application and thus expiration of the license. This is a far cry from the premises Staff in this case asserts are provided authority by Sheffield, aside from the elementary fact that licensees and applicants cannot unilaterally terminate licenses and applications, but shall only be on such conditions as the Commission establishes.

31/ Sheffield, supra at 675,678-9.

Note also that whereas Staff in the UCLA case asserts that Sheffield demonstrates that site restoration and stabilization specific conditions are matters to be decided solely by the Staff in an action separate from the withdrawals proceedings and in which neither the Board nor parties have roles, precisely the opposite appears to have been the case in Sheffield. There the Staff submitted to the Board a list of proposed conditions, input was provided by the other parties, and it was up to the Board to determine the specific site redress measures upon which to condition application withdrawal and thus license expiration.[32/] It was the Board's determination--not the Staff's--and it was to be done in the licensing proceeding, not as Staff suggests here, in an action separate to which the intervenors would not be party.

Note also that Sheffield clearly puts to rest any assertion that site redress conditions cannot be applied by the Board in the UCLA case because the Board allegedly had not authorized any actions which had affected the environment, being a renewal proceeding where grant of the initial license had preceded it. Aside from the obvious answer that the proceeding made possible years of additional environmental impact (e.g. site contamination) by permitting continued operation under 10 CFR 2.109, Sheffield makes clear that a license renewal which had not issued any Initial Decisions or Limited Work Authorizations permitting activity, as in the many construction permit cases in which site redress was a condition of withdrawal, likewise has the authority and duty to condition withdrawal on such site redress terms as are necessary to protect public health and safety and the rights of the parties. SHEFFIELD, LIKE UCLA A RENEWAL NOT A CONSTRUCTION PERMIT PROCEEDING,

32/ Sheffield supra, 12 NRC 156,158.

CONSIDERED SPECIFIC SITE RESTORATION CONDITIONS FOR WITHDRAWAL, EVEN THOUGH THE BOARD THERE HAD ISSUED NO NEW PERMITS THAT NEEDED VACATING. As in a construction permit proceeding where LWAs or CPs must be vacated if withdrawal is granted, a renewal proceeding for which withdrawal is reque sted results in termination of the license for which renewal was requested by simple operation of law via expiration. Therefore, site restoration conditions must be considered by the Board as withdrawal terms to protect the public and parties.

In short, Sheffield would not appear to support the Staff's position in this case, but contradict it.

Sterling[34/] "Applicants Cannot Improve Their Position--i.e. Insure the Retention of the Requested Permit or License--By Terminating the Proceeding"

The Sterling case makes quite clear that what the Staff appears to be proposing--indefinite continuation of the license, the application for renewal of which is being withdrawn--is at odds with the case law as well as, in the Appeal Board's words in Sterling, "considerations of fundamental fairness."

In Sterling, a construction permit had been authorized by a Licensing Board, which gave up all jurisdiction over it, and affirmed by the Appeal Board on all but two issues over which it continued to retain jurisdiction (radon and need for power). The Applicants requested the Appeal Board strike Sterling from its docket because of project discontinuance, and terminate all remaining issues raised by the intervenor's appeal. The Appeal Board granted that relief, indicating however there remained an additional question:

34/ Rochester Gas and Electric Corporation et al (Sterling Power Project, Nuclear Unit No. 1) ALAB-596, 11 NRC 867 (198)

> But as the NRC staff correctly points out in its response to the applicant's termination request [footnote to date of letter omitted], there remains the question as to the status, once the proceeding has been terminated, of the construction permit which was issued by the Director of Nuclear Reactor Regulation on the strength of the initial decision. Although the applicants have sidestepped that question, its answer is dictated by considerations of fundamental fairness. Had the intervenor's appeal been prosecuted to a successful conclusion, the possible consequence would have been not merely the reversal of the initial decision but, as well, the revocation of the construction permit. Surely, the applicants cannot improve their position--i.e., insure the retention of the permit--by having us terminate the proceeding and thus bring a halt to the appeal.
>
> Sterling at 868-9 (emphasis added)

Despite the very clear language of the Appeal Board here, this is precisely what the Staff would have this Board do: have the Applicant (UCLA) improve its position--i.e., insure the retention of the license, indeed without any expiration date--by having the Board terminate the proceeding and bring a halt to CBG's challenge to the license, but not permitting the license to expire as required under the timely application rule (10 CFR 2.109).

The Appeal Board identified the appropriate response: "remove the authority underlying" the permit or license in question:

> This will, in turn, call upon the Director of Nuclear Reactor Regulation to perform the ministerial duty of revoking the permit--i.e., the same duty that he would have had to discharge in the event that our appellate review of the merits of the initial decision had led us to conclude that the Licensing Board erroneously had authorized permit issuance.
>
> Sterling at 869

Note that it is the Boards' responsibilities to remove the authority underlying the permit or license in question--the Director of Nuclear Reactor Regulation's duty is the "ministerial" one of immediately revoking the permit at the direction of the Board. The Staff's proposal would turn these responsibilities on their head: the Director of NRR would determine when the license should be revoked, and then direct the Board to remove the underlying authority for the license by then making the

withdrawal of the application effective.

The "considerations of fundamental fairness" which the Appeal Board insisted required revocation of the permit or license for which the application was being withdrawn are even more clear in the UCLA case than in Sterling. Whereas it took an affirmative, additional action on the part of the Appeal Board (vacation of the initial decision) beyond mere granting termination of the proceeding, mere acceptance of the withdrawal request for UCLA automatically removes the underlying authority for the license for which the application is withdrawn. Whereas the Appeal Board said fundamental fairness requires additional action to revoke the license for which an application is withdrawn, the Staff in the UCLA case would have the Board not take the action requested by the Applicant (withdrawal of the application), let alone any additional action, so that the Applicant might retain that which its application requested. If the Sterling Appeal Board had to take the additional action of revocation of permit because the Applicant was not entitled to something which it might not have retained on appeal, certainly the UCLA Licensing Board must not, as urged by the Staff, refrain from accepting withdrawal of a now-moot application for renewal in order that the Applicant might indefinitely keep the license which it might not have been permitted to keep had the proceedings not been terminated and they had reached their final determination on the merits. (This is even more striking in Sterling, where the decisions by the Licensing Board had been completed and gone against the intervenor, but the Appeal Board still revoked the license because the remaining appeal might have succeeded in overturning them.)

UCLA's license expired four years ago, and remains effective only by virtue of a live application for renewal--now moot and for which withdrawal has been requested. As shall be seen below, moot applications are not to be kept on the docket; as seen above, certainly not for the purpose of

permitting retention of a license which, had the adjudicatory proceeding been permitted to resolve the remaining factual and legal disputes, might not have been granted, and was in effect only by virtue of the applicatio..:

> Surely, the applicants cannot improve their position--i.e., insure the retention of the permit--by having us terminate the proceeding...

Sterling at 868-9

North Coast[35]--Licensing Boards Not to Retain on Their Dockets in Perpetuity an Application Which Has Become Entirely Academic

The Staff, as discussed above, asks the Board to ignore UCLA's request to withdraw its application and only make the withdrawal some indefinite time in the far-off future (at least many years) so that UCLA may retain for a "considerable time ..." the license so hotly contested these last four years. This despite the fact that UCLA has announced it has dropped all plans for renewal, wishes the application withdrawn and the proceeding terminated, will never operate the reactor again and will tear it apart and dispose of it.

In North Coast, the Appeal Board determined that Licensing Boards have the authority--even where there is no request to withdraw the application--to dismiss or deny an application pending before it if it should appear that the applicant had abandoned its plans for the facility in question. As the Appeal Board stated:

> It scarcely perforce follows, however, that a licensing board is required to retain on its docket in perpetuity an application which has become entirely academic. In this connection, we find nothing in Section 189 of the Act or Section 2.104 of the Rules of Practice which might support such a curious result.
>
> (emphasis added)

35/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980)

Yet this "curious result" is precisely that which is proposed by Staff in this case, even though, unlike the initial North Coast case, there is a request from the Applicant to withdraw the application and terminate the proceeding and where it has clearly announced it is dropping all plans for which the application was put forward. Note also that, just as in Sterling where there was no withdrawal request (merely a request for termination of the proceedings) but the Board nonetheless had the authority and responsibility to revoke the authority under which the license at issue in the proceeding was founded, Boards in North Coast were directed by the Appeal Board that they had the authority to remove from their dockets applications "which had become entirely academic," even in the absence of a request for withdrawal. The Staff's proposal in the UCLA case, then, is even more "curious" than the concept rejected by the Appeal Board in North Coast--here it is proposed that the Board is required to keep on the docket indefinitely an application abandoned by its sponsor and for which withdrawal is requested.

One month after the Appeal Board remanded the North Coast matter back to the Licensing Board to determine whether the Applicant intended to actively pursue the application, the Applicant requested withdrawal of the application, which was promptly granted, and the application struck from the docket. The decision accepting the withdrawal request will be discussed in a later section.

Davis-Besse[36]--Site Resotoration Required as Condition of Withdrawal; Existing Permits Immediately Revoked, Withdrawal With Conditions Immediately Effective; Boards to Determine Conditions for Permit and Proceeding Termination, Staff to Advise.

In Davis-Besse, the applicant therein withdrew its application for construction permits and the Chairman of the Appeal Panel struck from its docket two partial initial decisions authorizing Limited Work Authorizations, directing that the request that the proceeding be fully terminated be addressed to the Licensing Board which still retained jurisdiction over portions of it. (ALAB-622, 12 NRC 667). The Staff, noting that site preparation work had been performed under the LWAs, argued that any termination must be preceded by review to determine whether the conditions at the site resulting from applicant's activities there require the imposition of special conditions. The Appeal Board, importantly, directed that the Board, before deciding what conditions to attach to the termination request, accord the Staff a reasonable opportunity to propose any conditions "which its inspection of the current state of the site might suggest be attached to the termination order." [The Appeal Board appended a footnote indicating that it is for licensing boards to impose conditions upon the withdrawal of an application, pursuant to 10 CFR 2.107(a).]

Thus, the role of Staff in determination of conditions for withdrawal of applications, termination of proceedings, and termination of permits or licenses related thereto is to propose conditions. It is for the Boards to determine whether the specific site restoration conditions proposed by Staff--or any other party--should be imposed. Staff, in its proposal for the UCLA case, asserts the contrary--

---

36/ Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667 (1980); LBP-81-33, 14 NRC 586 (1981

Boards (and other parties to the proceeding) have no say, site restoration is a matter to be worked out between Staff and Applicant in a separate action. Staff's proposal turns the 2.107(a) responsibilit on its head.

In a related matter, the Appeal Board (12 NRC 668-9) criticized the manner in which the Applicant in that case communicated with the NRC on the termination matter. Taking issue with the procedure of submitting a letter "by a lay official of the lead applicant to an NRC staff official," the Appeal Board indicated the communications should be from counsel to the adjudicatory board instead, noting in particular that such a procedure as employed by the lay official of Toledo Edison ignored the important issues of attaching withdrawal conditions related to the site work that had occurred, matters which counsel should have addressed, rather than the official, and to the Board, not an NRC staff figure. This matter has recently surfaced in the case before this Board, with a number of requests for relief being submitted by letter from a UCLA official to an NRC official, rather than as motions by UCLA counsel to the Board. These requests related to conditions for termination, in addition to raising certain confusion because of apparent contradictions with requests before the Board, appear to attempt to sidestep the Board's responsibility to determine conditions, rather than the Staff's, and the requirement that Applicant's proposals related to those conditions be by motion to the Board, not letter to the Staff, with opportunity for response by the other litigants.

As indicated in the Appeal Board decision, the withdrawal request and conditions attached thereto regarding site redress pursuant to 10 CFR 2.107(a) were placed before the Licensing Board. Staff reviewed the site, made recommendations as to conditions that should be attached to proceeding termination, application withdrawal, and revocation of outstanding LWAs. The Board considered the pleadings on the proposed conditions, and ordered a number of specific site restoration conditions pursuant to 2.107(a). The legal basis for the existing LWAs was immediately revoked, the Director of NRR was ordered to immediately revoke the LWAs in question and publish in the Federal Register notice of immediate withdrawal of the application, and the application was withdrawn and proceeding terminated, effective immediately, with the site restoration conditions to be legal commitments required to be carried out after the withdrawal was effective.

Note again that Davis Besse is thus at right angles to the proposal by Staff in this case. Existing permits were immediately revoked, withdrawal and proceeding termination likewise immediately effective, with site restoration required as a condition to be carried out thereafter. The Staff was in the role of a party proposing conditions; the Board, pursuant to 10 CFR 2.107 was the decision-maker. There was no "separate action" for termination of the existing permits, the permits were not permitted to continue with withdrawal only after the conditions were met. Specific requirements for site restoration were attached by the Board; not a transfer of that responsibility to the Staff.

The Director of NRR was directed by the Board to immediately revoke the existing permits, with site restoration to occur later; Staff here proposes the Director of NRR determine what site restoration is necessary, and direct the Board when to revoke the application. Again, this is upside down.

No distinction with the UCLA case can be made on the basis that Davis-Besse was a construction permit proceeding. If an LWA or permit is required to perform site alteration at a proposed nuclear facility, and if Staff's argument is correct that it needs to have the licensee maintain an NRC permit or license in order for the Staff to retain jurisdiction over the licensee to ensure site restoration, then Davis-Besse and all the other cases where site restoration was required as a condition for withdrawal are at odds with Staff's interpretation. The Board in Davis-Besse (affirmed by the Appeal Board in ALAB-652, 14 NRC 627 (1981)) yanked the authority for the limited work authorizations (and directed NRR to perform the ministerial duty of revoking them), with site restoration to be performed afterwards according to specific requirements established by the Board. If a permit or LWA is required for construction work at a site, it would likewise be required for construction work involved with site restoration. If a permit is required to enforce site restoration, then the Davis-Besse boards should have been required to follow the proposal Staff puts forward in the UCLA case: withdrawal of the application effective only upon completion of conditions, conditions being primarily that the Applicant apply to the Staff for permission to terminate the LWAs, Staff to determine what site restoration is required, LWAs terminated only after site restoration is completed to satisfaction of staff, who will then direct the Board to make

the withdrawal effective. As noted in Bailly, citing Davis-Besse, the withdrawal procedure sanctioned by the Appeal Board is just the opposite--withdrawal effective immediately, with conditions legally binding and to be accomplished thereafter, all permits immediately revoked, site restoration required thereafter. As shall also be discussed below, and was touched on in discussing Sheffield, any argument that this procedure is not relevant to UCLA because it is a renewal proceeding where the authority in question was not granted by the Board in question is likewise shown to be in error in Bailly, which required the same result as in Davis-Besse, despite the fact that the latter was a CP application proceeding and the former an extension (i.e., renewal) proceeding.

Fulton[37]--Licensing Boards Have Power to Dismiss With Prejudice, But Requires a Showing of Substantial Injury that Cannot be Made Whole by Attaching Appropriate Conditions

In Fulton, a Licensing Board dismissed an application with prejudice, believing that the record demonstrated that the Applicant had been less than candid with the Board during the proceeding about its intentions regarding the application and that it had misused the Early Site Review procedures. The Appeal Board overturned the decision, ruling that although Boards have the authority to dismiss with prejudice, the record did not support the conclusion of the Licensing Board regarding the ESR procedure and the Applicant's intentions in that specific case. The Appeal Board defined "dismissal with prejudice"--criticizing the Licensing Board for not having explicitly so defined what it meant, something important to do in this case--as foreclosing the opportunity for applying for another kind of reactor than the one for which the

37/ Philadelphia Electric Company (Fulton Generating Station, Units 1&2) ALAB-657, 14 NRC 967 (1981)

withdrawn application was addressed at this site. UCLA's request for withdrawal andits proposed conditions fits the Appeal Board's definition of "without prejudice"--UCLA proposes a condition that its Argonaut be decommissioned and not operate again, obviously foreclosing the re-application for renewal of this reactor so long contested here, but reserving the right to apply for a license for another reactor, at UCLA or elsewhere. Although half of the contentions being litigated in this proceeding were not tied to the particular type of reactor, being site-adequacy or Applicant competence (e.g. history of noncompliance), those issues might have to be re-litigated were the Regents to apply for another reactor at some other time. The issues as to the Argonaut, however, would be forever mooted by the conditions to decommission and not operate. Thus, UCLA seems to have defined "without prejudice" in its proposed conditions the same as the Fulton Appeal Board, but as that Board indicated, it should be made explicit. (We note that Staff has not commented on UCLA's proposed condition 1, no further operation, which CBG insists upon.)

North Coast (2)[38]--Dismissal Should Generally Be Without Prejudice Unless There Would Be a Substantial Injury to the Intervenor or Public that Could Not Be Remedied by Conditions on the Withdrawal; Such a Condition Might be Payment of Costs and Fees if the Expense Had Been Substantial and Intervenor Had Developed Information that Cast Doubt on the Application.

In North Coast, the Appeal Board expanded on its discussion in Fulton, supra, regarding withdrawal with or without prejudice. Citing, as it did in Fulton, the Federal practice, the Appeal Board

38/ Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1) ALAB-662, 14 NRC 1125 (1981)

once again indicated Boards have the authority to dismiss with prejudice, but should only do so when there will be some substantial injury to the Intervenor or public that cannot be cured with appropriate conditions. The Federal practice cited to establishes that (1) one has the right to voluntary dismissal without prejudice or conditions if the dismissal occurs at a very early stage of the proceeding (in the Federal Rules, before summary disposition motions or answers by the opposing party are served; see F.R.C.P. 41(a)(1)) where neither expense nor significant rights have accrued to the defendant (i.e., the Intervenor), and (2) if dismissal is requested at a later stage in the proceeding, where substantial expense and rights (such as discovery) have accrued to the opposing party, dismissal shall generally be without prejudice but upon such conditions as to ensure those costs will not be borne a second time if there is relitigation and those rights not lost (e.g. by payment of fees & costs and preservation of documents). Thus the mere prospect of a second litigation (e.g. for another kind of reactor at the same site, where one had raised site adequacy issues in the first litigation) is insufficient in and of itself to cause dismissal with prejudice, because the injury and inconvenience involved to the other party can be compensated for by a remedy less severe than dismissal with prejudice--dismissal without prejudice but on certain conditions. The standard Federal conditions are payments of costs, attorneys fees and related disbursements, and preservation of documents. In fact, as shall be discussed shortly, the standard Federal practice, from the authority relied upon by the Appeal Board in these cases here, is withdrawal without prejudice upon payments of fees and related disbursements.

In North Coast, the Appeal Board found no substantive injury to the Intervenor that would warrant a dismissal with prejudice. As to fees, referring to the sources of the Federal practice which identify the usual practice as dismissal without prejudice upon payment of fees (if the case has "gotten off the ground"), the Appeal Board said as follows[39/]:

> We note that the case at bar did not entail lengthy discovery, or proceed through the trial stage. It hardly got off the ground. We leave open the question whether something short of a dismissal with prejudice, such as conditioning withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information which cast doubt upon the merits of the application.

Those circumstances are precisely those of this case. Unlike North Coast, this proceeding did "get off the ground," there was lengthy discovery, we did go deeply into the hearing stage, CBG's expenses were extensive, and most clearly, CBG developed information which cast serious doubts upon the merits of the application (so much so, in fact, that the Applicant withdrew its first safety analysis, repudiated much of its second, and was left with very serious questions unresolved after extensive hearings and deeply critical testimony and cross-examination by CBG. The Board ruled, e.g. in its February 8, 1983 Order, that CBG had developed substantial information that cast serious doubt about the inherent safety of the device, genuine disputes which required a hearing. The adequacy of the application was, if anything, called into even greater question by CBG's involvement in those hearings.)

39/ North Coast at 1135, n. 11

Whereas the need for dismissal with prejudice or with fees & disbursemer might be mooted by granting the dismissal with the conditions proposed by UCLA (reactor not operate again, be decommissioned, fuel expeditiously off-shipped) as modified by CBG (dates certain, conditions binding and explicit commitments, reporting requirement, document preservation, etc.), that is certainly not the case if Staff's proposal were adopted. There, dismissal would cause extremely substantial injury to CBG--it would lose all rights it had acquired by virtue of the applicatio proceeding (service, document preservation, participation in making its views known in an adjudicatory setting, ability to present evidence and testimony and to cross-examine, and, most importantly, ability to attempt to prevent license renewal and continued license possession unless safety and security problems were resolved). Applicant would get more than it requested by applying--indefinite license possession--and CBG would lose the fundamental rights guaranteed to it by Section 189 of the Atomic Energy Act, right to a hearing and decision on the evidence as to whether the renewal should issue. If any part of Staff's proposal were accepted, or if CBG's conditions were not, then the prejudice would be severe enough that dismissal would have to be, according to the North Coast standard and the long-standing Federal practice, either with prejudice or at minimum with costs, fees, and disbursements.

Bailly [40] --Approval of Site Restoration Plan is Board Responsibility; Withdrawal Must Be Immediate, Conditions to Be Carried Out Thereafter; Conditions to Be Legally Binding, Enforceable by Commission and Courts; Dates Certain Required; Reporting Requirement and Post-Termination Monitoring Rights

Bailly is the seminal case of relevance to the UCLA case and the Staff proposals therein. Bailly was a construction permit extension proceeding (i.e., a renewal). Bailly involved a facility with a construction permit granted in a different, previous proceeding, a permit which had expired and for which the licensee had requested extension. As in the UCLA case, the expired permit continued in effect while the extension request was litigated.

Like all the other cases, in this one the Licensing Board determined the specifics of the site restoration plan and ordered it included as a condition of application withdrawal; as is the established practice, Staff and the other parties could propose conditions, but the Board made the determination what they should be, with Staff and the other parties to supervise the site restoration progress to assure compliance with the conditions. Those conditions were very explicit, and included completion dates--the Board having determined that the absence of initiation and completion dates "suggest the possibility of an extended or indefinite delay in completing (or even beginning) the restoration ." Therefore the Board included such initiation and completion dates as conditions in its Order. This is a central point and central problem with both the Staff and Applicant proposals--the lack of initiation and completion dates make the kind of delay identified by the

40/ Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), LBP-82-29, 15 NRC 762 (1982); LBP-82-37, 15 NRC 1139 (1982)

Bailly Board as requiring prevention via dates as conditions an unacceptable possibility. A commitment to do something without a date by which it must be started and/or completed is an essentially non-binding commitment, because the party can always say it still plans to carry out the commitment and has violated no term of it because no dates were included. Bailly required initiation and completion dates for its site redress conditions, and this Board must as well, or otherwise the decommissioning condition is essentially without meaning and essentially unenforceable. These dates should be reasonable, but legally binding--UCLA and Staff's attempt to have a decommissioning commitment that is non-binding as to completion or nature would be very injurious to CBG's rights, because the decommissioning condition might never be complied with, if specificity and dates are lacking. This is especially true since Staff proposes that the license stay in effect, and the application not be withdrawn, until the decommissioning is completed, and the University has recently indicated[41/] it wishes to defer for many years even deciding whether to complete decommissionin and if so, how and when. Conditions without initiation and completion dates are not enforceable conditions, and the Bailly Board (and that of Black Fox) determined the responsibility of 10 CFR 2.107 to attach such terms and conditions as are just to the withdrawal mandated initiation and completion dates.

41/ See letter of July 26 from UCLA's Wegst to NRR's Denton

Perhaps the most important aspect of Bailly for the UCLA case is that it resolved squarely the issue of whether applications should be withdrawn effective immediately or effective only upon completion of site restoration conditions. Contemplating the issues raised by the Staff in the UCLA proceeding--that maintaining a function ing permit and an application not yet withdrawn would/assertedly enhance enforcing the conditions and conferring jurisdiction--the Board decided squarely that those concerns could be met simply by letting the construction permit expire by virtue of the withdrawn extension application and making the site redress conditions binding commitments enforceable by the Commission and the courts. In determining that withdrawals should be effective immediately, with binding conditions to be followed thereafter, the Board relied on a number of factors, including:

> Finally, but not the least in our consideration, there is the Appeal Board's approval of the general procedure of terminating proceedings subject to site restoration conditions, rather than having the Licensing Board supervise the restoration and then terminate the proceeding. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-622, 12 NRC 667 (1980); ALAB-652, 14 NRC 627 (1981). To depart from a general procedure sanctioned by the Appeal Board, even under reasonable (but not compelling) circumstances, stands little chance of success. (emphasis added)
>
> Bailly, 15 NRC 762, 765

Thus, the key feature of the Staff's proposal--defer effective date of application withdrawal until completion of site restoration many years in the future, and thus keep alive the license indefinitely, is directly rejected by NRC practice.

If the procedure is to let existing NRC permits and licenses lapse by virtue of withdrawal of renewal or extension requests (or vacating of initial decisions in non-renewal cases) by immediate effectiveness of conditioned withdrawals, with the conditions binding, there is no basis whatsoever for Staff's contrary proposal in the UCLA case. If conditions under 10 CFR 2.107(a) req uire a continuing license to have effect, then 10 CFR 2.107(a) would have no power whatsoever. 2.107(a) gives Boards authority to establish binding terms and conditions in exchange for withdrawal without prejudice and vacating of existing permits; Bailly makes clear withdrawal does not await completion of those conditions, conditions in the UCLA case for which the Staff and UCLA propose an open-ended time frame for cmpliance.

One cannot argue that the long line of cases that have required site redress as conditions of withdrawal, and established the specifics of such redress in the conditions, are not relevant to the UCLA case because the UCLA Board has authorized no actions affecting the environment that require redress. In addition to the fact that the very pendency of the Board's proceedings has permitted four more years of environmental impact and radiological contamination necessitating redress, Bailly, like UCLA, was a proceedins to determine whether a license previously granted, expiration of which had passed, should be extended. The Bailly Board had taken no action affecting the environment, yet was required under 2.107(a) to establish specific site redress conditions to assure that no untoward effects resulted from the withdrawal of the application (and thus termination of the permit and the project).

As to the issue of whether to grant the withdrawal with or without prejudice, Bailly followed the Appeal Board direction in Fulton and made explicit exactly what portions of the action were with and what without prejudice. As to the "effect that termination of this proceeding should have on future activities at the Bailly site,":

> As we understand that effect, which would be automatic (by operation of law) even without our characterizing the termination, Construction Permit No. CPPR-104 will expire without opportunity for further extension because the time for filing a timely application for extension has passed. Since there has been no decision adverse to NIPSCO's building a nuclear plant at the Bailly site, NIPSCO would be free to file a new application to construct a nuclear plant on that site. We see no reason to depart from that result by either failing to specifically foreclose NIPSCO from reviving Construction Permit No. CPPR-104, or by permitting the expiration of that permit to prejudice NIPSCO's right to file a new application for a construction permit. We would spell out that result to assure its certainty.
>
> Bailly at 765 (emphasis added)

The Bailly Board did indeed spell out that result to make it a certainty in its conditions, and the UCLA Board should as well. The Bailly Order explicitly stated that Construction Permit No. CPPR-104 "is deemed to have expired without further opportunity to revive such permit." (id. at 769).[42] The Board ordered all environmental effects that had occurred under Permit CPPR-104 (which it had not issued; it had merely been hearing evidence whether it should be extended at the time the extension application was withdrawn) to be redressed, by dates certain, so that not only was the permit gone, with all opportunity to revive it likewise gone, but the environmental effects of the lapsed permit likewise were removed or redressed. Given those conditions, the Board explicitly kept open the opportunity for the Applicant to apply for a new Construction Permit for another reactor at the Bailly site. That is the Fulton Appeal Board standard; that is what was ordered

[42] emphasis added

at a situation similar to UCLA's renewal withdrawal, at Bailly; that is the effect UCLA has requested in asking for withdrawal without prejudice on the condition that its Argonaut be decommissioned, dismantled, decontaminated, and disposed of, not to operate again; and it should be spelled out by the Board. Staff's proposal is to the contrary--rather than spell out that the license R-71 has expired due to the renewal application being withdrawn and that License R-71 cannot be revived (but not precluding the opportunity to apply for a new license for another reactor), Staff proposes the License R-71 be indefinitely extended. This is contrary to all the case law and fundamental fairness.

As to the issue of fees and expenses, the Bailly Board, following the North Coast footnote 11 referred to earlier, recognizes the right to impose conditions on dismissals as an exception to the "American rule" (that you cannot, absent special statutory authority permitting private attorneys-general, receive costs as an award for winning in litigation.) As discussed in more detail in Perkins, to follow, fees and expenses as a condition for withdrawal is not an award for winning anything, but compensation for having to face the possibility that due to a party being permitted to withdraw without prejudice to bringing another action one might have to expend the same costs twice for the same action.

Bailly found that the circumstances of that case did not fit in with the above-mentioned exception to the American Rule, and that Boards do not have the authority to go beyond the established exception. (Staff's reference to this matter in its pleading at p. 5 is particularly misleading--Bailly found merely that the Appeal Board's "footnote 11" conditions were not met by those particular intervenors, and that Licensing Boards could not go

beyond the established conditions.) Since the Federal Rule is that fees are not to be granted when the ruling is with prejudice, but only as compensation for when it is without prejudice, the Bailly Board found that, since the extension application was withdrawn and the construction permit automatically expired, and since site restoration was included as a withdrawal condition, withdrawal was effectively with prejudice and thus fees and expenses were not appropriate under the Rule. (Recognizing that a new application for a new construction permit for a different reactor at the same site could be filed, the Board argued that the particulars of any such new CP case would be different than those of this particular CP completion-date-extension case, and thus expenses would not be duplicated. That would not necessarily be the case in the UCLA matter, where an operating license renewal involves the full range of issues that can be addressed in an initial operating license application, and where many of the contentions at issue in the renewal case were site suitability and Applicant competence issues that would be duplicated in an application for a new operating license for another reactor at the UCLA site).

Whereas one can argue that withdrawal without prejudice (as defined above) of the UCLA renewal application, like the Bailly case, is essentially with prejudice to License R-71 and the UCLA Argonaut (although without prejudice to a new application for another reactor), and thus CBG might not be entitled to fees and expenses (at least with regards that portion of the contentions that are specific to the Argonaut rather than the site and the Applicant THAT WOULD NOT BE THE CASE WERE THE STAFF'S PROPOSAL ACCEPTED.

Under the Staff's proposal, not only would the withdrawal be effectively without prejudice as to R-71 and the Argonaut, it would produce extreme prejudice to the rights of CBG, by giving the formerly-requested renewal, but without conclusion of or even continuation of the evidentiary hearings, and in the face of abandonment of the application. Furthermore, the renewal would be without termination date, legally infinite, something not permitted by the regulations even were the renewal granted after an affirmative finding by a Board on the merits of the application. The Staff's proposal would deprive CBG of a ruling on the merits but grant UCLA the license the application for which it wants to withdraw. Under those circumstances, CBG's injury would be immense, and the standards of withdrawal with prejudice or conditions of fees and expenses and other terms would be clearly mandated under the case law.

In short, Bailly should be looked at closely, particularly the withdrawal Order prepared. Withdrawal, and thus automatic permit expiration, was immediate--not indefinitely deferred as proposed by Staff here. Specific site restoration conditions for termination were a responsibility of the Board, not the Staff as proposed here. A reporting requirement--every three months until completion--was imposed, providing the intervenor continued notice after the proceeding terminated to monitor compliance with the conditions. This included inspection rights, full service, and the like. Dates certain were established for initiation and completion of the conditions, not indefinite open-ended situations as proposed by both Staff and UCLA. That the underlying permit automatically expired and could not be revived was clearly spelled out.

And the conditions were legally binding, enforceable by the Commission and the courts. CBG's proposed language is taken almost verbatim from Bailly, as are many of its proposed modifications of UCLA's proposed conditions. Bailly's Order states:

> That the conditions imposed by this termination order be considered as an obligation assumed by NIPSCO in consideration of the Commission's terminating this proceeding prior to the restoration of the site, enforceable by the NRC Commission and the courts.

The Intervenor is thus given places to go if the conditions are not met, and the conditions become legally binding. Under the Staff's proposal, there would be no legal binding and no place to go if promises made were not kept--in fact, UCLA would have an indefinite license and thus no obligation legally whatsoever to commence or complete dismantlement, particularly in absence of any required dates spelled out. It could keep the highly enriched uranium close to forever (last time it shipped out lightly-irradiated fuel took nearly two decades), and it could for years or decades delay dismantlement actions. The conditions must be explicit, with dates certain, binding, and with reporting requirements and prompt service and notice to CBG--all as required in Bailly. The Bailly Orders should be looked at with great care in resolving what Order should issue in the UCLA case. One should remember as well Bailly was a permit extension or renewal, like UCLA. If Bailly could require site restoration work without an active construction permit, this Board can and should require dismantlement and decontamination and disposal conditions without an active license, as conditions for the withdrawal pursuant to 10 CFR 2.107(a). If Bailly and all the other cases make conditioned withdrawal immediately effective, and revoke all existing permits

or licenses in effect by virtue of the proceeding or the application being withdrawn, then so should this Board. The Staff's proposal runs counter to all the precedent, and all fairness and due process.

Perkins[43]--Conditions Are for the Protection of the Intervenor; "Payment of Attorney's Fees is Not Necessarily Prohibited, As a Matter of Law, As a Condition of Withdrawal Without Prejudice"

Perkins is the seminal case with regards conditioning withdrawals without prejudice on payment of Intervenor's fees and expenses. It is the most thoroughly thought-out and argued, being directed by the Appeal Board to consider the matter, keeping in mind the Appeal Board's previous words in footnote 11 of its North Coast decision. (See Appeal Board decision in Perkins, ALAB-668, 15 NRC 450 (1982) providing direction to and guidance to the Licensing Board to address this issue.)

The Perkins Board approached the withdrawal motion with the following standards in mind:

> Duke is entitled to withdraw its application without prejudice unless there is legal harm to the intervenors or the public.
>
> In this case the Board may attach reasonable conditions on a withdrawal without prejudice to protect intervenors and the public from legal harm.
>
> But if conditions on a withdrawal without prejudice cannot avoid legal harm, dismissal with prejudice may be ordered, but only to the extent that a dismissal with prejudice is necessary to prevent the legal harm. The right to a voluntary dismissal without prejudice is note not absolute. LeCompte [v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976)] at 604.
>
> Duke would have the option to accept either reasonable conditions on a dismissal without prejudice, or a dismissal with prejudice as to certain issues. Yoffe [v. Keller Indus., Inc., 580 F. 2d 126, 129-30 (5th Cir. 1978); petition for rehearing denied, 582 F. 2d 982 (1978)] 580 F.2d at 131, n.13; 582 F.2d at 983.

43/ Duke Power Company (Perkins Nuclear Station, Units 1,2 and 3), LBP-82-81, 16 NRC 1128 (1982); ALAB-668, 15 NRC 450 (1982).

The Board goes on:

> Moore's Federal Practice cited in North Coast (Vol. 5, ¶41.05[2], at 71-75 (2d ed. 1981) discusses many cases where a motion for unconditional voluntary dismissal without prejudice was denied or where a motion to dismiss was granted, but with prejudice. The tenor of these cases is that the litigation had moved along too far to dismiss unconditionally without prejudice because the other party had already been put to the expense of defending.
>
> Perkins, 16 NRC at 1135, emphasis added

The Board went on to make clear the Intervenors have standing with regards determination of conditions for withdrawal--a matter the Staff now asserts is outside the scope of this proceeding, a matter entirely in its jurisdiction alone. id. at 1136:

> Part and parcel of their right to intervene is the right to enjoy any earned benefits of tne ensuing proceeding. Otherwise the entire intervention process would be pointless.
>
> id at 1137, emphasis added

Continuing:

> In our view the Intervenors have standing to seek a dismissal with prejudice or to seek conditions on a dismissal without prejudice to the exact extent that they may be exposed to legal harm by a dismissal.
>
> id, emphasis added

Thus, Staff's argument that CBG has no standing in any action to determine conditions on termination, that that is a separate action in which it may not participate and in which it has no rights, is squarely wrong. To the extent CBG would be injured by Staff arranging for unlimited extended duration of the license CBG has opposed so long--a very large injury--CBG surely has standing in determining whether those conditions should be imposed. Likewise, to the extent Staff wishes to keep--without termination dates--UCLA's right to possess highly enriched uranium and a radioactively contaminated reactor, CBG is highly injured and has the right to

conditions that do not produce said injury.

The Perkins Board continued:

> If the Intervenors have won anything in this proceeding they are entitled to have that judgment preserved for use in any revived Perkins proceeding or to be protected from harm if any victory is nullified by the unfair need to relitigate their interests again.

CBG has won important legal and evidentiary rulings in this case; there are scores of Board Orders on important matters herein; a major evidentiary record, with important documentary and expert witness evidence, as well as a vast array of admissions against interest by witnesses of opposing parties obtained through cross-examination. CBG has had valuable discovery rights, and rights to service and notice, regarding the nuclear activities of the Applicant. If Applicant insists on dismissal without prejudice as to applying for another reactor at UCLA, documents must be preserved so that evidence useful in litigating the same site and competence issues would not be lost by virtue of the application withdrawal here. That is a relatively simple matter, to be resolved by CBG's proposed document preservation order. However, if Staff's proposal is permitted, indefinitely deferring the withdrawal and permitting continued license possession, the injury to be addressed is far larger and requires far more serious conditions, of which fees and expenses would be but one; preservation of evidentiary record and legal decisions but another.

Perkins was not persuaded by the arguments of the NRC Staff and Duke that the Commission's boards lack authority to award attorneys fees "for the purpose of obviating legal harm threatened by a withdrawal without prejudice.":

Many cases under Rule 41 have involved the payment of attorney's fees to save defendants from legal harm where actions have been dismissed without prejudice. As the court in LeCompte noted:

> Most cases under the Rule [41(a)(2)] have involved conditions that require payment of costs and attorney's fees. See, e.g., American Cyanamid Co. V. McGhee, 317 F.2d 295 (5th Cir. 1963); see also 5 Moore's Federal Practice ¶41.06, at 1081-1083 (2d ed. 1975); Annot., 21 A.L.R.2d 627, 633-637 (1952), and cases cited therein.

528 F.2d at 603.

The courts have freely used the payment of attorney's expenses as the most useful of the conditions available to protect a defendant in recognition that the plaintiff may reinstate his action after the defendant has been put to effort and expense in the first proceeding for naught. Id.

The American rule, which bars recovery of litigation costs by the prevailing party as an award for winning a presumably completed law suite, must be distinguished from the practice of reimbursing litigation costs as a condition on a dismissal without prejudice. The latter is not an award for winning anything, but is intended as compensation to defendanys who have been put to trouble and expense to prepare a defense only to have the plaintiff change his mind, withdraw the complaint, but remain free to bring the action again. It is only anticipation that the defendant may have to incur expenses to prepare again in a refiled proceeding which justifies the payment of defendant's costs in the first proceeding as a condition of dismissal without prejudice. 5 Moore's Federal Practice, supra, ¶41.06, at 41-83, 41-86.

Both Staff and Duke recognize that boards may apply appropriate conditions on the withdrawal of an application for construction permit, but each argues that a condition requiring reimbursement of attorney's fees may not attach because boards lack statutory authority or any inherent equity authority for such a condition. Their arguments fall of their own weight. Where is the express authority to attach any kind of condition--redress of a site for example? Is there something about money that takes reimbursement of litigation expenses out of the bank of possible conditions available to avoid legal harm to an adversary? Staff argues only that the Federal Rules do not necessarily apply to Commission proceedings [emphasis in original]. Response at 29. Applicant lightly brushes aside the well-established use of attorney's fees in without-prejudice dismissals by courts to protect litigants from harm. Reply at 26. Both allow the clear prohibition against lawyer's fees under the American rule to wander out of its limitations into their own considerations of conditions on dismissals without prejudice--two essentially unrelated concepts.

> There is nothing about the payment of money which removes a possible litigation-expense condition from consideration, because, in the final analysis, the utility does not have to pay. It can instead elect to accept a reasonable with-prejudice ruling as to issues where, for example, the intervenor prevailed and where the public interest permits.
>
> id at 1139-1140

After its extensive consideration of the matter, the Board issues its ruling, pursuant to the Appeal Board's direction to do so (ALAB-668, 15 NRC 450):

> We hold that the payment of attorney's fees is not necessarily prohibited, as a matter of law, as a condition of withdrawal without prejudice of a construction permit applicatior
>
> Perkins at 1141

After determining that there is no legal bar to grant of attorney's fees in NRC proceedings as conditions of withdrawal without prejudice (it should be noted that no distinction with an operating permit application appears to alter the conclusion), the Perkins Board went on to determine that fees and expenses were not appropriate conditions given the particulars of that case, because no legal harm would devolve upon the Intervenor by a withdrawal without prejudice. Since the particular case involved withdrawal at a very late stage--after decisions against the intervenor were issued--and since those decisions were adverse to the intervenor, it was argued the intervenor would suffer no injury were it required to litigate the matters again. The worst that could happen, it was argued, was that it would lose again--no harm. If it won, it had been granted a second opportunity at bat it would not have had otherwise. These conditions, of course, do not apply in the UCLA case, where the Board issued no initial decisions despite the evidentiary hearings held to date. Were CBG forced to relitigate matters, it would not be being granted

an unearned second chance but rather would lose the bulk of the first effort--testimony and cross-examination and documentary evidence and discovery materials and rulings and summary disposition responses--all having to be repeated to no benefit to CBG and extreme expense (these four years have been extremely expensive to CBG, which is prepared to identify in detail those expenses were the Board to permit in any of Staff's proposal and the resulting attendant injury.)

Thus, the Perkins ruling that there is no bar to a payment of fees and expenses as a condition of withdrawal without prejudice if injury results as a result of that withdrawal would require the Board establish a procedure to determination of what payment of litigation expenses should be required as a withdrawal condition if any of the Staff's proposal were accepted. That proposal, involving indefinite continued license possession with removal of all the rights CBG has acquired in the proceeding, would constitute the kind of injury for which payment of litigation expenses would be but a minimum condition.

Stanislaus[44/] --Document Preservation, Continuing Notification of Plans as Conditions for Withdrawal

Stanislaus involved conditioning withdrawal upon preservation of discovery documents. The Applicant had requested withdrawal without prejudice, and since extensive discovery had occurred and future litigation was not precluded, the Board determined that withdrawal without prejudice could only be sanctioned if the withdrawal were conditioned upon terms to protect the Intervenor from harm that might occur from the withdrawal--in this case, loss of the discovery which might be needed in future litigation.

Stanislaus is right on point to the UCLA case. To the extent that UCLA is requesting withdrawal without prejudice--which appears from its proposed conditions and commitments to be to keep open the nuclear option at the UCLA site for a reactor other than the Argonaut it intends to dismantle--and to the extent that the same site adequacy and Applicant competence issues (e.g., history of regulatory non-compliance, security lapses, radiation spills, indicating inadequate managerial controls and inability to demonstrate likelihood of future regulatory compliance) could thus be raised, all documents related to the issues that may have to be relitigated must be preserved. (Since there are few if any of the documents involved that are not relevant to the issue of adequacy of Applicant as a potential licensee, and the adequacy of the site, but particularly the former, one cannot really separate out documents which need not be preserved. Operating and maintenance logs, for example, while containing some Argonaut-specific information, also contain a wealth of information demonstrating past non-compliance with operating procedures and

44/ Pacific Gas and Electric Company, Stanislaus Nuclear Project, Unit 1, CLI-82-5, 15 NRC 404 (1982); LBP-83-2, 17 NRC 45 (1983)

maintenance responsibilities that would be relevant evidence or information no matter what type of reactor UCLA might apply for at the UCLA site.)

To the extent UCLA has withdrawn the Argonaut reactor from its future plans--which it repeatedly says it has permanently done so, even to the extent of "permanently" disabling it and starting to dismantle it--then there should be no reason whatsoever that that is not made an explicit condition and binding commitment. "Good faith" statements are insufficient to protect a party, unless they are made legally binding; if they are made in good faith, as UCLA repeatedly asserts they are, then there is no injury to UCLA whatsoever in making them binding, and much potential injury to CBG can be prevented. The history of this case and the numerous stipulations entered into, or commitments made by Applicant, that ended up not kept necessitates any commitments made here be binding and in force once the proceeding ends. For that and other reasons, Staff's silence on the matter of UCLA's first proposed condition--that the reactor not operate again--and on clear definition of "without prejudice" is injurious; that condition and clear definition as per Fulton are essential.

Stanislaus makes clear that if, as is the required practice, application withdrawal is immediately effective, document preservation rights and rights to prompt notice of Applicant's plans are required to protect Intervenor. (Applicant cannot be permitted to remove an Intervenor from a proceeding by withdrawing, then reapplying for example for another reactor at the same site and hope to get out of having to litigate the site and character issues by not having informed the Intervenor directly and promptly that it intends to exercize its "without prejudice" rights in some fashion. Similarly,

if Applicant intends to take actions that could be seen as not fulfilling the withdrawal conditions, prompt notice is essential to ensuring affected parties can take action to enforce the conditions. This was also required in Bailly.)

It should be noted that Stanislaus determined that, since the proceeding had not proceeded through the discovery stage, the Appeal Board's North Coast footnote 11 conditions for payment of litigation expenses as condition for withdrawal without prejudice were not met in that particular case, but the rights of the Intervenor could be adequately protected by preserving the fruits of that discovery.45/

In short, Stanislaus would require preservation of discovery insofar as there are no binding conditions barring future litigation of any of the matters at issue in the UCLA proceeding at bar. Where UCLA has dropped plans and cannot revive the renewal application for the Argonaut, that must be, as UCLA itself has proposed, a condition of withdrawal. To the extent UCLA wishes to leave open the door to relitigate non-reactor-specific issues by a future application for another kind of reactor at the UCLA site, discovery related to Applicant's record as a licensee and to site & procedure matters must be preserved.

45/ The single Administrative Law Judge hearing the Stanislaus case, unlike the three-member Board in Perkins at about the same time, found "there is no need to determine whether the Commission has the power to authorize payment of litigation expenses as a condition of permitting withdrawal of an application without prejudice," and then adds several sentence of dicta on the matter. Whereas the Perkins Board spent many pages examining the precedent and issues, then issuing what it described as an affirmative "ruling" on fees as permissible conditions, these brief non-binding comments by this ALJ, going against the NRC precedent and the Federal practice which it itself said is "abundantly clear" is favored in NRC cases (at 50) is entitled to little weight compared, for example, with the Perkins ruling.

Black Fox[46] Site Restoration Required; Withdrawal with Conditions Effective Immediately; Outstanding Permits Immediately Revoked; Staff Nonetheless Has All the Monitoring Authority It Needs to Assure Site Redress; Dates Certain Required for Completion.

Black Fox, in three brief pages, makes many of the basic points about established NRC practice regarding withdrawals discussed in the previous cases. Site restoration was required according to a specific plan identified as a specific condition in the Order. The withdrawal with conditions was effective immediately, and outstanding permits were immediately revoked; yet the Staff, by virtue of the binding nature of the conditions, had all the authority it needed to monitor and assure compliance, even though the utility was no longer an NRC licensee--the conditions of withdrawal, agreed to by the utility in accepting the withdrawal with those conditions (it had the choice of not withdrawing if it didn't like the conditions), subjected the former licensee to a binding commitment to fulfill the obligations in the conditions. Furthermore, dates certain were established (see condition 1a) for completion of site stabilization.

If the Staff has the authority to oversee soil stabilization and erosion control site work where there is no longer any valid Limited Work Authorization, because that restoration work was a condition for withdrawing the LWA and application and terminating the proceedings, then the same is true in the UCLA case if the dismantling matters are 2.107 conditions.

46/ Public Service Company of Oklahoma, et al (Black Fox Station, Units 1 and 2) LBP-83-10

The Federal Practice Briefly

As is seen in reviewing the NRC cases dealing with voluntary withdrawal, they rely heavily on the Federal practice and interpretations thereon. Boards have frequently cited to LeComte v. Mr. Chip (528 F. 2d 601, 5th Cir. 1976), to Wright and Miller's Federal Practice, to Yoffe, and other similar cases and authority. The Federal practice underscores all the points made above as to the NRC well-established principles in this regard:

> When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant, for it is his position which should be protected.
>
> LeComte, supra, at 604

LeComte, citing a number of authorities, also stated that most cases involving voluntary dismissal have involved conditions that require payment of costs and attorneys fees, but that the trial judge "is not limited to conditions of payments of costs, expenses and fees. The dismissal may be conditioned upon the imposition of other terms designed to reduce inconvenience to the defendant." LeComte at 603.[47] These other conditions identified in LeComte include production of documents, producing certain witnesses at trial, paying half cost of defendant bringing in other witnesses, and so on. id. LeComte makes clear that the purpose of conditions is to "prevent defendants from being unfairly affected by such dismissal." id at 604.

47/ emphasis added

The purpose of terms and conditions is not to punish a withdrawing party but to protect the opposing party:

> Good faith, however, is simply irrelevant to an award of attorneys' fees or the imposition of any other "terms and conditions" under Rule 41(a)(2). As noted above, the purpose of the rule is to protect defendants from undue prejudice or inconvenience caused by a plaintiff's premature dismissal.
>
> GAF Corp. V. Insurance Co. of N. America 665 F2d 364 (D.C. Cir. 1981); on remand 96 F.R.D. 188, D.C. 1982)

Just as "good faith" in having prosecuted a case and then withdrawing before completion is irrelevant to the imposition of withdrawal conditions, which are designed to protect the other party, "good faith" promises by the withdrawing party are insufficient protection for the opposing party against undue prejudice or inconvenience caused by the dismissal--the "good faith" commitments must be made legally binding, explicit, enforceable conditions.

IV. THE STAFF'S PROPOSAL IN LIGHT OF THE ABOVE STANDARDS

We have discussed above in great detail how the entire NRC case law appears to go against the proposed withdrawal procedure suggested by Staff in this case. Whereas the full weight of NRC practice regarding withdrawals involves Boards conditioning withdrawals on site redress, document preservation and reporting requirements, with conditioned withdrawals effective immediately and related permits and licensees immediately revoked with the attached conditions legally binding, Staff proposes to turn the well-established practice on its head. Staff proposes to shift the 2.107 responsibility to set site redress conditions

from the Board to the Staff. The Staff proposes to remove the other parties to the proceeding from any involvement in setting those conditions, and to eliminate any right to monitor the compliance with those conditions. Whereas withdrawals are immediately effective, Staff proposes indefinite deferral, although the application has been entirely abandoned and its sponsor seeks its withdrawal. And most creatively--and injurious--Staff proposes indefinite continued possession of the contested license for which renewal is no longer sought. The Staff proposal thus violates the full range on NRC precedent on withdrawals, but most particularly, the Sterling standard that one cannot retain through withdrawal that which one was not guaranteed of retaining or obtaining through applying. Staff essentially proposes that UCLA get indefinite license renewal through withdrawal of its application for license renewal, totally untenable, unnecessary, and contrary to the well-established procedure.

The Staff Argument

First of all it should be said that the Staff proposal is that the current (expired) license remain in effect until completion of dismantling, decontamination and disposal operations, and that UCLA says it has no idea when--or even if--those operations will ever be completed.[48/] All agree it will be "many years in the future," if ever. Under the Staff proposal, UCLA would get to keep the license for a very long time, perhaps essentially forever, despite abandoning its renewal application.

48/ see June 26 letter, Hegst to Denton

Staff says there is no reason not to grant UCLA's request to withdraw its application. Nonetheless, it proposes that the Board not do so--not for many, many years, until decomissioning is, if ever, complete. Yet the Staff wishes to Board to give up jurisdiction over the application and terminate all proceedings related thereto, although the application would not be withdrawn until some unnamed year in the future.

The Staff's primary argument to this effect is that UCLA needs a license while it decommissions its facility. This is incorrect, as shall be discussed below, but even so badly misses the point. There is a very large distance between needing a license and having a right to a license. In the case of UCLA, its license expired over four years ago, and continued possession of its license authority was soley by virtue of having an active renewal application actively been litigated. UCLA has no right to continued possession of any portion of License R-71 unless either one of two things occur: (1) a finding on the merits favorable to UCLA on all contested issues in the renewal proceeding, or (2) prior to that time, a valid renewal application actively being litigated before a Board. Staff, however, proposes termination of the proceeding and the Board's jurisdiction, before any merit findings, so neither condition can possibly be met. UCLA, even if it needed a license, no longer has any right to R-71, which has essentially automatically expired, by action of law, pursuant to 2.109.

Staff admits that by withdrawing the application, the license R-71 expires automatically, pursuant to 10 CFR 2.109, but attempts to evade the clear intent and language of the regulation by urging that the Board keep on the docket indefinitely the abandoned application. Note however, the Appeal Board's direction in North Coast against precisely such a practice--abandoned applications are not to be kept alive, but to be dismissed, even were there not, as there is in the UCLA case, a request by the Applicant for withdrawal.

The Staff faces an additional dilemma with its proposal: it wishes the adjudicatory proceeding over the UCLA application, and CBG's involvement therein, to end, but it wishes the application to be kept artificially alive. CLEARLY THE STAFF CANNOT HAVE IT BOTH WAYS. EITHER THE APPLICATION IS NOT WITHDRAWN, IN WHICH CASE THE HEARINGS MUST CONTINUE, OR IT IS WITHDRAWN, AND LICENSE R-71 EXPIRES. ONE CANNOT HAVE IT BOTH WAYS.

If the Staff's proposal of indefinitely rejecting UCLA's request for withdrawal of its application were to be accepted, then the evidentiary hearings must be promptly resumed, which neither Staff nor UCLA want. But if the adjudicatory proceeding is terminated, as they propose, the application related thereto must terminate as well, and with it the expired license kept in force only by virtue of that application. Staff cannot have UCLA granted an indefinite extension of License R-71, as it proposes.

The Argument That UCLA Needs a License

Staff argues that UCLA must have a license to possess ("and maintain") its reactor, and its SNM, after termination of the proceedings and while it complies with decommissioning and disposal. This is misleading.

It is true that an entity requires a license if it wishes to continue its licensed activities with SNM or a reactor. However, if it loses its license--e.g., by revocation, as under 10 CFR 50.100, or by expiration, under 10 CFR 2.109--then it no longer has the authority to possess either and must return the SNM to a licensed entity and dismantle the reactor. (If one falls behind on one's contractual responsibilities, e.g. house or car payments, one loses title--legal possession authority--to the house or car. It thus must be returned to or retaken by whoever is legally authorized to possess it. Obviously there will be a period prior to the transfer that ownership has lapsed yet transfer has not been completed--that is simply why when one loses legal authority to possess something it must be promptly returned to an entity that has that authority.)

This is made explicit in 10 CFR 50.101 in the cases of license revocation--the NRC may immediately retake possession of SNM from a licensee whose license has been revoked. It is true that the entity whose license has expired or been revoked no longer has authority to possess SNM--and it is precisely for that reason that SNM must be promptly returned to an entity who does have said authority. If one were to accept Staff's argument here, 10 CFR 50.100 and 50.101 would be made null and void. The Commission could never revoke a license--because the SNM would remain in possession of the entity and, according to Staff's creative position here, the entity needs a license to possess the SNM. This is clearly an entirely circular and specious argument. Furthermore, it is clear that the Commission has the authority to retake possession of items for which licenses are required but valid licenses no longer exist.

In this sense, that is what dismantling, decontamination and disposal operations are--transferring materials that contain residual radioactivity to a disposal facility that has a license for such materials.

Staff's creative argument would make impossible, for example, a finding by any Board to deny an application for license renewal. If a Board were to do so--if this Board were to have done so if the UCLA application were not withdrawn--then the license would have lapsed and the applicant such as UCLA would be in the position UCLA is in now by having withdrawn its application--with an expired license. Someone with an expired license promptly returns whatever had been licensed to someone who has a valid license.

Staff's argument would thus nullify the entire process of license renewals, making of them a mockery. If possession of a reactor or SNM automatically grants to one a right to a license, as Staff claims here, then a facility whose license is soon to expire need never apply for renewal, because so long as it possesses the items in question it must have a license. This is a clear logical fallacy. Staff has it backwards: a license gives you a right to possession, possession does not give you a right to a license. To say that one needs a license in order to possess SNM or a reactor means merely that if one no longer has a license, one must give up said possession; it does not mean that the agency must grant a continued license as long as the entity holds on to possession.

If authority to possess lapses, possession must be abandoned, under such conditions as the Commission establishes to protect the public. If possession is not to be abandoned, a license is needed, requiring an application.

Need for a license does not mean right to a license. The requirements of the Atomic Energy Act--hearing, affirmative safety ruling, right to intervention, etc.--must still be met. By proposing to end the proceedings but maintain the license Staff proposes an extra-legal grant of a license, a license which UCLA itself has requested it give up.

Staff asserts by implication that in order for the Commission to retain jurisdiction over UCLA to ensure off-shipment and dismantling, UCLA must retain a license. This is precisely wrong. By retaining a license, UCLA no longer is required to off-ship or dismantle--because it retains the authority to possess. (Note that the Staff claims in SECY-84-266 regarding this matter and UCLA that so long as UCLA retains a valid license, the Staff has no authority to require UCLA's fuel to be off-shipped by any particular time.) Thus, continued license possession denies the Staff of the ability to require fuel removal or dismantling, because the facility thus still has a legal license for the SNM and reactor. Only if UCLA's authority to possess lapses, by license expiration, does the Commission have jurisdiction to reclaim the SNM and radioactive material contaminating the reactor, material which UCLA no longer is authorized to possess and which must be removed.

Note also that Staff's creative argument would nullify 10 CFR 50.51, which requires that a license be granted for no longer than the estimated useful life of the reactor. Staff proposes that it is impermissible for a facility not to retain a license for the useful life of the plant plus the decommissioning period.

The Commission retains jurisdiction over the activities of those it regulates by a variety of means, of which licenses are only one. Note that the Commission has the authority to issue notices of violation to non-licensees, for example. See 48 FR 44170. It can seize SNM from entities which do not have valid licenses for it. 10 CFR 50.101. And it can apply legally binding conditions to withdrawals and revoke any permits or licenses that had been in effect due to the proceeding being terminated. 10 CFR 2.107(a) and the many NRC cases cited above.

10 CFR 2.107(a) provides legally binding requirements on entities who wish to withdraw applications. Note that none of the NRC cases involved requiring the Applicant who was requesting withdrawal to, in a separate action, request termination of the existing permits or licenes it had. Boards just revoked, or let expire, those permits or licenses, but first attached binding conditions that remained in effect after the licenses or permits ceased to exist.

10 CFR 2.107(a) provides all the authority the Commission needs to retain jurisdiction to require its conditions for withdrawal are carried out. Conditions upon voluntary withdrawal are essentially binding contracts--in exchange for permitting withdrawal, the Commission requires certain site restoration or other activity be taken, and those conditions are legally binding, enforceable by the NRC Commission and the courts. (See Bailly, for example.)

The Staff's proposal would thus nullify 50.51, 50.100, 50.101, the basic premise of renewal proceedings, and most importantly, 2.107(a), stripping Boards of the authority to set conditions for withdrawal.

Does UCLA Need (Or Have Right to) a Reactor License Through the End of the Dismantling Phase?

Staff asserts that UCLA needs a license to "possess and maintain" its reactor while the open-ended license termination process it proposes is being carried out. It bases its assertion on the requirement that one must possess a license in order to possess a reactor. As discussed above, even if one needed a license one does not have an automatic right to one, and losing your license means losing your right to a reactor (i.e., requiring that it be promptly disassembled and removed). However, the assertion that UCLA's attempt to dismantle its reactor requires a valid reactor license until that is completed has another problem.

10 CFR 50.10 states that one must request and obtain a valid license if one wishes to possess a utilization facility, which is defined in 50.2(b) as a reactor. A reactor, however, is defined in 50.2(k) as

> an apparatus, other than an atomic weapon, designed or used to sustain nuclear fission in a self-supporting chain reaction.

The Board has directed that what used to be the UCLA Argonaut reactor be functionally disabled from being able to "sustain nuclear fission in a self-supporting chain reaction" and UCLA asserts it has made the hulk "permanently" incapable of going critical, as the first of its dismantlement and disposal steps. Once the fuel is removed, and the metallic core components, all that will remain will be a concrete shell. When is a concrete shell a reactor? The regulations tell us--when it is capable of sustaining nuclear fission. The UCLA device no longer is, its sponsors tell us, and they intend to take further steps taking it apart, however they intend to defer many years the completion of

the dismantling process. On what basis should a concrete shell permit UCLA a reactor license, when the shell clearly cannot sustain fission as required in the regulatory definitions?

If Staff's argument were correct that a reactor license is required of anyone who possesses a concrete wall that once was or may once be a wall of a reactor, then clearly a construction permit for a nuclear reactor must constitute a possession license. Yet all the CP cases involve immediate withdrawal, with site restoration conditions to be followed thereafter, even though all permits are immediately revoked. If site redress can occur there without a reactor (or even construction) permit, so too it can under 10 CFR 2.107(a) with a partially disassembled facility.

Now, it is clear that the remnants of what was the UCLA Argonaut are radioactively contaminated and require redress. Even if one were to accept Staff's argument that a valid license is required while that redress occurs, rather than binding 2.107 conditions, there is absolutely no reason why that license should be the full R-71 facility license, which authorizes SNM possession and use, reactor possession and use. UCLA has recognized this in part, and has requested amendment of its existing (albeit effectively expired) license to remove authorization for operation. It has recently requested amendment to remove the possession authorization for the fresh fuel it has shipped off, and commits to removing the authorization for the irradiated fuel when it is removed (these should all be conditions of the license, and those aspects of the application related thereto immediately withdrawn, automatically by force of law terminating those aspects of License R-71.)

STAFF, HOWEVER, IS SILENT ON WHAT PORTIONS OF LICENSE R-71 AND THE RENEWAL APPLICATION SHOULD BE PERMITTED IN EFFECT. Certainly UCLA cannot be permitted to keep an operating license for which it has no need nor right. Certainly it cannot be permitted to keep a SNM license for fresh Highly Enriched Uranium it has already given up. Certainly it cannot be permitted to keep any SNM license at all as soon as it has complied with the Board directive to remove the fuel as soon as reasonably practicable. And certainly it cannot be permitted to retain a possession license for a reactor when the hulk has been permanently made incapable of being a reactor, as claimed by its sponsors.

At best, UCLA may need a by-product license for the residual contamination at the facility while it disposes of the contamination and decides what to do with the rest. UCLA has every right to apply for a by-product license to be used for the purpose of and while it is decommissioning what used to be its reactor. BUT IT DOES NOT NEED, NOR DOES IT HAVE RIGHT TO, A REACTOR LICENSE WHICH HAS EXPIRED AND FOR WHICH RENEWAL IS NO LONGER BEING SOUGHT. NOR DOES IT NEED, NOR HAVE RIGHT TO, AN OPEN-ENDED LICENSE FOR WEAPONS-GRADE URANIUM.

If the Staff's proposal were granted, most of CBG's concerns about the UCLA facility would remain. Without a date certain (a reasonable, achievable date, one that is broad enough that there is no security problem like happened last time when UCLA published what month it was shipping the HEU) for removal of the HEU from UCLA and termination of its authority to possess weapons-grade material, essentially all of CBG's security and most of its safety concerns remain in force. The HEU can still be stolen; it is irradiated material, with 24-years worth of long-lived isotopes

largely still present, capable of being released in accidental fire or arson. Without explicit condition that the reactor be permanently disabled and not operate again, and without revocation of the operating license and final determination of the operating portion of License R-71, timely renewal 2.107 provisions would let UCLA keep the right to operate, with all the safety issues that entails. By not establishing any dates certain for completion of even any of the phases of dismantling, decontamination and disposal, or specifying the nature of those activites (e.g., will the primary coolant be dumped down the drain or more suitably diposed of?), but only requiring that UCLA submit an application for license termination, CBG is left with a reactor and SNM in place, a license in place, and no binding commitments thereon nor any resolution about any of the challenges it has made to the license, the SNM and the reactor.

EITHER WITHDRAWN APPLICATION OR CONTINUED HEARINGS--ONE CANNOT HAVE IT BOTH WAYS

If Staff wishes the application to remain effective so that UCLA's expired license remains in effect, then the proceedings as to that application must continue. If Staff wishes UCLA to have an open-ended license to possess weapons-grade uranium and if no reasonable date is set for termination of both the license and the possession, the suspended security hearings must be immediately resumed. (A decision on the adequacy of the security arrangements against both theft and sabotage was supposed to have issued by now, were it not for the withdrawal request.) If Staff wishes the application to remain in effect for many years, so must CBG's procedural rights thereto.

10 CFR 50.82 Not Applicable in Application Withdrawal Proceedings

The Staff's second major assumption, in addition to its premise that UCLA "needs" a license, is that the procedures for imposing conditions for withdrawal of applications and termination of licensing proceedings are found in 10 CFR 50.82 rather than 10 CFR 2.107, and are matters of sole jurisdiction of the Staff, not the Board, and to which intervenors are not permitted. This is contrary to all the case law, the clear language of the regulations, and fundamental equities.

2.107 makes clear that requests for withdrawal of applications and termination of licensing proceedings must be directed to licensing boards if they occur after notice of hearing, and the presiding officer of said boards is toattach such conditions as are necessary to such withdrawals and termination.

50.82 is an entirely different matter. Where there is no application, no licensing proceeding, entities with licences that have not expired or are otherwise subject to on-going hearings may request to lay down the license before its expiration date.

50.82 would be applicable if in 1975 UCLA had announced it did not plan to apply for renewal in 1980 but would apply instead under 50.82 for termination of the license, that termination to be conditioned on dismantling, disposal, and decontamination. But when UCLA applied in 1980 for renewal, and its license continued in effect beyond expiration due to that application, the only provisions applicable are 2.107. If theapplication is withdrawn, there is no license to request termination; for that reason, 2.107 provides the necessary authority to condition withdrawals. Note too that where withdrawals have occurred involving existing licenses, there is no indication of 50.82 ever being applied, only 2.107.

If the Board Accepts the Staff's Proposal

CBG has indicated above that the Staff's proposal is at variance with essentially all the case law, is totally unnecessary, and would be massively injurious to CBG's rights. We trust the proposal, in light of the above, will not be accepted.

If, however, the Board does accept the proposal, evidentiary hearings on the application must be immediately rescheduled (due to denying UCLA's request to withdraw the application) and the Board must permit CBG to make application for fees, expenses, and other disbursements to partially compensate for the injury occasioned by dismissal under those circumstances.

CBG did not apply for litigation expenses as a condition of withdrawal as proposed by UCLA because UCLA's proposal (that the reactor never operate again, be decommissioned, permanently disabled, and the weapons-grade material expeditiously removed) produced manageable injury to CBG, manageable by more simple conditions such as dates certain, reporting requirements, document preservation, and the like.

But if Staff's proposal is accepted--giving UCLA the license indefinitely in response to UCLA requesting to withdraw the application for that license--then the injury would be massive and CBG must be in some measure compensated for that injury. (CBG does not now itemize said expenses or the portions of the application its information has helped cast doubt upon, but should be provided opportunity to do so if the Staff's proposal were accepted.)

If the Board Accepts Any Portion of Staff's Proposal

CBG believes that the Staff's proposed conditions (or transfer of authority to set the conditions to Staff, with no binding commitments of specifity or dates for initiation or completion) are wholly injurious and at odds with NRC practice and procedure. Furthermore, they are totally unnecessary, as following the established practice provides all the protection and none of the injury occasioned by Staff's approach. If any part of the proposed conditions are considered by the Board, however, the following must also be considered:

(1) Staff does not indicate what port or portions of the UCLA license and renewal application would continue. UCLA currently has a request for and license for up to 5 kg of weapons-grade nuclear material, plus a license to possess and operate an Argonaut reactor. UCLA has proposed conditioning the withdrawal on the reactor not operating again, and has assertedly permanently disabled it from doing so. The operating portion of the license and application must be withdrawn, with clear language that pursuant to 2.109 they are finally determined. If the sole purpose of continuing a license is to enable disposal, only a license for disposal need continue, and only those limited aspects of the renewal application related thereto need not be immediately withdrawn.

(2) The SCNM license is for up to 5 kg. UCLA is to rapidly dispose of that material under Board Order of June 22, commits to doing so, and has already removed about 1.4 kg of fresh HEU. The license must be tied to reasonable, prompt dates for off-shipment

of the remaining irradiated HEU, and should lapse with each shipment. In other words, since the fresh fuel is already gone, that portion of the application and license related thereto must be immediately withdrawn, stated explicitly to have been finally determined pursuant to 10 CFR 2.109. When the remaining 3.6 kg are shipped, the remaining SSNM possession and use authority in License R-71, and those portions of the Application for renewal thereof, should immediately lapse and be withdrawn, stated explicitly to have been finally determined. At that time--which is to occur expeditiously, as soon as reasonably practicable--there would be no longer in effect those portions of the application for renewal of License R-71, and thus those portions of the license itself, which authorize either operation of the reactor or possession of SSNM. All that would remain given Staff's proposal, would be a reactor <u>possession</u> license and application for renewal thereof, <u>explicitly</u> restricted from ever operating.

(3) If one does not accept the argument that the Argonaut has ceased to be a reactor by the permanent disabling already performed by UCLA, clearly it ceases to be so once the metallic core components have been removed and disposed of and the fuel gone, plus the exterior plumbing removed. All that remains then is essentially a concrete shell. If a reactor possession license must be kept while dismantling occurs, it must be <u>explicitly</u> restricted to decommissioning purposes solely and terminate (and the remaining renewal application portion finally determined) upon that dismantlement of the core. In other words, when Phases 1 & 2 in Dr. Hegst's proposed decommissioning plan of June 26 are completed, any reactor possession license for decommissioning purposes should

terminate as well. At that time, with all the fuel boxes, coolant piping, control blades and drives, and the fuel itself removed from the core and the site, all that is left is basically a concrete shell, not a reactor, and a reactor possession license is unneeded and inappropriate. By that time (one to two years at the outside, CBG would insist), UCLA should be able to have applied for a by-product license for any remaining residual contamination and thus have a valid license for whatever long-term final disposition it wishes to undertake. This would resolve part of CBG's concern that by keeping the application alive and the license alive until completion of a process UCLA says will be many years in the future and may not be completed at all, UCLA could receive almost infinite grant of the license it had formerly requested but now wished to withdraw. Thus, if one permits deferral of withdrawal of part of the application, it should only be for reactor possession, made explicitly only for decommissioning purposes, and be only for a relatively short time while the core components are removed and the fuel is off-shipped; any remaining work can be done under an acquired by-product license. (A more reasonable approach <u>might</u> be to require as an immediate condition application by UCLA for a byproduct license for decommissioning purposes, application withdrawal to occur upon said receipt of license.)

(4) ABSOLUTELY ESSENTIAL--DATES CERTAIN FOR INITIATION AND COMPLETION MUST BE INCLUDED AS CONDITIONS. Otherwise there is no binding requirement to do anything. (See <u>Bailly</u> and <u>Black Fox</u>)

CBG has proposed January 1, 1985 for all the weapons-grade materials to be offsite, and for the decommissioning plan to be filed. UCLA asserts it cannot commit to either. Certainly where there is so much potential injury to CBG's interests were these matters to be indefinitely delayed, a substantial affirmative showing of why the fuel can't be offsite by next year is required. CBG notes that the irradiation level of the fuel is not the bar to committing to a completion date half a year hence; UCLA's Tech Specs say the fuel can be moved three weeks after shutdown (five months have already passed), and UCLA has already committed to handling and removing all the fuel from the core and placing it in storage pits by November 1 (See Wegst letter of July 25 to Denton, Appendix A). If the fuel can be moved from the core to the pits by November 1, it certainly can be moved from the core to shipping casks by January 1. Earl Rutenkroger, a specialist in nuclear and hazardous materials for Tri-State Motor Transit Company, the shipping company UCLA has used for transfers of reactor fuel, is quoted in the UCLA Daily Bruion of June 25, 1984, as saying that the existing shut-down period for UCLA's fuel was more than adequate for safe removal, and that fuel removal usually takes "about a day." We have confirmed this with Tri-State. UCLA informed the Commission (pleading on the Olympics) that it had located at least two shipping casks, although it might take two trips to transfer all the fuel. Two trips or even three represent only a few days extra of travel; certainly there cannot be an excuse there for not being able to remove the fuel by next year.

The Board has reason to comment a number of times during this proceeding on why it appears UCLA is so reluctant to part with weapons-grade uranium. One of CBG's original contentions was that having nearly five kilograms of unirradiated 93% enriched Uranium in storage for a period of a decade for a reactor that burned up about a gram per year was unnecessary and dangerous from a safeguards standpoint. It took a very long time, but UCLA eventually removed the unneeded material. Will we have to wait that long again?

See the discussion in CBG's summary disposition motion on Contention XIII (too much SNM) for a detailed history of how often UCLA had more SNM than authorized by its license and how it took years in each case for it to come into compliance by off-shipping the excess. On a matter of such central importance to this case--the risks of theft or diversion of weapons-grade uranium--and with absolutely no showing of any reason to the contrary by UCLA--a date certain for completion of off-shipment of the remaining SNM must--repeat must--be included as a binding condition. Director of NMSS Bob Burnett has committed to expediting all NRC paperwork on the transfer, and assisting with other agencies; just awaiting the request from UCLA.

CBG has proposed a date certain of January 1, 1985, half a year from the time UCLA said it started making arrangements for the offshipment. If that is insufficient--and there is no reason to indicate it is--then make the completion date nine months or even a year (i.e. April 1 or July 1, 1985)--but a binding completion date for offshipment and termination of all SNM license and application MUST BE INCLUDED AS A CONDITION.

Similarly, if any portion of the application is to remain alive, and portion of License R-71 thereby, for purposes of dismantlement of the Argonaut, dismantlement must be defined and a completion date set. UCLA initially said it could not even commit to submitting an application for license termination and decommissioning by 1985, but did so last week. It is true that it cannot commit to Phase 4 (final disposition of the concrete shell), but it commits now to Phases 1,2, and 3 (offshipment of SNM; removal and disposal of exterior plumbing, primary coolant, and metallic core components; and radiation survey for determining extent or remaining residual radiation). It commits to by November 1, 1984, taking eight steps as part of that decommissioning process (Attachment A, Negst letter of July 25.) Leaving aside Phase 4, which it should do under a byproduct license, not a reactor possession license obtained by indefinite withdrawal of a renewal application now abandoned, there is no reason why reasonable dates for completion of the removal and disposal of primary coolant, exterior plumbing and metallic core components cannot likewise be made conditions. They likewise should be able to do that work by January 1, given they say they will start by November 1 if not sooner, but six months, a year, or even two if there were some serious reason for such a long time, but a date should be set for the initiation and completion of the preliminary phase of dismantlement. If UCLA cannot commit for many years, as Dr. Negst indicates, to final disposition of the concrete shell, that is one matter, but removal of the core components is a different story; without completion dates for that, the

reactor remains only a few steps away from being operational (a weld removed here, a severed line reconnected there).

One other comment is in order. Staff's proposal is essentially merely that UCLA apply for decommissioning. It has now done so with the Wegst application of June 25 and 26. The commitments made therein need be made explicit conditions of application withdrawal, with dates certain for the first three short-term phases and some definition of terms (e.g. metallic core components means metallic components within the core as bounded by the concrete shield, that "disposed of" or "removed" means removed off the UCLA site to a suitable recipient, that the concrete shield options are demolition and off-shipment or sealing or use for some non-reactor purpose).

That UCLA apply for decommissioning is an insufficient condition. It must be committed to dismantlement, decontamination and disposal, as a condition of withdrawal, and the Phase 1-3 commitments, with a date certain, be binding conditions of the application withdrawal.

Additionally, it must be said that the parallel requests by UCLA's Wegst to NRR for amendments to the license must not deter the imposition of conditions on the application withdrawal, because it is only by virtue of a non-withdrawn (or conditionally withdrawn) application that there would even be a continuing license to amend. The responsibility for adding these conditions must be the Board's under 2.107; all the commitments made by UCLA need be made binding conditions for withdrawal, so that CEC does not bear the risks associated with UCLA failing to comply with commitments made in letters but not included as conditions.

Conclusion

The well-established procedure for withdrawals is conditioning them on site restoration specifics, document production or preservation, reporting and monitoring requirements, and making the withdrawals and revocation of all permits and licenses that exist by virtue of the existence of the terminated proceeding effective immediately, with conditions legally binding thereafter, enforceable by the NRC Commission and the courts.

UCLA's proposed conditions--and all four must be explicitly included--go a long way toward meeting the standard. CBG's proposed modifications, making them more explicit and enforceable, resolve the bulk of residual injury to CBG and the public that might occur by such a withdrawal.

The Staff's proposal is directly opposite of all the established precedent in this regard. It would usurp Board responsibility to establish conditions, force the Board to keep on its docket an entirely academic application which had been abandoned by its sponsors, remove all of the rights CBG had by virtue of the proceeding without withdrawing the application thereon, and most injurious, would give UCLA an unlimited License R-71, more than it could have received had it eventually prevailed in its application, without having to reach those merit issues, as reward for withdrawing and abandoning the very application in question.

CBG strenuously presses the conditions it proposed, which are consistent with the case law and regulations and fundamental fairness. No one will be injured by CBG's proposal; massive injury would result from Staff's.

If any of Staff's proposal is accepted, only that portion of the application and the License R-71 should be permitted to stand absolutely needed for decommissioning. Dates certain must be established for completion, particularly for removal of the weapons grade uranium. The operating license application must be immediately withdrawn, with clear language that it has been finally determined pursuant to 10 CFR 2.109.

CBG strenuously recommends that the Board follow the required practice and condition the withdrawal on the kinds of terms and conditions CBG had proposed, which are consistent with a long string of NRC case law. Should the Board decline to do so, CBG respectfully requests that it indicate whether the Order constitutes a final decision for purposes of appeal.

Respectfully submitted,

Daniel Hirsch

dated at Ben Lomond, CA
this 1st day of August, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket No. 50-142
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	(Proposed Renewal of Facility License)
(UCLA Research Reactor)	

DECLARATION OF SERVICE

I hereby declare that copies of the attached: CEG RESPONSE TO STAFF PROPOSED CONDITIONS AS TO UCLA REQUEST FOR APPLICATION WITHDRAWAL

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: August 1, 1984.

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

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

EX Glenn O. Bright
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

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

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

Christine Helwick
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

Lynn Naliboff
Deputy City Attorney
City Hall
1685 Main Street
Santa Monica, CA 90401

Dorothy Thompson
Nuclear Law Center
6300 Wilshire Blvd., #1200
Los Angeles, California 90048

Ms. Carole Kagan, Esq.
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel Hirsch
President
COMMITTEE TO BRIDGE THE GAP