

transmitted as Staff Paper No. AEC-R 118/4 dated January 9, 1966

UNITED STATES OF AMERICA

ATOMIC ENERGY COMMISSION

(Suppl)
File **Comp**

In the matter of the application by)
GENERAL ELECTRIC COMPANY)
and)
SOUTHWEST ATOMIC ENERGY ASSOCIATES)
For a Provisional Construction Permit)
for the Southwest Experimental Fast)
Oxide Reactor (SEFOR))

DOCKET NO. 50-231

1-7-66

Appearances

Jules Pearlman, Esq. 1/
on behalf of General Electric Company

Mr. J. Robert Welsh, President 1/
of Southwest Atomic Energy Associates

Troy B. Conner, Jr., Esq. and Howard B. Helman, Esq.
on behalf of the U. S. Atomic Energy Commission
Regulatory Staff

Limited Appearance

Mr. Edward L. Wilson by limited appearance presented a
statement of position as a representative of the
Arkansas State Board of Health

SUPPLEMENTAL INITIAL DECISION

1. An Initial Decision herein, issued on September 10, 1965, conditionally granted a provisional construction permit for the experimental

1/ The Applicant SAEA was not represented by counsel in this proceeding. SAEA has delegated to GE responsibility for prosecuting this application. The position of the GE attorney was thus stated:

"I am an attorney representing General Electric and therefore will be the sole counsel for the Applicants."

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reactor facility proposed by the Applicants. That decision pointed out that the evidence of record upon three matters did not warrant findings and conclusions essential to support an unconditional authorization. It was therein provided that the parties might submit additional information and pleadings concerning those reserved matters. The then authorized provisional construction permit expressed, and the decision explained, that the action taken was subject to further consideration and possible modification.^{2/} The parties have submitted more evidence and pleadings, and the matters reserved are now to be decided.

2. Applicants have supplied more information about their proposed environmental surveillance program and coordination with the Arkansas State Board of Health, (Reserved Point 1). It appears therefrom that the deficiencies noted in paragraph 35 of the Initial Decision have been fully cured. Accordingly, the Board approves and adopts the Applicants' Supplemental Proposed Findings 1 and 2. It follows that the provisional construction permit as heretofore authorized should no longer be conditional with respect to the proposed environmental surveillance program.

3. Related to the foregoing matter is Reserved Point 3 in the Initial Decision, the inadequacy of evidence to support affirmative safety judgments based on meteorological conditions likely to exist in

^{2/} The Initial Decision, anticipating the filing of additional information, stated at ¶ 43:

" . . . Thereafter this Board will reconsider the matters reserved and its ultimate conclusions in the light of the complete record as supplemented and will issue an appropriate decision or order. . . ."

an extreme accident situation. Substantial evidence has now been provided on the record to show that the Applicants' augmented plans for site meteorological studies as detailed in the statements by the Applicants' consulting meteorologists will provide an acceptable basis for an assessment of the suitability of the site. Therefore, the Board adopts Applicants' Supplemental Proposed Findings 3 and 4, and finds that the reservation with respect to this point has been satisfied. Accordingly, that condition should be removed.

4. Difficulty has been experienced in resolving the Initial Decision's Reserved Point 2 involving the national security issue and alien control implications which were not satisfactorily explained as pointed out in paragraphs 8-13 of the Initial Decision. Applicants have submitted more evidence as described hereinafter. Further consideration has led the Board to reject Applicants' Supplemental Proposed Findings 5 and 6 which are here quoted:

"5. Neither General Electric nor SAEA nor any of the members of SAEA or the companies which they represent is owned, controlled, or dominated by any alien, foreign corporation or foreign government."

"6. Gesellschaft has neither a right of control nor actual control over the SEFOR project or any phase of the project."

5. The AEC Regulatory Staff has not responded to the Initial Decision with further information or arguments on the point in question. Applicants' presentation rests on the current evidentiary record and the belief, stated in its supplemental brief, that it is not "necessary or desirable to present any argument on this question." Now at hand are

significant portions of four SEFOR contracts.^{3/}

6. The evidence does not show that SAEA has any other business or activity than the SEFOR project; that SAEA might do other things is not here material. To the extent that Gesellschaft's contract rights tend toward control of SEFOR, they tend also toward that alien control^{4/} which is forbidden by law.

7. Repetition of findings and discussion is here avoided by referring to paragraphs 8 through 13 of the Initial Decision for a portrayal of the issue to be decided now. On May 14, 1964 four contracts were executed between: (A) AEC and SAEA; (B) SAEA and Gesellschaft; (C) SAEA and GE (Program Contract); and (D) SAEA and GE (SEFOR Contract). In evidence^{5/} now are selected portions and an index of contents of contracts A, C and D,

^{3/} Applicants' argument that the "relevant provisions of the contracts are already a part of the hearing record" because they were described in the testimony is again rejected. In order to remove and avert misunderstanding it is declared here that the Applicants did not refuse or ignore the Board's requests for information concerning the contracts, and such an inference should not be made. Simply stated--and as shown in the Initial Decision--that information with which the Applicants did respond at the hearing failed to meet a basic test of probative and substantial evidence: The meaning of any contract is best manifested by its terms. The Board did not request that the contracts be submitted, thus leaving to the parties the choice as to whether or how their burden of proof would be met.

^{4/} The word "control" is often used herein to encompass the statutory phrase "owned, controlled or dominated".

^{5/} The Applicants' selection of portions, made to spare the record's enlargement by all of the 379 pages of the contracts, seems reasonable notwithstanding this decision's later reference to clauses indexed but not shown.

and the whole of the B contract. All four contracts are expressly inter-related and all exclusively pertain to the construction and operation of SEFOR. No other contract governs the SEFOR project, although the SAEA intra-member agreement (Initial Decision, paragraph 7 and footnote 6) primarily defines the members' respective fiscal obligations toward SEFOR. The participation in SEFOR by Gesellschaft, who is identified in paragraphs 8 and 9 of the Initial Decision, poses a foreign control question that must be answered.

8. The Arkansas land upon which SEFOR is to be built is owned by SAEA. Title to the facility upon completion will be in SAEA. The evidence ^{6/} shows troublesome countervailing facts. Recognizing that declarations of heed for the law are made in the contracts, it yet becomes necessary to examine the available documents to determine whether those non-self-executing declarations are clarified or modified. Directly confronting this examination are the contracts' provisions: against amendment without notice to or concurrence by AEC; against conflict with the AEC-SAEA contract; and declaring that Gesellschaft "is aware of the limitation in the Atomic Energy Act . . . with respect to foreign individuals or government agencies."

9. The real interests of all SEFOR participants are more fully discernible now than at the time of the Initial Decision. The contracts make it clear that the largest single financial supporter of the SEFOR project is the U. S. Atomic Energy Commission with obligations in excess of \$12 million for research, development, and testing. SAEA is a conduit

^{6/} Findings and comments hereinafter stated derive from the SAEA-Gesellschaft contract unless it is otherwise stated or clearly indicated.

for, and a contributor to, effectuating the project; it has, under its AEC contract, obligations encompassing the construction of the facility and its use which have been virtually transferred to GE by contracts C and D noted above. SAEA will be the relatively passive owner of SEFOR with various rights and ostensible duties, but GE will build and operate the facility. However, the contributions and participation by SAEA are shared with Gesellschaft.

10. Transparently, SAEA and Gesellschaft are 50-50 partners in SEFOR. Costs of construction are to be borne equally up to the estimated total SAEA obligation of \$10 million; any savings made below that figure are to be shared equally. Only if the estimate is exceeded does SAEA pay more, and then only up to an additional \$900,000; any excess costs beyond that amount are to be borne by GE. The SAEA-Gesellschaft funding obligations substantially end upon completion of construction. The AEC-financed operating program then begins, with the results thereof to be shared by all contracting parties.

11. Neither shared costs nor vestment of legal title effectively defines that control which must be ascertained here. The inquiry now reaches for meaningful facts denoting actual or potential exercise of guiding direction of the activity to be carried on. That business for which licensing is sought is the design and construction and use of SEFOR. In those matters SAEA's authority in important areas relating to control is not greater than that of Gesellschaft. Notwithstanding that AEC and GE have contracts with SAEA which enmesh the SEFOR project, this inquiry into control focuses on the relation of SAEA to the facility.

12. Consideration is now accorded to facets of SEFOR control which are shown by the contract to be in SAEA and Gesellschaft respectively. Gesellschaft acts for the benefit of itself and Euratom, each having identical rights with regard to the results of the SEFOR program for which they provide technical and financial cooperation. SAEA and Gesellschaft "will cooperate" in the project, in which "SAEA will represent the rights, claims and interests of Gesellschaft as well as its own." Gesellschaft participated in negotiating the other three contracts and will abide by their terms, "as provided in this agreement." Design and construction costs are to be borne as above described.

13. A high level group denominated the Project Review Committee will be formed by SAEA and Gesellschaft to function with respect to the design and construction and use of SEFOR; it will review performance under the GE contracts. A second group, the Technical Policy Committee, will be formed by Gesellschaft and GE to review, on a semi-annual basis, "the technical policy questions underlying GE's proposed [SEFOR] plans . . . for the next six months." SAEA and AEC, at their option, may have representatives to participate in meetings of this committee. Such technical policy questions will be settled by mutual agreement of Committee members, or by SAEA as "impartial arbitrator" if agreement is not reached. Any such disagreement will be so presented to SAEA as to permit resolution "with a minimum of study." GE will not be bound by changes in plans which might adversely affect safety or increase total costs or impinge upon the GE obligations in a cited section of a GE-SAEA contract which is not

in evidence. In any event, the three corporate participants will confer with AEC at least twice a year to review progress and plans. It appears from the foregoing that substantial control of SEFOR is to be exercised by the two major committees in each of which Gesellschaft has essentially a 50% voice. By way of contrast, SAEA has such a voice in only one of these committees, being but a referee of disputes in the other. Herein the measure of SEFOR control by Gesellschaft exceeds that vested in SAEA.

14. For Gesellschaft's financial and other contributions to SEFOR the SAEA-Gesellschaft contract requires that, with respect to all existing or future SAEA contracts with AEC or GE concerning SEFOR,

"SAEA will consult with Gesellschaft on all matters of policy and on all questions affecting costs to be decided or determined by SAEA or on which it is to be consulted or as to which it must agree. Specifically, SAEA will consult with Gesellschaft with respect to . . . the selection of any arbitrator, engineer or other professional or specially qualified person for any purpose under any such agreement. . . . [if] . . . they should be unable to agree as to any such matter, it will be resolved by arbitration"

If the two parties fail to agree upon any matter within the scope of the above required consultations, it is to be settled by arbitration as specified in the contract. It is noted from the indexes that the two GE-SAEA contracts include arbitration clauses and the AEC-SAEA contract has a technical disputes and arbitration clause, none of which are in the ^{7/} record. The above provisions show that the reins of control of SEFOR are held by Gesellschaft at least as strongly as by SAEA. Indeed,

7/ Arbitration of disagreements under the ~~SAEA-Gesellschaft~~ contract will be effected by a panel of three arbitrators one to be appointed by each party and those two to select the third member. Even though SAEA might not here be required to consult Gesellschaft before nominating its arbitrator, it appears that Gesellschaft must concur in SAEA's selection of arbitrators under the other SEFOR contracts.

Gesellschaft's reach into SEFOR affairs penetrates and permeates every aspect of SEFOR control which SAEA may attempt to exercise; in all such matters SAEA must have either Gesellschaft's concurrence or an arbitrated determination wherein the Gesellschaft voice is no less dominant than is that of SAEA.

15. The contract specifies that Gesellschaft may designate scientists and engineers "to participate at all levels in" the SEFOR project, provided that they are qualified in the judgment of GE and that they will be under GE's direction; they will be paid by Gesellschaft. It does not appear from the evidence of record that SAEA has or expects to assert comparable authority to place selected representatives among those who will carry out the SEFOR project. The day-to-day operation of SEFOR appears in this respect to be more influenced by Gesellschaft than by SAEA. Both SAEA and Gesellschaft are entitled, to the extent permitted by law and by the AEC and the AEC agreement, to "have access to, and . . . receive, full and complete information regarding" the SEFOR project; they equally may have "full use and disposition of such information."

16. Future uses of SEFOR, beyond completion of the program under contract, are not foreseeable now, but determinations and courses of action with respect thereto are to be arrived at in concert. Neither SAEA nor Gesellschaft will impede efforts by the other party to develop with GE a further research and development program. Such parties as do not participate in later programs are entitled to the fruits of that research without royalties or license fees. In the event of termination of the other SEFOR contract, this contract may be terminated upon an equally assessed cost basis.

17. Upon weighing the matters hereinabove described against the protestations of the witnesses disclaiming foreign control and also against the specific and general similar declarations of the contracts, it is concluded that the SEFOR project for which the license here is sought would be significantly and substantially under the control and domination of Gesellschaft. This foreign corporation by contract has secured a substantial contributor's beneficial ownership in SEFOR notwithstanding its lack of legal title.^{8/} In vital areas affecting policy decisions the contracts vest at least a 50% negative control in Gesellschaft. In assigning personnel to carry on the project Gesellschaft has greater rights than SAEA and thus may exercise a day-to-day dominating influence in SEFOR. Impellingly important to the conclusions herein reached is the carefully and comprehensively expressed commitment by SAEA that, upon all matters affecting SEFOR under existing or future contracts, it must either find accord with Gesellschaft or relegate the issue to arbitration.

18. This Board has concluded that the statute proscribes alien control such as exists under these agreements and that the Commission is forbidden to issue licenses under such circumstances. The governing statute, from which Issue No. 4 derives, makes it the clear duty of the Board to decide

^{8/} It is obvious that SAEA will not have complete ownership of SEFOR because it is disabled from independently exercising those prerogatives ordinarily vested in an owner. Instead, SAEA can effectively manage, direct, and use SEFOR only with the consent of Gesellschaft. If control is not thus vested in Gesellschaft, neither is it vested in SAEA. The Board can not surmise that 379 pages of contract provisions nullify or tolerably dilute this foreign control. It has found that the exhibited contract clauses do not do so.

that issue adversely to the contentions of the Applicants and the Staff:

"... No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States, if in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public."

The hearing record shows that the SEFOR "entity . . . is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government."

19. The parties have submitted written statements by lawyers in Germany, in New York, and in the Office of the Comptroller General of the United States which opine the validity of the contracts' obligations upon the parties. The two opinions of the Comptroller General considered in depth the legal authority of the AEC to obligate and expend funds for SEFOR. Neither those opinions nor the Staff's review, as noted at paragraph 13 of the Initial Decision, analyze or perceive an impediment because of the alien control matter herein discussed. The SEFOR participants promoting this project have not provided on this record substantial evidence or persuasion that the declared purposes of the Atomic Energy Act, measured within the compass of Issue No. 4, would be served by granting the authorization herein requested. It follows, for the reasons hereinabove set out, that the application under consideration must be denied.

20. The issuance of a provisional construction permit was conditionally authorized by the Initial Decision which was expressly subject

2/ to reconsideration. Upon the basis of the foregoing reconsideration the Board is unable to find, in determining Issue No. 4, that the issuance of a provisional permit for the construction of the facility would be consistent with the Atomic Energy Act's provisions against foreign control. Hence, the conditional authorization for a provisional construction permit must be rescinded.

Order

IT IS ORDERED, this 7th day of January 1966, under the authorities cited in the Initial Decision and pursuant to the reservations therein expressed, that the conditional authorization for a provisional construction permit for SEFOR is made unconditional with respect to the safety-related matters of (a) the Applicants' plans for an environmental surveillance program and coordination with the Arkansas Board of Health, and (b) the adequacy of the Applicants' showing with respect to local meteorological surveys and analyses; HOWEVER,


IT IS FURTHER ORDERED that the conditional authorization for a provisional construction permit for SEFOR is set aside and the request therefor is denied because the evident measure of alien control of the project is not permitted by law; and

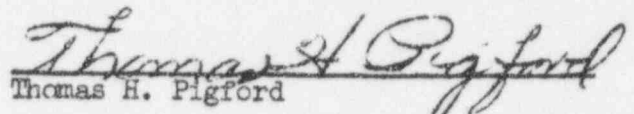
IT IS FURTHER ORDERED, pursuant to § 2.760 of the Commission's Rules and Regulations, that this Supplemental Initial Decision shall constitute

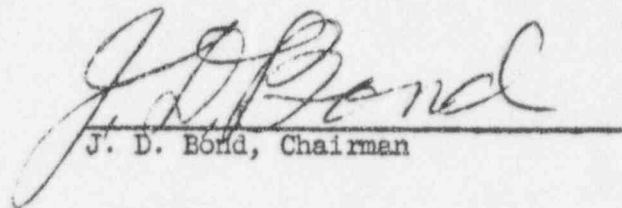
2/ It was pointed out in ¶ 44 of the Initial Decision that, "... the Applicants may elect to proceed with construction at the risk attendant upon Board reconsideration."

the final action of the Commission unless within forty-five days after its date a timely petition for review is filed or the Commission directs that the record be certified to it for final decision.

ATOMIC SAFETY AND LICENSING BOARD


Dixon Callihan


Thomas H. Pigford


J. D. Bond, Chairman

Issued:
January 7, 1966
Germantown, Maryland

UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of

General Electric Company
Southwest Atomic Energy Associates

Docket No. 90-231

CERTIFICATE OF SERVICE

I hereby certify that copies of the SUPPLEMENTAL INITIAL DECISION issued January 7, 1966 in the captioned matter were served on the following by deposit in the United States Mail, first class or air mail, this 7th day of January, 1966:

Southwest Atomic Energy Associates
306 Pyramid Building
Little Rock, Arkansas 72203
Attention: Mr. J. Robert Welch

General Electric Company
Atomic Power Equipment Department
175 Curtner Avenue
P. O. Box 254
San Jose, California 95125
Attention: Jules Pearlman, Esq.

Hon. Gene Thresher
County Court House
Fayetteville, Arkansas 72701

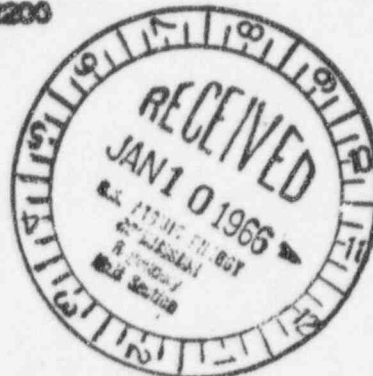
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[Signature]
Office of the Secretary

cc: J. D. Bord, Chairman, AS&L Board
Troy Conner, Esq.
B. Diggs ✓

RE DOCKET 50-231, GENERAL ELECTRIC COMPANY AND SOUTHWEST
ATOMIC ENERGY ASSOCIATES, WE HAVE BEEN ADVISED BY TELEPHONE
THAT ATOMIC SAFETY AND LICENSING BOARD YESTERDAY ISSUED AN
ORDER SETTING ASIDE INITIAL DECISION OF SEPTEMBER 10, 1965
GRANTING CONSTRUCTION PERMIT ON GROUND THIS PROJECT INVOLVES
ALIEN CONTROL NOT PERMITTED BY LAW. WE BELIEVE THE ORDER IS
UNSUPPORTED BY FACTS OR LAW AND WILL FILE PETITION FOR REVIEW
AND SUPPORTING BRIEF PURSUANT TO SECTION 2.762 OF THE RULES OF
PRACTICE PROMPTLY AFTER RECEIPT OF ORDER. IMMEDIATE EFFECT OF
ORDER IS TO REQUIRE SUSPENSION OF WORK AT PROJECT SITE.
CONTINUING CONSTRUCTION PENDING YOUR REVIEW COULD NOT IMPAIR
NATIONAL SECURITY WHILE SUSPENSION OF WORK WOULD DELAY AN
EXPERIMENTAL PROGRAM VITAL TO THE DEVELOPMENT OF THE FAST BREEDER .
REACTOR, CAUSE SUBSTANTIAL ECONOMIC DETRIMENT TO CONTRACTORS
PERFORMING WORK AT THE SITE AND TO THOSE FINANCIALLY OBLIGATED
TO CARRY OUT THE PROJECT, AND RESULT IN LAYOFF OF WORKERS EMPLOYED
AT THE SITE. WE RECOGNIZE THAT THE ORDER COULD BE AFFIRMED AND
ARE FULLY AWARE OF THE ECONOMIC RISK ASSOCIATED WITH CONTINUING
WORK PENDING YOUR REVIEW. HOWEVER WE BELIEVE THE ORDER IS
ERRONEOUS AND THAT OUR POSITION WILL BE CONVINCINGLY DEMONSTRATED
IN PROCEEDINGS TO FOLLOW. ACCORDINGLY WE RESPECTFULLY REQUEST
THAT THE ORDER BE STAYED PENDING YOUR REVIEW SO THAT WORK MAY
CONTINUE AT THE SITE. IN VIEW OF THE HARDSHIP TO INDIVIDUALS
EMPLOYED IN THE SITE WORK AND THE ECONOMIC DETRIMENT TO CON-
TRACTORS AND PARTIES TO THE PROJECT THAT WILL RESULT FROM EVEN
A SHORT SUSPENSION OF THE WORK. YOUR EARLY CONSIDERATIONS OF
THIS MATTER IS RESPECTFULLY REQUESTED. A COPY OF THIS MESSAGE
IS BEING SERVED SIMULTANEOUSLY ON TROY B. CONNORS JR, TRIAL
COUNSEL U.S.A.E.C. REGULATORY STAFF. (COPIES DR JAMES T. HERRON
STATE HEALTH OFFICER ARKANSAS STATE BOARD OF HEALTH LITTLE ROCK,

ARKANSAS, HONORABLE GENE THRASHER COUNTY COURT HOUSE
FAYETTEVILLE, ARK. AND J. ROBERT WELSH PRESIDENT SOUTHWEST
ATOMIC ENERGY ASSOCIATES PO BOX 1106 SHREVEPORT, LOUISIANA.

GENERAL ELECTRIC CO AND SOUTHWEST ATOMIC ENERGY ASSOCIATES
BY JULES PEARLMAN ATTORNEY 175 CURTNER AVENUE, SAN JOSE, CALIFORNIA