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JULY 25 1979

Docket Nos. 50-259
 50-260
 and 50-296

Mr. Hugh G. Parris
 Manager of Power
 Tennessee Valley Authority
 500 A Chestnut Street, Tower II
 Chattanooga, Tennessee 37401

REGULATORY DOCKET FILE COPY

Dear Mr. Parris:

By letter dated March 15, 1979, you requested amendments to licenses DPR-33, DPR-52 and DPR-68 for Browns Ferry Nuclear Plants, Units Nos. 1, 2 and 3. The proposed amendments were to include the word "transfer" in addition to the standard words "receive, possess and use" in the conditions of the licenses related to source, byproduct and special nuclear material. The justification cited for the proposed changes was to clarify whether TVA is authorized to transfer a new, unirradiated fuel assembly back to General Electric Company (an authorized receiver) for rework and repair using a transport carrier licensed to receive and transport the fuel assembly.

Enclosed is a legal opinion by the Commission's Director and Chief Counsel, Regulations Division, Office of the Executive Legal Director which concludes that the requested amendments are not necessary.

As explained in the enclosure, it is our opinion that 10 CFR Sections 30.41, 40.51 and 70.42 provide adequate authority, if the requirements of those sections are met, for operating licensees to ship unirradiated and spent fuel from reactor sites to persons properly authorized to receive such fuel.

As discussed with your staff, we are treating your application of March 15, 1979 as having been withdrawn.

Sincerely,

Original Signed by
 T. A. Ippolito

Thomas A. Ippolito, Chief
 Operating Reactors Branch #3
 Division of Operating Reactors

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|---------------|------------|-----------|----------|-------|
| Enclosure: | ORB#3 | ORB#3 | | |
| Legal Opinion | RClark:acr | Tippolito | | |
| DATE | 7/24/79 | 7/24/79 | 79083.00 | 213 P |

Mr. Hugh G. Parris
Tennessee Valley Authority

cc:

H. S. Sanger, Jr., Esquire
General Counsel
Tennessee Valley Authority
400 Commerce Avenue
E 11B 33 C
Knoxville, Tennessee 37902

Mr. Dennis McCloud
Tennessee Valley Authority
400 Chestnut Street, Tower II
Chattanooga, Tennessee 37401

Mr. E. G. Beasley
Tennessee Valley Authority
400 Commerce Avenue
W 10C 131C
Knoxville, Tennessee 37902

Robert F. Sullivan
U. S. Nuclear Regulatory Commission
P. O. Box 1863
Decatur, Alabama 35602

Athens Public Library
South and Forrest
Athens, Alabama 35611



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 13, 1979

MEMORANDUM FOR: Victor Stello, Jr., Director
Division of Operating Reactors
Office of Nuclear Reactor Regulation

FROM: Martin G. Malsch, Director and Chief Counsel
Regulations Division
Office of the Executive Legal Director

SUBJECT: AUTHORITY OF TVA, UNDER ITS OPERATING LICENSES
FOR UNITS 1, 2, AND 3 OF BROWNS FERRY NUCLEAR
PLANT, TO TRANSFER UNIRRADIATED AND SPENT FUEL
TO AN AUTHORIZED RECEIVER

This responds to your memorandum of April 5, 1979, inquiring whether an NRC license authorizing the operation of a nuclear power plant, such as that issued to TVA for the operation of Units 1, 2 and 3 of the Browns Ferry Nuclear Plant, which contains the standard wording authorizing the licensee "to receive, possess and use" requisite source, byproduct and special nuclear materials, is adequate to authorize the operating licensee to ship unirradiated and spent fuel to an authorized receiver, or whether such a license should be amended to specifically authorize the transfer and packaging of source, byproduct and special nuclear materials.

As explained below, it is our opinion that 10 CFR §§ 30.41, 40.51 and 70.42 provide adequate authority, if the requirements of those sections are met, for operating licensees to ship unirradiated and spent fuel from reactor sites to persons properly authorized to receive such fuel.

Discussion

NRC regulations prohibit the transfer of byproduct,^{1/} source^{2/} and

^{1/} 10 CFR § 30.3 provides in part "Except for persons exempt as provided in this part and Part 150 of this chapter, no person shall ... transfer, ... byproduct material except as authorized in a specific or general license issued pursuant to the regulations of this chapter.

^{2/} 10 CFR § 40.3 provides in part "No person subject to the regulations in this part shall... transfer, ... any source material after removal from its place of deposit in nature, except as authorized in a specific or general license issued by the Commission pursuant to the regulations in this part."

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special nuclear material^{3/} except as authorized in a specific or general license issued by the Commission pursuant to those regulations.

NRC regulations also provide that licenses issued under 10 CFR Parts 30^{4/}, 40^{5/} and 70^{6/} are subject to all valid rules, regulations and orders of the Commission.

10 CFR §§ 30.41, 40.51 and 70.42 specify, respectively, the kinds of transfers which licensees holding byproduct material licenses, source material licenses and special nuclear material licenses are authorized to make. Licensees who are able to satisfy the requirements of these sections may rely on this authority to make transfers even though the word "transfer" does not appear in their licenses because the Commission regulations expressly provide that the terms and conditions of a license include the condition that the license is issued subject to Commission regulations. As a licensee under 10 CFR Parts 30, 40 and 70 of the Commission's regulations, TVA is subject to all the provisions of the regulations, including 10 CFR §§ 30.41, 40.51 and 70.42. Accordingly, TVA may rely on these provisions for the authority necessary to make transfers as long as the requirements of these provisions are met. On the basis of this analysis, specific amendments of TVA's Browns Ferry operating licenses are not needed.

3/ 10 CFR § 70.3 provides in part "No person subject to the regulations in this part shall ... transfer special nuclear material except as authorized in a license issued by the Commission pursuant to these regulations.

4/ 10 CFR § 30.34(a) provides "Each license issued pursuant to the regulations in this part and the regulations in Parts 31-35 shall be subject to all the provisions of the Act, now or hereafter in effect, and to all valid rules, regulations and orders of the Commission."

5/ 10 CFR § 40.41(a) provides "Each license issued pursuant to the regulations in this part shall be subject to all the provisions of the Act, now or hereafter in effect, and to all rules, regulations and orders of the Commission."

6/ 10 CFR § 70.32(a)(8) provides "The license shall be subject to, and the licensee shall observe, all applicable rules, regulations and orders of the Commission."

10 CFR § 70.42(a) and (b)(5) provides in pertinent part:

"(a) No licensee shall transfer special nuclear material* except as authorized pursuant to this section.

"(b) Except as otherwise provided in his license and subject to the provisions of paragraphs (c) and (d) of this section [paragraphs (c) and (d) require licensees to verify whether persons to whom the material is to be transferred are authorized to receive it] any licensee may transfer special nuclear material*:

* * * * *

"(5) To any person authorized to receive such special nuclear material* under terms of a specific license or a general license or their equivalents issued by the Commission or an Agreement State; ..."

(The quoted portion of the text is identical to the text of the proposed rule.)

* § 30.41(a) and (b)(5) is similar but refers to byproduct material.
§ 40.51(a) and (b)(5) is similar but refers to source material.

This authority is adequate to authorize TVA, and other licensees with operating licenses similar to those issued to TVA, to transfer unirradiated or spent fuel to persons properly authorized to receive it. Since, according to the information provided in your memorandum, General Electric Company and the transport carrier appear to be fully licensed to receive and transport the fuel, it appears possible that TVA can complete the transfers in accordance with the requirements of these sections of the regulations.

In reaching this conclusion, consideration has been given to 10 CFR § 70.41(a) which provides:

"Each licensee shall confine his possession and use of special nuclear material to the locations and purposes authorized in his license. Except as otherwise provided in the license, each license issued pursuant to the regulations in this part shall carry with it the right to receive title to, own, acquire,

receive, possess and use special nuclear material. Preparation for shipment and transport of special nuclear material shall be in accordance with the provisions of this chapter." 7/

(Comparable provisions applicable to byproduct and source material licensees appear in 10 CFR §§ 30.34(c) and 40.41(c).)

Although at first glance the language of 10 CFR § 70.41(a) appears inconsistent with the preceding analysis, this apparent inconsistency disappears when the relationship between § 70.41 and § 70.42 is

7/ 10 CFR Part 71 contains regulatory requirements for packaging radioactive material for transport and transportation of radioactive material under certain conditions.

10 CFR § 71.2 states that

"The regulations in this part apply to each person authorized by specific license issued by the Commission to receive, possess, use or transfer licensed materials, if he delivers such materials to a carrier for transport or transports such material outside the confines of his plant or other place of use."

10 CFR § 71.3 provides in pertinent part that

"No licensee subject to the regulations in this part shall
(a) deliver any licensed materials to a carrier for transport
or (b) transport licensed material except as authorized by
the Commission, ..."

10 CFR § 71.1(b) makes clear, however, that the regulations in 10 CFR Part 71 are in addition to, and not in substitution for, other provisions, including those imposed by NRC in other parts of its regulations and by other agencies.

understood. At the time the Commission amended § 70.42,^{8/} it also made a conforming amendment to § 70.41(a) to delete the reference to transfers in that section. The purpose of the conforming amendment was to make clear that the only authorized types of transfers were those specified in § 70.42. Similar conforming changes were made in §§ 30.34(c) and 40.41(c), the parallel provisions in Parts 30 and 40.

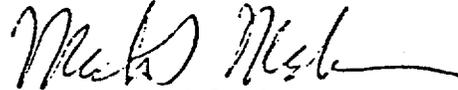
8/ 10 CFR §§ 30.41, 40.51 and 70.42 were added to the Commission's regulations in December 1973 (38 FR 33968-33971, December 10, 1973) and became effective March 11, 1974. The amendments were prepared in response to a GAO recommendation that the Commission (the AEC at that time) establish a specific requirement that suppliers verify that transferees are authorized to receive the quantity or type of material being shipped and provide guidance as to acceptable methods of verification (see SECY-R 571, November 17, 1972, Proposed Amendments to 10 CFR Parts 30, 40 and 70 - Transfer of Radioactive Material, and SECY-R 74-54, October 18, 1973, Amendment of 10 CFR Parts 30, 31, 40, 70 and 150 - Transfer of Radioactive Material.) The impetus for the recommendation stemmed from discovery of a significant number of instances in which licensees were found to possess unauthorized types and amounts of materials and unlicensed persons were found to possess materials without a license.

The statement of considerations which accompanied the proposed rule contained the following summary of the amendments (38 FR 4351-4353, at 4351, February 13, 1973.)

"In the proposed amendments which follow, a new § 30.41 would be added and §§ 40.51 and 70.42 would be revised to (1) list the various types of transfers of byproduct, source, and special nuclear materials which are authorized, (2) require transferors to verify that the transferees are authorized to receive the type, form, and quantity of material to be transferred, and (3) provide guidance on acceptable methods for such verification." (Emphasis supplied.)

At the time the amendments were adopted, the Commission also made certain conforming changes to the regulations (10 CFR §§ 30.34(c), 40.41(c) and 70.41(a) were amended to delete references to transfers. See SECY-R-571, November 17, 1972, Appendix A, pp. 8, 11 and 14.) to make clear that the only authorized types of transfers were those provided for in 10 CFR §§ 30.41, 40.51 and 70.42.

An unimpressive argument can be made that the absence of any reference to transfers in TVA's present operating licenses precludes TVA from taking advantage of the authority in 10 CFR §§ 30.41, 40.51 and 70.42 because that authority is limited by the following phrase "Except as otherwise provided in his license ...". In our opinion, this limiting language does not present any difficulty, since, as we have already indicated, TVA's license is, by its terms, specifically subject to all valid rules, regulations and orders of the Commission, including the regulations contained in 10 CFR §§ 30.41, 40.51 and 70.42.


Martin G. Malsch
Director and Chief Counsel