10912

LBP 90-34
October 15, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'90 OCT 15 A11:15

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Before Administrative Judge
Peter B. Bloch

SERVED OCT 15 1990

In the Matter of THE CURATORS OF THE UNIVERSITY OF MISSOURI (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247)	Docket Nos. 70-00270 30-02278-MLA RE: TRUMP-S Project ASLBP No. 90-613-02-MLA

MEMORANDUM AND ORDER
(Motion For Order Concerning Documents)

MEMORANDUM

In this Memorandum, I deny the request for an Order put forth in Intervenors' Motion of September 17, 1990[1].

Intervenors' principal request is for an Order to both the Staff of the Nuclear Regulatory Commission (Staff) and to The Curators of the University of Missouri (Licensee) "to notify the parties and the Presiding Officer of any new information which is relevant and material to the matters

---

[1]"Intervenors' Motion for Order Requiring Applicant to Serve Documents Upon Parties, and Requiring Staff and Applicant to Notify Parties and Presiding Officer of New Information Relevant and Material to the Matters Being Adjudicated." See also "Licensee's Response to 'Intervenors' Motion . . .'", October 8, 1990. Note that Intervenors refer to the University of Missouri as Applicant and I refer to them as Licensee. Although I usually prefer Intervenors' usage, in this case the license has already been granted and the term Licensee therefore seems more accurate.

D502

being adjudicated." When their request is stated in this form, Intervenors are largely correct about the obligations of the Staff and Licensee; but they, nevertheless, have not established the need for an Order that merely restates existing obligations.

The Staff's obligation stems from 10 CFR § 2.1231(c) and is: "a continuing duty to keep the hearing file up to date . . . in the way the hearing file was made available initially under paragraph (a)." As I stated in my unpublished memorandum of September 4, 1990, "Completeness of the Hearing File," at p. 2:

> [I]n LBP-90-27, 31 NRC _____ (July 30, 1990), I ordered the Staff to complete the hearing file. At the conclusion of my memorandum, I stated that:
>
> . . . [I]t shall . . . include in the record and serve on the parties all documents that comply with my Memorandum and Order of June 29. . . . Staff should include in the file all documents that intervenors may reasonably believe relevant to the admitted areas of concern. This should prevent recurrent litigation concerning this "non-discovery" phase of this Subpart L proceeding.

Licensee's obligation is governed by the McGuire rule,[2] which it concedes to be applicable to Subpart L proceedings.[3] That rule requires that relevant materials be served in licensing cases so that the facts will come to bear on the litigation, which otherwise might be an empty charade diverging from the facts. As Licensee correctly states, the

---

[2]Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973).

[3]Licensee's Response at 7.

parties are required to inform other parties and the Presiding Officer of "new information which is relevant and material to the matters being adjudicated."[4]

This principal was reiterated in Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 408 (Hon. Charles Bechhoefer, Chair), which states:

> In McGuire, the Board criticized the failure of the applicant and the staff to have advised the Licensing Board promptly of certain modifications which the applicant had made in its quality assurance organization. Even though the adequacy of that organization was a contested issue in the proceeding, the modifications (which had occurred prior to the rendition of the initial decision) had not come to the attention of either the Licensing Board or ourselves until evidence was later received at a hearing on remand. We admonished the Bar that, "[i]n all future proceedings, parties must inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated", adding that otherwise "reasoned decision-making would suffer. Indeed, the adjudication could become meaningless, for adjudicatory boards would be passing upon evidence which would not accurately reflect existing facts". ALAB-143, 6 AEC at 625-26.

I conclude that the Staff and Licensee are already obligated to comply with the general outline of what Intervenors seek. In consequence, there is no reason for me to issue an Order unless, perhaps, there had already been egregious violations of these obligations and an Order would be a warning not to repeat the violations.

Intervenors' Motion apparently seeks an Order because they consider that Staff and Licensee have been seriously

---

[4]Licensee's Response at 7.

remiss in failing to file documents. However, on careful examination, I find that only one of the allegations is a violation of the McGuire obligation and, since this is an isolated incident, I am not persuaded that it is appropriate at this time to redress the situation through issuing an Order.

I. Intervenors' Allegations Evaluated

Intervenors allege three specific violations of the alleged obligation to keep them informed. I find that the first two allegations are without substance and the third is correct but of insufficient seriousness to support issuance of an Order.

A. Department of Energy Environmental Review

Intervenors allege that Licensee should have filed the Department of Energy's Environmental Assessment of TRUMP-S, February 1990, which made a finding of No Significant Impact. However, Licensee states that Nuclear Regulatory Commission Regulations do not require an environmental assessment and that the DOE findings were therefore irrelevant. It relies on 10 CFR § 51.22(c)(14)(v), which exempts from the environmental assessment requirement the "use of radioactive materials for research and development and for educational purposes". I conclude that Licensee correctly interprets the regulations as exempting TRUMP-S from

the requirement for an environmental assessment and that the DOE study is therefore irrelevant to the admitted concern on the need for an environmental assessment.

B. Financial Assurance Statement

Intervenors have asserted that Licensee should have filed the financial assurance statement and statement of intent that it submitted to the Director, Nuclear Regulatory Commission Region III. However, they have not shown the relevance of these statements to any admitted area of concern or to the two challenged amendments. Consequently, they have not shown any breach of anyone's obligation to file these documents.

C. Memorandum: "major flaw in the facility design"

Intervenors assert that a document, attached as Exhibit 2 to its Application for Temporary Stay and to Preserve the Status Quo, August 21, 1990, should have been filed by Licensee. That document was a memorandum that summarized the findings of a consultant, hired by Licensee, who said that there was a "major flaw in the facility design" for conducting the TRUMP-S study.

When I considered the significance of the memorandum in LBP 90-30, 31 NRC _____ (August 24, 1990), I stated (slip op. at 2):

> Although the documents filed by Intervenors caused me to have enough concern about the safety of the Alpha Laboratory to consider granting a temporary stay, I have now analyzed the answering documents submitted by Licensee. I am persuaded by the affidavit of the University of Missouri-Columbia Research Reactor's (MURR's) Interim Director, Dr. J. Steven Morris, that there is no serious risk either to the health of members of the public or to workers in the Alpha Laboratory. Consequently, after weighing each of the factors required for a stay or temporary stay, I have decided that the request for a temporary stay should be denied.

Licensee's Response, at 8-9, states that there was no new information "relevant and material to the matters being adjudicated." It further states that:

> Licensee's evaluation of that design question had demonstrated that there was no "major design flaw," that applicable NRC requirements had been met, and that there was reasonable assurance that the health and safety of both the public and MURR personnel were protected.

I find that Licensee's explanation is an inadequate response to the purpose of the McGuire rule. Licensee's suggested test of relevance is its own conclusions after careful study that went beyond the document itself. By analogy, I recall that in the Comanche Peak operating license case, in which I was Chair of the Licensing Board, Applicants had many studies that indicated that their nuclear power plant's pipe supports were properly engineered. However, that was the issue being litigated and a hypothetical consultant study reaching the opposite conclusion would have been relevant and material regardless of that applicant's evaluation of its merit.

Here as well, the test of relevance and materiality was met before Licensee analyzed the underlying questions. The opinion of Licensee's own consultant was sufficiently important to deserve my careful attention, with respect to a motion for a temporary stay, as well as Licensee's careful follow-up. It was because of the importance of the charges in the memorandum that a reasonable person would decide to inquire further and would complete supplemental analyses.

The need for those further studies suggests to me that the document met the McGuire test. Therefore, I would have Licensee be more careful in the future to ascertain the relevance of documents before it conducts further analysis. See Houston Lighting and Power Company, et. al. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595 (1986) at 624. I believe that Licensee has been demonstrating its good faith in this proceeding and that it can be expected to comply with this ruling without a formal Order. Hence, no Order will be issued. See id. at 625.

II. Conclusion

The Licensee and Staff already are obligated to update the hearing file, pursuant to the regulations of the Commission and the McGuire rule, and there is no need for me to issue an Order in that regard.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is, this 15th day of October 1990, ORDERED, that:

> "Intervenors' Motion for Order Requiring Staff and Applicant to Notify Parties and Presiding Officer of New Information Relevant and Material to the Matters Being Adjudicated," September 17, 1990 is denied.

Respectfully ORDERED,

Peter B. Bloch
Presiding Officer

Bethesda, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of THE UNIVERSITY OF MISSOURI (Special Nuclear Materials Lic. 247 Byproduct Mat. Lic. 24-00513-32)	Docket No.(s) 70-270/30-2278-MLA

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB LBP-90-34 M&D (MOTION ...) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Gustave A. Linenberger, Jr.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Maurice Axelrad, Esquire
Newman & Holtzinger, P.C.
Suite 1000 - 1615 L Street, NW.
Washington, DC, 20036

Lewis C. Green, Esquire
Attorney for Petitioners
314 North Boardway, Suite 1830
St. Louis, MO 63102

Director
Research Reactor Facility
Research Park
University of Missouri
Columbia, MO 65211

Betty K. Wilson, Esq.
Attorney for Individual Intervenors
Oliver, Walker, Carlton and Wilson
Market Square Office Building
P. O. Box 977
Columbia, MO 65205

Henry Ottinger
Missouri Coalition for the Environment
511 Westwood Avenue
Columbia, MO 65203

Mark Hale, Director
Mid-Missouri Nuclear Weapons Freeze, Inc.
804 C East Broadway
Columbia, MO 65201

Docket No.(s)70-270/30-2278-MLA
LB LBP-90-34 M&D (MOTION ...)

Robert L. Blake, Jr., M.D.
Physicians for Social Responsibility/
Mid-Missouri Chapter
M-228 UMC Health Sciences Center, MO U.
Columbia, MO 65212

A. Bert Davis
Regional Administrator
U.S. Nuclear Regulatory Commission
Region III
799 Roosevelt Road
Glen Ellyn, IL 60137

Dated at Rockville, Md. this
15 day of October 1990

Patty Henderson
Office of the Secretary of the Commission