UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge
Peter B. Bloch

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

LICENSEE'S RESPONSE TO "INTERVENORS' MOTION FOR SUMMARY DISPOSITION AND OTHER RELIEF"

In Intervenors' Motion for Summary Disposition and Other Relief ("Summary Disposition Motion") (undated, served by express mail on October 25, 1990), Intervenors first argue that the Part 30 license is ripe for summary disposition, assert that the Presiding Officer has authority to summarily dispose of matters under § 2.749 and request that the Part 30 license should be summarily set aside. Summary Disposition Motion at 2.

The Presiding Officer has already noted that "Since I am authorized to determine the outcome of this case based on the written filings, Intervenors' Motion for Summary Disposition, October 25, 1990, seems irrelevant." Memorandum and Order (Licensee's Partial Response Concerning Temporary Stay), LBP-90-38, slip op. at p. 13, n.9 (Nov. 1, 1990). However, a brief response to Intervenors' motion seems warranted.

First, it is not as clear as Intervenors make out that the Presiding Officer's authority in a Subpart L proceeding under § 2.1209 automatically includes summary disposition authority under § 2.749. In other instances where the Commission intended to incorporate Subpart G provisions into Subpart L it do so expressly. However, Intervenors' motion is so patently without merit that such question need not be reached.

Intervenors have made no pretense of satisfying the requirements of § 2.749. They have provided no statement of the material facts as to which they contend that there is no genuine issue to be heard, nor have they provided any supporting affidavits.

Basically, they appear to be seeking a ruling that, as a matter of law, the Part 30 license was unlawfully issued because Licensee is in violation of § 30.32(i)(1). 1/ They are not entitled to such ruling because, as explained in Section D.2 of Licensee's Written Presentation (Nov. 14, 1990), which is hereby incorporated by reference, the effective date of § 30.32(i)(1) occurred after the Part 30 license was issued. In any event, the motion for summary disposition could not be granted because, even if § 30.32(i)(1) were applicable to

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1/ Although the Memorandum and Order (Grant of Temporary Stay) (Oct. 20, 1990) indicates (at page 9) that "Licensee admitted that it was subject to the provisions of 10 CFR § 30.32(i)(1)," Licensee's counsel does not recall making any such statement. His best recollection of the statements made during the October 20 conference call appears at page 5 of the Memorandum (Memorandum of Conference Call of October 19, 1990) (Oct. 30, 1990).

Licensee now, numerous facts concerning those regulatory provisions would be in dispute.

Finally, even if there were a violation, setting aside "the Part 30 license" would not be an automatic remedy. Putting aside that "the Part 30 license [presumably Intervenors mean Amendment No. 74 to License No. BPM-24-00513-32]" covers both neptunium and americium and only americium is in dispute under § 30.32(i)(1), deficiencies in an application can be remedied during a proceeding through supplementary information, the imposition of additional license conditions, etc. Again, the grant of a summary disposition motion would not be an appropriate process for the Presiding Officer's evaluation of such circumstances.

Other Concerns

Intervenors also accuse Licensee of a "false statement" and apparently seek some unspecified relief from the Presiding Officer. Summary Disposition Motion at 3-5.

To place this incident in proper perspective, Licensee would like first to reiterate the facts. During the conference call of October 19, when the Presiding Officer inquired as to whether the NRC Staff had been informed that the authorized amount of americium exceeded the amount set forth in § 30.32(i)(1), Licensee's counsel informed him that Licensee had mentioned this to Region III personnel upon reading Dr. Adam's affidavit of July 27, 1990. See Memorandum (Memorandum of

Conference Call of October 19, 1990) at 5 (Oct. 30, 1990). Counsel's statement was based upon having been so informed by Licensee's staff. Enclosed is an Affidavit of Dr. Susan M. Langhorst Regarding Conversations of August 1, 1990, which attests to her conversation with the NRC Staff and encloses a copy of her telephone conference notes of August 1, 1990.

Licensee cannot explain why Dr. Adam cannot "recall any conversations where it was implied or stated that [his] affidavit was incorrect." See Affidavit of William J. Adam (Nov. 2, 1990), provided with the letter to Judge Bloch from Colleen Woodhead (Nov. 2, 1990). It is possible that since other matters were discussed in the conversation on August 1 this specific point did not impress him, particularly if he believed that his "additional" rationale for not reviewing emergency procedures was not particularly significant.

Licensee denies and strongly resents the accusation that it is guilty of "false statements."

The decision in Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), DD-83-17, 18 NRC 1289, 1293-94 (1983) cited by Intervenors is not on point. There, the applicant submitted incomplete information to the NRC in its application and failed to bring to the attention of the NRC Staff a corresponding factual misstatement that the NRC Staff had made in its Final Environmental Statement. Unlike the situation in Perry, Licensee did not provide incomplete information in its application and Licensee promptly informed the

NRC Staff on August 1 of the apparent error in the Staff's July 27 affidavit.

Since Licensee did not violate any obligation to the NRC Staff, Intervenors appear to be arguing that Licensee violated some other obligation by not also informing the Presiding Officer and the parties. Seemingly, Intervenors believe that this matter is covered by some expanded interpretation of the McGuire doctrine.

However, Licensee had no reason to believe at that time that it had any new "relevant and material information" that should be communicated to the Presiding Officer and the parties. The factual information that it communicated to the NRC Staff was not new. It was well known to all that Licensee's application and license amendment involved 25 curies of americium; and Licensee had communicated to all from its earliest filings that the MURR Facility Emergency Plan was applicable to the Alpha Laboratory. See Response of Licensee to Request for Hearing and Stay Pending Hearing at 16-17, 22, 35 (May 25, 1990) and Affidavit of J. Steven Morris at 5 (May 24, 1990).

The NRC Staff's statement was made in the course of explaining its actions with respect to compiling the hearing file, not in expressing a position on substantive legal issues. In Paragraph 4 of Dr. Adam's July 26, 1990 affidavit, he first stated:

> 4. I reviewed the applications for amendments to the Parts 30 and 70 licenses of the University of Missouri in the context of

> the University's existing Part 30, Part 50 (104), and Part 70 licenses for its research reactor facility (Missouri University Research Reactor (MURR)). The six issues admitted to the hearing are not related to my review of the amendments issued because they concern matters previously reviewed prior to issuance of the existing licenses.

Then, as a supplementary matter, he stated "In addition," followed by the inaccurate statement.

Presumably, according to Intervenors, Licensee had the responsibility of evaluating whether or not the NRC Staff had a valid reason for not correcting an obvious factual error under those circumstances and had the obligation to discharge for the NRC Staff whatever responsibility the NRC Staff had to make such correction.

Licensee does not believe that its McGuire obligations stretch that far. Contrary to Intervenors' misbegotten assertion, this was not a situation where "Licensee has known, at least since July 27, 1990, that its Part 30 license is invalid, in violation of 10 CFR 30.32(i)(1)." Summary Disposition Motion at 3. Licensee was not in violation of 10 CFR 30.32(i)(1), its license was not invalid, and no information was being withheld.

In any event, obviously Intervenors were not misled. In fact, it appears that the NRC Staff's misstatement focused Intervenors' attention on an inapplicable regulation, rather than leading Intervenors away from it.

Under the current circumstances, where the quantity of americium involved is and always has been free of dispute and the

legal principles involved are being briefed, there does not seem to be any warrant for further consideration of Intervenors' accusations by the Presiding Officer.

Respectfully submitted,

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