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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judge  
Peter B. Bloch

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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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

LICENSEE'S OPPOSITION TO  
INTERVENORS' MOTION FOR ORDER RECOMMENDING FORMAL HEARING,  
OR IN THE ALTERNATIVE REQUIRING ORAL PRESENTATIONS

AND

MOTION TO STRIKE INTERVENORS' MOTION

In "Intervenors' Motion for Order Recommending Formal Hearing, or in the Alternative Requiring Oral Presentations" ("Intervenors' Hearing Motion") (undated, served by telefax on Nov. 14, 1990), Intervenors request that, pursuant to § 2.1209(k), the Presiding Officer "recommend to the Commission that a formal hearing be held before considering the final decision, and before considering any possible vacation of the stay order." Intervenors' Hearing Motion at 1. In the event that no such formal hearing should result, Intervenors move that the Presiding Officer require oral presentations by the parties.  
Id.

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For the reason stated below, Licensee opposes each aspect of Intervenors' motion and urges the Presiding Officer to deny such motion summarily.

Intervenors also request that a conference call be held on Friday, November 16 to afford the parties an opportunity to be heard on the question of the need for such a hearing. *Id.* at 6. Licensee also opposes the convening of a conference call for such purposes, since it believes that the Presiding Officer has ample basis in the pleadings to deny the motion summarily.

Finally, Intervenors' Hearing Motion is a frivolous request for the relief that it seeks and is an ill-disguised attempt to present additional arguments in favor of continuing the present temporary stay. Intervenors have filed such motion notwithstanding the Presiding Officer's explicit directive that "Intervenors are prohibited from replying to [Licensee's] response" and that "[t]hey may not submit new evidence with respect to the temporary stay. Memorandum and Order (Licensee's Partial Response Concerning Temporary Stay), LBP-90-38, slip op. at 2 (Nov. 1, 1990). Their pretense should not be allowed to stand, and their impermissible arguments (comprising the entire motion) should be struck.

I. Hearing Or Oral Presentation Before Final Decision

Intervenors' request with respect to hearing or oral presentation is essentially a repetition of a request made in Intervenors' Written Presentation (at 59-60) of questions

previously suggested by Intervenor (Id. at 55-59), with some expansion of the questions on which a hearing should be held. Licensee has explained in Licensee's Written Presentation (at 83-87) why, under the circumstances of this proceeding, scheduling an "oral presentation" on the parties' written presentations or recommending to the Commission that cross-examination be permitted would be contrary to the explicit guidance provided by the Commission to presiding officers in Subpart L proceedings. Accordingly, Licensee need not repeat these cogent arguments here.

However, the Licensee should emphasize that the filing of this motion by Intervenor at this time with respect to a final decision which is obviously not on the immediate horizon could only have been a pretext for attempting to bring indirectly before the Presiding Officer the type of argumentation he had directed them not to bring directly.

To the extent that Intervenor might have wanted to provide to the Presiding Officer some advance notice that they would seek an oral presentation or a § 2.209(k) recommendation to the Commission, they had already accomplished that purpose in Intervenor's Written Presentation. As to whether some specific issues might or might not be suitable for such future action by the Presiding Officer, the Intervenor could have no earthly idea at this time. They had not yet received a copy of Licensee's Written Presentation which could have answered some of the



questions they sought to raise. <sup>1/</sup> They had not yet received the information that Licensee will be allowed to file in response to Intervenors' rebuttal. They had not yet received the information that will be provided in Licensee's responses to such written questions as the Presiding Officer may propound at his own initiative or at the suggestion of Intervenors. The process of submitting written presentations and responses to written questions under § 2.1233 is not yet nearing completion.

Thus, the motion to request an oral presentation under § 2.1235 or a recommendation under § 2.209 is extremely premature.

But the motion is not innocently premature, it is willfully premature. It is filed on the eve of the Presiding Officer's receipt of the Licensee's Written Presentation and Response to Intervenors' Renewed Request for a Stay, which, as Intervenors correctly fear, may persuade the Presiding Officer to

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<sup>1/</sup> In fact, in Licensee's Written Presentation, it did answer a number of the questions raised by Intervenors at pages 55-59 of Intervenors' Written Presentation, i.e., Licensee answered those questions that sought factual information that might somehow be related to the areas of concern under litigation. It is likely, however, that Intervenors' thirst for discovery will be insatiable. For example, having been provided ample information on Licensee's comprehensive emergency planning and fire fighting preparations and being unable to point to any deficiencies therein, they now want to engage in unlimited discovery on possible enhancements Licensee might be considering. See Intervenors' Hearing Motion at 4. With all of the information that has already been presented, the Presiding Officer can readily tell that these additional tidbits are not truly required for "an adequate record" and can easily assess Intervenors' probable motivation for their questions.

dissolve the temporary stay that he issued ex parte. The motion is willful because it contravenes the Presiding Officer's precise directive, and because it seeks to reinforce an impression that Intervenor's have sought to foster, namely, that the focus of this proceeding should not be on technical issues, but, somehow, on the credibility of individuals, including innocent bystanders like Battalion Fire Chief Call.

It is more than a little bit strange that, when Intervenor's litany of questions are examined, there is so little raised of substance and, instead, so much about who said what to whom and when. It is clear that those irrelevant and collateral questions are not being raised naively.

Licensee is confident that the Presiding Officer will not be misled. He will not only deny Intervenor's motion, he will strike it.

## II. Hearing Or Oral Presentation Before Vacating Stay Order

As noted above, the Presiding Officer has already ruled that, under the NRC procedural regulations, Intervenor's are prohibited from replying to Licensee's response regarding the temporary stay or from submitting new evidence with respect to the temporary stay. LBP-90-38, slip op. at 2. A fortiori, Intervenor's would not be entitled to an opportunity to respond or present additional evidence at an oral presentation.

Over, for the reasons spelled out in Licensee's letter to the Presiding Officer dated September 12, 1990, it is Licensee's

position that the provisions of § 2.1235 do not permit the Presiding Officer to allow "oral presentations" on stay requests, but that such further proceedings are permitted only with respect to the substantive written presentations.

However, the Presiding Officer does not need to parse the regulations finely in order to deny this specific request for an "oral presentation." When a temporary stay order has been granted ex parte, it would be grossly inequitable for the Presiding Officer to delay dissolving such stay until the petitioner is provided still another opportunity to present argument or evidence, either in written form or in an oral presentation.

Finally, Intervenors' suggestion that the Presiding Officer recommend to the Commission, pursuant to § 2.1209(k), that a formal hearing be held before vacating the temporary stay is frivolous. The Presiding Officer is fully able on the basis of the ample record before him to determine whether the Intervenors have made the requisite showing under the four criteria of § 2.788(e) and whether the "extraordinary circumstances" exist that would warrant continuing a temporary stay under § 2.788(g). There is no question that, on the basis of the information filed by the Licensee on November 14, the temporary stay should be dissolved.

Particularly in light of the Presiding Officer's prior ruling, Intervenors were fully aware that there was no chance that the Presiding Officer would call for an oral presentation or



make a § 2.209 recommendation to the Commission on the question of vacating the temporary stay. The only possible purpose of this portion of the motion was to provide the pretext that some imminent action justified the motion and thus permit the Intervenor to bring prohibited arguments surreptitiously before the Presiding Officer.

### III. Conference Call On November 16

There is absolutely no reason for a conference call on this subject on November 16. The legal principles are clear; the relevant facts are before the Presiding Officer. Intervenor simply seek another opportunity to bring up before the Presiding Officer in the conference call arguments relating to the temporary stay order that he has already informed them are not permissible.

The Presiding Officer should not grant them that opportunity.

### IV. Notion To Strike

The reason why the Intervenor's Hearing Motion should be struck as constituting impermissible argument with respect to vacating the temporary stay order is illustrated most vividly at page 3, where Intervenor accuse Licensee as follows:

Extending these approximations to the third decimal place, as though these were precise numbers to begin with, the Licensee manages to conclude that the total curie activity of this material is 1.994 curies. Any reasonable rounding of these estimates would bring the total to 2.

The Intervenor's do not cite where Licensee has allegedly extended "these approximations to the third decimal place" and has allegedly concluded that the total curie activity "is 1.994 curies." The reason Intervenor's provide no citation is simple: Licensee never made that statement! In Table 2 (on page 7) of the Affidavit of Dr. J. Steven Morris Regarding Plutonium Content (Oct. 29, 1990), Dr. Morris states, based on a 1975 Los Alamos National Laboratory analysis, that the total plutonium activity ( $\alpha + \beta$ ) is 1.94.<sup>2/</sup> Somehow, Intervenor's have changed that number to 1.994 in order to create a number that they can round to 2 curies.

The basic point that Licensee is trying to make, however, is not that Intervenor's fabricate, misrepresent and mischaracterize both facts and generalities. They have done that before and they will undoubtedly do so again. Licensee will respond patiently and painstakingly each time.

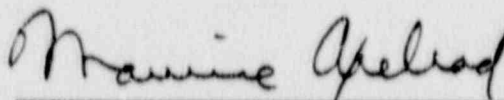
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<sup>2/</sup> Licensee's number does not include americium. If the question is whether curie content of plutonium exceeds 2 curies, Licensee is not aware of any reason why one would add the amount of americium.



But they were not permitted to present such arguments (whether correct or incorrect) under the pretext of a motion for an oral presentation or formal hearing. Their motion should be struck.

Respectfully submitted,



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Date: November 15, 1990

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DUCKETED  
USNHC

ATOMIC SAFETY AND LICENSING BOARD 1990 NOV 19 P12:10

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No. 24-00513-32;	)	ASLEP No. 90-613-02-MLA
Special Nuclear Materials	)	
License No. SNM-247)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Opposition To Intervenor's Motion For Order Recommending Formal Hearing, Or In The Alternative Requiring Oral Presentations And Motion To Strike Intervenor's Motion" were served upon the following persons by deposit in the United States mail, postage prepaid and properly addressed on the date shown below:

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U.S. Nuclear Regulatory Commission  
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The Honorable Gustave A. Linenberger, Jr.  
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Attn: Chief, Docketing & Service Section  
(Original plus two copies)

\*/ Also sent by telecopy on November 15, 1990.

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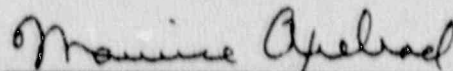
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Dated this 15th day of November, 1990.

  
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