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UNITED STATES OF AMERICA<sup>90</sup> OCT 29 P3:52  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD  
OFFICE OF SECRETARY  
& SERVICE  
BRANCH

Before Administrative Judge  
Peter B. Bloch

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

INTERVENORS' MOTION  
FOR SUMMARY DISPOSITION AND OTHER RELIEF

**THE FACTS**

The Part 30 license amendment which is the subject of this hearing authorizes possession and use of 25 curies of americium. That is more than the 2 curies which require compliance with § 30.32(i)(1) of Title 10 of the Code of Federal Regulations.

In an affidavit dated July 26, 1990, Dr. William J. Adam, of the NRC Staff, stated that "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. In addition, the amount of nuclear material authorized by the amendments is below the threshold in NRC regulations requiring

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fire protection procedures; emergency planning procedures and emergency procedures. 10 CFR 30.32(i)(1)."

In a telephone conference with the Presiding Officer and attorneys for the Licensee and the Intervenors, on October 19, 1990, the attorney for the Licensee admitted that it was subject to the provisions of 10 CFR § 30.32(i)(1) and that the Licensee had informed the Staff of that conclusion. See Memorandum and Order (grant of Temporary Stay) of October 20, 1990, at page 9. Specifically, he stated that when the Licensee saw Dr. Adam's reference to § 30.32, the Licensee called Dr. Adam and pointed out to him that the amendment authorized 25 curies of americium.

#### ARGUMENT

By the admission of the Licensee, the Part 30 license was unlawfully issued, in violation of § 30.32(i)(1). That raises several questions.

*1. The Part 30 license is ripe for summary disposition*

There is no dispute that the Part 30 license was improperly issued, and therefore it must be set aside. That conclusion does not require any more facts than have already been admitted.

Pursuant to § 2.1209 the Presiding Officer has the authority to regulate the course of the hearing, to take appropriate action to avoid delay, and to take any other action consistent with the Act and Chapter 2 of Title 10. Under § 2.749 the Presiding Officer shall summarily dispose of any matter brought before him if there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law, as is the case here.

Accordingly, the Part 30 license should be summarily set aside.

## 2. Other concerns

Although this admission of the Licensee is obviously new information which is relevant and material to the matters being adjudicated, it was not communicated to counsel for the Intervenors, or apparently the Presiding Officer, until the telephone conference of October 19. The Licensee thought it prudent to notify Dr. Adam of his error. Did not the Licensee have an obligation to notify the Judge, and the Intervenors, also? The failure of the Licensee to correct the Staff's statement has been held to be a "false statement" within the meaning of § 186 of the AEA, 42 U.S.C. § 2236(a), *Cleveland Electric Illuminating Co.*, 18 NRC 1289, 1293-94 (1983).

In the Order of October 20, granting a temporary stay, the Presiding Officer noted that, in view of the doubt as to the validity of the Part 70 license amendment, he "would expect Licensee to have voluntarily suspended its experiments until it could at least be assured that it was in compliance with its license." Here, the 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). When the Licensee learned that its license was invalid, would it not have been in order for the Licensee voluntarily to suspend its experiments?

When the Licensee communicated this information to the Staff, the Staff became aware that the statement made by Dr. Adam in his affidavit of July 26, 1990, that the amount of nuclear material authorized by the amendments is "below the threshold in NRC regulations . . .", citing 10 CFR 30.32(i)(1), was erroneous. The Staff had a clear obligation to inform the parties and the Presiding Officer that this affidavit was erroneous. The failure of the Staff to notify the Presiding Officer and the Intervenors that Dr. Adam's affidavit was erroneous violates not only the

*McGuire* rule, but also the fundamental principle that one who has furnished information under oath in a contested proceeding has an obligation to correct errors when he learns of the errors.

In the general practice of law there are fundamental principles of candor toward the tribunal. The Rules of the Missouri Supreme Court, for example, include Rule 3.3, entitled "Candor toward the Tribunal." Subparagraph (a)(4) provides in part: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures."

These same principles are applicable in NRC proceedings. *Consumers Power Co.*, 16 NRC 897, 916 (1982); 10 CFR § 2.713(a). See also *Tennessee Valley Authority*, 15 NRC 1387, 1394 (1982) ("modifications and rescissions of important evidentiary submissions"); *Consumers Power Co.*, 14 NRC 1768, 1782 (1981) ("... the adjudication could become meaningless, for adjudicatory boards would be passing upon evidence which would not accurately reflect existing facts").

What were they waiting for? Were the Staff and the Licensee simply sitting on this error for two and one-half months, waiting to see whether the Intervenors or the Presiding Officer would notice this error?

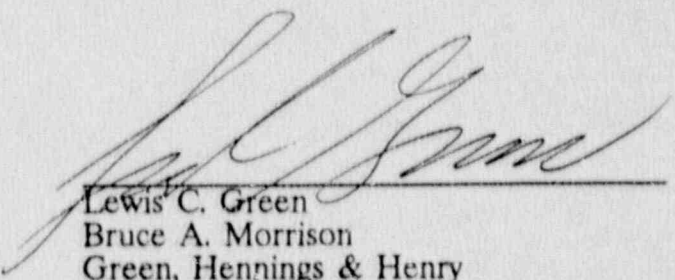
When the Staff became aware that the Part 30 license had been issued in violation of § 30.32(i)(1), would it not have been in order for the Staff to have revoked or suspended the license pursuant to § 30.61(b)?

In the public interest, the Staff should feel some obligation to enforce the regulations, especially those directly related to the public safety. It may be appropriate for the Presiding Officer to make further inquiries.

## CONCLUSION

For the foregoing reasons, Intervenor respectfully request:

1. An order summarily setting aside the Part 30 license, and
2. Such other and further relief as the Presiding Officer may deem appropriate.



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CERTIFICATE OF SERVICE

True copies of the foregoing were mailed this <sup>25<sup>th</sup></sup> day of October 1990, by United States Express Mail, postage prepaid, to:

The Honorable Peter B. Bloch '90 OCT 29 P3:52  
Administrative Law Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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