11168

DUPLICATE ORIGINAL

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 TO STRIKE
IRRELEVANT AND UNRELIABLE MATTERS"

In Intervenors' Motion to Strike Irrelevant and Unreliable Matters ("Intervenors' Strike Motion") (undated, served on November 26, 1990), Intervenors move to strike portions of Licensee's Written Presentation and various affidavits.

First, Intervenors move to strike as "irrelevant" seven portions of Licensee's Written Presentation and all exhibits cited in those portions (including, without limitation, nine cited affidavits). Intervenors' Strike Motion at 1-2.

Although the basis stated by Intervenors is "irrelevancy" (perhaps in order to fall within one of the bases for a strike motion stated in § 2.1233(e)), such basis cannot conceivably be applied to the portions of Licensee's Written Presentation and Exhibits identified by Intervenors. All of these materials contain facts or arguments relating to an

D503

admitted concern and/or addressing an argument presented by Intervenors. All of these materials are clearly "relevant."

The true grounds proffered by Intervenors for this portion of the motion to strike are not "irrelevancy," but the arguments presented at pages 2-3 of the motion. Intervenors first argue that these "affidavits and arguments relate to matters which were required to be a part of the application" and presumably should not be admitted now.

Such argument does not provide any grounds for a motion to strike recognized under § 2.1233(e), and the motion should be denied on that basis alone.

To the extent that the Intervenors may be arguing that Licensee's affidavits and arguments should have been part of the application, they are mistaken. Licensee's materials, in order to respond to Intervenors' presentation, support and elaborate upon the information contained in its applications. As Licensee has demonstrated throughout Licensee's Written Presentation (Nov. 14, 1990), its applications satisfied all regulatory requirements. The additional information is being submitted to resolve the concerns admitted in this proceeding, but does not constitute any information required to be part of an application. 1/

1/ However, even if there had been an omission or deficiency in an application, there is no reason why the missing information could not be provided as part of a submittal in this proceeding.

It is apparent that Intervenors are simply repeating the argument contained in their written presentation that the Presiding Officer's decision must be made solely on the basis of information contained within the application. As Licensee has previously explained in responding to that argument, Intervenors are mistaken as to the scope of information that can be presented as part of an applicant's or licensee's initial written presentation. See Licensee's Written Presentation at 9-13 (Nov. 14, 1990). Both NRC regulations and NRC regulatory practice permit the submittal of evidence that goes beyond the four corners of the application, and nothing in the Atomic Energy Act precludes the submittal of such evidence. 2/ Id. Licensee incorporates its previous response by reference.

Intervenors then raise a couple of arguments predicated on the notion that if information submitted in this proceeding modifies the application, a motion for leave to amend the application must be submitted. Intervenors' Strike Motion at 2-3. Licensee would first note that such argument is academic at this point since Licensee has not sought to modify anything in its applications. All of the information it has provided

---

2/ [illegible] is irrelevant that the NRC staff will not have had an [illegible]unity to review some of the information that may be [illegible]ted. The Presiding Officer is authorized to make a [illegible]rmination on such information, whether or not it has [illegible] reviewed by the NRC staff. Of course, under § 2.1213 presiding officer may order or permit the NRC staff to [illegible]icipate with respect to a particular issue if he determines that the staff's participation would aid materially in the resolution of such issue.

supports and elaborates upon the adequacy of its applications and how the applications satisfy all applicable regulatory requirements.

However, the point made by Licensee in "Licensee's Response to 'Intervenors' Motion for Reconsideration ... and Emergency Order ... Part I'" at 9-10 (Nov. 21, 1990) is perfectly valid. It may turn out in the course of a proceeding that an applicant or licensee does submit information that modifies its application. There is nothing in NRC regulations or regulatory practice that would require a formal modification of the application or a motion for leave to modify the application. In a case such as the instant proceeding, where the license amendment has already been issued, it would be the obligation of the Presiding Officer to determine the appropriate action to be taken with respect to the issued license amendment. The actions that might be considered would include upholding the license amendment, clarifying it, imposing additional conditions, suspending the amendment, etc. Intervenors' concern that someone in the future could not determine "what conditions or restrictions have been imposed on the Licensee" (Intervenors' Strike Motion at 3) is unwarranted. If the hypothetical "modification" of the application has any regulatory significance, at the request of any party or upon the Presiding Officer's own determination, it would be reflected in an appropriate clarification of the issued license amendment or in the imposition of additional conditions.

Finally, Intervenors move to strike "as unreliable hearsay" the portion of Licensee's Exhibit 7 that "purports to report what Mr. Steppen said, and all references to NUREG 1140." Intervenors' Strike Motion at 3.

It is unclear whether Intervenors are claiming that "hearsay" evidence is inadmissible in NRC proceedings. If they are, they are clearly wrong, since, under § 2.1233(e), strict rules of evidence are not applicable and hearsay is admissible. Moreover, Intervenors have themselves provided much hearsay evidence, including Intervenors' Exhibit 6, reciting what Mr. Steppen allegedly told Mrs. Drey, and thus have conceded that hearsay evidence is admissible.

There is nothing "unreliable" about the two items of evidence that Intervenors seek to strike. In his affidavit, Mr. Eschen explains that, in the course of conducting his own review of the adequacy of the glove box ventilation and exhaust system, he spoke to Mr. Steppen to ascertain the reasons for Mr. Steppen's recommendation that another HEPA filter DOP-testable in-place be added so that he could consider those reasons. Licensee's Exhibit 7 at 3. This was a logical and commendable action for Mr. Eschen to take and his first-hand testimony as to such action is fully reliable.

NUREG-1140, "Regulatory Analysis of Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees," was prepared by the NRC Office of Nuclear Regulatory Research. As the Presiding Officer is aware from his own review

and previous pleadings, NUREG-1140 was relied upon by the Commission in the adoption of enhanced emergency planning requirements for byproduct materials and special nuclear materials licensees. See, e.g., Final Rule, 54 Fed. Reg. 14501, 14502-03 (Apr. 7, 1989). There is thus every reason to consider it a reliable document in an NRC proceeding.

Intervenors are free to make whatever arguments they wish as to the weight that should be given to the foregoing materials, but they have presented no valid argument that the materials are inadmissible and should be struck.

For the reasons stated above, Licensee's Strike Motion should be denied.

Respectfully submitted,

Maurice Axelrad
David W. Jenkins

Newman & Holtzinger, P.C.
Suite 1000
1615 L Street, N.W.
Washington, D.C. 20036

(202) 955-6600

Counsel for
THE CURATORS OF THE
UNIVERSITY OF MISSOURI

OF COUNSEL:

Robert L. Ross, General Counsel
Phillip Hoskins, Counsel
Office of the General Counsel
University of Missouri
227 University Hall
Columbia, MO 65211

(314) 882-3211

Date: December 6, 1990