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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge
Peter B. Bloch

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 RESPONSE TO
"INTERVENORS' MOTION FOR ORDER ADMITTING AREA OF CONCERN
RESPECTING FINANCIAL ASSURANCE OF DECOMMISSIONING

In Intervenors' Motion for Order Admitting Area of Concern Respecting Financial Assurance of Decommissioning ("Financial Assurance Motion") (undated, served on November 26, 1990), Intervenors move that the Presiding Officer admit an additional area of concern relating to financial assurance of decommissioning.

Licensee urges that such motion be denied both because Intervenors have not stated an area of concern admissible in this proceeding, and because the motion is untimely and Intervenors have not satisfied the requirements specified in § 2.1205(k).

I. Admissibility Of Area Of Concern

Although Intervenors have not specifically identified the area of concern that they seek to have admitted, they apparently wish to litigate in this proceeding the adequacy of

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the "Financial Assurance Statement and Statement of Intent" that was filed by the Licensee with the NRC on June 15, 1990. 1/ As described below, such area of concern is not admissible in this proceeding because it is not germane to the subject license applications and license amendments and because the arguments that Intervenors wish to raise constitute a challenge to the NRC regulations prohibited by § 2.1239(a).

As prescribed in § 2.1205(d)(3), a petitioner must describe in detail the "areas of concern about the licensing activity that is the subject matter of the proceeding ...." As explained in the statement of consideration accompanying the adoption of this provision, the specification of concerns "must be sufficient to establish that the issues the requester wants to raise regarding the licensing action fall generally within the range of matters that properly are subject to challenge in such a proceeding." Final Rule, 54 Fed. Reg. 8269, 8272 (Feb. 28, 1989). Moreover, § 2.1205(g) states that "the presiding officer shall determine that the specified areas of concern are germane to the subject matter of the proceeding ...."

A presiding officer does not have plenary subject matter jurisdiction, he has only the jurisdiction and power which the Commission delegates to him. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785,

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1/ This filing has previously been provided as Attachment 3 to "Response of Licensee to 'Petitions for Leave to Intervene; Requests for Stay'" (Aug. 20, 1990), and will be referred to as Licensee's Financial Assurance Statement.

790 (1976). In a license amendment proceeding, the presiding officer's limited jurisdiction enables him to admit only issues that are within the scope of the matters delegated to him, i.e., within the scope of the amendment applied for. See, e.g., Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983), citing, Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979) and Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); see also Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 221-22 (1976).

This proceeding deals with two license amendment applications that were filed on February 21, 1990 and March 12, 1990, respectively, resulting in license amendments issued on March 19, 1990, and April 5, 1990, respectively. The pertinent NRC regulations (§§ 30.35(c) and 70.25(c)) did not require that financial assurance for decommissioning be provided as part of the license amendment applications and considered as part of issuing such license amendments; instead, they required that such financial assurance be provided no later than July 27, 1990. In the license amendment applications and the license amendments here at issue, Licensee neither requested nor received authorization for decommissioning or approval of any funding assurance therefor.

Accordingly, whether such financial assurance was filed prior to July 27, 1990, and was adequate is not germane to the instant proceeding, which deals solely with the subject license amendment applications and license amendments. Whether or not Licensee has properly complied with the financial assurance requirements of the regulations subsequently to the issuance of the license amendments is a compliance or enforcement question. Intervenors may be able to have such question considered by filing a § 2.206 petition; they are not entitled to have such question considered in this particular Subpart L licensing proceeding. Such matters are not within the scope of the amendments requested and are not within the Presiding Officer's jurisdiction.

Moreover, even if financial assurance were germane to the subject matter of this proceeding, the area of concern should still be rejected because the particular arguments that Intervenors want to raise constitute an impermissible challenge to the regulations.

Intervenors allege that Licensee's Financial Assurance Statement "is chimerical, void, unlawful and unconstitutional." Financial Assurance Motion at 2.

Section 30.35(f)(4) (as does § 70.25(f)(4)) states that financial assurance can be provided by the following method: "(4) In the case of Federal, State, or local government licensees, a statement of intent containing a cost estimate for

decommissioning . . ., and indicating that funds for decommissioning will be obtained when necessary."

The NRC has provided additional guidance for such government licensees (including the Licensee, which is a Missouri governmental entity 2/) by describing the necessary contents of the "statement of intent" as follows:

> The purpose of the statement of intent is to ensure that, early in the life of the licensed facility, government licensees make their funding bodies aware of decommissioning requirements and costs and the eventual need for funding. The statement must identify the facility(ies) for which it guarantees financial assurance and the corresponding decommissioning costs. Also, it must indicate that funds for decommissioning costs will be requested and obtained sufficiently in advance of decommissioning to prevent delay of required activities. The statement of intent should include evidence of the authority of the officials of the Federal, State, or local government entity to sign the statement of intent.

Regulatory Guide 3.66 (Task DG-3002), "Standard Format and Content of Financial Assurance Mechanisms Required for Decommissioning Under 10 CFR Parts 30, 40, 70 and 72," at 3-25 (June 1990).

Licensee has fully complied with the NRC regulations and the foregoing guidance. Licensee's Financial Assurance Statement identified the four University of Missouri campuses where radioactive materials are authorized to be used, stated the

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2/ The Commission specifically contemplated that State universities could provide assurance of funding for decommissioning through a statement of intent. See Proposed Rule, 50 Fed. Reg. 5600, 5607 (Feb. 11, 1985).

required amounts relating to decommissioning, provided the requisite statement that "[n]ecessary funds for decommissioning will be requested and obtained sufficiently in advance of decommissioning to prevent delay of required activities," and included evidence of the authority of the Vice President for Administrative Affairs to sign the statement of intent.

It is apparent that Intervenors are questioning not whether Licensee's Financial Assurance Statement satisfies the regulations, but whether satisfying such regulations is sufficient. For example, although Licensee's statement that "funds for decommissioning costs will be requested and obtained" explicitly satisfies the requirements of the regulations and the foregoing NRC guidance, Intervenors would additionally require information concerning "from whom" the funds will be requested and obtained. Financial Assurance Motion at 2. Moreover, referring to operations "under the constraints of a very tight budget," Intervenors characterize a statement of intent that funds "will be requested and obtained" -- as permitted by the regulations -- to be insufficient. Id. at 3.

Thus, Intervenors seek not the statement of intent required by the regulations, but, instead, a guarantee that funds for decommissioning will be available. Such a requirement was explicitly rejected by the Commission in adopting the subject regulations. When the proposed rule had been subject to misinterpretation as requiring a guarantee, the Commission

changed the proposed rule to its present language and explained the change as follows:

> The intention of the proposed rule is that these State and Federal licensees should, early in their facilities' lifetime, be aware of the eventual decommissioning of the facility, specifically its cost, and make their funding bodies aware of those eventual costs. The provisions of the rule requiring naming a guarantor of funds may be subject to misinterpretation. Accordingly, the proposed rule is being modified to indicate that Federal and State licensees should provide a statement of intent that they have an estimate of the cost to decommission their facilities and that they will obtain funds when necessary for decommissioning. This modification should satisfy the need for assurance from these facilities within the constraints of governmental budgetary policies.

Final Rule, 53 Fed. Reg. 24018, 24037 (June 27, 1988).

Thus, Intervenors' suggested area of concern, by seeking to require more than is required by the applicable NRC regulations -- and by seeking a guarantee explicitly rejected by the Commission -- constitutes a challenge to the NRC regulations. Such a challenge is prohibited in a proceeding under Subpart L by § 2.1239(a). Accordingly, Intervenors' area of concern must be rejected.

II. Timeliness

The area of concern must also be rejected because it has not been submitted by Intervenors in timely fashion and Intervenors have not satisfied the requirements of § 2.1205(k). In ruling on untimely requests, the Presiding Officer must

consider whether the petitioner has established that the late filing was excusable and that the grant of the request will not result in undue prejudice or undue injury to any other participant. Intervenors have failed on both counts.

Intervenors raise two arguments in an attempt to justify the lateness of their filing, neither of which constitutes a valid excuse. First, they argue that they had believed that the sufficiency of the financial assurance was already part of this proceeding. Financial Assurance Motion at 3-4. However, they had no reasonable basis for such belief, since none of their admitted concerns was so broad as to include decommissioning or related financial assurance. 3/

Moreover, even if Intervenors were laboring under such inexcusable false illusions, those should have been dispelled months ago. In their original petition, the Individual Intervenors sought admission of an area of concern relating to financial assurance of decommissioning, which was rejected by the Presiding Officer on August 28, 1990. See Memorandum and Order (Admitting Parties and Deferring Action on a Stay) slip op. at 5 (Aug. 28, 1990). As the Individual Intervenors had adopted all of the existing concerns, it was apparent that these concerns did

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3/ For example, in responding to Intervenors' similar assertion earlier, the Presiding Officer has stated with respect to Area of Concern Number One: "I find no support for Intervenors' current assertion about the breadth of this concern, which related to 'handling and experimenting with these highly dangerous materials' and not to decommissioning." Memorandum and Order (Motion for Reconsideration) slip op. at 3 n.2 (Nov. 9, 1990).

not encompass financial assurance, since, if they did, the seeking and the rejection of such additional area of concern would have been meaningless. Intervenors did not seek reconsideration of the Presiding Officer's rejection of such area of concern nor did they separately seek to have such concern admitted in this proceeding until now -- approximately six months after filing their original petition and approximately three months after the rejection of the Individual Intervenors' area of concern. Intervenors slept on whatever rights they might have had, and they cannot now plead alleged ignorance of these rulings as justifiable excuse for a late filing.

Intervenors' second argument is that they were "assured a hearing in a separate proceeding" until the NRC rescinded on November 14, 1990, additional license amendments that had been issued on financial assurance for decommissioning. Financial Assurance Motion at 4. For reasons expressed in a letter addressed to the Office of the Secretary on October 1, 1990, Licensee does not believe that a hearing would have been granted even on the since-rescinded amendments. 4/ But, in any event,

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4/ Intervenors accuse Licensee and the Staff of "playing a shell game, holding out on amendment for a hearing, then snatching it away." Financial Assurance Statement at 4. Licensee, of course, did not play any "game." It never applied for an amendment and, as stated at footnote 1 on page 3 of its October 1, 1990 letter to the Office of the Secretary, Licensee believed that a license amendment was not necessary because it was already obligated to comply with the regulations. As for the NRC Staff's actions, as explained both in the November 14, 1990 letter to Licensee and the November 16, 1990 letter to the Presiding Officer,

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that separate issue does not justify a late filing in this proceeding. Intervenors chose to pursue a separate proceeding on those amendments; they chose not to file an area of concern relating to financial assurance in this proceeding. This was a willful choice on their part and they have to face the consequences. They cannot pursue one avenue (the separate proceeding) and, when they are confronted with a potential roadblock, change their minds and then seek to pursue belatedly the instant proceeding. Their mistaken choice does not constitute a justifiable excuse for a late filing.

In a lame attempt to establish that there will not be undue prejudice or undue injury to another participant, Intervenors assert that Licensee will not be prejudiced by late admission of this area of concern since it "has lost no opportunity to locate or develop evidence to support" Licensee's Financial Assurance Statement. Financial Assurance Motion at 4. They miss the point entirely. Both Intervenors and Licensee have filed their initial written presentations, Intervenors' rebuttal is due shortly and Licensee's response is scheduled thereafter. Thus, written presentations will soon be complete and, in Licensee's judgment, the record will be complete for the Presiding Officer's determination. Introducing another area of concern at this late date will necessarily require another round

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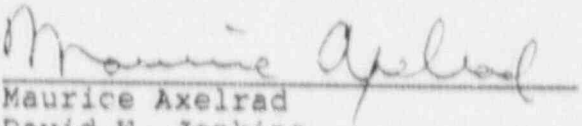
4/(...continued)
its legal review had determined that the amendments were redundant and unnecessary and the rescissions simply corrected the inappropriate issuance of the amendments.

(or more) of presentations and rebuttals and will inexorably delay the completion of this proceeding. Such delay will prolong the cloud that has been cast upon Licensee's activities by the continuation of this proceeding. It affects the availability of MURR staff for the conduct of experiments; it affects the negotiations for the continuation of the experiments; it affects Licensee and its personnel in numerous aspects, large and small. The continuing prejudice and injury are both tangible and intangible. Intervenors have failed to establish that admission of this late filed area of concern will not prejudice or injure the Licensee.

III. Conclusion

For all of the reasons stated above, Intervenors' untimely area of concern should be rejected.

Respectfully submitted,



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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

CERTIFICATE OF SERVICE

I hereby certify that copies of:

1. "Licensee's Response to 'Intervenors' Motion For Reconsideration Of Memorandum And Order Of November 16, 1990 (Dissolution of Stay);'"

2. "Licensee's Response To 'Intervenors' Motion To Strike Irrelevant And Unreliable Matters;'" and

3. "Licensee's Response To 'Intervenors' Motion For Order Admitting Area Of Concern Respecting Financial Assurance Of Decommissioning'"

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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