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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
John H Frye, III, Chairman
Dr. Emmeth A. Luebke
Glenn O. Bright

In the Matter of	Docket No. 50-142 OL (Proposed Renewal of Facility License)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	
(UCLA Research Reactor)	April 22,1983

MEMORANDUM AND ORDER
(Ruling on Motions for Summary Disposition of Contentions II [Class of License] and XVIII [Financial Qualifications])

On September 1 and 3, 1982, Staff and Applicant respectively moved for summary disposition of virtually all admitted contentions in this proceeding, including Contention II (Class of License) and Contention XVIII (Financial Qualifications). Following certain objections from CBG, we instituted a bifurcated procedure for responses to these motions in the hope of providing a more manageable way of dealing with them. The considerations leading to this procedure are recited in our Memorandum and Order of October 22, 1982 (LBP-82-93, 16 NRC ____). Motions for reconsideration of this Memorandum and Order were filed and disposed of in our unpublished Memorandum and Order of November 10, 1983.

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The bifurcated procedure has resulted in some confusion with regard to the proper procedures for disposing of motions for summary disposition. The parties are reminded that bifurcation of responses to motions for summary disposition is no more than that. It simply required that a party's response to the facts alleged in the motion be separated from its legal brief. Burdens are not shifted, nor are standards for deciding motions changed. The purpose of the bifurcated response was to permit the Board and parties to initially focus their attention on factual disputes before addressing legal issues.

Following CBG's factual response to the motions, we concluded that ". . . most of the premises and assumptions underlying the fundamental UCLA and Staff position that this reactor is inherently safe are disputed." We went on to detail the disputes which we found to exist. (See unpublished Memorandum and Order of February 8, 1983.) Consequently, we denied the motions with respect to Contentions V, XIX, VIII, XV, XII, and XIV.

In the course of the prehearing conference of February 23, 1983, UCLA requested tht we take up the motions with respect to Contentions II and XVIII. We agreed to do so and requested legal responses from opponents. CBG objected to this, pointing out that no ruling had been made with respect to existence of disputes and asserting that because a dispute would preclude a grant of the motions, such a ruling was necessary. In our Prehearing Conference Memorandum and Order of March 23, we provided our ruling with respect to disputes, indicated to CBG that, in accord with 10 CFR § 2.749(d), only disputes as to material

facts require that result, and again called for legal responses from opponents. In so doing, we pointed out that we were not convinced that there were disputes as to material facts which would require hearing and indicated that opponents of the motions should address this proposition. CBG and Santa Monica have filed their responses.

In its response, CBG raises two procedural objections. First, CBG views the Board's Order requiring its response as impermissibly shifting the burden to it to affirmatively show that summary disposition should not be granted. Such is not the case. If anything, the procedure followed by the Board has given CBG a better opportunity to address the movant's case for summary disposition than would have been the situation had the bifurcated procedure not been adopted. It is in fact not dissimilar from relief sought by CBG. Cf. LBP-82-93, supra, 16 NRC at _____, slip op. p.7.)

Second, CBG expresses some concern that our intent may be to make findings with respect to disputed facts. Such is not the case.

Contention II - Class of License

This Contention asserts that UCLA has applied for the wrong license. CBG takes the position that, because more than 50% of reactor funding and more than 50% of reactor usage have been devoted to the sale of services, rather than research and education, the reactor is not properly licensable under § 104 of the Atomic Energy Act. CBG's position would require licensing under § 103 of the Act pertaining to commercial licenses.

UCLA, in its motion, maintains that its reactor is properly licensable under § 104. This position is based on the assertion that the reactor is maintained by UCLA for educational purposes. Any commercial use of the reactor is, according to UCLA, purely incidental. In support of this position, UCLA notes the 1971 amendment, to §§ 102, 103, and 104 of the Act. Those amendments had the effect of ending the AEC's practice of licensing power reactors under § 104(b) and requiring that such reactors be licensed under § 103. UCLA points to the legislative history of these amendments which recognized that some universities licensed under § 104(c) sometimes used their reactors for commercial purposes. The legislative history notes that such "insubstantial" use was not to require licensing under § 103 absent a Commission determination otherwise.

UCLA then examines the Commission's regulations under this provision of the law, 10 CFR §§ 50.21 and 50.22. UCLA seems to take the position that the amendments to these regulations which followed the amendments to the Act indicate that university training reactors licenses under § 104(c) would continue to receive such treatment, but that certain other research reactors - those used to produce radioisotopes for sale or for neutron radiography on a commercial basis - might not.

The affidavits and other materials submitted in support of UCLA's motion take the position that the sole reason for maintaining the reactor is to support the educational and research purposes of the School of Engineering and Applied Science, and that any commercial use

is therefore incidental. Consequently, UCLA views the costs of commercial services as those costs which might be avoided if the service were not rendered. These costs are costs of student reactor operators, utilities, and supplies. Thus, UCLA's accounting for the costs of the commercial operation during 1980, when such use was greatest, amount to 2% of the overall costs of the facility. The affidavits point out that this practice is consistent with accounting practices applicable to commercial use of other UCLA facilities and that such commercial use may not interfere with academic use, nor may services be provided which are otherwise available to the public (Rebok affidavit, ¶ 6).

Staff also moved for summary disposition of this Contention. Staff takes the position that the Contention is fatally flawed because it focuses on the sources of funding for the reactor and the proposition of hours of use for commercial as opposed to academic purposes, rather than costs. Staff also supports UCLA's accounting for the costs of commercial operation.

CBG vigorously attacks these positions:

> CBG has shown, and will show further herein, that the activities, utilization, function, and purpose of the UCLA reactor have radically altered since the original class 104 license was granted, and that the purposes for which the license was originally granted (research and education) have become almost non-existent, replaced instead with virtually exclusively commercial activity, in violation of the requirements for class 104 licenses. CBG will show that the commercial activity admitted by the Applicant exceeds by an order of magnitude the educational functions of the reactor, and that considerably more than 50% of the use of the reactor is, by Applicant's own admission, commercial (which the Applicant now calls "extramural.") (CBG Response to Prehearing Conference Memorandum and Order, p.10.)

Starting from this point, CBG also traces the legislative history of the 1971 amendments to §§ 103 and 104 of the Atomic Energy Act and their implementing regulations. CBG concludes that a situation contemplated in those amendments and implementing regulation - a Class 104(c) reactor used for industrial and commercial purposes to a significant extent - is presented by the UCLA reactor.

CBG next analyzes UCLA's accounting method, concluding that this method presents an absurd situation. Under CBG's factual assumptions, the UCLA accounting method results in some 2% of the cost of the reactor being charged against some 65% of the use. CBG maintains that, under this accounting method, any educational or research use, no matter how small, could justify Class 104(c) status no matter how large the commercial use. Santa Monica shares CBG's views.

CBG concludes its discussion with a consideration of the practical consequences of Class 103 as opposed to Class 104 status. Among these consequences CBG finds:

1. Higher license and inspection fees;
2. Price-Anderson insurance coverage;
3. Mandatory ACRS review of the application;
4. Mandatory antitrust review of the application which would serve to protect commercial firms providing the same services from unfair competition from UCLA;
5. An alteration of the NEPA cost-benefit consideration;
6. More stringent safety standards would be applicable; and
7. More stringent ALARA standards would be applicable.

In our March 23 Prehearing Conference Memorandum and Order, we set forth our conclusions regarding disputes. These disputes center on two points. The first concerns the proper accounting method to apply. The second concerns the amount of reactor operating time which has been devoted to commercial as opposed to educational and research purposes. In our Memorandum and Order, we indicated that the first dispute seemed to be more one concerning the proper interpretation of the law and regulations and hence involved a question of law or perhaps a mixed question of law and fact. The relevance and materiality of the second dispute, which is clearly one of fact, depends upon the resolution of the first dispute.

We find that the first dispute involves a question of law and that CBG's interpretation of 10 CFR § 50.22 is correct. As CBG points out, UCLA's interpretation leads to an absurdity. Section 50.22 states that, if the reactor is used so that more than 50% of its costs are attributable to commercial activity, then it is to be licensed under § 103 of the Act. Clearly, this does not contemplate that more than 50% of the costs may be attributable to less than 50% of the use. In promulgating this provision, the Atomic Energy Commission noted that it would not affect Class 104(c) status for nonprofit educational licensees whose reactors are used for education and training because those reactors are not used for commercial purposes.

Our conclusion is also supported by the legislative history of the 1971 amendments to § 104 of the Act. On this issue, the Joint Committee on Atomic Energy stated:

> The committee is aware that university-licensees under subsection 104 c., and other licensees under subsections 104 a. or 104 c., sometimes use these reactors for industrial or commercial purposes. It is the intention of the committee that such insubstantial use not affect licensing under section 104; however, should the Commission find that any facility so licensed is being used substantially for industrial or commercial purposes, then the Commission shall determine whether such use is sufficiently substantial to entail licensing under section 103. (House Report 91-1470, 1970 U.S. Code Cong. & Adm. News at 5008.)

Section 50.22 constitutes the Commission's determination that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under § 103.

This brings us to the second dispute - has this reactor been devoted to commercial purposes more than 50% of its operating time. As we have indicated, this is clearly a factual dispute. Our interpretation of § 50.22 makes this dispute relevant and material to this Contention. Consequently summary disposition must be denied and further proceedings held.

We are of the opinion that these further proceedings should be conducted by an Alternative Board Member pursuant to § 2.722(a)(3). The Alternate Member will determine the scope and nature of these proceedings. His report should indicate the extent to which the UCLA Argonaut UTR has been used for commercial and for educational and research purposes. His report should also, taking the parties' views into account, contain his recommendations for any relief he deems appropriate in the circumstances.

Pursuant to § 2.722(a)(3), the Alternate Board Member's report is advisory only. The Board itself retains final authority with respect to

this contention, and will permit the parties, if they so desire, to file exceptions to the Alternate's report.

In a separate Order, we are appointing Judge James A. Laurenson as Alternate Board Member. Judge Laurenson is a permanent Legal Member of the Panel and also serves the Commission as an Administrative Law Judge.

Contention XVIII - Financial Qualifications

UCLA's motion with respect to this contention takes the position that 1) there are no material facts in dispute, 2) the University is financially qualified, and 3) that the following assertions of the Contention are not litigable:

a) UCLA has deferred maintenance for lack of funds. UCLA states the claim is false and that, in any event, it is not precluded from deferring maintenance so long as the Commission's regulations are observed.

b) Because UCLA is a public institution subject to yearly funding, it cannot reasonably assure that such funding will always be available. UCLA maintains that this position would prevent any public institution from demonstrating financial qualifications.

c) UCLA has not met the requirements of § 50.33(f) of the Regulations. UCLA maintains that it has met these requirements.

Staff, in its motion, takes the position that UCLA is clearly financially qualified.

CBG's opposition to these motions centers on the funding level of the NEL and includes an offer to prove:

1. That important safety modifications have not been made for lack of funds;

2. That insufficient funds have been available for maintenance and repair;

3. That lack of funds has resulted in failure to comply with safety requirements;

4. That lack of funds has resulted in injuries;

5. That the University's financial crisis makes the NEL a likely target for budget cuts; and

6. That UCLA does not approach funding of the NEL from a safety viewpoint, instead making decisions on programmatic grounds.

CBG recognizes that the relative importance of these issues is dependent on the outcome of the hearings on inherent safety, and emphasizes the fact that the financial qualifications issue is a safety issue.

Santa Monica is in general agreement with CBG.

The Board shares CBG's views with regard to the safety significance of these arguments and their relationship to the inherent safety issue. However, we are here examining the financial qualifications of the Applicant, the Regents of the University of California, who annually administer a budget of billions of dollars. (Rebok affidavit accompanying UCLA Motion.) Moreover, as we pointed out in our Prehearing Conference Memorandum and Order, the uncontested facts show that the NEL budget is a small fraction of the School of Engineering and Applied Science budget and a very small fraction of the UCLA budget. We

are forced to conclude that CBG's and Santa Monica's concerns and the factual disputes on this matter are irrelevant and immaterial to the issue of the financial qualifications of the Regents. The Regents unquestionably will have sufficient funds available to safely operate and decommission this reactor. Consequently the motions must be granted.

This is not to say that CBG's and Santa Monica's concerns will go unheeded. We believe these concerns are raised by other contentions which directly address points 1 through 4 of CBG's offer of proof in terms of their safety significance rather than in terms of money. At the conclusion of this proceeding, we will have reached definitive conclusions with regard to these matters, conclusions which will, should CBG's position be borne out, require that sufficient funds be supplied or that the reactor be shut down. This is a far more effective means to resolve any such problems.

ORDER

In consideration of the foregoing, it is this 22nd day of April, 1983, ORDERED:

1. UCLA's and Staff's Motions for Summary Disposition of Contention II are denied.

2. UCLA's and Staff's Motions for Summary Disposition of Contention XVIII are granted.

Judge Luebke concurs in this Memorandum and Order but was unavailable to sign it.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Glenn O. Bright
ADMINISTRATIVE JUDGE

John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
April 22, 1983