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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
THE REGENTS OF THE UNIVERSITY)	Docket No. 50-142
OF CALIFORNIA)	(Proposed Renewal of Facility
)	License Number R-71)
(UCLA Research Reactor))	
)	September 6, 1983

UNIVERSITY'S EXCEPTIONS TO RECOMMENDED
DECISION BY ALTERNATE BOARD MEMBER

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I. INTRODUCTION

On April 22, 1983 the Board denied University and Staff motions for summary disposition of Contention II and appointed an Alternate Board Member to conduct further proceedings and report concerning the extent to which the UCLA reactor has been used for commercial and for educational and research purposes.^{1/} A special evidentiary proceeding was held before the Alternate Board Member on May 24-26, 1983. The parties filed proposed findings of fact, conclusions of law and arguments and reply briefs. The Alternate Board Member issued his report in the form of a Recommended Decision (Decision) on July 12, 1983. The report contained the recommendation that UCLA be granted a Class 104 license conditional upon the limitation that less than 50% of the use of the reactor as recorded and reported by UCLA in "console hours" be for commercial use. Decision, at 27. The parties were permitted to take exception to the Alternate Board Member's report. Order, at 9.

II. EXCEPTIONS

1. University takes exception to findings, conclusions and recommendations that are based on the Board's ruling,^{2/} interpreting 10 CFR §50.22, that if a reactor is "used" more than

^{1/} "Memorandum and Order (Ruling on Motions for Summary Disposition of Contention II [Class of License] and XVIII [Financial Qualifications])", (Order), at 8.

^{2/} Order, at 8.

50% of the time for commercial purposes, it must be licensed as a commercial facility. University submits that the Board's "%-of-operating-time test" is incorrect.^{3/} Decision, at 26, 31 (Finding 27), 32 (Findings 28, 29 and 32), and 33 (Recommendation 3).

2. University takes exception to findings that the UCLA facility has engaged in activities for commercial purposes by inferring the nature of the UCLA facility's activities from the nature of the specific facility user's activities. Decision, at 12, 25, 26, 27, and 32 (Findings 28 and 29).

3. University takes exception to the failure to consider the arguments of University (and Staff) and the considerable evidence of record that University devotes the costs of owning and operating the UCLA reactor facility to education and research purposes and not to commercial purposes.

4. University takes exception to the finding that the reactor has educational use only when it is operating and has no use when it is not operating. Decision, at 24, and 30 (Finding 16).

5. University takes exception to the use of the term

^{3/}

In a related pleading filed herewith, "University's Response in Support of Staff's Petition for Reconsideration" (Response), University joins Staff in urging the Board to reconsider its April 22, 1983 ruling concerning the interpretation to be given §50.22.

"console hours" as a measure of the educational uses of the reactor. The report confuses operating time measured by the running-time-meter with the term used by Mr. Ashbaugh as his approximation of the student-instruction time that occurs at the reactor console. Decision, at 11, 26, 28 (Finding 5).

6. University takes exception to the recommendation that UCLA establish a uniform measurement for all categories of reactor use in terms of "console hours" and that UCLA report "console hours" to the Commission. Decision, at 32 (Findings 30 and 31) and 33 (Recommendations 1 and 2).

III. DISCUSSION

The Alternate Board Member's report is based on a misinterpretation of the Commission's regulations. Section 50.22 requires an assessment of the purposes for which the costs of owning and operating the facility are incurred. There is no support for the Board's view, also adopted by the Alternate Board Member (Decision, at 26), that the Commission intended that its class of license decisions would turn on the percentage of the use of the reactor. Application of the "%-of-use" test to the case of the UCLA facility leads to obvious difficulties. In the first place there is no single, objective measure of the "use" of the reactor. Decision, at 22-25. The Alternate Board Member proposes his own measure based on "console hours", a term developed by

University's witness. However, the record is clear that this term was used as an approximate measure of instruction time at the reactor console. Moreover, in attempting to establish a "uniform measurement" of reactor usage the Alternate Board Member is led to the untenable conclusion (for a facility that operates only 5% of the time) that the reactor facility has no "use" except when it is operating. Decision, at 24. The evidence of record is substantial that the reactor facility has considerable use in laboratory analysis, lecture and preparation work, maintenance, demonstrations and other support activities even when the reactor is not operating, notwithstanding that there is no simple way of measuring such uses. Decision, at 13-17, Tr. 12-14, 77-78, 288-307, 328-332, UCLA's Exhibits 5 and 6.

Secondly, "use" of the reactor measured in operating time bears no relation to the actual costs of operating the facility. Documents submitted in connection with University's motion for summary disposition^{4/} establish that the vast majority of operating costs are fixed costs which have not varied with changes in the number of operating hours (measured in "port-hours") reported for non-academic users. Tr. 50-58, 61. For example, it is to be noted (Rebok letter, Attachment D) that although annual port-hours of use reported for non-academic users increased from an average of less than 2 hours in the six years prior to 1978 to an average

^{4/} In particular, the Rebok letter of January 25, 1982 (with its Attachment D) and the Affidavit of Don C. Rebok, para. 5-8.

over 200 hours in the 1987-81 period there was no commensurate change in any of the major categories of operating cost or total operating costs over the same period. Moreover, it is clear that non-academic uses of the reactor have not displaced academic uses over this same period. UCLA Exhibit 2. Even in a manufacturing concern, a method of cost allocation based on variations in an activity that bore no relation to the manner in which costs were actually incurred would be rejected as unacceptable. A fortiori with University's reactor laboratory, where actual reactor operating time amounts to less than 5% of total time and where, more importantly, reactor operations support the complex and essentially non-quantifiable human activities of research and education. It is entirely appropriate that the major fixed costs of owning, operating, and maintaining the UCLA reactor facility be allocated to the University's educational and research purposes. Rebok letter, Peterson, ff. Tr. 448 at pp 3-7.

The Board was apparently led to its "%-of-use" test based on CBG's assertion that the UCLA accounting method leads to an absurdity. However, CBG applies its own accounting method in arriving at the apparent absurdity. CBG asserts that UCLA's method allocates 98% of the costs to less than 10% of the use and notes that in the extreme that method could justify "9000 hours" of commercial activity per year (if the year had that many hours). But that assertion is based on CBG's definition of "use" and its own method of accounting. By contrast, UCLA's "method",

which is unexceptionable, requires examination of the way in which its costs of operation are actually incurred and what costs could be avoided if the activity in question was curtailed or discontinued. This method is in accordance with accepted cost accounting principally which generally state that an incurred cost should be identified as to the function or purpose for which it is incurred or expended. Peterson, at 4, Decision, at 20.

It is clear with respect to any of CBG's "extreme" situations that most if not all of the elements of cost presently incurred to support the education and research programs would no longer be incurred. Most of the costs of a lecturer, two senior reactor operators, a secretary processing student paperwork and a proportionate share of salary benefits, supplies and expenses could be avoided. Moreover, additional costs would have to be incurred to support the greatly increased "commercial" activity, a significant portion of the manager's time and hence his costs would no doubt be involved in marketing, secretarial costs would be incurred to process the paperwork, etc. In short, in any of the extreme situations proposed by CBG, under UCLA's method, the majority of the costs would be readily discerned to be devoted to commercial activity. But CBG's extreme example is not the situation represented by the UCLA facility. There is no evidence that the costs incurred at the UCLA facility as described in the Rebok letter and Attachments are not incurred for educational and research purposes and there is no evidence that any major categories of cost could be avoided if "commercial" activity were discontinued.

As pointed out, \$50.22 requires an assessment of the purposes for which the costs of owning and operating the facility are incurred. Reactor facilities at nonprofit educational institutions, where the research and educational purposes of the facility are clearly demonstrated, require no detailed cost accounting. But for facilities where the research and educational purpose is not manifest^{5/} and reasonable questions concerning the purpose of such facilities are raised, the Commission intends that an assessment be made of the various elements of cost to determine which, if any, have been (or will be) incurred for the purpose of engaging in commercial activity. Of course, the Board's method, based on determining the percentage of operating time spent on commercial activities, would not work with new license applications because ordinarily such facilities would not then be operating.

A. The UCLA Reactor Facility is Not Used for Commercial Purposes

The Alternate Board Member's report assumes that the UCLA reactor is used for "commercial" purposes but fails to address University's arguments and evidence of record that the

^{5/} Such facilities might include Class 104(c) licensees that are not nonprofit educational institutions operating reactors to support bona fide science and/or engineering programs.

assumption is based on erroneous characterization of University's activities.^{6/} UCLA's single, non-academic user is "commercial" in that the reactor services he obtains promote his "for-profit" business interests. However, the use he obtains cannot fairly be imputed as University's use.

The Commission is properly concerned with the purpose of the licensee in providing the service, not the purpose of the non-academic user. There is no evidence that UCLA competes with any commercial facilities in making its services available to its non-academic user on a fee-for-service basis. The record is also clear that the non-academic user is charged the same fee that has been charged academic users. Decision, at 29, Tr. 56, 138-140, 168-170. The total fees collected from the single non-academic user in the year of his greatest use of the reactor is a small percentage of the costs of operating the facility and, hence, is clearly not profitable. Decision, at 29; Peterson ff. Tr. 448 at 3, 7-8. Moreover, the record clearly shows that the single, non-academic user has contributed the use of his equipment and has lectured and instructed students in his area of expertise in a way that measurably benefits the educational and research programs of the reactor facility and UCLA generally, and is reason enough for accommodating his use of the facility. Tr. 44, 192-197, 214-218, 220, 224; UCLA Findings 8-11. The University

^{6/} "University's Proposed Findings of Fact and Conclusions of Law (Concerning Hearing on Contention II)", June 23, 1983 (UCLA Findings), at 7-12.

regularly makes its facilities and services available to the public on a fee-for-service basis (for example, computer center services, library services, parking services, hospital services, recreational services) without regard to whether the public user is "commercial". Providing services on a fee basis to both academic and non-academic (commercial) users where the fees do not result in a profit to the activity cannot be fairly regarded as commercial activity. There is no evidence to support a finding that the UCLA facility is engaged in commercial activity.

B. A Proper Method of Accounting for the Uses of the Reactor Would Consider the Reactor-Dependent Activities that Take Place Even When the Reactor is Not Operating

The Alternate Board Member adopts a narrow, restrictive definition of "use" of the reactor which disregards any use of the reactor facility when the reactor is not operating. In so doing, the Alternate Board Member rejected the testimony of the accounting experts. University's expert, a partner of the "big eight" accounting firm (Deloitte, Haskins and Sells) that functions as the outside auditors of the University, outlined several methods that could be used to allocate costs and chose a "conservative" method that related reactor-dependent class hours to academic and non-academic "research" measured in "port-hours". Tr. 425-428, 433. Staff's financial analyst considered reactor-dependent student hours an appropriate method to allocate costs. Peterson, ff. Tr. 448, at 2, 5-8.

Although the Alternate Board Member stated that there was "little argreement" among the accounting experts, the record is clear that University's expert and Staff's expert regarded their methods as equally valid and consistent in requiring that reactor-dependent activities be considered. Tr. 433-435, 437, 441, 459, 462-463. CBG's accounting expert, who professed no experience in university accounting, disagreed with the methods chosen by Staff and University witnesses to account for reactor-dependent activities. However, he did state that a basic principle of cost accounting "is that costs should follow services rendered", a statement of principle that is not much different from the statement of University's expert that costs should be allocated on the basis of "benefits that are derived." Baefsky, ff. Tr. 636, at 2; Tr. 425. Moreover, CBG's expert seemed to concede that if the reactor was "critically necessary" for a particular class lecture, that class lecture could properly be considered a use of the reactor. Tr. 721. The evidence of record supports the view that any allocation of costs of the reactor facility should consider reactor-dependent activities.

Having rejected the expert opinion, the Alternate Board Member proposed his own method based on the concept of "console hours" which was described by University's Mr. Ashbaugh. Tr. 363. However, the report confuses "console hours" with the running-time-meter which University's Ostrander mentioned. Decision, at 11, Tr. 157-158, 363. Mr. Ashbaugh stated that "console hours"

were his approximations based on his first-hand knowledge and that no record was kept of console hours. Tr. 308, 313, 355, 363-366, 386-387, 410-411. The Alternate Board Member's adoption of a cost accounting method based on his understanding of "console hours" is not supported by the record. Apparently, the Alternate Board Member's reason for adopting his method was because there was "no objective method for establishing the educational use of the reactor when it is not operational." Decision, at 24. However, he overlooks the fact that UCLA has never had to record and report the educational use of its facility. University submits that under the correct interpretation of §50.22 such reporting should not be required as it would impermissibly result in subjecting University to a new regulation not applicable to other licensees. The Alternate Board Member's allocation of uses is incorrect.

IV. CONCLUSION

For the reasons above, University respectfully requests that the Board reject the recommendations of the Alternate Board Member and find that the 104(c) license of the UCLA facility should be renewed without conditions.

Dated: September 6, 1983.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(UCLA Research Reactor))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S
EXCEPTIONS TO RECOMMENDED DECISION BY ALTERNATE BOARD MEMBER.

in the above-captioned proceeding have been served on the following
by deposit in the United States mail, first class, postage prepaid,
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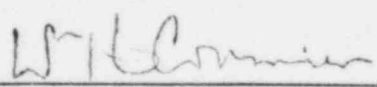
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