

DOCKETED  
USNRC

'83 SEP 21 A11:11

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
NRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

UNIVERSITY'S RESPONSE IN SUPPORT OF  
STAFF PETITION FOR RECONSIDERATION

DONALD L. REIDHAAR  
GLENN R. WOODS  
CHRISTINE HELWICK  
590 University Hall  
2200 University Avenue  
Berkeley, California 94720  
Telephone: (415) 642-2822

Attorneys for Applicant

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA

8309220160 830906  
PDR ADOCK 05000142  
G PDR

DS03

## I. INTRODUCTION

On May 2, 1983 Staff petitioned for reconsideration of the Board's Order of April 22, 1983 denying University and Staff motions for summary disposition of Contention II.<sup>1/</sup> Staff argued that the Board's interpretation of 10 CFR 50.22 is legal error and that the Board's interpretation of the factual evidence is erroneous. The Board deferred consideration of Staff's petition pending receipt of an advisory report by the Alternate Board Member designated by the Board to conduct a special evidentiary proceeding on Contention II.

University fully supports Staff's petition. In a separate pleading, University takes exception to several of the findings, conclusions and recommendations of the Alternate Board Member which are based on the Board's interpretation of Section 50.22. Resolution of this legal question must precede any further consideration of the factual record that has been developed concerning Contention II.

## II. PROCEDURAL HISTORY

University's license application is to renew its "Class 104(c)" operating license, which was originally issued in 1960. CBG's Contention II, which was admitted to the proceeding

---

<sup>1/</sup> "NRC Staff Petition for Reconsideration of Ruling on Motions to Summarily Dismiss Contention II (Class of License)", (Petition).

in September 1980, claims that University should apply for a Class 103 license because "more than fifty percent of reactor funding and more than fifty percent of reactor usage have been devoted to the sale of services, rather than research or education."

On September 1, 1982 University and Staff moved for summary disposition of Contention II and seventeen of the twenty remaining contentions which had been admitted to the proceeding. In its motion<sup>2/</sup> University traced the pertinent changes to the Atomic Energy Act and the Commission's implementing regulations concerning the circumstances under which Class 103 licensing would be required. Motion, at 25-30. University concluded that the Commission intended that University reactors operated for educational and research purposes would continue to be licensed under section 104c of the Act. Id., at 29. In support of its motion University submitted the affidavits of Ostrander, O'Neill and Rebok attesting to the fact that the purpose of the UCLA reactor facility is to support the education, research and training of undergraduate and graduate students of the University and, to a lesser extent, of other universities and colleges in the Southern California area. Id., at 30. University also submitted its letters of January 25 and April 19, 1982 to the Commission which provide the basis for University's assertion that the costs of

---

<sup>2/</sup> "University's Motion for Summary Disposition of Contentions I, II, III, IV, V, VI, VII, VIII, IX, X, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX", (Motion).

operating the UCLA reactor facility are devoted to educational and research purposes and that the incidental costs associated with the non-academic (or, so-called "commercial") use of the reactor are insignificant.<sup>3/</sup> Based on the representations contained in these affidavits and other documents, University asserted that it does not operate its reactor facility for any "commercial purpose", that it does not "devote" any of the costs of owning and operating the facility to such a commercial purpose, and that even if the incidental costs associated with the non-academic use of the reactor are considered as costs "devoted to" a commercial purpose, in all years those costs are insignificant under the test of Section 50.22.

On January 12, 1983 CBG submitted its affidavits in opposition to University and Staff motions for summary disposition in accordance with the "bifurcated response procedure" adopted by the Board in its October 22, 1982 Memorandum and Order.<sup>4/</sup> In its Prehearing Conference Memorandum and Order of

---

<sup>3/</sup> In particular, the January 25, 1982 letter from D. C. Rebok, Assistant Vice Chancellor-Finance at UCLA, to the NRC's J. R. Miller, with four attachments (Rebok letter) and the Affidavit of Don C. Rebok, para. 5-8.

<sup>4/</sup> The Board adopted the bifurcated procedure for responding to the summary disposition motions in response to CBG's September 20, 1982 motion to dismiss. The first step of the procedure was a determination of the facts which were not in dispute. The second step was the application of the law to the facts to determine the correct legal result.

March 23, 1983, the Board ruled that the parties' Contention II disputes resolved around "the proper accounting method to be used to determine the costs to UCLA of the commercial operation of the reactor." Memorandum and Order, at 15. The Board concluded this raised the question of the interpretation of 10 CFR 50.22, a question of law. Accordingly, the Board directed CBG to file its legal arguments in opposition to University's and Staff's motions for summary disposition of Contention II.

On April 4, 1983 CBG provided its interpretation of 10 CFR 50.22.<sup>5/</sup> CBG alleged that "the purposes for which the license was originally granted (research and education) have become almost non-existent, replaced instead with virtually exclusively (sic) commercial activity." CBG Response, at 10. In neither the January 12, 1983 response nor the April 4, 1983 response did CBG dispute the cost information contained in the document submitted with the University's summary disposition motion.<sup>6/</sup> Instead CBG took issue with UCLA's accounting method. CBG claimed that the UCLA method was absurd, resulting in an allocation of 98% of the costs of owning and operating the facility to education and research and 2% to "commercial" activity. Id., at 17. CBG asserted that facility costs should be allocated on the basis of "port hours" of reactor use.

---

<sup>5/</sup> "Response to Prehearing Conference Memorandum and Order" of March 23, 1983; the Contention II discussion appears at pp. 10-23 (CBG Response).

<sup>6/</sup> Affidavit of Rebok and letters of January 25, 1982, with attachments "B", "C" and "D" (but not A, the "Class Use Table", which was disputed), and April 19, 1982.



On April 22, 1983 the Board issued its ruling<sup>7/</sup> denying University and Staff motions for summary disposition of Contention II. The Board accepted CBG's interpretation of 10 CFR 50.22. According to the Board,

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 Section 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. (Order, at 7.)

The Board apparently was persuaded of this interpretation of Section 50.22 based on its reading of the legislative history of the 1971 amendments to Section 104 of the Act and on CBG's argument that the UCLA interpretation leads to an absurdity. Id., at 7. Having thus ruled to resolve the legal question presented by Contention II, the Board directed that further proceedings be conducted to determine whether the UCLA reactor has been used for commercial purposes more than 50% of the time. The further proceedings were to be conducted by an Alternative Board Member. Id., at 8.

On May 2, 1983 Staff filed its petition for reconsideration of the Board's April 22 ruling concerning Contention II on the grounds that the Board's interpretation of 10 CFR 50.22 constitutes legal error and that the Board's interpretation of the factual evidence is erroneous. Petition, at 2. Citing the far-reaching

---

<sup>7/</sup>"Memorandum and Order (Ruling on Motions for Summary Disposition of Contentions II (Class of License) and XVIII (Financial Qualifications))" (Order).

effect of the Board's ruling, Staff points out that the Board's interpretation overlooks the clear words of the regulation which compare reactor use to "costs of owning and operating the reactor." Id., at 4. In addition, Staff asserts that the Board is mistaken in apparently adopting CBG's factual premise that "operating time is the sole use of the reactor and that reactor-dependent activities in class instruction and research is somehow not to be considered as reactor use." Id., at 7. Staff urges the Board to reconsider its interpretation of Section 50.22 which equates cost with operating time and which results in disregarding the use of the reactor as a tool to support education and research programs even when it is not operating. Id., at 6, 10.

In its May 4, 1983 Order<sup>8/</sup> the Board deferred consideration of Staff's Petition pending receipt of the Alternate Board Member's advisory report of the special proceeding which was to be held May 24-26, 1983. The Board identified issues raised in Staff's Petition which were to be addressed in the special proceeding and stated that the factual record to be developed before the Alternate Board Member would assist in the resolution of this matter. April 4 Order, at 2.

The special proceeding before the Alternate Board Member was held May 24-26, 1983. At the close of the hearing University,

---

<sup>8/</sup> "Memorandum and Order (Concerning Staff's Petition for Reconsideration of Ruling on Motions to Summarily Dismiss Contention II (Class of License))" (April 4 Order).

Staff and CGG filed proposed findings of fact, conclusions of law, and arguments. On July 12, 1983 the Alternate Board Member issued his Recommended Decision, which was based on the Board's April 22 ruling that if more than 50% of the use of a reactor is for commercial purposes, that reactor must be licensed under Section 103. Recommended Decision, at 3.

### III. DISCUSSION

The Board apparently bases its interpretation of Section 50.22 largely on the CBG argument that the UCLA interpretation leads to an absurdity. However, CBG's argument rests on certain factual premises which were disputed by the parties and which are inconsistent with the factual record as developed in the special proceeding. As explained below, the UCLA interpretation does not result in an absurdity.

The Board finds additional support for its interpretation in the legislative history of the 1971 amendments to Section 104 of the Act.<sup>9/</sup> The Board concludes that

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 Section 103. (Order, at 8).

---

<sup>9/</sup> The Board cites a portion of House Report 91-1470, 1970 U.S. Code Cong. & Adm. News at 5008.



The Board goes on to state that its interpretation of Section 50.22 raises the factual question

. . . has this reactor been devoted to commercial purposes more than 50% of its operating time. (Id.)

As construed by the Board, Section 50.22 would require that a nonprofit educational institution be licensed as a commercial facility if more than 50% of reactor operating time is used for commercial activity in any year regardless of the educational and research purposes of such a license in constructing, operating and maintaining its reactor facility.

The Board's interpretation is incorrect. The Board overlooks the clear words of the regulation which are based on assessing the purpose for which the costs of owning and operating the facility are incurred. The Board also overlooks the Statement of Consideration<sup>10/</sup> which accompanied the Commission's adoption of the 1973 amendments to Section 50.22 implementing Public Law 91-560. That Statement of Consideration clarifies that UCLA facility operations do not present the situation contemplated in Section 50.22.

---

<sup>10/</sup>Published as 38 Federal Register 11445 (May 8, 1973).

- A.            The Correct Test Under Section 50.22 is Whether Costs are to be Incurred for the Purpose of Engaging in Commercial Activity.

Section 50.22 provides, in relevant part, that a facility will be deemed to be for commercial purposes

. . . if the facility is to be used so that more than 50 percent of the annual cost of owning and operating the facility is devoted to the production of materials, products or energy for sale or commercial distribution, or to the sale of services, other than research and development or education or training. (Emphasis Added.)

The clear meaning of this provision is that if more than 50% of the annual costs are incurred for the purpose of engaging in commercial activity the facility will be deemed to be used for commercial purposes. The particular construction adopted by the Commission in 1973 requires an assessment of the purposes for which facility costs are incurred.

The Board states that Section 50.22 ". . . does not contemplate that more than 50% of the costs may be attributable to less than 50% of the use" Order, at 7. According to the Board's interpretation, costs are simply allocated on the basis of "use"; assessment of the actual purposes for which the various elements of cost are incurred is unnecessary. In fact, under the Board's interpretation, there is no reason to mention costs in the formulation of the regulation: a facility will be deemed commercial

. . . if the facility is to be used more than 50% of the time for the production of materials, products, or energy for sale or commercial distribution. . .

No examination of the costs of owning and operating the facility is required under the Board's formulation. Not surprisingly, the Alternate Board Member, who adopts the Board's interpretation of Section 50.22 in his Recommended Decision, makes his determination of the educational and research versus commercial use of the reactor (in terms of "console hours") without any consideration of costs. Recommended Decision, at pp. 22-26.

Had the Commission intended that costs be allocated simply on the basis of "use" or reactor "operator time" it would have adopted the simpler formulation suggested above. The Commission did not so intend. The Commission was aware that the "uses" of research reactors, particularly those supporting widespread and diverse academic programs at educational institutions were not susceptible of consistent, objective measurement from institution to institution. Accordingly, the Commission required an assessment of the purpose for which facility costs were incurred, recognizing that incidental use of the facility in connection with "commercial" activity would not affect the basic purpose for which facility costs were incurred.

B. UCLA Reactor Operations Do Not Present the Situation Contemplated in Section 50.22 -- A Research Reactor Facility Used Substantially for Commercial Purposes.

The conclusion that the Commission was concerned with the purposes for which facility costs were incurred and not the

percentage of usage of various activities is supported by the Statement of Consideration which was published with the 1973 amendment of Section 50.22:

The legislative history of Public Law 91-560 indicates that the principal purpose of the legislation was to subject new applications for production and utilization facilities formerly licensed under section 104b. of the Act as research and development facilities--power reactors and fuel reprocessing plants--to licensing under section 103. The legislative history also shows that the Congress was aware that some applications for facilities to be licensed under section 104c. as research reactors might also be considered "for industrial or commercial purposes" if such reactors had such a purpose to a significant extent (S. Rept. No. 91-1247, 91st Cong. 2d Sess., at 28 (1970)). Such facilities might include, for example, research reactors that are used for neutron radiography on a commercial basis.

The amendments to Section 50.22 of part 50 which follow categorize as a facility "for industrial or commercial purposes" a facility designed or used so that more than 50 percent of the annual cost of owning and operating the facility is devoted to the production of materials, products, or energy for sale or commercial distribution, or for the sale of services, other than research and development or education or training. Under this construction, a license issued to a nonprofit educational institution for a facility for education or training purposes only would continue to be licensed under section 104c. of the Act, since the licensed operation would not be devoted to production of goods or services for sale or commercial distribution. (38 Federal Register 11445, 46.) (Emphasis added.)

In the first place, the statement makes it clear that the regulation is principally directed towards power reactors and fuel reprocessing plants formerly licensed as 104b facilities. Secondly, under the construction adopted by the Commission (assessing the purposes for which facility costs are incurred), university

licensees would continue to be licensed under 104c of the Act, since the purpose of such facilities was research, education and training. However, other 104c facilities<sup>11/</sup> might be considered "for commercial purposes" if such a purpose was present to a significant extent. Thirdly, the test is clearly one of assessing the purpose for which the licensee operates the facility.

C. The UCLA Interpretation of Section 50.22 Does Not Result in an Absurdity.

CBG argues that UCLA's (and Staff's) accounting method are absurd because UCLA charges only 2% of facility costs to "commercial" activity which (in 1980) represents 65% of the use of the reactor. CBG calculates that it would take more commercial operating hours than there are hours in the year for the UCLA facility to be deemed "commercial" under the UCLA "accounting method." The Board apparently accepted CBG's factual premises and agreed that the result presented an absurd situation. However, that "absurdity" results from applying CBG's accounting method, which assumes that actual operating costs are directly related to "use" of the reactor measured in "port-hours" of operating time. University specifically rejects that method. It is the use of CBG's accounting method and not University's that results in the absurd situation.

---

<sup>11/</sup>

That is, non-university research reactor facilities, such as the GA Technologies, Inc. Triga reactor facility located in San Diego, Calif., which is licensed as a 104c facility but which is not affiliated with any college or university.



CBG and the Board overlook the fact that the reactor operates less than 5% of the time. When CBG asserts (and the assertion is not supported by the factual record) that 65% of the use of the reactor is commercial, CBG means 65% of the 5% of the time the reactor operates. The vast majority of facility costs are incurred when the reactor is not operating. These costs are incurred solely for the purpose of maintaining the reactor as an "instructional tool" to support the education and research programs of the University. The costs of constructing, owning, operating and maintaining the UCLA facility have been incurred for the purpose of supporting University's academic programs. The additional use of the reactor in connection with "commercial" activities does not change the nature of those costs.

The documents submitted in support of University's summary disposition motion attest to the fact that no change in the basic operating costs accompanied the increase in "commercial" activity that occurred in 1979 and 1980. The UCLA facility was staffed at the same level of six career employees throughout this period and salary and benefits costs, which comprise the majority of operating costs, remained relatively consistent. An increase in certain incidental costs of operations was associated with the increase in "commercial" activity; however, the additional costs were a small percentage of total operating costs. Rebok Letter and its Attachment "D".

University's accounting method is based on cost objectives. If an element of cost is incurred for the purpose of engaging in "commercial" activity it would be allocated to that activity. The allocation would be made whether or not there had been any change in the number of hours (however measured) that the reactor had been used for that activity. For example, if a new staff member was hired (or an existing staff member reassigned) to prepare sample analyses for the non-academic or "commercial" user the salary costs of that employee would be allocated to the "commercial" activity. The allocation would be made regardless of whether "commercial" hours of use of the reactor had increased, stayed the same, or decreased. Similarly with all other cost elements.

#### IV. CONCLUSION

For the reasons above, University joins Staff in urging the Board to reconsider its interpretation of Section 50.22 and its Order denying the motions for summary disposition of Contention II.

Dated: September 6, 1983.

DONALD L. REIDHAAR  
GLENN R. WOODS  
CHRISTINE HELWICK

By W H Cormier  
WILLIAM H. CORMIER  
Representing UCLA

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S  
RESPONSE IN SUPPORT OF STAFF PETITION FOR RECONSIDERATION.

in the above-captioned proceeding have been served on the following  
by deposit in the United States mail, first class, postage prepaid,  
addressed as indicated, on this date: September 6, 1983.

John H. Frye, III, Chairman  
Administrative Judge  
ATOMIC SAFETY AND LICENSING BOARD  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dr. Emmeth A. Luebke  
Administrative Judge  
ATOMIC SAFETY AND LICENSING BOARD  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Glenn O. Bright  
Administrative Judge  
ATOMIC SAFETY AND LICENSING BOARD  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Ms. Carole F. Kagan, Esq.  
ATOMIC SAFETY AND LICENSING BOARD  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Counsel for the NRC Staff  
OFFICE OF THE EXECUTIVE LEGAL DIRECTOR  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Daniel Hirsch  
Cte. to Bridge the Gap  
1637 Butler Avenue, #203  
Los Angeles, CA 90025

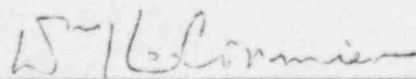
Mr. John Bay, Esq.  
3755 Divisadero #203  
San Francisco, CA 94123

Mr. Daniel Hirsch  
Box 1186  
Ben Lomond, CA 95005

Nuclear Law Center  
c/o Dorothy Thompson  
6300 Wilshire Blvd., #1200  
Los Angeles, CA 90048

Ms. Lynn G. Naliboff  
Deputy City Attorney  
City Hall  
1685 Main Street  
Santa Monica, CA 90401

Chief, Docketing and Service Section  
OFFICE OF THE SECRETARY  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

  
WILLIAM H. CORMIER  
UCLA Representative

THE REGENTS OF THE UNIVERSITY  
OF CALIFORNIA