UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ROCHESTER GAS AND ELECTRIC CORPORATION, et al. (Sterling Power Project, Nuclear Unit No. 1)	)	Docket No. STN 50-485

LICENSEES' ANSWER TO ECOLOGY ACTION'S PETITION FOR REVIEW

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October 12, 1979

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Rochester Gas and Electric Corporation, et al. hereby answer the Petition for Review of ALAB-562 filed by Ecology Action of Oswego on September 27, 1979. For the reasons stated herein, the petition should be denied.

Procedural History

On April 11, 1978, the Commission ruled that the value for radon emissions in Table S-3 of 10 C.F.R. §51.20 was in error. 43 Fed. Reg. 15,613 (1978). The Commission ruled that the issue of radon emissions and their resulting health effects should be litigated in proceedings then pending before the Commission. Id. at 15,615-16. Responding to the Commission's direction, the Appeal Board determined in ALAB-480 not to try the issue separately in each

of the proceedings in which it was presented. 7 NRC 796, 803 (1978). Rather than consolidate all the proceedings for hearing, the Appeal Board decided to use one proceeding--Perkins[1]--as the lead case. After the Perkins record was incorporated into the record in all the other proceedings, parties to those proceedings were given the opportunity to "supplement, contradict, or object to" anything in the Perkins record, as well as to comment upon the decision later handed down by the Perkins Licensing Board. 7 NRC at 805-06.

After papers were filed by certain intervenors specifying alleged "deficiencies" in the Perkins record, the Appeal Board consolidated the proceedings in which those intervenors were active and invited the parties to move for summary disposition of appropriate issues. ALAB-540, 9 NRC ___ (April 25, 1979) (slip op. at 6, 10-12). A motion for summary disposition of all issues was filed by the utilities whose proceedings were consolidated by the Appeal Board. Responses to the motion were filed by the intervenors (see, e.g., June 25, 1979 response of Ecology Action) and the Appeal Board ruled on the motion in ALAB-562. ALAB-562 granted the motion in part, and denied it in part. Ecology

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1/ Duke Power Co. (Perkins Station, Units 1, 2 and 3), Docket Nos. STN 50-488, 50-489, 50-490.

Action's petition seeks Commission review of rulings in ALAB-562 with respect to the reach of NEPA[2/], and the alleged variation in radon releases from mine to mine. ALAB-562, slip op. at 18-24.

Argument

I.

ECOLOGY ACTION'S PETITION IMPROPERLY SEEKS INTERLOCUTORY REVIEW OF ALAB-562.

Ecology Action seeks review of two rulings in ALAB-562 that granted summary disposition of certain of Ecology Action's 26 alleged "deficiencies" in the Perkins record. The portion of ALAB-562 of which Ecology Action seeks review is interlocutory, and thus Commission review at this stage is improper.

The rulings in ALAB-562 of which Ecology Action seeks review are analogous to "partial summary judgment" in a Federal District Court. Professor Moore's treatise extensively considers the subject of appealability of "partial summary judgments". He states:

> "Since Rule 54(a) defines 'judgment' as used in the Federal Rules as including a decree and 'any order from which an appeal lies,' it might be contended that a partial summary judgment rendered

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2/ National Environmental Policy Act of 1969, as amended, 42 U.S.C. §4321 et seq. (1976).

> under Rule 56 is, by virtue of the definition in Rule 54(a), an appealable judgment. But this contention fails for two reasons:
>
> "1. Rule 56(d) expressly provides the procedure for dealing with a partial summary judgment. It is clear from Rule 56(d) that a partial summary judgmen. is not a final judgment, [nor appealable unless this particular interlocutory order is made appealable by statute,] but is merely a pre-trial adjudication that certain issues in the case shall be deemed established for the trial of the case. Such an adjudication is on a par with the preliminary order formulating issues under Rule 16.
>
> "2. As pointed out in the discussion of Rule 54(b), it was the policy of the draftsmen of the Federal Rules to continue the policy under the former practice of not allowing interlocutory appeals, except where specifically provided for by a statute of the United States."

6 Moore's Federal Practice ¶56.20[4], at 56-1232 (2d ed. 1979) (footnotes omitted). This view is fully supported by the Federal courts.[3/]

The Commission is generally guided in its interpretation of its own Rules of Practice by resort to analogous Federal Rules. See, e.g., Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565,

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3/ See, e.g., Gray Line Motor Tours, Inc. v. City of New Orleans, 498 F.2d 293 (5th Cir. 1974); American National Bank and Trust Co. of Chicago v. Certain Underwriters at Lloyd's London, 444 F.2d 640 (7th Cir. 1971); DePinto v. Landoe, 411 F.2d 297 (9th Cir. 1969); Burleson v. Canada, 285 F.2d 264 (4th Cir. 1961); Coffman v. Federal Laboratories, Inc., 171 F.2d 94 (3rd Cir. 1948), cert. denied, 336 U.S. 913 (1949); see also 6 Moore's Federal Practice, supra, at n.5, and accompanying text.

568 n. 13 (1977); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-374, 5 NRC 417, 421 (1977) (additional views of Mr. Farrar, joined in by the entire Board). This general rule is modified by the proposition that "before guidance can be taken from judicial proceedings, there must be inquiry into whether the situations are truly similar." Midland, supra.

Here, the situations are "truly similar". The Commission's summary disposition rule, 10 C.F.R. §2.749 (1979), is analogous to Rule 56 of the Federal Rules of Civil Procedure. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). Therefore, resort to Federal precedent is appropriate.

Since Federal precedent characterizes the rulings here in issue as "interlocutory", the Commission should treat them as such and apply its own regulation barring consideration of interlocutory appeals. 10 C.F.R. §2.730(f) (1979); see Duke Power Company (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-433, 6 NRC 469, 470 (1977), and cases cited therein. Accordingly, Commission review of ALAB-562 should not be granted.

II.

THE ISSUES RAISED BY
ECOLOGY ACTION DO NOT
WARRANT COMMISSION REVIEW.

The standards for determining whether to grant a petition to review the decision of an Appeal Board are set forth in 10 C.F.R. §2.786 (1979). It appears that Ecology Action contends that the decision of the Appeal Board in ALAB-562 with respect to the reach of NEPA raises "important questions of public policy" within the meaning of §2.786(b)(4)(i). It also appears that Ecology Action is contending that review of ALAB-562's ruling with respect to the alleged variation in radon emissions from mine to mine is "clearly erroneous" within the meaning of §2.786(b)(4)(ii). Neither contention is correct.

ALAB-562's ruling that NEPA does not require consideration of foreign environmental impacts is consistent with a series of Commission decisions. Slip op. at 18-19. The Appeal Board's discussion of those cases, and the cases themselves, convincingly refute Ecology Action's arguments to the contrary. In addition, the Appeal Board's ruling is consistent with national policy as set forth in Executive Order 12,144, 44 Fed. Reg. 1957 (1979).

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While the issue of the jurisdictional reach of NEPA may have, at one time, been considered an "important question of public policy", the Commission exhaustively addressed itself to the question of NEPA's reach in the cases cited by the Appeal Board in ALAB-562, and no reason has been suggested by Ecology Action why the Commission need look at the question yet again. Accordingly, the Commission should not do so.[4/]

With respect to the ruling in ALAB-562 concerning the alleged variations in radon emissions from mine to mine, the Appeal Board's ruling that no hearing on that contention is required is not "clearly erroneous". The affidavit of Dr. Morton I. Goldman[5/] supports the conclusion reached by the Appeal Board. No evidence was filed to the contrary.

4/ It is not entirely clear whether Ecology Action is appealing the Appeal Board's determination that 1) impacts within foreign countries from foreign mining and milling need not be considered, or 2) impacts within this country from foreign mining and milling need not be considered, or both. If Ecology Action is contesting the second determination, the short answer is that the Appeal Board did not foreclose such consideration. It simply observed that Ecology Action had failed to make a threshold showing that such impacts require consideration. Cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

5/ Affidavit of Dr. Morton I. Goldman, sworn to on May 22, 1979, attached to Licensees' Joint Motion for Summary Disposition of Radon Issues, served May 25, 1979 ("Goldman Aff.").

Instead, intervenors simplistically insisted that no relationship exists between radon emitted and tons of ore mined.

As the Appeal Board noted, Dr. Goldman and Ecology Action relied on the same data on this issue. Slip op. at 23. Having appraised the same information as intervenors, Dr. Goldman concluded that the data show that the Staff estimate in Perkins "may be high by almost a factor of two." Goldman Aff. at 5. He also explained why the Staff's methodology presented "the best generic correlation that can be made" to estimate radon releases from underground uranium mining. Id.

Faced with little beyond rhetoric to the contrary, the Appeal Board can hardly be faulted for agreeing with Dr. Goldman and concluding that no further hearing on the issue is required.

Conclusion

ALAB-562 is an interlocutory decision. Therefore, review of it is premature. In any event, Ecology Action's petition does not present any "important question of public policy" or establish that the Appeal Board ruled in a

"clearly erroneous" manner on the subject of radon releases from mines. Accordingly, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served, this 12th day of October, 1979, a copy of "Licensees' Answer to Ecology Action's Petition for Review", by first-class mail, postage prepaid, upon each of the following:

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