

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of	)	
ROCHESTER GAS AND ELECTRIC CORPORATION, <u>ET AL.</u>	)	Docket No. STN 50-485
(Sterling Power Project	)	
Nuclear Unit No. 1)	)	

NRC STAFF'S RESPONSE TO PETITION FOR REVIEW

The NRC Staff opposes the petition for review of ALAB-507-<sup>1/</sup> filed on December 7, 1978, by Ecology Action, as intervenor in the captioned proceeding. In ALAB-507, the Appeal Board denied Ecology Action's request for an order prohibiting the Applicant from contracting for the purchase of enriched uranium for use at the Sterling facility pending the outcome of an appeal seeking similar relief in the United States Court of Appeals for the District of Columbia Circuit. As Ecology Action recites in its petition (p. 2) this is the second time that it has requested the Commission to grant precisely the relief sought here.

Ecology Action's sole argument in support of its request for a stay has not changed since April 28, 1978 when the argument was first made; Ecology Action alleges that a failure to bar the Applicant from contracting

<sup>1/</sup> November 17, 1978.

for uranium would moot the radon issue before its resolution in this case. Specifically, if uranium is mined as a result of execution of a contract for uranium, the major impacts from radon will already have occurred before the final cost-benefit balance is struck; presumably Ecology Action wishes to adduce evidence which it believes will demonstrate that the radon impacts from the mining and milling of uranium tilt the cost-benefit balance against the facility.

The Appeal Board denied Ecology Action's motion for a stay principally because the Board agreed with the Staff's argument that the Commission has exercised its authority to grant general licenses to acquire title to, and a fortiori contract for, nuclear fuel without first obtaining a specific NRC license.<sup>2/</sup> That grant of a general license is set forth in 10 CFR §70.20. In this regard, the Board stated:

. . . [T]he licensing regime which the Commission has administered under the Atomic Energy Act for many years is geared to insuring Commission scrutiny of circumstances or conditions involving a possibility of danger to the public health and safety. Contracting for legal title to uranium is simply not one of them.<sup>3/</sup>

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<sup>2/</sup> ALAB-507, pp. 5-9.

<sup>3/</sup> ALAB-507, slip op. at 7.

While Ecology Action appears to concede that 10 CFR §70.20 would permit the Applicant to execute a contract for the purchase of uranium,<sup>4/</sup> Ecology Action contends that §70.20 permits activity which is barred by 42 U.S.C. §2099 (Sec. 69 of the Atomic Energy Act of 1954, as amended), which provides:

The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material, if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

Congress, through passage of this provision of the Act, conferred upon the Commission authority to deny a license to receive title to uranium if it determined that such receipt of title was "inimical to the common defense or the health and safety of the public." However, the very existence of §70.20 reflects a Commission determination that the act of signing a legal document has no such impact. In short, 42 U.S.C. 2099 does not bar the activity permitted by §70.20; indeed, the promulgation of §70.20 demonstrates that the Commission has exercised its discretion under 42 U.S.C. §2099 to determine, in a general fashion, which activities should be proscribed without a specific license and which were so innocuous from a health and safety standpoint as not to require regulation.

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<sup>4/</sup> Petition for Review, p. 3.

Thus, 10 CFR §70.20, the very regulation which grants a general license that permits the signing of a contract for special nuclear material, also expressly prohibits, without a specific license, the acquisition, delivery, receipt, possession, use, transfer, import or export of that material. The basis for that prohibition is almost self-evident; specific licenses are necessary for the listed activities precisely because they could have some effect on public health and safety. Far from being inconsistent with the 42 USC §2099, therefore, the regulation in question is the embodiment of the discretion required to be exercised by the Commission pursuant to §2099. If Ecology Action believes that the Commission acted unwisely in making the judgment inherent in 10 CFR §70.20, the Appeal Board has already emphasized that there are appropriate avenues by which relief may be sought;<sup>5/</sup> Ecology Action has chosen not to avail itself of those procedures. As the Appeal Board stated, "we may not forbid what the Commission regulations permit."<sup>6/</sup> Ecology Action does not disagree that §70.20 permits what they now ask be forbidden. The petition should be denied on this ground alone.

Although unnecessary to the decision, the Appeal Board went on to note that even if, arguendo, it had authority to grant the requested stay, no

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<sup>5/</sup> ALAB-507, slip op. at 9, fn. 17.

<sup>6/</sup> Id.

showing of irreparable injury had even been attempted, let alone successfully made by Ecology Action.<sup>7/</sup> Of course, it is, by now, well established that a stay is seldom granted without a demonstration of irreparable injury.<sup>8/</sup> Further, as the Appeal Board has very recently stated, "a stay application which does not even attempt to make a showing on that factor is virtually assured of failure."<sup>9/</sup> Moreover, the only allegation made in the present Petition in this regard is that the radon issue will be rendered moot if a stay is not granted. The Staff finds this argument not only unavailing, but incomprehensible. As the Appeal Board emphasized, the issue of impacts of radon is still open before it.<sup>10/</sup> The precise issue is whether, given the adverse impacts of radon fairly attributable to the proposed facility, the costs of constructing the plant outweigh the benefits. Ecology Action will have its "day in court" on that question, regardless of whether signatures are placed on a uranium sales contract.

Part of Ecology Action's problem, in our view, is its insistence that "uranium for Sterling" will be mined and milled at some future date.<sup>11/</sup> As a matter of fact, no uranium will be mined or milled "for Sterling." Uranium is a fungible commodity. Should it be determined that a construction

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<sup>7/</sup> Id., at 9-13.

<sup>8/</sup> Permian Basin Area Rate Cases, 390 U.S. 747, 773 (1968).

<sup>9/</sup> Public Service Co. of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-505, Docket Nos. STN 50-556, 50-557, November 2, 1978, Slip op. at 6.

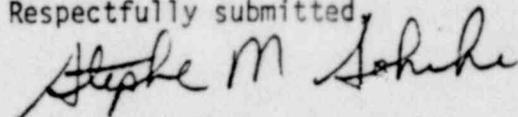
<sup>10/</sup> Id., at 12.

<sup>11/</sup> Petition for Review, p. 4.

permit should not issue to Rochester Gas and Electric Company to build this facility, there are operating facilities to which the rights to the uranium already contracted for could certainly be sold. Ecology Action does not allege otherwise.

For the reasons discussed above, Ecology Action's Petition should be denied; there is no important question of fact, law or policy requiring Commission attention in this case.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stephen M. Sohinki". The signature is written in dark ink and is positioned above the typed name.

Stephen M. Sohinki  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 22nd day of December, 1978.



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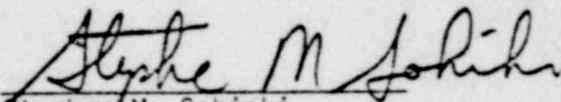
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