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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
U.S. NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

'89 NOV 17 P2:59

In the Matter of	)	
	)	
KERR-McGEE CHEMICAL CORPORATION	)	Docket No. 40-2061-ML
(West Chicago Rare Earths Facility	)	ASLBP No. 83-495-01-ML

RESPONSE OF ILLINOIS IN OPPOSITION TO THE MOTION OF KERR-McGEE FOR AN ORDER TO PROTECT THE BOARD'S JURISDICTION

BRIEF

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November 16, 1989

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TABLE OF CONTENTS

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Now comes the People of the State of Illinois, by and through their Attorney, NEIL F. HARTIGAN, the Attorney General of the State of Illinois and the Illinois Department of Nuclear Safety and in opposition to the Motion of Kerr-McGee For an Order to Protect the Board's Jurisdiction, states as follows:

I. INTRCDUCTION

Kerr-McGee has filed a Motion which is asking the Board to act to prevent the State of Illinois from filing an application which seeks to amend its 274(b) Agreement with the Nuclear Regulatory Commission. Under this agreement Illinois has the authority to regulate those materials that are in the West Chicago, Illinois area which have been defined as "source" materials. Jurisdiction over those materials classified as "by-product" materials remains with the Nuclear Regulatory Commission.

Because of this split of jurisdictional authority, Illinois is in the process of filing an application with the NRC which will seek an amendment to the 274(b) agreement and give it authority over by-product material as well. The state/federal

authority split over the materials in West Chicago has created an untenable situation. The application to amend the Section 274(b) agreement will resolve this division of authority.

Before responding to the substance of Kerr-McGee's Motion, Illinois believes the Board should deny that Motion on its face. Illinois' application to amend its 274(b) Agreement is being made directly to the Nuclear Safety Commission. The Board does not have any jurisdiction to grant or reject this application. Should the Board grant injunctive relief this would effectively block the NRC from acting on the application.

An order from the Board under these circumstances would be analogous to a lower court issuing an injunction precluding a higher court from acting. Such an act clearly would not be permissible. Kerr-McGee's Motion seeks to achieve an end indirectly which it would not be entitled to seek directly - the preclusion of action by the NRC.

As to the substance of the Motion Kerr-McGee has presented a three-fold argument that would allow the Board to issue a stay or injunction against the State of Illinois and preclude it from submitting an application to amend its 274(b) agreement with the Nuclear Regulatory Commission. First, Kerr-McGee presents a number of federal cases which have discussed the authority of a federal court to issue orders to preserve the jurisdiction of the court. Second, Kerr-McGee refers to decisions of NRC tribunals which the company contends supports the proposition that the Board has the authority to issue an injunction against the State

of Illinois. Third, Kerr-McGee argues, that in any event, the Board's authority to issue this injunction can be directly tied to the powers conferred by Section 2.718 of the NRC regulations. 10 C.F.R. 2.718.

II. SECTION 2.718(m) DOES NOT PROVIDE A BASIS FOR GRANTING INJUNCTIVE RELIEF

This analysis appears to be made in reverse order. The Board should first decide if there is a specific regulation that allows it to issue an injunction against the State of Illinois and forbid it from filing an application to amend the 274(b) agreement.

In its motion, Kerr-McGee presents only one regulation that arguably confers power upon the Board to grant injunctive relief. This regulation is 2.718 which provides:

> A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the power to:
>
> (a) Administer oaths and affirmations.
>
> (b) Issue subpoenas authorized by law.
>
> (c) Rule on offers of proof, and receive evidence.
>
> (d) Order depositions to be taken.
>
> (e) Regulate the course of the hearing and the conduct of the participants.
>
> (f) Dispose of procedural requests or similar matters.
>
> (g) Examine witnesses.

(h) Hold conferences before or during the hearing for settlement, simplification of the issues or any other proper purpose.

(i) Certify questions to the Commission for its determination, either in his discretion or on direction of the Commission.

(j) Reopen a proceeding for the reception of further evidence at any time prior to initial decision.

(k) Appoint special assistants from the Atomic Safety and Licensing Board Panel pursuant to §2.722;

(l) Issue initial decisions; and

(m) Take any other action consistent with the Act, this chapter, and sections 551-558 of Title 5 of the United States Code.

Each of the enumerated powers given to the presiding officer appear to be directly connected with procedural aspects of the hearing. Subsections (a) through (l) provide specifically enumerated powers. It is the final subsection that Kerr-McGee contends provides the basis for the Board to grant injunctive relief against the State of Illinois.

Subsection (m) provides:

> Take any other action consistent with the Act, this chapter, and sections 551-558 of Title 5 of the United States Code.

The issue the Board must decide is whether subsection (m) provides the authority to issue an injunction against the State of Illinois and forbid it from filing an application to amend its licensing agreement with the N.R.C. It is the position of Illinois that each of the powers enumerated by subsections (a) through (l) are essentially procedural powers. Subsection (m)

should be similarly interpreted. The powers conferred by that section should not be given an unduly broad interpretation.

Kerr-McGee has cited three cases in support of its proposition that Section 2.718(m) provides a jurisdictional basis for the Board to issue an order of injunctive relief. Kansas Gas & Elec. Co. (Wolf Creek Station, Unit No. 1), ALAB-321, 3 NRC 293 (1976), aff'd, CLI-77-1, 5 NRC 1 (1977); Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-2, 15 NRC 48 (1982); and Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145 (1988).

In Kansas Gas & Elec. Co., the Licensing Board had to decide if its powers were broad enough to allow it to issue a declaratory order. The Licensing Board concluded that it had such power and the Atomic Safety and Licensing Appeal Board issued a directed certification to consider this question.

The Appeal Board agreed with the Licensing Board and found authority in 10 C.F.R. Section 2.718. Under subsection (m), the Appeal Board noted that the Licensing Board was given powers consistent with the Administrative Procedure Act. The latter act specifically authorizes agencies to issue declaratory orders.

In Wisconsin Elec. Power Co., supra, the Licensing Board had to decide if Section 2.718 (m) powers were broad enough to allow it to order discovery even though the discovery pertained to an area not specified in the general discovery regulation under Section 2.740(b)(1). The Licensing Board concluded

that the powers conferred by Section 2.718(m) allowed discovery in areas that did not directly involved contentions.

The third case cited is Vermont Yankee Nuclear Power Corp., supra. In this case, the applicant sought authority to expand capacity of its spent fuel pool. One of the issues raised by the Applicant and the Staff was the jurisdiction of the Licensing Board. They contended the only basis for jurisdiction was that provided by Section 2.718(m). The Applicant also claimed that section was not broad enough to provide jurisdiction for the Board to take certain actions. In response to that argument, the Board stated at: (18 NRC Lexis 66 at 70)

> It is not that clear, however, whether the section could provide a jurisdictional base for consideration of a particular course of action or whether subject matter jurisdiction would first have to be founded on some other provision. That in turn might depend upon the degree to which a particular action might bear upon or be disruptive of the resolution of other issues in the proceeding.
>
> Fortunately, we need not here resolve those questions. Our jurisdictional base for considering the instant motion is clearly founded on another provision, 10 C.F.R. §2.717(b).

There is one aspect of that case that must be addressed. In its opinion the Licensing Board suggested that its powers may be broad enough to grant injunctive relief pursuant to Section 2.178(m). However, the Board did not grant injunctive relief in this case nor did it rely upon Section 2.718(m) for its decision. Because of these facts, the Board should not consider this case as precedent.

The position of Illinois is that none of the cases support the proposition that Section 2.718(m) can be interpreted so broadly that the Board has the authority to issue injunctive relief against the State of Illinois. The regulation of discovery discussed in Wisconsin Electric Power Co., supra, appears exactly the type of area that Section 2.718(m) is designed to encompass. Both Kansas Gas & Elec Co., supra and Vermont Yankee Nuclear Power Corp. supra, relied upon explicit statutory authority besides Section 2.718(m). The former relied upon provisions of the Administrative Procedure Act while the latter relied upon Section 2.717(b).

Kerr-McGee has not provided authority to this Board that Section 2.718(m) in fact has been used for the purposes of granting injunctive relief. Had Kerr-McGee found such precedent it would have cited this in its brief. The dictum in Vermont Yankee Nuclear Power Corp is not authority. In that case the Board was not certain that Section 2.718(m) was sufficiently broad enough to provide a jurisdictional basis for injunctive relief unless subject matter jurisdiction could be premised on some other regulatory provision. Since the Board does not have the Illinois application to amend the 274(b) agreement before it, the Board should not use its powers under 2.718(m) to grant injunctive relief.

III. THE ADDITIONAL CASES CITED BY KERR-McGEE DO NOT PROVIDE A BASIS FOR THE GRANTING OF INJUNCTIVE RELIEF

While it is the position of Illinois that Section 2.718(m) is not broad enough to grant injunctive relief, Kerr-

McGee does not base its argument exclusively on this section. It also discusses a number of cases where it claims NRC tribunals have acted to preserve their jurisdiction. It relies upon Texas Util. Generating Co. (Comanche Peak Steam Elec. Station, Units 1 and 1), CLI-83-6, 17 NRC 333 (1983); Texas Util. Generating Co. (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-83-8, 17 NRC 339 (1983) Kansas Gas & Elec. Co. (Wolf Creek Nuclear Generation Station, Unit No. 1), ALAB-307, 3 NRC 17 (1976) and Duke Power Co., CLI-80-3, 11 NRC 185 (1980).

Three of the four cases cited by Kerr-McGee directly relate to the powers of an NRC tribunal to grant a stay of an order of either the Appeals Board or the Licensing Board. In the Texas Util. Generating Co. cases, the NRC stayed orders of the Atomic Safety and Licensing Appeal Board while the Appeal Board issued a stay in the Kansas Gas & Elec. Co. case. The Duke Power Co. case involved the issuance of an interim protective order and operated very much like a stay.

The power to issue a stay is directly provided by regulation. Section 2.788(a) provides in pertinent part:

> Within ten (10) days after service of a decision or action any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on an appeal or petition for review...

Illinois certainly agrees that the NRC tribunals are specifically empowered to issue stays. However, before a stay can be issued there is the requirement that a decision or action must be issued. The facts of the instant case before the Board

show there has been no decision or action by an NRC tribunal which pertain to the application by the State of Illinois for an amendment of its 274(b) agreement with the NRC. The only way a stay can be issued is pursuant to the provisions of Section 2.788. These provisions do not apply, therefore no stay can be issued.

IV. ASSUMING THE BOARD HAS THE AUTHORITY TO ISSUE A PRELIMINARY INJUNCTION PURSUANT TO SECTION 2.718(m) OR PURSUANT TO CASE AUTHORITY, THE ELEMENTS FOR PRELIMINARY INJUNCTIVE RELIEF HAVE NOT BEEN MET

In its motion, Kerr-McGee contends it is entitled to preliminary injunctive relief. Its analyzes the four traditional factors that courts consider in deciding whether such relief is appropriate. The factors include: 1) success on the merits; 2) irreparable injury; 3) harm to the parties; and 4) the public interest. (Brief at page 9 Footnote 8) This is very similar to the analysis that is used by NRC tribunals in assessing whether or not a stay should granted. As the Licensing Board noted in Florida Power and Light Company (Turkey Point Nuclear Generating, Units 3 and 4), LBP-81-30, 14 NRC 357, 358 (1981), "these rules governing the consideration of a stay are a codification of the judicial principles applicable to motions for preliminary injunctions."

If the Board believes it has the authority to issue preliminary injunctive relief against the State of Illinois to preclude it from filing an application to amend its 274(b) agreement, the Board should employ the criteria set forth for granting

a stay under 10 C.F.R. §2.788(e). For a party to be entitled to a stay, the moving party must show:

1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

2) Whether the party will be irreparably injured unless a stay is granted;

3) Whether the granting of a stay would harm other parties; and

4) Where the public interest lies.

A. Kerr-McGee Cannot Make A Strong Showing That It is Likely To Prevail On The Merits

In its brief, Kerr-McGee dismisses the first factor as having no bearing on the instant matter (Brief at page 9, footnote 8). Clearly, there is no reasonable basis for Kerr-McGee to pick and choose which standards have to be met. This factor indeed is appropriate for the Board to consider.

The transfer of jurisdiction from federal authority to state authority over radioactive material is governed by Section 274(b) of the Atomic Energy Act, 42 U.S.C. 2021(b). Pursuant to that statute, the NRC has already turned jurisdiction over to Illinois with regard to source material that is found in the West Chicago area. The NRC has previously determined the Illinois program was sufficiently compatible with the NRC program to allow this jurisdictional transfer. Since Illinois is now seeking control over by-product material, there is every reason to believe that the NRC will transfer responsibility to Illinois as well, since the source and by-product material came from the same West Chicago site.

Kerr-McGee, under these circumstances cannot make, and has failed to make, a strong showing that it is likely to prevail on the merits and block the Illinois application for control over the by-product material. As the Licensing Board stated in Florida Power and Light, supra, "without a strong showing that the movant is likely to prevail on the merits of an appeal, there is no right to a stay 'even if irreparable injury might otherwise result.'" (14 NRC 357 at 359)

B. Kerr-McGee Has failed To Make A Showing That It Will Be Irreparably Injured

Despite repeated statements throughout its brief that the failure to grant relief will cause irreparable harm, Kerr-McGee has failed to make a showing of what that harm would be. There are many statements in the brief that indicate the Illinois Department of Nuclear Safety and specifically its director, Terry Lash, are opposed to onsite disposal of the waste. Nevertheless, there is nothing in the brief which makes a demonstration of irreparable harm.

The only fair reading of this brief is that Kerr-McGee is trying to depict the IDNS and its director in the worst possible light for the sole purpose of prejudicing the position of the State of Illinois before the Atomic Safety and Licensing Board. There is simply no other way of fairly viewing the attacks upon the Illinois agency and its director. Furthermore, as Kerr-McGee notes in its brief, the very issue of due process, is now one of the issues before the D.C. Circuit Court of Appeals. Kerr-McGee Chemical Corp. v. NRC, Nos. 87-1254 and 88-

1636. Oral argument in this case took place on November 14, 1989.

As the Licensing Board stated in Florida Power and Light, supra, 14 NRC 357 at 359:

> The issue of whether irreparable injury will result unless a movant is granted a stay is often a "crucial" factor in NRC deliberations. It is well established that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury.

For the Board to grant preliminary injunctive relief, Kerr-McGee must make this showing. Illinois submits that no such showing has been made.

C. The Granting Of Injunctive Relief Would Cause Harm To Other Parties

While Kerr-McGee summarily dismisses the possibility of harm to the State of Illinois, it completely fails to address the interests of another party -- West Chicago and the citizens it represents. It is Kerr-McGee's position that the grant of injunctive relief would have no affect upon the State of Illinois. However, this is simply not true. The present split of authority between the federal government and the State of Illinois over source and by-product jurisdiction very much impacts the ability of either level of government to effectively regulate the wastes that are in the West Chicago area.

Illinois, by filing its amendment to the Section 274(b) agreement is attempting to remedy this jurisdictional split. Should the Board issue an order barring Illinois from filing its

application, then the State would remain in the difficult position of trying to regulate only part of the West Chicago area waste.

D. It Is In The Public Interest To Have One Governmental Body Regulating The Waste In The West Chicago Area

Finally, it would be in the public's interest to have the State of Illinois regulate the wastes in the West Chicago area. Kerr-McGee addresses the issue of public interest by suggesting at page 17 of its brief that:

> The prompt resolution of the propriety of on site stabilization would serve the public good as it may enable the community to put this issue behind it and move on the more real and productive concerns.

Despite the fact that Kerr-McGee apparently knows what is in the best interest of the public, it ignores the fact that many residents in the West Chicago area do not want to put behind them the fact that a nuclear waste site is located in the middle of their city. It may be in Kerr-McGee's interest to have on site disposal, but this may not be in the public's interest. Certainly, the Kerr-McGee brief fails to adequately address this element.

Kerr-McGee has suggested that the Board employ the four step analysis that courts use in deciding whether or not to grant preliminary injunctive relief. As has been pointed out in Illinois' response, Kerr-McGee fails to make the necessary showing under this analysis. The Board would be remiss in granting any

form of injunctive relief based on the brief submitted by Kerr-McGee.

V. CONCLUSION

It is the position of the State of Illinois that Kerr-McGee has failed to sufficiently show either a statutory basis or a case law basis for this Board to issue an order which would effectively preclude Illinois from filing an application to amend its Section 274(b) agreement. Further, should the Board conclude that it has power to act then the Board is urged to reject the granting of injunctive relief because Kerr-McGee simply has failed to make a sufficient case for preliminary injunctive relief.

Finally, let it be noted that the State of Illinois is not seeking to amend its §274(b) agreement with the NRC because it seeks to thwart the Board's jurisdiction. This application is being made because the State has the responsibility to protect the interests of its citizens. The protection of these interests is the sole purpose for the existence of government. While Kerr-McGee has concerns that will affect its bottom line, Illinois must have concerns that affect the 16,000,000 citizens who live within this State.

For the reasons stated in this Response, Illinois asks the Board to deny Kerr-McGee's Motion for an Order to Protect the Board's Jurisdiction. In the alternative, should the Board grant Kerr-McGee's Motion, Illinois requests a direct certification to

CERTIFICATE OF SERVICE

I DOUGLAS J. RATHE, an attorney in this case do certify that on the 16th day of November, 1989, I caused to be served to be served the foregoing Illinois' Response To The Motion Of Kerr-McGee For An Order To Protect The Board's Jurisdiction, to be served upon the parties listed below by Express Mail:

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the Commission pursuant to Section 2.718(i) for a ruling on the Board's decision.

Respectfully submitted,

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