

10/20/81

RELATED CORRESPONDENCE

DOCKET NUMBER 50-201  
PROD. & UTIL. FAC.  
DOCKETED  
USNRC

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

'81 OCT 22 P1:45

Nuclear Fuel Services, Inc.,  
Petitioner,  
v.  
Nuclear Regulatory Commission,  
Respondent.

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH  
No.

EMERGENCY MOTION

PETITIONER'S EMERGENCY MOTION FOR STAY  
PENDING REVIEW FROM THE ORDER OF  
THE UNITED STATES NUCLEAR REGULATORY COMMISSION

Pursuant to Rule 18 of the Federal Rules of Appellate Procedure, and Rule 6(j) of the Rules of this Court, Petitioner Nuclear Fuel Services, Inc. ("NFS") respectfully moves this Court for a Stay Pending Review of an Order entered by the Nuclear Regulatory Commission on September 30, 1981, a copy of which is attached to Petitioner's Memorandum in Support of this Motion. In addition, as a result of the NRC's unlawful action, Petitioner is under a Court Order to take certain irremediable action by noon, October 20, 1981, as described more fully in this Motion and accompanying Memorandum. Accordingly, in order to prevent irreparable injury, Petitioner further requests that the Court act on this Motion immediately and without awaiting a response from Respondent.

On September 30, 1981, the United States Nuclear Regulatory Commission in blatant violation of its own regulation, issued an order authorizing the immediate amendment to NFS's license to operate the Western New York Nuclear Services Center ("Center").

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The proposed amendment permits the temporary transfer of the Center to the Department of Energy. In notifying NFS of the amendment, the NRC advised NFS that it could request a hearing in accordance with 189(a) of the Atomic Energy Act of 1954 as amended, but that the amendment was "authorized" and thus immediately effective. The notice failed to advise NFS that, pursuant to 10 C.F.R. § 2.204 (1980), NFS had an unequivocal right to a hearing prior to the amendment taking effect. In addition, the NRC ignored the fact that 10 C.F.R. § 2.204 also provides that such an amendment becomes effective only after the expiration of 20 days if no hearing is requested within that time. On October 13, 1981, NFS submitted to the NRC a request for a hearing pursuant to 10 C.F.R. § 2.204 and a motion requesting the postponement of the effectiveness of the proposed license amendment until such a hearing could be held. Although NFS through its counsel has repeatedly requested the NRC to act on its request and motion, to date the NRC has failed to so act.

Concurrent with the activities at the NRC, NFS is involved in litigation with the New York State Energy Research and Development Authority ("NYERDA") in the United States District Court for the Western District of New York. As part of that litigation, NYERDA has sought an order based on its various contracts with NFS to compel NFS to transfer the Center to DOE and to vacate the facility. Such a transfer can take place only if the NRC issues a valid final order amending NFS's license permitting such a

transfer. 1/ Although no legally effective order has as yet been issued, and no hearing has been held on the proposed amendment as required by 10 C.F.R. § 2.204, at approximately 4:30 p.m. on October 16, 1981, the District Court for the Western District of New York, relying on the NRC's amendment of September 30, 1981, issued an order requiring NFS to vacate the Center by noon, October 20, 1981.

NRC's unjustifiable and unlawful violation of its regulation has placed NFS in an impossible dilemma. Should NFS vacate the Center as required by the Court Order, NFS will have irretrievably lost its right to a prior hearing. NFS cannot, as a practical matter, vacate the facility and litigate the patent illegality of the NRC's action and thereafter resume control of the Center. Upon vacating the facility, NFS will be forced to terminate the employment of its staff and thus will not have sufficient personnel to continue as operator of the facility at some later date. Thus, the net result of the NRC's summary action will be the permanent forfeiture of NFS's right to a prior hearing. Although NFS cannot vacate the facility without losing its right to a prior hearing, NFS is now under a Court Order to do so by noon, October 20, 1981.

The NRC's adamant refusal to hold a prior hearing is particularly egregious in light of this Court's decision in

1/ NRC regulations provide that neither a license nor any right under a license may be assigned or otherwise transferred "unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of the Act and shall give its consent in writing. 10 C.F.R. §§ 30.34(b) and 50.54(c).

Sholly v. N.R.C., 651 F.2d 780 (D.C. Cir. 1981). 2/ In that decision, this Court, construing the language of Section 189(a) of the Atomic Energy Act of 1954, held that the NRC must always hold a hearing prior to amending a license. Here, the NRC has refused to grant a hearing in the face of a clear and unambiguous regulation which it promulgated and which specifically provides for a prior hearing.

The NRC, as a federal agency, should not be permitted to act with impunity in flouting its own rules and regulations. Unless this Court immediately stays the effectiveness of the NRC amendment, the NRC's unlawful action will be effectively insulated from review by this Court. Once NFS vacates the facility by noon, October 20, 1981, its right to a prior hearing will be lost and review of the NRC's action by this Court will be meaningless.

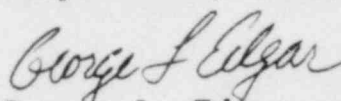
The Court is respectfully requested to act immediately on this Motion without awaiting the seven day period for a response from the NRC. This Motion could not be filed until the District Court for the Western District of New York on October 16, 1981, ordered NFS to vacate the Center. NFS's one day delay in filing with this Court was due to the pendency of NFS's Motion to Postpone before the NRC and because of the NRC's statement to counsel for NFS that it was reviewing the Motion and considering a two week

2/ NFS understands that the United States Supreme Court has recently issued a writ of certiorari in Sholly. NFS does not rely on Sholly for its right to a prior hearing but instead relies exclusively on 10 C.F.R. § 2.204 (1980).

postponement. 3/ In spite of the urgency of NFS's Motion and the impossible dilemma faced by NFS, the NRC failed to either grant or deny the Motion to Postpone. Indeed, as late as 4:00 p.m., October 19, 1981, the General Counsel's Office of NRC stated to Counsel for NFS that the NRC had not acted on the Motion. Thus, NFS's only recourse is to seek the assistance of this court and request the immediate issuance of a stay of the effectiveness of the NRC order amending NFS's license. This requested relief does no more than is already required of the NRC by virtue of 10 C.F.R. § 2.204.

Accordingly, for the reasons contained above, as well as those contained in the accompanying Memorandum, NFS respectfully requests this Court to stay the effectiveness of the amendment to NFS's license pending review by this Court.

Respectfully submitted,



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3/ NFS has made every conceivable effort to cause the NRC to postpone the effectiveness of the license amendment. Most recently, on October 19, 1981, NFS advised NRC of the District Court Order and again requested the NRC to act on NFS's Motion to Postpone.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioner's Emergency Motion For Stay Pending Review From The Order Of The United States Nuclear Regulatory Commission and Memorandum In Support thereof were served on the following parties this 20th day of October, 1981, in the following manner:

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By first-class mail, postage prepaid:

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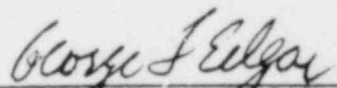
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GEORGE L. EDGAR  
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Nuclear Fuel Services, Inc.

Dated: October 20, 1981