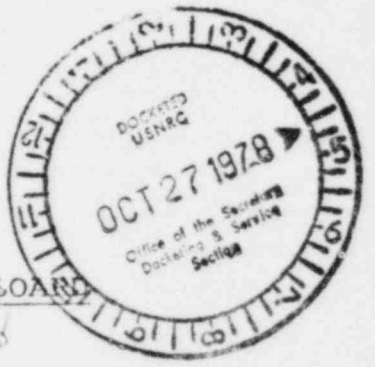


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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| In the Matter of | ) | |
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| 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 MOTION TO STAY

Ecology Action of Oswego, New York ("Ecology Action") has filed a motion dated October 18, 1978 1/ for a stay barring Rochester Gas and Electric Company ("RG&E") from contracting for the purchase of uranium to be used at the proposed Sterling nuclear power plant, pending the outcome of Ecology Action's petition for review now before the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 78-1855). Licensees hereby oppose that motion for the reasons given below and in the attached affidavit executed by Anton A. Fuierer ("Fuierer Affidavit").

1. The NRC has no jurisdiction to regulate or enjoin RG&E's uranium procurement activities

No statute gives NRC jurisdiction to grant the requested relief. The Atomic Energy Act of 1954 authorizes

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1/ The motion was served on the parties on October 20, 1978.

the NRC to license the construction and operation of nuclear facilities, but this does not extend to private uranium contracting activities.[2] Authorization is not and never has been required from the NRC to undertake uranium procurement. Specifically, the possession or non-possession of the construction permit has no bearing on the right of a utility applicant to engage in the procurement of uranium. NRC regulations confirm this view.[3] The fact that such uranium contracting does not fall within the licensing authority of the Commission forecloses the Commission from exercising authority over that activity by virtue of injunctive relief.[4]

Furthermore, the National Environmental Policy Act of 1969[5] ("NEPA") does not confer jurisdiction on the NRC to take the requested action. Any activity that RG&E undertakes in entering into uranium supply contracts is a purely private, commercial activity, and the action that Ecology Action seeks to enjoin does not constitute, and is

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2/ Atomic Energy Act, § 101 and 103, 42 U.S.C. §§ 2131 and 2133 (1970).

3/ 10 C.F.R. § 50.10 (1978) expressly excludes from the licensing requirement activities such as procurement of components for the facility.

4/ Biderman v. Morton, 497 F.2d 1141, 1146-48 (2d Cir. 1974). It is, of course, injunctive relief against a private party rather than a stay of an NRC decision or proceeding that Ecology Action has requested. There is no decision or proceeding to "stay", since no decision or proceeding of the NRC was necessary to authorize the contracting in the first place.

5/ 42 U.S.C. §§ 4321-47 (1970 & Supp. V 1975).

not bound up with, a "major federal action significantly affecting the human environment". While NEPA may confer a cause of action for enjoining actions of federal agencies that are in violation of its mandates, it emphatically does not constitute a jurisdictional basis for enjoining purely private activities of non-federal entities. 6/

Put another way, NEPA may not be employed to broaden substantive regulatory jurisdiction of federal

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6/ Bradford Township v. Illinois State Toll Highway Authority, 463 F.2d 537 (7th Cir.), cert. denied 409 U.S. 1047 (1972); Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976); Biderman v. Morton, supra note 4; Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973). This precedent reveals two basic tests for determining when activities of a non-federal entity might be enjoined under NEPA:

(a) Whether the proposed action is funded by, or pursuant to contracts with, the federal government; and

(b) Whether the proposed action must be authorized by the federal government.

Clearly, proposed uranium contracting activities of RG&E meet neither of the two tests, and are "purely private activities" (534 F.2d at 1245). See also Kansas Gas and Electric Co. and Kansas City Power and Light Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-321, 3 NRC 293, 307 (1976). Moreover, as distinct from the action sought to be prevented in the Wolf Creek case (constructing a railroad spur and access road to the site), uranium contracting has no relation whatever to the specific plant site, which is the focus of the construction permit approval. Moreover, contracting for uranium is not the same as mining and milling of uranium, just as contracting to build a nuclear plant is not the same as building it. Finally, uranium is a fungible commodity and the prospect of resale means any commitment to a particular plant is easily reversible. Fuierer Affidavit, ¶ 5-6. In short, the connection between NRC facility licensing authority and uranium contracting is so remote as to be virtually non-existent.

agencies to prohibit activities beyond their original regulatory ambit. In Gage v. AEC[7] the U.S. Court of Appeals for the District of Columbia Circuit directly addressed this question. The court held that the AEC could not, under the guise of NEPA and the Atomic Energy Act, prohibit prelicensing acquisition by utilities of land on which facilities requiring licensing might ultimately be constructed. The court noted:

> NEPA does not mandate action which goes beyond the agency's organic jurisdiction. . . . [Citations] Intervention to prevent environmental harm from private and non-federal action, as opposed to merely withholding its own "major federal action" of granting a construction permit until a NEPA review has occurred, may very well go beyond the AEC's organic power. . . .[8]

It is thus clear that the NRC does not possess jurisdiction to prohibit acquisition of uranium supplies, a step whose relation to licensed activities is far more remote even than prelicensing land acquisition. Ecology Action's motion should be denied on jurisdictional grounds alone.

2. Ecology Action has supplied no grounds to justify reconsideration of the Appeal Board's May 5, 1978 Order

In its order of May 5, 1978 the Appeal Board denied an earlier motion by Ecology Action for a stay of

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7/ 479 F.2d 1214 (D.C. Cir. 1973).

8/ Id. at 1220 n.19. See also id. at 1219 n.17; Kitchen v. FCC, 464 F.2d 801 (D.C. Cir. 1972).

uranium contracting by RG&E, primarily on the ground that Ecology Action had proffered no evidence that radon is generated in quantities sufficient to have possibly serious health or environmental consequences. Ecology Action's latest motion does nothing to remedy this deficiency. Despite its efforts to distinguish this motion from the earilier one, Ecology Action offers nothing new except for one thing: its argument that what it is really trying to do is preserve its day in court. As a matter of fact, even that argument is not new, as it was made with the original motion. 9/ The argument is of no consequence since Ecology Action has presented no evidence to show that it is entitled to relief from the court in the first place. 10/

3. In any event, Ecology Action has not made and adequate showing to justify the requested relief

The factors to be considered in judging Ecology Action's request are those set forth in Virginia Petroleum

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9/ NRC Dkt. No. STN 50-485, "Motion to Suspend Construction Permit" of Ecology Action, April 28, 1978, pp. 5-6.

10/ There is a peculiar snake-eating-its-own-tail aspect to Ecology Action's series of actions. First it requested a stay from NRC pending resolution of the radon issue before the agency. When that was denied, it petitioned the court for review of that denial. It now requests NRC to issue a stay pending court review not because of an alleged health problem, but "to preserve its day in court" to protest the first stay denial. All this has occurred in absence of a showing by Ecology Action of any irreparable harm from the contracting activities or any likelihood of prevailing on the merits in these contests.

Jobbers Association v. FPC.[11] We address these factors below.

A. Ecology Action will not be Irreparably Harmed if the Requested Relief is Denied

As previously discussed, Ecology Action has failed to make any showing that radon releases from uranium mining and milling generally constitute a significant health or environmental problem to the members of Ecology Action, or even the public at large, much less the small portion of such mining and milling which might be associated with the possible contracting activities in question related to the Sterling facility.

Even in the event RG&E were to enter into contracts for uranium which could be used for the Sterling facility, such contracting activity would result in no incremental increase in uranium mining and milling or associated increase in radon-222 from uranium mill tailings, if such uranium were

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11/ 259 F.2d 921 (D.C. Cir. 1958). See 10 C.F.R. § 2.788 (1978). Ecology Action has also averted to the arguments in its original stay request to the Appeal Board, in which it argued that failure of strict compliance with the requirements of NEPA, per se, can constitute sufficient harm to warrant injunctive relief. This position, however, is contradictory to the precedent in the District of Columbia Circuit, where the Court has generally required a showing of irreparable harm to the environment accompanying noncompliance with NEPA. Fund for Animals v. Frizzell, 530 F.2d 982, 986 (D.C. Cir. 1975); Environmental Defense Fund, Inc. v. Froehlke, 477 F.2d 1033 (D.C. Cir. 1973). Nor does Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502 (D.C. Cir. 1974) lend support to Ecology Action's position when, as here, the agency in question has no decisionmaking authority with regard to the activity in question. See pp. 1-4, supra.

contracted for and were not used at the Sterling site. This is because the uranium could instead be reallocated to the RG&E Ginna plant, or sold to another company for use at its nuclear facility, thereby producing additional supplies for those facilities and a comparable reduction in requirements for mining and milling. Thus no harm whatsoever, much less irreparable injury, would occur to Ecology Action from any radon as a result of RG&E entering into any uranium supply contracts.12/

The only other injury alleged by Ecology Action is merely a generalized allegation of injury to present and future generations as a result of release of radon-222. This speculative, "nonspecific" allegation is not of sufficient magnitude, much less of imminent quality, to warrant granting of injunctive relief.13/

B. Substantial harm to other parties will result if the requested relief is granted

Substantial and irreparable harm to RG&E and the other three co-licensees could potentially result from the granting of the injunctive relief.14/ An order prohibiting

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12/ See the annexed Fuierer Affidavit, ¶¶ 1-5.

13/ See, e.g., Fund for Animals v. Frizzell, supra p. 6, at 987.

14/ Contrary to Ecology Action's assumption, the type of harm that is considered under Virginia Petroleum Jobbers with regard to the party against which relief is being sought need not be "irreparable harm" as required under the first criterion. Instead, substantial harm is the appropriate test. 259 F.2d at 925. Nevertheless, in this case, the harm to licensees would be irreparable as well.

RG&E from entering into uranium fuel supply arrangements in the interim pending the outcome of Case No. 78-1855 could result in significant increases of the cost of uranium fuel supply to RG&E and the other four co-licensees as well as less favorable terms in any uranium fuel supply contract. The penalty could be very substantial. These consequences are detailed in paragraphs 9-12 of the Fuierer Affidavit.

C. Public interest considerations favor denial of the requested relief

The potential increase in costs and unfavorable supply conditions referred to in Subsection B above will also adversely impact on the consuming public in the service areas of the four co-licensees. The increased fuel costs would be reflected in the rates charged for electrical service to those customers.15/

On the other hand, no harm to the public interest will occur if requested relief is denied. As was shown above, no irreversible incremental increase in uranium mining and milling will occur if contract arrangements are made pending the outcome of Case No. 78-1855, and even if there were an incremental increase, there has been no showing that it would represent a significant health hazard. Indeed, as discussed in Subsection D, below, evaluations on the impacts of radon that have occurred in recent NRC licensing proceedings thus far have indicated that the reassessed

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15/ Fuierer Affidavit, ¶ 12.

health effects from radon releases are insignificant in relation to impacts from natural background radiation.

D. Ecology Action is not likely to prevail on the merits of it appeal

The merits of Ecology Action's court appeal will involve substantially the same issues as those being discussed here--namely, whether Ecology Action's prior efforts to obtain from the NRC a stay of uranium contracting satisfy the tests laid out in Virginia Petroleum Jobbers.[16/] Ecology Action is unlikely to convince the court that it has satisfied those tests, for the reasons given herein. For example, Ecology Action would have to persuade the court that it is likely that the radon-222 problem will be determined by the NRC to be a serious health hazard affecting either it or members of the public. This is very unlikely since Ecology Action, as previously mentioned, has failed to provide either the NRC or the court with evidence that this is the case. Even where evidentiary presentations have been made on this subject by others holding Ecology Action's views, Atomic Safety and Licensing Boards have consistently ruled that the environmental impact of radon-222 emissions is unsubstantial.[17/] Also, Ecology Action

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16/ See page 6, supra.

17/ Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), NRC Dkt. Nos. 50-556 and 50-557 (July 24, 1978); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), NRC Dkt. Nos. 50-483, 50-489 and 50-490 (July 14, 1978); Carolina Power and Light Company (H.B. Robinson, Unit No. 2), NRC Dkt. No. 50-261 (June 16, 1978); Washington Public Power Supply System (Nuclear Project No. 4), 7 NRC 254 (1978).

is unlikely to overcome the jurisdictional hurdle discussed in Section 1 above, which it must do in its court case as well as here, in order to prevail.

Finally, where stays have been requested of the NRC and the Courts based on the radon issue, these have been denied.18/

## Conclusion

For the reasons given above, Ecology Action's motion should be denied.

Respectfully submitted,

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Dated: October 27, 1978

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18/ Kepford v. NRC, No. 78-1160 (D.C. Cir. unpublished order dated March 8, 1977); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), CLI-78-3, 7 NRC 307 (1978); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), NRC Dkt. Nos. STN 50-546 and STN 50-547 (August 30, 1978).