

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

Docket No. STN 50-485

PETITION FOR REVIEW

1. Intervenor Ecology Action of Oswego, New York, (hereinafter Ecology Action), petitions the NRC for review of a decision of the Atomic Safety and Licensing Appeal Board (hereinafter Appeal Board), dated November 17, 1978, (ALAB-507) and received by counsel for intervenor on November 24, 1978.

2. The Appeal Board in this decision denied Ecology Action's request that the NRC forbid Rochester Gas and Electric (hereinafter RG&E) from contracting for the purchase of uranium to be used at the proposed Sterling nuclear power plant pending the resolution of an appeal by Ecology Action to the United States Court of Appeals for the D. C. Circuit.

3. On August 26, 1977 the Atomic Safety Licensing Board approved the application of RG&E to build a nuclear power plant at Sterling, New York.

4. Subsequently, the NRC removed the table S-3 value for

radon-222 emissions and ordered a hearing on radon-222 emissions in all cases still pending before a Board or Appeals Board. 43 Fed. Reg. 15613 (April 14, 1978). That order applied to this case.

5. Consequently, on April 28, 1978, Ecology Action asked that the construction permit be suspended and that RG&E be barred from contracting for Sterling uranium until the radon-222 emissions issue had been resolved in this case.

6. The Appeal Board denied the request on May 5, 1978.

7. Ecology Action petitioned the Commission for review of the denial. The Commission failed to act in timely fashion, thereby affirming the Appeal Board.

8. Ecology Action then filed a Petition for Review with the D.C. Circuit Court of Appeals on August 25, 1978, (Case # 78-1855) asking for judicial review of these denials.

9. Ecology Action returned to the Appeal Board on October 18, 1978 and sought a stay pendente lite of the May 5, 1978 decision which did not prevent all contracting by RG&E for the uranium to be used at Sterling. The Appeal Board denied the relief requested. (ALAB-507)

10. The Appeal Board based its denial on three grounds:

(a) There was no decision for the Appeal Board to stay;

(b) The NRC regulations permit such contracting;

(c) Ecology Action failed to demonstrate any irreparable injury arising from a failure to grant the relief.

11. All three grounds are erroneous.

12. The Appeal Board's first basis for denial is procedural and elevates form over substance. Traditionally, a "stay" has

been the judicial procedure used to maintain the status quo pending an appeal of a decision which alters the status quo. Ecology Action perceived the Appeal Board's May 5, 1978 order as permitting RG&E to contract for uranium by refusing to prevent it. What Ecology Action sought was a stay of that permission pending appeal.

13. Concededly, if granted, that stay, to be effective, would have required affirmative action by the Appeal Board enjoining such contracting. If the Appeal Board and the NRC staff feel more comfortable calling Ecology Action's application one for an injunction rather than for a stay, Ecology Action has no objection, (and indeed, it is because the Appeal Board has characterized this application as one for injunction instead of for a stay, that Ecology brings now a petition for review by the NRC pursuant to 10 CFR §2.786 (1978), rather than for a stay pursuant to 10 CFR §2.788 (1978)). Nonetheless, the substance of what Ecology Action seeks is a stay because it seeks preservation of the status quo pending appellate review of a decision which permits a disruption of the status quo.

14. The second ground for denial is also mistaken. While 10 CFR §70.20 (1978) grants a general license to receive title to uranium, and it would be under this regulation presumably that RG&E would have authority to contract for title to uranium, the regulation, particularly as it permits activity barred by 42 U.S.C. §2099 (1973), need not remain unchanged. Indeed, just as the NRC removed the radon-222 value from Table S-3, so may the NRC revoke the general license or even deny a general license in this case pending resolution

of the radon-222 issue. It is facile to contend that what an agency's organic act prevents the agency must permit it because it has a regulation granting such permission.

15. In short, the NRC has ample authority and imagination to prevent an alleged harm from nuclear power if it wishes to prevent such harm.

16. And that raises the third, and what Ecology Action believes to be, the real basis of the Appeal Board's denial, Ecology Action's failure to establish an irreparable harm.

17. It is not at all clear exactly how Ecology Action was supposed to establish such a harm since to date it has not been afforded an opportunity to offer evidence on the radon-222 emission issue. During the regular hearings in this case, Table S-3 barred such evidence, and there have been no radon-222 hearings yet in this case. Ecology Action can and did make an offer of proof that as a result of radon-222 emissions, the nuclear fuel cycle would be far deadlier than the coal fuel cycle. Perhaps most importantly, if the uranium for Sterling is mined and milled before the resolution of the radon-222 issue, then that resolution becomes immaterial.

18. What Ecology Action seeks to prevent during the pendency of its appeal to the D.C. Circuit is a change in the status quo which makes the appeal moot. RG&E has specifically not ruled that development out as a possibility.

19. What determines the merit of an application for a stay is whether permitting the status quo to be altered will moot the appeal. Money paid on a trial court judgment can be recovered if

upon appeal there is a reversal. The mining & milling of uranium, however, sets the billion year clock of radon-222 emissions running and at that point analysis of the harm is academic.

20. Thus, in this case there are two irreparable harms:

- (1) The irreparable harm of radon-222 emissions themselves, and
- (2) The irreparable harm of permitting such emissions to occur before their impact is analyzed.

21. The NRC should grant this petition for review because it involves an important question of law and policy that significantly affects the environment and public health and safety and because it involves an important procedural question. The NRC should evaluate whether it can or should permit issues involving harm to the public health and safety and to the environment to be resolved not by thoughtful analysis tested by the adversarial process but rather by the unilateral action of power plant applicants. The issue on this petition for review is not whether the Appeal Board assessment of the harm from radon-222 emissions is a clearly erroneous mistake of fact (although Ecology Action believes such to be the case), but rather whether the Appeal Board should be permitted to jeopardize its own opportunity to assess that harm prior to the occurrence of the harm.

WHEREFORE, Ecology Action respectfully requests that the Commission grant this Petition for Review.

Respectfully submitted,

December 7, 1978

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CERTIFICATE OF SERVICE

I hereby certify that I have served the document entitled "Petition for Review" dated December 7, 1978, by mailing first class and postage prepaid copies thereof to each of the following persons this seventh day of December, 1978.

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