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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD APPEAL PANEL

OFFICE OF PUBLIC AFFAIRS
ATTENTION: PUBLIC AFFAIRS
BRANCH

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

WEST CHICAGO'S OPPOSITION TO MOTION FOR A PROTECTIVE ORDER

Kerr-McGee's motion for a protective order is another vain attempt by the company to collaterally attack the Commission's October 1990 transfer of jurisdiction over byproduct materials to the State of Illinois. The Commission's October 17, 1990 Memorandum and Order (CLI-90-09) and the subsequent agreement executed soon thereafter by Chairman Carr and Governor Thompson (55 Fed. Reg. 46593, November 5, 1990), "permits the State to regulate 11e.(2) byproduct material and the facilities that produce 11e.(2) byproduct material." *Id.* Kerr-McGee is improperly asking this Panel to interfere with the section 274 agreement.

Although Kerr-McGee shrouds its motion by referring to it as a request for a "protective order," Kerr-McGee is asking this tribunal to overrule the full Commission and enjoin the State from regulating byproduct materials. In fact, Kerr-McGee's prayer for relief seeks "an order directing the State to vacate its notice of December 5, 1990, and specifically prohibiting the State from interfering with Kerr-McGee's NRC-issued license." This Board clearly is without jurisdiction to prevent the State of Illinois from carrying out its authority.

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Kerr-McGee has already failed once in asking a Commission tribunal to interfere with the State of Illinois' independent rights to assume jurisdiction over the byproduct materials that were the subject of this proceeding. Earlier in this litigation, before the Section 274 agreement was executed, Kerr-McGee moved the Atomic Safety and Licensing Board to prevent Illinois from pursuing its application to regulate byproduct materials. The Board summarily rejected Kerr-McGee's motion, stating (1) that the issue of Illinois application was a matter before the *full Commission* and not the Board; and (2) that the Board has no jurisdiction over Illinois' actions. In rendering its decision in *Kerr-McGee Chemical Corporation (West Chicago Rare Earths Facility)*, LBP-89-35, 30 NRC 677, 680 (November 22, 1989) the Board first explained that, as here, Kerr-McGee was really asking the Board to interfere with the State's rights by seeking an order "to protect the Board's jurisdiction:"

On October 27, Kerr-McGee filed a motion seeking an order that would protect this Board's jurisdiction to complete this proceeding. The motion is motivated by the fact that Illinois is seeking to amend its agreement with the Commission under the terms of section 274 of the Atomic Energy Act in order to acquire jurisdiction over the mill tailings located on Kerr-McGee's West Chicago site...Kerr-McGee asks that we order Illinois not to file a final application for such authority until a final decision is achieved in this case...

The Board quickly found, with staff's concurrence, that it has no jurisdiction to undermine the State's statutory authority to seek regulatory authority from the Commission:

Staff and Illinois correctly point out that we have no jurisdiction to issue such order. We are empowered by the Commission to decide issues in controversy concerning Kerr-McGee's application. That authority does not permit us to prohibit Illinois from seeking delegation of authority from the Commission pursuant to section 274. Such application simply does not involve review by an atomic safety and licensing board. It is a separate proceeding before the Commission. The Commission has authority to decide whether it

wishes to resolve Kerr-McGee's application or delegate authority for its resolution to Illinois. Kerr-McGee's motion is denied.

Id. (emphasis added).

The Board's recent decision governs Kerr-McGee's present motion. This Panel has "no jurisdiction to issue such order" prohibiting Illinois from acting on the authority to regulate byproduct materials conferred upon it by the Commission. Rather, this Appeal Board, like the Board below, "is empowered by the Commission to decide issues in controversy concerning Kerr-McGee's application." *See also* 10 CFR Sections 1.17 and 2.785 restricting the Appeal Panel's duties to review of Board decisions. Kerr-McGee's motion to enjoin the state from carrying out its functions "simply does not involve review by an atomic safety and licensing board."

The Commission now has made its decision authorizing Illinois to assert regulatory control over the wastes at West Chicago. The Commission has denied Kerr-McGee's petition for reconsideration. *State of Illinois* (Agreement Number One to the Section 274 Agreement between the NRC and Illinois). No. CLI-90-11 (November 8, 1990). And in fact, Kerr-McGee has appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. *Kerr-McGee Chemical Corporation v. United States*, No. 90-1534 (D.C. Cir. filed November 14, 1990). Kerr-McGee's attempts (1) to cajole this Panel to undermine the Commission, which authorized Illinois to assert authority over the materials at West Chicago, and (2) to usurp proper appellate procedures is plainly inappropriate and the motion must be denied.

The cases that Kerr-McGee cites in its motion have absolutely no connection to the facts present here. The movants in the NRC cases cited by Kerr-McGee were not asking the licensing boards to undermine an order issued by the full Commission. By contrast, here Kerr-McGee is asking this Panel to, in

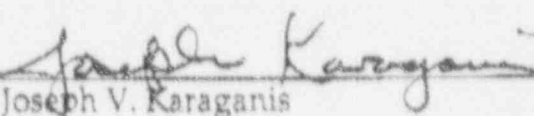
effect, revoke or modify the Commission's decision to transfer authority to regulate byproduct materials to the State. More importantly, in each of the cited cases, the tribunals had jurisdiction to order the relief granted. Here, this *review* Panel has no authority to order Illinois to take action unrelated to the merits of the appeal. Moreover, unlike the cited cases, Kerr-McGee will not suffer any irreparable harm by this Appeal Board's denial of the motion. By its own terms, Illinois' December 5, 1990 order does not take effect for 90 days. And even if Kerr-McGee claims irreparable harm in the manner that Illinois is asserting its jurisdiction, the proper forum for such challenge is not here. Rather, as Kerr-McGee appears to concede by filing suit, any challenge to the section 274 agreement that Kerr-McGee wishes to make should be made before the judges of the United States Circuit Court of Appeals for the District of Columbia Circuit.

Finally, as staff itself concedes in its November 19, 1990 brief in response (at 3) to our Motion to Terminate, "this proceeding should be terminated because the Commission's discontinuance of regulatory authority over 11e.(2) byproduct material has resulted in this Appeal Board's loss of jurisdiction of the pending appeal from LBP-90-9." Because this Panel has no jurisdiction whatsoever, even over the appeal, it certainly has no jurisdiction to undermine the Commission's orders and enjoin the State from carrying out its authority under the Atomic Energy Act.

For the reasons stated above, the City of West Chicago requests this Panel to deny Kerr-McGee's motion for a protective order.

Respectfully submitted,

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Dated: December 21, 1990

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CERTIFICATE OF SERVICE

I, James D. Brusslan, an attorney in this case do certify that on the 21st day of December 1990, I caused to be served the foregoing **WEST CHICAGO'S OPPOSITION TO MOTION FOR A PROTECTIVE ORDER** upon the parties listed below by Facsimile:

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