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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD



In the Matter of)

KERR-MCGEE CHEMICAL)
CORPORATION)

(West Chicago Rare Earths)
Facility))

Docket No. 40-2061-ML

NRC STAFF MOTION FOR CERTIFICATION TO THE COMMISSION OF THE
QUESTION OF JURISDICTION

Richard G. Bachmann
Counsel for NRC Staff

December 24, 1990

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I. INTRODUCTION

The NRC Staff hereby moves the Appeal Board to certify to the Commission, pursuant to 10 C.F.R. § 2.785(d), the question of whether the Commission retained jurisdiction over the Kerr-McGee license after the November 1, 1990 amendment to the agreement between the NRC and the State of Illinois, which transferred regulatory responsibility for section 11e.(2) material to the State in accordance with Sec. 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201.

II. DISCUSSION

On October 17, 1990, the Commission approved an amendment to the agreement with the State of Illinois which approved the State's generic program for the regulation of "byproduct material" as defined in section 11e.(2) of the Atomic Energy Act of 1954, as amended. CLI-90-09, 32 NRC ____ (1990). Pending before the Appeal Board at that time were the appeals of the State of Illinois and the City of West Chicago ("intervenor") from the Licensing Board's initial decision, LBP-90-9, 31 NRC 150 (1990), and related rulings, and the intervenors' August 31, 1990 motion to vacate the Kerr-McGee license amendment issued as a result of that decision. As a result of the

amendment to the agreement, intervenors filed a motion before the Appeal Board to terminate the proceeding for lack of jurisdiction.

At the same time these matters are pending before the Appeal Board, there is pending before the Commission a request from the City of West Chicago for a hearing on another amendment to the Kerr-McGee license, or alternatively, to vacate that amendment on jurisdictional grounds. West Chicago's Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment, dated November 9, 1990.

Thus, the Commission and the Appeal Board are each faced with the issue of the jurisdictional implications of the transfer of regulatory responsibility for the section 11e.(2) material from the NRC to the State of Illinois. This issue is fundamental to the resolution of the other issues pending before the Commission and the Appeal Board, since a determination that jurisdiction over the Kerr-McGee license passed from the NRC to the State of Illinois when the amendment to the agreement became effective would preclude further consideration of pending matters within the NRC.

In view of this fact, the NRC Staff moves the Appeal Board to certify to the Commission, pursuant to 10 C.F.R. § 2.35(d), the following question:

To what extent has the U.S. Nuclear Regulatory Commission retained jurisdiction over the above-captioned license subsequent to the effective date of the amendment to the agreement with the State of Illinois, November 1, 1990?

Pursuant to 10 C.F.R. § 2.785(d), the Appeal Board may, in its discretion, certify to the Commission "major or novel questions of policy, law or procedure." Since a determination that the November 1, 1990 amendment transferred all the Commission's regulatory authority over Section 11e.(2) material in Illinois to the State would deprive this Appeal Board, and indeed the Commission itself, of jurisdiction over the pending

litigation as of that date, this deprivation of jurisdiction, with adjudicatory matters still pending, creates a major and novel question of procedure and law.

In *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-681, 16 NRC 146 (1982), the Appeal Board faced a similar situation. The Commission had suspended the Diablo Canyon low power license pending the results of an independent design verification program because of doubts about the adequacy of the licensee's quality assurance program. 16 NRC at 147. The Appeal Board had pending before it an appeal from the Licensing Board decision authorizing the low power license, and a motion to reopen the record based on "new evidence" in the quality assurance and quality control (QA/QC) area. *Id.* The question before the Appeal Board was whether the Commission intended its suspension order to deprive the adjudicatory boards of jurisdiction over QA/QC matters. 26 NRC at 148. Although in certifying the jurisdictional question to the Commission, the Appeal Board based its rationale largely on avoiding licensing delays, it also stated that "deciding jurisdictional questions now may ultimately save considerable Commission resources." 26 NRC at 149. Finally, the Appeal Board determined to hold the motion to reopen "in abeyance pending the Commission's determination of the certified questions or until we receive further instructions from the Commission (such as directions to forward the motion to it for decision)." *Id.*

In the instant proceeding, unlike *Diablo Canyon*, the issue is not only where, within the NRC, jurisdiction lies but rather more fundamentally, whether the NRC has continuing jurisdiction at all. On November 8, 1990, the Commission acknowledged the motion to vacate the decision on appeal, based on the November 1, 1990 amendment, filed before this Appeal Board by the State of Illinois and the City of West Chicago. *In*

the Matter of State of Illinois (Amendment Number One to the Section 274 Agreement between the NRC and Illinois), CLI-90-11, 32 NRC __ (Slip Op. at 2). Although the Commission noted that it "fully expected" such a motion, the Commission "expresse[d] no opinion as to how that motion should be decided." *Id.* Subsequently, on November 9, 1990, the City of West Chicago filed before the Commission its "Request for Hearing on October 15, 1990 License Amendment or to Vacate Amendment." The request sought to vacate the amendment authorizing receipt and storage of contaminated soils from outside the City's limits based on lack of jurisdiction by the Commission. By Order dated December 7, 1990, the Commission requested, *inter alia*, the views of the parties on the impact Commission action on the City's request might have on the jurisdictional questions pending before the Appeal Board. Thereafter, on December 12, 1990, Kerr-McGee filed its "Motion for a Protective Order" with this Appeal Board in order to "preserve" the Appeal Board's jurisdiction and the status of Kerr-McGee's NRC-issued license.

Thus, at the present moment, this Appeal Board has before it a motion to vacate the decision on appeal based on lack of NRC jurisdiction, and a conflicting motion that the Appeal Board issue an order protecting that jurisdiction. At the same time the Commission has before it a motion to vacate a license amendment based on that same lack of jurisdiction. The Staff submits that the questions of jurisdiction and the Commission's intent in executing Amendment No. 1 to the Illinois Agreement, here pending before both the Appeal Board and Commission in essentially identical form, is precisely the type of question that ought to be certified to the Commission. Since the City's motion to vacate is now before the Commission the overall question of jurisdiction should be decided by the Commission prior to further consideration of any other matter

pending before the Appeal Board.

As noted above, in CLI-90-11, the Commission acknowledged the pending motions before the Appeal Board concerning, among other things, the question of jurisdiction and expressed no opinion as to how that issue should be decided. CLI-90-11 at 2. But that was before the City of West Chicago's petition presented the jurisdictional issue directly to the Commission. The Staff believes that it is now appropriate for the Commission to consider this issue. A determination at this time may obviate further consideration of the other issues that are now pending. If the Commission determines that resolution of the jurisdictional issue does not eliminate the need to address the other issues, then the matter can be pursued after the jurisdictional issue is resolved.

III. CONCLUSION

The Appeal Board should certify the jurisdictional question to the Commission for resolution and hold matters pending before it in abeyance until the Commission resolves the question.

Respectfully submitted,



Richard G. Bachmann
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of December, 1990.

