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BEFORE THE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF

ENVIROCARE OF UTAH, INC. Docket No. 04008989

APPLICATION FOR BY-PRODUCT
MATERIAL WASTE DISPOSAL LICENSE

APPLICANT'S ANSWER TO REQUEST FOR HEARING
OF KERR-MCGEE CHEMICAL CORPORATION

Applicant, Envirocare of Utah, Inc., by its undersigned counsel, pursuant to 10 CFR 2.714 and the Order of the Atomic Safety and Licensing Board, submits its Answer to the Kerr-McGee Request for Hearing.

INTRODUCTION

Applicant Envirocare of Utah, Inc. ("Envirocare") has applied for a license to accept uranium and thorium byproduct material from other persons for disposal at a site near Clive, Utah. The U.S. Nuclear Regulatory Commission published its Notice of Receipt of Application for Byproduct Material Waste Disposal License in this matter on January 25, 1991 (56 Fed.Reg. 2959). On February 25, 1991, Kerr-McGee Chemical Corporation ("Kerr-McGee") filed its Request for Hearing.

Kerr-McGee's Request for Hearing substantially misunderstands or misrepresents the character of this proceeding and the factual and legal matters at issue. A reading of Kerr-McGee's Request for Hearing would suggest that the paramount issue for determination is whether or not the thorium mill wastes located at Kerr-McGee's former thorium mill in West Chicago, Illinois should be shipped to Envirocare's facility in

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Utah for disposal. That issue will not even be addressed in this proceeding.

Envirocare's Application for a license from the NRC is not directed at the West Chicago thorium wastes, nor will this proceeding consider whether or not those specific wastes should be shipped to Envirocare's facility. If that issue must be determined at some future date, it will be decided in an entirely separate proceeding, before the State of Illinois or before the NRC.

Envirocare has received inquiries from numerous parties throughout the United States who are seeking a licensed facility to accept and dispose of byproduct materials. If and when the Envirocare facility is licensed to receive such materials, Envirocare will serve many customers, including governmental entities. The merits of Envirocare's application for a license and the ultimate success of Envirocare's operations are not in any way contingent upon the disposition of the West Chicago thorium wastes.

As argued below, when this proceeding is viewed in its proper context, it becomes clear that Kerr-McGee has no standing to request a hearing or to participate as a party in this licensing proceeding. The interests which Kerr-McGee seeks to protect are not at issue in this proceeding, and Kerr-McGee will have ample opportunities to advance or defend its interests in other, appropriate proceedings.

I. Kerr-McGee Has No Standing Here Because Its Asserted Financial Interests Do Not Fall Inside The Zone of Interests To Be Protected.

In its Request for Hearing, Kerr-McGee asserts two kinds of financial interests in this proceeding. First, Kerr-McGee suggests that an improper licensing decision "might subject Kerr-McGee to

potential liability for claims arising under state tort law and federal and state environmental statutes." Kerr-McGee Request for Hearing, p. 6. Secondly, Kerr-McGee asserts a significant financial stake in that it would be more expensive for Kerr-McGee to transport the West Chicago thorium wastes to the Envirocare site rather than disposing of those materials on site in West Chicago. Id. Prior rulings of the NRC make clear that neither of Kerr-McGee's purported financial interests are sufficient to create standing for Kerr-McGee in this proceeding.

The basic standards which control standing to intervene or to request a hearing as an affected person were clearly stated many years ago by the Nuclear Regulatory Commission:

> Intervention as a matter of right in NRC domestic licensing proceedings is governed by the judicial standing doctrine which requires petitioner to allege both (1) some injury that has occurred or will probably result from the action involved to the person asserting it and (2) an interest "arguably within the zone of interest" protected by the statute.
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> Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976)

Kerr-McGee's first asserted interest, that it may be affected through the imposition of liability on Kerr-McGee for unsafe disposal of the West Chicago thorium wastes, is both factually and legally inadequate. To begin with, the alleged injury is much too speculative and vague to constitute an "injury in fact," the first element of standing. Factually, Kerr-McGee's asserted injury occurs only if it is assumed (1) that the West Chicago wastes are shipped to Envirocare for disposal (a matter which is not at issue in this proceeding), (2) that the waste is disposed of in an unsafe and improper manner, and (3) that

legal liability could be imposed upon Kerr-McGee, as a customer of Envirocare, notwithstanding the fact that Envirocare was specifically licensed to receive and dispose of such materials.

Such speculative injury, contingent upon numerous remote actions which are not the subject of this proceeding, do not constitute injury in fact. As was stated in Washington Public Power Supply System (WPPSS Nuclear Project, Nos. 3 and 5), LBP-75-2, 1 NRC 21, 33 (1975):

> Here, the petitioner alleges only the possibility of economic injury, which depends, in turn, upon the happening of such future event which may or may not ultimately occur.... Such allegations are insufficient to support standing.

Not only is Kerr-McGee's asserted interest and injury too speculative, but its asserted interest amounts to no more than a generalized grievance. Kerr-McGee is not now a customer of Envirocare and will not become a customer unless Envirocare is properly licensed here and Kerr-McGee later chooses to or is ordered to ship its wastes to Envirocare. If Kerr-McGee can establish standing based only upon its general concern for future liability, then every generator of byproduct material or low-level radioactive waste would have standing to intervene in every licensing proceeding relating to any disposal facility. The NRC has never recognized such unlimited standing.

> It has been established in Commission practice that a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.
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> Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit No. 1) DLI-83-25, 18 NRC 327, 333 (1983).

Finally, even if it is conceded, for the purpose of argument, that Kerr-McGee's concern for future liability does rise to the level of an

injury in fact, that injury falls outside the zone of interests protected by the statutes which govern this proceeding, thus failing the second test for standing. Portland General Electric Company, supra, 4 NRC at 610.

In Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976), the petitioner, Sun Ship, sought party status on the basis of its concern that, if the facility were licensed and an accident later occurred because of the failure of components manufactured by Sun Ship, Sun Ship might suffer damage to its reputation as well as personal injury and property damage liability. 4 NRC at 102. The Licensing Appeal Board rejected this claimed basis for standing.

> ...Sun Ship's asserted "concern" for the safety of the facility stems entirely from its interest in protecting its business reputation and avoiding possible damage claims. But we have been pointed to nothing in the terms or legislative hisrory of the Atomic Energy Act which might provide even a wobbly underpinning for a suggestion that the statutory health and safety provisions had - - even as a secondary purpose - - furtherance of an interest of that character.
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> 4 NRC at 105-106 (footnotes omitted).

Therefore, Kerr-McGee's "concern" regarding potential future liability is insufficient to confer standing upon Kerr-McGee in this proceeding. Kerr-McGee's asserted injury is too speculative, is contingent upon events unrelated to this licensing proceeding, is too generalized and falls outside the zone of interests to be protected by the governing statutes.

Kerr-McGee's second asserted economic interest, that it would be more expensive to ship the West Chicago thorium wastes to Envirocare's

facility in Utah as compared to on-site disposal, is similarly inadequate to confer standing.

Again, it must be emphasized that this proceeding will not consider, let alone determine, whether or not Kerr-McGee should transport the West Chicago wastes to Envirocare for disposal. Whether Kerr-McGee will be permitted to proceed wi its proposed on-site disposal or will be directed to consider other methods of disposal is the subject of several separate, currently pending administrative and judicial proceedings. This proceeding will determine only whether or not Envirocare will be licensed to receive byproduct materials from other persons for disposal, and Envirocare will pursue its application for a license regardless of the outcome of Kerr-McGee's efforts to obtain approval for its on-site disposal plan.

Clearly, Envirocare's facility could be licensed, operated for a period of years and ultimately closed without ever causing any impact on Kerr-McGee's interests. Kerr-McGee will be affected only if the State of Illinois or NRC later orders Kerr-McGee to dispose of its West Chicago thorium wastes at some site other than the mill site, and only if Envirocare is ultimately selected as the disposal site.

Because the economic injury which Kerr-McGee asserts will flow not from the NRC's action in this licensing proceeding but from a separate decision by the State of Illinois or NRC in independent proceedings, Kerr-McGee has failed to demonstrate the first criterion for standing, injury in fact "from the action involved," that being the licensing of Envirocare. Portland General Electric Company, supra, 4 NRC at 610.

Further, even if it is accepted, for the purposes of argument here, that Kerr-McGee's asserted economic injury will flow directly

from licensing of the Envirocare facility, Kerr-McGee's claim for standing still fails because the asserted injury is not within the zone of interests protected by the governing statutes:

> [I]t is now settled that an interest which is purely economic in character does not confer standing to intervene under the Atomic Energy Act; nor is threatened economic harm sufficient to invoke the National Environmental Policy Act unless (as is not alleged here) that harm "will or may be occasioned by the impact that the Federal action under consideration would or might have upon the environment."

Houston Lighting and Power Company (Allens Creek Nuclear Generation Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); see also Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Washington Public Power Supply System, supra, 1 NRC at 35. For example, a commercial fisherman may have standing as a result of economic injuries caused by the destruction of stocks of fish due to the environmental impact of the proposed action. Washington Public Power Supply System, 1 NRC at 35-36.

Here, there is no pretense that Kerr-McGee's asserted economic injury will flow from any environmental impact. Kerr-McGee merely complains (prematurely) that it may be forced to spend more money to transport the thorium wastes to Utah. Pursuant to clearly enunciated NRC decisions, this claimed economic injury does not fall within the zone of interests of the Atomic Energy Act or National Environmental Policy Act and is insufficient to confer standing upon Kerr-McGee.

II. Kerr-McGee's Expressed Devotion To Public Health And Safety Is Also Inadequate To Confer Standing.

Kerr-McGee's Request for Hearing also suggests that it seeks party status in this proceeding in order to protect public health, safety and the environment. Kerr-McGee's concern for public health and safety is actually expressed as one of the aspects of the proceeding as to which Kerr-McGee requests a hearing. Because the economic interests asserted by Kerr-McGee as the basis for its standing are inadequate, it is not necessary to consider the issues which Kerr-McGee wishes to contest at a hearing. However, even if Kerr-McGee's interest in the public health and safety and the well being of the environment had been expressly asserted as the basis for Kerr-McGee's standing, these interests too would be inadequate.

Nowhere in its Request for Hearing does Kerr-McGee allege that Kerr McGee's health and safety will be affected by the licensing of the Envirocare facility. Given the remoteness of the Envirocare site from Kerr-McGee's holdings, such an allegation would carry no weight.

Controlling decisions make clear that the petitioner must itself have suffered or be likely to suffer the injury in order to claim standing. The "injury in fact" test requires that the party seeking standing be itself among the injured. Sierra Club v. Morton, 405 U.S. 727, 734-735, 31 L.Ed.2d 636, 643, 92 S.Ct. 1361 (1972). Generalized grievances shared by a large class of persons do not create standing. Metropolitan Edison Company, supra, 18 NRC at 332-333.

Therefore, Kerr-McGee's general concern for public health and safety and the environment is inadequate to confer standing in this matter.

III. Kerr-McGee's Participation In This Proceeding Is Unnecessary To Protect Kerr-McGee's Interests And Would Be Unnecessarily Dilatory and Expensive.

Contrary to the assertions of Kerr-McGee's Request for Hearing, Kerr-McGee's interests will not be affected by this proceeding. Plainly, Kerr-McGee's concerns arise only because of its fear that it may someday be ordered to dispose of the West Chicago thorium wastes by shipment to an off-site facility instead of proceeding with its own plan for on-site disposal. Again, disposition of the West Chicago thorium wastes is not the subject of this proceeding. Kerr-McGee will have ample opportunity to protect its interests regarding the West Chicago clean-up in other, appropriate proceedings.

It is important for the Board to take note of the fact that no other party has requested a hearing in this proceeding. The Board should also be aware, as set forth in Envirocare's Application, that the Envirocare site is extremely remote from populated areas, is ideally situated in terms of hydrology and geology, and is already licensed by appropriate governmental authorities for the receipt and disposal of other radioactive and hazardous materials. It is Envirocare's position, apparently shared by the rest of the interested community, that no hearing is necessary on this Application for License.

On the other hand, it is plain that Kerr-McGee seeks to participate in this proceeding solely to advance Kerr-McGee's own agenda, that being the obstruction and delay of licensing of any facility which might eventually provide an alternative to Kerr-McGee's preferred on-site disposal of the West Chicago thorium wastes. In its effort to avoid such potential competition, Kerr-McGee would prevent or delay the licensing of Envirocare's facility, notwithstanding the fact that there are many other parties who presently possess byproduct

materials and who are extremely interested in contracting with Envirocare for disposal of such materials.

Kerr-McGee's effort to shift the focus of this proceeding from the general issue of Envirocare's suitability for licensing to Kerr-McGee's narrow issue of the disposition of the West Chicago thorium wastes demonstrates that Kerr-McGee seeks only to confuse the issues appropriately presented in this licensing proceeding and to delay at all costs the issuance of a license to Envirocare. Kerr-McGee's desperation is also reflected in its baseless argument that the shipment of byproduct materials from other states to Envirocare's Utah facility would contravene federal policy, citing the Low-Level Radioactive Waste Policy Act, 42 USC 2021c, 2021d. The Low-Level Act, of course, specifically exempts byproduct materials from the statute's reach. 42 USC 2021b(9).

In truth, Kerr-McGee's participation in this matter will succeed only in increasing the cost to Envirocare and the NRC and in delaying the availability of Envirocare's site to the numerous parties anxious to transport waste there for disposal. Far from assisting in the development of a sound record in this proceeding, Kerr-McGee's participation will serve only to inappropriately broaden and delay the proceeding.

CONCLUSION

For the reasons stated above, Kerr-McGee cannot establish standing to request a hearing in this proceeding. Kerr-McGee can adequately protect its interests in other, appropriate proceedings before the NRC, the State of Illinois or in the courts. Moreover, Kerr-McGee's

participation in this proceeding will serve only to broaden the issues and delay the proceeding.

In these circumstances, this Board should deny Kerr-McGee's Request for Hearing.

Respectfully submitted this 25th day of March, 1991.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of March, 1991, mailed a true and correct copy of the foregoing Applicant's Answer to Request for Hearing of Kerr-McGee Chemical Corporation, being properly addressed and bearing proper postage, to the following:

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