

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	
KERR-MCGEE CHEMICAL CORPORATION	}	Docket No. 40-2061-ML
(West Chicago Rare Earths Facility)	}	ASLBP No. 84-495-01-ML

NRC STAFF RESPONSE TO KERR-MCGEE CONTENTIONS

By letter dated January 20, 1984, submitted to the Board in conjunction with its responses to contentions filed by the Illinois Attorney General (Illinois) and the West Chicago Chamber of Commerce (Chamber) Kerr McGee (KM) has raised three contentions that it now wishes to have litigated in this proceeding. Contention 1 would ask the Board to determine whether alternative I meets all NRC and EPA regulatory requirements for disposal of the thorium plant wastes, and to find that final disposal of those wastes at the West Chicago site is authorized at this time. If this contention is accepted by the Board, KM will urge a Board decision and order that would require the NRC Staff to authorize disposal of the waste onsite. This result would be contrary to the major conclusion of the FES, which recommended storage only at the present time, deferring to a much later date the issue of onsite disposal. Contentions 2 and 3 raise relatively minor technical issues. These contentions are not raised merely in reply to the Illinois and Chamber petitions and contentions. KM has filed separate and complete responses to those petitions and contentions. Further, the KM contentions brings up issues that are not

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otherwise raised in this proceeding in timely petitions. None of the Illinois or Chamber contentions on the FES raise the issue of the staff's denial of the KM proposal, nor are the two technical issues embedded in the Illinois or Chamber contentions on the decommissioning plan.^{1/}

The NRC Staff urges the Board to reject these three KM contentions for the following reasons:

1. The letter is the functional equivalent of a late filed request for a hearing on a denial of the Applicant's proposal. As such it is considerably out of time, and with no justification for its lateness. The FES, on pages 1-7 and 1-8 states, without equivocation, that the NRC Staff would only license storage under the conditions stated in the FES published in May 1983. The Notice of Opportunity for a Hearing, issued shortly thereafter, on June 7, 1983 (48 FR 26831) stated that the licensee (KM) may file a request for a hearing by July 11, 1983. No request was filed by KM. Accordingly, KM has waived its

^{1/} The petitioner's, and other persons who could intervene, have had no previous notice of KM's intent to take issue with the NRC Staff's basic licensing decision as noticed in the FES. The NRC Staff believes that if the KM contentions are admitted a new and revised Notice of Hearing should issue, so that others who may not have petitioned on the assumption that the NRC Staff's licensing decision was uncontested, may have an opportunity to do so.

opportunity and right to challenge the NRC Staff's denial of its proposal (alternative I) in favor of the NRC Staff's licensing choice (alternative III).

That parties can and do waive rights in hearings is recognized in Commission practice. See e.g., Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) LBP-82-115, 16 NRC 1923 (1982); Toledo Edison Company et al. (Davis Besse Nuclear Power Station, Unit 1) LBP-75-40, 2 NRC 125, 128-129 (1975). KM's waiver of their right to a hearing is not curable now by submitting what amounts to a very late petition for a hearing on issues of specific interest to KM. Moreover, this is not a case of late intervention, to which the factors enumerated 10 CFR 2.714(a)(1) would apply,^{2/} since KM, as the licensee affected by the proceeding initiated by Illinois and Chamber petitions, has participated as a party since the first request by Illinois for a hearing.

KM is not a naive intervenor coming late to a proceeding out of procedural ignorance. For example, as early as July 22, 1983 KM, represented by competent counsel, filed an answer to the Illinois petition in which it suggested that all parties who

^{2/} Even if it is considered appropriate to apply the factors in 10 CFR 2.714(a)(1) the contentions should be denied as inexcusably late and disruptive. See Project Management Corporation et al. (Clinch River Breeder Reactor Plant) ALAB-354, 4 NRC 383 (1976).

have filed petitions to intervene submit final contentions by August 15, 1983. Again, on August 17, 1983, KM filed a lengthy answer to the West Chicago Chamber of Commerce petition in which it noted that, "All hearing petitions have now been submitted," and suggested an informal proceeding, showing in the process a high degree of knowledge of NRC law and procedure. Under these facts it is reasonable to conclude that KM knowingly waived its right to a hearing on the staff's selection of Alternative III for licensing. The proceeding taking place now is due solely to the fact that two third party intervenors requested it. Having failed to file its own request for a hearing in time, KM should not now be allowed to freight on their petitions.

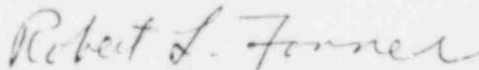
2. The contentions raised by KM are also outside the scope of the proceeding ordered by the Commission. It is firmly established in Commission practice that licensing boards act only upon an express or necessarily implicit delegation of authority. See e.g., Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1) LBP-81-60 14 NRC 1724, 1727 (1981); Public Service Company of Indiana Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2) ALAB-316, 3 NRC 167 (1976). The Commission's Order of November 4, 1983 referred to this Board for hearing only those petitions that were then before the Commission. As the Commission itself has noted, 10 CFR Part 2, Subpart G hearings on materials licensing matters are discretionary, and authority is given to the licensing boards only on a case by case basis by express

delegation. Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-92-2, 15 NRC 232 (1982). In this case it is clear on the record that only the petitions and contentions of Illinois and the Chamber have been referred to this Board by the Commission, and only the contentions raised in those petitions (as subsequently amended pursuant to the Board's order of December 6, 1983) that are admitted as valid contentions are within the authority of this Board to adjudicate. Accordingly, the Board has no authority and no discretion to admit the KM contentions.

Conclusion

For the reasons given above the NRC Staff objects to the contentions raised in the KM letter of January 20, 1983, and requests the Board to deny the contentions and to strike the letter from the record.

Respectfully submitted,



Robert L. Fonner
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 31st day of January 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO KERR-MCGEE CONTENTIONS" dated January 31, 1984 in the above-captioned proceeding, have been served on the following, by deposit in the United States mail first class, or as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 31st day of January, 1984:

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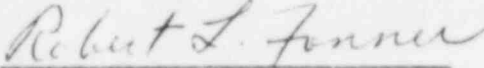
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