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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. W. Reed Johnson
Howard A. Wilber

January 7, 1987

In the Matter of	
KERR-McGEE CHEMICAL CORPORATION	Docket No. 40-2061-SC
(Kress Creek Decontamination)	

MEMORANDUM AND ORDER

Appellee Kerr-McGee Chemical Corporation has moved (on November 21, 1986) for reconsideration, or alternatively referral to the Commission, of our November 13, 1986, Memorandum and Order (unpublished) holding the NRC staff's appeal in this proceeding in abeyance. Kerr-McGee seeks an expeditious decision in that appeal -- i.e., before the NRC transfers its jurisdiction over the subject matter of this show cause proceeding to the State of Illinois pursuant to an agreement authorized by section 274 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021.

Our November 13 Memorandum and Order thoroughly addressed Kerr-McGee's initial Motion for an Expedited Decision (October 16, 1986). In brief, the NRC staff had advised us that in the near future it would move to "terminate" this proceeding, which the staff initiated and

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in which it is now the appellant.[1] Kerr-McGee (which prevailed before the Licensing Board), however, seeks a prompt "final" decision (presumably in its favor) that assertedly could be legally binding in any future proceeding involving the same issues that might be brought against Kerr-McGee in Illinois or elsewhere. For our part, we are simply reluctant to devote additional NRC resources to a complicated matter over which the agency is about to yield its jurisdiction. See infra note 3.

Kerr-McGee's motion for reconsideration expands on its previous arguments but adds nothing to compel a change in our decision to hold this proceeding in abeyance. When the staff does move to terminate,[2] however, we would be willing to consider a request to do only that (i.e., terminate) and to decline to vacate either the Licensing Board's initial decision or the show cause order that initiated this proceeding. Ordinarily, when an applicant for a nuclear facility construction permit or operating license seeks to

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[1] The staff has not indicated that it would "withdraw its appeal" -- action that would have consequences different from "termination" of the proceeding.

[2] In response to Kerr-McGee's motion and certain questions we posed in our Order of December 3, 1986 (unpublished), the staff states that the agreement with Illinois is now likely to be executed by early March 1987. We assume that the staff's motion will follow soon thereafter.

terminate an ongoing licensing proceeding and withdraws its application while on appeal, we vacate the underlying licensing board decisions on the ground of mootness. See Rochester Gas and Electric Corp. (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867, 869 (1980). As explained in Sterling, this action is necessary in order to eliminate the authorization for the issuance of a permit (so that the ministerial act of revoking the permit can be performed) and is "dictated by considerations of fundamental fairness" to those who might have challenged that authorization. Id. at 869, 868.

In this proceeding, however, maintaining the status quo may be more appropriate than vacating the Licensing Board's decision and/or the show cause order. In the first place, unlike other proceedings involving motions to terminate, this proceeding would not really be moot in the usual sense -- i.e., lacking in controversy. Lacking instead would be the legal authority for us to act, once the NRC executes the agreement transferring jurisdiction to Illinois.[3] Moreover,

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[3] The staff states unequivocally that the subject matter of this proceeding, which the staff initiated, is "source material" and that regulatory authority over it will be transferred to the State of Illinois. Whether the staff has correctly characterized the material involved here is neither evident from the record below nor relevant to the matter now at hand. If the NRC staff says it is transferring its jurisdiction over this proceeding, we

(Footnote Continued)

because the Licensing Board's decision is so limited to the special facts of this case, there is no need for the concern about its precedential impact on other Commission cases that has prompted vacation of board decisions in other proceedings. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54-55 (1978). Finally, and perhaps most important, equitable considerations here appear to militate against vacating the Licensing Board's decision. To be sure, we see no impediment to a staff motion to terminate this proceeding as a consequence of its transfer agreement, and we have the discretion to defer further consideration of the staff's appeal pending the filing of such motion. But, at the same time, it seems unfair to deprive Kerr-McGee of the successful defense of its activities before the Licensing Board by abrogating that decision. Simply terminating the case as it stands following that Board's decision -- neither affirming nor reversing on appeal -- may present a reasonable solution to this dilemma. Decisionmakers in any possible future proceedings could then determine the legal

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(Footnote Continued)
perceive no basis on which to conclude otherwise and must accept that claim.

effect of the Licensing Board's decision -- a matter on which we have no cause to speculate.[4]

In any event, as we stressed in our November 13 Memorandum and Order (at 4), at this time we are merely deferring consideration of the staff's appeal. When the staff actually moves to terminate this proceeding, we will then consider exactly what action might be appropriate in the circumstances, and we expect the parties to address that in their pleadings.

As for Kerr-McGee's alternative request to refer this matter to the Commission, movant merely recites the criteria of 10 C.F.R. § 2.730(f) required for such action -- i.e., prevention of (a) detriment to the public interest or (b) unusual delay or expense. It wholly fails to explain or to show how either criterion is satisfied here, nor is this self-evident.

Kerr-McGee's motion for reconsideration, or referral, of our November 13, 1986, Memorandum and Order holding this proceeding in abeyance is denied.

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[4] We can see no basis for Kerr-McGee's assumption that, in the event of some future legal proceeding in another forum involving Kress Creek, it would be deprived of its due process rights.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board