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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 ASLBP No. 83-495-01-ML
(West Chicago Rare Earths Facility)	

KERR-MCGEE'S RESPONSE TO VIEWS OF THE STAFF AND THE STATE REGARDING THE BOARD'S PROPOSED HEARING SCHEDULE

On January 23, 1985, this Board issued an order directing the NRC Staff to prepare and circulate a Supplement to the Final Environmental Statement in the above-captioned proceeding. The Staff has indicated that it expects to complete the Draft Supplemental Environmental Statement ("DSES") in July 1986, at which time it will be circulated for public comment. The Final Supplemental Environmental Statement ("FSES") is then expected in March 1987. In order to expedite the proceeding, the Board has proposed that the hearing commence after the DSES is completed, rather than awaiting the FSES.

On October 4, 1985 Kerr-McGee filed its response supporting the Board's proposal. Kerr-McGee asserted that the Board's proposal is consistent with both the letter and spirit of the National Environmental Policy Act ("NEPA"), and implicitly authorized by Commission regulations.

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Kerr-McGee also asserted that this Board has the authority to exempt these proceedings from the application of 10 C.F.R. § 51.104(a) and that an exemption is appropriate under the criteria set forth in Section 51.6.

The NRC Staff and the State have each filed responses opposing the Board's proposed hearing schedule. The Staff maintains that the Board cannot proceed with early hearings unless the Commission grants a wiaver of Section 51.104(a), pursuant to 10 C.F.R. § 2.758, and that Kerr-McGee has failed to meet the burden of proof necessary to obtain the waiver. The State requests that the Board delay all further proceedings until its litigation against Kerr-McGee in the Illinois State Court is complete. In the alternative, the State requests that the Board await issuance of the DSES before addressing the waiver question. They contend that, depending on the nature of the DSES, early hearings may compromise the comment period.

On October 15, 1985, this Board ordered that "[b]ecause points have been made in some responses which are not addressed in others, each party may reply to the responses of others." Kerr-McGee hereby submits its response to the views of the Staff and the State.

As more fully addressed, infra, it is Kerr-McGee's position that the Board's proposal for early hearings is supported by case law. Furthermore, in a license amendment

proceeding, 10 C.F.R. § 51.6, not section 2.758, sets forth the applicable standards for granting an exemption from the requirements of section 51.104(a). In addition, since the pending state litigation cannot render these proceedings moot, we reject the State's view that the license amendment hearings should be postponed until after the resolution of the pending state court litigation. Finally, contrary to the State's assertion, commencing hearing upon issuance of the DSES will not compromise the purpose of the comment period.

I. CASE LAW SUPPORTS THE BOARD'S PROPOSAL FOR EARLY HEARINGS

In Philadelphia Electric Company, (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 862-66 (1984), the Appeal Board upheld a Licensing Board's decision to waive the requirements of Section 51.104(a) and conduct operating license hearings prior to issuance of the DES, reasoning that (1) the Licensing Board's decision did not violate the National Environmental Policy Act ("NEPA"),[1/] and (2) early hearings did not result in prejudice. Ignoring the express holding, the Staff interprets Limerick as a bar

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1/ See also, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93-94 (1st Cir. 1978)

to this Board's proposal to conduct hearings after issuance of the DSES.

To the contrary, the decision in Limerick authorizes the Board's proposed action in this case. The Appeal Board expressly recognized that Licensing Boards have the discretion to relax or modify the application of a procedural rule such as 10 C.F.R. § 51.104, when the ends of justice require it. 20 NRC at 864. Moreover, here, as in Limerick, early hearings will not prejudice the fairness of the adjudicatory process. The issues to be litigated have been extensively briefed and argued and have been the subject of intensive discovery. 20 NRC at 865. Indeed, the instant case has far less potential for prejudice than Limerick since, in contrast to that case, these proceedings will have the benefit of a DES, a FES, and the DSES.

In an attempt to distinguish Limerick from the instant case, the Staff asserts that the result would have been different if the case had been decided under present section 51.104(a) rather than its predecessor section 51.52(a). There is no merit to this argument; the provision in former section 51.52(a) which prevented the Staff from asserting its position on NEPA issues at an adjudicatory hearing until the FES was filed, reappears without substantive change in present section 51.104(a). Compare section

51.52(a) (1982) with Section 51.104(a) (1984).[1] Indeed, if anything, the relevant NEPA regulation has been relaxed since Limerick was decided.[2]

1/ Former section 51.52(a) provided, in pertinent part

> In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft environmental impact statement will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public. (Emphasis added.)

Current section 51.104(a) similarly states:

> (a)(1) In any proceeding in which (i) a hearing is held on the proposed action, (ii) a final environmental impact statement has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA and this subpart are in issue, the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public. (Emphasis added.)

2/ The 1984 revisions repealed the provision in former section 51.52(b) requiring that the FES be offered into evidence at hearing. See 10 C.F.R. § 51.52(b) (Jan. 1984 Rev.). Under present law, the Staff has discretion whether to introduce the FES. See Section 51.104(a). This change implies that while the FES will generally precede the hearing as a matter of procedure, Limerick, 20 NRC at 864 n.43, the FES cannot be considered an indispensable substantive element of the hearing.

The holding in Limerick makes it clear that Section 51.104 is a procedural rule "adopted for the orderly transaction of business" before the Board. 20 NRC at 864. Accordingly, this Board has the discretion under Limerick to waive the application of Section 51.104(a) and proceed with hearings upon issuance of the DSES. See also, 10 C.F.R. §§ 51.15, 2.718; Kerr-McGee's Response to Board's Proposal, 6-7 (Oct. 4, 1985).

II. THE DECISION WHETHER TO EXEMPT THE HEARING FROM APPLICATION OF SECTION 51.104(a) IS GOVERNED NOT BY SECTION 2.758, BUT BY SECTION 51.6

In its response to the Board's inquiry, Kerr-McGee asserted that the standard for waiving section 51.104(a) is found in Section 51.6.[1/] Because the Board's proposed hearing schedule is authorized by law and in the public interest, the Board is authorized to exempt these proceedings from the application of section 51.104(a). See, Kerr-McGee's Response to Board's Proposal, 4-7 (Oct. 4, 1985).

1/ That section provides:

> The Commission may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and are otherwise in the public interest.

The Staff asserts that the standard for waiver is governed by 10 C.F.R. § 2.758, rather than section 51.6, and that Kerr-McGee must therefore establish "special circumstances . . . [showing] that the application of [Section 51.104(a)] would not serve the purposes for which the . . . regulation was adopted." 10 C.F.R. § 2.758(b). Section 2.758 is inapplicable to the instant proceedings, however, since by its terms that section is applicable only in initial licensing proceedings. Section 2.758(b) provides in relevant part

> A party to an adjudicatory proceeding involving initial licensing . . . may petition that the application of a specified Commission rule or regulation [issued in its program for the licensing and regulation of production and litigation facilities, source material, special nuclear material or by product material] be waived or an exception made for the particular proceeding.

The West Chicago facility is already "licensed" with the meaning of the Atomic Energy Act. See 42 U.S.C. § 2014(p) (1982). These proceedings involve an amendment to a license, and accordingly, section 2.758 is inapplicable.

In Chotin Towing Corp. v. Federal Power Commission, 250 F.2d 394 (D.C. Cir. 1957), the D.C. Circuit held that, absent a statutory definition, the common sense meaning of initial licensing "would suggest that '[a]n application to . . . modify all or part of * * * existing rights and obligations established in an outstanding license is not an

application for an initial license.'" Id. at 395 (emphasis added).[1/] Section 2.758 must be interpreted so as to give effect to each word; yet "[i]f all applications by licensees are to be considered applications for 'initial' licenses, the . . . word 'initial' is mere surplusage." Id. Since the Commission limited the application of section 2.758 to "initial licensing" proceedings, it is reasonable to conclude that the Commission intended that exemptions in other proceedings involving NEPA regulations be covered by section 51.6.[2/]

Rather than render the Commission's limiting language superfluous, and frustrate the purpose of section 51.6, this Board should appropriately limit the application

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1/ The fact that Chotin was concerned with interpreting the term "initial licensing" found in Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 1007, in no way alters the common sense meaning of the term.

2/ Furthermore, Subpart G of Part 2, which contains section 2.758, sets forth "[R]ules of General Applicability." In contrast, section 51.6 specifically authorizes exemptions from the regulations implementing NEPA. Section 2.3 expressly provides that in the event of "conflict between a general rule in Subpart G of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs." Therefore, to the extent that section 2.758 conflicts with the specific exemption authorized by section 51.6, the latter must govern. See, Federal Trade Commission v. Manager, Retail Credit Company, Miami Branch Office, 515 F.2d 988, 993 (D.C. Cir. 1975) (specific statutory provision prevails over more general provision).

of section 2.758 to initial licensing proceedings.[1/]

III. THE STATE COURT LITIGATION CANNOT RENDER THE LICENSE AMENDMENT PROCEEDINGS MOOT

The State urges the Board to postpone any hearings until after resolution of the pending state court litigation. It argues that, should the court order removal of the tailings, as the state has requested, "[a]ny permission the Commission might ultimately give to Kerr-McGee to bury the wastes onsite will [be] rendered completely ineffective . . ." State's Position on Waiver, 2 (Oct. 7, 1985). This curious "reverse preemption" argument cannot prevail in light of the recent holding in Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234 (7th Cir. 1985).[2/]

In Brown, the issue was whether the Atomic Energy Act preempted Plaintiffs' request for a state-law injunction to remove the thorium mill tailings from the West Chicago

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1/ See e.g., Duquesne Light Co. (Beaver Valley Power Station, Unit 2), ASLPB-83-490-04-02, 19 NRC 393 (1984) (initial operating license proceeding); Pacific Gas & Electric Co., (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981) (initial operating license proceeding); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 788, n.54 (1979) (construction permit proceeding); Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2) LBP-76-9, 3 NRC 205 (1976) (construction permit proceeding).

2/ The Petition for Rehearing in the Brown case was denied by the Seventh Circuit on October 24, 1985.

site. Id. The court held that where, as here, "the radiation and nonradiation hazards are inseparable, federal law preempts a state law injunction ordering removal" of the tailings. Id. at 1240. The suit for relief held preempted in Brown is virtually indistinguishable from the State's suit against Kerr-McGee. Therefore, the pending state litigation is incapable of rendering the license amendment proceedings moot. Accordingly, absolutely no purpose will be served by postponing the federal hearings until after resolution of the state litigation. Indeed, as the Board asserted at the September 26, 1985 Prehearing Conference, the "early resolution of this proceeding could be beneficial in determining to what extent an actual conflict exists between State and Federal regulation." Tr. 42.[1/]

V. COMMENCING HEARINGS UPON ISSUANCE OF THE DSES WILL NOT COMPROMISE THE OBJECTIVES OF THE COMMENT PERIOD

The State asserts that the Board should postpone considering a waiver of section 51.104(a) until after the DSES is filed because "[d]epending on the [DSES's] conclusions and the complexity or controversial nature of the bases for those conclusions, the Staff might do better to

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1/ This reasoning would also fully support a waiver of the application of section 51.104(a) under the rule announced in Limerick. 20 NRC at 864-65.

grapple with public comments at the internal administrative level . . ." prior to hearing. State's Position on Waiver, at 3. In light of the State's recent Motion to Stay Proceedings, filed October 2, 1985, Kerr-McGee submits that the State is more concerned with delaying the progress of these proceedings, for the convenience of counsel, rather than with protecting the interests of the NRC Staff.

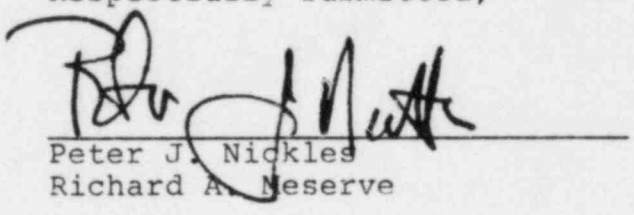
Commencing hearings upon issuance of the DSES will not compromise the Staff's ability to analyze comments. Indeed, it may make the Staff's consideration of comments all the more informed. Because the hearing process itself will further supplement the DSES, see Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), ALAB-479, 7 NRC 774, 793 (1978), the State's additional contention that expedited hearings will deprive interested persons and agencies of a meaningful opportunity for comment (State's Position on Waiver, at 2), has no legal or factual basis.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our response filed on October 4, 1985, Kerr-McGee urges this Board to exercise the authority set out in 10

C.F.R. § 51.6 to exempt these proceedings from the evidentiary rule of 10 C.F.R. § 51.104(a). The Board should schedule hearings upon issuance of the DSES.

Respectfully submitted,



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Kerr-McGee Chemical Corporation	)	Docket No. 40-2061-ML
	)	ASLSP No. 83-495-01-ML
(West Chicago Rare Earths Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Kerr-McGee Chemical Corporation's Response to Views of the Staff and the State Regarding the Board's Proposed Hearing Schedule have been served by first-class mail, postage pre-paid, on this 1st day of November, 1985, as follows:

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