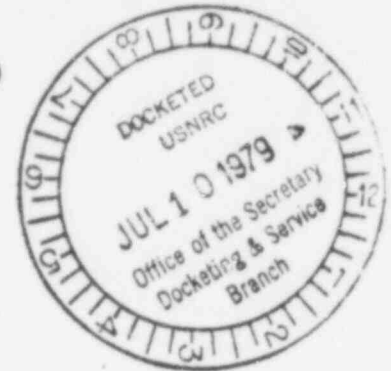


July 9, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



In the Matter of

NUCLEAR ENGINEERING COMPANY, INC.

(Sheffield, Illinois Low-Level
Radioactive Waste Disposal Site)

}
} Docket No. 27-39
}

NRC STAFF OPPOSITION TO NECO MOTION FOR RECONSIDERATION AND
CLARIFICATION OF THE COMMISSION'S NOTICE OF HEARING AND
MEMORANDUM AND ORDER OF JUNE 6, 1979

The NRC Staff opposes Nuclear Engineering Company's (NECO or Licensee) Motion for Reconsideration and Clarification of the Commission's Notice of Hearing and Memorandum and Order, issued on June 6, 1979. The Commission's Notice of Hearing and Memorandum and Order, as NECO had requested: (1) ruled on the propriety of the issue framed by the Order to Show Cause issued on March 22, 1976 by the Director, NMSS (whether NECO can unilaterally terminate its license for activities at Sheffield), and (2) referred the show cause issue to the Licensing Board considering other aspects of the Sheffield disposal site. It denied, however, NECO's request to "rescind" the immediate effectiveness of the show cause order. It did not go beyond NECO's request or pass on any issues except those necessary to rule on NECO's motion. NECO's

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complaint at this juncture is not that matters were precipitously decided, but that they were decided contrary to the position it espoused.^{1/}

The issues NECO says this Commission should not have decided were just those that the Commission had to face in determining, as NECO asked the Commission to do, whether there was a basis for an immediately effective show cause order and whether the question in the show cause order was properly framed. If this ruling "inexorably colors the remainder of the entire proceeding"

1/ As NECO itself requested in its motion of March 22, 1979 (pp. 3-4):

For the reasons discussed in detail below, the Order to Show Cause is void in failing to meet the requirements of Commission precedents such that an order can be made immediately effective. However, NECO wishes to resolve this matter as expeditiously as possible and believes that any question relating to the termination of the license can be most efficiently handled by the Licensing Board now in existence. Accordingly, NECO moves that the Commission rescind the Office of Nuclear Material Safety and Safeguards' order and refer the matter to the Licensing Board. . . .

Again at the end of its motion it requested (pp. 14-15):

. . . In any event, the Order fails to recite any imminent threat of actual harm to the public health and safety there. Accordingly, in the absence of such particularized findings or even specific allegations, the Order to Show Cause wholly lacks a sufficient basis to have issued "immediately effective," and should be rescinded in that respect.

Conclusion

For the reasons stated above, the Order of the Director should be rescinded, the issues should be redefined and the matter referred to the Atomic Safety and Licensing Board immediately. . . .

(NECO motion, p. 2), it is only because NECO asked the Commission to determine, as a preliminary matter, whether an immediately effective order should have been issued and whether the central question in this proceeding is whether NECO can unilaterally terminate its license.

I. The Commission Decided that the Director of NMSS Had Jurisdiction to Issue the Show Cause Order and Make It Immediately Effective.

The Commission determined (at pp. 4-8) that the Director of NMSS had authority to issue the subject order over NECO's objection that he did not have authority to do so. As it summed up (at p. 8):

. . . Consequently, we find that the Director acted well within his discretion in issuing an immediately effective show cause order. Furthermore, we also find that these same reasons require that the order remain in effect at least until the issues have been resolved by the Licensing Board.

Thus, it was decided by this Commission that the question to be litigated is whether NECO could unilaterally terminate its license, leave the site, and thus relieve itself of its responsibilities under its license for material it buried. No need existed to recite any authority for the proposition that a materials licensee could not act in such a manner, as this is the very issue referred to the Licensing Board for determination. Furthermore, an authoritative basis for the proposition exists in Section 184 of the Atomic Energy Act, 42 U.S.C. 2034, which provides, in part:

No license granted hereunder . . . shall be transferred, assigned or in any manner disposed of . . . unless the Commission shall, after securing full information, find the transfer is in accord with the provisions of this Act, and shall give consent in writing.

See also 10 CFR §§30.34, 40.46, and 70.36.

After NECO notified the NRC on March 8, 1979, that it was terminating its license and leaving the site, the Director of NMSS had ample authority to set down for hearing the issue of whether such action could be taken by the Licensee "without affirmative action of the Commission."

Show cause orders and the establishment of administrative hearings to consider among other matters the jurisdiction of an agency to take a particular action, have long been upheld. In Myers v. Bethlehem Co., 303 U.S. 41 (1938), the Supreme Court held that administrative agencies have jurisdiction in the first instance to hear and consider challenges to their jurisdictions, and that such challenges must first be considered in administrative proceedings before they are taken to court. See also Toilet Good Manufacturers Assn. v. Gardner, 387 U.S. 158, 162-163 (1967); Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, Inc., 400 U.S. 62, 71 (1970).^{2/}

^{2/} Thus an order to show cause providing for a hearing even when immediately effective is not a "final order" within the meaning of the Hobbs Act, 28 U.S.C. 2342(4), allowing immediate court review. See Nor-Am Agricultural Products, Inc. v. Hardin, 435 F.2d 1151 (8th Cir. 1970); Citizens for a Safe Environment v. Atomic Energy Commission, 489 F.2d 1018 (3d Cir. 1974); Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget, supra.

Under the regulations of the Commission, 10 CFR 2.202(f), and the cases a show cause order can be made immediately effective for any one of the following factors:

- The protection of the public health and safety.
- The protection of the public interest.
- The willfulness of the violations.

Cf. Administrative Procedure Act, 5 U.S.C. 558(c). As the Commission has recognized, the public health and safety need not be immediately threatened; there need only be a potential threat to those interests requiring prompt remedial action to allow the issuance of an immediately effective order. Consumers Power Co. (Midland Plant, Units 1 & 2), CLI-74-3, 7 AEC 7, 10-12 (1974). The public interest alone, without public health and safety considerations, can also, as here, support such an order. Cf. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950). Similarly, here the fact that the Licensee willfully, purposefully left the site, whether or not that conduct was unlawful, gives an independent ground for the immediately effective order. Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); Air Transport Associates v. CAB, 199 F.2d 181, 186 (D.C. Cir. 1952), certiorari denied, 344 U.S. 922 (1953). In each of the cases cited there was, of course, no conclusive finding at the time the immediately effective order was issued that the law was violated or that any moral turpitude existed, but only that the respondent

had willfully or purposefully performed acts that the authority issuing the order believed violated the law. In fact in each case the respondent particularly denied it had violated the law, but the element of willfulness allowed for an immediately effective order before any determination on the merits of the defense.

Further, as detailed by the Commission, NRC inspection of the Sheffield low-level waste disposal site had shown that NECO was not providing security at the site, that the burial trenches contained sinkholes exposing radioactive waste, and that the sumps and runoff were not being monitored for radioactive contaminants. (Commission Memorandum, p. 8). These circumstances could be expected to lead to the off-site migration of radioactive material which could expose the public (Id., p. 6). We note that not one of these facts was controverted by the affidavit submitted by NECO.

In setting down for hearing the question of whether NECO can unilaterally terminate its license, the Commission was not determining the merits of the question (Memorandum, pp. 7-8). It only determined that the Director of NMSS had jurisdiction to and did properly issue an immediately effective show cause order on the law and facts before him; i.e., that NECO had announced it was terminating its license without Commission action, and was abandoning the Sheffield site containing radioactive materials it received under license (thus converting the site to an unrestricted and uncontrolled area). See 42 U.S.C. 2234; 10 CFR 20.207.

The Commission found was no cause to pass on the ultimate issue of whether the Licensee could unilaterally renounce its license, or whether the Commission had jurisdiction to control that act. After rightly ruling that the Director of NMSS had jurisdiction and did properly notice a hearing for the Licensee to show cause why it had authority to act unilaterally, and to make that order immediately effective in the public health, safety, and interest, the Commission left for that hearing issues of whether the Licensee had authority to abandon the site and renounce its license.

No clarification of the Memorandum and Order and the Notice is needed as it is clear just which issues were and were not decided. It is also clear that the Director of NMSS issued a proper show cause order in the circumstances of this case.

II. The Commission Correctly Determined The Facts on Which the Show Cause Order Was Predicated.

The Licensee cites Consolidated Edison Co. of New York (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 175 (1973). That was a proceeding in which the Commission refused to overturn a Director's determination not to issue a show cause order. It is difficult to perceive how such a proceeding could be used to support the proposition that the Director of NMSS abused his discretion by issuing such an order. As we have previously shown under general law and the law of this Commission, the Director had authority to issue the show cause order in this case for three separate reasons:

- The protection of the public health and safety.
- The protection of the public interest.
- Because the Licensee's conduct was willful.

In any event, even applying the criteria set out in the Consolidated Edison case, the Commission (Memorandum, pp. 4-5) has found that the Director of NMSS properly issued the show cause order under the five criteria set out in that case. The first test is whether the statement of reasons given provides an adequate understanding of the decision. The show cause order of March 20, 1979, recites the fact that NECO was licensed in 1967; that application for renewal of the license was made in 1968; that the license continued in force; and that the license incorporated by reference a Manual requirement that NECO maintain the site, maintain security on the site, and conduct monitoring. It further recited that NECO announced it was terminating its license and its activities at the Sheffield site. It also recited that inspection by NRC employees had confirmed that NECO had abandoned the site, and was not complying with the terms of its license. As a further predicate for the order it was noted that under statute and Commission regulation no person may dispose of a license or their obligations thereunder except under terms and conditions established by the Commission, and that NECO's obligations remain in force. Thus, there can be no misunderstanding of the conduct which triggered the order, or of the legal premises attending its promulgation.

The next criterion listed in Consolidated Edison is whether the Director correctly understood the governing law, regulations, and policy. The Commission's Memorandum (p. 6) squarely met this issue and "found that latent conditions which may cause harm in the future are a sufficient basis for issuing an immediately effective show cause order where consequences may not be subject to correction in the future. Consumers Power Co. (Midland Plants, Units 1 & 2), CLI-74-3, 7 AEC 10-12 (1974)." The show cause order here pointed to the lack of monitoring permitting the undetected migration of radioactive materials, the lack of security permitting exposure or removal of those materials, and the deterioration of the trenches exacerbating those conditions. Each of these factors show the latent conditions which may cause harm to the public health and safety in the future and properly premise the issuance of the subject order. As the Commission held, the issuance of the show cause order was reasonable and justified "to ensure that license termination would be preceded by appropriate Commission review." (Memorandum, p. 6.)

The third criterion listed in the Consolidated Edison case is whether all necessary factors have been considered and extraneous factors excluded. NECO complains that health and safety factors were not considered. As indicated, the whole order and the recitation of conditions at the Sheffield site buttress the conclusion that NECO had to be ordered back on the site to repair the trenches, to provide security, and to monitor radioactive effluents in order to protect the public health and safety. Certainly as the show cause order itself recites, "Public safety considerations are paramount..." (p. 2).

Further, as the Commission found, the order was also premised on protecting the public interest and on the willfulness of NECO's conduct in leaving the site. Either of these, as previously detailed, of itself provides sufficient grounds for the show cause order.

NECO also maintains that the Commission has failed to consider that it buried all of the nuclear waste in accord with NRC regulations, and that this fact prevents a show cause order from issuing to test whether NECO could unilaterally terminate its license. This is a non sequitur, even if it be assumed that placing waste in shallow trenches relieves a licensee of its responsibilities. First, the order sets as the hearing issue whether NECO can unilaterally terminate its license--not whether NECO buried materials correctly. Second, one of the issues in such a proceeding may well be whether NECO has, as it maintains, buried the materials in accord with its license. The facts recited in the Commission's Memorandum, which are premised on the show cause order and the Staff's affidavits, cast substantial doubts on that supposition.^{3/} Therefore, NECO's arguments about the lack of hazards of buried waste, even if true, have no relevance to the validity of the Commission's Memorandum and Order.^{4/}

^{3/} The licensee's affidavit, based on hearsay, fails to establish any lack of risk to the public health and safety. Compare the affidavit of Dr. Michael Bell submitted by the Staff to the Commission.

^{4/} It is further noted that the licensee still has not cited any regulation which relieves one who buries waste under a Commission license of responsibility for that waste, or a regulation which would allow the licensee to renounce its license without specific Commission authorization.

From the foregoing discussion it is plain that the last two factors listed in the Consolidated Edison case have also been met. The Director made an inquiry appropriate to the facts, and his decision was not untenable on the basis of all the information before him. As indicated, he examined the law and the license, and had NRC employees inspect the site. He gathered information to make a determination. As the Commission concluded--"the Director acted well within his discretion in issuing an immediately effective show cause order." (Memorandum, p. 8.) No cause exists to reconsider any part of the Commission's Memorandum and Order or Notice of Hearing.

III. The Effect of the Commission Determination of June 6, 1979, on the Referred Proceeding.

The NRC Staff does not dispute that in this proceeding the immediate effectiveness of the show cause order is intertwined with the merits of the order itself (Commission Memorandum, p. 4, n. 1). To the extent issues were determined in the course of judging the validity of the immediate effectiveness of the show cause order or ruling on the propriety of the question set out in the order, those issues have been determined. See Toledo Edison Co. (Davis Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-378, 5 NRC 557 (1977), Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974). NECO sought to have those issues determined as a preliminary matter and is not entitled to a second bite at the apple. It is bound by the matters it presented and the determination it sought.

However, it must be emphasized there is no appealable "final order" in this proceeding at this time.^{5/} The proceeding is ongoing. The issue of whether NECO may unilaterally terminate its license without affirmative action by the Commission has been referred to the Licensing Board. The Licensing Board further has before it the request by NECO to terminate the proceedings to renew the license, and the question of what conditions, if any, should be imposed as a condition of any termination. See Licensing Board Order of May 3, 1979, Docket 27-39.

CONCLUSION

For the reasons stated above no clarification or reconsideration is needed for the Memorandum and Order or the Notice of Hearing. The Commission properly ruled on the issues presented by the parties in the course of considering the validity of the immediately effective Order to Show Cause, and referred the issue framed in the show cause order to the Licensing Board for determination.

Respectfully submitted,

for Lawrence Bronner
Edwin J. Reis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 9th day of July, 1979

^{5/} See p. 4, note 2, supra. It is plain any court action at this time will interfere with orderly agency action, as it is plain that NECO's right to unilaterally terminate its license and the ongoing proceeding without condition has not been determined. No final order has been issued. Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, Inc., supra; Citizens for a Safe Environment v. Atomic Energy Commission, supra; Dow Chemical Co. v. Ruckelshaus, 477 F.2d 1317 (8th Cir., 1973); Cf. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 592 (D.C. Cir. 1971).

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In the Matter of)
NUCLEAR ENGINEERING COMPANY, INC.) Docket No. 27-39
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO NECO MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE COMMISSION'S NOTICE OF HEARING AND MEMORANDUM AND ORDER OF JUNE 6, 1979" 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 by deposit in the Nuclear Regulatory Commission internal mail system, this 9th day of July, 1979:

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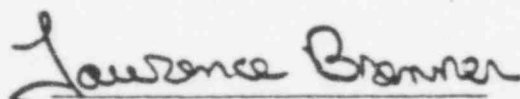
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