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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)
)
NUCLEAR ENGINEERING COMPANY, INC.) Docket No. 27-39
)
(Sheffield, Illinois Low-Level)
Radioactive Waste Disposal Site))

OBJECTIONS OF NUCLEAR ENGINEERING COMPANY, INC.
TO AMENDED CONTENTIONS OF THE STATE OF ILLINOIS
AND OPPOSITION TO MOTION FOR A PREHEARING CONFERENCE

Preliminary Statement

The State of Illinois has sought to amend its petition to intervene in this proceeding by the addition of new contentions numbered 17 through 25. These new "contentions" should be disallowed because they are not factual contentions at all, but merely restate Illinois' legal theory of the case. Although the proposed contentions vary in language, each purports to characterize, in legal terms, the alleged obligations of materials licensees generally to "decommission" a low-level waste disposal site such as Sheffield.^{1/}

None of the proposed contentions presents any facts in relation to NECO's alleged responsibilities to "decommission" the Sheffield site. While some of the legal issues presented by the proposed contentions will require resolution during the remainder of this proceeding, the purpose of contentions under the Commission's Rules of Practice is to focus the attention of the

^{1/} As we have noted in earlier pleadings, no such "decommissioning" requirements exist. See note 5, infra.

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Atomic Safety and Licensing Board ("Licensing Board") on factual matters requiring evidentiary adjudication, not simply to list legal theories.

Further, the prehearing conference requested by Illinois is clearly premature at this date, since there is still pending before the Commission the motion by Nuclear Engineering Company, Inc. ("NECO") for reconsideration and clarification of the Commission's earlier Notice of Hearing and Memorandum and Order of June 6, 1979. Until the Commission has more clearly stated the jurisdiction of this Licensing Board and defined the issues to be adjudicated, a prehearing conference would not be fully productive.

Argument

I.

To appreciate the nature of the proposed contentions urged by the State of Illinois by way of amendment, a brief review of the posture of this proceeding is necessary. By letter dated March 8, 1979, NECO gave notice to the Nuclear Regulatory Commission ("NRC" or "Commission") that it had terminated its license for activities at the Sheffield low-level radioactive waste disposal site effective that day, and further gave notice of its withdrawal of its application for license renewal and site expansion at Sheffield.

Subsequently, the Director, Office of Nuclear Material Safety and Safeguards, issued an order to show cause, effective immediately, requiring NECO to resume its activities at the Sheffield site. NECO moved that the Commission take emergency action to rescind the order as void. Although Illinois and the

NRC Staff opposed NECO's motion, all the parties agreed that the issues raised by the order to show cause could be decided by the Licensing Board already convened in this proceeding.^{2/}

The Notice of Hearing, as it presently is written, states that the issue to be considered and decided by the Board is "whether NECO can unilaterally terminate License No. 13-10042-01 for activities at Sheffield without affirmative action by the Commission." In addressing this issue, the Board can consider the legal theory posed by Illinois' proposed contentions as to whether and to what extent a materials licensee under Parts 30, 40 and 70 must, under the present rules, "decommission" a low-level waste disposal site before turning it over to the State or federal government lessor of the disposal site for perpetual care.

Accordingly, the new contentions proposed by Illinois merely redefine the overall issue to be decided by the Board in terms of Illinois' legal theory of the case. It is not the function of contentions under 10 C.F.R. §2.714(b), however, to set out legal theory. Rather, the rule requires that a contention contain a factual basis "set forth with reasonable specificity." As the Licensing Board stated in Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 221 (1976), the "one good" contention necessary for intervention must present a "litigable issue susceptible of

^{2/} As previously stated, NECO's motion for reconsideration and clarification of the Commission's Memorandum and Order is still pending.

factual determination at an evidentiary hearing." Also, in Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-77-48, 6 NRC 249, 250 (1977), for example, a number of intervenor contentions were rejected because they were conclusory and failed "to provide the necessary specificity and factual bases as required by §2.714 of the Rules of Practice." Although a contention may contain mixed questions of fact and law, Project Management Corp. (Clinch River Breeder Plant), LBP-76-14, 3 NRC 430, 432 (1976), purely legal issues are inappropriate as contentions because they will not assist the Board in focusing upon the evidentiary issues necessary to develop a sound record. We now apply these general principles to Illinois' proposed contentions in order.

In proposed Contention 17, Illinois merely paraphrases the issue as defined by the Commission's Notice of Hearing of June 6, 1979.

Proposed Contention 18 would require the Board to apply State law to determine whether NECO owns or possesses the Sheffield site. It is well established, however, that an interpretation of State law will not be undertaken by the NRC. Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977). In any event, there can be no basis under the Atomic Energy Act of 1954, as amended, or NRC regulations for the Board to adopt State law to decide whether NECO required NRC approval

to withdraw from the Sheffield site. Such an approach would directly contravene the Supremacy Clause of Article VI, cl. 2 of the Constitution as well. See Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).

Likewise, proposed Contention 19 simply reaches a legal conclusion in asserting that NECO either owns or possesses the radioactive material buried at the Sheffield site. As should be clear on the record from the number of pleadings already filed,^{3/} whether or not a materials licensee continues to "possess" buried radioactive waste is already an issue in this proceeding. The proposed contention adds nothing by way of focusing on evidentiary issues.

The remainder of proposed Contention 19 as well as proposed Contention 20 merely set forth Illinois' theory of the case, i.e., that NECO has effected or sought to effect a "transfer" of radioactive wastes to Illinois, the lessor of the Sheffield site, by its termination and withdrawal. Since NECO has expressly taken the position that radioactive wastes buried in accordance with its license and NRC regulations are no longer within its possession, it follows that there are no such wastes to "transfer" to the State of Illinois or anyone else.^{4/} Illinois cannot create a valid contention by attributing to

^{3/} See, e.g., Answer of NECO to Order to Show Cause and Demand for Hearing at 5 (March 23, 1979); Licensee's Post-Hearing Brief on Issues Arising During Oral Argument Before the Licensing Board on March 27, 1979 at 9-23 (April 3, 1979).

^{4/} See note 2, supra.

NECO a legal theory on which it has never relied. This is a simple instance of knocking down straw men.

Proposed Contention 21, insofar as it refers to legal requirements under State law, is invalid for the reasons discussed above. As it pertains to federal law, the contention is in any event wholly conclusory, asserting only that NECO is under an obligation to obey the law. Obviously, the legal issue of NECO's obligations regarding surveillance and maintenance of the Sheffield site is already pending before the Board.

The same is true of proposed Contention 22, which presents legal issues determinable by an examination of NECO's license as well as the language of the Atomic Energy Act of 1954, as amended, and pertinent NRC regulations.^{5/}

Proposed Contention 23 also is premised on the legal theory that decommissioning applies to materials licensees such as NECO. Obviously, NECO does not contend that it has developed or submitted a "decommissioning plan" for approval, since none is presently required by its license or the Commission's rules.

^{5/} See, e.g., NECO's Motion for Emergency Action By the Commission at 5 (March 22, 1979). It is also noted that nothing in the authorities cited in the proposed contention requires decommissioning. In fact, NUREG-0436 (December 1978) expressly states that the decommissioning provision applicable to nuclear reactors under Part 50, applies only to production and utilization facilities, and not to materials licensees under Parts 30, 40 and 70. While NUREG-0436 cites studies and rulemaking underway which would apply decommissioning requirements to materials licensees, nowhere does the document state any such decommissioning requirement. Likewise, the NRC Staff's "Branch Position - Low-Level Waste Burial Ground Site Closure and Stabilization

(Footnote ^{5/} continued on next page)

Proposed Contention 24 again raises issues of legal responsibility for the maintenance and surveillance of the Sheffield site. This, too, is simply a matter of construing NECO's license in connection with NRC regulations, in particular, 10 C.F.R. §20.302(b) as well as NECO's lease of the Sheffield site from the State of Illinois. Whether public health and safety responsibilities pertaining to the Sheffield site are those of NECO or the State of Illinois is therefore purely a legal issue to be determined by the Board.

Finally, proposed Contention 25, requesting that the Board order NECC to remain on the Sheffield site and perform certain surveillance and maintenance functions, is not a contention at all, but rather a prayer for relief. In its consideration of the Staff's order to show cause along the lines directed by the Commission by its previous Notice of Hearing and Memorandum and Order, as clarified, the Board will obviously act to preserve the public health and safety.

II.

Additionally, Illinois has asked that a prehearing conference be convened by the Board within 60 days in order that the Board may rule upon its newly proposed contentions. Since none of the proposed contentions will substantially assist the

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(May 17, 1979) (Rev. 1) recognizes that there are presently no "decommissioning" requirements under 10 C.F.R. Parts 30, 40 and 70. The Staff document merely states that decommissioning requirements will be proposed in 1980 rule-making. The Staff's enumerated "objectives" obviously cannot apply to NECO's activities retroactively.

Licensing Board in developing a sound evidentiary record, and each should be denied for the reasons discussed above, there is no need for a prehearing conference for a ruling upon such contentions. Second, while a prehearing conference prior to the hearing ordered by the Commission in its Notice of Hearing dated June 6, 1979 would be appropriate at some later date, it would be premature now. As noted, NECO filed on June 18, 1979 a motion for reconsideration and clarification of the Commission's Notice of Hearing and Memorandum and Order of June 6, 1979.^{6/} The motion requested the Commission to clarify whether it had decided controlling jurisdictional and other legal issues which had been addressed at length in its Notice of Hearing and Memorandum and Order. The Commission has not yet ruled upon this motion. Thus, until the Commission clarifies the mandate of this Board to proceed, a prehearing conference would not be fully productive. Once the Commission has ruled, however, a prehearing conference would then be in order.

Conclusion

The new contentions proposed by the State of Illinois raise legal points which merely recast in different language the dispositive issue already defined by the Commission's Notice of Hearing. Such legal theories are not proper contentions, which, under the Commission's Rules of Practice, require a factual basis in order to focus the Licensing Board's attention to issues that

^{6/} In addition, NECO moved on July 19, 1979 to supplement its motion for reconsideration and clarification to introduce new evidence not available at that time. By order dated July 24, 1979, the Commission granted NECO's order.

will assist it in developing a sound evidentiary record. Illinois' legal theories may, of course, be tested in the context of the pending issues. A prehearing conference to rule upon these contentions would therefore be unnecessary or at least premature at this time.

Respectfully submitted,

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July 30, 1979

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Objections of Nuclear Engineering Company, Inc. to Amended Contentions of the State of Illinois and Opposition to Motion for a Prehearing Conference," dated July 30, 1979, in the captioned matter, have been served upon the following by deposit in the United States mail, this 30th day of July, 1979:

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