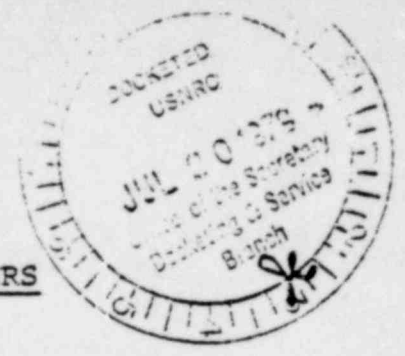


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSIONERS



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

MOTION BY NUCLEAR ENGINEERING COMPANY, INC.
TO SUPPLEMENT ITS MOTION FOR RECONSIDERATION
DATED JUNE 18, 1979

On June 18, 1979 Nuclear Engineering Company, Inc. ("NECO") filed a Motion for Reconsideration and Clarification of the Commission's Notice of Hearing and Memorandum and Order of June 6, 1979 ("Motion for Reconsideration"). NECO hereby moves to supplement its Motion for Reconsideration to introduce new evidence relevant to the matter which was produced by the Staff of the Commission pursuant to a Freedom of Information Act ("FOIA") request.

BACKGROUND

On March 20, 1979 the Staff issued an Order to Show Cause to compel NECO to resume its responsibilities and obligations under its former license for the Sheffield, Illinois Low-Level Radioactive Waste Disposal Site. The Order was made immediately effective on the grounds of the willfulness of NECO's unauthorized termination of its license and "in view of the importance to the public health and safety of the required monitoring and maintenance of the

Sheffield site."^{1/} No further statement of fact or findings were made by the Staff in accordance with the requirements of the Administrative Procedure Act 5 U.S.C. 551 and 10 C.F.R. §2.202.

As a result NECO filed Respondent's Motion for Emergency Action by the Commission and To Stay the Immediate Effectiveness of the Order to Show Cause Issued by the Director, Office of Nuclear Material Safety and Safeguards ("Motion for Emergency Action and Stay") dated March 22, 1979. This Motion sought emergency action by the Commission to rescind the Staff's Order to Show Cause as void because it was no longer a licensee and because it wholly failed to meet the requirements of the Commission's regulations both procedurally and substantively. NECO incorporates by reference all of its arguments set forth in its March 22, 1979 Motion.

On June 8, 1979 the Commission issued its Memorandum and Order and Notice of Hearing which, in referring the matter to the Licensing Board, ruled on basic jurisdictional matters at least inferentially.

Accordingly, on June 19, 1979, NECO filed its Motion for Reconsideration.

As detailed in its Motion to File Out of Time submitted herewith, NECO filed a request pursuant to the Freedom of Information Act ("FOIA") 5 U.S.C. 552 and 10 C.F.R. Part 9 on June 7, 1979. The response

^{1/} Order, p. 4

to this letter, as pertinent to this motion, was not received by NECO until July 16, 1979. The response to the FOIA request contains information from the technical staff of the Commission which reflects that the Office of Inspection and Enforcement refused to issue the Order to Show Cause on the ground that there was no health and safety concern sufficient to justify an immediately effective Order.

ARGUMENT

The response to the Freedom of Information Act request is contained in a memorandum dated March 27, 1979 from Mr. L. B. Higginbotham, Assistant Director, Division of Fuel Facility and Materials Safety Inspection, Office of Inspection and Enforcement to Mr. E. J. Reis, Assistant Chief Hearing Counsel, Office of the Executive Legal Director ("OELD"), captioned "Nuclear Engineering Company, Inc. - Recommended Order to Show Cause." ("Higginbotham Memorandum") The memorandum, a copy of which is attached, recites that Region III had prepared a draft Order to Show Cause at the request of the OELD, which was intended to supplement the March 20 Order to Show Cause.

Speaking for the Materials Division of the Office of Inspection and Enforcement, Mr. Higginbotham stated that:

"After reviewing the order and its enforcement basis . . . we do not agree that the order be issued by IE. There are several bases for this . . . (2) the "iffy" nature of the health and safety concern expressed on page 3 of the order"

The material referred to on page 3 of the draft Order to Show Cause provided:

"If the leachates in concentrations in excess of the unrestricted area MPC reach the sand lenses, and if these sand lenses are continuous, then it is likely that concentrations of radio-nuclides in water in excess of the unrestricted area MPC will reach off site areas."

These statements demonstrate that there is no technical basis or justification for making the Staff's proposed Order immediately effective on any health and safety basis.

As set forth in detail in its Motion for Emergency Action and Stay dated March 22, 1979, the Commission's legal precedents mandate that not only should orders to show cause be used sparingly, but also must contain explicit findings concerning public health and safety if they are to be made immediately effective on that basis. A causal relationship must be shown.^{2/}

The fact that the draft Order attached to the Higginbotham Memorandum prepared at the request of the Office of the Executive Legal Director ("OELD") essayed to provide the specific findings required by §2.202 reflects the understanding that such findings were essential.

Nevertheless, for reasons unexplained in any documents obtained from the Staff, the Staff chose to rush out an Order more than a week earlier, on March 20, 1979. It would appear significant that while the Office of Enforcement and Inspection refused to execute and issue an Order to Show Cause without proper findings,

^{2/} See Motion for Emergency Action and Study, pp. 5-14.

the Office of Nuclear Materials Safety and Safeguards was willing to do so, obviously with the concurrence of OELD.

It is clearly significant that the arm of the Agency with the responsibility for determining actual conditions at the site expressed the technical judgment that an immediately effective Order to Show Cause was not technically justified, whereas the headquarters personnel issued the Order totally ignoring the technical findings concerning the hazard to public health and safety required by the cited precedents.

Accordingly, it is clear that (1) procedurally the March 20 Order to Show Cause did not contain the necessary findings to support an immediately effective Order, and (2) substantively there was no immediate threat to public health and safety at Sheffield which justified such action as reflected by the technical judgment of the Office of Inspection and Enforcement.

For these reasons alone, the March 20 Order to Show Cause should be rescinded and dismissed by the Commission.

Respectfully submitted,

CONNER, MOORE & CORBER

Troy B. Conner, Jr.
Troy B. Conner, Jr.
Counsel for the Licensee

July 19, 1979

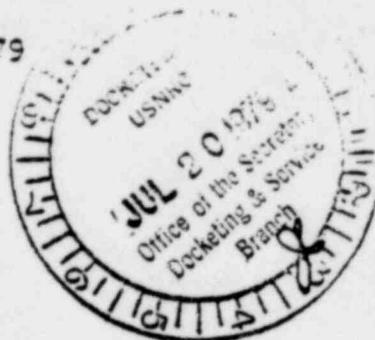
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June 7, 1979



Mr. Daniel J. Donoghue
Director
Office of Administration
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

FREEDOM OF INFORMATION ACT REQUEST

Dear Mr. Donoghue:

On May 4, 1979, Leonard Bickwit, Jr., General Counsel for the Nuclear Regulatory Commission submitted an Adjudicatory Consent Calendar Item, SECY-A-79-42, supporting Commission approval of a Memorandum and Order sustaining the immediate effectiveness of a Staff Order to Show Cause under 10 CFR 2.202 and a Notice of Hearing on that Order regarding the Nuclear Engineering Co., Inc. disposal site at Sheffield, Illinois. In his discussion, Bickwit makes reference to a March 29, 1979 memorandum on the subject to the Commission outlining the events leading up to the order issuance.

Pursuant to 10 CFR Part 9, Subpart A and 5 USC §332 (1970), we hereby request that the following records be provided for public inspection and copying:

- (1) Memorandum of March 29, 1979 from Leonard Bickwit, Jr. to the Commission regarding events leading to the NECO Order; and
- (2) any other such memoranda, work papers or analyses relating to the NECO Order to Show Cause and Notice of Hearing for the period January 1, 1979 to June 7, 1979.

DJPC 79071800707

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It is requested that the Commission provide this material in less than the 10-day maximum period provided. A petition for reconsideration of the Commission's Memorandum and Order pursuant to 10 CFR §2.771 must be filed within 10 days from the date of the Order. The requested information was presumably relied upon by the General Counsel in preparing the Order for the Commission. Accordingly, it appears significant to a motion for reconsideration to correct errors in the Order.

Thank you for your cooperation.

Sincerely,

Troy B. Conner, Jr.
Troy B. Conner, Jr.

POOR ORIGINAL