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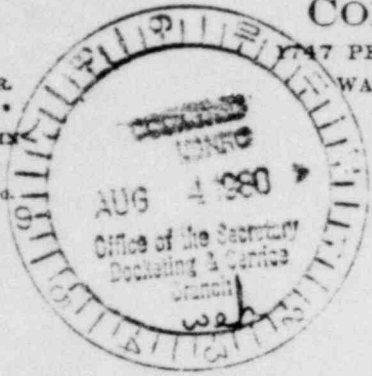
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July 31, 1980

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In the Matter of
Nuclear Engineering Company, Inc.
(Sheffield, Illinois Low-Level
Radioactive Waste Disposal Site)
Docket No. 27-39

Gentlemen and Dr. Little:

By letter dated July 8, 1980, NECO responded to the directive of the Board at the prehearing conference on June 26, 1980 that each party submit those issues it wishes to litigate in this proceeding. On July 16 and 17, 1980, the State of Illinois and the NRC Staff, respectively, also responded.

The Staff has taken the position that only one issue should be considered in addition to that which the Board was directed to hear by the Commission in its Notice of Hearing dated June 8, 1979 in this proceeding. The Staff objected to NECO's issues one and three, and substituted its own version for NECO's issue two. It did not address the appropriateness of the issues submitted by the State of Illinois. NECO hereby submits its answer to the Staff's objections and asks that its three issues be allowed.

The Staff's objections are premised on the mistaken belief that the Commission, in rendering its Notice of Hearing and Memorandum and Order, ^{1/} prohibited consideration of any issues except the one stated, in haec verba, with regard to the validity of the Staff's order to show cause issued on March 20, 1979. That proposition is entirely without merit. In fact, the

1/ See Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-77-6 9 NRC 673 (1979).

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Staff's position is plainly contradicted by its own suggestion of a second issue not designated by the Commission. But more important, the Commission itself disclaimed any intent in its prior Memorandum and Order to decide for itself, or prevent NECO from subsequently litigating before the Licensing Board, whether the NRC lacks jurisdiction to continue a license or otherwise to impose conditions on the basis that a materials licensee "possesses" source, byproduct or special nuclear material finally disposed of by burial in the soil in full compliance with license requirements. The Commission stated:

NECO's mere assertion that it could unilaterally terminate its license presents significant questions of law and policy beyond the scope of the Director to decide in the context of the need for action to protect public health and safety. NECO's novel legal theories have not been subject to scrutiny by any independent tribunal. Thus, . . . at this time we offer no opinion on NECO's legal theories^{2/}

The Commission's June 6 Memorandum and Order clearly shows that the Commission recognized that more than one issue might be raised with regard to the order to show cause. The Commission stated that the Director's order should remain in effect

. . . until the issues have been resolved by a Licensing Board. Of course, at this time we make no determination on the merits of the issues in the show-cause proceeding. If the decision on any of those issues should come before us for review, we will at that time reach our conclusion on the basis of the record then before us.^{3/}

Also, in its subsequent Memorandum and Order on NECO's motion for reconsideration and clarification,^{4/} the Commission explained at length that this Licensing Board, and not the Commission, would determine the issues to be adjudicated. It

2/ Id. at 678 (emphasis added).

3/ 9 NRC at 679.

4/ Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1 (1980).

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recounted that its prior Order "explicitly disclaimed any intention to reach a decision on the merits of the issues pending before the Licensing Board," even though the Commission may have "reached tentative views on the issues yet to be resolved."^{5/}

The Commission's Notice of Hearing likewise indicates that its designation of one issue to be decided by the Licensing Board was by no means intended to supplant or eliminate any other issue properly before the Board. The Notice recites agreement among the parties "that resolution of the issues raised by the Order to Show Cause would be most expeditiously and efficiently handled by consolidating consideration of these issues with the Licensing Board proceeding now considering NECO's application to renew its license and its subsequent motion to withdraw that application."^{6/} The Commission then stated that the issue it had framed was to be considered by this Board "[i]n addition to the issues now pending."^{7/} Accordingly, it is clear that the Commission did not intend to restrict this Board to the single issue formulated in its Memorandum and Order of June 6, 1980. Indeed, the entire thrust of that decision is that NECO should have an opportunity to present its theory of the case in terms of its own legal defenses, notwithstanding the present objections of the Staff.

The Staff's specific objections to NECO's three issues are also without merit.^{8/} Primarily, the Staff is concerned that the wording of these issues is prejudicial. Assuming arguendo, that it were so, this Board is well aware of its adjudicatory responsibilities and will apply the proper burden of proof and other appropriate rules of evidence. The Staff is, of course, free to offer whatever proof or legal arguments it wishes to rebut NECO's position. With regard to its final objection, the Staff is absolutely incorrect in suggesting that the Commission has sustained the validity of the Director's order to show cause. The Commission has made it abundantly

^{5/} Id. at 4.

^{6/} Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), Docket No. 27-39, "Notice of Hearing" (June 6, 1979) (emphasis added).

^{7/} Id.

^{8/} As noted, the Staff apparently does not object to NECO's issue two.

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clear that it merely sustained the immediate effectiveness of the order.^{9/}

NECO also believes that the issues submitted by the State of Illinois in response to the Prehearing Conference request of the Board should not be accepted for the following reasons. The State's issue one is merely a rewording of the issue designated for hearing by the Commission in its Memorandum and Order of June 6, 1979. It is therefore redundant at best.

The State of Illinois' proposed issues two through eight are wholly improper for several reasons. Basically, they seek to interject issues beyond the jurisdiction of this Board and, indeed, of the Commission, particularly with regard to attempting to settle matters relating to ownership of the site, contract law, perpetual maintenance, and the posting of bonds. None of these issues may be considered by this Board. Although there may be subsets, there are only two basic issues before the Board, i.e.:

- (1) whether NECO legally terminated its license on March 8, 1978, and hence removed itself from any jurisdiction of the NRC, and

^{9/} The Commission stated:

[W]e find that the Director acted well within his discretion in issuing an immediately effective show-cause order Of course, at this time we make no determination on the merits of the issues in the show-cause proceeding. [9 NRC at 678-79]

Later, the Commission stated:

Lest NECO or the Licensing Board labor under any misconception about this matter, we take this occasion to affirm that our June 6 Memorandum and Order addressed only NECO's request to take emergency action to rescind a Director's Order and to stay the immediate effectiveness of that Order and was issued for that purpose only Complementing this holding, we stated that we were making no determination of the merits of the issues in the Show-Cause proceeding. [11 NRC at 5]

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- (2) if not, what are the appropriate health physics measures, if any, that need be taken before NECO may quit the site.

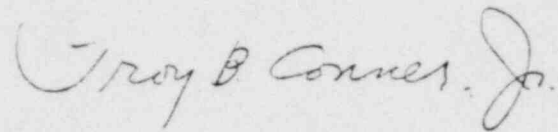
Insofar as the Federal government is concerned, the State of Illinois accepted ownership of the Sheffield site and committed to maintain that site in perpetuity upon NECO's departure, in consideration for the sums of money decided upon by the State at the time it entered into its commitments. It is not for this Board to determine whether the Illinois former Attorney General's "thinkspeak" attempt to rewrite State law and the State's commitment to the Federal government can be foisted upon a former licensee in an administrative hearing involving only licensing conditions. If, indeed, the State of Illinois wishes to pursue the former Attorney General's theories, its remedies, if any, presumably lie in Federal district court.

Further, issues two and five raise issues of public health and safety in terms so broad as to be meaningless. They fail to identify any authority or basis upon which such general propositions could even be litigated and therefore will be of no assistance in framing the issues. Issue three is improper because it assumes as a premise that NECO still has responsibilities under its NRC materials license and that NECO is seeking to "transfer" its former responsibilities as a licensee to the State. Issues four and six are subsumed within NECO's first and second issues and are therefore redundant and unnecessary. In addition to their overbreadth, issues five and seven incorrectly assume that NECO's lease agreement with the State has a "duration" beyond the time NECO determines for itself that it no longer wishes to maintain and operate the Sheffield site under its former materials license. Issue eight is also redundant and, moreover, there is no provision under the Atomic Energy Act of 1954, as amended, or under the NRC rules and regulations for providing a security bond. Under the Act it is assumed, in light of the NRC review of an applicant's qualifications, that any licensee will be financially able to carry out the requirements of its license.

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For the reasons discussed above, we respectfully submit that each of NECO's three issues should be litigated and that the issues submitted by the State of Illinois are either inappropriate or already covered by the issues designated by the Commission and/or the Staff and NECO and should not therefore be accepted.

Sincerely,

A handwritten signature in cursive script that reads "Troy B. Conner, Jr." The signature is written in dark ink and is positioned to the right of the typed name.

Troy B. Conner, Jr.

cc: Service List