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July 13, 1982

Mr. Richard E. Cunningham, Director
Division of Fuel Cycle & Material Safety
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Mr. Cunningham:

I wrote to you on May 13, 1982, advising of United Nuclear Corporation's interest in a proposed Agreement dated March 1982 which, we understood, had been submitted informally to the Nuclear Regulatory Commission by the State of Rhode Island. I then advised you that UNC might wish to comment on that draft Agreement.

UNC's Rhode Island counsel, by letter of May 28, 1982, (a copy of which was sent to you) advised the State that, in UNC's opinion, the draft Agreement violates an agreement which the State had made with UNC as part of litigation now pending in the Federal District Court in Rhode Island.

Without prejudice to the position stated in the May 28 letter, UNC now wishes to furnish its comments on the revised draft recently submitted by Rhode Island (May 1982 "Memorandum"). We would very much appreciate the Staff's consideration of these comments in connection with its review of the Rhode Island draft.

In summary, we have concluded that the proposed memorandum could not be entered into and have identified many of its serious deficiencies in the enclosed comments. It is our view that the apparent goals of the State of Rhode Island cannot be accommodated within the regime of the Atomic Energy Act and NRC regulations.

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Finally, your letter of June 7 prompts one additional comment. Then-Chairman Hendrie's letter to Governor Garrahy (dated June 12, 1981) expressed confidence that the Governor's staff and the NRC Staff "can reach agreement on mutually acceptable decontamination standards and timing for termination of the °UNC! license." I do not wish to quibble but I am sure you recognize that there can be a very real difference between "reach agreement" and "reach an agreement." In our view, Dr. Hendrie's letter does not constitute "a commitment to attempt to reach an agreement with the State of Rhode Island on acceptable decontamination standards and timing for termination of the UNC license"--the terminology used in your letter.

We are, of course, prepared to discuss this matter with you if you would find that useful.

Sincerely,

Kathleen H. Shea

Kathleen H. Shea
Attorneys for United Nuclear
Corporation

KHS/aps

Enclosure

cc: William T. Crow

July 13, 1982

Comments on Proposed Rhode Island-NRC
Memorandum of Understanding

I. Introduction

United Nuclear Corporation holds a special nuclear materials license for its Wood River Junction facility issued by the Nuclear Regulatory Commission. A letter of April 29, 1980, advised the NRC of UNC's intention to terminate its activities under the license and to formalize plans for decommissioning the facility. UNC's license has been amended and now specifies that it will not be terminated except by order of the NRC upon successful decommissioning and further requires UNC to decommission the facility and site for unrestricted subsequent use. UNC has undertaken extensive decontamination efforts at the site in accordance with established NRC criteria and has reviewed additional criteria developed by the NRC for application to other apsects of this effort. UNC has committed to complete this effort and remains committed to do so.

UNC recently received a copy of a draft document entitled "Memorandum of Understanding Between the State of Rhode Island and the U.S. Nuclear Regulatory Commission Regarding Decommissioning of UNC Recovery Systems, Wood River Junction" dated May 1982 ("Memorandum" or "MOU"). It is our understanding that this Memorandum was prepared by the State and represents the State's views

respecting the role which it wishes to play during and after UNC's decommissioning of the Wood River Junction facility. UNC further understands that this Memorandum has been furnished to the NRC Staff and that appropriate NRC personnel are currently analyzing it. As the licensee with responsibility for decommissioning the facility UNC is, of course, directly affected by any actions which purport to establish different or additional regulatory criteria governing its decommissioning efforts. The Memorandum does indeed attempt to impose additional procedural and substantive regulatory requirements, and UNC therefore believes that its views must be considered before the NRC takes any action with respect to the State's proposal.

UNC believes that it is neither necessary nor appropriate for the NRC to enter into a formal agreement with the State of Rhode Island regarding decommissioning of the Wood River Junction facility. UNC's license was issued by the NRC which retains sole authority under the Atomic Energy Act to regulate UNC's activities. If the State has concerns about the manner or extent of the NRC's exercise of its licensing authority, established procedures exist whereby those concerns may be considered and resolved.

II. General Comments

UNC finds the Memorandum fundamentally objectionable in two respects: (1) The Memorandum purports to establish substantive requirements which will be imposed on UNC in connection with its decommissioning effort. In UNC's view, an MOU between the NRC

and a state government is not a proper mechanism for that purpose. Furthermore, many of the substantive requirements sought to be imposed are erroneous, unjustified, or otherwise objectionable. (2) The Memorandum appears intended to grant the State broad additional rights to "contest," by unspecified procedures, the decommissioning criteria adopted for the Wood River Junction facility and to seek judicial review of NRC actions in this matter. However, the procedural rights and remedies available in connection with NRC licensing actions are established by law and regulation and may not be modified or enlarged by agreement between the NRC and a non-licensee.

There have been instances where the Commission has entered into agreements with states for cooperative efforts in particular cases even where the NRC has sole licensing authority. However, those agreements do not contemplate that the states and the NRC will share substantive regulatory responsibility over NRC licensees, including the imposition of licensing standards, as does the Memorandum. In fact, the sharing with the State of substantive regulatory responsibility contemplated in the Memorandum is inconsistent with the Atomic Energy Act which provides that the Commission will issue and enforce its own licenses under the conditions which it deems necessary to protect the public health and safety.

The full scope of UNC's permissible activities under its license are established by the Atomic Energy Act, the Commission's

regulations implementing the Act, and the terms and conditions set forth in the license. The Memorandum purports to establish, by agreement solely between the State and NRC, additional substantive requirements which will be imposed upon UNC before its license may be terminated. The Memorandum provides no connection between the requirements it would impose and the standards established by the Atomic Energy Act or NRC regulations. Moreover, the NRC may impose changes in a license, without the licensee's consent, only by regulation adopted in accordance with statutory procedures (Atomic Energy Act § 187) or by order issued pursuant to applicable NRC rules. (See, 10 C.F.R. § 2.204.) Any such amendment or modification reflects a determination by the Commission that new license conditions are necessary to effectuate the purposes of the Atomic Energy Act (i.e., a finding by the NRC that the public health and safety require the change). Furthermore, the permissible amendment/modification procedures afford licensees an opportunity to be heard respecting the appropriateness of the amendment. The applicable law and regulations clearly do not permit the imposition of new license requirements through independent Commission agreements with third parties such as that proposed by the State here.

Section 3 of the Memorandum provides that, even after the NRC has determined the applicable criteria, the State may "contest" (an undefined term) those criteria on an ad hoc basis, and the Memorandum purports to establish standards against which the

State's challenges will be judged. The rights of persons to seek reconsideration or review of Commission action, and to independently petition the Commission to take regulatory action against its licensees, are established in the Atomic Energy Act and implemented by the Commission's regulations. (E.g., 10 C.F.R. §§ 2.100 et seq. and 2.200 et seq.) If the State of Rhode Island wishes to challenge the Commission's licensing standards, it must do so in accordance with the NRC's rules.

III. Section by Section Comments

This Section contains UNC's comments on selected provisions of the proposed Memorandum. These comments are not intended to be exhaustive.

A. Sections 1 and 2

While the Memorandum is ostensibly intended to reflect an effort to find "mutually acceptable levels of cooperation" between the State and the NRC and to foster consultation between these parties, it in fact seeks to provide an unprecedented framework for shared regulatory responsibility between the State and NRC. As stated above in Part II of these Comments and further discussed below, the State and NRC may not by agreement "define the rights and obligations of the signatory parties" in a way which conflicts with due process, the Atomic Energy Act, or NRC regulations.

The State seeks NRC agreement to minimize "duplication of effort" and to "avoid delays" (Paragraph 2-2). Risks of "dupli-

cation" and "delays" exist only if the State asserts that its authority overlaps that of the NRC. In our view that assertion is invalid.

Paragraph 2-3 is unnecessary since there will be no "proprietary information . . . relating to the decontamination and decommissioning of the" UNC facility.

B. Section 3: Decontamination Procedures and Criteria; General Principles

This Section would require establishment of specific standards and procedures applicable to UNC's decontamination effort and would provide the State with procedural rights, beyond those afforded by NRC regulations, to "contest" whatever requirements are imposed. As discussed above, procedural rights and licensing standards may not be created nor expanded by agreement between the State and NRC.

Section 3-1 applies an "ALARA" standard to all of UNC's activities while under succeeding provisions the State would be permitted to "contest" on an ad hoc basis whether "ALARA" is being achieved. It is unclear precisely what these subsections contemplate or how they would be applied in practice; however, they appear intended to subject existing and proposed criteria to an open-ended possibility of repeated ad hoc legal challenges. No licensee, UNC included, can decommission its facility to meet uncertain and shifting requirements without being subjected to substantial unnecessary burdens. The Commission's regulations permit challenges to Commission-established license obligations

while protecting the legitimate rights of licensees. The State's proposed standards and procedures, however, offer no such protection and are therefore improper.

Paragraphs 3-2 through 3-7 refer to "procedures" relating to UNC's decommissioning effort and appear to contemplate that "procedures" will be formalized and approved by the NRC (and the State). That is incorrect. UNC has adopted and applied decommissioning and decontamination procedures which will achieve compliance with NRC guidelines. However, it has not submitted those procedures formally to the NRC and does not plan to do so. Historically, such details are developed by licensees for internal use and are subject to NRC inspection and verification but are not approved by the agency (or the State). Rhode Island has not identified any basis for requiring submittal of procedures in this case.

Paragraph 3-7 provides that the State would "be afforded a reasonable opportunity to conduct a public hearing prior to contesting or recommending alternatives to or modification" of the criteria and procedures. This is in effect another assertion of concurrent jurisdiction by the State and is unacceptable. We note also that the "public hearing," whether formal or not, could result in enormous and unnecessary delay and expense.

C. Section 5: Decontamination of Groundwater

To the best of our knowledge, groundwater at the Wood River Junction site meets the requirements of NRC regulations and UNC plans no action to decontaminate the groundwater.

The State of Rhode Island seeks to apply the Environmental Protection Agency's "National Primary Drinking Water Regulations" as "targets" against which UNC's decontamination proposals and activities will be measured. The State does not explain how EPA's regulations might appropriately be applied here, and in fact, their application would be inappropriate.

The Safe Drinking Water Act, 42 U.S.C. § 300f et seq., directs the EPA to promulgate regulations specifying the maximum permissible levels of various contaminants in water which is delivered to any user of "a public water system." EPA has established such contaminant levels for radionuclides. (40 C.F.R. §§ 141.15 and 141.16.) As the statute makes clear, however, these contaminant levels apply solely to water delivered to the public by a "public water system" which is statutorily defined as a system delivering drinking water to at least 25 persons or which includes at least 15 service connections. The statute further contemplates that the drinking water contaminant levels will be established at values considered achievable after the imposition of reasonably available treatment technologies. (42 U.S.C. § 300g, 300g-1.) It is clear that the EPA limits do not apply per se to the groundwater at the UNC site and there is no rational basis for uniquely imposing them on this activity.

The proposed standard in Section 5-2 of the Memorandum is without basis in existing regulations, and is an improper attempt to impose substantive licensing requirements through an agreement between NRC and the State.

D. Section 6: Site Characterization, Surveys and Investigation

The term "site characterization" is not defined in the Memorandum and its intended meaning is not clear. In UNC's view, "site characterization" has been completed. It was an action taken by UNC to define the extent of contamination; it was not required by the NRC and there is no reason to include it in an agreement between the NRC and the State.

UNC has submitted decommissioning plans which include a timetable for decontamination verification surveys. The results of those surveys will be submitted to the NRC which will presumably make the results public. A separate, independent survey will be performed for the NRC by Oak Ridge Associated Universities to verify that UNC has complied with NRC requirements. Rhode Island has apparently suggested changes in the proposed ORAU plan applicable to the restricted area. UNC has not seen those proposed changes and therefore has no opinion as to their merits. In fact, the proposed ORAU plan dated May 13, to which Rhode Island refers, has not been furnished to UNC by the NRC. Rhode Island also attempts to dictate the timing of the ORAU survey, delaying it until "after radiological waste materials in the 'restricted area' . . . have been removed from the site . . . ."

There is simply no reason to postpone the survey until completion of the shipments; a followup survey at that time will suffice.

E. Section 7: Soil Decontamination

UNC has worked with the Commission over the past 18 months to review soil decontamination criteria applicable to the Wood River Junction facility. In December 1980, draft criteria were prepared by the NRC and submitted to the State, the public, and UNC for comment. Detailed comments were received from the State of Rhode Island and UNC. In June 1981, the Commission issued final soil decontamination criteria after reviewing the comments submitted to it. Recently, UNC has submitted detailed soil decontamination plans which will result in UNC's meeting NRC requirements as set forth in the final criteria. In UNC's view, no further administrative action is necessary or appropriate with respect to the decontamination of soils at the Wood River Junction site and Paragraphs 7-1 and 7-2 are simply unnecessary.

F. Section 8: Onsite Storage of Radioactive Waste

As both the NRC and the State are aware, UNC, after substantial effort, has succeeded in obtaining a commitment from the Department of Energy to accept low-level radioactive waste from the Wood River Junction facility. Shipment of wastes to the DOE site began in June 1982 and will continue as the decommissioning process moves forward. All such shipments of wastes will be conducted in accordance with applicable regulatory requirements.

However, most of the waste is not hazardous under DOT regulations and therefore any requirement to use DOT-approved containers (Paragraph 8-1) is inappropriate. It is not possible at this time to establish a precise schedule for the shipment of waste material because soil decontamination has not been completed and, consequently, the amount of material to be shipped is not yet established.

UNC objects to the Memorandum's proposed imposition of vague standards such as "as quickly as reasonably achievable" (Paragraph 8-2) which are undefined and have no legal or other basis. Rhode Island seeks to prohibit storage on site of "wastes for which there is in place no approved shipping plan or timetable" (Paragraph 8-3). UNC's license contains no such provision and no justification for it has been offered. Once again, it appears that the State is attempting to impose its will upon the NRC, to dictate how (and when) the NRC should carry out its statutory responsibilities.

G. Section 9: Inspections for Compliance

We believe an NRC/State agreement is not the appropriate mechansim for establishing UNC/State relationships regarding access to private property. However, under appropriate circumstances, UNC would be willing to permit representatives of the State to accompany NRC officials in accordance with NRC guidelines during inspections of the Wood River Junction decommissioning effort. UNC is also prepared to permit State officials, while accompanying NRC personnel, to conduct at State expense verifying

tests or measurements subject to the following conditions: (1) UNC approves the number of persons admitted and the timing and location of the tests; (2) performance of these tests and measurements does not interfere with UNC's decommissioning efforts or other activities at the site; (3) the State agrees to hold UNC harmless in connection with conduct of tests; and (4) the procedures used, and the data and results obtained in State-conducted tests, are disclosed in full to UNC.

H. Section 10: Appeals from a Decision by NRC

It is hard to oppose the resolution of differences "at the administrative level" (as opposed to resort to litigation) (Paragraph 10-1). However, in fact, NRC is the exclusive licensing authority and cannot compromise its regulatory responsibilities by negotiating "differences of opinion on technical matters."

Paragraph 10-2 represents another impermissible effort to create new legal rights by agreement between the parties. Whatever disagreements might arise between the State and NRC with respect to appropriate license conditions, as discussed above no new requirements may be imposed on UNC except through the procedures provided in the Commission's rules implementing the Atomic Energy Act. At the administrative level, the State may, by petition pursuant to 10 C.F.R. § 2.206, request the NRC to impose additional requirements and UNC would have an opportunity to participate in the NRC determination of such a petition.

Ultimately, if the State is dissatisfied with the agency's final action, it may exercise its right to seek appellate review as provided by law. However, the NRC is without authority to create a right of appeal to "Federal District Court" from "any decision or decontamination [sic?] made by NRC regarding a decontamination procedure or criteria or any finding of compliance with such a procedure or criteria . . . ."

J. Section 11: Modification of the NRC License

As discussed in Part II above, the procedures applicable to license amendments and modifications have been established by regulation, and the appropriate standards come from the Atomic Energy Act as interpreted by the NRC. None of these legal requirements may be altered by agreement. The standard suggested by the State ("no new or greater risk to the public health and safety") is unprecedented and improper.

K. Section 12: Public Information and Hearings

We note that use of the word "hearings" in Paragraph 12-2 is probably incorrect; it appears that the State intends to refer here to "meetings."

The Memorandum (Section 12-3) would bind NRC to "conduct a full adjudicatory hearing at or near the completion of the decommissioning process . . . ." Although the term "full adjudicatory hearing" is not defined, we assume it refers to a trial-type hearing under Section 554 of the Administrative Procedure Act. The State thus seeks to mandate a hearing which the

State could not obtain as of right under NRC regulations or the Atomic Energy Act. The Commission has recently held that NRC regulations do not require a hearing on an amendment to a materials license although the Commission may find that such a hearing is in the public interest or may offer an opportunity to request such a hearing. Furthermore, the Commission concluded that the Atomic Energy Act does not require that hearings in materials license cases be formal, trial-type hearings. Therefore it held that, in a case similar to the present facts, written comments and documentation would satisfy any hearing requirement. (Kerr-McGee Corp. (West Chicago Rare Earth Facility), CLI-82-2, 15 NRC 232 (1982).)

To the best of our knowledge, the State has offered no support of its request for trial-type hearings in this case. We believe it may be said of this case, as it was in Kerr-McGee, that:

> The factual issues involved are of a technical nature whose resolution does not require any oral, trial-type inquiry focusing on credibility and, accordingly, additional procedures are unlikely to add to the fact-finding process or result in a better record for agency review.

(Kerr-McGee, supra, 15 NRC at 262.) In our view, the NRC must reject Section 12.3.

L. Section 14: Statutory Authorities

In view of the substantive provisions of the Draft Agreement, this Section is at least incorrect.