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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
Northeast Nuclear Energy Company)	Docket No. 50-423-LA-3
)	
(Millstone Nuclear Power Station,)	
Unit No. 3))	ASLBP No. 00-771-01-LA

NORTHEAST NUCLEAR ENERGY COMPANY'S OPPOSITION
TO "INTERVENORS' MOTION TO FILE SUPPLEMENTARY
DECLARATION AND TO CONFORM THEIR SUMMARY"

INTRODUCTION

Northeast Nuclear Energy Company ("NNECO") hereby opposes the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") "Motion to File Supplementary Declaration and to Conform to Their Summary" ("Motion"), dated July 6, 2000. In the Motion, the Intervenors ask the Atomic Safety and Licensing Board ("Licensing Board") to: (1) supplement their Subpart K summary with an additional decalarant; and (2) conform their Subpart K summary. As discussed herein, NNECO opposes this motion because it does not satisfy the "good cause" requirement of 10 C.F.R. § 2.711(a) and violates the simultaneous filing requirements of 10 C.F.R. § 2.1113.

BACKGROUND

On April 19, 2000, the Licensing Board issued Memorandum and Order (Schedule for Proceeding) that established, pursuant to 10 C.F.R. § 2.1113, a deadline of June

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30, 2000, for the filing of the parties' written Subpart K summaries. Less than two hours before the expiration of that deadline, and long after business hours, the Intervenors faxed a "Motion for Permission to File Summary Untimely," asking for an extension of time because a computer problem made it "impossible" to meet the deadline.¹ The Intervenors then filed their Subpart K summary three days later, on July 3, 2000, and filed a revised version the following day, July 4, 2000. Both NNECO and the NRC Staff timely filed their Subpart K summaries on June 30, 2000.

On July 5, 2000, upon return to the office from the holiday weekend, counsel for NNECO informed the Licensing Board that, conditionally, NNECO would not oppose the late-night motion (of June 30, 2000) and the untimely Subpart K summary (the July 3 or July 4 versions). Nevertheless, NNECO counsel expressed a concern that its own Subpart K summary had been timely filed in electronic format on June 30, 2000, and that the delay in the Intervenors' filing effectively subverted the simultaneous filing provision of Subpart K, allowing the Intervenors to have access to NNECO's filing prior to making their own filing. NNECO counsel requested that the Licensing Board request, prior to granting the June 30 extension motion, that Intervenors' counsel certify that she did not unfairly utilize NNECO's electronic filing.

On July 6, 2000, six days after the deadline, the Intervenors filed the subject Motion.

¹ The Intervenors did not explain how the computer problem prevented filing the Subpart K summary, but did not prevent the filing of the motion. The Intervenors also did not address the circumstances whereby it did not discern the problem until close to midnight on the day of the filing deadline.

ARGUMENT

The subject Motion follows the earlier motion to allow a late filing, and in effect seeks an opportunity to file a third version of the Subpart K summary, now six days late. While NNECO did not oppose (conditionally) the earlier motion, NNECO does oppose this Motion. The subject Motion is completely lacking in any showing of good cause and accepting the late filing would completely subvert the Subpart K simultaneous filing requirement.

Under Subpart G, pursuant to 10 C.F.R. § 2.711(a), a licensing board may grant an extension of time “for good cause.” The same criterion applies under Subpart K, which establishes procedures “to encourage and expedite expansion of spent nuclear fuel storage capacity.” See 10 C.F.R. §§ 2.1101, 2.1117. The Commission also has established an “unavoidable and extreme circumstances” test to satisfy the “good cause” requirement of 10 C.F.R. § 2.711(a).² Even if the Licensing Board finds that the unspecified computer problem cited by the Intervenors in the June 30, 2000 facsimile motion could be construed as “unavoidable and extreme” (a supposition that is far from certain) and grants that motion, such relief does not run to the current Motion to supplement. Intervenors have not only failed to articulate a good cause for the Motion to supplement, but have failed to proffer any reason at all.

By the subject Motion, the Intervenors seek to add the affidavit of David Lochbaum supporting the Subpart K filing. No reason is given as to why Mr. Lochbaum’s affidavit was not attached to the earlier versions. Indeed, the electronic version of the affidavit is dated June 30, 2000. While NNECO has not received an executed original, calling into serious

² See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 – 22 (Aug. 5, 1998). The use of the “unavoidable and extreme circumstances” test was recently affirmed by the Court of Appeals for the District of Columbia Circuit. *National Whistleblower Center v. NRC*, 208 F.3d 256, 263 (D.C. Cir. 2000).

question the accuracy of the electronic affidavit, it nonetheless seems logical that by June 30, 2000, the Intervenors would have known whether or not Mr. Lochbaum would support the filing. No reason is given as to why their support was not, and could not be, included in the July 3 or July 4 versions. The bottom line is that Mr. Lochbaum's affidavit is late without any good cause shown.

Moreover, 10 C.F.R. § 2.1113 specifically requires that the parties to a Subpart K proceeding file their written Subpart K summaries simultaneously. By the Motion, the Intervenors are trying to file a third untimely version of their Subpart K summary. Such action has given the Intervenors the opportunity to review the written Subpart K summaries of the other parties prior to submission of their own filing, which subverts the intention of the simultaneous filing requirement of 10 C.F.R. § 2.1113, and is patently unfair to the other parties who have strictly complied with the regulations. Therefore, because granting of the Motion would subvert the requirements of 10 C.F.R. § 2.711, the Licensing Board should deny the Intervenors' Motion to supplement and conform their Subpart K filing.

NNECO also observes that it is unclear from the declaration of Mr. Lochbaum just what information is being sponsored; there is no connection made in either the July 6 Motion or the declaration between Mr. Lochbaum and specific information in the Intervenors' Subpart K summary. Rather, the declaration seems no more than an endorsement of the Subpart K summary, and Appendices A, B, and C thereto, in their entirety. No specificity is made as to facts offered by Mr. Lochbaum or with respect to his expertise on those facts. Accordingly, the declaration does not meet any reasonable standard for acceptance in this proceeding.

CONCLUSION

The Licensing Board should deny the "Intervenors' Motion to File Supplementary Declaration and Conform Their Summary" because it does not satisfy the "good cause" requirement of 10 C.F.R. § 2.711(a) and violates the simultaneous filing requirements of 10 C.F.R. § 2.1113. Moreover, in view of the unfairness of allowing the Intervenors the opportunity to file revisions of their Subpart K summary after the filings of the other parties, NNECO requests that the Licensing Board require the Intervenors to certify that, prior to the date of any revised Subpart K filing accepted by the Licensing Board, the Intervenors had not reviewed the other parties' Subpart K summaries and unfairly utilized that information in preparing their own late summary.

Respectfully submitted,



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ATTORNEYS FOR NORTHEAST NUCLEAR
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Dated in Washington, D.C.
this 7th day of July 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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Northeast Nuclear Energy Company) Docket No. 50-423-LA-3
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(Millstone Nuclear Power Station,)
Unit No. 3) ASLBP No. 00-771-01-LA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NORTHEAST NUCLEAR ENERGY COMPANY'S OPPOSITION TO INTERVENORS' MOTION TO FILE SUPPLEMENTARY DECLARATION AND TO CONFORM THEIR SUMMARY" in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 7th day of July 2000. Additional e-mail service has been made this same day as shown below.

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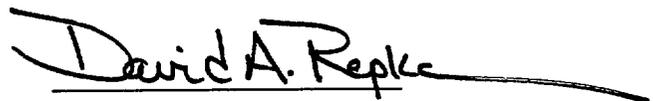
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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka
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