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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 07/14/00

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

NORTHEAST NUCLEAR ENERGY
COMPANY

(Millstone Nuclear Power Station, Unit No. 3;
Facility Operating License NPF-49)

Docket No. 50-423-LA-3

ASLBP No. 00-771-01-LA

July 14, 2000

MEMORANDUM AND ORDER

(Ruling on Various Motions and Procedure at Oral Argument)

This proceeding concerns the re-racking of the spent-fuel pool of the Millstone Nuclear Power Station, Unit No. 3. At the written request of the Licensee (NNECO), the proceeding is subject to the hybrid-hearing procedures of 10 C.F.R. Part 2, Subpart K. In accord with those procedures, the Licensing Board set schedules for the proceeding by Memorandum and Order dated April 19, 2000, calling for, inter alia, the filing of parties' written summaries on Friday, June 30, 2000, by first-class mail and oral argument commencing on Wednesday, July 19, 2000, in New London, CT. NNECO and the NRC Staff timely filed their written summaries on June 30.

Pending before us are several motions concerning the filing by CCAM/CAM (Intervenors) of their written summaries. Also discussed herein are the procedures applicable at the oral argument. Finally, the order of appearances at oral limited appearance sessions on July 18 and 20, 2000, is set forth.

1. Motions concerning Intervenors' written summaries.

(a). Background. On Friday, June 30, 2000, the day the Intervenors were supposed to file by first-class mail their written summaries, they filed a "Motion for Permission To File Summary Untimely," on the basis that "a sudden and unexpected computer lock makes it impossible to meet [the June 30] deadline."¹ The CCAM/CAM summary was in fact served (by e-mail) on Monday, July 3, 2000, with a corrected version served (by e-mail) on July 4, 2000, and mailed on July 5, 2000. Upon telephone inquiry by the Board Chairman to the parties on July 3, 2000 (necessitated by a need to resolve the question in a timely fashion), the Licensee advised that it was important to preserve the simultaneous filing requirement of Subpart K , but that it would not object to the Intervenors' late filing, as long as the Intervenors had not reviewed the filings of other parties and revised their submittal prior to submitting their own written summary. The Staff declined at that time to take a position on the Intervenors' motion.

On July 6, 2000, the Intervenors filed a "Motion to File Supplementary Declaration and to Conform their Summary." Their earlier summary had included a copy of the declaration of one expert, Gordon Thompson, Ph. D. This motion sought to add the declaration of another expert, David A. Lochbaum, and to amend the written summary to incorporate a reference to Mr. Lochbaum's declaration.²

¹Previously, that same day, the Intervenors had timely responded to questions for parties posed by the Licensing Board's Memorandum (Questions for Parties) dated May 23, 2000. NNECO and the Staff responded to those questions through their written summaries.

²On July 10, 2000, CCAM/CAM filed Notices of the Filing of the Original Declarations of Gordon Thompson, PhD. and David A. Lochbaum, together with the declarations.

In response, the Licensee opposed this motion, primarily on the basis of the lack of good cause to amend the filing date but also for violation of the simultaneous filing requirement of Subpart K.³ For its part, the Staff on July 6, 2000, filed a response in opposition to the Intervenors' July 6 motion to file a supplementary declaration and to conform their written summary.

The Staff on July 7 also filed a motion to strike Intervenors' written summary, together with the two declarations.⁴ The Staff's primary basis for this motion is that the facts and data relied on by the Intervenors are not properly sworn to, as required by statute and regulations (see 10 C.F.R. § 2.1113).

(b). Rulings on Motions.

Having considered all the filings before us, we have concluded that the Intervenors should be granted the filing extensions that they have requested. With respect to the first, caused by a computer lockup, we have no reason to expect that a party will not run into problems in filing the massive documentation necessitated by the Subpart K rules. Filing by first-class mail on June 30, 2000 (as required by our scheduling order) would have resulted in receipt by July 5, 2000. See 10 C.F.R. § 2.710. CCAM/CAM's e-mail service on July 3 (corrected on July 4) reached the parties at least by July 5. The receipt of this information, therefore, was within the

³Northeast Nuclear Energy Company's Opposition to "Intervenors' Motion to file Supplementary Declaration and to Conform their Summary," dated July 7, 2000.

⁴NRC Staff Motion to Strike Detailed Summary of Facts, Data and Arguments and Sworn Submission on which [CCAM/CAM] Intend to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Millstone Unit No. 3 Nuclear Power Plant.

time within which timely filings would have been received. Thus, there should not have been any significant adverse impact on the other parties' preparation for oral argument. As for Mr. Lochbaum's declaration, which did not reach the parties until July 6, there was no significant substantive information set forth, only a declaration that Mr. Lochbaum participated in the preparation of the CCAM/CAM summary statements. All parties were aware of Mr. Lochbaum's participation for the Intervenors since the outset of this proceeding--indeed, his deposition was taken by both the Licensee and Staff. Thus, accepting Mr. Lochbaum's declaration, as we do, will pose no undue hardship on the other parties--except, of course, on the merits, where Mr. Lochbaum's expertise provides enhancement to certain of the technical positions adopted by the Intervenors.

The Licensee has raised one valid point with respect to the various late filings of the Intervenors--the simultaneous filing requirements of Subpart K. To assure that the principles underlying the simultaneous filing requirement have not been violated, we will require the Intervenors' counsel, as well as their expert witnesses, to certify at the oral argument that, at the time they submitted their late-filed summaries, they had not examined any of the filings of other parties and relied upon them in preparing their own filings.

As for the Staff's motion to strike the Intervenors' written summaries for not being sworn statements, such position is legally untenable. The requirements of sworn statements may be satisfied by either oath or affirmation. See, e.g., 10 C.F.R. § 2.740a(d); Federal Rules of Civil Procedure, Rule 603. An affirmation is defined as "A solemn and formal declaration or asseveration that an affidavit is true, that the witness will tell the truth, etc.; this being substituted for an oath in certain cases."

Black's Law Dictionary, 6th Edition (1990) at 59, emphasis supplied. Both declarations submitted by CCAM/CAM state that they support Intervenors' "sworn submission," that their contributions to the Summary "have been true and correct to the best of [their] knowledge and professional judgement," and that they "declare, under penalty of perjury, that the foregoing is true and correct." In the view of the Board, these declarations amount to affirmations, and the written summary therefore constitutes a sworn written submission, as contemplated by 10 C.F.R.

§ 2.1113. Although, as the Staff observes, there is no correlation between particular statements in the written summary and particular expert witnesses, there also is no requirement that there be any (even though such correlation would indeed be useful).

2. Procedures at Oral Argument.

At the oral argument, the Licensing Board plans to treat each of the three contentions sequentially. Because the burden of establishing a dispute of fact warranting an evidentiary hearing is on the Intervenors, their presentations will be heard first, followed by the Licensee and Staff. The Intervenors will then be permitted rebuttal.

The parties' presentations on each contention should be 30 minutes or less, with a 30 minute limit for rebuttal. The Board may adjust these times at the oral argument, depending on the complexities of the contentions and the disputes with respect to each contention.

3. Order of appearances at limited appearance sessions.

As previously announced, oral limited appearance statements will be heard on July 18 and 20, 2000. Speakers will be heard on a first-come, first-served basis, except that those who have sent written statements or requests to make statements to

the Secretary (or the Licensing Board) will be heard first. A clerk will maintain a sign-up sheet. Oral statements should be no longer than approximately five minutes.

Written statements may also be submitted.

* * *

It is so Ordered.

For the Atomic Safety and
Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 14, 2000

[Copies of this Memorandum and Order were e-mailed to counsel for each party on Friday, July 14, 2000.]

NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
NORTHEAST NUCLEAR ENERGY) Docket No. 50-423-LA-3
COMPANY)
)
(Millstone Nuclear Power Station,)
Unit No. 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON VARIOUS MOTIONS AND PROCEDURE AT ORAL ARGUMENT) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles Bechhoefer, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel

Mail Stop - T-3 F23

Mail Stop - T-3 F23

Ann P. Hodgdon, Esq.
Robert M. Weisman, Esq.
Office of the General Counsel

Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission

Lillian M. Cuoco, Esq.
Senior Nuclear Counsel
Northeast Utilities Service Company
107 Selden Street
Berlin, CT 06037

Washington, DC 20555-0001

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LB MEMORANDUM AND ORDER
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PROCEDURE AT ORAL ARGUMENT)

David A. Repka, Esq.
Donald P. Ferraro, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge, CT 06876

[Original signed by Kris Cater]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of July 2000