

June 8, 2000

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))
)

NRC STAFF'S MOTION TO DISMISS CONNECTICUT COALITION AGAINST
MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE'S CONTENTION 4

INTRODUCTION

Pursuant to 10 C.F.R. § 2.707, the NRC staff ("Staff") moves the Licensing Board to dismiss Connecticut Coalition Against Millstone ("CCAM") and Long Island Coalition Against Millstone's ("CAM") (collectively "Intervenors") Contention 4.

BACKGROUND

Discovery in this Subpart K proceeding began on February 28, 2000. The NRC staff served its First Set of Interrogatories and Requests for Production of Documents Directed to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone on March 24, 2000. On April 8, 2000, CCAM and CAM filed a Reply to NRC Staff's First Set of Interrogatories. The reply provided insufficient responses to two of the Staff's interrogatories, as follows:

- a. Specific Interrogatory B (6); Identify the boron loss event cited on page 100 of the prehearing conference transcript, as to name of the plant and date. Specify the cause, the amount of boron lost, the duration of the event, the actions taken and the result. Make specific reference to all documents, records, statements or sources which relate to your answer.

Intervenors' response: Transcript not available.

- b. Experts (2): For each expert named in the answer to General Interrogatory 1, state . . . (d) any authorities and/or treatises upon which the expert relies.

Intervenors' response: The brief which will be filed by the Intervenors will provide the information.

On April 17, 2000, counsel for the NRC staff provided Intervenors with the pertinent transcript pages in order to facilitate a response to Interrogatory B(6). Letter from A. Hodgdon, Counsel for NRC staff, to N. Burton, Counsel for Intervenors (April 17, 2000). During a telephone conference call held on April 18, 2000, between counsel for the Licensee, the Intervenors, and the Staff, counsel for the Staff requested that these two interrogatories receive a prompt reply. Ms. Burton advised Staff counsel that she would submit an additional response to Interrogatory B (6) by Monday, April 24, 2000, and an additional response to Interrogatory Experts (2) by Tuesday, April 25, 2000.

However, Intervenors failed to provide the responses as promised and on May 3, 2000, the Staff filed a motion to compel Intervenors' responses. When Intervenors failed to respond to the motion within the time required for such responses, Staff counsel wrote a letter to the Licensing Board requesting it to act on the motion and to compel Intervenors' answers. Letter from S. Uttal, Counsel for the NRC Staff, May 24, 2000.

On May 26, 2000, the Licensing Board convened a telephone conference call during which it, among other things, granted the Staff's motion to compel and ordered Intervenors to respond with the response to be received by the Staff by May 30, 2000. Tr. 229-30; Memorandum and Order (Discovery Rulings, 5/26/00 Telephone Conference), at 2, 8. On that date, the Staff received a one-page fax in which Intervenors answered the first of Staff's specific interrogatories set forth in the motion to compel as follows:

Please refer to attached Preliminary Notification Index I-990996
Millstone 2 and attachments thereto.

The document provided does not concern boron loss nor does it in any way correspond to the characterization of a document that Intervenors' counsel relied on, but failed to identify, at the prehearing conference in support of Intervenors' Contention 4. Thus, the document provided in response to the Board's order is not responsive to the Staff's request. Further, Intervenors make no attempt to reconcile Intervenors' counsel's argument at the prehearing conference with the document provided. See attached transcript pages 100- 01.

With regard to the second item, a request for “ (d) any authorities and/or treatises upon which the expert relies,” Intervenors state as follows:

Please refer to attachments provided in “Connecticut Coalition Against Millstone Supplemental Response to Northeast Nuclear Energy Company's First Request for Production,” dated May 30, 2000. Other authorities may be relied on as the brief preparation develops.

On May 30, 2000, Staff counsel telephoned NNECO's counsel to request a copy of the attachments said to have been provided to NNECO on that date and was told that NNECO's counsel had not received such documents. On June 1, 2000, two days after the date established by the Board as the date by which the responses were to be received by the Staff, Tr. 229-30; Memorandum and Order at 2, 8, the Staff received by mail a copy of “Connecticut Coalition Against Millstone Supplemental Response to Northeast Nuclear Energy Company's First Request for Production,” dated May 30, 2000. The Staff has examined the documents provided and determined that none of them are responsive to Staff's interrogatory requesting identification of “authorities and/or treatises upon which [Intervenors'] expert[s] rel[y].”

In addition to not having provided the references compelled by the Board's order granting Staff's motion to compel, the second sentence of Intervenors' response, “other authorities may be relied on as the brief preparation develops,” adds nothing to the response that the Board required to be supplemented.

ARGUMENT

Intervenors have failed to provide answers that are responsive to the Staff's interrogatories and are, thus, in default. In this instance, the default is more than a mere technicality, as the Staff's interrogatories were carefully crafted to elicit responses that would allow the Staff to identify Intervenors' concerns, especially with regard to Contention 4, and, thus, to be able to address those concerns in its written submissions. The Staff needs this information and is entitled to it, especially in this Subpart K proceeding where the parties file simultaneously rather than in responsive filings.

Pursuant to 10 C.F.R. § 2.707, licensing boards may, with regard to a failure to comply with a discovery order entered pursuant to § 2.740, make such orders as are just. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), LBP-83-29A, 17 NRC 1121, 1122 (1983); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 80 (1986). A Licensing Board may dismiss the contentions of an intervenor who has failed to respond to an applicant's discovery requests. *Carolina Power & Light Co. and North Carolina Eastern Mun. Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 810 (1986).

Having defaulted with regard to actions required by the Board, Intervenors should be subject to just and appropriate sanctions. Although an intervenor can be dismissed from a proceeding for failure to comply with discovery orders, *Northern States Power Co.* (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977), in NRC practice, intervenors have been dismissed only where the imposition of lesser sanctions earlier in the proceeding had failed to correct the intervenors' actions. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 375-77 (1988), *rev'd in part and vacated in part*, ALAB-902, 28 NRC 423 (1988), *review denied and stay denied*, CLI-88-11, 28 NRC 603 (1988). Since Intervenors have failed to provide a document that they relied on at the prehearing conference in support of their Contention

4, it is appropriate to dismiss that contention, while allowing Intervenors to pursue their remaining two contentions. As regards Intervenors' other default, their failure to identify the authorities on which their experts rely, there would not appear to be any appropriate relief available at this time.

CONCLUSION

For the reasons discussed, the Staff moves the Board to dismiss Intervenors' Contention 4.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville this
8th day of June, 2000

1 spent fuel pool. In fact, there will be, there has been,
2 there always will be. It's -- the boron concentration is
3 much, much higher than what's credited in any of these
4 evaluations. There are just a lot of conservatisms built in
5 here and there's no basis to assume it's going to be a
6 criticality event.

7 JUDGE KELBER: Don't follow the Osmidian trap and
8 claim that there will always be.

9 MR. REPKA: Good point.

10 JUDGE KELBER: For the duration of the license
11 perhaps, but not for always -- not forever.

12 MR. REPKA: Good point, but boron is maintained in
13 the spent fuel pool at all times.

14 CHAIRMAN BECHHOEFER: Well, that gets into the
15 next contention. We're going to do it after lunch,
16 actually.

17 MR. REPKA: Right. Let me assure you before
18 lunch, the boron is not going anywhere.

19 MS. BURTON: May I respond briefly --

20 CHAIRMAN BECHHOEFER: Yes.

21 MS. BURTON: -- to this point, to note that it
22 wasn't long ago, I've alluded to that, boron did go
23 somewhere, because there was a leakage in the spent fuel
24 pool that went undetected for something like 12 hours and,
25 presumably, the water that leaked out did contain boron and

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1 that meant that there was some change that occurred to the
2 fluid in the pool. We're concerned that that represents an
3 example of a misuse of an administrative control at
4 Millstone. We have made a nexus here.

5 Where our concern is that -- well, basically, our
6 response here is -- that Thomas Jefferson once asserted, we
7 find this truth to be self evident. The administrative
8 controls are the utilities physical -- the utilities barrier
9 to criticality, to the seriousness of accident. And if they
10 are not a part -- if they're misused, that is the ultimate
11 inevitable obvious potential consequence. And that is why
12 we have set forth this contention and was asserted
13 separately from the following one, which is more directed
14 specifically to judicial authority.

15 JUDGE KELBER: Okay.

16 CHAIRMAN BECHHOEFER: I think we'll break for
17 lunch. Is an hour enough for everybody to -- or does it
18 take longer to order -- if we all go to the restaurant here,
19 it probably will take longer.

20 MS. HODGDON: Excuse me, Judge Bechhoefer.

21 CHAIRMAN BECHHOEFER: Yes.

22 MS. HODGDON: We have an hour -- we're willing to
23 go a few minutes later in the --

24 CHAIRMAN BECHHOEFER: Yes.

25 MS. HODGDON: A tradeoff --

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO DISMISS CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE'S CONTENTION 4" in the above-captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system or; by deposit in the Nuclear Regulatory Commission's internal mail system with copies by electronic mail, as indicated by an asterisk; or by E-mail as indicated by a double asterisk, followed by a conforming copy via first-class mail this 7th day of June 2000.

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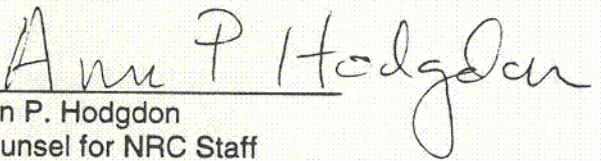
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