

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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-R

January 17, 2001

MEMORANDUM AND ORDER
(Denying Motion to Reopen Record on Contention 4)

On December 18, 2000, the Connecticut Coalition Against Millstone (CCAM) and the Long Island Coalition Against Millstone (CAM), intervenors in this proceeding (collectively referenced as CCAM/CAM), filed a motion requesting that the Licensing Board reopen the record with respect to CCAM/CAM Contention 4, and to vacate its decision in LBP-00-26 on that contention, based on new information which, they assert, would have caused the Board to reach a different result with respect to that contention. Northeast Nuclear Energy Co. (NNECO or Licensee) and the NRC Staff oppose such motion. For reasons set forth below, we deny that motion and decline to reopen the record on Contention 4.

1. Background.

CCAM/CAM Contention 4, as admitted in LBP-00-02, 51 NRC 25, 32-33 (2000), reads as follows:

“Undue and Unnecessary Risk to Worker and Public Health and Safety.”

The new set of administrative controls trades reliance on physical protection for administrative controls to the extent that poses an undue and unnecessary risk of a criticality accident, particularly due to the fact that the licensee has a history of not being able to adhere to administrative controls with respect, inter alia, to spent fuel pool configuration.

The Licensing Board, in accord with procedures spelled out in 10 C.F.R. Part 2, Subpart K, and based on affidavits or declarations filed by all parties, together with oral argument, concluded that

NNECO has demonstrated that it can adhere to administrative controls, with adequate safety margin and defense-in-depth, without posing an undue or unnecessary risk to plant workers or the public. The conservatively estimated error rate of fuel assembly misplacement of 1 in 3000 moves (or once every 9 years) is not high enough to characterize such an event as likely. Safety margins are maintained by the regulatory requirement that rack reactivity be less than 0.95, while the use of soluble boron adds defense-in-depth against an accidental criticality. Criticality calculations have used conservative assumptions, thereby introducing additional margin. We find, therefore, that, relative to Contention 4, there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing. As such, based on the record before us, we dispose of this contention as being resolved in favor of NNECO.

LBP-00-26, 52 NRC 181, 200 (2000).

CCAM/CAM on November 13, 2000, filed a petition for Commission review of LBP-00-26, including specifically our ruling on Contention 4. NNECO and the NRC Staff have opposed Commission review, claiming our ruling in LBP-00-26 was appropriate (including, inter alia, our ruling on Contention 4). The Commission has not yet ruled on CCAM/CAM's petition. The license amendments authorized by LBP-00-26 have, however, been issued by the NRC Staff (including a particular condition sought by CCAM/CAM, not directly pertinent to the matter here under consideration, on which all parties had agreed).

During the pendency of CCAM/CAM's appeal, however, CCAM/CAM became aware of further information they assert bears on their Contention 4. Specifically, during

the week of November 24, 2000, NNECO advised the Staff that it “could not confirm the location of two fuel pins” at the Millstone Unit 1 spent fuel pool. Such disclosure was assertedly made public by NRC in the NRC Weekly Information Report For the Week Ending November 24, 2000. (CCAM/CAM has attached a copy of the pertinent excerpt from that report to its Motion to Reopen.) Further, CCAM/CAM advises that such disclosure was made public in the NRC Daily Events Report as Event No. 37596 dated December 14, 2000, a copy of which was also attached to the Motion. CCAM/CAM further notes that the missing fuel pins would have properly been included among events set forth in NNECO’s April 4, 2000 response to one of CCAM/CAM’s March 21, 2000 interrogatories (adding that NNECO should have updated the interrogatory response as of the time it became aware of the new information).

Although the proceeding is currently pending before the Commission, CCAM/CAM filed their motion to reopen the record, and to vacate the decision in LBP-00-26, with the Board, with a copy of the motion included in CCAM/CAM’s motion dated December 19, 2000 requesting that the Commission stay our decision in LBP-00-26 pending review of the motion to reopen. In CLI-00-25, 52 NRC ____, ____ (slip op. at 2, n.3) (Dec. 21, 2000), the Commission noted that, during the appeal, the Board lacked jurisdiction to entertain the motion, that the motion should properly have been filed with the Commission, but it expressly remanded the motion to reopen to the Board for our consideration in the first instance, “given the Board’s greater familiarity with the record in this case.”

On January 8, 2001, NNECO and the Staff each filed responses in opposition to CCAM/CAM’s motion, based on both procedural and substantive considerations. We turn now to our ruling on these matters.

2. Licensing Board Ruling on CCAM/CAM Motion.

Under NRC rules, motions to reopen the record are governed by 10 C.F.R.

§ 2.734, which reads in pertinent part:

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely

(2) The motion must address a significant safety or environmental issue.

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. . . .

At the outset, NNECO would have us reject the motion out of hand, for lack of any supporting affidavit (irrespective of any health and safety consequences that might be entailed). The Staff likewise would have us take into account the lack of an affidavit as one reason for denying the motion. Although we recognize the importance of the affidavit requirement, we decline to premise our decision in this particular instance on the lack thereof, for two reasons. First, the Commission is well aware of the affidavit requirement and that CCAM/CAM's motion failed to include an affidavit. When it remanded the motion to us for our consideration, given our "greater familiarity with the record," it would appear that the Commission intended that we consider the merits of the motion and not be swayed solely by its apparent procedural inadequacies. Second, the matters giving rise to the motion are matters of public record (copies of which have been provided in full to the Board and the Commission.) An affidavit to the effect that CCAM/CAM's representative discovered the reports which, in her opinion, bore on the contention that CCAM/CAM previously raised, would consist of little more than unnecessary paperwork. (In contrast, the demonstration of the significance of the new

information and the likelihood of its causing a change in the result we previously reached might well have benefitted from the affidavit of a competent witness.)

Turning to the first reopening criterion--timeliness--the NRC Staff states that the motion was timely filed, and NNECO raises no timeliness objection. We find the motion to have been timely filed--i.e., within three weeks of the initial public availability of the information on which it is based.

Turning to the second criterion--significance of the issue--no party contests the safety significance of the issue to which the motion is addressed--i.e., NNECO's ability and willingness to carry out administrative controls relative to the spent fuel pool (SFP). Nor do we.

It is the third criterion--ability of the new information to cause us to reach a result different from that we previously reached--which NNECO and the Staff assert mandates that the motion must fail.

As described by NNECO, the facts giving rise to their identification of the missing fuel pins (or rods)¹ are as follows. NNECO first disclosed its findings to the NRC in mid-November, as reflected in the NRC Weekly Information Report specifically cited by the Intervenors. Subsequently, on December 14, 2000, NNECO made a report on this matter to the NRC in accordance with 10 C.F.R. § 20.2201(a)(1)(ii) (Event Number 37596). To summarize the event, as outlined in the affidavit of Joseph J. Parillo, a Senior Engineer in the Nuclear Analysis Section at the Millstone facility, attached to NNECO's response to the motion to reopen, the two fuel pins at issue were removed from a Millstone Unit 1 fuel assembly in October 1972 to allow General Electric (the fuel

¹Fuel rods (or, equivalently, pins) are elements of fuel assemblies. In boiling water reactors such as Millstone Unit 1, assemblies are typically denoted by the size of the array of fuel rods: a 15 x 15 assembly (sometimes called a bundle) consists of 225 rods.

vendor) to examine the fuel to study the effects on the fuel of a saltwater intrusion into the reactor vessel at Unit 1. After the examination, the two pins could not be reinserted into the fuel assembly. The records indicate that the two pins were subsequently stored separately from the fuel assembly in a storage container in the Millstone Unit 1 SFP.

As part of the ongoing decommissioning of Unit 1, NNECO has been conducting records reviews for material in the Unit 1 SFP. During those reviews, the Licensee identified a discrepancy in the paperwork: NNECO records do not account for the two pins beginning in September 1980. Upon discovery of the discrepancy, NNECO began further records reviews and examinations in the Unit 1 SFP. Those reviews are currently ongoing with full knowledge and oversight of the NRC Staff. Contrary to the implications in the Motion to Reopen, there appears to have been no bad faith or attempt to conceal the issue by NNECO. NNECO promptly made the December 14 event notification to the NRC related to the unaccounted for licensed material. Indeed, CCAM/CAM, in their motion, acknowledge that NNECO disclosed the event to the NRC during the week of November 24, 2000, and that they have access to the NRC documentation.²

It is CCAM/CAM's position that, had the Board been made aware during the proceeding that NNECO is unable to account for two highly radioactive spent fuel rods at Unit 1, we would have been unable to reach the conclusion we did relative to Contention 4 (see quotation above) and that we would have been legally compelled to commence a full evidentiary hearing on that contention. We disagree.

²We express no opinion, however, as to whether NNECO's reporting of this incident to the NRC satisfactorily corresponded to reporting requirements applicable to NNECO's license for Unit 1.

CCAM/CAM themselves provide no basis, other than the opinion of counsel, to support this conclusion. To the extent that the missing fuel rods reflect on the ability of NNECO to carry out administrative controls--a major premise of Contention 4--the issue is clearly one that would have been encompassed within the scope of the contention. We may also presume, although there is no evidence to this effect before us, that some of the NNECO personnel involved in the Unit 1 event may also be involved in the operation of Unit 3. But the event occurred long before the shutdown and later restart of Unit 3 (1996-98). In LBP-00-26, we determined, on the basis of Staff affidavits together with Licensee statements of intentions, that NNECO's managerial capability and willingness to carry out administrative controls had dramatically improved following the restart.³ As reiterated by the Staff in opposing the motion to reopen,⁴ there is nothing in the new information concerning Millstone Unit 1 that would change the conclusions previously expressed by their witnesses, upon which we relied in part⁵, to the effect that, following restart, NNECO had demonstrated its ability to carry out administrative controls adequately. Further, as emphasized both by NNECO (affidavit of Joseph J. Parillo, dated January 5, 2001, ¶15) and the Staff (affidavit of Laurence I. Kopp and Anthony C. Attard, dated January 8, 2001, ¶ 6), the misplacement of two fuel rods at Millstone Unit 3 would pose no criticality concern.

³We note, however, that, in accord with general NRC rules, there was no opportunity for public participation in the Millstone Unit 3 restart decision. Following approval by the Commission, the Staff authorized restart.

⁴Affidavit of James C. Linville, Jr., dated January 8, 2001, ¶ 5; affidavit of Antone C. Cerne, Jr., dated January 8, 2001, ¶ 4.

⁵LBP-00-26, 52 NRC at 199-200 and n.51.

In its motion, CCAM/CAM also claim that NNECO should have updated its discovery response at the time it became aware of the missing fuel rods. In this instance, however, the obligation to update discovery responses (see 10 C.F.R. § 2.740(e)(2)) ended upon issuance by the Licensing Board of its ruling terminating that aspect of the proceeding to which the discovery related. Because NNECO apparently did not become aware of the missing fuel rods until November 2000, and because our decision in LBP-00-26 was issued on October 26, 2000, NNECO was not required to update its discovery responses at the time it became aware of the new information.

3. Conclusion. For the foregoing reasons, CCAM/CAM have not established a sufficient basis for us to conclude that, had the Millstone Unit 1 information been before us, we would have determined that an evidentiary hearing on Contention 4 was warranted. For that reason, CCAM/CAM's December 18, 2000 motion to reopen the record is hereby denied.⁶

IT IS SO ORDERED.

The Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

⁶On January 16, 2001, CCAM/CAM moved for permission to respond to NNECO's January 8, 2001 filing in opposition to the Motion to Reopen. The Licensing Board hereby denies this motion. We note that the major point raised by NNECO was the lack of any affidavit--a requirement that we have found unnecessary with respect to the particular motion before us. CCAM/CAM may, of course, file a petition for reconsideration of this Memorandum and Order. See 10 C.F.R. § 2.771. Consideration of particular matters relevant to the incident at Millstone Unit 1 would be within our remanded jurisdiction, although other related matters might not be. Such a petition must be filed by January 29, 2001.

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 17, 2001

[Copies of this Memorandum and Order have this date been transmitted by e-mail to counsel for each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION TO REOPEN RECORD ON CONTENTION 4) (LBP-01-01) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-423-LA-3
LB MEMORANDUM AND ORDER
(DENYING MOTION TO REOPEN
RECORD ON CONTENTION 4)
(LBP-01-01)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of January 2001