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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)	)	

NRC STAFF RESPONSE IN OPPOSITION TO
INTERVENORS' MOTION FOR RECONSIDERATION

INTRODUCTION

On January 29, 2001, Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (jointly "Intervenors) filed a "Motion for Reconsideration" of the Licensing Board's Memorandum and Order (Denying Motion to Reopen Record on Contention 4), issued January 17, 2001. For the reasons discussed below, the NRC staff ("Staff) opposes the motion and requests the Licensing Board to deny it.[1]

BACKGROUND

On October 26,2000, the Licensing Board issued LBP-00-26, a Memorandum and Order denying the request of Intervenors for an evidentiary hearing in the spent fuel pool expansion proceeding, based on the Board's determination that there was no genuine and substantial dispute of fact to be resolved in an evidentiary hearing, and terminating the proceeding. LBP-00-26, 52 NRC 181, 197 (2000)

On December 18, 2000, Intervenors filed before the Licensing Board a Motion to Reopen and Vacate Decision.

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[1] On January 30, 2001, the Licensing Board telephoned Staff counsel and indicated that the Staff should respond to Intervenors' Motion for Reconsideration by February 20, 2001.

On December 21, 2000, the Commission issued a Memorandum and Order, CLI-00-25, remanding the Motion to Reopen to the Licensing Board, noting that the motion should have been filed with the Commission, as the matter was before the Commission by virtue of the Intervenors' having filed, on November 13, 2000, a petition for Commission review of LBP-00-26.

On January 8, 2001, pursuant to the schedule established by the Licensing Board in its Memorandum and Order of December 19, 2000, both NNECO and the NRC staff filed responses opposing Intervenors' Motion to Reopen.[2]

On January 17, 2001, the Commission issued CLI-01-03, a Memorandum and Order in which the Commission denied review regarding Contention 4. With regard to Contention 4, the Commission found the Licensing Board's fact finding well grounded in the record and declined further review because the petition for review raised no substantial question whether the Board's findings of fact were clearly erroneous and because Intervenors had provided no probative evidence regarding human factors. CLI-01-03, slip op. at 4.

On January 17, 2001, the Licensing Board denied Intervenors' Motion to Reopen. On January 29, 2001, Intervenors filed the instant Motion for Reconsideration, in which they seek, as discussed below, reconsideration on the basis of matters that they had not raised in their Motion to Reopen and that the Board had, therefore, not considered in its denial of that motion.

DISCUSSION

1. STANDARDS GOVERNING MOTIONS FOR RECONSIDERATION

Commission case law generally disfavors motions for reconsideration that do not point out errors in the existing record but rather seek to introduce new arguments or new evidence. *See Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-418, 6 NRC 1,

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[2] Northeast Nuclear Energy Company's Response in Opposition to Motion to Reopen and Vacate Decision, January 8, 2001; NRC Staff Response Opposing Intervenors' Motion to Reopen, January 8, 2001.

2 (1977). Unless the Board has relied upon an unexpected ground for the decision, new factual evidence and new arguments are not relevant in such a motion. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984). A motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not have reasonably been anticipated. *Id. See also Ralph L. Tetrick* (Denial of Application for Reactor Operator License), LBP-97-6, 45 NRC 130, 131 (1997). A motion for reconsideration on the denial of a motion to reopen will be denied for failure to show a material error of law or fact. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-97-14, 46 NRC 55, 59 (1997), *citing Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233, 235 (1986) and *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 (1986).

2. INTERVENORS' MOTION FOR RECONSIDERATION

Intervenors' motion is not so much a motion for reconsideration as it is a supplement to their prior Motion to Reopen. As discussed below, Intervenors' motion seeks to raise new arguments based on information that, while not new, is, according to Intervenors, new to them. *See* Motion at 6. None of the points Intervenors raise would support the granting of Intervenors' motion. These points are:

1. That NNECO has operated Unit 1 outside its design basis for more than twenty years and that a statement made by Mr. Frank Rothen, NNECO vice-president for special work services, in a public meeting on January 4, 2001, that NNECO had not responded to a "50.54(f) order" of December, 1995, constituted an acknowledgment that NNECO had not provided the NRC with a confirmation that Unit 1 is operating within its design basis (Motion at 5-6);[3]

[3] Intervenors include with their filing a videotape of the January 4, 2001, meeting, in which a letter from the Honorable Edward J. Markey, Congressman from Massachusetts, dated

2. That material facts relating to what Intervenors regard as inconsistencies and contradictions between the deposition testimony of Michael C. Jensen, given on May 11, 2000, and NNECO's account of the missing fuel rods in the Licensee Event Report (LER) filed by NNECO on January 11, 2001, as well as other documents, are in dispute and should be addressed (Motion at 6-7);

3. That NNECO's performance of a criticality calculation to determine the risk of criticality in the event the rods were placed next to the most reactive assembly in the Unit 1 pool (See LER, January 11, 2001, at 4), is an admission that failure to adhere to administrative controls over spent fuel storage can challenge criticality margins (Motion at 7);

4. That the circumstances surrounding the missing rods illustrate the folly of trading physical protection for administrative controls (Motion at 7-8));

5. That the "new" administrative controls associated with the recently granted amendment to expand storage in the Millstone Unit 3 spent fuel pool require "more attention to complexity" than the administrative controls involved with "preventing spent fuel rods from leaving the pool" (Motion at 8); and

6. That it is too soon to tell whether NNECO is "ethically" rehabilitated, as the Licensing Board has found (Motion at 8).

In light of these matters, Intervenors state that the Licensing board must "mount an investigation." Motion at 8.

As discussed below, none of the matters referenced by Intervenors offer any support for the Licensing Board to reconsider its denial of Intervenors' Motion to Reopen.

December 20, 2000, concerning the Millstone Unit 1 fuel rod unaccountability issue, to Richard A. Meserve, Chairman, Nuclear Regulatory Commission, was discussed. Chairman Meserve responded to the letter on February 1, 2001. The Staff attaches copies of Congressman Markey's letter and the Chairman's response with this filing for the information of the Board and parties (Exhibits 1 and 2).

A. Mr. Rothen's Statement That NNECO Did Not Answer A 1995 §50.54(f) Letter Concerning Unit 1.

As noted above, Intervenors seem to rely upon Mr. Rothen's statement that NNECO had never responded to a 1995 §50.54(f) "order"[4] as providing a reason for the Board to reopen the record on Contention 4. This argument was not raised in the December 18, 2001 Motion to Reopen and intervenors cannot raise new arguments or introduce new evidence as part of a motion for reconsideration unless the licensing board has relied on an unexpected ground for its decision. *See Comanche Peak* (1984), cited above. That is not the case here.

In addition, Intervenors' argument concerning the § 50.54(f) letter and/or the confirmatory order is without merit. The § 50.54(f) letter indicated that a response was necessary only if NNECO planned to restart the unit. NNECO had shut down Unit 1 for refueling in November, 1995. The unit was never restarted. As noted above, NNECO certified in a letter of July 21, 1998, pursuant to 10 C.F.R. §§50.82(a)(1)(i) and (a)(1)(ii), that it had determined to permanently cease operations at Millstone Unit 1 and that fuel had been permanently removed from the reactor vessel. Under these circumstances, a response to the §50.54(f) letter was not required and no inference concerning operation of the pool outside the design basis should be drawn from the licensee's failure to respond to the §50.54(f) letter.

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[4] Intervenors' motion references a "50.54 (f) order." Motion at 3, 4, 6. The Declaration of Joseph H. Besade, filed in support of their motion, references a Confirmatory Order of August 14, 1996. Declaration, ¶ 11. That order and a letter pursuant to § 50.82(a)(1)(i) and (a)(1)(ii) concerning Unit 1, dated July 21, 1998, are addressed in SECY-99-109, August 9, 1999. In that SECY paper, the Staff informs the Commission that the Independent Corrective Action Verification Program (ICAVP) required for Unit 1 by the Confirmatory Order of August 14, 1996, is not required in light of NNECO's letter pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (a)(1)(ii) stating that NNECO had permanently ceased operations at Unit 1 and that it had permanently removed the fuel from the reactor vessel.

The §50.54(f) letter of December 13, 1995, the Confirmatory Order of August 14, 1996, the § 50.82(a)(1)(i) and (a)(1)(ii) letter of July 21, 1998 and the SECY paper of August 9, 1999, are discussed below and copies of these documents are attached as Exhibits 3,4,5 and 6, respectively.

Beyond that, Mr. Rothen's statement does not reveal new information. The §50.54(f) letter, the confirmatory order and the letter from NNECO certifying that the fuel had been permanently removed from the reactor have been publicly available for a number of years and accessible to Intervenors long before the filing of both their Motion to Reopen and this Motion for Reconsideration. Intervenors' statement that they did not know of this information until weeks after the Licensing Board decision (Motion at 6) does not support their Motion for Reconsideration.

Finally, Intervenors fail to demonstrate that NNECO's failure to respond to the § 50.54(f) letter and/or the confirmatory order or their inference that this failure amounts to the operation of Millstone Unit 1 outside its design basis does not in any way relate to Contention 4, which concerns the increased risk of criticality posed by the administrative procedures necessary to implement the Millstone Unit 3 amendment under consideration in this proceeding.

B. Material Facts In Dispute

Intervenors point to a number of statements made in Mr. Jensen's deposition, in Mr. Parillo's affidavit filed in support of NNECO's answer opposing the motion to reopen, and in the LER, filed January 11, 2001, which they assert are inconsistent and contradictory. Motion at 6-7. Intervenors argue that, because of these inconsistencies, the Board should not have concluded in its denial of their Motion to Reopen that NNECO promptly made the December 14, 2000, event notification to the NRC. *Id.* at 7.

None of these allegedly inconsistent and contradictory statements is relevant to Contention 4, which concerns an increased risk of criticality caused by the complexity of the administrative procedures needed to implement the license amendment at issue. Contention 4 concerns fuel assemblies in the Millstone Unit 3 spent fuel pool; it does not concern fuel rods in the Millstone Unit 1 spent fuel pool. Contrary to Intervenors' representation, any facts that may be in dispute are not material to Contention 4 or to the Board's conclusions regarding whether the Motion to Reopen should have been granted.

C. The Criticality Calculation In The LER

Intervenors' filing relies on a "declaration" of David A. Lochbaum[5] to support their allegation that the fact that NNECO performed a criticality calculation in connection with its analysis of the health and safety implications of the scenario in which the fuel remains on site is an admission that failure to adhere to administrative controls over spent fuel storage can challenge criticality margins. Motion at 7. Mr. Lochbaum's conclusion is based on faulty logic and a lack of familiarity with the Commission's regulations. NNECO needed to perform the calculation in order to determine whether in a worst case scenario, where the two rods were placed next to the most reactive assembly in the pool, k- effective would exceed applicable limits.[6] The calculation established that k-effective would not exceed 0.90, which is Millstone Unit 1's Defueled Safety Analysis Report (DSAR) requirement for subcriticality in the Unit 1 pool. Thus, subcriticality would be maintained with twice the margin required by the Staff's acceptance criterion, which is not more than 0.95 k-effective.[7]

The Licensing Board's decision in LBP-00-26 discusses at length the events at facilities other than Millstone that might have challenged the Staff's acceptance criterion of 0.95 k- effective, but did not. The Licensing Board concluded that none of these events raised a genuine and

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[5]Mr. Lochbaum's statement is entitled "Declaration of David A. Lochbaum." However, it does not satisfy the NRC's requirements for affidavits, in that it is neither sworn nor affirmed. Insofar as it might be offered as expert opinion, the Board should not give it any weight, as it does not appear that Mr. Lochbaum is qualified to offer human factors testimony.

[6] *See* 10 C.F.R. § 20.2201(b)(1)(iv) regarding requirements for written reports filed pursuant to 10 C.F.R. §20.2201. Section 20.2201(b)(1)(iv) requires that a written report filed pursuant to §20.2201 set forth information concerning exposures of individuals to radiation, circumstances under which the exposures occurred, and the possible total effective dose equivalent to persons in unrestricted areas. Under "IV. Health and Safety," the LER addresses both direct dose and the possibility of a dose as a result of criticality in the pool. Because 0.90 k-effective would not be exceeded, a radiation dose as a result of criticality in the pool would not be possible. *See* LER at 3-4.

[7] The Licensing Board in LBP-00-26 regards k-effective of 0.95 or lower as a "regulatory goal." 52 NRC at 190.

substantial issue with regard to Contention 4. LBP-00-26, 52 NRC 181, 197-200 (2000). The Commission denied review of Contention 4, noting that the Board's fact finding on Contention 4 appeared well grounded in the extensive original record. CLI-01-03 at 4. The Commission found that the petition for review raised no substantial question whether the Board's finding of fact is clearly erroneous. *Id.* The mere fact that NNECO performed the above-mentioned criticality calculation does not change any facts found by the Board in relation to Contention 4.

D. Trading Physical Protection For Administrative Controls

Intervenors state that the matter of the unaccounted for fuel rods illustrates the folly of trading physical protection for administrative controls. Motion at 7-8. They rely upon the opinions expressed by Mr. Lochbaum in ¶ 5(c) of his declaration as support for this proposition. In ¶ 5(c) Mr. Lochbaum speculates as to the cause of the "mislocation" of the two fuel rods in Millstone Unit 1 (that they were separated from their assembly and not reinstalled) and compares it to the installation of new racks in the Millstone Unit 3 spent fuel pool, which, according to Mr. Lochbaum, represents a potential cause of fuel assembly mislocation. The relationship between the separation of two fuel rods from their assembly in the Millstone Unit 1 spent fuel pool and the installation of new racks in the Millstone Unit 3 spent fuel pool is not apparent. This speculation does not point to any error in the existing record. It does not provide any basis for the Licensing Board to reconsider its previous ruling.

E. Intervenors' Allegation That The Administrative Controls Required For The Millstone Unit 3 Amendment At Issue Are More Complex Than The Administrative Controls Required To Keep Fuel From Leaving The Millstone Unit 1 Pool

Intervenors rely upon ¶ 5(d) of the declaration of Mr. Lochbaum for their argument that the administrative procedures involved with the amendment at issue are more complex than the procedures required to keep spent fuel rods from leaving the pool. Motion at 8. Mr. Lochbaum claims that the LER states that the missing fuel rods may have been mistaken for other irradiated components and instruments, such as LPRMs, and shipped offsite for disposal. Declaration,¶ 5(d).

Although the LER does, in fact, treat shipment offsite as a credible scenario requiring evaluation, it does not, as Mr. Lochbaum claims, state that the rods may have been mistaken for other irradiated components. Thus, since it is not known how the two rods came to be "missing," it is also not known what administrative procedures may have been violated.

Mr. Lochbaum continues, "Fuel rods are much more distinguishable from LPRMs and other irradiated components than fresh fuel assemblies of a given enrichment are from fresh fuel assemblies of a higher enrichment." *Id.* Mr. Lochbaum fails to note that there is no need to visually distinguish fresh fuel of a given enrichment from fresh fuel of a higher enrichment, as all fresh fuel up to 5 w/o % U235 is stored in the 3-out-of-4 Region 1 racks in the Millstone Unit 3 spent fuel pool. Additionally, this storage pattern does not reflect a change from the previous requirement for fresh fuel storage. *See* Application, March 19, 1999, Attachment 1 at 25 (TS 5.6.1.1.a.(2)).

Regarding Mr. Lochbaum's observation that fuel rods are more distinguishable from LPRMs than spent fuel assemblies of a certain burn-up are from spent fuel assemblies of a higher burn-up, such distinctions are not necessary, pursuant to the amendment or without regard to the amendment, visually or otherwise. Mr. Jensen's affidavit submitted in support of NNECO's Summary on June 30, 2000, explains how calculations are performed according to enrichment burn-up curves to determine for which region of the pool a given assembly qualifies. Each assembly bears a serial number and each storage cell has a number. It is the responsibility of the fuel handling workers to place an assembly with a given serial number into its designated cell. *See* Affidavit of Michael C. Jensen, filed in support of NNECO's Summary, June 30, 2000. Thus, Mr. Lochbaum's comparison between the administrative procedures involved with the handling of *fuel rods at Millstone Unit 1*, as he understands them, as opposed to the administrative procedures involved with the handling of *fuel assemblies at Millstone Unit 3*, is both inaccurate and irrelevant.

To summarize regarding Mr. Lochbaum's declaration in ¶ 5(d), the declaration mischaracterizes both the LER and the amendment request and it ignores Mr. Jensen's affidavit,

which was not challenged by Intervenors at argument. Further, as the Licensing Board found in LBP-00-26 and the Commission affirmed in CLI-01-03, Intervenors offered no probative evidence regarding human factors. The distinctions on which Mr. Lochbaum insists, in addition to being, as argued above, irrelevant, would require expertise in human factors. Mr. Lochbaum does not represent that he has such expertise and it appears that he does not. None of the information offered by Mr. Lochbaum in his declaration points to any error in the existing record and, thus, it is not appropriate support for a motion for reconsideration.

E. NNECO's "Ethical" Rehabilitation

Intervenors question the Licensing Board's reliance on the startup record of Millstone as evidence of the company's "ethical" rehabilitation. Motion at 8. They assert that no reliance should be placed on recent rehabilitation efforts at Millstone. Their opinion is unsupported and should not be given weight. This is yet another attempt to make new arguments not raised in the Motion to Reopen and does not support reconsideration of the Board's ruling on that motion.

F. Intervenors' Call For The Licensing Board To Mount An Investigation

Intervenors cite *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-918, 29 NRC 473 (1989) for the proposition that the Licensing Board should "mount an investigation" to inquire into the close timing between the release of the Board's decision on October 26, 2000, and NNECO's asserted discovery of the missing rods on November 16, 2000, three weeks later. ALAB-918 does not support Intervenors' suggestion. ALAB-918 concerns the Appeal Board's consideration of an intervenor appeal from a licensing board denial of a motion to admit an emergency planning exercise contention or, in the alternative, to reopen the record. The licensing board's decision, which was affirmed, required further briefing and supporting affidavits addressing whether the Intervenors' motion raised a significant safety issue as required by 10 C.F.R. §2.734. ALAB-918, 29 NRC 473 at 478-79. A licensing board's authority to order briefing does not extend to the authority to order an investigation. Further, Intervenors' suspicions

concerning the timing of NNECO's conclusion regarding the two fuel rods are not related to any of the issues that were the subject of the Licensing Board's decision denying reopening.

Intervenors also cite 10 C.F.R. § 2.760a, which concerns a licensing board's jurisdiction to consider matters not put into controversy by the parties. That regulation is not apposite here where the matter at issue has been raised by a party. Beyond that, it is not clear that this Licensing Board would have the jurisdiction to consider matters pursuant to its authority under 10 C.F.R §2.760a where the Commission has narrowly limited the Board's jurisdiction on the remand of the motion to reopen to consideration of whether the matters raised in that motion relate to Contention 4. *See Waterford,* CLI-84-1, 23 NRC at 7.

Intervenors conclude that if the Licensing Board had considered the issue Intervenors raised in their motion to reopen a result different from that reached by the Board in LBP-00-26 on Contention 4 would have been likely. Motion at 9. However, the only administrative controls at issue in Contention 4 were those necessary to implement the amendment. As the Staff pointed out in its response opposing Intervenors' motion to reopen, Intervenors concentrated their efforts in the Subpart K proceeding on the *basis* for Contention 4, i.e. Millstone's "history," rather than on the administrative controls that were the *subject* of that contention. The Licensing Board concluded that the heart of Contention 4 was whether the revision of Millstone 3's Technical Specifications to include Figures 3.9.1, 3.9-3 and 3.9-4, detailing the limits on fuel placement , were so complex as to make fuel misplacement likely. LBP-00-26, 52 NRC at 197. Without regard to whether failure of administrative controls that are not yet identified at Millstone Unit 1 was involved in the matter of NNECO's inability to account for two fuel rods, those administrative controls are unrelated to administrative controls required for the Millstone Unit 3 amendment. The matters that Intervenors are seeking to raise are not within the scope of the amendment request, much less within the scope of Contention 4.

CONCLUSION

For the reasons discussed above, the Intervenors have not raised any matter that would cause the Licensing Board to reconsider its denial of Intervenors' Motion to Reopen. Therefore, the Licensing Board should deny the Motion for Reconsideration.

Respectfully submitted,

Ann P. Hodgdon **/RA**
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of February, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO INTERVENORS' MOTION FOR RECONSIDERATION" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service as indicated by a double asterisk, with copies by electronic mail as indicated, this 20th day of February, 2001:

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