

RAS 3078

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 05/23/01

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DOMINION NUCLEAR CONNECTICUT, INC.) Docket No. 50-423-LA-3
)
(Millstone Nuclear Power Station,)
Unit No. 3))

NRC STAFF'S VIEWS CONCERNING
PROCEDURES ON REOPENING THE RECORD

In LBP-01-17, a Memorandum and Order of May 10, 2001, the Atomic Safety and Licensing Board, on reconsideration of LBP-01-1, in which the Board denied a motion to reopen filed by Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("Intervenors"), granted the motion for reconsideration and reopened the record. In addition, the Board scheduled a prehearing conference for May 24, 2001, and set forth three questions to be addressed by the parties during the conference. LBP-01-17, slip op. at 15-16.

In LBP-01-17, the Board also invited the parties to file their views regarding procedures to be followed in the reopened proceeding no later than May 22, 2001. The Board indicated that the parties should discuss procedural options and further discovery among themselves prior to submitting their recommendations as to procedures, so that, if possible, there would be no disagreement concerning procedures to be followed. *Id.* at 16.

In a telephone conference call on Friday, May 18, 2000, the parties held the discussion contemplated by the Board, but were unable to reach agreement. The Staff's views on two of the matters on which views were solicited are set forth below. The third matter, which concerns immediate effectiveness, is a matter of law and is, thus, not subject to party agreement. The Staff will address that matter at the prehearing conference.

1. Procedures for the reopened proceeding

The Board's first question reads as follows:

(1). The procedural requirements of the reopened hearing –i.e., whether affidavits or declarations (together with oral argument), as contemplated by Subpart K, are sufficient to resolve the issue, or, alternatively, whether a full evidentiary hearing (as sought by CCAM/CAM) is necessary or warranted. Further, the parties are invited to address whether further discovery may be necessary or warranted and, if so, under what standards and schedule.

The issue of when a Subpart K proceeding (such as the instant proceeding) may be resolved by affidavits or declarations, or when evidentiary hearings are required, was addressed by the Commission in *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC ____ (slip op., May 10, 2001). In that proceeding (also conducted under Subpart K), the Commission addressed Intervenor Orange County's argument that a factual disagreement between its expert and the experts of CP&L and the NRC staff was enough to trigger a full evidentiary hearing. The Commission stated:

Subpart K establishes a two-part test to determine whether a full evidentiary hearing is warranted: (1) there must be a genuine and substantial dispute of fact “which can only be resolved with sufficient accuracy” by a further adjudicatory hearing; and (2) the Commission's decision “is likely to depend in whole or in part on the resolution of that dispute.” See 10 C.F.R. § 2.1115(b).

CLI-01-11, slip op. at 6. The Commission cited its earlier opinion in *Northeast Nuclear Energy Company* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-03, 53 NRC 22 (2001), where the Commission had stated:

In promulgating § 2.1115(b) of Subpart K, we used the same test described in the Nuclear Waste Policy Act of 1983 [“NWPA”] at 42 U.S.C. § 10154(b)(1). We noted that

the statutory criteria are quite strict and are designed to ensure that the hearing is focused exclusively on real issues. They are similar to the standards under the Commission's existing rule for determining whether summary disposition is warranted. They go further, however, in requiring a finding that adjudication is necessary to resolution of the dispute and in placing the burden of demonstrating the existence of a genuine and substantial dispute of material fact on the party requesting adjudication.

See id. at 26, n.5, quoting Final Rule, “Hybrid Hearing Procedures for Expansion of Spent Nuclear Fuel Storage Capacity at Civilian Nuclear Power Reactors,” 50 Fed. Reg. 41,662, 41,667 (Oct. 15, 1985).

Id. After a lengthy discussion in which it distinguished its Subpart K procedures from its summary disposition rule, the Commission concluded:

The Commission does not have extensive experience with Subpart K proceedings to date. On a case-by-case basis, we generally will defer to our licensing boards’ judgment on when they will benefit from hearing live testimony and from direct questioning of experts or other witnesses. If, however, a decision can be made judiciously on the basis of written submissions and oral argument, we expect our boards to follow the mandate of the NWPA and Subpart K to streamline spent fuel expansion proceedings by making the merits decision expeditiously, without additional evidentiary hearings. See 42 U.S.C. §§ 10151(a)(2), 10154.

Id. at 10.

Thus, as set forth in Subpart K and as interpreted by the Commission in recent decisions, there is no option as to whether to proceed directly to an evidentiary hearing: *i.e.*, an evidentiary hearing is not reached except through the procedures set forth in 10 C.F.R. § 2.1115. In other words, the Board must find (a) that there is a genuine and substantial dispute of fact “which can only be resolved with sufficient accuracy” by a further adjudicatory hearing, and (b) that the Commission’s decision “is likely to depend in whole or in part on the resolution of that dispute.” The burden rests upon the party requesting a hearing to demonstrate “the existence of a genuine and substantial dispute of material fact,” and the Licensing Board should decline to require evidentiary hearings unless it finds that it cannot reach a decision on the basis of written submissions and oral arguments but, instead, requires the presence of experts or other witnesses.

The Staff addresses discovery in its response to the second question.

2. The Licensee’s Investigation and Report

The Board’s second question reads as follows:

Should further hearing activities await the conclusion of DNC’s investigation and its report on its search for the missing fuel rods?

In the Staff's view, all adjudicatory-related activities, including discovery, should await the conclusion of the licensee's investigation and, further, as urged by the Staff in its motion to defer proceedings, filed today, all activities in this adjudicatory proceeding should be deferred to await the conclusion of OI's investigation and issuance of its report. Inasmuch as the need for discovery (and its possible scope) could be affected by the OI investigation, and the conduct of discovery could possibly interfere with or jeopardize the OI investigation, the Staff submits that the Board should not order any discovery until after the issuance of these reports. In addition, the Staff believes that there is no need to establish the parameters of any discovery that might be necessary until the parties have had an opportunity to review the licensee's report.

3. Other Matters

The Staff is considering filing a request for reconsideration and/or clarification of the Licensing Board's decision in LBP-01-17, based on its view that the Board's decision exceeds the scope of the issues presented by the Intervenors in their motion to reopen and their motion for reconsideration and of their Contention 4 as admitted by the Board. The Staff is prepared to discuss this matter at the prehearing conference.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of May, 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO HOLD PROCEEDING IN ABEYANCE", together with the attached "AFFIDAVIT OF BARRY R. LETTS IN SUPPORT OF THE NRC STAFF'S MOTION TO HOLD PROCEEDING IN ABEYANCE," "NRC STAFF'S VIEWS CONCERNING PROCEDURES ON REOPENING THE RECORD" and the "NOTICE OF APPEARANCE" of Norman St. Amour 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 followed by a conforming copy via first-class mail, as indicated by a double asterisk, this 22nd day of May 2000.

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