

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
)	
Dominion Nuclear Connecticut, Inc.)	Docket No. 50-423-LA-3
)	
(Millstone Nuclear Power Station,)	ASLBP No. 00-771-01-LA-R
Unit No. 3))	

DOMINION NUCLEAR CONNECTICUT, INC.'S RESPONSE
TO QUESTIONS POSED BY THE LICENSING BOARD IN LBP-01-17

I. INTRODUCTION

Dominion Nuclear Connecticut, Inc. ("DNC") hereby files its response to the procedural questions posed by the Atomic Safety and Licensing Board ("Licensing Board") in LBP-01-17, issued on May 10, 2001 ("Order").¹ Specifically, the Licensing Board requested the parties (DNC, the Connecticut Coalition Against Millstone ("CCAM")/the Long Island Coalition Against Millstone ("CAM"), and the NRC Staff) to submit their views on:

1. the procedural requirements applicable to the reopened hearing;
2. whether further hearing activities should await the conclusion of DNC's investigation into the missing fuel rods; and

¹ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3) LBP-01-17, 53 NRC __ (2001).

3. the effect of LBP-01-17 on the Licensing Board's immediate effectiveness finding in its earlier decision in this matter, LBP-00-26.²

DNC discusses each of these matters below.³

II. DNC's Views

A. *Procedural Requirements for the Reopened Hearing*

As recognized by the Licensing Board in the Order, this proceeding has been conducted in accordance with the procedures of 10 C.F.R. Part 2, Subpart K. The availability of those procedures was mandated by the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, *et seq.* ("NWPA"). Under Subpart K procedures, a full evidentiary hearing can be conducted only if, after written filings and an oral argument, the Licensing Board makes specific, defined findings. Specifically, under 10 C.F.R. § 2.1115(b), an issue may be designated for evidentiary hearing only if:

- there is a genuine and substantial dispute of fact; and
- the dispute can be resolved with sufficient accuracy only through introduction of evidence at an adjudicatory hearing; and

² See 52 NRC 181 (2000).

³ At the time this proceeding began, Northeast Nuclear Energy Company ("NNECO") was the licensee for Millstone Unit 3. On March 9, 2001, the NRC granted the request to transfer the operating license for Unit 3 from NNECO and the selling co-licensee owners to DNC, an indirect, wholly-owned subsidiary of Dominion Energy, which is in turn owned by Dominion Resources, Inc. The closing of the transaction involving the sale of Unit 3 was completed, and the conforming license amendment change was issued, on March 31, 2001. Accordingly, DNC is now the operating licensee and party in interest in this matter.

- the NRC's ultimate decision is likely to depend in whole or in part on the resolution of the dispute.

In the present matter, the Licensing Board has not entertained written filings on the relationship of the Unit 1 issue to Contention 4, the Licensing Board has not held the oral argument required by Subpart K, and has not made any of the three required findings to justify a full evidentiary hearing. Accordingly, the Licensing Board has no choice under the regulations other than to address the Unit 1 issue under the procedures of Subpart K.

The Commission recently in *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC ____ (slip op. May 10, 2001), provided important guidance on the Subpart K process — guidance that is germane to the Licensing Board's question regarding procedures for this case. In that Subpart K proceeding, the appellant argued that evidentiary hearings would be required if it had demonstrated a "genuine and substantial dispute of fact." The Commission disagreed, emphasizing that the regulations require much more than a disagreement between parties to justify an evidentiary hearing. The Commission emphasized that licensing boards are fully able to consider and resolve technical issues based on the written filings and oral argument called for by Subpart K. The Commission wrote:

The short of the matter is that the NWPA and our rule implementing it (Subpart K) contemplate merits rulings by licensing boards based on the parties' written submissions and oral arguments, except where a board expressly finds that "accuracy" demands a full-scale evidentiary hearing. Subpart K's abbreviated hearing approach is in harmony with other NRC rules, such as Subparts L and M, that authorize informal adjudicatory decision-making without the panoply of full trial-type processes. *See* 10 C.F.R. § 2.1201 *et seq.* (Subpart L); 10 C.F.R. § 2.1301 *et seq.* (Subpart M).

Licensing boards are fully capable of making fair and reasonable merits decisions on technical issues after receiving written submissions and hearing oral arguments. The Commission is a technically oriented administrative agency, an orientation that is reflected in the make-up of its licensing boards. Most licensing boards have two, and all have at least

one, technically trained member. In Subpart K cases, licensing boards are expected to assess the appropriate evidentiary weight to be given competing experts' technical judgments, as reflected in their reports and affidavits. The inquiry is similar to that performed by presiding officers in materials licensing cases, where fact disputes normally are decided "on the papers," with no live evidentiary hearing. *See e.g., Hydro Resources, Inc.*, CLI-01-4, 53 NRC at 45; *Curators of the University of Missouri*, CLI-95-01, 41 NRC 71, 118-20 (1995). The NRC's administrative judges, in other words, and the Commission itself, are accustomed to resolving technical disputes without resort to in-person testimony.

Id., slip op. at 9.

In the present case, written submissions and oral argument will be ample to address the question that the Licensing Board has posed. Specifically, the Licensing Board has reopened this proceeding to evaluate the issue of the two fuel pins at Millstone Unit 1, but only:

... to the extent it bears upon the adequacy of administrative controls at the Millstone-3 SFP and DNC's ability or willingness to implement such controls successfully. The scope of this reconsideration is limited to the procedures or controls for management of the SFPs and their modes of execution that may be common to Millstone-1 and Millstone-3.

LBP-01-17, slip op. at 15.

As such, the Licensing Board has reopened the proceeding, not to consider the entire history of fuel movements at Unit 1, but to examine whether there is any commonality between any Special Nuclear Material accountability procedures that may have led to the loss of accountability of the two fuel pins at Unit 1 and the Unit 3 procedures that support the revised Unit 3 spent fuel assembly storage configuration and reactivity limits.⁴ DNC sees no reason that this issue cannot and should not — at least in the first instance — be addressed through Subpart K procedures. Based on written submissions and oral argument, DNC will demonstrate that the

⁴ Similarly, the scope of the reopening does not include the oft-repeated charges of CCAM/CAM regarding NNECO's disclosures with respect to the Unit 1 pins.

NRC's ultimate decision on Contention 4 does not depend in whole or in part on the Unit 1 pin issue.

B. Whether Further Hearing Activities Should Await the Conclusion of DNC's Investigation of the Missing Fuel Rods

DNC, as the licensee for Millstone Unit 1, is overseeing an intensive investigation into the matter of the two Unit 1 pins. The investigation is being conducted under the sponsorship of Northeast Utilities Service Company (which under the Millstone purchase and sale agreement remains financially responsible for the issue) by a dedicated Fuel Rod Accountability Project ("FRAP"). The FRAP is made up of a multi-discipline team that includes at least 21 professional individuals, supported by additional staff. Because accountability with respect to the two dis-assembled pins appears to have been lost over 20 years ago, the FRAP has been engaged in a methodical, comprehensive, and very time-consuming assessment of the events and circumstances that might resolve the matter. While the Licensing Board in its decision to reopen seemed to question the lack of visible progress on the Unit 1 issue in the last few months, the facts are that the FRAP has been actively engaged in its comprehensive assessment and substantial progress has been made. The robust investigation process has involved the retrieval, review, and analysis of records, careful planning and conduct of physical inspections of the Unit 1 spent fuel pool, and formal interviews, both onsite and offsite, of individuals who may have knowledge of the matter. As of this filing, all of these efforts remain in a very active stage.⁵

⁵ DNC and Northeast Utilities gave a presentation to the Nuclear Energy Advisory Committee ("NEAC") on May 17, 2001, regarding the scope and status of the FRAP. Counsel for DNC has already provided to counsel for CCAM/CAM a copy of the presentation slides from the NEAC meeting. A similar presentation was made to the

The FRAP effort specifically includes an independent root cause assessment (“RCA”). The RCA is being conducted by professionals versed in the discipline. The RCA is in progress and is focused on the cause and contributing factors for the loss of accountability with respect to the two Unit 1 pins. The RCA will include an assessment of the extent of condition, which by its nature will consider the applicability of the issue to the other Millstone units. The final RCA will, by necessity, be based on the FRAP factual conclusions regarding the pins. The FRAP has targeted the end of June to complete their effort and a final report, with the RCA to be completed shortly thereafter. These dates, however, are goals and are subject to the understanding that the quality of the investigation takes priority over the schedule.⁶

With respect to this proceeding, the issue before the Licensing Board does not encompass by any means the full scope of the exhaustive FRAP investigation. The Licensing Board has reopened the record to examine whether the Unit 1 issue related to two specific fuel pins “suggests a failure of administrative controls” at Unit 3, and if so, “to determine the extent to which the failure of administrative controls at the Millstone-1 SFP could carry over to the successful implementation of administrative controls at the Millstone-3 SFP.” LBP-01-17, slip op. at 15. Further, as quoted above, the Licensing Board limited the scope of the reconsideration to the procedures that may be “common to Millstone-1 and Millstone-3.” *Id.*

Given that the focus of Contention 4 is on the potential for criticality based on mishandling of complete fuel assemblies, and the limited scope of the Licensing Board’s

NRC at a noticed meeting, open to the public, held on April 23, 2001, at King of Prussia, Pennsylvania. DNC expects the NRC’s meeting report to be available shortly.

⁶ Given the number of interviews being conducted, the current target date appears to present a significant challenge.

reconsideration, the essential, relevant documents to address the Licensing Board's question in this proceeding will be the FRAP report and the RCA. These documents will address the most likely explanations for the loss of accountability at Unit 1, the root causes, the extent of condition, and any relationship to Millstone Unit 3 procedures. When completed, these documents will be made available to the NRC, the public, the Licensing Board, and the parties in this proceeding. These documents, and any references included therein, are expected to be very robust and will provide a sufficient basis for the parties and the Licensing Board to consider the narrow issue that remains in this proceeding.

DNC believes that further proceedings on this issue must, for both logical and practical reasons, await the conclusion of the FRAP effort and the RCA. This view reflects an efficient approach that would avoid burdening and hindering the progress of the FRAP. The FRAP report and RCA will provide sufficient documentation such that further discovery such as that contemplated by CCAM/CAM will be unnecessary.⁷ Further proceedings, including discovery, prior to completion of these documents, would serve no purpose other than to delay the project and potentially chill the investigation and assessment. The FRAP investigation and RCA are, and must remain, DNC's first priority.

In sum, DNC requests that these proceedings be held in abeyance pending completion of the FRAP/RCA report. DNC further maintains that these documents, when

⁷ The Commission's Subpart K regulations clearly contemplate limits on discovery. For example, 10 C.F.R. § 2.1111, "Discovery," states, *inter alia*, that "all discovery shall be completed within 90 days. The presiding officer may extend the time for discovery upon good cause shown based on exceptional circumstances and after providing the other parties an opportunity to respond to the request." The spirit of Subpart K and of recent Commission assessments of the need to limit discovery in proceedings argue strongly in favor of avoiding unnecessary and unwarranted "fishing expeditions."

available, with the supporting references, should provide sufficient discovery to proceed to a Subpart K filing on the issue of whether there is commonality between the procedures at issue at Unit 1 and those at issue in Contention 4 for Unit 3. This approach would allow for the ongoing investigation to proceed unimpeded, and would allow an efficient resolution of this matter.

C. *Effect of LBP-01-17 on the Licensing Board's Immediate Effectiveness Finding in LBP-00-26*

As referenced by the Licensing Board in the Order, the Licensing Board's prior decision on the merits of Contention 4 was immediately effective. *See* LBP-00-26, 52 NRC at 214, Part F, ¶ 4. The immediate effectiveness of the Licensing Board's decision was not based on an "immediate effectiveness finding." Rather, immediate effectiveness was required by 10 C.F.R. § 2.764(a). Under the regulation, a decision such as LBP-00-26 is immediately effective, subject only to a finding that good cause has been shown that the decision should not be immediately effective. No such showing was made at the time. And, in the absence of any stay request pursuant to 10 C.F.R. § 2.788, the license amendment authorizing use of the new spent fuel racks and the revised regional storage restrictions was issued by the NRC Staff on November 28, 2000.

The Licensing Board's decision to reopen the record to consider the implications of the Unit 1 pin issue should have no effect on the prior immediate effectiveness of the Licensing Board's decision or on the license amendment that was properly issued by the NRC Staff following that decision. The record in this proceeding provides ample basis for a conclusion that the racks and regional storage restrictions authorized in the license amendment provide adequate assurance of nuclear criticality control in the Unit 3 spent fuel pool — with a substantial margin of safety demonstrated by undisputed criticality calculations. As also documented in the record in this case, the fuel handling procedures and other controls utilized to

implement the regional storage restrictions have been proven to be effective at Millstone Unit 3. There is no basis or good cause to reopen the issue of immediate effectiveness.

In the Order, the Licensing Board cites the Atomic Safety and Licensing Appeal Board's ("Appeal Board") decision in *Consumers Power Company* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784-85 (1977). The *Midland* case, in an analogous situation, stands for the proposition that a stay of a previously authorized activity "does not follow automatically" when the agency's review is subsequently reopened. In *Midland*, the Court of Appeals for the District of Columbia Circuit had, after the construction permit had been issued, remanded the matter to the Commission for further consideration of certain issues in the environmental impact statement.⁸ The Appeal Board allowed the construction authorized prior to the remand to continue. Similarly, in *Philadelphia Electric Co.* (Limerick Generating Station, Unit 2), CLI-89-17, 30 NRC 105 (1989), the Commission specifically allowed a plant to continue operating based on the existing record in the proceeding, notwithstanding a Court of Appeals for the Third Circuit determination that further consideration of severe accident mitigation design alternatives was necessary.⁹ These precedents apply equally with respect to the regional spent fuel storage restrictions already implemented at Millstone Unit 3 — successfully — during the last refueling outage.

In addition, NNECO, as the licensee at the time, has substantively responded to the issue of the Unit 1 pins and their relevance to the Unit 3 license amendment at issue in this proceeding. In response to the CCAM/CAM motion to reopen, NNECO provided the affidavit

⁸ See *Aeschliman v. NRC*, 547 F.2d 622, 632 (D.C. Cir. 1976), *rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

⁹ See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3rd Cir. 1989).

of Mr. Joseph J. Parillo. Mr. Parillo, among other things, explained the difference between the administrative controls used to implement the new storage racks and redefined regions at Unit 3, on the one hand, and the administrative controls related to tracking Special Nuclear Material at Millstone Unit 1, on the other. See “Northeast Nuclear Energy Company’s Response in Opposition to Motion to Reopen and Vacate Decision,” dated January 8, 2001, at 13-14 and attached Affidavit of Joseph J. Parillo, at ¶¶ 12-16. In addition, a substantial record compiled in this proceeding confirms that the procedures used at Unit 3 to support reactivity limits have been effective to assure that spent fuel assemblies are properly placed in spent fuel storage locations. As stated by Mr. Parillo, there was no misplaced assembly at Unit 1 and there has still never been a case at Millstone where a fuel assembly was placed in a storage region for which it was not qualified. *Id.*, Affidavit at ¶ 10.

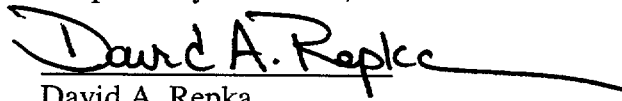
Moreover, the record in the case, as compiled last year, amply demonstrates the substantial margin of safety against a nuclear criticality in the re-configured Millstone Unit 3 spent fuel pool. See “Summary of Facts, Data, and Argument on Which NNECO Intends to Rely at the Subpart K Oral Argument,” dated June 30, 2000, at 16, 30-32. The focus of Contention 4 was and remains on prevention of nuclear criticality. The undisputed criticality calculations of record, which specifically allow for the possibility of fuel handling or accountability errors that might be postulated to lead to fuel assembly mis-loads, provide assurance that continued implementation of the regional storage restrictions will not result in a nuclear criticality.

Finally, consistent with the *Midland* decision cited above, neither a “traditional balancing of equities” or “any likely prejudice to further decisions” favors a stay of effectiveness of the prior Licensing Board decision. The new storage racks have been installed at Millstone Unit 3 and the revised regional storage restrictions have been implemented. Fuel assemblies

have been successfully placed in all three regions, and criticality credit is no longer taken for Boraflex material. Re-establishing the pre-existing regions would necessitate unnecessary fuel movements and would require DNC to again credit the degraded Boraflex material. Continued use of the new racks and revised storage restrictions is, quite simply, the safest approach. In addition, re-establishing the prior regions would compromise full-core off-load capability during the present Unit 3 operating cycle. All of these results would be unwarranted and counter-productive. Moreover, the continued effectiveness does not prejudice any further decisions this Licensing Board may make.

In sum, the decision to reopen this proceeding should have no impact on the effectiveness of the Licensing Board's earlier decision or on the license amendment previously issued by the NRC Staff.¹⁰

Respectfully submitted,



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Dated in Washington, D.C.
this 22nd day of May 2001

¹⁰ The license amendment was issued after the Licensing Board's decision in LBP-00-26, and therefore there was no final finding by the NRC Staff that the amendment involves no significant hazards consideration. The proposed amendment was evaluated by NNECO in accordance with the standards of 10 C.F.R. §§ 50.91 and 50.92, and NNECO determined that no significant hazards consideration were involved. An amendment that involves no significant hazards consideration may be issued by the NRC Staff notwithstanding any pending licensing proceedings. A Staff determination in this regard cannot be challenged in this proceeding. See 10 C.F.R. § 50.58(c).

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(Millstone Nuclear Power Station,) ASLBP No. 00-771-01-LA-R
Unit No. 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut, Inc.'s Response to Questions Posed By the Licensing Board in LBP-01-17" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 22nd day of May 2001. Additional e-mail service has been made this same day as shown below.

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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal flourish extending to the right.

David A. Repka
Counsel for DNC, Inc.