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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-01-29
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

DOMINION NUCLEAR CONNECTICUT, INC.

(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

Oct. 5, 2001

MEMORANDUM AND ORDER
(Staff Motion to Continue to Hold Proceeding in Abeyance)

The NRC Staff, on September 4, 2001, filed a "Motion to Continue to Hold Proceeding in Abeyance" (Motion). On October 2, 2001, the Atomic Safety and Licensing Board conducted a telephone conference with regard to this Motion (Tr. 604-____). For reasons set forth below, and confirming rulings announced during the conference, we are granting in part and denying in part this Motion.

1. Background. By our Memorandum and Order (Telephone Conference, 5/24/01), dated June 21, 2001 (unpublished) (June 21 M&O), we granted (in part) the request of the NRC Staff to place further prehearing activities in this proceeding (e.g., discovery) in abeyance pending completion of an investigation by the NRC's Office of Investigations (OI). The investigation concerned an allegation bearing upon a former Licensee's (Northeast Nuclear Energy Company or NNECO) reporting to NRC of missing fuel pins at the Millstone Unit 1 Spent Fuel Pool (SFP). The deferral was to extend either to September 4, 2001, or the completion of the investigation, if earlier.

For its part, the Licensee (Dominion Nuclear Connecticut, Inc., or DNC) had also sought to defer activities in this proceeding pending completion of its own investigation into the disappearance of the fuel pins or rods. DNC had initially projected June 30, 2001 as a target date for completion of its investigation (denominated as its Fuel Rod Accountability Project (FRAP report)), with an analysis ("Root Cause Analysis" or RCA) due several weeks later, but acknowledged that its target dates could slip. Indeed, by letter to the Licensing Board and parties dated July 26, 2001, the Licensee acknowledged that its FRAP investigation and report would not be completed until late September 2001, with the RCA to be completed in the same time frame "or shortly thereafter."

2. Staff Motion. On September 4, 2001, the NRC Staff filed its Motion. Supported by affidavits of Barry R. Letts, Region 1 Field Office Director, OI, and Dr. Ronald L. Bellamy, Chief, Decommissioning and Laboratory Branch, NMSS, in Region 1¹, the motion states, inter alia, that OI completed its field work and began preparation of its report of the investigation in August 2001, and expected that copies of the report will be available to the Board and parties by October 31, 2001, barring unanticipated delays.

The Motion goes on to request further deferral of this proceeding until the OI report becomes available and, additionally, until the Staff has had an opportunity to analyze the Licensee's FRAP report and RCA. The Staff advises that its inspection of the FRAP report is currently scheduled to begin on October 9, 2001 (based on availability of the FRAP report by the end of September 2001, as set forth by DNC) and that the Staff analysis is expected to be completed "by the end of November."

¹Copies of signed and executed affidavits were provided to the Licensing Board and parties by letter dated September 21, 2001.

3. Other parties' positions. By response dated September 14, 2001, the Licensee supports the Staff Motion, with some qualifications. It opines that the FRAP report and RCA are the critical pacing items in this proceeding. It reiterates that the FRAP report would be completed by the end of September 2001, but adds that release of the FRAP report to the Board and parties would not occur until a few days later, in early October, with the RCA due several weeks later. DNC regards the scheduled October 31 release of the OI report as generally consistent with its dates for release of the FRAP report and RCA. Therefore, DNC does not oppose the Staff's requested deferral until October 31, 2001, although expressing some doubt as to the OI report's relevance to the issue currently pending before the Board. As for the Staff's request to defer until the end of November to allow it time to analyze the FRAP report and RCA, DNC regards this request as premature and takes no position with respect to it. DNC suggests a prehearing discussion for mid- to late-October, to cover issues of discovery and other prehearing activities in this proceeding.

Intervenors Connecticut Coalition Against Millstone and Long Island Citizens Against Millstone (collectively, CCAM/CAM) filed their response to the Staff's Motion on September 26, 2001.² Noting that they had opposed deferral when initially requested by

²At the Licensing Board's request, the Chief Counsel for the Atomic Safety and Licensing Board Panel (ASLBP), on September 24 and 25, 2001, attempted to contact by telephone counsel for CCAM/CAM, and left messages to inquire whether CCAM/CAM had received the Staff's motion and had any views with respect thereto. CCAM/CAM counsel responded to the ASLBP Chief Counsel on September 25, 2001, and noted that their response (which should have been filed by September 20, 2001) would be filed shortly. The September 26 response noted and apologized for CCAM/CAM's delay in filing "occasioned by scheduling disruptions brought about by the terrorism events of September 11, 2001." The Intervenors expressed their belief that neither the Staff nor Licensee would be prejudiced if the Licensing Board takes due consideration of their response. Although we could decline to consider CCAM/CAM's response for untimeliness, in view of the events of September 11, 2001 and in the absence of a showing of substantial prejudice to other parties, we will consider their

(continued...)

the Staff and Licensee, they oppose further deferral on the basis that the Staff Motion fails to provide any information that would warrant further deferral. CCAM/CAM also points out that, since the issuance of the June 21 M&O, the Staff had failed, with one exception, to provide "periodic reports as to the status of the OI investigation, together with inspection reports on this matter," as directed by the Board. CCAM/CAM further notes that release of the FRAP report and RCA had been delayed 100 days beyond the June 30, 2001 target date, without any explanation. On this basis, CCAM/CAM requested a telephone conference to discuss the reasons for further deferral. As indicated earlier, such conference was held on October 2, 2001.³

4. Licensing Board Ruling.

Proceedings subject to 10 C.F.R. Part 2, Subpart K (such as this one) are expected to be conducted with a view toward expedited completion. See Statement of Considerations, 10 C.F.R. Part 2, Subpart K, 50 Fed. Reg. 41,662 (Oct. 15, 1985); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). Deferral of these proceedings, as requested by the Staff, inherently compromises this goal and thus should be founded upon significant public interest reasons before being adopted. We thus analyze the Staff's Motion with these general considerations as a backdrop.

²(...continued)

response here. We have thus considered the Intervenor's filing and, indeed, scheduled the October 2, 2001 telephone conference as a result.

³Participating in the call, in addition to the three Board members, were David Repka, Esq., and Lillian Cuoco, Esq., for DNC; Nancy Burton, Esq., for CCAM/CAM; Ann Hodgdon, Esq., accompanied by Victor Nerses, Project Manager, and David Cummings, Esq., for the NRC Staff; and Michelle McKown, Esq., counsel to the ASLBP. Several other observers also were present.

(a). As indicated in our June 21, 2001 M&O (which reflected rulings made as a result of the May 24, 2001 telephone conference), the genesis of our deferral of prehearing activities in this proceeding (particularly discovery) was primarily the presence of an ongoing OI investigation, which was the basis upon which the Staff sought deferral. Although not aware of the explicit information being investigated by OI, we nevertheless accepted the Staff's conclusion (supported by affidavits) that prehearing activities in this proceeding could compromise the OI investigation, and we ruled that further prehearing activities should be deferred during the pendency of the OI investigation. The rationale, of course, was the desire to protect investigative material from premature public disclosure, as sanctioned in the Commission's Statement of Policy: Investigations, Inspections, and Adjudicatory Proceedings (Sept. 7, 1984) (published at 49 Fed. Reg. 36,032 (Sept. 13, 1984)).

As there set forth, the protection from public disclosure is designed either (1) to avoid compromising an ongoing investigation or inspection, or (2) to protect confidential sources. Such lack of full disclosure, however, is to be strictly limited:

[T]he Commission [notes] that as a general rule it favors full disclosure to the boards and parties, that information should be protected only when necessary, and that any limits on disclosure to the parties should be limited in both scope and duration to the minimum necessary to achieve the purposes of the non-disclosure policy.

49 Fed. Reg. at 36,033, see also Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-9, 41 NRC 404, 405 (1995).

It is not clear from the 1984 Policy Statement whether, to accommodate either of OI's interests specified above, deferral should extend only to the completion of OI's field investigation (which here occurred in August) or (alternatively) to the completion of OI's report, scheduled for no later than October 31, 2001. Upon inquiry during the October 2 telephone conference, parties were not able to reach agreement on this question. In

addition, during the telephone conference, we inquired why it would take OI from the end of August (when it finished its investigation) to October 31, 2001, to prepare and release its report. The Staff explained the reasons for this delay, including multiple required approvals at both the Region I level and at NRC Headquarters. Although we are not entirely satisfied that the OI report could not have been prepared and circulated more expeditiously, we are aware that we have no authority to direct the Staff in the performance of its non-adjudicatory functions. See, e.g., Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-12, 11 NRC 514, 516 (1980).

Based on the foregoing, however, we are prepared to construe the 1984 Policy Statement as sanctioning deferral until preparation and distribution of the OI report. We thus extend the deferral to October 31, 2001, or to the date of distribution of the OI Report, whichever comes earlier.⁴

(b). The Licensing Board's June 21, 2001 M&O also dealt with a motion by DNC to defer further activities in this proceeding pending completion of the FRAP report and the RCA. At the time, the target date for completion of the report was June 30, 2001, with the RCA scheduled shortly thereafter. Based on the circumstance that the deferral sought by DNC was shorter in duration than that sought by the Staff, which we had granted, we also granted the Licensee's deferral motion.

As noted earlier, the Licensee, by letter dated July 26, 2001, advised that it had not met its target date of June 30, 2001 for the FRAP report and RCA. It estimated that

⁴If the Staff believes that deferral to accommodate either of the OI interests specified above need extend beyond October 31, 2001, we direct the Staff to notify the Board and parties (by e-mail as well as through a paper filing) no later than Wednesday, October 24, 2001. The Board will then hold an in camera hearing session, as set forth in the Sept. 7, 1984 Policy Statement (involving only the Board, the Staff, and OI) to ascertain the relationship between information being investigated by OI and information that may be relevant to this proceeding and to determine whether discovery in this proceeding would compromise either of the two OI interests outlined above.

the FRAP report would be completed by late September 2001, with the RCA shortly thereafter. During the telephone conference, DNC confirmed that the FRAP report had been completed and was in the process of acceptance review by DNC. It is anticipated that the FRAP report will be distributed to the Board and parties next week, and that the RCA will be completed in several weeks, presumably by mid- to late-October. The Staff, in its current deferral motion, seeks to defer further activities pending completion by DNC of its FRAP report and RCA and, additionally, until it has completed its own analysis of the FRAP report and RCA, estimated for the end of November, 2001.

The current schedule for distribution of the FRAP report and RCA is within the deferral period we are granting to accommodate the OI report. Accordingly, we are also granting the Staff's request for deferral pending receipt of the FRAP report and RCA.

The Staff's additional request for deferral until the end of November to permit it to analyze and review the FRAP report and RCA stands, however, on a different footing. The Licensee deems this request to be premature. Clearly, it is. But, beyond that, an analysis of the FRAP report and RCA, as sought by the Staff, may in effect be equated to trial preparation. During the telephone conference, the Staff indicated that it could not develop its views on these matters until it had an adequate opportunity to review the FRAP report and RCA, and thus could not respond to discovery until after such review. Nonetheless, such review would still amount to a form of trial preparation, and to grant the Staff's request for deferral during this period, while at the same time precluding other parties from undertaking a significant part of their own trial preparation (e.g., discovery), could be inequitable. Indeed, other parties' trial preparation may involve matters differing from an analysis of the FRAP report and RCA but nonetheless requiring pretrial activities such as discovery. For these reasons, we are denying the

Staff's request insofar as it seeks deferral pending its scheduled analysis of the FRAP report and RCA.⁵

Both in their response to the motion and during the telephone conference, CCAM/CAM asserted that the Staff had failed to fulfill its responsibilities to provide copies to the Board and parties of inspection reports and status reports as to the OI investigation. The Staff indicated that it had provided certain inspection reports (by letter dated June 28, 2001) and that no OI status reports had been prepared. The Staff acknowledged that an inspection report would be prepared and distributed within the next week or so. It denied that any further reports were available. The Board accepted this response.

5. Other Matters.

Earlier in this proceeding, at the May 24, 2001 prehearing teleconference (Tr. 573-74), the Licensing Board discussed with the Staff and other parties items from a letter from Commission Chairman Richard A. Meserve to Congressman Edward J. Markey, dated February 1, 2001, responding to the Congressman's inquiries concerning the missing fuel rods and the requirements governing the storage of spent fuel at nuclear plants.⁶ During the October 2, 2001 teleconference, the Board inquired whether the response to Congressman Markey had been updated. The Staff advised that an update was about to be provided by Chairman Meserve within a relatively short time period and that, after transmission to Congressman Markey, the Staff would provide a

⁵Prior to the end of the deferral period, any party may, of course, request further deferral, for good cause shown.

⁶Copies of this letter were furnished to the Licensing Board and parties through the Staff's February 20, 2001 filing in this proceeding.

copy to the Licensing Board and parties. The Licensing Board appreciates the Staff's assistance in this regard.

6. Order.

For the reasons stated, it is, this 5th day of October 2001,

ORDERED:

1. The Staff's motion to extend the deferral of this proceeding to October 31, 2001 (the date when its OI report is scheduled to be released) is hereby granted.

2. The Staff's motion to extend the deferral period to the date of release and distribution of the FRAP report and RCA, currently scheduled for mid-October, 2001, seeks relief comprehended by the OI deferral set forth above and, accordingly, is also hereby granted, until no later than October 31, 2001.

3. The Staff's additional request for further deferral to the end of November, 2001, to permit it to analyze the FRAP report and RCA, is hereby denied.

In addition, the parties are advised that a telephone prehearing conference will be held in late October 2001, at a time to be announced, to prescribe discovery schedules, schedules for filing prepared statements, and other dates relative to the 10 C.F.R. Part 2, Subpart K oral argument.

For the Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 5, 2001

[Copies of this Memorandum and Order have been served this date by e-mail on representatives of each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (STAFF MOTION TO CONTINUE TO HOLD PROCEEDING IN ABEYANCE) (LBP-01-29) 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
(STAFF MOTION TO CONTINUE TO
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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of October 2001