

RAS 4022

DOCKETED 03/06/02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

SERVED 03/06/02

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

March 6, 2002

MEMORANDUM AND ORDER
(Telephone Conference Call, 2/28/02)

On February 28, 2002, the Atomic Safety and Licensing Board conducted a transcribed telephone prehearing conference (Tr. 670-697). As set forth in the Board's Memorandum and Order dated February 26, 2002, the purpose of the conference was to consider (1) CCAM/CAM's (Intervenors') Motion to Extend Scheduling Orders and Date of Oral Argument, dated February 19, 2002; (2) Dominion Nuclear Connecticut, Inc.'s (DNC's) Emergency Motion to Compel Answers to Interrogatories and Production of Documents, dated February 21, 2002; and (3) the NRC Staff's Motion to Compel CCAM/CAM to Respond to NRC Staff's First Set of Discovery Requests Directed to Intervenors in the Reopened Proceeding, dated February 25, 2002. Participating in the conference, in addition to the three Administrative Judges, were David Repka, Esq., Donald P. Ferraro, Esq., Lillian M. Cuoco, Esq., and Mr. Peter Hyde, on behalf of DNC; Nancy Burton, Esq., on behalf of CCAM/CAM; and Ann Hodgdon, Esq., Mr. Victor Nerses, Project Manager, and Mr. John Hickman, Project Manager for Millstone Unit 1, on behalf of the NRC Staff. Also present were Mr. Joseph Besade, a member of CCAM,

the Citizens Regulatory Commission, and Fish Unlimited, and Michelle McKown, Esq., law clerk to the Atomic Safety and Licensing Board Panel (ASLBP).

A. Pre-existing Schedules. At the prehearing conference conducted on October 31, 2001, and memorialized by the Board's Memorandum and Order dated November 5, 2001, the Licensing Board set forth discovery schedules extending until February 8, 2002 and prescribing the filing of the parties' prepared statements by March 18, 2002. Further, the Board scheduled an oral argument fifteen days later (as required by 10 C.F.R. § 2.1113(a)), on April 2, 2002. See also Licensing Board's Notice of Filing Schedules and Oral Argument, issued on February 4, 2002.

B. Motion for Extension of Filing Dates and Oral Argument. By motion dated February 19, 2002, CCAM/CAM requested a 60-day extension of time of the dates for filing presentations as well as oral argument. See CCAM/CAM Motion to Extend Scheduling Orders and Date of Oral Argument [hereinafter CCAM/CAM Motion]. They claim to have become aware of the filing schedules through our Notice of Filing Schedules and Oral Argument, but as set forth above, they were advised of such schedules considerably earlier. As their rationale for an extension of time, they observe that they are represented by a solo practitioner acting pro bono in this matter, who has just completed a jury trial where the verdict was rendered on February 11, 2002, followed by post-verdict proceedings which are currently ongoing, and that the "demands and pressures" of such proceedings substantially interfered with her ability adequately to address the copious filings submitted by the other parties (in discovery) in this matter. CCAM/CAM Motion at 2; see Tr. 676.

DNC and the NRC Staff each opposed the extension, by filings dated February 22, 2002 and February 26, 2002, respectively. See DNC Response to Motion to Extend Scheduling Orders and Date of Oral Argument [DNC Response]; Staff Response

Opposing CCAM/CAM Motion to Extend Scheduling Orders and Date of Oral Argument [Staff Response]. They point out that the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998) set a standard for granting extensions of time only when warranted by "unavoidable and extreme circumstances" and that, in their opinion, none of the circumstances pointed to by CCAM/CAM satisfied that criterion. See DNC Response at 2; Staff Response at 2. DNC emphasizes that these policy objectives are particularly applicable in a Subpart K proceeding such as this one, where the rules were adopted with a view toward expedited completion of hearings. See DNC Response at 2 n.2, 3-4.

They also characterize the large volume of material with which CCAM/CAM is confronted as being self-imposed, inasmuch as CCAM/CAM framed its discovery inquiries. See DNC Response at 3; Staff Response at 2. Finally, they point to statements in the Commission's earlier 1981 Policy Statement on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) to the effect that, "[w]hile a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." See DNC Response at 3; Staff Response at 2.

As noted during the prehearing conference (Tr. 678), the Board believes that the standard for granting extensions of time in a Subpart K proceeding is that specified in Subpart K itself which, as set forth above, was adopted by the Commission with a view toward completing proceedings of this type expeditiously--i.e., "good cause shown based on exceptional circumstances." 10 C.F.R. § 2.1111. The general standard set forth in the 1998 policy statement must give way to the explicit standard set forth in

Subpart K. Further, the Board rejects DNC's and the Staff's attempts to fault the Intervenor for seeking too much information during discovery.

Nonetheless, the Board does not believe that even the seemingly less stringent standard applicable in Subpart K proceedings has been satisfied. In that connection, we note that CCAM/CAM was present at the October 31, 2001 conference where these dates were established (without objection from CCAM/CAM); that, as the Staff points out (Tr. 683-84), CCAM/CAM received our November 5, 2001 Order that memorialized those dates; and that, when counsel for CCAM/CAM became involved in the other case that occupied most of her time, she did not seek any extension at that time. See id. at 684. Further, we note that only one issue is involved in the proceeding at this time (however complex it may turn out to be). Counsel has an obligation to satisfy time standards governing all of her cases and, if it appears that there may be conflicting time obligations, to notify the adjudicator together with participating parties as soon as possible.

Beyond that, however, the Licensing Board Administrative Judges and law clerk have assigned obligations in other proceedings that cannot be readily altered and which would make any significant extension of time deleterious to the timely completion of this proceeding. For these reasons, and taking into account all the facts and circumstances and arguments presented to us, we are denying the CCAM/CAM motion for an extension of the filing dates and oral argument.

C. Motions to Compel. As described above, both DNC and the Staff have filed motions to compel CCAM/CAM to respond to their discovery requests. See DNC Emergency Motion to Compel Answers to Interrogatories and Production of Documents (Feb. 21, 2002) [DNC Motion to Compel]; Staff Motion to Compel CCAM/CAM to Respond to NRC Staff's First Set of Discovery Requests Directed to Intervenor in the

Reopened Proceeding (Feb. 25, 2002 [Staff Motion to Compel]). They assert that CCAM/CAM has filed no responses whatsoever to their discovery requests and that they need the information requested to prepare for the March 18, 2002 filing of their presentations and the April 2, 2002 oral argument. Specifically, they assert that their discovery requests were narrowly drawn, seeking such basic information as the identity and qualifications of CCAM/CAM's witnesses, and the subject matter of their presentations, and that such responses should have been received no later than February 13, 2002. See DNC Motion to Compel at 1-2; Staff Motion to Compel at 1-2. DNC, in its Motion to Compel, had sought responses by March 1, 2002 (one day following the prehearing conference), whereas the Staff motion had specified no response date. DNC Motrioioptn to ompel but at the prehearing conference specified Monday, March 4, 2002 (Tr. 681). DNC in particular stressed the importance of discovery in a case governed by Subpart K. DNC Motion to Compel, at 5.

As discussed during the telephone conference, CCAM/CAM claimed its lack of timely response was caused by the same circumstance that caused it to file its motion for an extension of time (discussed above). The parties acknowledged that, as a practical matter, CCAM/CAM's responses could not be provided by March 1, 2002, as requested by DNC. But DNC and the Staff each conceded that, if the responses were received by no later than Thursday, March 7, 2002, they could meet the March 18, 2002 date for filing their presentations (Tr. 688 (DNC), 689 (Staff)). CCAM/CAM also indicated that, notwithstanding their compliance with the March 7, 2002 date for responding to discovery, they would be able to satisfy the March 18, 2002 date for their presentations (Id. at 689).

CCAM/CAM also observed that they desired to file additional discovery requests, or motions to compel of their own, based on the failure of other parties to provide

meaningful responses to their earlier discovery requests (id. at 676). (As noted above, one of the bases for CCAM/CAM's motion for additional time had been their inability to analyze the voluminous material already provided.)

As a result, the Board provided that CCAM/CAM must respond to outstanding discovery requests, and that those responses must be received by DNC and the Staff, respectively, no later than March 7, 2002 (id. at 690). That date also constitutes the date for documents to be received (id. at 690-91). Further, the Board ruled that CCAM/CAM would not be permitted to file additional discovery requests, which at this time would be clearly untimely (see 10 C.F.R. § 2.740(f)), or even to file motions for protective orders, see 10 C.F.R. § 2.740(c), which, given the time constraints governing a Subpart K proceeding and the failure of CCAM/CAM to have filed such motions at least prior to the time when discovery responses would have been due, would be untimely in the context of this proceeding (Tr. 687, 688).

D. Other matters. During the prehearing conference, the Board raised two matters that it desired the Licensee and Staff to address in their written presentations:

1. The extent to which they are aware of NRC Regulatory Issue Summary 2001-12, "Nonconservatism in Pressurized Water Reactor Spent Fuel Storage Pool Reactivity Equivalencing Calculations," dated May 18, 2001, and whether it applies to matters at issue in this proceeding (see Tr. 692).

2. With respect to the report of the Special Inspection 05000245/2001013, dated February 26, 2002 (which the Staff has provided to all parties and the Board), to what extent is the Millstone Corrective Action Plan, including the additions to the plan mentioned in the foregoing report, applicable to Millstone Unit 3 (see id. at 693).

E. Order. Based on the foregoing, and all of the facts developed at the prehearing conference, it is, this 6th day of March, 2002,

ORDERED:

1. CCAM/CAM's Motion to Extend Scheduling Orders and Date of Oral Argument, dated February 19, 2002, is hereby denied.

2. DNC's Emergency Motion to Compel Answers to Interrogatories and Production of Documents, dated February 21, 2002, is hereby granted to the extent indicated above. Responses must be filed on the schedule outlined earlier.

3. The NRC Staff's Motion to Compel CCAM/CAM to Respond to NRC Staff's First Set of Discovery Requests Directed to Intervenors in the Reopened Proceeding is hereby granted, with responses to be filed on the schedule indicated above.

4. DNC and the Staff are requested to include in their written presentations responses to the two Licensing Board inquiries set forth above.

For the Atomic Safety and Licensing Board

/RA/

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 6, 2002

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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DOMINION NUCLEAR CONNECTICUT, INC.) Docket No. 50-423-LA-3
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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 (TELEPHONE CONFERENCE CALL, 2/28/02) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, DC 20555-0001	Administrative Judge Charles Bechhoefer, Chairman Atomic Safety and Licensing Board Panel Mail Stop - T-3 F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of March 2002