

RAS 4800  
7-2-02

DOCKETED  
USNRC

2002 AUG 30 PM 3: 26

OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

Before Administrative Judges:

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

In the Matter of : Docket No. 50-423-LA-3  
  
DOMINION NUCLEAR : ASLBP No. 00-771-01-LA-R  
CONNECTICUT, INC.  
  
(Millstone [Nuclear] Power :  
Station, Unit No. 3;  
Facility Operating License :  
NPF-49) : AUGUST 23, 2002

PETITION FOR REVIEW

The Intervenors respectfully petition the U.S. Nuclear Regulatory Commission for review of the Licensing Board's Memorandum and Order issued on August 8, 2002 ("Denying Request for Evidentiary Hearing on Reopened Contention 4 and Terminating Proceeding"). 10 CFR §2.786(b)(1).

I. **Summary of the Decision of Which Review Is Sought (10 CFR §2.786(b)(2)(I))**

In the order at issue, the Licensing Board denied the Intervenors'<sup>1</sup> request for an evidentiary hearing with respect to the issue of the Licensee's<sup>2</sup> disclosure that

<sup>1</sup> The Intervenors are the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone

<sup>2</sup> The proceedings were initiated by a license amendment application submitted by Northeast Nuclear Energy Company ("NNECO") to expand the storage capacity of the Millstone Unit 3 spent fuel pool. During the intervening time, ownership of the Millstone Nuclear Power Station has passed to Dominion Nuclear Connecticut, Inc. ("DNC").

it was unable to account for two highly radioactive spent fuel rods at Unit 1 at the Millstone [Nuclear] Power Station<sup>3</sup> in Waterford, Connecticut.<sup>4</sup>

It is undisputed that the Intervenors first became aware that NNECO had lost account of the two spent fuel rods during the week of November 24, 2000, when the U.S. Nuclear Regulatory Commission posted an obscure notice to such effect identifying the rods as "pins" on its website; and it is undisputed that NNECO was aware at least as early as September 12, 2000 that it did not know where the spent fuel rods were; and it is undisputed that NNECO did not disclose such fact in these proceedings prior to October 26, 2000, the date the Licensing Board issued its Memorandum and Order dismissing Contention 4; and it is undisputed that the Intervenors and not NNECO reported the fact of the missing rods to the Licensing Board in these proceedings; and it is undisputed that the Intervenors

---

<sup>3</sup> On August 8, 2002, the U.S. Nuclear Regulatory Commission granted the application of Dominion Nuclear Connecticut, Inc. to delete the word "Nuclear" from the official name of the "Millstone Nuclear Power Station." (This amendment permits the *post facto* alteration of official records of the U.S. Nuclear Regulatory Commission and allows the "deletion of the word 'nuclear' from the title of the physical security program plans listed under the security related license condition and when it is used in the phrase 'Millstone Nuclear Power Station' elsewhere in the operating license." See Letter of John B. Hickman, Division of Licensing Project Management, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission dated August 8, 2002 to J A Price, Vice President, Dominion Nuclear Connecticut, Inc., and attachments thereto, Safety Evaluation, page 2.) Apparently, Dominion Nuclear Connecticut, Inc. anticipated the Commission's approval of the deletion of the word "nuclear" from the official name of the Millstone [Nuclear] Power Station because as early as January 25, 2002, the company's attorney, Lillian M. Cuoco, identified the plant as the "Millstone Power Station" in the signature block of the company's First Set of Interrogatories directed to the Intervenors in these proceedings dated January 25, 2002.

<sup>4</sup> In LBP-01-17, the Licensing Board, mindful of the possibility that a failure of administrative controls at Millstone Unit 1's spent fuel pool might carry over to successful implementation of administrative controls at Millstone Unit 3's spent fuel pool, as well as "in view of the significance of the loss of control over Special Nuclear Material (see 10 CFR Part 74, Subpart A) [found] it appropriate to grant [the Intervenors'] motion for reconsideration of LBP-01-1 at this time and to reopen the record on Contention 4, to the extent it bears upon both 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."

submitted the following Interrogatory *inter alia* to NNECO in these proceedings on March 21, 2000:

“Interrogatory No. F-1: Please identify all instances of error (at Millstone or other nuclear plants) in managing, moving, placing or tracking fresh or spent fuel and all documents pertinent thereto.”

and it is undisputed that NNECO provided the following response to such Interrogatory on April 4, 2000:

“With regard to Millstone, the following events have been identified as responsive to this request . . .”  
together with information regarding eleven events at Millstone, none of which involved the failure to account for the location of the missing Unit 1 spent fuel rods; and it is undisputed that neither NNECO nor DNC, once the latter took over ownership of the Millstone [Nuclear] Power Station, ever updated or corrected its discovery responses in these proceedings nor sought leave to do so to disclose the facts concerning the failure to account for two spent fuel rods at Unit 1.

The Licensing Board agreed that “the record is insufficient for us to determine NNECO’s degree of knowledge of the missing fuel rods. A further evidentiary hearing would likely be necessary for us to make a definitive determination on whether DNC should have advised the Board at an earlier date (in September or October, 2000) of the investigation as to the location of the fuel rods.” The Licensing Board determined that in order to determine the adequacy of the reporting of the missing fuel rods to the Licensing Board under Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625

7 4

(1973), the Board need determine when NNECO had, or should have had, adequate knowledge of the loss or potential loss of the fuel rods. **“If NNECO had such knowledge by September 2000, a report to this Board prior to October 26, 2000 (the issuance date of LBP-00-26) should have been made. If such report had been tendered, it could very well have had an impact on the timing of our issuance of LBP-00-26.”** (Emphasis added.)

The Board further ruled: “DNC claims that NNECO had not yet determined in September, 2000 that the two fuel rods were actually missing; the most they knew was that there was a records discrepancy that had not been investigated. **Assuming adequate knowledge by NNECO, however, and given the pendency of reopened Contention 4, it appears that, during September or October, 2000, the Board should at least have been alerted to the initiation of this investigation.**” (Emphasis added.)

The Intervenors argued to the Licensing Board that the licensee’s reporting failure bears directly on the licensee’s ability or willingness to implement satisfactorily the administrative controls attendant to an expansion of the Unit 3 spent fuel pool.

The Licensing Board concluded, however, concluded that the licensee’s failure to file with it a timely report was “the result of mere confusion as to what had occurred and an uncertainty about the need to confirm doubts as to whether there was any outstanding information that would warrant a litigation-related report. The information is peripheral at best to the Licensee’s ability or willingness to carry out SFP administrative controls adequately. As such, it does

not rise to the type of disputed fact that would cause us to authorize a full evidentiary hearing." The Board concluded that the Intervenor failed to demonstrate "any significant factual disputes of a type that would warrant an evidentiary hearing under 10 CFR §2.1113." Furthermore, the Board concluded that it was satisfied that

**II. Statement of Record Reference (10 CFR §2.786(b)(2)(I))**

The Intervenor raised the issues pertinent to this petition in their Summary and Sworn Submission dated March 18, 2002 and in the Declaration of Joseph H. Besade in support thereof as well as during proceedings at oral argument on April 2, 2002.

**III. Statement of Error (10 CFR §2.786(b)(2)(I))**

A. The Licensing Board erred in concluding that the Intervenor failed to demonstrate "any significant factual disputes of a type that would warrant an evidentiary hearing under 10 CFR §2.1113."

B. The Licensing Board erred in making a factual finding that the licensee's failure to comply with reporting requirements resulted from mere innocent confusion.

C. The Licensing Board erred in declining to convene an evidentiary hearing on grounds its would duplicate other investigations by the NRC.

D. The Licensing Board erred in concluding that new procedures to be employed at Millstone 3's spent fuel pool would adequately address the issue of increased reliance upon administrative controls which is at the core of reopened Contention 4.

7 4

IV. **Statement Why Commission Review Should Be Exercised (10 CFR**

**§2.786(b)(2)(I)**

- A. The Licensing Board has decided a substantial and important question of law, policy and discretion erroneously.

In the reopened proceedings, it was established that the licensee was well aware of its failure to account for two highly radioactive spent fuel rods at Millstone Unit 1 prior to October 26, 2000, when the Licensing Board issued its decision in LBP-00-26.

There can be no doubt that such information was germane to the Intervenor's discovery request submitted on March 21, 2000 and as to which the licensee did not object ("Interrogatory No. F-1: Please identify all instances of error (at Millstone or other nuclear plants) in managing, moving, placing or tracking fresh or spent fuel and all documents pertinent thereto.").

The Board is aware of the rule that "all parties to an adjudicatory proceeding are expected to advise the adjudicator (here this Licensing Board) and all parties of 'new information which is relevant and material to the matters being adjudicated.' Duke Power Company, Id., and Tennessee Valley Authority (Brown at Ferry Nuclear Plants, Units 1, 2 and 3), ALAB-677, 15 NRC 1387, 1394 (1982). Any uncertainty with regard to the relevancy and materiality of new information is to be decided by the adjudicator. McGuire, 6 AEC a 625, n. 115.

The Licensing Board correctly concluded that the licensee should have reported to it what information it had regarding the investigation into the missing

rods, at the very least. LBP-02-16 at 15. The Board was properly mindful of the “significance of [a licensee’s] lack of control over Special Nuclear Material” (LBP-01-17 at 21).

However, the Licensing Board erred in considering the licensee’s conduct in this extraordinary matter in isolation, removed from NNECO’s dismal history of admitted criminal conduct and flagrant violation of its license and federal requirements governing operations of nuclear power plants, conditions leading to the unprecedented shutdown of the three-reactor station in 1996.

Similarly, the Licensing Board failed to consider the notoriety NNECO achieved by engaging in retaliatory employment practices against nuclear whistleblowers and fostering a work environment that was not “safety-conscious.” The record is absent evidence that the cultural environment has improved.

The existence of a safety conscious work environment is indisputably critical to the proper implementation of administrative controls at a nuclear power plant, including in its fuel movement operations.

Whether such an environment can be fostered is largely dependent on the commitment of company management to complying with federal requirements of operations, including reporting requirements, and including reporting requirements to adjudicatory bodies such as the Licensing Board.

It cannot be responsibly disputed that a manifestation by company management of a lack of willingness to comply with such requirements and standards cannot but have negative repercussions on the workforce, which may

lead to an erosion of the ability or willingness to implement more complex administrative controls.

However, although the Licensing Board earlier expressed recognition of the licensee's dismal operating history, which includes its notorious failure to promote a safety conscious work environment, and although it recognized the link between such conduct and the issue of whether the licensee could be expected to safely implement additional administrative controls in the spent fuel pool, the Board failed to appreciate and take into its due consideration the fact that the untimely provision of significant information is an important measure of a licensee's character, particularly if it is found to constitute a material false statement. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-738, 18 NRC 177, 198 (1983), rev'd in part on other grounds, CLI-85-2, 21 NRC 282 (1985).

Furthermore, the Board failed to consider that an applicant's failure to notify a board of significant information may reflect a deficiency in character or competence if such failure is a deliberate breach of a clearly defined duty, a pattern of conduct to that effect, or an indication of bad faith. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-86-15, 23 NRC 595, 625-626 (1986).

Parties in Commission proceedings have an absolute obligation to alert adjudicatory bodies in a timely fashion of material changes in evidence regarding (1) new information that is relevant and material to the matter being adjudicated; (2) modifications and rescissions of important evidentiary



submissions; and (3) **outdated or incorrect information on which the Board may rely.** Tennessee Valley Authority, 15 NRC 1387, 1388.

The legal and policy significance of the Board's decision is that it condones misreporting mischief in an adjudicatory proceeding. The Board has concluded that the record is incomplete, yet it has denied an evidentiary hearing. The issue of NNECO's knowledge of the missing rods is essential to the issues in these proceedings because it goes to the heart of the "character" issue, which the Board allowed into these proceedings in Contention 4. The decision assures that the record will never be complete. Such a decision has potential to perpetuate much mischief, not just in terms of the present licensee but in all future adjudications. Legal and policy considerations call for a reconsideration and review .

B. The Licensing Board erred in concluding that the Intervenors failed to demonstrate "any significant factual disputes of a type that would warrant an evidentiary hearing under 10 CFR §2.1113."

There is a significant factual dispute in the failure of the licensee to report the missing spent fuel rods during the adjudicatory proceedings. There is an unresolved and disputed issue as to whether such omission was wilful.

Wilfulness bears on the ultimate issues pertinent to Contention 4. <sup>5</sup>

C. The Licensing Board erred in making a factual finding that the licensee's failure to comply with reporting requirements resulted from mere innocent confusion.

The decision is affected by a contradiction: the Board recognizes that the reporting issue is a factual issue in dispute, but then concludes as a matter of

fact that the failure to comply with federal reporting requirements was the result of mere innocent confusion. Only at an evidentiary hearing where the licensee would be subject to cross-examination can the pertinent facts become known.

- D. The Licensing Board erred in declining to convene an evidentiary hearing on grounds it would duplicate other investigations by the NRC.

As has been demonstrated hereinabove, the adjudicatory proceedings have been affected by serious error, to the prejudice of the Intervenors, both of which organizations's memberships include individuals living within the 10-mile emergency evacuation zone of Millstone. They are not parties to internal NRC investigations. They will be denied the relief to which they believe they are entitled – ultimately, denial of the amendment at issue – a result which will not be achieved even if internal NRC investigations are effective.


- E. The Licensing Board erred in concluding that new procedures to be employed at Millstone 3's spent fuel pool would adequately address the issue of increased reliance upon administrative controls which is at the core of reopened Contention 4.

The Licensing Board reached conclusions of fact – that DNC can be relied upon to properly implement new and more complex administrative controls in the spent fuel pool at Millstone Unit 3 - while material facts necessary to support such conclusions of fact are in dispute, which dispute can only be resolved by an evidentiary hearing.

---

<sup>5</sup> DNC should not be heard to argue that the issue of the missing spent fuel rods at Millstone Unit 1 is one it inherited and it should not be saddled with the errors of a previous owner. However, in

Respectfully submitted,  
**THE INTERVENORS**

By:   
\_\_\_\_\_  
Nancy Burton, Esq.  
147 Cross Highway  
Redding Ridge CT 06876  
Tel. 203-938-3952  
Fed. Bar No. 10836  
nancyburtonsq@aol.com

---

these proceedings, DNC has seamlessly followed in the steps of NNECO.

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

**Before Administrative Judges:**

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

<b>In the Matter of</b>	<b>:</b>	<b>Docket No. 50-423-LA-3</b>
<b>DOMINION NUCLEAR CONNECTICUT, INC.</b>	<b>:</b>	<b>ASLBP No. 00-771-01-LA-R</b>
<b>(Millstone [Nuclear] Power Station, Unit No. 3; Facility Operating License NPF-49)</b>	<b>:</b>	<b>AUGUST 23, 2002</b>

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing "Petition for Review" filed on behalf of the Intervenors in the above-captioned proceedings were mailed on August 23, 2002 via U.S. Mail, First Class, postage pre-paid, and emailed to the addresses as indicated below, to the following:

Hon. Richard A. Meserve  
Chairman  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Hon. Greta Joy Dicus  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Hon. Edward McGaffigan, Jr.  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Hon. Jeffrey S. Merrifield  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Hon. Nils J. Diaz  
Commissioner  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Charles Bechhoefer, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington Dc 20555  
[cxb2@nrc.gov](mailto:cxb2@nrc.gov)

Dr. Richard F. Cole  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington DC 20555  
[rhc1@nrc.gov](mailto:rhc1@nrc.gov)

Dr. Charles N. Kelber  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington DC 20555  
[cnk@nrc.gov](mailto:cnk@nrc.gov)

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington DC  
Attn: Rulemakings and Adjudications  
[hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

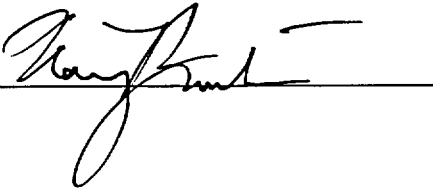
Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Adjudicatory File  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

Ann P. Hodgdon, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington DC 20555

David Repka, Esq.  
Winston & Strawn  
1400 L Street NW  
Washington DC 20005-3502

Lillian M. Cuoco, Esq.  
Millstone [Nuclear] power Station  
Building 475/5  
Rope Ferry Road  
Waterford CT 06385

A handwritten signature in black ink, appearing to read "David Repka", is written over a horizontal line.