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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

September 10, 2002 (3:23PM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:

Dominion Nuclear Connecticut, Inc.

(Millstone Power Station, Unit No. 3)

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Docket No. 50-423-LA-3

ASLBP No. 00-771-01-LA-R

ANSWER OF DOMINION NUCLEAR CONNECTICUT IN OPPOSITION TO  
PETITION FOR REVIEW OF LBP-02-16

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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I. INTRODUCTION

On August 23, 2002, the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone (collectively, the "Petitioners") filed a Petition for Review of the Final Decision of the Atomic Safety and Licensing Board ("Licensing Board") in this matter, LBP-02-16, issued on August 9, 2002. Pursuant to 10 C.F.R. § 2.786(b)(3), Dominion Nuclear Connecticut, Inc. ("DNC"), the Millstone Unit 3 licensee, hereby responds in opposition to the Petition for Review.

II. BACKGROUND

This proceeding has been conducted under the NRC's hearing procedures of 10 C.F.R. Part 2, Subpart K. The proceeding relates to a license amendment issued by the Nuclear Regulatory Commission ("NRC") on November 28, 2000. The license amendment — originally issued to the former Millstone licensee, Northeast Nuclear Energy Company ("NNECO") — increased the authorized storage capacity of the Millstone Unit 3 spent fuel pool ("SFP") from

756 fuel assemblies to 1,860 fuel assemblies.<sup>1</sup> To accomplish this, the amendment allowed the use of new fuel storage racks in the Unit 3 SFP and amended the Unit 3 Technical Specifications to, among other things, establish revised regional storage constraints for fuel assemblies based on fuel assembly reactivity limits (*i.e.*, enrichment, burnup, and decay time).

The Licensing Board's Final Decision addresses Petitioners' reopened Contention 4. In Contention 4 the Petitioners had asserted that the additional fuel racks and regional storage configuration would increase the potential for a criticality accident in the SFP because they involve a "complex array" of "administrative controls." In an October 2000 Memorandum and Order (LBP-00-26), the Licensing Board previously determined that the Petitioners had failed to meet the criteria of Subpart K for an evidentiary hearing on that issue.<sup>2</sup> That decision was affirmed by the Commission.<sup>3</sup>

In a May 2001 Memorandum and Order (LBP-01-17),<sup>4</sup> the Licensing Board reopened the proceeding on Contention 4 to evaluate the issue of two individual fuel rods (*not* fuel assemblies) at Millstone Unit 1 (*not* Unit 3) which had been found by NNECO to be unaccounted for, based upon its own review of Unit 1 records in late 2000. The Licensing Board reopened Contention 4, but only:

. . . to the extent [the Unit 1 issue] bears upon the adequacy of administrative controls at the Millstone-3 SFP and DNC's ability or

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<sup>1</sup> The Millstone license transfers from NNECO to DNC were completed on March 31, 2001.

<sup>2</sup> *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-26, 52 NRC 181, 197-200 (2000).

<sup>3</sup> *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22 (2001).

<sup>4</sup> *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-01-17, 53 NRC 398 (2001).

willingness to implement such controls effectively. 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, 53 NRC at 408. The focus of the reopened matter therefore was on whether there is any commonality between procedures which contributed to the loss of accountability of the two Unit 1 fuel rods and the procedures that support the revised Unit 3 spent fuel assembly configuration and reactivity limits authorized by the license amendment at issue here.

On March 18, 2002, DNC submitted a comprehensive "Summary of Facts, Data, and Arguments on Which Dominion Nuclear Connecticut Will Rely At the Reopened Proceeding Subpart K Oral Argument" ("DNC's Summary"). DNC's Summary included four affidavits addressing the issue in the reopened matter, including a panel affidavit of three experts personally involved in the investigation and root cause assessment of the Unit 1 fuel rod issue. The NRC Staff also filed a written summary, on the same date, with support in affidavit form. In contrast, the Petitioners filed a cursory written summary, with no meaningful support, expert or otherwise. The Petitioners provided no assessment of the root cause of the Unit 1 problem and no comparison of historic Unit 1 accountability procedures to the procedures used at Unit 3 today to implement the license amendment. The Petitioners relied on no more than the fact that two Unit 1 fuel rods were determined to be unaccounted for and the Petitioners' perception of a delay in reporting the matter to the NRC and the Licensing Board.

In its Final Decision the Licensing Board concluded that, in light of the complete record and its analysis, there is no issue meeting the strict criteria of 10 C.F.R. § 2.1115(b) for an evidentiary hearing. Accordingly, the Licensing Board evaluated the record on the reopened Contention 4, decided the issue, and terminated this proceeding.

### III. ARGUMENT

Under 10 C.F.R. § 2.786(b)(4), the Commission may, in its discretion, grant a petition for review giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Petitioners have not set forth any issue that raises a *substantial question* with respect to any of these considerations. Essentially, the Petitioners claim only that the Licensing Board erred — as either a matter of fact or law — in failing to find a factual dispute that would merit an evidentiary hearing in a Subpart K matter.<sup>5</sup> This is demonstrably not the case and the Petition for Review should be denied. Moreover, this is the type of issue where substantial deference is owed the Licensing Board.

The Commission's Subpart K regulations clearly establish that an issue may be designated for an 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

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<sup>5</sup> The Petition for Review appears grounded on considerations (i) and (ii). No meaningful showing is made that would be responsive to considerations (iii), (iv), or (v).

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

10 C.F.R. § 2.1115(b). Any issues that do not meet *all* of these criteria are to be disposed by the Licensing Board promptly after the oral argument. *See* 10 C.F.R. § 2.1115(a)(2). The Petitioners may disagree with the Licensing Board's conclusion, but there is no basis whatsoever on which to conclude that an evidentiary hearing is warranted or that the Licensing Board erroneously decided the contention on the merits.

The issue raised by reopened Contention 4 was specific and limited. DNC submitted substantial evidence on that issue, including *uncontroverted* testimony supporting the following conclusions:

- The Unit 3 license amendment deals generally with the storage of fuel assemblies;
- DNC has comprehensive fuel handling controls to implement the Unit 3 license amendment at issue;
- At Millstone Unit 3, individual fuel rods have been and are positively controlled in a fuel storage box;
- The Unit 1 event involved fuel *rods* and did not implicate handling and control over fuel *assemblies* at either Unit 1 or Unit 3;
- The Unit 1 event as it related to fuel rods was limited to Unit 1;
- The Unit 1 event was specifically the result of historical factors unique to Unit 1 at the time, factors that did not, and do not, bear on Unit 3 fuel handling and accountability controls; and
- The Unit 1 event does not change the substantial margin of safety with respect to a criticality accident provided at the Unit 3 SFP.

*See generally* DNC's Summary, at 10-23. Based on this record, the Licensing Board correctly found "no evidence to indicate that the [current] Millstone-3 procedures are insufficient to serve their intended purpose." LBP-02-16, slip op. at 9.

In contrast to the record established by DNC and the NRC Staff, the Petitioners' written summary was supported only by the affidavit of Mr. Joseph Besade. Mr. Besade has no personal knowledge or expertise with respect to the license amendment, the Unit 3 fuel handling procedures at issue, or the facts and issues raised by the Unit 1 event. He testified only to his "awareness" of the Unit 1 issue and certain "facts" related to reporting of the issue. The burden was on the Petitioners to justify an evidentiary hearing and Mr. Besade's affidavit provided no basis for such a hearing. Given the one-sided record on the reopened issue, the Licensing Board was clearly correct to conclude that no evidentiary hearing is warranted.

In its Petition for Review, the focus of Petitioners' argument remains, not on the central substantive issue of reopened Contention 4 (*i.e.*, whether there was commonality between Unit 1 fuel rod accountability procedures and Unit 3 fuel handling procedures), but on allegations of deficiencies in the willingness and capability of DNC to implement the administrative controls. This too, however, is an issue that was comprehensively addressed in the record prior to the Licensing Board's first decision on Contention 4, LBP-00-26, and again with respect to the reopened issue. *See, e.g.*, DNC Summary, at 18-22; Tr. 755-770. In particular, DNC provided an affidavit directly addressing the facts and circumstances of the identification and reporting of the Unit 1 issue. *See* Affidavit of Daniel J. Meekhoff ("Meekhoff Aff."). Under Subpart K, an evidentiary hearing is not required unless there is a genuine and substantial issue that can only be resolved with sufficient accuracy through introduction of evidence at a hearing. Here, the Licensing Board had before it everything that Petitioners could offer as well as DNC's response to that issue. There was no basis or need for an evidentiary hearing. The Licensing Board correctly chose to resolve the issue based on the existing record.

The Petitioners' claim, both below and in the Petition for Review, that an alleged "delay" in reporting the existence of questions surrounding the Unit 1 fuel rods must be considered in concert with "NNECO's dismal history," and that this would establish a "lack of willingness" to comply with NRC requirements and licensee administrative controls. However, the Commission recently emphasized the "strict limits" that it places on "management" and "character" contentions. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001). The Licensing Board found that Petitioners' argument did not raise a "genuine and substantial dispute" where the decision of the Commission would likely be "dependent on the resolution of the dispute." LPB-02-16, slip op. at 15. The Licensing Board found that, to warrant a hearing, a dispute "would have to relate to the technical sufficiency of the license amendment proposal." LBP-02-16, slip op at 15. In contrast, the Petitioners have made no showing whatsoever that there was any inadequacy in the current fuel handling and accountability procedures at Millstone Unit 3 or in DNC's capability and willingness to implement those procedures. An alleged, unintentional delay in a report to the NRC, or to the Licensing Board, does not establish a basis for such a conclusion.

In its Final Decision, the Licensing Board summarized some of the record on the identification and reporting of the Unit 1 issue. *See* LBP-02-16, slip op. at 14-15. Specifically, NNECO had identified questions surrounding the two Unit 1 fuel rods and conducted some limited visual inspections in the Unit 1 SFP on or about September 12, 2000. After further, more rigorous inspections in mid-November 2000 failed to locate the rods in some likely locations, NNECO initiated an internal condition report and informally advised the NRC of the matter on November 16, 2000. Consistent with regulations,<sup>6</sup> NNECO made a formal reportability call to

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<sup>6</sup> *See* 10 C.F.R. § 20.2201(a)(1)(ii).

the NRC Operations Center within 30 days, on December 14, 2000. Also consistent with regulations,<sup>7</sup> NNECO submitted a written report on the missing fuel rods to the NRC on January 11, 2001. *See also* Meekhoff Affidavit, ¶ 17. Counsel supplied the written report to the Licensing Board and parties on January 16, 2001.

In an enforcement action issued on June 25, 2002, the NRC Staff assessed these circumstances and concluded that — in its judgment — there was sufficient information on September 12, 2000, after the limited visual search, for NNECO to conclude that the two Unit rods were missing within the meaning of the reporting requirement. Under this view, the telephone report to the NRC Operations Center would have been due in October 2000, with the written report due 30 days after that in November 2000. Based on an investigation by the Office of Investigations (“OI”), however, the NRC Staff did not identify any willful attempt by anyone to delay a report to the NRC. The Staff classified the violation as a Severity Level IV and did not propose any civil penalty in connection with the matter. Although DNC did not contest the violation, it has maintained that this reporting issue reflected no more than a matter of judgment as to when a condition report should have been initiated and when a notification should have been made to the NRC. *See* Meekhoff Aff., ¶ 19; DNC’s Written Summary, at 21-22; Tr. 765-66. This non-deliberate reporting issue has no bearing at all on DNC’s willingness or capability to implement fuel handling administrative controls. And it does not raise a genuine and substantial issue, that can only be resolved by an evidentiary hearing, that is central to resolution of the reopened Contention 4.

In its Petition for Review, the Petitioners focus on the Licensing Board’s suggestion that this Unit 1 matter might have been reported to the Licensing Board more

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<sup>7</sup> *See* 10 C.F.R. § 20.2201(b)(1).

promptly under the doctrine of *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973) (parties are expected to advise the adjudicator of “new information which is relevant and material to matters being adjudicated”). The questions of whether the Unit 1 matter ever was relevant and material to the Unit 3 license amendment, and whether the matter was ripe for earlier reporting may be debateable, but do not establish a dispute that would warrant an evidentiary hearing or dictate a different result with respect to reopened Contention 4. While *DNC* may not agree, the Licensing Board already adopted the most conservative view of reporting (that some obligation existed as early as September 12, 2000). More significantly, the Licensing Board went further and characterized the alleged failure to file a report with it at that time as:

. . . 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.

LBP-02016, slip op. at 15-16. This constitutes a reasonable assessment that is supported by the record in the case.<sup>8</sup> Accordingly, there was no reason to explore the reporting issue (the

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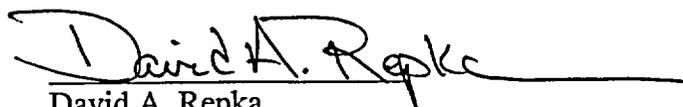
<sup>8</sup> Indeed, the record is clear in this case that any delay in notifying the Licensing Board of the issue is simply reflective of a delay in the NNECO reportability determination, as already addressed in the enforcement action. The Commission’s decision in *McGuire* should not be read to establish an obligation to report a potential issue to an adjudicatory board that arises earlier in time to any obligation that exists to report to the NRC Operations Center. NNECO in this case could not make a report to the Licensing Board until it had determined that there was a reportable event and determined that the matter was relevant and material to the proceeding. The Petitioners filed their Motion to Reopen Contention 4 on December 18, 2000, based on an NRC Weekly Information Report documenting NNECO’s November 16 preliminary informal notification. The Motion to Reopen was thus filed essentially in parallel to the licensee’s call to the NRC Operations Center and prior to the formal written report to the NRC. At the time the matter was also already on appeal to the Commission.

Commission's decision would not depend on it) and there was no basis to conclude that any relief was warranted with respect to reopened Contention 4.<sup>9</sup> The Commission has previously held that it is disinclined to review the findings and conclusions of its presiding officers and licensing boards on fact-specific issues, and that on review it does not "second guess" reasonable findings. *See, e.g., Hydro Resources* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 (2000); *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998), *quoting Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403-05 (1976). In the absence of any substantial question, clear error, or prejudice, review of LBP-02-16 is not appropriate.

#### IV. CONCLUSION

For the reasons above, the Commission should deny the Petition for Review.

Respectfully submitted,



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Dated in Washington, D.C.  
this 3<sup>rd</sup> day of September 2002

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<sup>9</sup> In any event, the Petitioners obviously were not prejudiced in any way by the alleged delay. The Motion to Reopen was granted and Petitioners had an opportunity to substantively establish any connection between the Unit 1 matter and the Unit 3 license amendment. This they completely failed to do.

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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "ANSWER OF DOMINION NUCLEAR CONNECTICUT, INC. IN OPPOSITION TO PETITION FOR REVIEW OF LBP-02-16" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 3<sup>rd</sup> day of September 2002. Additional e-mail service has been made this same day as shown below.

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