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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

|                                   |   |                          |
|-----------------------------------|---|--------------------------|
| In the Matter of                  | ) |                          |
|                                   | ) |                          |
| NORTHEAST NUCLEAR ENERGY CO.      | ) | Docket No. 50-336-OLA    |
|                                   | ) | (Spent Fuel Pool Design) |
| (Millstone Nuclear Power Station, | ) |                          |
| Unit No. 2)                       | ) |                          |

NORTHEAST NUCLEAR ENERGY COMPANY'S  
RESPONSE TO MOTIONS TO COMPEL  
AND FOR EXTENSION OF TIME

I. INTRODUCTION

On May 4, 1993, counsel for Northeast Nuclear Energy Company ("NNECO") received by facsimile from Cooperative Citizens Monitoring Network ("CCMN") an unsigned copy of a combined motion to compel further discovery from NNECO and a motion for an extension of the time generally provided to respond to summary disposition motions.<sup>1/</sup> NNECO herein opposes both aspects of the combined motion.

<sup>1/</sup> "CCMN Motion for Leave to Compel and Motion to Compel NNECO and NRC to Fully Respond to CCMN's Discovery Request and CCMN Motion for Variance in Schedule for Filing Response to Licensee's Summary Disposition Motion" ("Motion"). The Motion is dated April 30, 1993, and carries an unsigned certificate of service showing service by deposit in the U.S. Mail on May 3, 1993.

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## II. MOTION TO COMPEL DISCOVERY RESPONSES

CCMN moves first to compel NNECO to respond further to Requests 1 and 2 of CCMN's December 5, 1992 discovery requests. NNECO provided responses to these two requests on January 15, 1993.<sup>2/</sup> NNECO's responses to these requests encompassed a significant amount of information and a substantial number of documents. NNECO included an objection to a limited aspect of Request 1. NNECO did not object to any aspect of Request 2 and views its prior response to that request as fully responsive.

CCMN's motion to compel further responses is fatally late. Under the NRC's Rules of Practice, when a party believes discovery responses are inadequate, a motion to compel is required within ten days after the date of the purportedly inadequate response. 10 C.F.R. § 2.740(f)(1). CCMN's motion to compel therefore was due ten days after service of NNECO's January 15, 1993 responses. CCMN, in its motion to compel, has not explained the tardiness (i.e., by over four months) of the present motion.

During the recent prehearing conference, the Licensing Board cautioned CCMN that any motion to compel further discovery from NNECO or the NRC at this late date would be reviewed with a heavy burden on CCMN regarding timeliness. Tr. 109-110. In the face of this clear warning, CCMN states only that it "misinterpreted the

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<sup>2/</sup> "Northeast Nuclear Energy Company's Response to CCMN Discovery Requests of December 5, 1992 and December 16, 1992," January 15, 1993.

time frame in which we were to file our objections to their objection to our inquiries." Motion at 1. This is not a sufficient explanation. The Rules of Practice on the required times for motions to compel are clear. 10 C.F.R. § 2.711(a).

Furthermore, the recent prehearing conference in this proceeding was held on April 7, 1993. The path for CCMN to follow on seeking further discovery was made very clear at that time, i.e., that motions are to be accurately served on all parties in the proceeding and that a full discussion of the reasons for late filing is to be provided. Yet, since that conference, well over twenty days passed before CCMN filed its present Motion. This period alone exceeds the ten days for motions to compel specified in the Rules of Practice. Thus, even in the face of the Licensing Board's clear emphasis to CCMN regarding timeliness, CCMN offered no explanation for failing to file its motion sooner. This delay is excessive and unjustified, and the Motion to Compel must be denied.

Even if the Licensing Board were to set aside the untimely nature of the filing, the Motion still must fail. CCMN provides no reason that NNECO's objection to aspects of Request 1 is invalid. CCMN generally has failed to specify what further

information it seeks, much less a need for that information. In this respect alone, the Motion is insufficient.<sup>3/</sup>

From the Motion it appears that the only specific information at issue is the computer software used in the NNECO criticality analysis for Amendment 158. CCMN states that it would like "access to the Keno [KENO] programs that were used." Motion at 1. NNECO's position on the computer codes requested by CCMN (and Dr. Kaku) is quite clearly stated in its January 15, 1993 response. CCMN fails to come to grips with this objection. As stated in the objection, this program, if desired by CCMN, should be obtained directly from Oak Ridge National Laboratory ("ORNL").<sup>4/</sup> CCMN also vaguely asserts the need to see other materials related to the Amendment 158 criticality analysis. However, as stated in the objection, NNECO has provided input data for the analysis. With the exception of the KENO code itself, CCMN has sufficient data to independently recreate the criticality model and re-run the calculations.

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<sup>3/</sup> Section 2.749(f)(1) specifically provides that a motion to compel "shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion."

<sup>4/</sup> In Dr. Kaku's affidavit in this proceeding of March 1993, at ¶ 6, he states that he wants to run the KENO code on his VAX computer. NNECO does not possess or use a VAX version of the KENO code and understands that a VAX version is not presently available from ORNL. CCMN and Dr. Kaku can obtain information on available versions of the code as well as system/hardware compatibility from ORNL.

## II. MOTION FOR EXTENSION OF TIME

CCMN also moves the Licensing Board to grant a one month extension of time to respond to NNECO's Motion for Summary Disposition of May 7, 1993. The reason given is to allow CCMN's expert, Dr. Kaku, sufficient time to properly evaluate the validity of the information presented in NNECO's motion. According to CCMN, Dr. Kaku is limited by his teaching schedule from devoting the necessary time to this issue until June. NNECO opposes granting CCMN an additional month to respond to NNECO's Motion for Summary Disposition.

NRC's Rules of Practice allow sufficient time for answers to motions for summary disposition. Under 10 C.F.R. § 2.749(a), CCMN may serve an answer opposing NNECO's Motion for Summary Disposition within twenty days after service of the motion. Further, CCMN may respond to new facts in statements filed in support of the motion (presumably an NRC Staff answer, if any) within 10 days of service of that answer. By Commission policy, "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." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). The Commission expects the "good cause" standard (see 10 C.F.R. § 2.711(a)) for adjusting times fixed by its Rules of Practice to have been met before granting an extension of time. Texas Utilities Generating Company (Comanche

Peak Steam Electric Station, Units 1 and 2), LBP-82-18, 15 NRC 598 (1982) (citing the Commission's Statement of Policy at 454). The Licensing Board in Comanche Peak further noted that licensing boards are urged "to take firm hold of hearings and keep them moving." Id. (quoting U.S. Nuclear Regulatory Commission Policy and Planning Guidance 1982, NUREG-0085, Issue 1, page 4).

Dr. Kaku's teaching obligations do not constitute good cause to extend the schedule, especially in light of the amount of time he has had to review the materials on which NNECO's Motion for Summary Disposition is based. NNECO's motion is premised on information previously available to CCMN in discovery materials provided in January 1993. Also, some of the information was available to CCMN in the application for the license amendment here at issue (Amendment 158), which has been publicly available since April 1992. CCMN and Dr. Kaku have had ample time to review these materials, and the present CCMN motion does not explain why this time was insufficient.<sup>9</sup>

In sum, CCMN and Dr. Kaku have had the necessary material, the time, and the incentive to become familiar with the facts of

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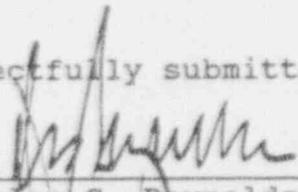
<sup>9</sup> It is significant to note that in his March 1993 affidavit in this proceeding, filed in response to NNECO discovery requests, Dr. Kaku provides little indication that he has actually reviewed the documents and information germane to this case. Nonetheless, CCMN and Dr. Kaku had reason to be familiar with the facts of the case as a result of filing contentions, affidavits, interrogatories and answers to interrogatories in this proceeding.

this case. Dr. Kaku's personal teaching obligations do not constitute good cause at this late juncture to extend the time for a response to a summary disposition motion (by over 100% beyond that allowed by 10 C.F.R. § 2.749).

III. CONCLUSION

CCMN's motion to compel further responses by NNECO to discovery Requests 1 and 2 should be denied. CCMN's Motion to extend the schedule provided in 10 C.F.R. § 2.749 for responses to summary disposition motions should also be denied.

Respectfully submitted,



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Dated at Washington, D.C.,  
this 13th day of May, 1993

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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In the Matter of )  
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NORTHEAST NUCLEAR ENERGY CO. ) Docket No. 50-336-OLA  
 ) (Spent Fuel Pool Design)  
(Millstone Nuclear Power Station )  
Unit No. 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NORTHEAST NUCLEAR ENERGY COMPANY'S RESPONSE TO MOTIONS TO COMPEL AND FOR EXTENSION OF TIME" have been served on the following by deposit in the United States Mail, first class, this 13th day of May, 1993:

Ivan W. Smith, Chairman\*  
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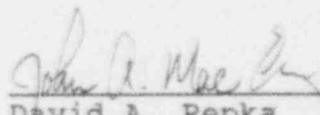
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\* Provided both in hard copy and magnetic media.