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DOCKETED  
July 12, 2000

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF STAFF  
RULING, ORDER, AND  
ADJUDICATIONS STAFF

In the Matter of:	)	
	)	
Northeast Nuclear Energy Company	)	Docket No. 50-423-LA-3
	)	
(Millstone Nuclear Power Station,	)	
Unit No. 3)	)	ASLBP No. 00-771-01-LA

NORTHEAST NUCLEAR ENERGY COMPANY'S SUPPORT OF NRC  
STAFF MOTION TO STRIKE DETAILED SUMMARY OF FACTS, DATA  
AND ARGUMENTS AND SWORN SUBMISSION OF CONNECTICUT COALITION  
AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE

INTRODUCTION

Northeast Nuclear Energy Company ("NNECO") hereby supports the U.S. Nuclear Regulatory Commission ("NRC") Staff's "Motion to Strike Detailed Summary of Facts, Data and Arguments and Sworn Submission on Which the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone Intend to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Millstone Unit No. 3 Nuclear Power Plant" ("Motion"), dated July 7, 2000. The Staff filed the Motion to strike the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") written summary in its entirety for failure to comply with 10 C.F.R. § 2.1113 and Section 134 of the Nuclear Waste Policy Act of 1982, as

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amended (42 U.S.C. § 10154) ("NWPA"), in that the facts and data relied upon are not properly sworn to as required by the statute and the regulation. As discussed herein, NNECO supports the Motion.

### **BACKGROUND**

On April 19, 2000, the Atomic Safety and Licensing Board ("Licensing Board") issued Memorandum and Order (Schedule for Proceeding) that established, pursuant to 10 C.F.R. § 2.1113, a deadline of June 30, 2000, for the filing of the parties' written Subpart K summaries. Less than two hours before the expiration of that deadline, the Intervenor faxed a "Motion for Permission to File Summary Untimely," asking for an extension of time because a computer problem made it "impossible" to meet the deadline. On July 3, 2000, the Intervenor filed the first of three versions of their "Detailed Summary of Facts, Data and Arguments and Sworn Submission on Which Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Intend to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Millstone Unit No. 3 Nuclear Power Plant" ("July 3 Summary"). The July 3 Summary was accompanied by a "Declaration of Dr. Gordon Thompson in Support of Intervenor's Summary and Sworn Submission Regarding Contentions 4, 5 and 6" ("Thompson Declaration"). The Intervenor subsequently filed a revised version of the written summary on July 4, 2000 ("July 4 Summary"), again including only a declaration of Dr. Thompson.

On July 6, 2000, Intervenor filed another motion to file an additional declaration and to conform their summary. The motion was accompanied by a new version of the summary ("July 6 Summary"), supported by the declarations of Dr. Thompson (as discussed above) and of Mr. David Lochbaum ("Lochbaum Declaration"). The Thompson Declaration appears properly

executed by Dr. Thompson on June 30, 2000. The e-mailed Lochbaum Declaration, however, is dated June 30, 2000, but is not executed. On July 10, 2000, counsel for NNECO received, via U.S. mail, two additional copies of the Lochbaum Declaration. One copy was undated and executed by counsel for the Intervenor, Ms. Nancy Burton. The other copy was dated June 30, 2000, and executed by Mr. Lochbaum, but with a July 5, 2000 facsimile date line.

NNECO has, conditionally, not opposed either the July 3 Summary or the July 4 Summary on lateness grounds, but has opposed the July 6 version for its lateness. Specifically, on July 7, 2000, NNECO filed "Northeast Nuclear Energy Company's Opposition to the Intervenor's Motion to File Supplementary Declaration and to Conform Their Summary." NNECO stated that it would not object to the lateness of the July 3 and July 4 version of the summary, if the Intervenor could certify that they did not subvert the simultaneous filing requirement. NNECO, however, expressly opposed the July 6 motion and the July 6 Summary on the grounds that the Intervenor did not satisfy the "good cause" requirement of 10 C.F.R. § 2.711(a) and that the late summary violates the simultaneous filing requirements of 10 C.F.R. § 2.1113. Intervenor not only failed to articulate a good cause for the untimely filing of the July 6 Summary, but failed to proffer any reason at all.

### DISCUSSION

10 C.F.R. § 2.1113(a) requires, *inter alia*, that, "[e]ach party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission." Section 2.1113(b) requires that, "[o]nly facts and data in the form of sworn written testimony or other sworn written submission may be relied on by the parties during oral argument, and the presiding officer shall consider those facts and data only if they are submitted in that form."

The NRC Staff's current Motion to strike is not based on lateness, but on other issues of form. It extends to all three versions of the Intervenor's written summary. Completely apart from the lateness issue, and as also mentioned in NNECO's July 7 filing (at page 4), the Staff argues correctly that the various summaries filed by the Intervenor are defective because the facts and data relied upon are not properly in the form of sworn written testimony. The summaries contain no citations to either Dr. Thompson or Mr. Lochbaum, and consequently, there is no way to ascertain what, if any, facts or data each declarant has contributed to the summary. Therefore, it is virtually impossible for the Licensing Board to determine which of the alleged factual issues are supported by sworn testimony or other sworn admission, and which are purely representations of counsel.

As far back as 1981, in its original Statement of Policy on Conduct of Adjudicatory Proceedings, the Commission provided guidance for all matters before NRC licensing boards:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While 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.

CLI-81-8, 13 NRC 452, 454 (May 20, 1981) (emphasis added). In the case at hand, the Intervenor has made no attempt to show that such "special circumstances" exist. The Intervenor is represented by counsel and should be held to appropriate standards.

Moreover, the Commission's most recent Statement of Policy on Conduct of Adjudicatory Proceedings ("1998 Policy Statement") further addressed the obligations of the parties in NRC proceedings:

Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. *Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.*

CLI-98-12, 48 NRC 18, 21 – 22 (Aug. 5, 1998) (emphasis added).<sup>1</sup> Therefore, it is clear that the Intervenor's filings are not only untimely, but also deficient as to format. In accord with the Commission's 1998 Policy Statement, the written summary, in all its versions, should be stricken from the record.

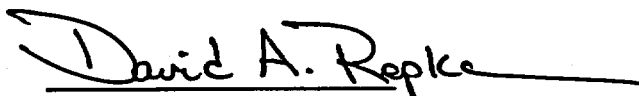
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<sup>1</sup> The 1998 Policy Statement further addresses the obligation of the licensing boards in adjudicatory proceedings. "The Commission emphasizes its expectation that the boards will enforce adherence to the hearing procedures set forth in the Commission's Rules of Practice in 10 CFR Part 2, as interpreted by the Commission."

### CONCLUSION

The Intervenor's written summary does not comply with 10 C.F.R. § 2.1113 and Section 134 of the NWPA, in that the facts and data relied upon are not properly sworn to as required by the statute and the regulation. Consequently, the Intervenor's written summary should be stricken from the record in this proceeding.

Respectfully submitted,



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ATTORNEYS FOR NORTHEAST NUCLEAR  
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Dated in Washington, D.C.  
this 12th day of July 2000

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

Northeast Nuclear Energy Company

(Millstone Nuclear Power Station,  
Unit No. 3)

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Docket No. 50-423-LA-3

ASLBP No. 00-771-01-LA

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "NORTHEAST NUCLEAR ENERGY COMPANY'S SUPPORT OF NRC STAFF MOTION TO STRIKE DETAILED SUMMARY OF FACTS, DATA AND ARGUMENTS AND SWORN SUBMISSION OF CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE" in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 12th day of July 2000. Additional e-mail service has been made this same day as shown below.

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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka  
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