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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
NORTHEAST NUCLEAR)	Docket No. 50-423-LA-3
ENERGY COMPANY)	
)	
(Millstone Nuclear Power Station,)	
Unit No. 3))	
)	

NRC STAFF RESPONSE TO
INTERVENORS' MOTION FOR STAY

Ann P. Hodgdon
Counsel for NRC Staff

December 28, 2000

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INTRODUCTION

On December 19, 2000 , Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (jointly "Intervenors") filed before the Commission a "Motion for Stay," in which Intervenors requested the Commission to stay its consideration of Intervenors' petition for review of the Licensing Board's decision in LBP-00-26, issued October 26, 2000. As a basis for their request, Intervenors cite their filing on December 18, 2000, before the presiding Atomic Safety and Licensing Board of a Motion to Reopen and to Vacate Decision ("Motion to Reopen"). Intervenors ask, in their Motion for Stay, that the Commission hold in abeyance its consideration of Intervenors' petition for review pending the Licensing Board's action on their Motion to Reopen.

On December 19, 2000, NNECO filed a response to the Motion for Stay in which it opposed the granting of both motions.¹ Also on December 19, 2000, the Licensing Board

¹ Northeast Nuclear Energy Company's Response in Opposition to Motion to Stay, December 19, 2000.

issued an order scheduling responses to Intervenor's Motion to Reopen and indicating that responses should also address the Board's jurisdiction.²

On December 20, 2000, the Commission issued an order extending the time for its action on Intervenor's petition for review until January 31, 2000, and, on December 21, 2000, it issued a memorandum and order, CLI-00-25, remanding the Motion to Reopen to the Licensing Board, indicating that it would await responses to the Motion for Stay before ruling on that motion.

As noted above, in CLI-00-25, the Commission remanded the Motion to Reopen to the Licensing Board. Thus, as discussed below, the Commission, in effect, granted Intervenor's Motion for Stay of Commission consideration of Intervenor's petition for review of Contention 4. However, the Commission did not stay its consideration of the petition for review insofar as it concerns Contention 6 and, in the Staff's opinion, it should not.

BACKGROUND

On March 19, 1999, Northeast Nuclear Energy Company ("NNECO") submitted a license amendment application by which it sought to increase the storage capacity of its spent fuel pool at Millstone Unit 3 by adding racks. On February 9, 2000, the Licensing Board issued a Prehearing Conference Order, (LBP-00-02, 51 NRC 25), in which it found that Petitioners Connecticut Coalition Against Millstone ("CCAM.") and Long Island Coalition Against Millstone ("CAM") had standing to intervene in a proceeding on that application and admitted three of their contentions, Contentions 4, 5 and 6. On February 22, 2000, NNECO invoked the hearing procedures of 10 C.F.R. Part 2, Subpart K, in accordance with

² Memorandum and Order (Responses to Motion to Reopen Record), December 19, 2000.

10 C.F.R. § 2.1109(a). On July 19-20, 2000, after the submission by the parties of written summaries, the Board heard oral argument on two of the admitted contentions, Contention 4 and Contention 6, the other admitted contention, Contention 5, having been settled. On October 26, 2000, the Licensing Board issued LBP-00-26, a memorandum and order denying the request of Intervenors for an evidentiary hearing based on its determination that there was no genuine and substantial dispute of fact to be resolved in an evidentiary hearing and terminating the proceeding.

On November 13, 2000, Intervenors filed a petition seeking Commission review of LBP-00-26; on November 22, 2000, both NNECO and the Staff filed responses opposing the motion.³

DISCUSSION

In their Motion to Reopen, Intervenors state that the information on which they seek to reopen relates to their Contention 4. In particular, they state that they are moving to reopen the proceedings for further development of the record with regard to the disclosure by the licensee, Northeast Nuclear Energy Company ("NNECO"), to the NRC during the week of November 24, 2000, that it could not confirm the location of two fuel pins at the Millstone Unit 1 spent fuel pool. Motion to Reopen at 1. They state that the licensee's historical inability to adhere to administrative controls is an issue in these proceedings (Contention 4). *Id.* at 3. They also state that it is their position that, had the Licensing Board been made aware that NNECO was unable to account for two highly radioactive

³ Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Petition for Review of LBP-00-26, November 13, 2000; Northeast Nuclear Energy Company's Answer Opposing the Petition for Review of LBP-00-26, November 22, 2000; NRC Staff Response in Opposition to Petition for Review of LBP-00-26, November 22, 2000.

spent fuel rods at Unit 1, the Board would not have been able, in dismissing Contention 4, to make the finding that NNECO had demonstrated that it could adhere to administrative controls with adequate safety margin and defense-in-depth without posing an undue or unnecessary risk to plant workers or the public. *Id.* Significantly, however, there is no mention, either in their Motion for Stay or in their Motion to Reopen, of Contention 6, which raises a legal issue regarding the meaning of General Design Criterion (GDC) 62; it is only with respect to Contention 4 that Intervenor claim that the new information discussed above raises a factual issue.

Intervenors have neither addressed nor met the criteria for a stay in 10 C.F.R. § 2.788.⁴ Indeed, Intervenor have not sought a stay of the effectiveness of the Licensing Board's decision in LBP-00-26. Nevertheless, as discussed above, the effect of the Commission's remand to the Licensing Board of the Motion to Reopen was to grant Intervenor request for stay as it concerned Contention 4, a factual matter whose resolution Intervenor claim would change the outcome of the Licensing Board's decision regarding Contention 4.

The Intervenor's Motion for Stay and the Commission's remand do not affect Contention 6, which, as discussed above, concerns a legal question. In light of this and the absence of any apparent harm either to Intervenor or to any other party from the Commission's continued consideration of Intervenor's petition for review insofar as it concerns

⁴ The Commission's regulations in 10 C.F.R. §2.788(e) regarding stays of decisions pending review state as follows:

In determining whether to grant or deny an application for a stay, the Commission . . . will consider:

- (i) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (ii) Whether the party will be irreparably injured unless the stay is granted;
- (iii) Whether the granting of a stay would harm other parties; and
- (iv) Where the public interest lies.

Contention 6, the public interest would be served by the Commission's denying Intervenor's request insofar as it might arguably concern Contention 6.

CONCLUSION

As discussed, the Commission should deny Intervenor's Motion for Stay insofar as that motion relates to Contention 6.

Respectfully submitted,

/RA/

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of December, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENORS' MOTION FOR STAY" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service as indicated by a double asterisk, with copies by electronic mail as indicated, this 28th day of December, 2000:

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