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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of:

Northeast Nuclear Energy Company

(Millstone Nuclear Power Station,
Unit No. 3)

Docket No. 50-423-LA-3

**NORTHEAST NUCLEAR ENERGY COMPANY'S
RESPONSE IN OPPOSITION TO MOTION FOR STAY**

I. INTRODUCTION

On December 19, 2000, the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") filed a Motion for Stay of the Commission proceedings on this matter. CCAM and CAM have also, by filing of December 18, 2000, filed with the Atomic Safety and Licensing Board ("Licensing Board") a Motion to Reopen the record with respect to the previously completed Subpart K proceeding. Northeast Nuclear Energy Company ("NNECO") herein responds in opposition to the Motion for Stay.¹

¹ NNECO also opposes the Motion to Reopen. In accordance with a Memorandum and Order issued by the Licensing Board on December 19, 2000, a response to the Motion to Reopen, to be filed with the Licensing Board, would be due on January 8, 2000. Absent further direction from the Commission, NNECO would file with the Licensing Board in accordance with that schedule. However, as discussed below, NNECO maintains that the Licensing Board does not presently have jurisdiction over the matter. And, in any event, the Motion to Reopen does not raise information that would lead to a different result in this proceeding.

II. BACKGROUND

On October 26, 2000, the presiding Licensing Board in this matter issued its Initial Decision (LBP-00-26) under the procedures of 10 C.F.R. Part 2, Subpart K, resolving all admitted contentions. Most relevant to the current Motion for Stay, the Licensing Board decided Contention 4 in favor of NNECO, concluding that the proposal to add storage racks to the Millstone Unit 3 Spent Fuel Pool does not pose an undue and unnecessary risk of a criticality accident as asserted in the contention. The Licensing Board relied upon a substantial record showing not only NNECO's administrative controls to verify movements of fuel assemblies, but also the substantial margin of safety provided by the regulatory requirement that reactivity be maintained less than 0.95, and the defense-in-depth against criticality provided by soluble boron in the spent fuel pool. *See, e.g.*, LBP-00-26, at 26.² The record also included detailed, uncontroverted criticality calculations demonstrating this defense-in-depth against a criticality event in the Unit 3 spent fuel pool. *See, e.g., id.* at 18-19.

On November 13, 2000, CCAM and CAM filed a Petition for Review of the Licensing Board's Initial Decision in accordance with 10 C.F.R. § 2.786. CCAM and CAM did not file any request for stay of the Initial Decision within the time prescribed by 10 C.F.R. § 2.788. The Licensing Board's Initial Decision was immediately effective and, in the absence of any stay, the requested license amendment has since been issued.

² Page cites are to the slip opinion.

NNECO opposed the Petition for Review by filing of November 22, 2000. The Petition for Review remains before the Commission with the time for Commission action on the Petition for Review currently extended until December 20, 2000. The Motion for Stay contemplates a stay only of the Commission's consideration of the Petition for Review, pending further proceedings before the Licensing Board. Given the imminence of the December 20, 2000 milepost, NNECO is responding to the December 19, 2000 Motion for Stay herein.

III. DISCUSSION

A. Millstone Unit 1 Report

The Motion for Stay, as well as the Motion to Reopen, are premised upon an issue regarding two fuel pins at Millstone Unit 1 that were recently determined to be unaccounted for, based upon a review of Unit 1 records. NNECO informally disclosed its findings to the NRC in mid-November as reflected in the NRC Weekly Information Report cited by the Petitioners. Subsequently, on December 14, 2000, NNECO made a report on this matter to the NRC in accordance with 10 C.F.R. § 20.2201(a)(1)(ii) (Event Number 37596).

To summarize, the two fuel pins at issue were removed from a Millstone Unit 1 fuel assembly in October 1972 to allow General Electric (the fuel vendor) to examine the fuel to study the effects on the fuel of a saltwater intrusion into the reactor vessel at Unit 1. During the examination process, the two pins could not be reinserted into the fuel assembly. The records indicate that the two pins were stored separately in the Millstone Unit 1 spent fuel pool. In November 2000, as part of the ongoing

decommissioning of Unit 1, NNECO was conducting records reviews for material in the Unit 1 spent fuel pool. NNECO identified a discrepancy in the paperwork: records do not account for the two pins beginning in *September 1980*. Upon discovery of the discrepancy, NNECO immediately began further records reviews and examinations in the Unit 1 spent fuel pool. Those reviews are currently ongoing with full knowledge and oversight of the NRC. Contrary to the repeated implications of CCAM and CAM, there has been no bad faith or attempt to conceal the issue. NNECO timely made the December 14 event notification related to the unaccounted for licensed material. Indeed, CCAM and CAM, in the Motion to Reopen, acknowledge that NNECO disclosed the event to the NRC during the week of November 24, 2000, and that they have access to the NRC documentation.

B. The Motion for Stay

This Unit 1 event is a current regulatory matter that is being addressed with all deliberate speed and seriousness by NNECO and the NRC. While at the present time the matter is not yet resolved, CCAM's and CAM's concern may be appropriately addressed through the Commission's 10 C.F.R. § 2.206 process.

With respect to this licensing proceeding, the Commission's standards for a stay are set forth in 10 C.F.R. § 2.788 and include, among other things, consideration of whether the moving party has made a strong showing that it is likely to prevail on the

merits of the issue.³ The Commission's standards for reopening a record are codified at 10 C.F.R. § 2.734 and include, among others, the requirement that the motion demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.⁴ The stay requested should not be granted because the petitioners have not shown that they are likely to prevail on the merits of the motion to reopen. Petitioners cannot prevail on the motion to reopen because the new evidence could not affect the outcome of the decision on Contention 4.

There are at least three reasons why the unaccounted for fuel pins cannot affect the outcome of Contention 4:

1. To the extent that the Unit 1 issue reflects on implementation of administrative controls, the issue relates to events of the early 1970's through 1980. In the current proceeding, as discussed in a Memorandum and Order (Discovery Rulings, 5/26/00 Telephone Conference), dated June 8, 2000, the Licensing Board recognized that the age of a previous administrative control issue at Millstone is germane to the value of the incident as evidence in this

³ CCAM and CAM are in effect seeking a stay only of the Commission's consideration of their appeal. There is no stay requested with respect to the license amendment, nor would such a request be timely.

⁴ Section 2.734(b) includes a requirement that a petitioner include affidavits from competent individuals in support of a motion to reopen. CCAM and CAM have provided no such affidavits. The purpose of this requirement is to assure that the petitioners have a sound factual and technical basis to support the claim that the

proceeding. In ruling upon NNECO's request for protective order, the Licensing Board restricted certain discovery requests to experience since either the last refueling outage or restart from the extended Millstone recovery shutdown in the mid-1990's, whichever is earlier. The Licensing Board also restricted evidence to events at Unit 3. *See, e.g.,* Discovery Ruling, at 4. In its Initial Decision, the Licensing Board also observed with respect to a 1994 incident that the event "occurred prior to the 1996-98 shutdown and restart of the reactor and thus does not necessarily reflect on the Licensee's current capability for carrying out administrative controls." LBP-00-26, at 24. In this light, the probative value of the Unit 1 event is extremely small.

2. The issue at Unit 1 involves two fuel pins. In contrast, Contention 4 addresses the ability of NNECO to manage spent fuel assemblies and to implement regional storage based upon reactivity limits of the assemblies. The record below addresses the procedures for handling spent fuel assemblies and for verifying their appropriate placement in spent fuel storage locations. An issue regarding the handling and paperwork related to two fuel pins removed from a

record should be reopened. In the absence of such technical support, there would be no basis on which to conclude that the reopening standard was satisfied.

Unit 1 fuel assembly under unusual circumstances in the 1970's has little bearing on the prospective handling of intact Unit 3 fuel assemblies.

3. The focus of Contention 4 was and must remain the potential for inadvertent criticality—that is, on whether added complexity and the potential for error allegedly created by the regional storage pattern could lead to a criticality event. The evidence in this case related to criticality, including the uncontroverted criticality calculations NNECO placed in evidence, overwhelms any evidence of past fuel handling incidents—based on the substantial margins of safety demonstrated. NNECO's calculations show that hypothetical misplacement of multiple, intact fuel assemblies, far more reactive than the Unit 1 pins at issue, would not lead to a criticality event in the Unit 3 spent fuel pool in the proposed configuration.

In sum, the petitioners have not provided any basis for a stay of the Commission's deliberations with respect to the Petition for Review or for further proceedings before the Licensing Board. CCAM and CAM have not presented any evidence related to the two Unit 1 fuel pins that could change the outcome of this proceeding with respect to Contention 4.

C. The Motion to Reopen

The Motion to Reopen was filed with the Licensing Board. However, because an Initial Decision has been issued and a Petition for Review filed, jurisdiction over the Motion to Reopen properly lies with the Commission. *See* 10 C.F.R. § 2.718(j); *see also* Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773, 775 (1985). Accordingly, the Motion to Reopen should be considered by the Commission rather than the Licensing Board. Moreover, further responses to this Motion are not necessary. For the reasons discussed above, the Motion to Reopen should be denied.⁵

⁵ If further responses are required, NNECO requests guidance from the Commission concerning the proper venue for response.

IV. CONCLUSION

For the reasons above, the Commission should deny the Motion for Stay.

With respect to the Motion to Reopen, the Commission presently has jurisdiction over this request and should conclude that further evaluation of the issue is not necessary and that the Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Repka". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

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Dated at Washington, D.C.
this 19th day of December, 2000

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NORTHEAST NUCLEAR ENERGY COMPANY'S RESPONSE IN OPPOSITION TO MOTION FOR STAY" in the captioned proceeding have been served upon the following by deposit in the United States mail, first class, this 19th day of December, 2000. Additional e-mail service has been made this same day as shown below.

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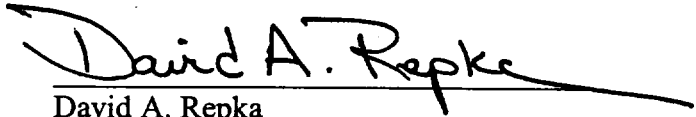
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December 19, 2000