

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE IN OPPOSITION TO
PETITION FOR REVIEW OF LBP-00-26

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November 22, 2000

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INTRODUCTION

On November 13, 2000, pursuant to 10 C.F.R. §2.786(b)(i), the Connecticut Coalition Against Millstone ("CCAM") and Long Island Coalition Against Millstone ("CAM") (collectively "Petitioners") filed a "Petition for Review of LBP-00-26" ("Petition"). *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-00-26, 52 NRC ____, slip op. (Oct. 26, 2000), is a memorandum and order that, among other things, denies the request of CCAM/CAM for a further evidentiary hearing concerning Northeast Nuclear Energy Company's (NNECO) license amendment request to increase storage in the spent fuel pool at Millstone Unit 3. This NRC staff response is filed pursuant to 10 C.F.R. §2.786(b)(iii). For the reasons discussed below, the Commission should deny the Petition.

SUMMARY OF THE DECISION

The Licensing Board's decision was issued in a proceeding governed by the Commission's regulations in 10 C.F.R. Part 2, Subpart K (10 C.F.R. §§2.1101 - 2.1117). CCAM/CAM's Contention 4 alleged that reliance on the administrative controls needed to implement the amendment would pose an undue and unnecessary risk of a criticality accident in the spent fuel

pool. After oral argument concerning whether a full evidentiary hearing was warranted, the Licensing Board concluded that Contention 4 failed the first test in 10 C.F.R. §2.1115(b), in that it raised no genuine and substantial dispute of fact whose resolution required the introduction of evidence in an adjudicatory hearing. LBP-00-26, slip op. at 21-22, *citing* 10 C.F.R. §2.1115(b).

The Board truncated the parties' argument on Contention 5, which alleged the need for soluble boron in the pool at all times and not just when moving fuel, in view of the parties' agreement on a technical specification that would resolve that contention. *Id.* at 8.

Contention 6 involved a question of law, that is, whether General Design Criterion (GDC) 62, (10 C.F.R. Part 50, Appendix A), forbids the use of administrative controls in connection with the prevention of criticality in spent fuel pools. After reviewing the positions of each of the parties, the Board concluded that GDC 62 does not bar the use of the types of administrative controls sought to be used by NNECO. LBP-00-26, slip. op. at 28-46.

BACKGROUND

In LBP-00-26, the Board set out a lengthy background statement. LBP-00-26, slip op. at 2-10. The Board referenced its February 9, 2000, prehearing conference order, LBP-00-02, 51 NRC 25 (1999), which finds that CCAM and CAM have established their standing to intervene on NNECO's application and which admits three of CCAM/CAM's eleven proposed contentions. *Id.* at 3. It also referenced NNECO's invocation of the hybrid procedures in 10 C.F.R. Part 2, Subpart K, *Id.*, and the oral argument that was heard on July 19-20, 2000. *Id.* at 9.

ARGUMENT

The Petition Fails to Raise Any Issues that Meet the Criteria for Granting Commission Review

Pursuant to 10 C.F.R. §2.786(b)(4), a petition for review "may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the

following considerations: (1) 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 failed to demonstrate that there is a substantial question as to any of these five considerations.

I. Contention 4

Petitioners’ concerns regarding the Board’s treatment of their Contention 4 relate to claims of erroneous rulings regarding the following matters:

- 1) “Mispositioning” of a fuel assembly (Petition at 5);
- 2) Equipment failures during Refueling Outage 6 (RFO 6) (Petition at 5, 6-7);
- 3) The Board’s refusal to consider deregulation and the imminent sale of Millstone (Petition at 7, n. 14);
- 4) The Board’s imposition of an inappropriately high legal threshold by faulting Petitioners for their failure to provide evidence of actual criticality events at the Millstone spent fuel pools (Petition at 6);
- 5) LBP-00-26’s failure to reference decisional standards (Petition at 8).

Petitioners have failed to satisfy 10 C.F.R. §2.786(b)(2)(ii), requiring a statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised. Thus, responding parties can only speculate as to the basis on which error is claimed.

1. Mispositioning

The Petition contains a discussion of what Petitioners label a "mispositioning." Petition at 5. The discussion for the most part merely repeats the discussion in Petitioners' "Detailed Summary." The discussion relates to two incidents at Millstone 3; one involving an aborted attempt to load an assembly into a cell where an assembly was already stored and the other involving an operator's taking an assembly to the wrong location but discovering his mistake before attempting to load the assembly. See "NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon Which The Staff Proposes to Rely at Oral Argument on Contentions 4, 5 and 6," June 30, 2000, Exhibits 12, 13. The Board considered these matters in the context of its consideration of fuel misplacement events at other reactors discussed in Licensee Event Reports filed pursuant to 10 C.F.R. 50.73 and relied on by Petitioners for the proposition that a misplacement could lead to criticality. LBP-00-26, slip op. at 22-24. The Board found that the regulatory limit on reactivity of $k_{\text{eff}} \geq 0.95$ was not challenged in any of these events. *Id.* The Millstone incidents did not involve loading an assembly into a region for which it was not qualified. *Id.*

As noted above, it is not clear why Petitioners assign error to this Licensing Board finding, as they do not challenge the Board's finding that $0.95k_{\text{eff}}$ was not exceeded in any of these events and, as discussed below, their view that exceeding $0.95k_{\text{eff}}$ constituted a criticality accident was not supported.

2. Equipment Failures in RFO 6

Petitioners reargue their case below concerning RFO 6 at Millstone Unit 3 in May-June 1999, (Petition at 5-6), and accuse the Licensing Board of excusing the "reckless events" of RFO 6 by accepting NNECO's "commitment" to repair or replace its refueling equipment prior to RFO 7. *Id.* at 6-7. Petitioners acknowledge that the Board concludes that "there is an economic incentive for NNECO to make the proposed repairs, and no safety significance if they do not."

Petition at 8, citing LBP-00-26 at 9. (The quoted passage actually appears at 26 of LBP-00-26.) Petitioners do not state the way in which they consider the Board's conclusion regarding the safety significance of equipment problems in RFO 6 to be incorrect. The Staff submits that the conclusion is correct and is entirely consistent with the presentations of the parties regarding this matter. *See, e.g.,* Affidavit of Antone C. Cerne Addressing RFO6 at Millstone 3, ¶¶ 12, 13. CCAM/CAM's allegations that problems encountered during the outage could have resulted in damage to fuel in the pool were not substantiated. The Board correctly found that malfunctioning of the fuel transfer system such as that encountered during RFO 6 does not affect the actual location of the fuel in the spent fuel pool. LBP-00-26, slip op. at 9.

3. The Board's Refusal to Consider the Sale of Millstone

Petitioners charge as error the Licensing Board's failure to consider that deregulation is underway and that the sale of Millstone is imminent. Petition at 7. They state that during oral argument on July 20, 2000, they asked the Board to consider that the sale of Millstone was underway and that the present licensee would be absolved of the responsibility to perform corrective actions. *Id.* at n. 14. Petitioners do not identify the place in the record where the Board refused their request to consider the sale and any safety implications the sale might have. In fact, the request was made on July 19, 2000, at the beginning of oral argument. Tr. 339. It was not made in the context of claims that NNECO had made commitments to repair or replace refueling equipment because of failures during RFO 6. The Board's declination on the basis that it could not take into account any impending transfers that were not the subject of the amendment and that were beyond the scope of the proceeding is correct. *Id.* Beyond that, Petitioners never raised such issue in a motion for admission of a late-filed contention and this argument should not now be considered by the Commission. *See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)*, LBP-00-12, 51 NRC 247, 281-282 (2000).

4. The Board's faulting Petitioners for their failure to provide evidence of actual criticality at the Millstone spent fuel pools.

Petitioners charge that the decision faults them for failing to provide evidence of actual criticality at the Millstone spent fuel pools. Petition at 6. The Staff has not been able to identify anything in the record that would substantiate this charge. In LBP-00-26, the Board noted that there is no record of a criticality accident in a spent fuel pool anywhere, LBP-00-26, slip op. at 12, and that the misplacement events at other reactors cited by Petitioners did not result in a breach of the acceptance criterion of $k_{eff} \geq 0.95$. *Id.* at 22-24. The Board simply did not agree with Petitioners' definition of a criticality accident, i.e. an accident exceeding 0.95 k_{eff} would constitute a criticality accident. See LBP-00-26, slip op. at 11- 12, where the Board explains that criticality will not be reached until the k_{eff} of the spent fuel pool is at least 1.0 and that $k_{eff} \geq 0.95$ is a regulatory goal and not a regulation.

5. LBP-00-26's Failure to Reference Standards

Petitioners assign error to LBP's "complete absence of standards, and the absence of any written standards governing consideration of the application in question." Petition at 8. They state that the decision has no reference to standards or analysis as to how such standards were applied to the issues. *Id.*

Contrary to Petitioners' characterization, the Board did articulate the Commission's decisional standards. As noted above with reference to the misplacement of fuel assemblies, the Board noted that the Staff's acceptance criterion is $k_{eff} \geq 0.95$. LBP-00-26 at 11. The Board also recognizes the double contingency principle. *Id.* at 11-12. Thus, there is no basis to the claim that the Board did not reference standards in its decision.

Petitioners allege that LBP-00-26 is clearly erroneous with regard to the five matters raised in the Petition and discussed above. Petitioners have failed to show error in the Board's treatment of any of those matters.

The Commission is not inclined to upset the findings and conclusions of its adjudicatory tribunals, "particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed." *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174) CLI-00-12, 52 NRC 1, at 3 (2000), *citing Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 6 (1999). The Commission does not "second-guess" the reasonable findings of its presiding officers. *Hydro Resources, Inc.*, CLI-00-12, 52 NRC at 3, *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). Here, as in *Hydro Resources*, the findings and conclusions of the presiding officer are supported by the affidavits of experts on criticality and witnesses with direct knowledge of Millstone's operations. Therefore, Commission review of the Licensing Board's findings is not warranted.

II. Contention 6

Petitioners complain of the Licensing Board's disposition of their Contention 6. Petition at 8-10. However, they merely reargue their position as presented to the Licensing Board and fail to identify error on the Board's part. *Id.* The gist of Petitioners' Contention 6 is that NNECO seeks to use administrative controls to prevent criticality in the Millstone Unit 3 spent fuel pool, contrary to General Design Criterion (GDC) 62, which requires that criticality in the fuel storage and handling system be prevented by physical systems or processes, preferably by geometrically safe configurations. LBP-00-26, slip op. at 28-29. The Board found that the plain language of GDC 62 did not support Petitioners' reading; *i.e.* "processes" as used in the GDC include administrative means and the use of geometrically safe configurations is merely a preference. *Id.* at 43-45. Petitioners complain of the Board's failure to identify what the GDC excludes. Petition at 9-10. The Staff submits that the Board's construction of the GDC, recognizing that it expresses a preference

(but not an exclusion), is correct. LBP-00-26's treatment of GDC 62 and of Petitioners' Contention 6 is consistent with the treatment of a similar contention by the Licensing Board in *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 255-69 (2000). Although *Shearon Harris* is not governing precedent, the Licensing Board's disposition of Contention 6 in LBP-00-26 is not a departure from or contrary to established interpretations of this regulation and the ruling of another licensing board on a similar issue. Petitioners have not made the case that the Commission should take review pursuant to 10 C.F.R. §2.786(b)(4)(ii).

CONCLUSION

The Petition fails to satisfy any of the considerations of 10 C.F.R. §2.786(b)(4) concerning the circumstances in which the Commission has indicated that it may exercise its discretion to grant review. The Commission should, therefore, deny the Petition for Review.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ann P. Hodgdon", is written over the printed name.

Ann P. Hodgdon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of November, 2000

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Docket No. 50-423-LA-3

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO PETITION FOR REVIEW OF LBP-00-26" 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 22nd day of November, 2000:

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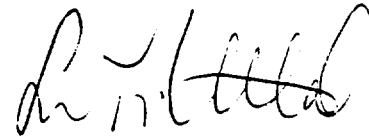
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