

November 20, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DOMINION NUCLEAR CONNECTICUT, INC)	Docket No. 50-423-LA-3
)	
(Millstone Nuclear Power Station,)	
Unit No. 3))	

NRC STAFF MOTION FOR RECONSIDERATION OF LICENSING BOARD
MEMORANDUM AND ORDER DATED NOVEMBER 15, 2001

On November 15, 2001, the Licensing Board issued a *sua sponte* Memorandum and Order (Appendices to OI Report, Case 1-2001-007), which changes the requirements of the Memorandum and Order (Staff Motion to Continue Holding Proceeding in Abeyance) LBP-01-29, 54 NRC __ October 5, 2001, which was based on agreements reached in a Prehearing Conference call of October 2, 2001, and Memorandum and Order (Telephone Conference Call, 10/31/01; Schedules for Proceeding), November 5, 2001.¹

The Order of November 15, 2001, notes that the Staff served a copy of the Office of Investigations (OI) report on October 31, 2001, as agreed. The Board's Order also recites that on November 7, 2001, the Board received by e-mail a copy of a letter to Staff counsel in which Intervenors, CCAM/CAM, asked the Staff for a copy of the appendices to the OI report that was provided to the Board and parties on October 31, 2001. The Board, after stating that it considers the appendices or exhibits to be "integral portions of the OI Report that . . . we had ordered to be

¹ The November 5, 2001 Order, set a schedule for discovery beginning November 7, 2001, but deferred discovery on the Staff until December 4, 2001. The Order also set schedules for written presentations and oral argument.

circulated to the Board and parties," orders the Staff to furnish the appendices and exhibits, outside the discovery process, as soon as available.

The Staff submits that the November 15, 2001, Order is, in effect, the grant of a motion to compel discovery against the NRC staff, without providing the Staff an opportunity to respond and where discovery against the Staff, as established by the Order of November 5, 2001, does not begin until December 4, 2001. Both the Board in its Order and the Intervenor in their letter (copy attached) ignore the fact that the Staff had made clear in the Prehearing Conference telephone call on October 2, 2001, that the exhibits were voluminous – 15 shelf inches – and that they would not be made available with the report. The Staff has attached two pages of the transcript of the Prehearing Conference in which the Staff provides this information and in which the Board appears to concur in the Staff's plans, indicating that "this process may take a very long time." Moreover, the Board's statement that the exhibits are an integral part of the OI report is a position that had not been offered by any party.

As noted above, the effect of the Board's order is to grant a motion to compel discovery against the Staff where no discovery request has been made, where the showing of need without which discovery against the Staff cannot be ordered has not been made, and where the Staff has not been given an opportunity to respond.²

The Staff submits that, based upon the discussion during the October 2, 2001, telephone conference, the Board and parties were aware that the Staff intended to produce only the OI report and not the appendices. Moreover, the Board appeared to concur in this plan. At no time did the

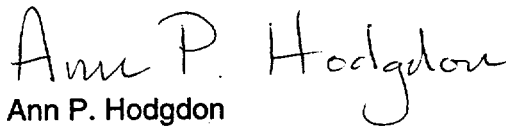
² The Board's Order directs the Staff, at its earliest convenience, to forward copies of the appendices to the OI report to the Board and all parties that have not yet been furnished those appendices. There is an inference here that copies might have been provided to parties other than the Intervenor. The only party to the proceeding other than the Intervenor and the Staff is the licensee and the Staff has not provided the appendices to the licensee.

Staff offer to provide the appendices prior to discovery, nor did any party request that they be provided.

MOTION

The NRC staff moves the Licensing Board to reconsider its Order of November 15, 2001, and to reaffirm its Order of November 5, 2001, to which no party objected.

Respectfully submitted,

A handwritten signature in cursive script that reads "Ann P. Hodgdon". The signature is written in dark ink and is positioned above the printed name and title.

Ann P. Hodgdon
NRC Staff Counsel

Dated at Rockville, Maryland
this 20th day of November, 2001

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket No. 50-423-LA-3

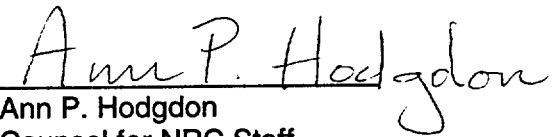
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November 7, 2001

Ann P. Hodgdon, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

Re: In the Matter of Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit No. 3) Docket No. 50-423-LA-3

Dear Ms. Hodgdon:

This letter will confirm and elaborate upon the telephone message I left on your voice mail this morning when I was unable to reach you directly.

I am in receipt of your letter dated October 31, 2001 addressed to the Administrative Judges in the above-referenced matter, together with a 30-page Office of Investigations Report.

The OI Report contains a "List of Exhibits" which identifies 40 exhibits referenced in the text of the report.

However, the exhibits were not forwarded to me along with the OI Report.

As these exhibits are clearly incorporated by reference in the report, I trust that they were not forwarded to me as a result of a simple act of inadvertence or clerical error. The exhibits are clearly pertinent to the issues the Intervenor will address in their discovery requests directed to the licensee today, as per order of the Licensing Board.

Regardless of *why* the Exhibits were not included in the mailing of the OI Report - which mailing you assured the Administrative Judges would occur on October 31, 2001 - the Intervenor have been placed at a significant disadvantage as they commence discovery today.

Today, Diane Screnci, of the NRC's Office of Public Affairs, stated that the exhibits may be available through the NRC's Public Document Room and/or pursuant to a Freedom of Information Act request.

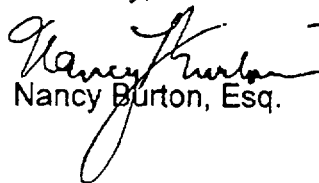
If the Intervenor are required to go to the Public Document Room or are relegated to the procedures available under FOIA to obtain the exhibits, they will

request an extension of time for discovery sufficient for obtaining the documents. They will also ask the Board to tax costs upon the NRC staff should costs be imposed upon the Intervenor by the NRC Public Document Room and/or pursuant to FOIA.

Therefore, this is to request that the NRC staff forward the exhibits to the Intervenor immediately.

Thank you.

Sincerely,



Nancy Burton, Esq.

cc: ASLB Panel
David A. Repka, Esq.

1 MR. REPKA: It is the same kind of
2 analysis that you would see the summary of it in an
3 LER. That's correct. I think the grander scale would
4 be an accurate way of characterizing it.

5 MS. HODGDON: Thank you.

6 JUDGE KELBER: The OI report presumably
7 will contain some fact.

8 MS. HODGDON: I'm not sure. I haven't
9 seen it. Normally they have facts and conclusions.
10 Yes, presumably. It's based on interviews, of course,
11 and normally an OI report compares interviews with
12 other interviews and tries to come out with an
13 investigation and tries to come out with a
14 determination of who's telling the truth and what
15 really happened.

16 JUDGE KELBER: So at the end of October,
17 we should have all the facts before us that are known.
18 Is that correct?

19 MS. HODGDON: Actually, by the end of
20 October, the staff plans to distribute the OI report
21 itself. The interviews on which the report is based
22 will not be available at that time because there's
23 some 15" of them and they're normally not given out
24 with the report. It takes longer to sanitize them,
25 copy them and so forth. And so normally, they don't

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1 go out with the report.

2 JUDGE KELBER: This process may in fact
3 take a very long time.

4 MS. HODGDON: Are you talking about
5 sanitizing and releasing those 15" of documents?

6 JUDGE KELBER: Yes.

7 MS. HODGDON: I think it might take a very
8 long time. It might not have to be done. I think
9 they're not normally done unless there's an FOIA
10 request for them.

11 JUDGE KELBER: We'll face that when we
12 come to it.

13 MS. HODGDON: Yes. I'd hope the 31st.

14 JUDGE KELBER: Everything is analysis and
15 nothing is fact finding.

16 MS. HODGDON: Judge Kelber, I'm sure that
17 you've seen OI reports. I know that Judge Bechoefer
18 has. Normally, there's a relatively thin report and
19 attached to it is sometimes, depending on the nature
20 of the report, when they go to hearing on the report--
21 which, of course, this hearing is not -- they will
22 have the interviews go along with the report.

23 JUDGE KELBER: I'm not so much concerned
24 about that. What I'm concerned about is when will we
25 have the facts before us that are known regarding this

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