

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 RESPONSE IN OPPOSITION TO  
CONNECTICUT COALITION AGAINST MILLSTONE/ LONG ISLAND COALITION  
AGAINST MILLSTONE MOTION FOR LEAVE TO REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c) of the Commission’s regulations, the NRC Staff (“Staff”) files this response to “Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion for Leave to Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-filed Environmental Contention” (“Motion”), filed on November 21, 2001. For the reasons discussed, the Staff opposes the motion and urges the Licensing Board to deny it.

BACKGROUND

On November 1, 2001, Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (“Intervenors” or “CCAM/CAM”) filed a “Motion to Reopen the Record And Request for Admission of Late-filed Environmental Contention,” which Dominion Nuclear Connecticut, Inc. (DNC) opposed in a filing of November 13, 2001, “Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-filed Environmental Contention and Motion for Directed

Certification.” The Staff filed an opposition to the motion on November 16, 2001, “NRC Staff Response Opposing the Motion of Connecticut Coalition Against Millstone / Long Island Coalition Against Millstone to Reopen the Record to Admit a Late-filed Environmental Contention.” The Staff’s response includes a detailed background statement of the history of the proceeding, which will not be repeated here.

### DISCUSSION

Intervenors introduce their argument with a claim that leave to file a reply is warranted because DNC and the Staff made a number of arguments in opposition to the motion to reopen. Motion at 2. Although Intervenors set forth their argument in three sections, “ A. Standards for Replies to Opposition to Motions and Contentions”, “B. The ASLB should permit a Reply to the Oppositions to CCAM/CAM’s Contentions” and “C. The ASLB Should Permit a Reply to the Oppositions to CCAM/CAM’s Motion to Reopen the Record,” Intervenors rely for all of these arguments on a single *sua sponte* opinion in *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979), and a line of cases proceeding therefrom. As discussed below, none of the opinions that Intervenors rely on has any applicability to a motion filed in the present posture of this proceeding.

#### A. Replies Concerning Contentions

Intervenors argue that there is one standard for replies to motions, 10 C.F.R. § 2.730(c), and another for replies to contentions, as set forth in *Allens Creek* and the cases following it. Motion at 3-4. However, Intervenors misread both the Commission’s regulations and its case law. The regulations and the cases distinguish between motions and petitions to intervene, not between motions and contentions, as argued by Intervenors. *Allens Creek* concerns an Appeal Board *sua sponte* interlocutory review of a licensing board scheduling order, where the Appeal Board’s concern was that the licensing board, confronted with more than fifty intervention petitions, had

indicated its intention not to permit oral argument at the prehearing conference held pursuant to 10 C.F.R. § 2.751a. The Appeal Board's comment was that before dismissing a contention proposed in an intervention petition a licensing board should give the proponent an opportunity to be heard in response. *Allens Creek*, 10 NRC at 525.

The posture of this proceeding is not that of *Allens Creek* or the cases following it. In the instant proceeding, CCAM/CAM filed a petition for intervention in September, 1999. Oppositions were filed and a prehearing conference was held. The Licensing Board rendered a decision after hearing oral argument on two contentions, eight of Intervenor's eleven proposed contentions having been found inadmissible and a ninth having been settled. The Commission granted, in part, Intervenor's petition for review and rendered a final opinion subject only to the reopening on the issue of any commonality that there might be between the loss of two fuel rods at Unit 1 and the licensee's ability to administer the controls necessary to prevent criticality in the reconfigured spent fuel pool at Millstone Unit 3.<sup>1</sup>

Intervenor's cite two other licensing board decisions<sup>2</sup> in support of their argument that applicable Commission case law establishes a right of reply to oppositions to the admissibility of contentions. Motion at 3. However, these decisions concern petitions for intervention and, thus, do not support Intervenor's argument.

#### B. Replies To Answers To Motions To Reopen

In contrast to standards for replies to contentions, which Intervenor's believe are a matter of right established by the Appeal Board's comment in *Allens Creek*, Intervenor's consider replies to oppositions to motions as requiring a "strong showing of good cause," citing *Commonwealth*

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<sup>1</sup> These matters are set forth at length in the background statement of "NRC Staff Response Opposing the Motion . . . to Reopen the Record . . . ," November 16, 2001.

<sup>2</sup> *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72 (1981).

*Edison Co.*(Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981). Motion at 2. That notwithstanding, Intervenor's argue that the rationale of *Allens Creek* should be applied to motions to reopen, citing *Allens Creek* for the proposition that a motion to reopen should not be rejected until the intervenor has had a chance to respond. Motion at 5, citing *Allens Creek*, 10 NRC at 525. As discussed above, *Allens Creek* has no applicability to contentions other than those filed as part of a supplement to a petition to intervene. There is no reason to apply it to replies to oppositions to motions to reopen, which are, as Intervenor's acknowledge in their opening sentence, governed by the Commission's rule concerning motions practice, 10 C.F.R. § 2.730(c). Section 2.730(c) does not allow the moving party a right to reply except as permitted by the presiding officer.

Intervenor's argue that, if the Board determines not to apply the *Allens Creek* standard to their request that they be allowed to reply to the oppositions to their motion to reopen (as opposed to their motion to admit a late-filed contention), the Board should find that they have shown good cause to reply in that their motion raises complex legal and factual issues involving the application of NEPA and implementing case law and regulations to the particular facts of the case. Motion at 5. Intervenor's argue that allowing them to reply would assist the Board in developing a complete decisionmaking record. *Id.* They claim good cause to make an accurate and complete legal and factual record "by correcting those aspects in which DNC's and the NRC Staff's arguments misstate, distort or ignore key requirements of the law and the evidence presented by CCAM/CAM." Motion at 5-6. This argument is without merit.

A licensing board considering the same argument that Intervenor's raise here found that the desire to correct "misrepresentations" did not constitute good cause for allowing a reply to an answer to a motion. In *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), 1987 WL 109481 (NRC, March 24, 1987), the Licensing Board, in considering the Commonwealth

of Massachusetts' motion for permission to file a reply to Applicants' answer to the Commonwealth's motion to reconsider a late-filed contention with revised basis and to reopen the record, addressed the Commonwealth's claim that it wished to apprise the Board of two apparent misrepresentations in Applicants' answer. The Board noted that it was quite capable of discerning misrepresentations, if any, and whether apparent or not. *Id.* The Board denied the motion, noting that a moving party has no right to a reply pursuant to 10 C.F.R. § 2.730(c) and that the Commonwealth had not shown good cause. *Id.*

C. Intervenors' Attempt To Expand The Time For Responding To Licensee's Motion

Intervenors state that they seek to contest DNC and the Staff's conditional request that if the ASLB takes jurisdiction it should certify the motion to the Commission under 10 C.F.R. § 2.718(i). Motion at 8. In response to this request, the Staff notes that DNC filed a motion for directed certification on November 13, 2001. The Staff indicated its support for that motion in its filing of November 16, 2001. Intervenors do not respond to DNC's motion in their filing of November 21, 2001, except to state that they do not believe that the argument put forth by DNC regarding the generic nature of the contention has merit or constitutes an adequate basis for referral. *Id.* The last day for filing a response to DNC's motion of November 13, 2001, was November 28, 2001. See 10 C.F.R. §§ 2.730(c), 2.710. That day has passed and Intervenors have merely noted that they seek to oppose the motion at some future time. To grant such a request would, in effect, grant Intervenors an extension of time to reply to a motion where there are no unavoidable or extreme circumstances articulated. Such a grant would be contrary to the Commission's policy statement on the conduct of adjudicatory proceedings. See CLI-98-12, 48 NRC 18, 21 (1998).

CONCLUSION

As discussed above, the Licensing Board should deny Intervenors' motion to file a reply.

Respectfully submitted,

**/RA/**

Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 6th day of December, 2001

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO CONNECTICUT COALITION AGAINST MILLSTONE/LONG ISLAND COALITION AGAINST MILLSTONE MOTION FOR LEAVE TO REPLY" 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 6<sup>th</sup> day of December, 2001:

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