RAS 3995

February 21, 2002

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
	)	
	)	ASLBP No. 00-771-01-LA-R
(Millstone Nuclear Power Station, Unit No. 3)	)	

DOMINION NUCLEAR CONNECTICUT, INC.'S
EMERGENCY MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND PRODUCTION OF DOCUMENTS

In accordance with the schedule directed by the Atomic Safety and Licensing Board ("Licensing Board"),[1] Dominion Nuclear Connecticut, Inc. ("DNC") served its First Set of Interrogatories and Document Request in the captioned proceeding on January 25, 2002.[2] The discovery served on Intervenors consisted of nine narrowly crafted interrogatories and a single document request (attached as Exh. 1). Intervenors were directed to answer the interrogatories, in writing and under oath, within 14 days of service.

To date, however, Intervenors have neither answered the interrogatories, objected to any of the discovery, nor moved for a protective order. In light of the imminent deadline of

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1 *See* "Memorandum and Order (Telephone Conference Call, 10/31/01; Schedules for Proceeding)," issued November 5, 2001.

2 Following customary procedures, the discovery requests were delivered by e-mail service as well as deposit in the United States mail.

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March 18, 2002 for the parties to submit "a detailed written summary of all the facts, data and arguments which are known to the party at that time and on which the party proposes to rely at the oral argument,"[3] DNC respectfully requests an order from the Licensing Board requiring Intervenors to answer the propounded interrogatories no later than March 1, 2002. DNC also requests the Board to order the production of documents requested forthwith.[4]

Clearly, Intervenors have defaulted in their discovery responsibilities in this proceeding. Though DNC has provided over 10,000 pages of requested documents and otherwise fully complied with the Intervenors' discovery requests,[5] the Intervenors have not responded in any fashion to DNC's single, narrowly focused set of discovery requests. These requests were electronically served on January 25, 2002 and, in accordance with 10 C.F.R. §2.740b, a response should have been served by February 8, 2002. Even allowing five days for mailing pursuant to 10 C.F.R. §2.710, the Intervenors' response should have been received by February 13, 2002. Yet, as of this date, no response has been received by DNC.

The refusal of an intervenor "to answer even one" of the interrogatories propounded, as here, understandably invites "a cool reception." *Pennsylvania Power & Light Co.* (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 334 (1980). As one Licensing Board observed in an early proceeding, pre-trial discovery in modern

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3 *See* "Notice of Filing Schedules and Oral Argument," issued February 4, 2002.

4 DNC's one document request simply asks for any document "that Intervenors expect to submit, reference, site, or otherwise rely upon in the written filing in this Subpart K proceeding."

5 Indeed, the Licensing Board will take note that DNC made only sparing objections to the discovery requested and the Intervenors have filed no motion to compel, implicitly acknowledging the sufficiency of those responses. Any motion to compel at this time would be long out of time.

administrative and legal practice "is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial." *Pacific Gas & Electric Co.* (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

The Commission and its boards have reiterated from time to time that "an important reason for allowing discovery is to eliminate, insofar as possible, the element of surprise in modern litigation. The underlying concept is to shorten the actual trial, with its attendant expense and inconvenience for all concerned, while increasing the parties' ability to develop a complete record for decisional purposes." *Susquehanna*, ALAB-613, 12 NRC at 312-27. Or, as the Board summarized in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-17, 11 NRC 893, 896 (1980): "Learning the position of an adversary in litigation is a traditional and important aspect of discovery. It is also an important element in developing a full evidentiary record." Similarly, the Board in *Seabrook* observed that "[i]nterrogatories which inquire into the bases of a contention serve the dual purposes of narrowing the issues and preventing surprise at trial." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-83-17, 17 NRC 490, 493-94 (1983).

These significant discovery obligations fall equally on all parties to an NRC proceeding. "The obligation *every litigant* faces to provide (through discovery) information on matters in controversy is a responsibility that can neither be ignored or evaded." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 364 (1988)(emphasis added). Hence, "to obtain evidence or secure information on the existence of evidence and to provide opposing parties the same option is interchangeably then a privilege and

duty of each Applicant and Intervenor in NRC administrative proceedings." *Id.* Consistent with a party's discovery obligations, the Commission long ago admonished:

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possesses fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). Moreover, here, as in many cases, "this Intervenor and — perhaps more importantly — its representatives are not strangers to NRC proceedings." *Susquahanna*, ALAB-613, 12 NRC at 335.

Not only does the failure to fulfill discovery obligations unnecessarily delay a proceeding, "it is also manifestly unfair to the other parties." *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), ALAB-678, 15 NRC 1400, 1417 (1982). This is so because:

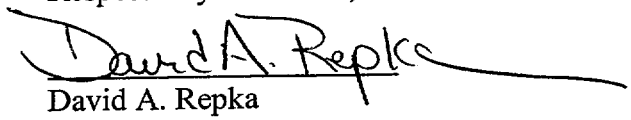
> The Applicants in particular carry an unrelieved burden of proof in commission proceedings. Unless they can effectively inquire into the positions of the Intervenors, discharging that burden may be impossible. To allow a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record.

Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977). Where the unanswered interrogatories "concern matters which are basic to an understanding of the [Intervenors'] positions on their contentions," the failure to answer is

particularly egregious. *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 79 (1986). As a result, unless the Intervenors are ordered to provide the requested discovery immediately, with the oral argument only a few weeks away, DNC "would be "penalized by [the Intervenors'] wrongful conduct." *Tyrone,* LBP-77-37, 5 NRC at 1420. This is particularly true in a Subpart K proceeding such as this one with simultaneous filing by the parties of position statements.

In this instance, Intervenors have completely defaulted in their discovery obligations and, in the process, have unfairly prejudiced DNC's ability to participate effectively in this oral Subpart K proceeding. To vindicate its right to prompt and timely discovery answers, DNC therefore respectfully requests that this motion be given emergency consideration and that the relief requested herein be granted forthwith.

Respectfully submitted,



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Dated in Washington, D.C.
this 21st day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
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(Millstone Nuclear Power Station, Unit No. 3)	)	ASLBP No. 00-771-01-LA-R

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut, Inc.'s Emergency Motion to Compel Answers to Interrogatories and Production of Documents" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 21st day of February 2002. Additional e-mail service has been made this same day as shown below.

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