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DOCKETED 03/18/02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION TO STRIKE
REPLY BRIEF FILED BY CCAM/CAM

Susan L. Uttal
Counsel for NRC staff

March 15, 2002

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.730, the staff of the Nuclear Regulatory Commission (Staff) hereby moves the Commission to strike the Connecticut Coalition Against Millstone and Long Island Coalition Reply Brief Regarding NEPA Requirement to Admit Contention Regarding Environmental Impacts of Destructive Acts of Malice and Insanity, March 12, 2002 (CCAM/CAM Reply Brief), for failure to comply with a Commission Order limiting the number of pages in the reply brief.

BACKGROUND

On February 6, 2002, the Commission issued CLI-02-05,¹ in which it accepted the referral from the Licensing Board (Board) in the captioned proceeding of that Board's determination rejecting late-filed Contention 12, finding that 10 C.F.R. § 50.13 precluded consideration of the risk of terrorist attacks in a proceeding to expand the storage capacity in the spent fuel pool at Millstone

¹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-05, 55 NRC__ (2002) (Commission's Order).

Nuclear Power Station, Unit 3.² The Commission's Order set a briefing schedule and page limits for the parties' briefs. Commission's Order, slip op. at 2. Reply briefs were limited to twenty pages. *Id.* On March 12, 2002, the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone (CCAM/CAM) filed their Reply Brief. The Brief is twenty-seven (27) pages in length, exclusive of table of contents and table of authorities. CCAM/CAM did not request enlargement of the page limitations. For the reasons stated below, the NRC staff hereby moves the Commission to strike CCAM/CAM's reply brief.

DISCUSSION

In CLI-02-05, the Commission accepted the Board's referral of the question of the applicability of 10 C.F.R. § 50.13. The Commission set a briefing schedule for the parties. The Order included explicit page limitations of the parties' briefs. Specifically, the Order provided that: "Reply briefs should be submitted no later than March 12, 2002 and *shall not* exceed 20 pages in length. CLI-02-05, slip op. at 2 (emphasis supplied). CCAM/CAM's brief exceeded the Commission's explicit page limitations by seven pages.

It is clear a party may not exceed page limitations without being granted leave to do so. *See, e.g., Toledo Edison Co. and Cleveland Electric Illuminating Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-430, 6 NRC 457 (1977). In this case, CCAM/CAM did not seek leave to exceed the page limitations. The Commission has, in the past, disapproved of attempts to circumvent page limitations by incorporating other documents or pleadings by reference or by utilizing extensive footnotes to make legal arguments. *See id. at 458* (motion to strike appendix granted where appendix containing charts and extensive footnotes consisting of legal argument found to be attempt to exceed page limits set by Appeal Board). *See also Consolidated Edison Co. of New York and Entergy Nuclear Indian Point 2, L.L.C. and Entergy Nuclear Operations, Inc.*

² Memorandum and Order (Late-Filed Contention Concerning Acts of Terrorism Affecting Spent Fuel Pool), LBP-02-02, 55 NRC__ (January 24, 2002).

(Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001) (“We will not permit incorporation by reference where the effect would be to circumvent NRC-prescribed page limits.”); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001) (disapproval of use of “voluminous footnotes, references to multipage sections of earlier filings, and supplementation with affidavits that include additional substantive arguments” in order to circumvent page limitations); *Hydro Resources, Inc.* (2829 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 121 n. 1 (1998) (“Incorporating the Petitioners' hearing petition by reference is an inartful attempt to bypass [the regulation's 10-]page limitation”), *interlocutory appeal dismissed*, CLI-98-8, 47 NRC 314 (1998).

In the *Harris* case, the Commission, while disapproving of the “effort to evade” the page limitations, did not strike the petitioner’s brief, but expanded the other parties’ page limits to allow them to “respond fully” to the petitioner’s brief.³ *Harris*, CLI-01-11, 53 NRC at 393. The Commission also put litigants on notice that such attempts to circumvent page limitations may be dealt with more harshly in the future. *Id.* at 394.

For now, though, we advise NRC litigants against taking [petitioner’s] self-help approach. We expect parties in Commission proceedings to abide by current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted. In the future, the Commission may exercise its authority to deal more harshly with attempts to circumvent page-limit or other procedural rules.

Id. This warning was apparently not heeded by CCAM/CAM.⁴

Finally, this case does not involve an attempt to circumvent the page limitations specified in the Commission’s Order by means such as those disapproved in *Indian Point*, *Harris*, *Davis*-

³ Such a solution in the instant case would not be effective, since the other parties, in fact, stayed within the page limitations in their reply briefs.

⁴ The Staff notes that co-counsel for CCAM/CAM in this appeal is the same counsel that represented the petitioner on appeal in the *Harris* case, and, thus, should be well aware of the Commission’s admonition in that case.

Besse and Hydro Resources. It involves a blatant disregard for an explicit Commission directive. As such, it should not be tolerated. Although there may be an array of sanctions that the Commission could impose, the Staff submits that the best remedy for CCAM/CAM's failure to comply with the Commission's Order is to strike the Reply Brief.

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that CCAM/CAM's Reply Brief be stricken for failure to comply with the Commission's Order setting page limitations.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC staff

Dated in Rockville, Maryland
this 15th day of March 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO STRIKE REPLY BRIEF FILED BY CCAM/CAM" 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 15th day of March, 2002:

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