

April 16, 2008

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  
)  
MILLSTONE NUCLEAR POWER ) ASLBP No. 08-862-01-OLA-BD01  
STATION UNIT 3 )  
(License Amendment Request for Stretch )  
Power Uprate) )

NOTICE OF STAFF COMPLIANCE WITH BOARD ORDER DATED APRIL 16, 2008  
GRANTING CCAM AND NANCY BURTON'S REQUEST FOR A SECOND E-FILING  
EXEMPTION AND STAFF'S OPPOSITION TO PETITIONERS' REQUEST FOR  
EXTENSION OF TIME TO REPLY

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Pursuant to the Board's Order dated April 16, 2008, the Staff of the Nuclear Regulatory Commission ("Staff") hereby files its notice of compliance with the Board's Order. Furthermore, the Staff opposes the Petitioners' request for extension of time to reply based on the vague contentions of their unexplained "technical difficulties".

The Staff had already on April 14, 2008, in response to an e-mail from Petitioners, provided its opposition for their exemption and a courtesy copy of the NRC Staff's April 11, 2008 filing to the Petitioners via e-mail. A copy of the Staff's April 14, 2008 e-mail which transmitted the filing is attached, and shows Ms. Burton and the Applicant as recipients. While it is unknown if Ms. Burton received the filing, the Staff believes the e-mail was successful because 1) no "bounce-back" e-mail was received and 2) the Applicant provided confirmation of receipt. Furthermore, the Applicant also forwarded the Staff's April 11, 2008 filing to Ms. Burton, as shown in the second attached e-mail from Mr. Travieso-Diaz to Ms. Burton. Additionally, Ms. Burton

confirmed to the Staff that she now is in receipt of the Staff's filing. See third attached e-mail from Ms. Burton to Mr. Roth.

The Staff wishes to make clear that on April 14, 2008, as discussed above, the Staff did quickly and proactively respond to Ms. Burton's requests as soon as the Staff was informed that Ms. Burton was unable to read the Staff's filing. On this matter, the Staff further notes that Ms. Burton's request of Friday evening made no mention of any problems reading the Staff's filing in "PDF" format, but merely requested a "Word" copy of the filing. A "Word" copy would not necessarily have the same format and pagination as the "PDF" filing, and thus could lead to confusion. Accordingly, the Staff elected not to send a "Word" copy.

In conclusion, the Staff had already achieved compliance with the Board's order to provide a copy of the filing to Ms. Burton.

## I. BACKGROUND

On March 27, 2008, an Atomic Safety and Licensing Board was established in response to Petition to Intervene and Request for Hearing submitted by Petitioners. Order of E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel (Mar. 27, 2008). The same Board order directed that "all correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule."<sup>1</sup> *Id.* at 2.

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<sup>1</sup> On December 16, 2005, the Commission issued a proposed rule, *Use of Electronic Submissions in Agency Hearings* (E-Filing) rule to extend the use of electronic submissions to agency adjudications. The purpose of the E-Filing rule is to eliminate the need for paper copies in agency adjudications, thereby decreasing expense and increasing efficiency. The final E-Filing rule requires documents in agency adjudications to be electronically submitted through the agency's Electronic Information Exchange (EIE) to the E-Submittal system.

Petitioners had previously been granted, by the Office of the Secretary, a one-time exemption from the e-filing requirements to meet the initial timely filing deadline. See Memorandum from Andrew L. Bates, Acting Secretary, to E. Roy Hawkens, Chief Administrative Judge, ASLBP (Mar. 24, 2008) ("[T]he Office of the Secretary was assured by Ms. Burton on behalf of CCAM and herself that the exception to the e-filing rules would only be for this one time.").

On April 4 and 7, 2008, the NRC Staff filed a Letter to the Board and two Notices of Appearance using the e-filing system<sup>2 3</sup>; on April 7, 2008, the Applicant filed a Letter to the Board and multiple Notices of Appearance using the e-filing system<sup>4</sup>; on April 8, 2008, the Board filed an Order using the e-filing system<sup>5</sup>. The Petitioners had four opportunities to test their ability to use the e-filing system to retrieve and view. The Petitioners did not alert Staff's Counsel to any problems reading the previous filings by the Board, the Applicant, or the Staff.

On April 11, 2008, the Applicant<sup>6</sup> and the NRC Staff<sup>7</sup> separately filed their answers to the Petitioners' request for a hearing using the e-filing system. The Petitioners now allege that they are still unable to access e-filed documents, and have been granted a second exemption from the e-filing rules.

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<sup>2</sup> Letter to the Board and Notice of Appearance for Lloyd Subin dated April 4, 2008.

<sup>3</sup> Notice of Appearance of David Roth dated April 7, 2008.

<sup>4</sup> Letter to the Board and Notices of Appearance for David R. Lewis, Matías F. Travieso-Díaz, Stefanie M. Nelson, and Lillian M. Cuoco dated April 7, 2008.

<sup>5</sup> Order (Confirming Dates for Answers and Replies to Answers) (April 8, 2008).

<sup>6</sup> Dominion Nuclear Connecticut's Response to Connecticut Coalition Against Millstone and Nancy Burton's Petition to Intervene and Request for Hearing dated April 11, 2008.

<sup>7</sup> NRC Staff Answer to Request To Intervene and for Hearing of the Connecticut Coalition Against Millstone and Nancy Burton dated April 11, 2008.

On April 15, 2008 via e-mail, the Petitioners submitted an e-mail request for an exemption from the e-filing provisions of 10 C.F.R. § 2.309(g)(4). The Petitioners incorrectly asserted that Counsel for the Staff had not responded to the Petitioners, when, in fact, in under one business day of the request, Counsel for the Staff promptly provided an e-mail with attachment<sup>8</sup>. The e-mail was sent via the “reply” function, so it should have been received by the same e-mail address used by Ms. Burton to send the request. The Staff received no indication (i.e. a notification from AOL.com) that the Staff's e-mail was rejected by Ms. Burton's account. A copy of the Staff's e-mail to Petitioners of April 14, wherein Staff had noted its opposition to an exemption, is attached.

## II. DISCUSSION

### A. The Staff has Complied with the Order

As stated above in the Background, the Staff had already sent Petitioners via e-mail on April 14, 2008 the Staff's Answer to the Petition. Any technical difficulties associated with Petitioners receiving and opening e-mails is not associated with the E-rule transmission requirements. However, the Staff, in compliance with the Board Order, has again sent an e-mail in reply to the Petitioners' e-mail request.

### B. An E-Filing Transmission Exemption Will Not Address the Petitioners' Inability to Receive and Read Filings

Petitioners misunderstand that even if an exemption is granted to the Petitioners, the NRC Staff and the Applicant can continue to use the electronic filing pursuant to

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<sup>8</sup> E-mail from Lloyd Subin to [NancyBurtonCT@aol.com](mailto:NancyBurtonCT@aol.com) sent Monday, April 14, 2008 11:37 AM with attachments called “NRC Staff Answer to CCAM Petition.pdf.”

10 C.F.R. § 2.302(g)(1)<sup>9</sup>. Moreover, even when documents are sent simply by e-mail, the documents are, as a common practice, provided in PDF format. Neither an “Electronic transmission exemption” pursuant to 10 C.F.R. § 2.302(g)(2)<sup>10</sup>, nor an “Electronic document exemption” pursuant to 10 C.F.R. § 2.302(g)(3)<sup>11</sup> would address the Petitioners’ apparent inability to receive and read the filings made by the Staff or others<sup>12</sup>. Any granted exemption affects only how the *exempt participant* files in the proceeding. Simply put, the requested e-filing transmission exemption will not aid the Petitioners regarding their alleged and vague “technical difficulties” to view, read, or access filings by the Board, the Applicant, the Commission, and the Staff.

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<sup>9</sup> 10 C.F.R. § 2.302(g)(1) states in part:

*Electronic filing.* Unless otherwise provided by order, all filings must be made as electronic submissions in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time.

<sup>10</sup> 10 C.F.R. § 2.302(g)(2) states:

*Electronic transmission exemption.* Upon a finding of good cause, the Commission or presiding officer can grant an exemption from electronic transmission requirements found in paragraph (g)(1) of this section to a participant who is filing electronic documents. The exempt participant is permitted to file electronic documents by physically delivering or mailing an OSM containing the documents. A participant granted this exemption would still be required to meet the electronic formatting requirement in paragraph (g)(1) of this section.

<sup>11</sup> 10 C.F.R. § 2.302(g)(3) states:

*Electronic document exemption.* Upon a finding of good cause, the Commission or presiding officer can exempt a participant from both the electronic (computer file) formatting and electronic transmission requirements in paragraph (g)(1) of this section. A participant granted such an exemption can file paper documents either in person or by courier, express mail, some other expedited delivery service, or first-class mail, as ordered by the Commission or presiding officer.

<sup>12</sup> The exemption request filed by the Petitioners stated that were unable to open the April 11, 2008 electronic filing made by the Staff. Second Exemption Request at ¶¶ 21-22.

C. An Extension of Time to Reply is Not Justified

Petitioners have not adequately explained why they are unable to open and read PDF formatted documents. Petitioners, again based on a vague incantation of “technical difficulties” have now requested an extension of time to file their reply to the Staff’s and Applicant’s Answer to their Petition to Intervene and Request for Hearing. However, given the ample notice and four previous opportunities to identify and address any belated technical issues, there is no justification for the Petitioners to delay the proceeding by taking additional time to answer the Staff’s and Applicant’s separate replies. Accordingly, the Staff opposes any time extension to submit a reply based on Petitioners’ unexplained “technical difficulties”.

CONCLUSION

In conclusion, the Staff had already previously sent via email the Staff’s Answer. The Staff further opposes any additional time for the Petitioners to answer the Staff’s Reply.

Respectfully submitted,

***/Signed (electronically) by/***

Lloyd B. Subin  
Counsel for NRC Staff  
U.S. Nuclear Regulatory  
Commission  
Office of the General Counsel  
Mail Stop – O-15D21  
Washington, DC 20555  
(301) 415-1988  
[lloyd.subin@nrc.gov](mailto:lloyd.subin@nrc.gov)  
Date of signature: April 16, 2008

## Lloyd Subin

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**From:** Lloyd Subin  
**Sent:** Monday, April 14, 2008 11:37 AM  
**To:** 'NancyBurtonCT@aol.com'  
**Cc:** matias.travesio-diaz@pillsburylaw.com; david.lewis@pillsburylaw.com; Lillian.Cuoco@dom.com; stefanie.nelson@pillsburylaw.com  
**Subject:** RE: Millstone 3 Uprate Proceedings  
**Attachments:** NRC Staff Answer to CCAM Petition.pdf

Attached please find a PDF copy of the Staff Answer. I did not receive your 7:41 PM Friday e-mail until Monday morning when I returned to my office. Further your e-mail did not indicate an e-filing access issue. It is unclear to the Staff how at this late time, after the third e-filed document by the Staff that you first inform us of problems with the electronic filing system, since the original issue arose with your initial filing last month. The Board Order of March 27 ordered that you should file electronically. After receipt of the Order would have been the time to inform the Board of any ongoing issues. Accordingly, the Staff would not support a waiver from the new electronic filing requirements.

LLOYD B. SUBIN  
Attorney  
Office of the General Counsel  
United States Nuclear Regulatory Commission  
301-415-1988  
015 D21  
[lbs3@nrc.gov](mailto:lbs3@nrc.gov)

NOTE: ATTORNEY CLIENT PRIVILEGE/  
ATTORNEY WORK PRODUCT  
LIMITED TO NRC UNLESS COMMISSION  
DETERMINES OTHERWISE.

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**From:** NancyBurtonCT@aol.com [mailto:NancyBurtonCT@aol.com]  
**Sent:** Monday, April 14, 2008 10:25 AM  
**To:** Lloyd Subin  
**Cc:** matias.travesio-diaz@pillsburylaw.com; david.lewis@pillsburylaw.com; Lillian.Cuoco@dom.com; stefanie.nelson@pillsburylaw.com; NancyBurtonCT@aol.com  
**Subject:** Millstone 3 Uprate Proceedings

Dear NRC Staff and Dominion Representatives:

This communication is submitted pursuant to the provisions of 10 CFR Section 2.323(b) in a sincere effort to resolve the issues raised below.

To date, I do not have access to the NRC's electronic filing system. Dominion's representatives were kind enough to forward me their April 11, 2008 response to the CCAM/Nancy Burton Petition to Intervene by ordinary email on April 11, 2008.

I am aware that a filing was made electronically by the NRC Staff on April 11, 2008; however, I was unable to access it. I emailed a request to the NRC Staff on April 11, 2008 for an ordinary email version; however, to date, I have received no response to such request.

I wish to bring to your attention that Arnold Gundersen, a technical expert who provided a Declaration in support of the Petition to Intervene and whose input is required for the prospective CCAM/Nancy Burton reply to the Dominion and NRC Staff April 11, 2008 responses, also was unable to access the NRC Staff response.

I wish to further relate that the NRC Staff filing does not appear to be available on the NRC's ADAMS website as of this writing.

Finally, the petitioners object to further proceedings in this matter if filings are not made accessible to members of the public, as they apparently are not as of this time. As a general rule, restricted proceedings -involving filings to which the

public and parties are denied otherwise easily available access through ADAMS or ordinary email - cannot be reconciled with the expectations of a free society.

CCAM/Nancy Burton request your consent to:

(a) A waiver during this proceeding from NRC's new requirements for "electronic" filings" until the NRC devises a means to make such filings simultaneously accessible to the public and the parties without imposing financial burdens on them and

(b) An extension of time to April 25, 2008 for CCAM/Nancy Burton to respond to the Dominion and NRC Staff responses to the Petition to Intervene and Request for Hearing, assuming the NRC Staff makes its April 11, 2008 filing accessible to CCAM/Nancy Burton and the public-at-large on or before April 18, 2008.

Please call me at 203-938-3952 to discuss this matter further if you wish.

I thank you in advance for your response

Sincerely,

Nancy Burton

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**Lloyd Subin**

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**From:** Travieso-Diaz, Matias F. [matias.travieso-diaz@pillsburylaw.com]  
**Sent:** Tuesday, April 15, 2008 5:45 PM  
**To:** NancyBurtonCT@aol.com  
**Cc:** Lillian.Cuoco@dom.com; Lewis, David R.; Lloyd Subin  
**Subject:** RE: FW: Millstone 3 Uprate Proceedings  
**Attachments:** NRC Staff's Response to Petition to Intervene and Request for Hearing.pdf

Dear Ms. Burton: As you requested, I am enclosing a copy of the Staff's April 11, 2008 response to CCAM's Petition to Intervene. However, you should have received – as I did -- an email from the Staff yesterday providing a copy of this document.

**Matias F. Travieso-Diaz | Pillsbury Winthrop Shaw Pittman LLP**

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Tel: 202.663.8142 | Fax: 202.663.8007 | Cell: 703.472.6463  
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**From:** NancyBurtonCT@aol.com [mailto:NancyBurtonCT@aol.com]  
**Sent:** Monday, April 14, 2008 12:55 PM  
**To:** Travieso-Diaz, Matias F.  
**Subject:** Re: FW: Millstone 3 Uprate Proceedings

Dear Sir:

Please accept my sincere apologies for addressing the email to you incorrectly and thank you for bringing the error to my attention. Apparently, my message was forwarded to you by others at your law firm.

I have sent two emails and left a telephone message with Mr. Subin of the NRC General Counsel's office in pursuit of my request that he forward to me in email format a copy of his April 11, 2008 response to the CCAM/Nancy Burton petition. I have received no response from him as to any of these communications.

Would you be so kind as to forward me a copy of Mr. Subin's response in an email format.

Thank you in advance for your kind assistance.

Sincerely,  
Nancy Burton

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\* Internal Revenue Service regulations generally provide that, for the purpose of avoiding federal tax penalties, a taxpayer may rely only on formal written advice meeting specific requirements. Any tax advice in this message does not meet those requirements. Accordingly, any such tax advice was not intended or written to be used, and it cannot be used, for the purpose of avoiding federal tax penalties that may be imposed on you or for the purpose of promoting, marketing or recommending to another party any tax-related matters.  
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## Lloyd Subin

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**From:** NancyBurtonCT@aol.com  
**Sent:** Wednesday, April 16, 2008 7:53 AM  
**To:** David Roth  
**Cc:** lbs@nrc.gov; Lloyd Subin; david.lewis@pillsburylaw.com; stefanie.nelson@pillsburylaw.com; matias.travieso-diaz@pillsburylaw.com; Lillian.Cuoco@dom.com  
**Subject:** Millstone 3 Uprate Extension Request

To NRC Staff and Dominion Representatives:

On behalf of petitioners CCAM/Nancy Burton, I intend to file a motion to the ASLB Panel requesting an extension of time until Tuesday, April 22, 2008 by which to file a consolidated reply to the responses of NRC Staff and Dominion to the CCAM/Nancy Burton Petition to Intervene and Request for Hearing.

I was able to access the NRC April 11, 2008 filing yesterday for the first time. It was forwarded to me by Mr. Travieso-Diaz and I noted it had also become available on the NRC's ADAMS website. I had not previously been able to access it as I am not yet technically able to participate in the NRC's electronic filing system.

Our technical expert, Arnold Gundersen, similarly first received the NRC Staff response last evening when I forwarded it to him. He has teaching and other professional commitments which make it necessary for me to file the motion for extension of time.

I thank you in advance for your courtesy and cooperation.

Sincerely,  
Nancy Burton

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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-OLA  
)  
(Millstone Power Station, Unit No. 3) ) ASLBP No. 08-862-01-OLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NOTICE OF STAFF COMPLIANCE WITH BOARD ORDER DATED APRIL 16, 2008 GRANTING CCAM AND NANCY BURTON'S REQUEST FOR A SECOND E-FILING EXEMPTION AND STAFF'S OPPOSITION TO PETITIONERS' REQUEST FOR EXTENSION OF TIME TO REPLY ", dated April 16, 2008, have been served upon the following by the Electronic Information Exchange and via email, this 16<sup>th</sup> day of April, 2008:

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William J. Froehlich, Chair  
Atomic Safety and Licensing Board  
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***/Signed (electronically) by/***

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