May 1, 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. 50-426-OLA
	)	
(Millstone Power Station, Unit 3)	)	ASLB No. 08-862-01-OLA-BD01
	)	

DOMINION NUCLEAR CONNECTICUT'S MOTION TO STRIKE PORTIONS OF CONNECTICUT COALITION AGAINST MILLSTONE AND NANCY BURTON'S REPLY TO RESPONSES TO PETITION TO INTERVENE

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), Dominion Nuclear Connecticut, Inc. ("Dominion") hereby moves to strike certain portions of "Connecticut Coalition Against Millstone and Nancy Burton Reply to Responses of NRC Staff and Dominion Nuclear Connecticut, Inc. to Petition to Intervene and Request for Hearing" ("Reply") dated April 22, 2008. The Reply raises entirely new issues, claims and arguments not found in the original Petition to Intervene and Request for Hearing ("Petition"). These new issues, claims and arguments are asserted without any attempt to satisfy the standards for late-filed amendments to contentions set forth in 10 C.F.R. §§ 2.309(c) and (f)(2). Accordingly, the portions of the Reply containing new, late-filed claims must be stricken, together with the new exhibits offered in their support.

II. BACKGROUND

On July 13, 2007, Dominion submitted its License Amendment Request ("LAR") to amend Facility Operating License NPF-49 for the Millstone Nuclear Power Station, Unit 3 ("MPS3") to increase the unit's maximum authorized core power from 3411 megawatts thermal

(MWt) to 3650 MWt. In response to a notice of opportunity for hearing,[1] Connecticut Coalition Against Millstone and Nancy Burton ("Petitioners") submitted their Petition on March 17, 2008, raising nine proposed contentions and requesting that the LAR be rejected. On April 11, 2008, Dominion and the NRC Staff ("Staff") filed answers to the Petition opposing the intervention on the grounds that Petitioners had failed meet the contention admissibility standards in NRC's rules.[2]

On April 22, 2008, Petitioners filed their Reply. In it, Petitioners do not limit themselves to defending the adequacy of their contentions as pled in the Petition. Rather, the Reply makes new allegations to bolster the contentions and attaches five new documents raising issues and claims nowhere to be found in the Petition. As discussed below, Petitioners' attempt to provide new claims and arguments in their Reply is clearly impermissible under the Commission's well-established rules of practice and controlling NRC case law, and seeks to gain an unfair advantage over Dominion and the NRC Staff, who have not had an opportunity to address these new claims. For these reasons, Dominion requests that the Board strike the offending portions of the Reply.[3]

III. STATEMENT OF LAW

Under 10 C.F.R. § 2.309(h)(2), a petitioner may file a reply to any answer within seven days after service of that answer. While the Commission's rules do not specify the content of such a reply, other provisions of 10 C.F.R. Part 2, the Statement of Considerations explaining the current rules, and Commission case law precedent make it clear that a reply to an answer is to

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[1] Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 73 Fed. Reg. 2,546, 2,549 (Jan. 15, 2008).

[2] Dominion Nuclear Connecticut's Response to Connecticut Coalition Against Millstone and Nancy Burton's Petition to Intervene and Request for Hearing (Apr. 11, 2008) ("Dominion Response"); NRC Staff Answer to Request to Intervene and for Hearing of Connecticut Coalition Against Millstone and Nancy Burton (Apr. 11, 2008). Dominion also challenged Ms. Burton's standing to participate in her individual capacity.

[3] Attachment 1 hereto identifies the portions of the Reply that should be stricken.

"be narrowly focused on the legal or logical arguments presented" in the answers of the applicant/licensee and NRC Staff. Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004) (emphasis added). In this case, Petitioners have gone beyond any reasonable interpretation of an allowable reply by raising entirely new claims. If the hearing procedures established in 10 C.F.R. Part 2 are to have meaning, these portions of the Reply must be stricken.

The Commission has held that a reply to an answer may not be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004), reconsideration denied, Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619 (2004) ("LES"); Nuclear Management Company (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006). In the LES proceeding, the licensing board "declined to consider new 'purportedly material' information in support of the contentions that was first submitted as part of a reply pleading." LES, CLI-04-25, 60 N.R.C. at 224 (footnote omitted). On appeal of the board's decision, the Commission agreed that "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs." Id. The Commission went on to state that such a course of action was clearly impermissible under its rules of practice:

> [O]ur contention admissibility and timeliness requirements "demand a level of discipline and preparedness on the part of petitioners," who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," a point the Board itself emphasized in this proceeding. As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply could be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset."

CLI-04-25, 60 N.R.C. at 224-25 (footnotes omitted) (emphasis added).

In CLI-04-35, the Commission reaffirmed its holding in CLI-04-25. The Commission reiterated that allowing a reply to raise new arguments or claims not found in the original contention would eviscerate its requirements for the pleading of contentions:

> "Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements" . . . "by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later." The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is "more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions." Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.

CLI-04-35, 60 N.R.C. at 622-23 (footnotes omitted).

The Commission went on to strongly reaffirm that a reply to an answer could not, under its rules of practice, be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention:

> What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.

Id. at 623 (emphasis added).

Thus, the Commission has squarely ruled that a reply to an answer may not be used to cure an otherwise deficient contention. As the Commission has made clear, a contrary ruling would eviscerate the rules of practice governing timely filing of properly pled contentions, contention amendments, and submission of late-filed contentions.

The NRC rules provide that "amended or new contentions filed after the initial filing" may be done "only with leave of the presiding officer upon a showing that –

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information."

10 C.F.R. § 2.309(f)(2) (emphasis added). As the Commission held in LES, allowing a reply to introduce new or amended contentions would clearly render these provisions governing late filed contentions meaningless.

In the instant proceeding, the Board has drawn Petitioners' attention to the limitations in the matters that can be raised in a reply, stating: "Petitioners are reminded that "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer." Order (Granting CCAM and Nancy Burton Request for Extension of Time to File Consolidated Reply) (Apr. 17, 2008), slip op. at 2, citing 69 Fed. Reg. at 2,203. Thus, Petitioners were forewarned not to raise new issues in their Reply. Unfortunately, they have chosen to disregard the Board's admonition.

IV. ARGUMENT

Petitioners begin their Reply by requesting Subpart G hearing procedures. Reply at 1. Under the NRC rules of practice, a request for Subpart G procedures must be made in the petition, not raised for the first time in a reply. 10 C.F.R. § 2.309(g) states: "A request for hearing and/or petition for leave to intervene may also address the section of hearing procedures." The Petition made no mention of hearing procedures, and no new information has become available since that time that could justify a belated request for Subpart G procedures. Moreover, the request made in Petitioners' Reply is itself based on new allegations not previously included in Petitioners' contentions, including allegedly "Dominion's failure to detect the evolution of 'tin whiskers' in its circuit boards" and "historical failures of Dominion and its predecessor . . . related to recurring valve and other equipment malfunctions and engineering failure." Reply at 1-

2. These claims are found nowhere in the original Petition. Similarly, to bolster their new claim that "the credibility of an eyewitness may reasonably be expected to be at issue and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matters" (id. at 2), Petitioners attach new exhibits relating to these allegations, none of which were provided or identified as a basis for the previous contentions. Id. at 2 nn.1-3. For these reasons, the entire section of Petitioners' Reply entitled "Selection of Hearing Procedures" is improper and should be stricken.

Throughout their Reply, Petitioners point to "the problematical operational and managerial history of the Millstone Nuclear Power Station," perhaps in an attempt to bolster their new and belated argument that Subpart G hearing procedures be applied. Id. at 13, 21; see also Id. at 14. Again, the original Petition does not raise any claims relating to the "operational and managerial history" of MPS3. Petitioners also cite for the first time in their Reply "[h]istorical recurring failures of mechanical components such as pipes and valves at Millstone Unit 3 and poor engineering in the late 1990s." Id. at 18.[4] All of these new claims should be stricken.

The Reply improperly attempts to inject other new claims into the contentions. Thus, in support of their fourth contention, Petitioners cite the results of the NRC Office of the Inspector General's September 2007 audit ("OIG audit"). Id. at 15. The original Petition, however, made no reference to the OIG audit, either in support of Contention 4 or anywhere else. Further, the adequacy of the NRC Staff's performance (the subject of the OIG audit) is not an appropriate issue in NRC hearings, see Dominion Response at 14 n.23, and Petitioners' attack on the NRC Staff is particularly egregious because it does not even relate to this proceeding.

Petitioners' Reply expounds upon and resubmits the qualifications of Mr. Gundersen. Id. at 16-17. Those qualifications are not responsive to any of the arguments made by Dominion or the Staff in their responses to the Petition.

[4] In support of these alleged historical problems, Petitioners include Exhibits A and B, two documents that were not relied upon in the original Petition, or attached to it, and which should for that reason be stricken.

In support of their seventh contention, Petitioners discuss a March 28, 2008 letter from the NRC Staff to Dominion. Id. at 22-25. Although this letter was not available when Petitioners filed the original Petition, Petitioners fail to follow NRC procedures for amending their contentions and instead have attempted to include it in the Reply as a new basis for Contention 7. This is an impermissible enlargement of the bases relied upon in the original Petition.[5] Petitioners also quote statements made by Dominion's CEO concerning the benefits of the uprate, as well as an October 19, 2007 NRC Weekly Information Report discussing the sufficiency of the LAR and schedule for review, which Petitioners characterize as indicating a rush and pressure to gain NRC approval. Id. at 25-27. Not only are these statements not mentioned in the original Petition, but the entire argument bears no relevance to Contention 7, which alleges that the LAR was incomplete. Petitioners also improperly seek to attack the NRC Staff's performance as acceding to pressure.

The Petitioners further seek to bolster their Contentions 7 and 8 by critically citing for the first time sections of Attachment 1 to the LAR: "Descriptions, Technical Analysis and Regulatory Analysis for the Proposed Operating License and Technical Specifications Changes." Id. at 27, 30. Presumably, the Petitioners would have read the LAR in full before intervening, and cannot supplement the bases of their contentions by citing new sections of it in their Reply. Further, the argument in Dominion's Response that these contentions failed to controvert the LAR, see Dominion Response at 39, does not give Petitioners license to raise new challenges to the LAR for the first time in their Reply. Clearly, the NRC pleading requirements would have little meaning if new issues or bases can be asserted in a Reply simply by virtue of an applicant's objection to the original contention.

[5] In addition to discussing and attaching this letter impermissibly, Petitioners fail to mention that Dominion responded to the Staff's letter on April 4, 2008, eighteen days before Petitioners filed their Reply, and provided the Staff with the requested information.

Petitioners also seek to impermissibly expand the bases of Contention 8 by relying on a new document: "Comments of Michael Steinberg regarding Connecticut Tumor Registry Statistics." Id. at 32 n.25. Neither this document nor the topic of tumor registry statistics was raised in the original Petition. Similarly, the allegation of tragedies in families living near Millstone (id. at 34 n.30) is raised for the first time in the Reply.

In support of Contention 9, Petitioners claim for the first time that there is no valid NPDES permit for Millstone and that the Connecticut Department of Environmental Protection ("CTDEP") "has repeatedly violated the Clean Water Act." Id. at 35-36. In addition to impermissibly seeking to expand the factual bases of Contention 9, these allegations have been dismissed by the Connecticut Supreme Court, Fish Unlimited v. Northeast Utils. Serv. Co., 755 A.2d 860, 864, 866-67 (Conn. 2000),[6] and determined to be beyond the NRC's jurisdiction. See Dominion Nuclear Connecticut (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 N.R.C. 81, 93 (2004). Petitioners also impermissibly raise for the first time that the previous operator of Millstone, Northeast Nuclear Energy Company, entered into a plea to environmental charges in 1997.[7] Reply at 36 n.32. Such new allegations are improper in a reply, and in any event do not relate either to Dominion or to the uprate.

In a further attempt to expand the bases for Contention 9, Petitioners attach the so-called "Blanch critique" to their Reply—a new document pertaining to the CTDEP's assessment of Millstone's environmental monitoring data. Reply at 37-38. Petitioners' discussion and attachment of the Blanch critique is both impermissible because it was not relied upon in the original Petition and irrelevant because Petitioners do not contest the validity of the environmental impact assessments contained in the Supplemental Environmental Report, Attachment 2 to the LAR.

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[6] See also Dominion's Answer to Connecticut Coalition Against Millstone's Petition to Intervene and Request for Rehearing, Docket Nos. 50-336-LR and 50-423-LR at 21-24 (June 7, 2007), available at ADAMS Accession No. ML041600187.

[7] This brand new claim does not even pertain to Dominion but to its predecessor in ownership of Millstone.

CONCLUSION

Petitioners' Reply ignores the Commission's well-established rules of practice, put in place specifically to ensure judicious, efficient administration of the Commission licensing proceedings. Both the Commission's rules and precedents mandate striking these portions of the Reply. Accordingly, the Board should strike all portions of the Reply that attempt to raise new facts, claims, and arguments.

CERTIFICATION

In accordance with 10 C.F.R. §2.323(b), counsel for Dominion has sought to discuss this motion with Petitioners and the NRC Staff. The NRC Staff does not oppose this motion. Dominion attempted to contact Petitioners by telephone and e-mail regarding this motion and received no response.

Respectfully Submitted,

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Dated: May 1, 2008

ATTACHMENT 1

Location of the impermissible new facts, claims, and arguments to be stricken from the Petitioners' Reply:

Selection of Hearing Procedures

- To be stricken in its entirety, including footnotes 1-3

Contention 1

- Page 13, second full paragraph, from after the comma in the first line through "Station" in the second line

Contention 3

- Page 14, first full paragraph of Contention 3, "history of operational deficiencies" in the fourth through fifth lines

Contention 4

- Page 15, first paragraph, from the fourth to last line
- Page 16, first paragraph, from the sentence that begins "NRC's unwillingness . . ." through the end of that page
- Page 17 in its entirety, including footnote 14

Contention 5

- Page 18, second full paragraph in its entirety

Contention 6

- Page 21, last paragraph, from after the comma in the first line through "Station" in the second line

Contention 7

- Page 22, from last paragraph, beginning "The NRC's letter," through the end of that page
- Page 24 in its entirety
- Page 25, from the beginning of the page through the end of the paragraph ending with "See Exhibit C," and from the paragraph beginning "Dominion's rush" through the end of that page
- Page 26 in its entirety
- Page 27, from the top of the page through the end of the quote ending with "August 15, 2008," and from the sentence in the last paragraph that begins "For example, Attachment 1 . . ." through the end of that page
- Page 28, from the top of the page through "[Emphasis added.]"

Contention 8

- Page 30, the second full paragraph in its entirety, including the quote
- Page 32, footnote 25
- Page 34, footnote 30

Contention 9

- Page 35, last three lines
- Page 36, first six lines and footnote 32
- Page 37, last five lines and footnote 37
- Page 38, first two lines

Exhibits

- Exhibits A, B, C, D, and E to be stricken in their entirety

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut's Motion to Strike Portions of Connecticut Coalition Against Millstone and Nancy Burton's Reply to Responses to Petition to Intervene" were served on the persons listed below in accordance with the Commission E-Filing rule, which the NRC promulgated in August 2007 (72 Fed. Reg. 49,139), and, where indicated by an asterisk, by e-mail, this 1st day of May, 2008.

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