

August 11, 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-OLA
)
(Millstone Power Station, Unit No. 3)) ASLBP No. 08-862-01-OLA-BD01

NRC STAFF'S ANSWER OPPOSING PETITIONER'S MOTION DATED JULY 31, 2008 FOR
NUNC PRO TUNC RELIEF AND CONTINUING WAIVER OF ELECTRONIC FILING

Pursuant to 10 C.F.R. § 2.323(c), and the Commission's Order,¹ the Staff of the NRC ("Staff") hereby answer the Connecticut Coalition Against Millstone ("CCAM") and Nancy Burton (together "Petitioners") Motion dated July 31, 2008 ("July 31 Motion"), which requested *nunc pro tunc* filing of a previous motion dated July 18, 2008 ("July 18 Motion"), a continuing waiver of electronic filing in this proceeding, and *nunc pro tunc* filing of the appeal dated June 16, 2008 ("Appeal") of the Atomic Safety and Licensing Board ("Board") Order² which denied Petitioners' request to intervene in a power uprate licensing action for Millstone Power Station Unit No. 3.

¹ *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3) (August 11, 2008) (Unpublished) (Directing that any pleadings related to the July 31, 2008 motion be directed to the Board).

² *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), LBP-08-09, ___ NRC ___ (June 4, 2008) (slip op.).

I. BACKGROUND

On June 4, 2008, the Board issued its Memorandum and Order ("Denial Order"), LBP-08-09, granting Petitioners standing but denying all contentions as inadmissible and terminating the proceeding. *Millstone*, LBP-08-09, __ NRC at __ (slip op. at 34). The proceeding and licensing background are described in the Denial Order and accordingly are not repeated herein. See *Id.* at 2-3.

On June 16, 2008, Petitioners appealed LBP-08-09 to the Commission, however the appeal was not filed using the NRC's E-Filing system. See June 16 Petitioners' Notice of Appeal. Both the Applicant and the Staff timely filed oppositions to the appeal on June 26, 2008. As of August 11, 2008, the Commission has not ruled on the appeal.

During the pendency of the appeal, on July 18, 2008, notwithstanding the fact that the Board had terminated the proceeding, and notwithstanding the fact that Petitioners had appealed to the Commission, Petitioners filed a motion before the Board to seek leave to file new/amended contentions, supported by expert declarations, within ten (10) days of receipt³ of the transcript of the Advisory Committee on Reactor Safeguards (ACRS) proceedings of July 8, 2008⁴. July 18 Motion.

On July 21, 2008, the Office of the Secretary emailed Ms. Burton and the parties and

³ The Transcript of the Advisory Committee on Reactor Safeguards Power Upgrades Subcommittee Meeting in Rockville, MD on July 8, 2008 with Related Handouts, Pages 1-449 (ADAMS Accession No. ML082100191) had a release date of July 28, 2008.

⁴ Petitioner Ms. Burton is transcribed as present and participating in the July 8 ACRS meeting. See e.g. Tr. at 282 (Burton) (regarding the meeting, Ms. Burton stated, "It's been a very, very informative day.") Tr. at 282 (Burton). Also, the Petitioners' expert witness, Arnold Gundersen, was present and participated at the meeting. See e.g. Tr. at 292 (Gundersen) (discussing Applicant's handouts for the ACRS meeting). Because they were present at the ACRS meeting, the date of the transcript is irrelevant in terms of providing new information.

notified them that the July 18 Motion was not accepted nor docketed because the filing failed to meet E-filing procedural requirements. E-Mail from Emile Julian to Nancy Burton (July 21, 2008 3:48 PM); *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Units 2 and 3), CLI-06-04, 63 NRC 32, 38-39 (The Commission directed the Secretary to screen all of Ms. Burton's filings and to reject any that are non-conforming with the Commission's practices and procedures without referring them to the Board or Commission).

On July 31, 2008, Petitioners filed a motion to request *nunc pro tunc* filing of the July 18 Motion to provide for a blanket exemption from E-filing in this proceeding, and to apply an E-filing exemption *nunc pro tunc* to the appeal before the Commission.⁵

The July 18 Motion (the motion which was not docketed by the Secretary of the Commission) provided general information on six prospective "new/revised" contentions regarding (1) temperature spikes in the hot legs of the reactor; (2) increase of fluence on the wall of the vessel; (3) use of assumptions relating to accident dose; (4) steam generator tube repair; (5) gas accumulation; and (6) pre-seasonal arrival of jellyfish. July 18 Motion at 2. By the motion, Petitioners sought leave to file their prospective formalized new/amended contentions, supported by expert declarations, within ten (10) days of receipt of the transcript of the ACRS proceedings. July 18 Motion at 2-3. The July 18 Motion was ambiguous regarding whether the motion itself was six new contentions, or was requesting permission to file six or more new or amended contentions in the future. If the Board orders *nunc pro tunc* filing of the

⁵ The Staff note that the Petitioners have made numerous requests and promises regarding being able to use E-filing. For example, on March 17, 2008, the Petitioners wrote that it successfully obtained a digital ID certificate, but still could not e-file, but would get it resolved for future filings. *See Connecticut Coalition Against Millstone And Nancy Burton Request For Exemption From "E-Filing" Requirements*, March 17, 2008, at 2-3. By April 15, 2008, Petitioners claimed they needed to raise money to be able to E-file. *Connecticut Coalition Against Millstone And Nancy Burton Second Request For Exemption From "E-Filing" Requirements*, April 15, 2008, at 5 (unnumbered). Three months later the petitioners still have not resolved their filing issues.

July 18 Motion, the Staff will then respond within the period set by the Board. The Staff's response will address how the prospective contentions are not timely, lack support, are not based on new information, do not identify any relevant omissions, and do not otherwise meet the contention filing requirements in 10 C.F.R. § 2.309(f).

On August 7, 2008, Petitioners caused additional confusion about what they requested and what motions were to be considered by submitting a new motion⁶ which repeated the same six "new/amended" contentions, still without expert support, outlined in the July 18 Motion; repeated the request to file final contentions after receipt of the ACRS transcript, albeit now 30 days later instead of 10 days later; and repeated the request to be exempt from electronic filing. However, the August 7 Motion did not explicitly withdraw the July 18 Motion and the July 31 Motion. See August 7 Motion at 2-3. The new August 7 Motion has not yet been accepted for docketing or forwarded to the parties and the Board or Commission by the Secretary of the Commission. The Staff will answer the August 7 Motion if the motion is accepted by the Secretary of the Commission for docketing.

II. COMMISSION RULES FOR E-FILING

The Commission's E-Filing Rule provides requirements for filing that address both file format and method of service. The normal method of filing is addressed by 10 C.F.R. § 2.302(g)(1), which states,

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. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and

⁶ "Connecticut Coalition Against Millstone And Nancy Burton Revised Motion For Leave To File Their New And/Or Amended Contentions Based On Receipt Of New Information And For Continuing Waiver Of Electronic Filing," August 7, 2008 (undocketed) ("August 7 Motion").

on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html>. If a filing contains sections of information or electronic formats that may not be transmitted electronically for security or other reasons, the portions not containing those sections will be transmitted electronically to the E-Filing system. In addition, optical storage media (OSM) containing the entire filing must be physically delivered or mailed. In such cases, the submitter does not need to apply to the Commission or presiding officer for an exemption to deviate from the requirements in paragraph (g)(1) of this section.

10 C.F.R. § 2.302(g)(1).

In promulgating the rule, the Commission stated that for the foreseeable future, the only technically compatible formats are types of Portable Document Format (PDF) files. 72 Fed. Reg. 49,139, 49,142 (Aug. 28, 2007). However, the Commission allowed for certain other formats for spreadsheets, when necessary. *Id.* at 49,146.

If a potential party has additional challenges that preclude it from both creating and transmitting acceptable files (i.e. they cannot create PDFs), the potential party may request an "Electronic Document Exemption" which relieves both the file formatting and electronic transmission requirements. 10 C.F.R. § 2.302(g)(3). "Good cause" for such an exemption would depend on the participant's circumstances and could include the cost of purchasing the necessary software. 72 Fed. Reg. at 49,143. The Commission believes the cost savings from electronic filing generally will exceed associated equipment, software and Internet access procurement costs. *Id.* Accordingly, the Commission encourages potential participants to move to electronic filing and service, whenever possible, rather than seeking an exemption. *Id.*

III ARGUMENT AND DISCUSSION OF MOTION

A. Nunc Pro Tunc Relief For July 18 Motion Is Moot

The July 31 Motion would retroactively reinstate the July 18 Motion that had been rejected by the Secretary for failing to comply with the filing rules. If the July 31 Motion was successful, the Board would then consider whether to grant 10 days from the receipt of the

ACRS transcript to file new and amended contentions. Petitioners received the transcript on July 28, 2008⁷; ten days from receipt was August 7, 2008. Even if the July 18 motion was accepted *nunc pro tunc*, the filing date requested by Petitioners has already passed.

Accordingly, the *nunc pro tunc* relief for the July 18 Motion is moot. Furthermore, the August 7 Motion essentially repeats the requests in the July 18 and July 31 Motions, in that it discusses the same six prospective contentions, and asks for the same relief from electronic filing requirements, but requests even more time to file actual contentions. Therefore, the *nunc pro tunc* relief of the July 31 Motion is moot.

B. E-Filing Exemption In Proceeding Before The Board Is Moot

The July 31 Motion asks the Board for "a continuing exemption from E-filing requirements in this proceeding." July 31 Motion at 4 (emphasis added). Again, the Staff note the mootness of this request, since the request is superseded in the August 7 Motion.

C. Nunc Pro Tunc Relief For Appeal Is Beyond Board's Authority

The July 31 Motion asks the Board to apply, if necessary, an E-filing exemption *nunc pro tunc* to the petitioners' Notice of Appeal dated June 18, 2008. July 31 Motion at 4. The requested relief simply ignores that the appeal is before the Commission, not the Board. The Board does not have any authority to direct the Commission to *nunc pro tunc* accept the current appeal before the Commission.

D. Post-Appeal Motions By Petitioners Create Jurisdictional Confusion

In their July 18 Motion, as well as in their August 7 Motion, the Petitioners have labeled each of the six proffered contentions as "new/amended." It is illogical and inefficient for the

⁷ Petitioners indicated by e-mail that they received the transcript on July 28, 2008. See E-mail from Nancy Burton to Dominion and NRC Counsel (Sent Tuesday August 5, 2008 8:18 AM).

Board to rule on amended contentions when the Commission is considering the unamended contentions on appeal. The Board would be usurping authority from the Commission if the Board were to entertain amendments to contentions when those same contentions are being reviewed by the Commission.

The issue of whether each new/amended contention is actually an amendment of a previous contention will be addressed if the July 18 Motion is accepted.

E. Good Cause For E-Filing Exemption Has Not Been Demonstrated

After several months of promises, the Petitioners have not made a persuasive case for an exemption in that they have not adequately explained what is preventing them from complying with the E-filing rules. The Petitioners vaguely assert that they must purchase \$500 worth of software⁸ to E-file, and claim that they do not have the \$500 to spend⁹. See Motion at 3. Petitioners appear to exaggerate the costs of software and services that can convert word processor documents into PDF files. An Internet search yields a multitude of software vendors and service providers who provide low-cost or free conversions of word processing files into PDF files.

F. Nunc Pro Tunc Relief Not Appropriate

Jurisdictional and mootness issues aside, the Petitioners have failed to make a plausible case for either the Board or the Commission to grant *nunc pro tunc* relief.

The Commission has seldom addressed the doctrine of *nunc pro tunc*, or "now for then"

⁸ Petitioners do not state what software they lack. Because the previous filings by the Petitioners were sent as word processor files instead of PDF files, the Staff assumes the Petitioners currently lack the ability to create PDF files.

⁹ The Staff question how the Petitioners can reasonably afford to create, copy, and deliver multiple copies of numerous anticipated paper submissions to the various parties, if Petitioners are unable to even afford \$500 for software. The cost of paper filing and paper delivery could well exceed the cost of E-Filing. See 72 Fed. Reg at 49,143.

relief. In the limited discussion of the topic, the Commission stated that it believes the *nunc pro tunc* doctrine could be used in cases "where bureaucratic error caused unjust results." *Edlow International Co., et al* (Agents for the Government of India on Applications to Export Special Nuclear Materials and Components), CLI-80-18, 11 NRC 680, 692 n. 25 (1980). The July 31 Motion cites no case law or authority on why the Petitioners should receive a *nunc pro tunc* order for their Board filing, nor for their Commission appeal.

There was no bureaucratic error or unjust result that needs to be corrected through entry of a *nunc pro tunc* order. Petitioners simply chose not to comply with the E-filing rules by not E-filing and not requesting a timely exemption.

IV. CONCLUSION

For the reasons stated above, the July 31 Motion should be not be granted. The *nunc pro tunc* request should be denied as moot, or in the case of the appeal, beyond the Board's authority, and the blanket exemption from E-Filing should be rejected for failing to show good cause.

Signed (electronically) by

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF ANSWER OPPOSING MOTION DATED JULY 31, 2008 FOR NUNC PRO TUNC RELIEF AND CONTINUING WAIVER OF ELECTRONIC FILING have been served upon the following by E-Mail due to the unavailability of the NRC's Electronic Information Exchange, this 11th day of August, 2008.

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