

August 25, 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))	
)	

NRC STAFF'S INITIAL LEGAL BRIEFING ON BOARD'S QUESTIONS

INTRODUCTION

On August 8, 2008, the Commission referred to the Board the "Connecticut Coalition Against Millstone and Nancy Burton Motion [collectively "CCAM"] for Leave to File their 'Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information' Dated July 18, 2008, *Nunc Pro Tunc*, and for Continuing Waiver of Electronic Filing"⁴ for any action it deems appropriate. (Unpublished) ("Referral Order"). Pursuant to the Commission's delegation, the Board requested legal briefs on four issues. Memorandum and Order (Requesting Legal Briefs from CCAM, Dominion, and the NRC Staff) (August 14, 2008) ("Briefing Order").⁵

⁴ Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File Their 'Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information' Dated July 18, 2008, *Nunc Pro Tunc*, and for Continuing Waiver of Electronic Filing (July 31, 2008).

⁵ The Board requested initial briefs by Monday August 25, 2008, and responsive briefs by Tuesday, September 2, 2008. Briefing Order at 3. The Board views its delegated jurisdiction to included motions related to: [CCAM] 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 (Aug. 7, 2008); [CCAM] Motion for Leave to File their "Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information" Dated July 18, 2008), *Nunc Pro* (continued. . .)

BACKGROUND

10 C.F.R. § 2.326 states:

(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

(b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

(c) A motion predicated in whole or in part on the allegations of a confidential informant must identify to the presiding officer the source of the allegations and must request the issuance of an appropriate protective order.

(. . .continued)

Tunc, and for Continuing Waiver of Electronic Filing (July 31, 2008) [hereinafter July 31 motion]; [CCAM] Motion for Leave to File and/or Amended Contentions Based on Receipt of New Information (July 18, 2008) [hereinafter July 18 motion]. Briefing Order at 2 n. 3. The Staff notes that none of these motions were cast as motions to reopen the record.

(d) A motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c).

10 C. F. R. § 2.326.

10 C. F. R. § 2.326 was promulgated when the NRC made major procedural revisions to its adjudicatory process in 2004, however, this section restated the provisions of § 2.734 without change. Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2224 (January 14, 2004) (to be codified at 10 C.F.R. pts. 1, 2, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76, and 110). Accordingly, decisions and rulemaking regarding 10 C.F.R. § 2.734 (pre-2004) provide persuasive authority towards resolving this issue.

10 C.F.R. 2.734 became effective in 1986. Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19535 (May 30, 1986) (to be codified at 10 C.F.R. Pt. 2). By 1984, the NRC had, through case law, established criteria under which "the evidentiary record in a closed formal licensing proceeding" conducted under subpart G of 10 CFR Part 2 (1984) may be reopened to admit new evidence. Criteria for Reopening Reports[sic] in Formal Licensing Proceedings, 49 Fed. Reg. 50189, 50189 (proposed December 27, 1984) (to be codified at 10 C.F.R Pt. 2).⁶ The Commission believed that the reopening criteria needed to be codified so that there would be no uncertainty as to what the rules require. *Id.*

⁶ The proposed rulemaking cited *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876 (1980) and *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station (ALAB-124, 6EAC 358 (1973) as cases that stand for the three criteria for a motion to reopen: 1) timely, or an exceptionally grave issue; 2) significant safety or environmental issue; 3) a different result reached from the newly proffered material. 49 FR at 50189.

BOARD QUESTIONS

Question 1

At what stage in the licensing process does the record close such that a new contention request must also meet the requirements of 10 C.F.R. § 2.326?

Answer 1.

I. The Record is Closed when the Board or Commission Rules

Where no contention was admitted, the record closes after any appeal to the Commission is denied, and the proceeding is terminated (*i.e.* no evidence was ever heard). See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-04, 63 NRC 32, 35 (2006). (CCAM was also the petitioner).

During the pre-hearing stage, or any stage the Board is anticipating more briefs on a contention, the record is likely open for that contention. During the 45-day period given to the Board by 10 C.F.R. § 2.309(i) for its initial decision on a hearing request, at least some portion of the record is clearly open, and a motion to reopen is premature.

Here, the Board terminated the proceeding on June 4, 2008, when it ruled all the proffered contentions inadmissible. *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), LBP-08-09, __ NRC __, __ (June 4, 2008) (slip op. at 34). The proceeding was terminated before any additional contentions and motions were proffered by CCAM. The proceeding before the Board was therefore closed.

Regarding how long after the closing that a motion would be "timely," in the rulemaking for 10 C.F.R. § 2.326, the Commission believed timeliness standards were well developed, and there was no need to impose an arbitrary cutoff point. 51 Fed. Reg. at 19535. When a litigant in a licensing proceeding attempts to introduce new factual or

expert evidence in an untimely⁷ fashion, the Commission we will reopen the record only when the new evidence raises an “exceptionally grave issue” calling into question the safety of the licensed activity. *Hydro Resources*, CLI-00-12, 52 NRC at 3 (2000) (citing see 10 C.F.R. § 2.734(a); see generally *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76-79 (1988)).

If the Board has separated some contentions from others in its ruling, (which this Board did not), and explicitly disposed of certain proffered contentions, but not others, then a motion to reopen would be required with respect to those closed contentions. 51 Fed. Reg. 19535 at 19538. That was not the case here; the Board found no admissible contentions. *Millstone*, LBP-08-09, slip op. at 34.

II. After License Issued is Too Late for Motion to Reopen

The Commission (not the Board) retains jurisdiction to reopen a closed case if the license has not been issued. *Dominion Nuclear Connecticut, Inc. Millstone*, CLI-06-04, 63 NRC at 35-36 (citing see, e.g., *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-1, 37 NRC 1 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1 (1992)). If a motion to reopen was filed before the license was issued, the Commission could consider the motion. See *id.* Once the Staff has issued the license, the Commission would treat a Motion to Reopen filed by CCAM as a petition for enforcement action under 10 C.F.R. §2.206. See *id.* at n. 4 (citing e.g., *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12,

⁷ As an example of what is not timely, the Commission found a motion to re-open was untimely because the studies upon which the intervenors relied were published well before the hearing closed, and before the intervenors submitted their written presentation. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 3 n. 3 (2000).

36 NRC 62, 67 (1992)). Logically, if a motion to reopen is denied, or one is never requested, any motion to submit an amended petition is moot after the Board's initial ruling. *See Id.*⁸

Petitioners Nancy Burton and CCAM did not file any motion to reopen prior to the Staff taking its licensing action on August 12, 2008. They are now impermissibly late, and the Commission will no longer entertain any motion to reopen. *See id.*

III. Jurisdictional Limits on Filing Motion to Reopen

A motion to reopen must be filed with the body having jurisdiction. 51 Fed. Reg. at 19538. On this topic, regarding an improperly filed motion to reopen, again involving CCAM, the Commission stated that after the Board issues its order and terminates the proceeding, the Board lacks jurisdiction to consider a motion to reopen. *Northeast Nuclear Energy Company*, (Millstone Nuclear Power Station, Unit No. 3), CLI-00-25, 52 NRC 355, 357 n.3.⁹ Logically, any stage after the Board has terminated the proceeding,

⁸ In the *Millstone*, CLI-06-04, 63 NRC 32, the Commission was faced with a similar defective last-minute motion to submit an amended contention shortly before the Staff took its licensing action. The Commission considered the request and summarized its finding as follows:

In sum, not only has CCAM failed to meet the standards in our regulations for reopening a closed record, it has not even attempted to meet those standards. Accordingly, the Motion to Reopen is denied, which renders moot CCAM's request for leave to submit an amended petition to intervene. But in view of the fact that CCAM has raised an issue that could plausibly affect public health and safety if it were true, we refer the motion to the Staff for treatment, as appropriate, under 10 C.F.R. §2.206. Finally, we direct the Office of the Secretary not to accept for filing or docketing any pleading signed by Ms. Burton that does not conform to the NRC's rules of practice.

⁹ The pertinent part stated, "The Board lacks jurisdiction to consider a motion to reopen after a petition to review a final order has been filed. See *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-726, 17 NRC 755 (1983); cf. *Curators of the University of Missouri (TRUMP-S Project)*, CLI-95-1, 41 NRC 71, 93-94 (1995). Although CCAM/CAM [Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM")]

(continued. . .)

such as with the current Millstone Board, is too late for filing a motion to reopen with the Board.

Conversely, a Board has found jurisdiction where resolution of one of several contentions remained before the Board, and no appeals were currently pending before the Commission. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 138, (2002) (aff'd on other grounds, *Dominion Nuclear Connecticut, Inc.*, (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 N.R.C. 367, (2002).

Applying the above cases to the current motions by CCAM demonstrates that the motions cannot be heard. There were no proffered contentions or other issues before the Board at the time the licensing action was taken on August 12, 2008. The only CCAM motion that had been referred to the Board was the July 31 motion, which itself sought to restore *nunc pro tunc* the July 18 motion; the July 18 motion did not submit contentions, but instead sought leave to file contentions within a certain time period (which has now passed). In other words, all CCAM had before the Board when the license was issued was a request to get permission to file something else at a future date. There were no contentions being considered by the Board that potentially could have saved jurisdiction and allowed the Board to entertain a motion to reopen in a manner similar to *Millstone*, LBP-02-5.

(. . .continued)

improperly filed its motion to reopen with the Board, we will treat the motion as though it had been correctly filed with the Commission." *Millstone*, CLI-00-25, 52 NRC at 357 n.3.

IV. Timeliness and Opportunity to Raise Earlier

If the Board still has jurisdiction, and a movant seeks a further evidentiary hearing on new issues not previously considered, the Board must consider (1) the timeliness of the motion, *i.e.*, whether the issues sought to be presented could have been raised at an earlier stage, such as prior to the close of the hearing; and (2) the significance or gravity of those issues. 10 C.F.R. § 2.326(a)(1-2); *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Regardless of when the motion is presented, the question in each case must center on whether the matter could have been raised earlier. *Id.* at 523 n. 12.

The Staff previously noted that the motions of CCAM did not appear to be timely.¹⁰

V. Summary

The time for CCAM to file a motion to reopen the Millstone uprate proceeding was the period of time after the Commission denied the appeal,¹¹ but before the Staff took its licensing action, and the motion should have been before the Commission. *Accord Millstone*, CLI-06-04, 32 NRC at 38 (2006).

¹⁰ The noted in particular that CCAM's claim that a transcript of a meeting CCAM attended was not supportive of a claim of new information. See "Staff's Answer Opposing Petitioner's Motion Dated July 31, 2008 For Nunc Pro Tunc Relief And Continuing Waiver Of Electronic Filing" at 2 n. 4 (August 11, 2008). Regarding the timing and other factors in 10 C.F.R. § 2.326, no motion to reopen has been submitted, and the Board has not requested a briefing on this issue, accordingly the Staff are not currently addressing how any of CCAM's various existing motions fail to meet the reopening criteria.

¹¹ This discussion ignores the complicating factor that would have been introduced is a petition for reconsideration was filed pursuant to 10 C.F.R. § 2.345 , inasmuch as none was filed.

Question 2

Is the answer to (1) the same for cases where contentions are admitted rather than cases where there are no admitted contentions? See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32 (2006).

Answer 2.

Yes. The rulemaking specifically considered cases where contentions were admitted and disposed of individually See 51 Fed. Reg. at 19538. On this topic, the Statements of Consideration responded to a comment as follows:

Comment: One commenter questioned whether the newly-codified criteria would apply in situations where a record is closed as to certain contentions, but open as to others, and a movant seeks to reopen the record with respect to a contention for which all the evidence has been heard.

Response: The criteria are intended to apply when a record is closed with respect to a particular contention. The motion should be filed with the body having jurisdiction under NRC case law.

Id.

Also as previously explained, if no contention is admitted, the Board will not have jurisdiction to hear a motion to reopen. *Millstone*, CLI-00-25, 52 NRC at 357 n.3.

The Commission, when it receives a motion on a case where no contention was admitted, will apply the reopening standards. See *Millstone*, CLI-06-4, 63 NRC 32. As stated in Answer 1, *supra*, the Commission concluded "CCAM failed to meet the standards in our regulations for reopening a closed record, it has not even attempted to meet those standards." *Id.* at 38.

Question 3

Do not the Commission's regulations contemplate an opportunity to file new or amended contentions provided that the circumstances under section 2.309(f)(2) have been met?

Answer 3

The regulations under 10 C.F.R. § 2.309(f)(2) do provide an opportunity to file new or amended contentions where the proceeding has not been terminated. The new filings are contemplated from the NRC's publication of draft or final environmental documents if they are different from the applicant's corresponding information. 10 C.F.R. § 2.309(f)(2). Otherwise, the new or amended contention must be based on newly available information and must be timely. 10 C.F.R. § 2.309(f)(2)(i-iii).

There is a short time (45 days) from the filing of the answers and responses from the initial request for hearing until the Board issues its decision. 10 C.F.R. § 2.309(i). During that initial 45-day time period, the record is clearly open, and there is no need for a motion to reopen. If a hearing request is wholly denied, the Board will no longer have anything before it,¹² and will not have jurisdiction to hear the motion to reopen, as that authority would return to the Commission. See *Millstone*, CLI-00-25, 52 NRC at 357 n.3.

If a hearing request is granted in part, then the record is also clearly open for those issues granted, and no motion to reopen is implicated for new and amended contentions on the open topics.

Significantly, 10 C.F.R. § 2.309(f)(2) addresses filing "with leave of the presiding officer." Therefore, 10 C.F.R. § 2.309(f)(2) only applies where there is an ongoing

¹² Again ignoring a possible Petition for Reconsideration.

proceeding before a presiding officer. Logically, where the Board has already denied intervention and terminated the proceeding, the Board no longer has jurisdiction to rule on a request under 10 C.F.R. § 2.309(f)(2). See *id.*

Where there was no open proceeding, the stricter requirements of 10 C.F.R. § 2.326 would apply. *Millstone* CLI-06-04, 63 NRC 32.

Question 4

If the licensing process is ongoing and new or amended contentions arise, under what circumstances would a motion to reopen be required in addition to a motion under 10 C.F.R. § 2.309(f)(2)?

Answer 4.

As discussed in Answer 3, *supra*, 10 C.F.R. § 2.309(f)(2) addresses leave from the presiding officer to file amended or new contentions after the initial filing. It is only relevant if an issue remains before a presiding officer. If a topic has *not* been addressed by the Board, and the Board's ruling is still pending, then only 10 C.F.R. § 2.309(f)(2) would be relevant, in that there is nothing to reopen yet.

In a situation where the licensing process is ongoing, meaning at least one open contention is before the Board, a motion to reopen would be required where the new or amended contention is on a topic already disposed of by the Board. See Answer 2 *supra*. If the topic is new and not previously addressed by the Board, and the proceeding is still open, then 10 C.F.R. 2.309(f)(2) would apply.

In any event, a petitioner who seeks to add information to a closed record, whether the information concerns a new contention or one which has already been heard, must file a motion to reopen. 51 Fed. Reg. at 19538-19539. The Commission requires that motions for reopening to litigate new contentions also meet the standards

for non-timely contentions in 10 CFR § 2.309(c), but does not provide a similar requirement for meeting 10 C.F.R. § 2.309(f)(2) as part of the regulation on reopening. 51 Fed. Reg. at 19537-19538; 10 C.F.R. § 2.326(d); *Millstone*, CLI-06-04, 63 NRC at 37.¹³

/Signed (electronically) by/

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¹³ Regarding CCAM, the Commission stated, Moreover, CCAM did not raise the Strontium-90 issue as a contention in the earlier proceeding before the Licensing Board. See *Dominion Nuclear Connecticut (Millstone Nuclear Power Station, Units 2 and 3)*, LBP-04-15, 60 NRC 81 (2004). Thus, Section 2.326(d) of our regulations requires that a motion to reopen that proceeding address the provisions for filing a late-filed contention in 10 C.F.R. § 2.309(c). Quite simply, if a party seeks to reopen a closed record and, in the process raises an issue that was not an admitted contention in the initial proceeding, it must demonstrate that raising this issue satisfies the requirements for a non-timely or “late-filed” contention. As with all other procedural requirements for reopening a closed proceeding, CCAM completely ignores this requirement.

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 "NRC STAFF'S INITIAL BRIEFING ON BOARD QUESTIONS", dated August 25, 2008, have been served upon the following by the Electronic Information Exchange, this 25th day of August, 2008, with a courtesy copy e-mailed to Ms. Burton:

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