

September 2, 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 REPLY TO PETITIONER'S AND APPLICANT'S 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 ("Petitioner") 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on Receipt of New Information' Dated July 18, 2008, *Nunc Pro Tunc*, and for Continuing Waiver of Electronic Filing" (Unpublished) ("Referral Order") for any action it deems appropriate. Pursuant to the delegation, the Board requested legal briefs on four issues.<sup>1</sup> Memorandum and Order (Requesting Legal Briefs from CCAM, Dominion, and the NRC Staff) (August 14, 2008) ("Briefing Order"). The Board requested that responsive brief be filed no later than Tuesday, September 2, 2008.

DISCUSSION

Petitioner, in its brief, once again requests a continuing waiver of the E-filing

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<sup>1</sup> The Board requested initial briefs by Monday August 25, 2008, and responsive briefs by Tuesday, September 2, 2008. Briefing Order at 3.

requirements claiming that the Petitioner's facts and circumstances have not changed and therefore a waiver is required.<sup>2</sup> The Staff's position remains that the Petitioner's motion should be denied because it was not filed and served in accordance with the Commission's E-Filing rule of 10 C.F.R. § 2.302(a), which requires that "[d]ocuments filed in Commission adjudicatory proceedings . . . be electronically transmitted through the E-Filing system, unless the Commission or presiding officer grants an exemption . . . ." Furthermore, 10 C.F.R. § 2.305(c) requires that filings must be served electronically through the E-Filing system. Applicant correctly points out that that motion has never been granted.<sup>3</sup> Nor should it be granted. Moreover, the Petitioner's failure to have timely requested an exemption is sufficient reason to deny the motion.<sup>4</sup> Additionally, the Commission's denial of Petitioner's appeal addresses Ms. Burton's continuous disregard for NRC regulations and ruled that her recurring procedural violations would be sufficient grounds for denying her appeal. *Millstone*, CLI-08-17, 68 NRC \_\_\_\_ (slip op. at 5). Also, the Commission clearly stated in this case that "[p]etitioners may not, however, continue to ignore our filing requirements. Recently, in fact, the Office of the Secretary rejected summarily Petitioners' motion to file late contentions in this proceeding, given their failure either to comply with our electronic filing requirements or to seek a waiver." *Id* at n 20.

The Staff agrees with the Applicant that there is no longer a proceeding that the

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<sup>2</sup> See Petitioner's Response at 1-2.

<sup>3</sup> See Applicant's Response at 13.

<sup>4</sup> Furthermore, Petitioner acknowledged that, "[b]y inadvertence, the petitioners did not request a specific exemption for their July 18, 2008 filing." *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), at 3 (July 31 Motion). However, this is not the first time that Petitioner was aware of the need to timely request an exemption.

Petitioner may even intervene, the motion was improperly filed and served, and the motion does not satisfy the criteria for either late intervention or to reopen a closed record.<sup>5</sup>

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.

Petitioner states that the record closes after a final judgment is rendered and states that no final judgment has been entered referring to the Secretary Order of August 8, 2008.<sup>6</sup> Petitioner fails to acknowledge the Commission's Order of August 13, 2008 which affirmed the Board's decision that Petitioner had not proffered an admissible contention. *Millstone*, CLI-08-17, 68 N.R.C \_\_\_\_ (slip op.). As such a motion to reopen the hearing can be filed by a party to the proceeding. However, a person or organization which was not a party to the proceeding may not file a motion to reopen the record unless it has filed for, and been granted, late intervention in the proceeding under 10 CFR § 2.309(c) (formerly § 2.714(a) (1)). *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-1, 35 NRC 1, 6 (1992).<sup>7</sup> As the Petitioner did not proffer an admissible contention, Petitioner should not be considered a party to the proceeding and would need to file and be granted late intervention, which Petitioner has not. Furthermore, if the Petitioner's motion was considered a motion to reopen, the Petitioner has made no attempt to address the standards required to reopen a closed

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<sup>5</sup> See Applicant's response at 1-3.

<sup>6</sup> Petitioner at 2.

<sup>7</sup> The Commission was clear that a motion to reopen a closed proceeding is available only to parties that have been admitted to the proceeding. *Comanche Peak*, CLI-92-1, 35 NRC at 4; *Texas Utilities Electric Co.* (Comanche Peak) CLI-92-12, 36 NRC 62, 3 (1992).

record in an adjudicatory proceeding or the standards for late intervention. Under 10 CFR § 2.323(b), if the Petitioner had filed the proper motion it would have to comply with the following:

(b) Form and content. Unless made orally on-the-record during a hearing, or the presiding officer directs otherwise, or under the provisions of subpart N of this part, a motion must be in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.

There is no indication that Petitioner has met these requirements either for a timely motion to reopen or correctly filed a motion for late intervention.

Petitioner further argues that since all of its attempted motions were accepted and the Secretary's Order occurred, prior to the Commission's ruling, that the Petitioner's motions are still valid and the Secretary's action serves to keep the record open. This has no bearing on whether they are a party or whether Petitioner has validly filed the proper motion. The Applicant correctly cites NRC case law indicating that the record is considered closed where the Petitioner has been dismissed.<sup>8</sup> The Board in LPB-08-09, slip op. at 34 terminated the proceeding. Furthermore, the Petitioner's appeal to the Commission was denied where the Commission in CLI-08-17 affirmed the Board's decision.

Taken a step further, the NRC Staff issued the license amendment for the uprate on August 12, 2008. (ADAMS Accession No. ML081610585). That action has

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<sup>8</sup> See Applicant's response at 4 where it states, "Thus, in Millstone, CLI-06-4, the Commission applied the factors in 10 C.F.R. § 2.326(a) when CCAM sought to introduce new contentions after its initial petition to intervene had been denied. See *Millstone*, CLI-06-4, 63 N.R.C. at 35, 37. Similarly, in *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-1, 35 N.R.C. 1 (1992), the Commission applied the factors in 10 C.F.R. § 2.734 (which is now 10 C.F.R. § 2.326) to a request to introduce new contentions after the Licensing Board had dismissed the adjudicatory proceedings pursuant to a settlement. See *Comanche Peak*, CLI-92-1, 35 N.R.C. at 3, 7."

effectively closed out the record, as the Commission stated “Once the Commission has issued an operating license for a unit, that action effectively closes out an opportunity for a hearing on that license or on any construction permit amendments. Any subsequent challenge to that unit's license must take the form of a petition under 10 C.F.R. § 2.206 for an order under 10 C.F.R. § 2.202.” See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67(1992).

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.

If contentions had been admitted, then the requirements of 10 C.F.R. § 2.309(f)(2) would be applicable. However, as stated above, no contentions were admitted and therefore there was no party to the proceeding. Therefore, the record closes 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). Staff supports Applicant's position which correctly asserts, as stated in Answer 1 *supra*, a motion to reopen a closed proceeding is available only to those admitted to the proceeding. Furthermore, as the Applicant asserts, in order for the Petitioner to now reopen this closed proceeding, it must satisfy both the standards for late intervention and the standards to reopen a closed proceeding.<sup>9</sup> Petitioner clearly has not.

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<sup>9</sup> “Thus, to reopen a closed proceeding, a non-party (such as Petitioner's) must satisfy both the (continued. . .)

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

As stated before, the Commissions regulations do contemplate such an opportunity, however 10 C.F.R. § 2.309(f)(2) only applies where there is an ongoing proceeding before a presiding officer. Where the Board has already denied intervention and terminated the proceeding, there is no proceeding to rule on a request under 10 C.F.R. § 2.309(f)(2). Therefore, where there is no open proceeding, the stricter requirements of 10 C.F.R. § 2.326 would apply. *Millstone* CLI-06-04, 63 NRC 32. The Staff agrees with the Applicant that Petitioner must comply with 10 C.F.R. § 2.326(a) and (b) in order to meet the criteria for late intervention.<sup>10</sup>

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.

The licensing process is no longer ongoing. Furthermore, the license amendment has been issued. In Petitioner's Answer to Question 4, Petitioner ignores

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(. . .continued)

standards for late intervention (to become a party) and the standards to reopen a closed proceeding. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-01, 37 N.R.C. 1, 3 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 161 (1993)" Applicant's Response at 5.

<sup>10</sup> See Applicant's Response at 7-8.

NRC case law and rulemaking that make it clear that a motion to reopen is still required. As discussed in Staff's prior Answer to Question 4, 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). 51 Fed. Reg. at 19537-19538; 10 C.F.R. § 2.326(d); *Millstone*, CLI-06-04, 63 NRC at 37; Staff's Answer at 11. Petitioner's response simply ignores what was stated in the Commission's Order in a prior motion to reopen filed by the Petitioner.

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

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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DOMINION NUCLEAR CONNECTICUT, INC. ) Docket No. 50-423-OLA  
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(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 REPLY TO PETITIONER'S AND APPLICANT'S LEGAL BRIEFING ON BOARD'S QUESTIONS", dated September 2, 2008, have been served upon the following by the Electronic Information Exchange, this 2<sup>nd</sup> day of September, 2008, with a courtesy copy e-mailed to Ms. Burton:

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