

August 25, 2008 (3:36pm)

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RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

(ATOMIC SAFETY AND LICENSING BOARD PANEL)

In the Matter of

Docket No. 50-423-OLA

Dominion Nuclear Connecticut, Inc.
(Millstone Nuclear Power Station,
Unit 3)

ASLBP No. 862-01-OLA-BD01

August 25, 2008

**CONNECTICUT COALITION AGAINST MILLSTONE AND NANCY BURTON'S
RESPONSE TO ATOMIC SAFETY AND LICENSING BOARD PANEL'S
MEMORANDUM AND ORDER DATED AUGUST 14, 2008 REQUESTING LEGAL
BRIEFS AND REQUEST FOR CONTINUING WAIVER OF E-FILING
REQUIREMENTS**

The petitioners, Connecticut Coalition Against Millstone and Nancy Burton (collectively, "petitioners" or "CCAM"), herewith respond to the Atomic Safety and Licensing Board Panel's Memorandum and Order dated August 14, 2008 by which it directed the petitioners, the applicant, Dominion Nuclear Connecticut, Inc. ("Dominion"), and U.S. Nuclear Regulatory Commission ("NRC") staff to file legal briefs on four issues to assist the Board with its consideration of the petitioners' pending motions¹ to submit new and revised contentions.

The petitioners further request a continuing waiver of electronic filing requirements and incorporate by reference herein their pending motions requesting such continuing

¹ The motions are: "Revised Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information and for Continuing Waiver of Electronic Filing" (August 7, 2008); "Motion for Leave to File 'Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information *Nunc Pro Tunc* and for Continuing Waiver of Electronic Filing'" (July 31, 2008); and "Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information" (July 18, 2008).

waiver insofar as the asserted facts and circumstances in support of such waiver have not changed.

The petitioners respond as follows:

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?*

Petitioners' Response:

The record in an administrative proceeding does not close until a final judgment is rendered by the administrative agency.

To date, no final judgment has entered in this administrative proceeding.

On August 11, 2008, the Secretary of the Commission issued the following order ("Secretary's Order"):

Pursuant to my authority under 10 C.F.R. § 2.346(i), the "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, 2006, *Nunc Pro Tunc*, and for Continuing Waiver of Electronic Filing," is referred to the Board for any action it deems appropriate. Any further pleadings related to this motion should be directed to the Board.
IT IS SO ORDERED.

In this case, the petitioners' three pending motions to file new and/or amended contentions, and the Secretary's Order were all filed prior to August 13, 2008, the date when the Commission affirmed the Panel's decision in LBP-08-09 and denied the petitioners' appeal. CLI-08-17, 67 NRC ___, ___ (slip op. at 18)(August 13, 2008).

Ordinarily, the Commission's issuance of a decision denying an appeal from an ASLB Panel's decision would constitute the "final judgment" for appeal purposes, assuming no further pleadings directed to the judgment have been filed.

However, by referring the petitioners' motion to the ASLB Panel "for any action it deems appropriate," the Commission Secretary acted to keep the record open notwithstanding the Commission's denial of the petitioners' appeal.²

Thus, the final judgment in this matter by which the record will be closed has been held in abeyance by virtue of the Secretary's order; therefore, the ASLB Panel is empowered and authorized to consider the petitioners' motions.

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).

Petitioners' Response:

The answer is the same because otherwise a petitioner would be unable to submit admissible contentions as expressly allowed by 10 C.F.R. § 2.309(f)(2), which does not distinguish between cases where contentions are admitted rather than cases where there are no admitted contentions.

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?

Petitioners' Response:

The clear and explicit language of 10 C.F.R. § 2.309(f)(2)

² The petitioners are of the view that the Commission's denial of their appeal given the pendency of the matter before the ASLB Panel by its own order was premature.

(“ . . . contentions may be amended or new contentions filed after the initial filing 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 new or amended 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.

makes clear that new or amended contentions meeting the criteria of 10 C.F.R. § 2.309(f)(2) must be allowed.

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)?

Petitioners' Response:

If a licensing process is ongoing, the record has by definition not yet been closed; hence, there is no need for a 10 C.F.R. § 2.326 motion to reopen which only applies to cases in which the record has been closed (“§ 2.326(a) A motion to reopen a closed record to consider additional evidence . . .”).

In this case, because the licensing process is ongoing, a motion to reopen is not required and would not be appropriate.

Respectfully submitted,

**CONNECTICUT COALITION AGAINST
MILLSTONE
NANCY BURTON**

[Signed in
original]


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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I certify that copies of the "CONNECTICUT COALITION AGAINST MILLSTONE AND NANCY BURTON'S RESPONSE TO ATOMIC SAFETY AND LICENSING BOARD PANEL'S MEMORANDUM AND ORDER DATED AUGUST 14, 2008 REQUESTING LEGAL BRIEFS AND REQUEST FOR CONTINUING WAIVER OF E- FILING REQUIREMENTS" was transmitted on August 25, 2008 by email and by U.S. Mail, First Class, postage pre-paid to the individuals and offices as indicated below:

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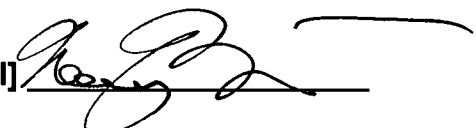
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