

December 3, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

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Dominion Nuclear Connecticut, Inc.

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Docket No. 50-423-LA-3

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(Millstone Nuclear Power Station,
Unit No. 3)

)

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ASLBP No. 00-771-01-LA-R

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DOMINION NUCLEAR CONNECTICUT, INC.'S RESPONSE TO
CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND
COALITION AGAINST MILLSTONE MOTION FOR LEAVE TO REPLY

Dominion Nuclear Connecticut, Inc. ("DNC") herein responds to the "Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion for Leave to Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention" ("Motion"), dated November 21, 2001. In their Motion, the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") request that the Atomic Safety and Licensing Board ("Licensing Board") allow the Intervenors to reply to the DNC and Nuclear Regulatory Commission ("NRC") Staff filings of November 13 and November 16, 2001,

respectively, which opposed the Intervenor's Motion to Reopen of November 1, 2001.¹ For the reasons discussed below, the Motion should be denied.

The Commission's regulations on motion practice, 10 C.F.R. § 2.730(c), specifically provide that a "moving party shall have no right to reply, except as permitted by the presiding officer or the Secretary or the Assistant Secretary." Consistent with Section 2.730(c), the Appeal Board has held that "[m]otion practice before this Commission involves *only a motion and an answer*; the rules provide expressly that the moving party shall have no right to reply to an answer in opposition to his motion." *Detroit Edison Co.* (Enrico Fermi Atomic Plant, Unit 2) ALAB-469, 7 NRC 470, 471 (1978) (emphasis added), *citing* 10 C.F.R. § 2.730(c). If a party, in this case the Intervenor, seeks leave to reply to a response, it has been found for good reason that "such leave will be granted *sparingly*, and then only upon a *strong* showing of good cause." *Commonwealth Edison Co.* (Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981) (emphasis added); *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150, 157 (1981).

At least one licensing board has explained its reasoning in denying the moving party's request to reply to an answer, commenting that "this rule puts a party on notice that *its original motion should be exhaustive* in support of and/or in explanation of the subject matter." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), 1987 WL 383710 (NRC, January 13, 1987) (emphasis added) (denying motion for leave to reply for lack of good cause); *see also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-

¹ The Motion to Reopen requested that the Licensing Board reopen the record for the purpose of admitting a late-filed contention similar to proposed contentions previously rejected in this matter.

72, 16 NRC 968, 971 (1982); *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994).

Under the present circumstances, and assessed against the “strong showing of good cause” standard, the Intervenor has failed utterly to justify another opportunity to reiterate arguments that were made before and to embellish those with arguments that could have been made before.

In their Motion, the Intervenor asserts that good cause exists to “make an accurate and complete legal and factual record by correcting those aspects in which DNC’s and the NRC Staff’s arguments misstate, distort or ignore key requirements of the law.” Motion at 4-5. However, a mere assertion that a reply was necessary to illuminate the Board on the law as on the other parties’ alleged misrepresentations and distortions has previously been rejected as grounds for good cause. In *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), 1987 WL 109481 (NRC, March 24, 1987), *a case involving a late-filed contention*, the licensing board denied the motion to reply for lack of good cause based on the claim that there had been a “misrepresentation” in the applicant’s answer. In denying the motion, the board noted that “a moving party has no right to reply “and that the “[t]he Board itself is quite capable of discerning misrepresentations, if any, and whether apparent or not.”²

² The Intervenor in their Motion here also rely upon an argument that, because the Motion to Reopen involves a contention, the rules and precedent on replies are somehow different — that is that the Intervenor must be heard again. However, there is nothing in Section 2.730 that would support such an assertion. The fact is, the present circumstances are not those of the *Allens Creek* case cited by Intervenor. That case involved initial proposed contentions. In that context, the rules specifically call for a prehearing conference. The current context is a Motion to Reopen. In submitting a motion to reopen or a late-filed contention, there is a clear standard to be met under the rules, and the movant knows exactly what needs to be demonstrated. And in the present case, where the contention being proposed is essentially a legal argument, there can be no doubt that the burden was on the Intervenor to thoroughly support that argument in their initial pleading, and there can be no doubt that the Intervenor fully argued their case.

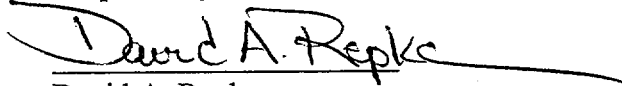
In the present case, the Intervenor was represented by competent counsel well-versed in NRC practice. The Intervenor had ample opportunity to draft an exhaustive pleading, including any arguments that they believed necessary to support their Motion to Reopen. Indeed, the Intervenor had almost two years since their original contentions on zircalloy fire were dismissed (after pleadings and oral argument); almost one year since they claim to have received the NRC Staff's technical study on decommissioning and spent fuel pool risks referenced in their Motion to Reopen; and 50 days since September 11, 2001. Granting more time now for a reply would simply encourage unnecessary and duplicative pleadings and would reward what would seem to be, at least implicitly, a self-acknowledged lack of diligence in drafting the initial papers.³

Moreover, a grant of an opportunity to reply would prejudice DNC by creating a schedule and opportunity for argument on the Motion to Reopen that clearly would be uneven and unfair. As discussed above, the Intervenor had, effectively, unlimited time in which to draft their Motion to Reopen and, by any measure, at least 50 days. In contrast, DNC had — under the rules of practice — 12 days to respond to the Motion to Reopen. Now, if Intervenor is granted a right to a reply (which they could be drafting right now), they will have at least 20 days more since DNC's opposition was filed on November 13, 2001, plus whatever time might be allowed in which to file a reply. A grant of an opportunity to reply would, quite simply, allow time for the Intervenor that would be grossly disproportionate to the amount of time allotted to

³ Compare *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-08, 33 NRC 461, 469 (1991). Although accepting a petitioner's "reply" pleading, the Commission itself warned that "we do not wish to provide incentive to future movants to file additional and unnecessary pleadings" and "we expect future movants to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly."

DNC and provided by the rules. Under these circumstances, there is no "strong showing of good cause" to depart from the rules of practice. The Intervenor's Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Repka", with a long horizontal flourish extending to the right.

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Dated in Washington, D.C.
this 3rd day of December 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
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Dominion Nuclear Connecticut, Inc.)	Docket No. 50-423-LA-3
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(Millstone Nuclear Power Station,)	ASLBP No. 00-771-01-LA-R
Unit No. 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut, Inc.'s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion for Leave to Reply" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 3rd day of December 2001. Additional e-mail service has been made this same day as shown below.

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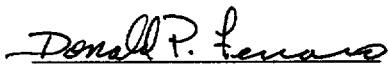
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