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OFFICE OF SECRETARY

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:	:	Docket No. 50-423-LA- 2 3
DOMINION NUCLEAR	:	ASLBP No. 00-771-01-LA
CONNECTICUT, INC.	:	
(Millstone Nuclear Power Station,	:	
Unit No. 3; Facility Operating	:	
License NPF-49)	:	November 21, 2001

**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**

Pursuant to 10 C.F.R. §§ 2.1117 and 2.730(c) and Commission precedents, Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively "CCAM/CAM" or "Intervenors") hereby move for leave to reply to oppositions filed by Dominion Nuclear Connecticut, Inc. ("DNC") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff to CCAM/CAM's motion to reopen the record of this proceeding and admit a late-filed environmental contention.¹

¹ See Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention (November 1, 2001) (hereinafter "CCAM/CAM Motion"); Dominion Nuclear Connecticut, Inc.'s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention and Motion for Directed Certification (November 13, 2001) (hereinafter "DNC Response"); NRC Staff Response Opposing the Motion of Connecticut Coalition Against Millstone/Long Island Coalition

Counsel for CCAM/CAM contacted counsel for DNC and the NRC Staff, who stated that they intend to oppose this motion.

ARGUMENT

DNC and the NRC Staff have made a number of arguments in opposition to CCAM/CAM's bid to have their evidence heard on the need for an Environmental Impact Statement ("EIS") to consider the effects of a severe pool accident caused by an act of malice or insanity against the Millstone 3 nuclear power plant. Both parties have vigorously attacked the admissibility of CCAM/CAM's environmental contention, as well as the materiality, adequacy and timeliness of the evidence proffered by CCAM/CAM in satisfaction of the standard for motions to reopen the record. As discussed below, leave for a reply by CCAM/CAM is warranted here.

A. Standards for Replies to Oppositions to Motions and Contentions

While NRC regulation 10 C.F.R. § 2.730(c) states that a movant shall have no right of reply to a response to a motion, the regulation expressly permits the Presiding Officer to make an exception to the prohibition. The ASLB has held that leave to reply is granted "sparingly," and requires a "strong showing of good cause." *See, e.g., Commonwealth Edison Co.* (Byron Station, Units 1 and 2), LBP-81-30A, 14 NRC 364, 372 (1981).

Although the regulations are silent on the issue of whether there is a right of reply to oppositions to the admissibility of contentions, a right of reply is established in NRC case law. *See Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station,

Against Millstone to Reopen the Record to Admit a Late-filed Environmental Contention (November 16, 2001) (hereinafter "Staff Response").

Unit 1), ALAB-565, 10 NRC 521, 525 (1979); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72 (1981); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235.

In *Allens Creek*, the Appeal Board likened a contention to a complaint in federal court, and compared an opposition to a motion to dismiss. 10 NRC at 525. The Appeal Board concluded that:

[i]nsofar as contentions are concerned, the intervenors must be heard in response because they cannot be required to have anticipated in the contentions themselves the possible arguments their opponents might raise as grounds for dismissing them.

Id.

B. The ASLB Should Permit a Reply to the Oppositions to CCAM/CAM's Contention.

The precedents cited above clearly establish that the ASLB should not reject CCAM/CAM's late-filed environmental contention without providing CCAM/CAM with an opportunity to reply to DNC and the NRC Staff on the issues of admissibility and justification for late filing. Thus, CCAM/CAM should be permitted to respond to incorrect arguments by DNC and the NRC Staff that CCAM/CAM have not provided a basis for considering the likelihood of a terrorist attack on Millstone 3 under the NEPA "rule of reason" (*see* DNC Response at 15, NRC Staff Response at 23-25); that CCAM/CAM have provided no means for assessing the likelihood of a terrorist attack (*see* NRC Response at 23); that various legal precedents preclude consideration of the contention (*see* DNC Response at 18-21, NRC Staff Response at 22-24); that the

contention, if proven, would be “of no consequence” (*See* DNC Response at 15, NRC Response at 21); that the ASLB has “no authority” to reconsider a ruling made in a previous decision if it was more than ten days before (*see* NRC Response at 22); that the NRC need not consider the risk of a terrorist attack qualitatively if it cannot do so quantitatively (*see* NRC Response at 23); that alternatives for mitigating the consequences of a severe pool accident need not be considered (*see* NRC Response at 24); that the Staff did not effectively concede, in official documents, that it considers the threat of acts of malice against spent fuel pools to be credible (*see* NRC Response at 19); that government statements and actions made in the weeks following September 11 can be ignored in evaluating good cause for late-filing (*see* DNC Response at 11, NRC Staff Response at 19); that CCAM/CAM’s interests can be protected in a generic proceeding (*see* DNC Response at 12-13, NRC Staff Response at 19); and that CCAM/CAM has offered “nothing” that would assist in the development of a sound record (*see* NRC Staff Response at 19).

C. The ASLB Should Permit a Reply to the Oppositions to CCAM/CAM’s Motion to Reopen the Record.

CCAM/CAM also respectfully submit that the Appeal Board’s reasoning in *Allens Creek* is applicable to the motion to reopen the record, and calls for an opportunity for CCAM/CAM to respond to DNC and the Staff. The standard for reopening the record amounts to an elevated test of admissibility and good cause for late-filing: the intervenor who seeks to reopen the record must make a strong evidentiary showing, and must justify the materiality, timeliness and safety and/or environmental significance of its claims and evidence. *Compare* 10 C.F.R. § 2.734(a) and (b) with 10 C.F.R. § 2.714(b) and (a)(1).

Like a motion to dismiss a complaint, an opposition to a motion to reopen the record consists of an argument that the evidence should not be heard, because it is irrelevant, not probative, or untimely. As the Appeal Board held in *Allens Creek*, the intervenor should not be required to anticipate the arguments that its opponents will make in support of their attempt to dismiss the case; and before a motion to reopen is rejected, the intervenor should be given a chance to respond. *See* 10 NRC at 525.

Further grounds for permitting a reply to the oppositions to CCAM/CAM's Motion are provided by the fact that many of the arguments made by DNC and the Staff in response to CCAM/CAM's Motion are also relevant to the question of whether the contention is admissible. As a practical matter, they are likely to be considered by the ASLB in evaluating the contention's admissibility and justification for late-filing. Thus, in order to ensure that the ASLB has a complete record with respect to admissibility and late-filing issues, leave to file a reply to the oppositions to CCAM/CAM's Motion is warranted.

Even if the ASLB decides not to apply the *Allens Creek* standard to CCAM/CAM's request that they be allowed to reply to the oppositions to their motion to reopen, CCAM/CAM also respectfully submit that they have good cause to reply. CCAM/CAM's Motion raises complex legal and factual issues involving the application of NEPA and implementing case law and regulations to the particular facts of this case. Allowing CCAM/CAM a reply would assist in the development of a complete decisionmaking record for the ASLB.

CCAM/CAM submit that they have good cause 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 and the evidence presented by CCAM/CAM. For instance, DNC and the Staff misinterpret the National Environmental Policy Act (“NEPA”) and Commission implementing regulations and decisions interpreting NEPA, and they also fail to address the manner in which federal agencies are required to update their NEPA analyses in response to new information and changed circumstances. *See* DNC Response at 16-21, NRC Response at 12, 14-15. DNC also incorrectly argues that the characteristics of the issues raised by CCAM/CAM are purely generic, and misstates the legal significance of generic issues in this case. *See* DNC Response at 15. In addition, DNC misstates the nature of the relief that could be obtained through this proceeding. *See* DNC Response at 15. DNC also inappropriately confuses NRC safety and design requirements with the requirements of NEPA. *See* DNC Response at 19-20. In contesting the timeliness of the motion, DNC and the Staff also inappropriately dismiss the relevance of government pronouncements issued subsequent to September 11. *See* DNC Response at 11, NRC Response at 10.

CCAM/CAM also seek an opportunity to address the significant number of legal and factual errors made in the NRC Staff’s Response, including the argument that an environmental impact need not be addressed if its likelihood cannot be quantified (*see* NRC Staff Response at 15); the incorrect assertion that CCAM/CAM’s current contention is merely a restatement of the contentions that CCAM/CAM filed in 1999 (*see* NRC Staff Response at 10-12); the false assertion that Dr. Thompson “is assuming worst case consequences that are totally unsupported by analysis or rationale” (*see* NRC Staff Response at 12 note 16); the false assertion that the potential for loss of water and exothermic reaction in spent fuel pools has been “rejected” (*see* NRC Staff Response at

13); the incorrect assertion that CCAM/CAM has failed to demonstrate the qualifications of Dr. Thompson (*see* NRC Staff Response at 15); the selective and misleading citation to an ASLB decision on Dr. Thompson's qualifications with respect to criticality prevention, rather than a more relevant citation to his qualifications to comment on severe accident issues (*see* NRC Response at 16); the distorted and misleading assertion that CCAM/CAM's "evidence consists of newspaper articles and a Staff document prepared in connection with a rulemaking." *See* Staff Response at 16. CCAM/CAM also seek leave to point out the Staff's failure to challenge the accuracy of a single one of the statements made in the press articles of which the Staff complains, to acknowledge that CCAM/CAM relies to a significant extent on official government press releases, or to acknowledge that CCAM/CAM's reliance on press articles was necessary because of the NRC's virtually complete failure to provide current information about the responses to the terrorist threat at nuclear plants on its own website. *See* NRC Staff Response at 16. The Staff's broadside against CCAM/CAM's motion misstates and distorts the law and the evidence provided in CCAM/CAM's motion to such an unusual and excessive degree that it would be grossly unfair to allow it to stand without providing CCAM/CAM with an opportunity to respond.

Finally, CCAM/CAM seek an opportunity to respond to several arguments by DNC and the NRC Staff that are not directly related to the admissibility of CCAM/CAM's contention or CCAM/CAM's satisfaction of the standard for reopening the record, but which nevertheless have an important bearing on the disposition of CCAM/CAM's Motion. For instance, CCAM/CAM believe that DNC's and the Staff's arguments that the ASLB lacks jurisdiction over CCAM/CAM's motion is based on an

overly broad reading of NRC case law. In addition, CCAM/CAM seek to contest DNC's and the Staff's conditional request that if the ASLB takes jurisdiction it should certify the motion to the Commission under 10 C.F.R. § 2.718(i). CCAM/CAM do not believe that the argument put forth by DNC regarding the generic nature of the contention has merit, or constitutes an adequate basis for referral.

Accordingly, the ASLB should grant CCAM/CAM leave to reply to DNC's and the Staff's oppositions to CCAM/CAM's Motion to Reopen the Record and late-filed environmental contention.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2001, copies of "CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE MOTION FOR LEAVE TO REPLY TO OPPOSITIONS TO MOTION TO RE-OPEN THE RECORD AND REQUEST FOR ADMISSION OF LATE-FILED ENVIRONMENTAL CONTENTION" were served on the following by E-Mail and first-class mail, except for the Office of Appeals, which was served by first-class mail only.

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