RAS 3581

November 16, 2001
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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-LA-3
	)	
(Millstone Nuclear Power Station, Unit No. 3)	)	

NRC STAFF RESPONSE OPPOSING THE MOTION OF CONNECTICUT COALITION AGAINST MILLSTONE/ LONG ISLAND COALITION AGAINST MILLSTONE TO REOPEN THE RECORD TO ADMIT A LATE-FILED ENVIRONMENTAL CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730(c) and 2.714(c) of the Commission's regulations, the NRC Staff ("Staff") files this 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," filed November 1, 2001 ("Motion"). For the reasons set forth below, the Licensing board should dismiss the motion for lack of jurisdiction. In the alternative, the Staff supports the licensee's motion to certify the issue to the Commission pursuant to 10 C.F.R. § 2.718(i). Nevertheless, if the Licensing Board determines it has jurisdiction to consider the motion, it should deny the motion because it fails to meet any of the regulatory requirements imposed on motions to reopen the record.

BACKGROUND

On March 19, 1999, Northeast Nuclear Energy Co. ("NNECO")[1] filed an application for a license amendment for its Millstone Unit 3 reactor by which it sought to increase spent fuel storage capacity in the Unit 3 spent fuel pool from 756 assemblies to 1860 assemblies. The NRC noticed the application in the *Federal Register* and also published an environmental assessment and finding of no significant impact. 64 Fed. Reg. 48672, 48675 (1999). Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("CCAM/CAM") filed a petition to intervene and subsequently filed a Supplemental Petition[2] in which they proposed eleven contentions.

On February 25, 2000, the Licensing Board issued a Prehearing Conference Order (Granting Request for Hearing), LBP-00-2, 51 NRC 25 (2000). The Licensing Board determined that both CCAM and CAM demonstrated representational standing through their respective members and admitted three of the eleven contentions proposed by CCAM/CAM in their Supplemental Petition. All of the admitted contentions concerned the potential for criticality.[3]

CCAM/CAM submitted five contentions directly or indirectly concerning the risk of a fuel cladding fire in the spent fuel pool. Proposed Contention 7 alleged that the amendment request introduced a significant increase in the probability and consequences of an overheating accident; proposed Contention 8 alleged that the request introduced a significant increase in the probability

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[1]On March 31, 2001, the Millstone was transferred to Dominion Nuclear Connecticut, Inc. ("DNC").

[2]Supplemental Petition to Intervene in Behalf of Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone, November 17, 1999 (Supplemental Petition).

[3]Contention 4 alleged that the administrative procedures necessary to implement the amendment would increase the risk of criticality in the spent fuel pool; Contention 5 alleged that the proposal to check the soluble boron concentration only during refueling and not between refueling outages increased the risk of criticality; and Contention 6 challenged the Staff's interpretation of General Design Criterion 62, in that CCAM/CAM believed that the GDC required that criticality be prevented by physical means and that administrative controls such as credit for burnup and decay time were not permitted. *See* 51 NRC 25, 32-41.

and consequences of accidents involving uncovering of fuel assemblies and the exothermic reaction of fuel cladding; proposed Contention 9 alleged that DNC's evaluation of alternatives to the proposed action was tainted by the conflict of interest of its contractor, Holtec International, in that Holtec manufactured racks but not CCAM/CAM's preferred alternative, casks for dry storage; proposed Contention 10 alleged that DNC should have considered the severe accident implications of alternative options; proposed Contention 11, the only proposed contention that mentioned the National Environmental Policy Act of 1969 ("NEPA"), alleged that the NRC staff should prepare an environmental impact statement with regard to each of the ten contentions proposed by CCAM/CAM, as each of these proposed contentions concerned activities that would significantly increase the probability and consequences of accidents.[4] The Board rejected all of these contentions, primarily for failure to satisfy the basis and specificity requirements of 10 C.F.R § 2.714(b). 51 NRC 25 at 41-46. The Board also rejected CCAM/CAM proposed Contentions 1, 2 and 3. 51 NRC at 29-31.[5]

The Board heard oral argument pursuant to 10 C.F.R. Part 2, Subpart K, on two of the three contentions admitted in LBP-00-02. Contention 5, however, concerning the need to test for boron concentration was settled. On October 26, 2000, the Board issued LBP-00-26, which denied CCAM/CAM's request for a further hearing on Contentions 4 and 6, resolved those contentions in favor of the licensee and terminated the proceeding. LBP-00-26, 52 NRC 181, 189-200,

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[4]In its bases supporting Contentions 10 and 11, CCAM/CAM relied upon the February, 1999 report of Dr. Thompson, attached to the Supplemental Petition as Exhibit 1. In that report in pages specifically cited by CCAM/CAM, Dr. Thompson discusses acts of malice (Conclusion C-2) and sabotage (Report at 8, 12). Supplemental Petition at 27, 31.

[5]Contention 1, alleged that DNC had failed to consider credible scenarios of fully blocked flow channels, was rejected as lacking an adequate basis (51 NRC 25at 29-30); Contention 2, alleged that DNC had failed to consider dropping an empty rack onto irradiated fuel, was rejected under 10 C.F.R. § 2.714(d) for failing to demonstrate a valid dispute (51 NRC 25 at 30-31); and Contention 3, alleged that DNC had failed to consider a cask drop, was rejected as beyond the scope of the proceeding, as DNC's license for Unit 3 did not permit the moving of casks in the spent fuel pool. 51 NRC 25 at 31-32.

202-213, 214.

On November 13, 2000, CCAM/CAM petitioned the Commission for review of LBP-00-26, alleging that the Board's decision included clearly erroneous rulings regarding administrative controls and criticality prevention issues. *See* Connecticut Coalition Against Millstone/ Long Island Coalition Against Millstone Petition for Review of LBP-00-26. CCAM/CAM'S petition did not seek Commission review of the Board's rejection of proposed Contentions 7 through 11, all of which appear to be related to an alleged increased risk of a fuel cladding fire in the spent fuel pool associated with the amendment request.

On November 28, 2000, the Staff, having made a final finding of no significant hazards consideration, issued the license amendment that NNECO had sought by its request of March 19, 1999. [6]

While CCAM/CAM'S petition for review of LBP-00-26 was pending before the Commission, CCAM/CAM filed a motion to reopen the record before the Licensing Board, based on NNECO's disclosure to the NRC of its inability to account for two spent fuel rods in the spent fuel pool of its Unit 1 reactor, which had been shut down since 1998.[7] On December 21, 2000, the Commission issued CLI-00-25, 52 NRC 355 (2000), in which it noted that the motion to reopen was improperly filed, as licensing boards lack the jurisdiction to reopen after a petition for review has been filed. 52 NRC 355 at 357, n. 3. Nonetheless, the Commission remanded the motion to the Board, noting the Board's greater familiarity with the record and that CCAM/CAM was primarily seeking to develop the record further as to Contention 4. 52 NRC at 357.

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[6]On that same day, the Staff forwarded copies of the amendment to the Licensing Board and parties by Board Notification 2000-08.

[7]Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen and to Vacate Decision, December 18, 2000.

On January 17, 2001, the Commission issued CLI-01-3, 53 NRC 22 (2001), in which it denied review of Contention 4 on the grounds that the Board's fact findings seemed reasonable and granted review of Contention 6.[8] 53 NRC 22, 25-27, 27-29. The Commission noted that it had directed the Board to decide CCAM/CAM's motion to reopen Contention 4 to consider reports of alleged mishandling of two spent fuel rods at Millstone Unit 1. 53 NRC 22 at 25.

On January 17, 2001, the Licensing Board denied CCAM/CAM's motion to reopen the record. LBP-01-1, 53 NRC 75 (2001). On May 10, 2001, however, the Board granted CCAM/CAM's motion for reconsideration of its prior ruling and decided to reopen the record.[9] LBP-01-17, 53 NRC 398 (2001).

On September 11, 2001, four large commercial airplanes were hijacked in midair over the continental United States. Two of those planes were deliberately crashed into the twin towers of the World Trade Center in lower Manhattan, the third was deliberately crashed into the Pentagon, and the fourth crashed in a field in western Pennsylvania. These events, together with the issuance of NUREG-1738, " Technical Study of Spent Fuel Pool Accident Risk at Decommissioning

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[8]On May 10, 2001, the Commission issued CLI- 01-10, 53 NRC 353 (2001), in which it affirmed the Board's ruling in LBP-00-26 as to Contention 6, holding that the phrase "physical systems or processes" in GDC 62 comprehends administrative and procedural measures necessary to implement or maintain such physical systems or processes. 53 NRC at 369.

[9]On June 21, 2001, the Licensing Board issued a Memorandum and Order (Telephone Conference, 5/24/01) (unpublished), in which it granted, in part, a Staff motion to hold the reopened proceeding in abeyance pending completion of an investigation by the Office of Investigations of an allegation of a willful violation of reporting requirements concerning the two "missing" fuel rods at the Millstone Unit 1 spent fuel pool. On November 5, 2001, the Licensing Board issued a Memorandum and Order (Telephone Conference Call, 10/31/01; Schedules for Proceeding)(unpublished), noting that the OI report had been provided to the Board and parties on October 31, 2001, that the licensee's Fuel Rod Accountability Project Report and Root Cause Analysis had also been distributed and that, thus, it was now appropriate to establish a schedule for discovery. The Board established a schedule for discovery and set April 2, 2002, as the date for oral argument. Memorandum and Order, November 5, 2001, at 1-3. Memorandum and Order, November 5, 2001, at 3.

Plants, (January 2001), are the asserted bases for CCAM/CAM's motion to reopen the record to admit a late-filed environmental contention.

DISCUSSION

1. THE LICENSING BOARD LACKS THE JURISDICTION TO CONSIDER THE INSTANT MOTION.

In its motion, CCAM/CAM argues that the Licensing Board presiding over this proceeding has the broad power to reopen any part of the record in order to consider a late filed contention. CCAM/CAM's position, however, is incorrect and not supported by established Commission precedent. Therefore, the Board should dismiss this motion for lack of jurisdiction.

CCAM/CAM argues that a prior Appeal Board decision should guide the Board in deciding whether it has jurisdiction over the motion to reopen. Motion at 2-3 (citing *Wisconsin Elec. Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-86, 5 AEC 376, 377 (1972)). In *Point Beach*, the Appeal Board ruled *sua sponte* that, given certain due process considerations related to that case, the Licensing Board should reopen that proceeding to augment the record on a health and safety matter, even though the Licensing Board had rendered a partial initial decision deciding all health and safety matters and the Appeal Board had affirmed that decision. *See Point Beach*, 5 AEC at 377.

More recent Commission precedent directly contradicts both *Point Beach* and CCAM/CAM's argument. In *Metropolitan Edison Co.,* et al. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324 (1982), the Appeal Board held that "jurisdiction to rule on a motion to reopen filed after exceptions have been taken . . . *rests* with the appeal board rather than the licensing board." 16 NRC 1324 at 1327.[10] In *Three Mile Island*, the Appeal Board reasoned that the rules found in Part 2 (*i.e.,* 10 C.F.R. Sections 2.785 and 2.718(j)) terminated a licensing board's

[10] *Three Mile Island* was decided prior to the rule change in 1991 that abolished the appeal board. Pursuant to regulations in effect since 1991, jurisdiction on a motion to reopen rests with the Commission once a petition for review has been filed.

jurisdiction once exceptions are filed or when the period during which the Commission can review the record expires.

In the course of this very proceeding the Commission specifically stated that "[t]he Board lacks jurisdiction to consider a motion to reopen after a petition to review a final order has been filed." CLI-00-25, 52 NRC 355 (2000) (*citing Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755 (1983)). CCAM/CAM ignores this precedent, which would seem to be the rule of the case.

Lastly, there is a strong line of cases that mandate that a licensing board may not go beyond the jurisdiction conferred on it by the Commission. *See, e.g., Pub. Serv. Co. of Indiana* (Marble Hill Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976) (the Board may "exercise only those powers which the Commission has given [it]") (*quoting Northern Indiana Pub. Serv. Co.* (Bailly Generating Station, Nuclear 1), ALAB-249, 8 AEC 980, 987 (1974)). In this case, the Commission ordered the Board to consider solely the issues regarding Contention 4. *See* CLI-00-25, 52 NRC 355 (2000). CCAM/CAM, in its motion to reopen, is asking the board to go beyond the power conferred upon it by the Commission in its order. *See* Motion at 1-2. Therefore, the Board should find that the motion is beyond the scope of its jurisdiction and dismiss it.

In the event that the Board declines to dismiss CCAM/CAM's motion for lack of jurisdiction, the Staff agrees with DNC that, in accordance with 10 C.F.R. § 2.718(i), the Board should certify the matter without decision to the Commission, and, therefore, joins in DNC's motion for certification.

2. THE MOTION TO REOPEN SHOULD BE DENIED.

If the Board determines that it has jurisdiction to decide the motion, then the motion should be denied.[11] As discussed below, CCAM/CAM does not satisfy the criteria for filing a late-filed contention, as required by 10 C.F.R. § 2.734(d), nor does it meet the other criteria of 10 C.F.R. § 2.734 governing reopening a closed record. In addition, the contention proffered by CCAM/CAM does not satisfy the requirements of 10 C.F.R. § 2.714(b) regarding the admissibility of contentions.

A. Standards for reopening

A motion to reopen a closed record to consider additional evidence must be timely, address a significant safety or environmental issue, and must demonstrate that a materially different result would be likely had the newly proffered evidence been considered initially. 10 C.F.R. § 2.734(a). The motion must be accompanied by one or more affidavits which set forth the factual and technical bases for the movant's claim that the criteria set forth in §2.734(a) have been met. 10 C.F.R. § 2.734(b). These affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. *Id.* Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). A motion to reopen that relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.714(a) (1)(i) through (v).

The proponent of a motion to reopen the record bears a heavy burden. Reopening is required only when new evidence is shown to be timely, safety or environmentally significant and sufficiently material to have changed the result initially reached. *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No.1), ALAB-462, 7 NRC 320, 338 (1978). The Commission

[11]Should the Board decide not to immediately certify this motion to the Commission, the Staff joins in DNC's request that any ruling by the Board on the motion be referred to the Commission pursuant to 10 CFR § 2.730(f).

expects its adjudicatory boards to enforce the section 2.734 requirements rigorously, that is, to reject out-of-hand reopening motions that do not meet those requirements within their four corners. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989), *citing Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-01, 23 NRC 1 (1986) and *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986).

In the Supplementary Information to the *Federal Register* Notice "Criteria for Reopening Records in Formal Licensing Proceedings," promulgating 10 C.F.R. § 2.734, the Commission stated that reopening will only be allowed where the proponent "presents material probative evidence which either could not have been discovered before or could have been discovered but is so grave that, in the judgment of the presiding officer, it must be considered anyway." 51 Fed. Reg. 19,535, 19,538 (1986).

The criteria set forth in 10 C.F.R. § 2.734(b) require that the supporting material accompanying a motion to reopen "must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. § 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence . . . and possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Similarly, the new evidence supporting the motion must be relevant, material , and reliable.*" Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89, 93 (1989), *quoting Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366 (1984).

B. CCAM/CAM's motion does not meet the standards for reopening.

The criteria for reopening a closed record include a requirement that the proponent also satisfy the requirements for nontimely contentions in 10 C.F.R. § 2.714(a)(1)(i)-(v).

10 C.F.R. § 2.734(d). As discussed in Section 3 of this brief, the contention proposed by CCAM/CAM fails to satisfy the requirements for late-filed contentions.

1) CCAM/CAM has failed to show that the motion is timely.

CCAM/CAM states that their motion is timely in that the information on which it is principally based consists of the September 11th attack on the World Trade Center and a steady stream of subsequent U.S. government pronouncements and initiatives, some as recent as October 31st. Motion at 22. The pronouncements and initiatives to which CCAM/CAM refers are described in a number of newspaper articles provided as exhibits to CCAM/CAM'S motion.[12] The attacks occurred on September 11th; CCAM/CAM filed on November 1st. Although CCAM/CAM attempts to demonstrate timeliness by stating that the government pronouncements and initiatives made in the weeks after September 11th contain new relevant information, that argument is specious and must be rejected. It is an attempt to extend the timeline to excuse the inordinate delay in filing. The motion is not timely insofar as it is based on the terrorist attacks.

But, even if a motion based on the September 11th events and filed November 1st could be considered timely, and the Staff does not agree that it is timely under any circumstances, the claim that the motion is based on that incident is simply not supported by the facts or by CCAM/CAM's filing. In fact, the contention and its bases are largely based on information identical to that submitted by CCAM/CAM in their supplemental petition for intervention and Dr. Thompson's supporting document also submitted at that time.[13] The present submittal is a mere restating of

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[12]The Staff notes that none of these newspaper articles would meet the 10 C.F.R. § 2.743(c) requirements for admissibility of evidence. Undocumented newspaper articles on subjects with no apparent connection to the facility in question do not provide a legitimate basis on which to reopen a record. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 6 n.2 (1986); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-786, 20 NRC 1087, 1089-1090 (1984). Thus, they cannot provide a basis for a finding of timeliness.

[13]*See supra* n.2.

everything CCAM/CAM and Dr. Thompson said in trying to gain admission of Contentions 7 -11 in this proceeding and which the Board correctly rejected. LBP-00-02, 51 NRC 25 (2000). None of the information cited by CCAM/CAM, other than the September 11th attacks, is new and, as discussed below, that information would not have led to a different result. CCAM/CAM is merely using the events of September 11th to parlay the previously asserted, repeatedly rejected arguments regarding the asserted need for an EIS into a new hearing.

As CCAM/CAM points out, the Licensing Board rejected its contentions, including the four contentions that it claims "together charged that the proposed license amendment raised the likelihood and consequences of a severe accident in a fuel pool, such that the NRC should be required to prepare an EIS to address the impacts and alternatives to spent fuel pool storage." Motion at 4. CCAM/CAM fails to mention, however, that it never sought Commission review of the Licensing Board's rejection of its contentions, even though it had the opportunity to do so. Thus, CCAM/CAM's own motion demonstrates that neither the motion to reopen nor the contention proposed in the motion is timely.

CCAM/CAM also relies on NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants," January 2001 in support of its motion to reopen.[14] Motion at 22. CCAM/CAM argues that the information contained in NUREG-1738 is "relatively new." *Id.* Yet, this document was made public in January of 2001 and Dr. Thompson and counsel

[14]The Staff notes that in discussing NUREG-1738, CCAM/CAM and Dr. Thompson mischaracterize it in several respects. For example, NUREG-1738 does not conclude that loss of water in a spent fuel pool can lead to the onset of an exothermic reaction for spent fuel of any age. CCAM/CAM Motion at 17. On the contrary, the Staff stated that it could not determine at what age of fuel a fire would be precluded. Second, the NUREG does not state that the onset of exothermic reactions can be assumed if the water level declines to the level of the top of the spent fuel racks. *Id.* The Staff made a bounding assumption for purposes of the analysis. The assumption was not modeled. Therefore, it is inaccurate to state that an exothermic reaction can be assumed. Third, contrary to CCAM/CAM's assertion, NUREG-1738 does not address the propagation of exothermic reactions from pool to pool. *Id.*

were notified of its publication in connection with another proceeding.[15] There is no justification provided to explain the 10.5 month delay in filing this motion to reopen, if, in fact, CCAM/CAM considered the document to be important and relevant to this matter.[16]

CCAM/CAM asserts that the environmental issues they raise are "extremely grave." *Id.* at 22-23. But, as discussed above, the issues they seek to raise are not new. They are the same issues CCAM/CAM and Dr. Thompson have sought to raise before. They are the same issues that have been previously rejected by this Licensing Board. *See* LBP-00-02, 51 NRC 25. As discussed elsewhere in this response, the September 11th events, while serious, do not change any of the previous conclusions. As evidenced in Dr. Thompson's previous writings and in CCAM/CAM's petition to intervene, the issue of sabotage has been raised and rejected. *See* Supplemental Petition to Intervene in Behalf of Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone, November 17, 1999, and the February 1999 Thompson Report, appended thereto. In addition, the necessity and/or ability of the NRC to consider such an issue as part of its NEPA review has been analyzed and rejected. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 701 (1985), *review declined,* CLI-86-5,

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[15]*See* January 17, 2001 Letter to Administrative Judges, from Susan L. Uttal, counsel for NRC staff, in Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), Docket No. 50-400-LA.

[16]To the extent that Dr. Thompson relies upon the Staff's affidavit filed in support of the written presentation in the Shearon Harris matter, the reliance is misplaced and clearly untimely. *See* Thompson Declaration at 10-11, 13-14. The Staff's affidavit was filed on November 20, 2000, more than 11 months before the instant motion was filed. The affidavit was case and site specific. Again, the Staff made a bounding, not modeled or analyzed, assumption regarding the onset of an exothermic reaction in order to provide a point in time for determining the time available for mitigating action. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 262, 266 (2001). Further, because all four Harris pools were located in the same building, the staff assumed that if one pool was burning, it was unlikely that someone could get into the building to put water in the other pools. This assumption is entirely irrelevant to Millstone. *See* NUREG-1031, Safety Evaluation Report Related to the Operation of Millstone Nuclear Power Station, Unit No. 3 at 9-2. Dr. Thompson is assuming worst case consequences that are totally unsupported by analysis or rationale.

23 NRC 125 (1986), *aff'd Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3rd Cir. 1989). So too, the real issue sought to be raised here, that of potential loss of water to spent fuel pools and the potential for exothermic reactions in spent fuel pools, has been raised, analyzed and ultimately rejected. *See, e.g.,* LBP-00-02, 51 NRC 25; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-09, 53 NRC 239 (2001), *aff'd* CLI-01-11, 53 NRC 370 (2001). The Staff submits that there are no "exceptionally grave" issues, only old issues repackaged to capitalize on the tragic events of September 11, 2001.

Therefore, because the motion is untimely and raises no exceptionally grave issues, CCAM/CAM has not met the criteria for reopening the record and the motion should be denied.

> 2) CCAM/CAM has failed to establish that the significance of the issues it would raise has any relevance to the captioned proceeding.

CCAM/CAM argues that the environmental issues they seek to raise are grave and, therefore, should be heard even if the motion is not timely. Motion at 23. The Commission is aware of the gravity of the terrorist attacks and is assessing the need to take those events into consideration as they may affect licensing and regulation of nuclear facilities and materials. However, although, as CCAM/CAM notes, the threat of a terrorist attack on a U.S. facility is neither idle nor speculative, the risk to a particular facility is not only speculative but also is not capable of being quantified. As noted elsewhere in this brief, the newspaper accounts offered by CCAM/CAM would not be admissible in evidence.

As regards the discussion in the second paragraph of CCAM/CAM's presentation on the significance of the new information on which they would reopen, that information is not, in fact, new. Dr. Thompson addressed sabotage/ terrorism events in the declaration offered in support of CCAM/CAM's intervention. See Supplemental Petition at Exh 1(February 1999 Thompson Report), page 8. Dr. Thompson also addressed acts of malice and cited a passage from a *Foreign Affairs*

article, where the authors spoke of the attacks on the embassies in Kenya and Tanzania and 'the threat of catastrophic terrorism." *Id.* at page B-3.

As discussed, this information is not new and the assertion of its relevance to the instant proceeding is highly speculative. CCAM/CAM has failed to show that the information on which their motion is based satisfies the requirements of 10 C.F.R. § 2.734(b) regarding significance.

> 3) CCAM/CAM has not met its burden of showing that had its evidence been considered initially a different result would have been reached.

As stated above, a motion to reopen a closed record to consider additional evidence must demonstrate, inter alia, that a materially different result would be likely had the newly proffered evidence been considered initially. 10 C.F.R. § 2.734(a). CCAM/CAM's statement that the Licensing Board did not consider a contention that sought the preparation of an EIS based on the risk of acts of malice or insanity (Motion at 23-24) is inaccurate. As discussed above, CCAM/CAM did in fact seek the admission of several contentions supported, in part, by Dr. Thompson's statements regarding sabotage. Supplemental Petition at Exh 1(February 1999 Thompson Report), page 8 and B-3. CCAM/CAM now characterizes the contentions proposed in the Supplemental Petition - Contentions 6,7 and 8 (the correct numbers for those contentions is 7 through 11) - as "generally" calling for an EIS to consider the effects of severe spent fuel pool accidents. *Id.* Contrary to CCAM/CAM's representations, the bases for those contentions did raise the need to consider acts or sabotage or malice. In addition, contrary to CCAM/CAM's representations, the need to prepare an EIS to consider these matters was previously raised and dismissed by the Licensing Board. LBP-00-02, 51 NRC 25, 41-46.

Furthermore, the analysis requested is not required under NEPA. CCAM/CAM has failed to provide a scenario with a specific initiating event concerning a threat posed to the spent fuel pool. CCAM/CAM asserts that an EIS should address all physically realizable causative events and forms of water loss. Motion at 8. In *Vermont Yankee Nuclear Power Corporation* (Vermont Yankee

Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989), *remanded on other grounds*, CLI-90-04, 31 NRC 333 (1990), it was decided that "when a postulated accident scenario provides the premise for a contention, a causative mechanism for the accident must be described and some credible basis for it must be provided." In the instant case, CCAM/CAM fails to provide a causative element for an accident scenario that is the premise of their contention. The mere mention of "attack of malice or insanity" does not constitute a causative event, since the nature of the attack is not known.

There is no meaningful basis upon which to measure the risks alluded to by CCAM/CAM concerning a threat to the spent fuel pool. Where there is no meaningful method by which the agency could either assess or predict the risks, they need not be considered. *See Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3rd Cir. 1989) (deciding the NRC was not incorrect in excluding consideration of sabotage risks, and that if a contention claims that an EIS is necessary the "rule of reason" by which NEPA is interpreted provides that agencies need not consider "remote and speculative risks" or "events whose probabilities they believe to be inconsequentially small). Without any details as to a causative event or specific scenario to assess, it is impossible to determine that such event would materially affect the outcome of the case.

4) CCAM/CAM has not shown that its affiant, Dr. Thompson, is expert in disciplines appropriate to the issues it seeks to raise.

CCAM/CAM states that Dr. Thompson is highly qualified to testify regarding the potential for a sabotage event at the Millstone plant. Motion at 24. Dr. Thompson has acknowledged that the probability of a terrorist attack cannot be assessed quantitatively. Dr. Thompson states:

> Although the probability of a terrorist attack cannot be assessed quantitatively, it can be assessed qualitatively. From a qualitative perspective, the probability within the U.S. homeland appears to be greater than it was, for example, in the 1980s. There is now a focussed , well-organized and well-financed threat. The United States is taking military action that may provoke further attacks. This new threat environment may persist for many years.

Declaration at 19. The Staff submits that, if this is an example of the qualitative assessment that CCAM/CAM proposes to present, qualitative assessments would seem to be, at best, useless. Dr. Thompson has not demonstrated an ability to provide even a qualitative assessment of why acts of sabotage or malice are more likely at this particular facility.

Also, regarding Dr. Thompson's expert qualifications, the Licensing Board in *Shearon Harris* addressed Dr. Thompson's claim of expertise in ruling that while it would not declare Dr. Thompson ineligible to be the expert witness for Intervenor, Board of Commissioners for Orange County, it would assign his testimony appropriate weight commensurate with his expertise and qualifications. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247 at 267 (2000). The Board noted that by virtue of his experience and training, his expertise relative to reactor technical issues would seem largely policy-oriented rather than operational. *Id.* at 267 n.9. The issues Dr. Thompson and CCAM/CAM seek to raise in this proceeding are also operational and thus are beyond his area of expertise.[17]

5) The evidence provided in support of the motion does not meet NRC standards for admissibility.

At page 29 of its motion, CCAM/CAM concludes that the evidence provided by its motion meets the admissibility standard of § 2.743(c). The case law discussed above makes it clear that the Commission's boards should not grant a motion to reopen where the proponent has not demonstrated that its evidence meets the Commission's admissibility standards. CCAM/CAM's evidence consists of newspaper articles and a Staff document prepared in connection with a rulemaking concerning decommissioning plants. Newspaper articles are not admissible for the truth of their statements. *See Waterford*, CLI-86-1, 23 NRC at 6 n.2; *Waterford,* ALAB-786, 20 NRC at 1089-1090. Nor has CCAM/CAM explained why Dr. Thompson's understanding of

[17]Dr. Thompson claims that the Staff adopted his position in NUREG-1738 and implies that his submissions or comments were instrumental in the Staff's analysis (*See* Motion at 27;Thompson Declaration of October 31, 2001 at 6). The Staff disagrees with his characterization.

newspaper articles should be given any more credence than that of a layman. CCAM/CAM *claims* to have met the standards; but it has not *demonstrated* that those standards are met.

3. THE MOTION DOES NOT MEET THE LEGAL STANDARDS FOR LATE-FILED CONTENTIONS.

As noted above, the Commission's regulations concerning reopening include a requirement that a motion to reopen relating to a contention not previously in controversy among the parties must satisfy the requirements for untimely contentions in 10 C.F.R. § 2.714(a)(1)(i) through (v).

A. Legal standards for late-filed contentions

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The most important element of the late filing criteria is good cause. *See Power Authority of the State of New York and Entergy Nuclear Fitzpatrick* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 506 (2001). As the Commission has stated,

> It is well established in our case law that [good cause] is a crucial element in the analysis of whether a late-filed contention should be admitted. If the proponent of a contention fails to satisfy this element of the test, it must make a 'compelling' showing with respect to the other four factors.

Commonwealth Edison (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

B. The motion does not satisfy the standards for late-filed contentions.

CCAM/CAM has not demonstrated good cause for the untimely filing of their motion. If the Board accepts its assertion that the motion is based upon the events of September 11, 2001, and, as stated above, the Staff disputes that assertion, there does not appear to be good cause for filing as late as November 1st. The reliance on newspaper articles should be considered an unacceptable means to extend the time to file. First, the newspaper articles on which CCAM/CAM relies and which it would offer in evidence would not meet the admissibility standards of § 2.743(c). Second, the only use CCAM/CAM makes of the events of September 11th is to allege that the terrorist threat has become more credible because of the events of that date. Therefore, the relevant date is September 11th. If good cause exists for a filing on November 1, 20001, some fifty days after the attacks, then good cause would exist for filing today or far into the future, as each passing day brings newspaper accounts and new pronouncements concerning the threat of terrorist attacks. CCAM/CAM also relies upon a Staff document, NUREG-1738, published more than 10 months ago. No good cause has been cited for this excessive delay in filing the motion. Thus, the motion has not established good cause for the late filing.

As regards Criterion (ii), other means whereby the petitioner's interest will be protected, as discussed elsewhere in this pleading, the Commission is reviewing the need for and appropriate level of protection against terrorist attacks on a generic basis. If CCAM/CAM'S interest is the protection of spent fuel pools against future attacks of malice, participation in future commission actions which result from its review of current regulations would appear to go further toward protecting CCAM/CAM's interest than would the pursuit of this matter in a Subpart K proceeding.

As for assisting in the development of a sound record, Criterion (iii), as discussed above, CCAM/CAM has offered nothing here that would be admissible in an adjudicatory proceeding. CCAM/CAM has not demonstrated that it can or will perform an analysis that addresses the myriad

of issues it alleges should be considered in this proceeding, but rather, merely speculates as to what it believes, should be considered in an analysis. *See* Thompson Declaration at 29 X and paragraphs referenced in that Summary. The lack of any such ability means that CCAM/CAM would not be able to litigate the issues it raises, since Subpart K requires an affirmative written presentation. Therefore, CCAM/CAM has not demonstrated an ability to contribute to the development of a sound record in this proceeding.

CCAM/CAM's interest would not be represented by existing parties, as CCAM/CAM is the only intervening party. Thus, CCAM/CAM's motion satisfies Criterion (iv).

CCAM/CAM acknowledges that the admission of its contention would broaden the issues and delay the proceeding. In fact, because of the vagueness of the contention, as discussed below, its admission would significantly broaden the issues and delay the proceeding. CCAM/CAM's showing does not satisfy Criterion (v).

Thus, four of the five factors weigh against the granting of the motion and the motion should be denied.

4. THE CONTENTION THAT CCAM/CAM HAS SUBMITTED IS NOT ADMISSIBLE.

Even if the Board were to find that the late-filing criteria have been satisfied, CCAM/CAM has still failed to propose a contention that satisfies the requirements of 10 C.F.R. § 2.714(b).

A. Legal standards governing the admission of contentions

In order for a contention to be admitted to a proceeding, the requirements of 10 C.F.R. § 2.714 must be met. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). A contention must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provides that each contention must consist of a "specific statement of the issue of law or fact to be raised or controverted" and must be accompanied by:

> (i) A brief explanation of the bases of the contention;
>
> (ii) A concise statement of the alleged facts or expert opinion which supports the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion;
>
> (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact.

10 C.F.R. § 2.714(b)(2). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Private Fuel Storage,* LBP-98-7, 47 NRC 142, 178 (1998).[18] When a postulated accident scenario provides the premise for a contention, a causative mechanism for the accident must be described and some credible basis for it must be provided. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989), *remanded on other grounds*, CLI-90-4, 31 NRC 333 (1990).

In order for a dispute to involve a material issue of law or fact, its resolution must make a difference in the outcome of the proceeding. *Oconee*, CLI-99-11, 49 NRC at 333-34, *citing Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process,* 54 Fed. Reg. 33,168, 33,172 (1989). *See also* 10 C.F.R. § 2.714(d)(2)(ii) (a contention must also be dismissed where the "contention, if proven, would be of no consequence . . . because it would not entitle [the] petitioner to relief."). Moreover, contentions that are not supported by some alleged fact or facts should not be admitted nor should the full adjudicatory hearing process be

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[18]The Licensing Board should not accept uncritically an assertion that a document or other factual information or an expert opinion supplies the basis for a contention, but should review the information to be sure that it does so. *See, e.g., Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61,90 (1996).

triggered by contentions that lack a factual and legal foundation. *Oconee*, CLI-99-11, 49 NRC at 334-35, *citing* 54 Fed. Reg. at 33,170.

Finally, under the *Peach Bottom* decision, a contention must be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
>
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
>
> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
>
> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
>
> (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21.

B. CCAM/CAM'S contention does not satisfy the standards of 10 C.F.R.§ 2.714(b) regarding admissibility.

The Commission's requirements for contentions, as noted above, include the requirement that a contention must state the specific issue of fact or law to be controverted. Contrary to that requirement, CCAM/CAM's contention consists of a three page argument. CCAM/CAM motion at 6-8. The contention appears to be that the NRC must prepare an EIS to consider the environmental impacts of the proposed license amendment, including its effects on the probability and consequences of accidents at the Millstone plant. *Id.*

The regulations call for a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion that support the contention. CCAM/CAM devotes some twelve pages to bases, most of which is argument. *Id.* at 9-20.

In Basis section A. entitled "Regulatory Requirements," CCAM/CAM asks the Licensing Board to reconsider its ruling rejecting its contentions concerning pool fires. Motion at 10. (CCAM/CAM identifies that ruling as being in LBP-00-26. However, the correct citation is to

LBP-00-2, 51 NRC 25, 41-46 (2000)). As discussed above, the Licensing Board has no authority to reconsider such rulings at this time. To have been timely, objections to the Board's Prehearing Conference Order should have been filed by March 7, 2000, at the latest. *See* 10 C.F.R. § 2.751a(d). CCAM/CAM did not file objections to the Prehearing Conference Order. More importantly, they did not address the ruling in their Petition for Review, filed November 13, 2000. The Commission's review in response to CCAM/CAM's petition for review gave full and fair attention to CCAM/CAM's concerns and the Commission made clear that the referral to the Licensing Board concerned only one matter, the reopening of Contention 4 to consider allegations concerning the Millstone Unit 1 "missing" fuel rods. CLI-00-25, 52 NRC 355 (2000).

In Basis B., "Proposed License Amendment Poses Significant Incremental Risk," CCAM/CAM merely reargues the positions argued in their proposed Contentions 7, 8, 9, 10 and 11, and rejected by the Board in its rejection of those contentions in LBP-00-2.

CCAM/CAM's Basis C, 1, "New Information Shows Higher Accident Risk Than Previously Evaluated, New Information regarding acts of malice or insanity," also presents an argument rather than the facts or expert opinion required by the applicable regulations. CCAM/CAM argues that the events of September 11th "dramatically and conclusively disproved" the Commission's conclusion that it was unable to make a meaningful assessment of the risks of sabotage. Motion at 12. Significantly, CCAM/CAM has not indicated that its affiant, Dr. Gordon Thompson, whom they consider an expert, is aware of any means by which a decision-maker can reasonably foresee that such an attack will target any particular facility or how the events of September 11th "dramatically and conclusively" disproved the Commission's position that the modeling of the risk of sabotage is beyond the state of the art of probabilistic risk assessment. In *Philadelphia Electric Co.* (Limerick Generating Station. Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), the Appeal Board upheld the Licensing Board's rejection of a proposed contention alleging that NEPA

requires that the risk of sabotage be considered in the EIS prepared as a part of the NRC staff's review of an operating license application for a nuclear power plant. The Court of Appeals for the Third Circuit upheld the Appeal Board's determination that there was no known basis upon which the agency could make a "reasonable prediction of . . . the kind of stochastic human behavior displayed in an act of sabotage," and that sabotage need not be considered in an EIS. *Limerick Ecology Action, Inc. V. NRC,* 869 F.2d, 719, 743-44 (3rd Cir. 1989)."

CCAM/CAM also argues that the CEQ's regulations implementing NEPA, specifically, 40 C.F.R. § 1502.22(b), require that an agency make an attempt to evaluate reasonably foreseeable significant adverse effects if the costs of obtaining the information is not exorbitant. The Third Circuit held that the CEQ guidelines are not binding on the NRC and that the NRC was not required to perform a worst case analysis. 869 F.2d at 743. In addition, CCAM/CAM fails to demonstrate that the risks of acts of malice could be explored in any meaningful way.

CCAM/CAM urges that severe accident mitigation design alternatives ("SAMDAs") must be considered in the EIS that it believes NEPA requires the NRC to prepare. The Board specifically rejected this argument in its Prehearing Conference Order, where it stated that the Appeal Board had held that the NRC never intended its Severe Accident Policy to apply to a license amendment proceeding involving reracking a spent fuel pool, *citing Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 282 (1987).

In Basis C., 2, "New Information Shows Higher Accident Risk Than Previously Evaluated, New information regarding potential for pool accident," CCAM/CAM concludes on the basis of a Staff study prepared in connection with a rulemaking concerning decommissioning plants, NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants" (NRC: January, 2001), that "the Staff has effectively conceded that acts of malice against a spent fuel pool are credible and worthy of consideration in the NRC's NEPA

decisionmaking process." Motion at 19. Needless to say, as with the document referenced in support of CCAM/CAM's proposed Contention 11, NUREG/CR-6451 (September 1997), the Staff made no such concession in NUREG-1738. Further, as noted by the Board in LBP-00-2, NUREG/CR-6451 concerned permanently shut down nuclear plants. 51 NRC at 46. In any event, the mere fact that the Staff has studied an issue does not constitute a concession that it should be included in NEPA analyses. "The existence of ongoing research into beyond design-basis accidents . . . does not undercut the reasonableness of the Commission's view that such accidents nonetheless remain highly improbable and therefore beyond NEPA's mandate. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-880, 26 NRC 449, 459 (1987), citing *San Luis Obispo Mothers for Peace v. NRC*, 751 F. 2d 1287, 1301 (D.C.Cir. 1984), *aff'd en banc* 789 F.2d 26, *cert denied*, ___ U.S. ___, 107 Sup. Ct. 330 (1986).

CCAM/CAM's fourth basis (which should be "D," not "B," as it appears at 19 of the Motion) sets out Dr. Thompson's ideas of what should be included in the EIS that CCAM/CAM calls for. Dr. Thompson's declaration appears to be an augmented version of the declaration presented by CCAM/CAM in support of its Supplemental Petition but prepared in connection with Orange County's intervention in a proceeding concerning the Shearon Harris facility's pools and based on the Shearon Harris pools. Dr. Thompson acknowledges that the probability of a terrorist attack cannot be assessed quantitatively. Declaration at 19. He also acknowledges that a scenario involving a hijacked plane may be less likely than it was before September 11th, Declaration at 20, but qualifies that acknowledgment with a number of speculations of his own and of others concerning how terrorists might strike using means other than a hijacked commercial airliner.

Nowhere in their twelve pages of bases or in Dr. Thompson's declaration has CCAM/CAM provided the factual or legal basis for admission of a contention required by the Commission's regulations in 10 C.F.R. § 2.714(b)(2)(ii).

In sum, this motion is in reality an extremely untimely motion to reconsider the rejection of CCAM/CAM's previously proposed, and rejected, contentions. CCAM/CAM failed to object to the prehearing conference order rejecting those contentions and further failed to address this matter in its petition for review of the Licensing Board's decision. In addition, CCAM/CAM has not provided any facts or legal theories which would render the previously rejected contentions, or this repackaged contention, acceptable. It should not now, at this extremely late date, be permitted to reopen this matter.

CONCLUSION

Based on the foregoing, CCAM/CAM's motion to reopen the closed record should be denied.

Respectfully submitted,

/RA/

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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-LA-3
	)	
(Millstone Nuclear Power Station, Unit No. 3)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Respectfully submitted,

/RA/

Antonio Fernández
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Dated at Rockville, Maryland
this 16th day of November, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE OPPOSING THE MOTION OF CONNECTICUT COALITION AGAINST MILLSTONE/LONG ISLAND COALITION AGAINST MILLSTONE TO REOPEN THE RECORD TO ADMIT A LATE-FILED ENVIRONMENTAL CONTENTION" and "NOTICE OF APPEARANCE FOR ANTONIO FERNANDEZ" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, or by deposit in the NRC's internal mail system with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service as indicated by a double asterisk, with copies by electronic mail as indicated, this 16th day of November, 2001:

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