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Form C-A (for Agency Cases)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR ENFORCEMENT

PETITION FOR REVIEW

PRE-ARGUMENT STATEMENT

SEE NOTICE ON REVERSE PLEASE TYPE OR PRINT. ATTACH ADDITIONAL PAGES IF NECESSARY.

NAME OF AGENCY: U.S. Nuclear Regulatory Commission AGENCY DOCKET NO: 50-423 LA-3/50-336-L

TITLE IN FULL: Connecticut Coalition Against Millstone v. U.S. Nuclear Regulatory Commission

ORDER NUMBER CLJ-02-01; CLJ-02-22 DATE ENTERED: 1/30/02; 11/21/02
APPROXIMATE NO. OF PAGES IN RECORD In excess of 1,000 NO OF EXHIBITS None
JURISDICTION OF COURT OF APPEALS 28 USC 2342, 2344 USCA Rule 15(a)

HAS THIS MATTER BEEN BEFORE THIS COURT PREVIOUSLY? Yes No IF YES, STATE
CASE NAME: N.A. CITATION: N.A. DOCKET NO: N.A.

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APPEAL TAKEN AS OF RIGHT BY DISCRETION (SPECIFY STATUTES UNDER WHICH APPEAL IS TAKEN) USCA
PETITIONER/APPLICANT IS AGENCY OTHER PARTY NON-PARTY SPECIFY STANDING Intervenor

FACTS UPON WHICH VENUE IS BASED Petitioner and Licensee are Connecticut-based.

NATURE OF ORDER ON WHICH REVIEW OR ENFORCEMENT IS SOUGHT Final order terminating proceedings.

- ADMINISTRATIVE REGULATION/RULEMAKING
- ROUTES
 - COMMUNICATIONS
 - COMMERCE
 - OTHER (SPECIFY) _____
- BENEFITS REVIEW
 - HEALTH & SAFETY
 - IMMIGRATION
 - TARIFFS
- UNFAIR LABOR PRACTICE
 - EMPLOYER
 - UNION

CONCISE DESCRIPTION OF PROCEEDINGS BELOW AND ORDER TO BE REVIEWED OR ENFORCED (NOTE THOSE PARTS OF THE ORDER FROM WHICH RELIEF IS SOUGHT) Final order terminating proceedings and denying an evidentiary hearing.

ISSUES PROPOSED TO BE RAISE ON PETITION OR APPLICATION RELIEF SOUGHT: Reversal of order and remand for evidentiary hearing. Decision contrary to law, not supported by substantial evidence, arbitrary and capricious.

TO YOUR KNOWLEDGE, IS THERE ANY CASE NOW PENDING OR ABOUT TO BE BROUGHT BEFORE THIS COURT OR ANY OTHER COURT OR ADMINISTRATIVE AGENCY WHICH

- (A) ARISES FROM SUBSTANTIALLY THE SAME CASE OR CONTROVERSY AS THIS APPEAL? YES NO
- (B) INVOLVES AN ISSUE SUBSTANTIALLY THE SAME, SIMILAR, OR RELATED TO AN ISSUE IN THIS APPEAL? YES NO
(IF YES, STATE WHETHER "A" OR "B" OR BOTH AND PROVIDE)

DOCKET _____ CASE NAME: _____
COURT OR AGENCY: _____ CITATION: _____ NUMBER _____

FOR PETITIONER OR APPLICANT:

(PRINT) NAME OF PETITIONER Connecticut Coalition Against Millstone NAME OF COUNSEL OF RECORD Nancy Burton, Esq. TELEPHONE 203-938-3952
DATE 2/27/03

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UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

DOCKETED 01/30/02

SERVED 01/30/02

COMMISSIONERS:

Richard A. Meserve
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)		
)		
)	Docket Nos.	50-336-LA
DOMINION NUCLEAR CONNECTICUT INC.)		50-423-LA
)		
)		
(Millstone Nuclear Power Station, Units 2 and 3))		

CLI-02-01

MEMORANDUM AND ORDER

The Commission has before it a petition filed by the Connecticut Coalition Against Millstone and the STAR ("Standing for Truth About Radiation") Foundation seeking reconsideration of the Commission's decision in [CLI-01-24](#). Both Dominion Nuclear Connecticut, Inc. ("DNC") and the NRC staff oppose the petition. We deny the petition.

As DNC correctly points out, "reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification."⁽¹⁾ See, e.g., [Central Electric Power Cooperative, Inc.](#) (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981); cf., [Private Fuel Storage, L.L.C.](#) (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998). Petitions for reconsideration should not be used merely to "re-argue matters that the Commission already [has] considered" but rejected. See [Advanced Medical Systems, Inc.](#) (One Factory Row, Geneva, Ohio), CLI-93-24, 38 NRC 187, 188 (1993); see also [Long Island Lighting Co.](#) (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1, 3-4 (1988); [Nuclear Eng'g Co. Inc.](#) (Sheffield, Illinois Low-level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980).

Here, the petitioners' reconsideration petition repeats the same claims the Commission rejected in [CLI-01-24](#), which found their sole contention inadmissible. The petitioners' argument is that the radiological effluent monitoring procedures at issue in this proceeding "are legally required to remain in Technical Specifications." See [Petition for Reconsideration of CLI-01-24](#) (12/17/01) at 6. Exactly as before, the petitioners claim that if these procedures are removed from the technical specifications, it is conceivable that: (1) a monitoring requirement might be changed; (2) "something" might "fail," as in "a relatively minor accidental or other failure of equipment;" (3) instrument surveillance may "somehow ... become unduly lax;" and (4) this reduced surveillance may "fail to pick up a release." *Id.* Again, they rely upon a statement by the licensee's counsel that such a scenario "could not be categorically discounted." *Id.* at 7.

Yet, as the Commission addressed in greater detail in CLI-01-24 ^A, simply because monitoring procedures ultimately bear upon safety does not mean that they must or should remain in technical specifications. It goes without saying that virtually all requirements involving the monitoring of instruments at nuclear power facilities have some connection to safety, but many such safety requirements can be followed and enforced adequately by means of licensee-controlled documents. The test for whether a particular set of safety requirements needs to be retained in the technical specifications is not whether one can conceive of a hypothetical scenario of potential injury, no matter the likelihood of harm or degree of relative significance. Instead, the Commission's policy is to reserve technical specifications for the most significant safety requirements. To that effect, applicable Commission regulations outline the types of safety items that must remain in the technical specifications. See 10 C.F.R. §§ 50.36, 50.36a.

In short, to argue that particular safety requirements are "legally required" to remain in technical specifications, it is not enough simply to allege that they bear some relation to safety; of course, by their very nature all "safety"-based requirements will. The petitioners needed to show why the monitoring procedures for routine, low-level, radioactive effluent at issue in this proceeding fall among those most critical safety issues that ought to be retained in technical specifications. They must provide some basis for concluding that there is a significant likelihood -- not just a theoretical possibility -- that safety at Millstone will be adversely impacted if the procedures are not kept in the technical specifications. They never did so. Their petition for reconsideration now simply reiterates various earlier claims, ignoring the Commission's analysis and disposition of them. Indeed, the petitioners even repeat misconceptions about these license amendments which the Commission highlighted and corrected in its decision. See CLI-01-24 ^A (slip op.) at 8 -9 & n.6, 21 (regarding "setpoints").

The petitioners also argue that the Commission's decision fails to "address Millstone realities," including "Millstone's notoriety as a leading emitter of radionuclides into the environment." See Petition at 8. They attach an unsigned and apparently incomplete statement by Dr. Christopher Busby, dated March 26, 2001. Dr. Busby believes that methods commonly used for calculating allowable radiological doses are incorrect, and that as a result, "reactors are licensed to release radioisotopes on the basis of erroneous models for radiation risk which significantly understate their true risk." Dr. Busby's views, though, largely reflect a generic objection to commercial nuclear power and to the Commission's regulations on dose limits, issues beyond the scope of these license amendments. His views amount to an impermissible attack on our reactor safety regulations. See 10 C.F.R. § 2.758. While Dr. Busby claims that "Millstone is particularly dirty," he provides no data indicating any current or ongoing problem with violations of effluent release limits at Millstone. Much of Dr. Busby's -- and the petitioners' -- references to Millstone's "notoriety" appear based upon historical events from several years ago which have not been linked to Millstone's current management or radiological effluent program, and therefore do not relate directly to these discrete license amendments.⁽²⁾

In sum, the petitioners have not pointed to any factual or legal error in CLI-01-24 ^A. Accordingly, we deny their petition for reconsideration.

Conclusion

For the reasons given in this decision, the petitioners' petition for reconsideration of CLI-01-24 ^A is **denied**.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of January, 2002.

1. DNC's Response in Opposition to Connecticut Coalition Against Millstone and STAR Foundation Petition for Reconsideration of CLI-01-24 ^A (Jan. 2, 2002) at 4.

2. In a footnote, the petitioners also refer vaguely to the testimony of Mr. Clarence Reynolds, which took place in an unrelated state court proceeding on March 12, 2001. The petitioners, however, did not provide the testimony, and the Commission has no basis to conclude that it has any relevance to the requested license amendments. Moreover, the testimony of Mr. Reynolds could have been raised or submitted at the time of the petitioners' earlier appeal and therefore is untimely and inappropriate as a basis for reconsideration. See Sacramento Municipal Utility District (Rancho Seco Nuclear

- Generating Station), CLI-93-12, 37 NRC 355 (1993).



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UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

DOCKETED 11/21/2002

COMMISSIONERS

SERVED 11/21/2002

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
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DOMINION NUCLEAR CONNECTICUT, INC.)
)
)
(Millstone Nuclear Power Station, Unit No. 3;)
Facility Operating License NPF-49))

Docket No. 50-423-LA-3

CLI-02-22

MEMORANDUM AND ORDER

This reactor license amendment proceeding arises from Northeast Nuclear Energy Company's ("NNECO") request, dated March 19, 1999, to increase the storage capacity of the spent fuel pool at the Millstone Unit No. 3 ("Millstone 3") reactor through the use of high-density storage racks. On August 8, 2002, the Licensing Board denied the request of the intervenors, Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone (collectively, "CCAM/CAM"), for an evidentiary hearing on a reopened contention and terminated the proceeding. CCAM/CAM petitioned the Commission for review. We grant review but affirm the Board's decision.-We give our reasons below.- - -

I. BACKGROUND¹

On March 19, 1999, NNECO submitted a license amendment application to increase the capacity of its Millstone 3 spent fuel pool from 756 to 1860 fuel assemblies. CCAM/CAM filed a joint petition to intervene, followed by a supplemental petition containing eleven proposed contentions. The Board admitted three contentions, including Contention 4, the sole contention at issue here. Contention 4 challenged use of "administrative controls" to prevent a criticality accident in the spent fuel pool.² The Board summarized and restated Contention 4 as follows:

Undue and Unnecessary Risk to Worker and Public Health and Safety

The new set of administrative controls trades reliance on physical protection for administrative controls to an extent that poses an undue and unnecessary risk of a criticality accident, particularly due to the fact that the licensee has a history of not being able to adhere to administrative controls with respect, inter alia, to spent fuel pool configuration.³

After oral argument pursuant to 10 C.F.R. Part 2, Subpart K, the Board found that "NNECO has demonstrated that it can adhere to administrative controls, with adequate safety margin and defense-in-depth, without posing an undue or

unnecessary risk to plant workers or the public." ⁴ In reaching this conclusion, the Board pointed to several factors: the conservatively estimated error rate for fuel assembly misplacement; safety margins maintained by rack reactivity requirements; the use of soluble boron to add defense-in-depth; and additional margin introduced by conservative assumptions in criticality calculations.⁵ We denied CCAM/CAM's petition for review of the Board's fact finding on Contention 4 because we found the Board's conclusion "well grounded in the extensive original record."⁶

While their petition for review was pending, CCAM/CAM filed a motion to reopen the record based on recent reports of two fuel rods missing (since approximately 1980) at another NNECO reactor at the Millstone site, Millstone Unit No. 1 ("Millstone 1").⁷ CCAM/CAM also alleged a discovery violation by NNECO in not updating prior discovery responses to include information on the missing fuel rods. We referred the motion to reopen to the Board.

CCAM/CAM's motion had two prongs. First, they alleged that, had the Board been aware that NNECO could not account for two fuel rods, it would have been unable to make its fact finding that NNECO has demonstrated that it can adhere to administrative controls with an adequate safety margin. Second, CCAM/CAM stated that NNECO had a duty to amend its prior discovery response on the question of fuel handling mishaps at Millstone Station. The Board initially denied the CCAM/CAM motion.⁸ The Board held that, despite the missing fuel rods, its conclusion -- that, following restart of Millstone 3, NNECO had demonstrated the ability to carry out administrative controls adequately -- did not change. Further, the Board ruled that the licensee did not have an obligation to update discovery after the Board's decision in LBP-00-26, which was issued on October 26, 2000, because NNECO "apparently did not become aware of the missing fuel rods until November 2000."⁹

CCAM/CAM sought reconsideration. They asserted that the adjudicatory record was incomplete regarding the missing rods, that it was likely that the licensee was aware of the missing rods during discovery, and that there was no sworn testimony on this point. Upon reconsideration, the Board found that most of CCAM/CAM's claims, including their discovery claim, lacked merit and did not require reopening the record. But the Board expressed concern that NNECO's loss of the fuel rods "could credibly be attributable to a failure of the administrative controls governing accountability for fuel rods [at Millstone 1.]" ¹⁰ The Board decided to inquire whether any "failure" of administrative controls at Millstone 1 "could carry over" to implementing administrative controls at Millstone 3.¹¹ The Board therefore reopened the record on Contention 4, but limited its inquiry to the commonality of administrative controls at Millstone 1 and Millstone 3:

[W]e find it appropriate to grant CCAM/CAM's motion for reconsideration ... to the extent it bears upon both the adequacy of administrative controls at the Millstone-3 [spent fuel pool] and DNC's ability or willingness to implement such controls successfully. The scope of this reconsideration is limited to the procedures or controls for management of the [spent fuel pools] and their modes of execution that may be common to Millstone-1 and Millstone-3.¹²

After a second round of written submissions and oral argument by the parties, the Board denied CCAM/CAM's request for a further evidentiary hearing on reopened Contention 4 and terminated the proceeding.¹³ In its denial order, the Board described the circumstances surrounding the loss of the two fuel rods and contrasted fuel handling procedures now used at Millstone 3 with those used at Millstone 1 at the time the loss occurred.¹⁴ The Board concluded that the deficiency at Millstone 1 was a result of unusual circumstances; that the missing rods are unlikely to cause a public health or safety problem; that the current Millstone 3 program adequately implements the requirements for locating spent fuel bundles properly; and that CCAM/CAM had not demonstrated "any significant factual disputes of a type that would warrant an evidentiary hearing."¹⁵ The Board viewed CCAM/CAM's alleged failure to timely report the missing fuel rods as "mere confusion as to what had occurred" and as "information ... peripheral at best to the licensee's ability or willingness to carry out ... administrative controls adequately."¹⁶

CCAM/CAM again petitioned for Commission review.¹⁷

II. DISCUSSION

A. Governing Legal Standards

Review of final decisions of the Board in a Subpart K proceeding is governed by 10 C.F.R. § 2.786.¹⁸ The criteria for the Board to designate issues for an adjudicatory hearing after the parties' written submissions and oral argument are set out in 10 C.F.R. § 2.1115. We outline these standards below in order to provide a framework for evaluating the CCAM/CAM petition for review.

1. 10 C.F.R. § 2.786

A petition for review of a final Board decision must contain concise statements of why the decision is erroneous and why the Commission should exercise review.¹⁹ The Commission may grant review when there is a substantial question with regard to one or more of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.²⁰

CCAM/CAM's petition nominally invokes a combination of the first and third considerations. CCAM/CAM first assert that the Board has decided a substantial and important question of law, policy and discretion erroneously and that the decision "has potential to perpetuate much mischief, not just in terms of the present licensee but in all future adjudications."²¹ But the essence of the petition is CCAM/CAM's assertion, under the "clearly erroneous" ground, that the Board improperly found the absence of significant factual disputes of a type that would warrant a Subpart K evidentiary hearing. We ordinarily do not review fact-specific Board decisions, absent obvious error.²² Here, though, we have decided to review the Board decision so that we can offer clarification of the parties' roles in a Subpart K adjudicatory proceeding, and set out our own reasons, in addition to the Board's, for why CCAM/CAM's reopened Contention 4 lacks merit.²³

2. 10 C.F.R. § 2.1115

As we explained earlier in this proceeding, 10 C.F.R. § 2.1115 describes a two-part test to determine whether a contention in a Subpart K proceeding warrants a full evidentiary hearing:

- (1) There must be a genuine and substantial dispute of fact which can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and
- (2) the decision of the Commission is likely to depend in whole or in part on the resolution of that dispute.²⁴

Thus, to go forward after the parties' written submissions and oral argument, there must be specific factual controversies, and additional documentary evidence or live testimony must be necessary for the Board to decide those facts, and the facts in question must require resolution for the Board to decide the case.

As we held last year, Subpart K "authorizes the board to resolve disputed facts based on the evidentiary record made in the abbreviated proceeding, without convening a full evidentiary hearing, if the board can do so with 'sufficient accuracy.'"²⁵ In short, Subpart K (which implements the Nuclear Waste Policy Act, 42 U.S.C. §§ 10131 et seq.) "contemplate[s] merits rulings by licensing boards based on the parties' written submissions and oral arguments, except where a board expressly finds that 'accuracy' demands a full-scale evidentiary hearing."²⁶ Unsupported factual allegations are inadequate to produce a controversy.²⁷ "The proponent of a contention must supply, at the written submission and oral argument stages of a Subpart K proceeding, all of the facts upon which it intends to rely at the formal evidentiary hearing, should one prove necessary."²⁸

Before evaluating whether the Board correctly applied the law to the facts, we turn now to a description of the facts, issues, and arguments that were -- or were not -- before the Board when it made its decision.

B. Information before the Board

In its written presentation, Dominion Nuclear Connecticut (which replaced NNECO as licensee in 2001) submitted abundant information in the form of a summary, exhibits, and sworn testimony consisting of affidavits of a supervisor from the reactor engineering team at Millstone 3, the supervisor for nuclear operations and support for Millstone 3, and an outside expert panel. These witnesses relied on the report of the Fuel Rod Accountability Project (FRAP Report), which was an investigation NNECO undertook regarding the loss of the two fuel rods, and a root cause analysis of the FRAP report. The NRC Staff provided a written summary, along with affidavits of several experienced scientists and engineers, including NRC's senior resident inspector at Millstone 3, Antone Cerne.

These submissions described in detail the extensive investigation of the loss of the two fuel rods; the likely modes of disposition of the rods; the differences in fuel handling procedures used at Millstone 1 at the time of the loss and at Millstone 3 today; and the two most recent (and successful) refuelings at Millstone 3. This information directly addressed the question the Board defined when it reopened the adjudicatory proceeding: i.e., whether there is any commonality between fuel handling procedures at the time of the accountability failure at Unit 1 and the present methods in use at Millstone 3.²⁹

CCAM/CAM, in their written submission, did not adequately controvert any of the Dominion-Staff information on the commonality issue; indeed, they failed to dispute most of the information at all. Instead, they stressed a perceived problem in discovery during this adjudication -- a topic the Board had not included in its reconsideration order -- and in informing the Board about the loss of the two fuel rods. The latter topic was not even within the scope of CCAM/CAM's original contention or its motions to reopen and reconsider. CCAM/CAM continued to assert that NNECO had an obligation to inform

them of the missing rods immediately by updating one of NNECO's discovery responses in this proceeding. The sole declaration CCAM/CAM provided was given by one of its members, a former employee of NNECO, who provided neither technical expertise nor relevant eyewitness observations. CCAM/CAM also submitted four other items: an NRC inspection report; a report, entitled "Failure to Report Missing or Lost Radioactive Fuel Rods in a Timely Manner," prepared by NRC's Office of Investigations; a newspaper article; and a licensee event report regarding Millstone 2.³⁰ None addressed the commonality issue.

CCAM/CAM formally acknowledged that the Board had limited the scope of the reopened proceeding to the commonality issue.³¹ They nonetheless dwelt on NNECO's allegedly untimely disclosure of the missing fuel rods to CCAM/CAM, the Board, and the NRC Staff -- issues far outside the scope the Board had established.

At the Subpart K oral argument, CCAM/CAM strayed even further from the limited subject of the reopened proceeding.³² They concentrated nearly exclusively on what they considered the "pervasive issue," the "culture" at Millstone,³³ an issue not comprehended within the reopened Contention 4. More important than what CCAM/CAM did before the Board was what they did not do. They cited no specific deficiencies in Millstone 3 procedures, and they provided no factual basis to suggest that Millstone 3's current procedures for accounting and control of special nuclear material remotely resemble the procedures in place at Millstone 1 in 1980, when Millstone's former operator lost track of the two fuel rods.

C. Analysis of the Board's Decision

Against this backdrop, the Board found that the procedures used at Millstone 3 "are sufficient to preclude, with high reliability, an accidental criticality in the spent fuel pool."³⁴ A further evidentiary hearing is not necessary for us to uphold this conclusion. The Commission "generally will defer to our licensing boards' judgment on when they will benefit from hearing live testimony and from direct questioning of experts or other witnesses."³⁵

1. Loss of the Fuel Rods

In their petition for Commission review, CCAM/CAM continue to emphasize the loss of the fuel rods, per se, and the timing of NNECO's reporting of the loss. They apparently believe that the loss of the rods "speaks for itself" and would have the Commission deny Dominion's license amendment on a ground akin to the tort doctrine of *res ipsa loquitur*; i.e., they ask us to infer negligence and/or poor safety culture and/or wrongdoing because the occurrence of the loss would not happen in the ordinary course of events without the fault of the licensee. The Board found the loss itself sufficient to reopen the proceedings. Indeed, the Board stated that the one matter giving support to the intervenors' motion for reconsideration was "the loss of the fuel rods itself and the failure of DNC thus far, after more than four months' search, to have located the rods or accounted for their disposition."³⁶ Although the loss of the fuel rods at Millstone 1 may warrant a hard look at the Millstone 3 situation, we will not rescind the Millstone 3 license amendment on this basis alone.³⁷

The obligation of CCAM/CAM did not end with the reopening of this proceeding. Without presenting probative technical evidence of their own, they have tried to stretch a 20-some-year-old loss at a different reactor (indeed, a different kind of reactor),³⁸ under different ownership, into a justification for denying a spent fuel expansion amendment at the Millstone 3 unit today. As the Board held, the record here amply shows the dissimilarities in procedures and practices in the two settings.³⁹

Some examples of the differences between Millstone 1 (in 1980) and Millstone 3 (today) are: (1) procedures to implement reactivity limits at Millstone 3 include dual review of the determination that an assembly meets the limits; (2) comprehensive special nuclear material accounting procedures at Millstone 3 cover both fuel assemblies and fuel rods (unlike the older Millstone 1, which had no procedure for individual rods); (3) fuel location at Millstone 3 is tracked on both a paper card file and a computer-based system called "Shuffleworks," which was not used at Millstone 1 when the loss occurred; (4) individual fuel rods at Millstone 3 are controlled in a fuel storage box, which is placed in a basket and stored in the same manner as a fuel assembly; and (5) Millstone 3, a pressurized water reactor, does not have local power range monitors, the devices for which the missing rods at Millstone 1 are believed to have been mistaken when they were removed from the spent fuel pool.⁴⁰ This list is by no means exhaustive. We also note that the Millstone 3 license amendment deals with the storage of fuel assemblies, while the Millstone 1 event involved fuel rods.

The Board accurately defined the scope of the current inquiry to be a comparison of the circumstances and practices at the time of the loss at Millstone 1 with the current circumstances and practices at Millstone 3 to determine whether Millstone 3 is vulnerable to a similar loss now.⁴¹ Dominion and the NRC Staff supplied the Board the information it needed to make the relevant determination. CCAM/CAM merely complained in the most general terms. Given the disparity in evidence, Dominion easily met its burden of proof regarding reopened Contention 4.⁴²

2. Reporting the Loss

As to the timeliness of NNECO's reporting the loss of the fuel rods, the Board described this issue as "peripheral at best to

the Licensee's ability or willingness to carry out [spent fuel pool] administrative controls adequately." ⁴³ When CCAM/CAM sought to reopen Contention 4, they raised the licensee's alleged discovery violation regarding notification about the missing fuel rods, but the Board excluded this matter when it set the boundaries for the reopened proceeding.⁴⁴ Thus, the discovery violation was not properly within the reopened proceeding.

During the course of the Subpart K oral argument, the intervenors shifted the focus of the reporting issue from the alleged discovery violation to an alleged failure to report the loss of the fuel rods to the NRC Staff and the Board. But CCAM/CAM had never mentioned this in their contention or in the reconsideration motion. The Board certainly did not admit it. As we reiterated just recently, "[t]he NRC's 'longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions' in order to give opposing parties 'advance notice of claims and a reasonable opportunity to rebut them.'" ⁴⁵ This policy is particularly important in a Subpart K proceeding, as the parties must submit their evidentiary case 15 days prior to the oral argument. This submission includes:

a detailed written summary of all the facts, data, and arguments which are known to the party at such time and on which the party proposes to rely at the oral argument either to support or to refute the existence of a genuine and substantial dispute of fact. Each party shall also submit all supporting facts and data in the form of sworn written testimony or other sworn written submission. ...

Only facts and data in the form of sworn written testimony or other sworn written submission may be relied on by the parties during oral argument, and the presiding officer shall consider those facts and data only if they are submitted in that form.⁴⁶

Strict adherence to this procedure is necessary to prevent one party from ambushing another with last-second new theories or claims. It was impermissible, in short, for CCAM/CAM to litigate a "failure to report" claim that they had not raised in their contention. That claim was not properly before the Board in the reopened proceeding.⁴⁷

In any event, as the Board held, the "failure to inform" issue is "peripheral" to the main question raised by CCAM/CAM's Contention 4 -- i.e., the reliability of administrative controls for criticality control in the Millstone 3 spent fuel pool.⁴⁸ As CCAM/CAM sees the case, the failure to report issue is a subset of a key "culture" or character issue that lies at "the heart" of Contention 4.⁴⁹ CCAM/CAM also contend that the Board erred in considering the alleged failure to report in isolation, apart from NNECO's "dismal history of admitted criminal conduct and flagrant violation of its license and federal requirements governing operations of nuclear power plants." ⁵⁰ Further, they maintain that the Board failed to consider NNECO's retaliatory employment practices and fostering a work environment that was not safety-conscious.⁵¹ But it is not self-evident why allegations concerning NNECO's past behavior relate to the proper implementation of Dominion's current license. And CCAM/CAM have certainly offered no evidence on the links, if any, between past acts and the amendment.

In another recent Millstone case, we addressed the "character" issue and the part it plays in NRC adjudications.⁵² There, we noted the strict limits that we place on such contentions; specifically, we said they must relate *directly* to the proposed licensing action.⁵³ In that case, CCAM and another petitioner had raised the events leading to NNECO's guilty plea and conviction in the mid-1990s, but made no attempt to demonstrate how these past events had a direct bearing on the specific license amendments then before a different Licensing Board. We concluded that "[t]here simply has been no link established between the individuals or direct management responsible for falsifying reactor operator examination results years ago, at issue in the NNECO conviction, and Millstone's effluent monitoring program or the managers currently responsible for overseeing it." ⁵⁴ We stated that we expect character issues to be "directly germane to the challenged licensing action." ⁵⁵

Similarly, in the instant case, CCAM/CAM attempt to insert a "character" issue into a license amendment proceeding raising chiefly technical matters. Here, as in the prior Millstone case, the Board recognized that CCAM/CAM did not establish the required link between past behavior and the licensing action contested in this case. In particular, CCAM/CAM fail to explain how NNECO's reporting delay, if indeed there was one, bears on the ability of a new licensee, Dominion Nuclear, to implement administrative criticality controls that the NRC Staff and the Board have found fully protective of the public health and safety.

III. CONCLUSION

For the foregoing reasons, the Commission grants review and affirms LBP-02-16.
IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 2002..UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

1. On March 31, 2001, Dominion Nuclear Connecticut, Inc. became the licensee and party in interest in this matter.
2. The other admitted contentions also involved criticality concerns. The parties resolved Contention 5, dealing with the surveillance schedule for soluble boron in the spent fuel pool, by an agreed upon license condition, subsequently adopted by the Board. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), LBP-00-26, 52 NRC 181, 201 (2000). After oral argument, the Board denied CCAM/CAM's request for a further evidentiary hearing on Contention 6, which questioned the licensee's ability to take credit in criticality calculations for enrichment, burnup, and decay time limits. See *id.* at 202-214. On petition for review, the Commission solicited briefs from the parties in this case and in a similar ongoing proceeding. See CLI-01-03, 53 NRC 22 (2001). Ultimately, the Commission approved the Board's decision on the purely legal question raised in Contention 6. See CLI-01-10, 53 NRC 353 (2001).
3. LBP-00-2, 51 NRC 25, 34 (2000).
4. LBP-00-26, 52 NRC at 200.
5. See *id.*
6. CLI-01-03, 53 NRC at 26. CCAM/CAM provided no probative evidence regarding human factors and expressly accepted NNECO's criticality calculations, which showed that criticality would not occur in the spent fuel pool even with concurrent misplacements of several fuel assemblies and substantial dilution of the soluble boron. See *id.* at 27. To demonstrate that an evidentiary hearing is warranted, a party must support factual allegations with experts or documents. NNECO presented specific facts. CCAM/CAM, however, made only general allegations insufficient to trigger an evidentiary hearing under Subpart K. See *id.*
7. The reactor core at Millstone 1, a boiling water reactor, consisted of 580 fuel assemblies. The fuel assembly from which the missing fuel rods were removed contained 49 such rods. Other fuel assemblies at Millstone 1 contained either 49 or 64 fuel rods. At Millstone 3, a pressurized water reactor, the core consists of 193 fuel assemblies, each containing 264 individual fuel rods. See "NRC Staff Brief and Summary of Relevant Facts, Data and Arguments upon Which the Staff Proposes to Rely at Oral Argument on Contention 4 in the Reopened Proceeding" with attached Affidavit of Antone C. Cerne, Cerne Affidavit at ¶ 9 (Mar. 18, 2002) ("Cerne Affidavit").
8. See CLI-01-03, 53 NRC at 29; LBP-01-01, 53 NRC 75 (2001).
9. See LBP-01-01, 53 NRC at 79-80. The Board was mistaken. Actually, the record now indicates that NNECO had first discovered the possibility that the rods were missing in September 2000.
10. LBP-01-17, 53 NRC 398, 406-07 (2001).
11. *Id.* at 408.
12. *Id.* (emphasis added).
13. See LBP-02-16, 56 NRC ___ (Aug. 8, 2002).
14. See *id.* at ___, slip op. at 6-11.

15. See *id.* at ___, slip op. at 19.

16. See *id.*, at ___, slip op. at 15-16.

17. During the pendency of the reopened proceeding, CCAM/CAM offered a late-filed terrorism contention. The Board rejected the contention, but referred its ruling to the Commission. See LBP-02-05, 55 NRC 131 (2002). We accepted the referral, which remains under Commission consideration. See CLI-02-05, 55 NRC 161 (2002).

18. As Subpart K has no review provisions of its own, the Subpart G rule is applicable by virtue of 10 C.F.R. § 2.1117.

19. See 10 C.F.R. § 2.786(b)(2)(iii)-(iv).

20. 10 C.F.R. § 2.786(b)(4)(i)-(v). See also *Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-93-8, 37 NRC 181, 184 (1993).

21. *Petition for Review* at 6-9 (Aug. 23, 2002).

22. *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)*, CLI-01-11, 53 NRC 370, 382 (2001), *aff'd sub nom. Orange County v. Nuclear Regulatory Commission*, Docket No. 01-1073 and 01-1246, unpublished decision (D.C. Cir. Sept. 19, 2002). For reasons set forth in Section II.C.2 of this order, the Board's factual error described in note 9, *supra*, is immaterial.

23. See 10 C.F.R. § 2.786(b)(4)(v) (Commission may grant review for "any other consideration" it deems in "the public interest"); see generally *Safety Light Corp.*, CLI-92-12, 36 NRC 79, 85-86 (1992).

24. CLI-01-03, 53 NRC at 26.

25. *Shearon Harris*, CLI-01-11, 53 NRC at 385.

26. *Id.*

27. See *Millstone*, CLI-01-03, 53 NRC at 27.

28. *Shearon Harris*, CLI-01-11, 53 NRC at 388.

29. As noted, *supra*, the Board summarized the circumstances surrounding the loss of the two fuel rods and the differences between administrative controls at Millstone 1 and Millstone 3 in its recent decision. See LBP-02-16, 56 NRC at ___, slip op. at 6-11. The Board based its narrative on the voluminous affidavits, other documents, and arguments submitted by Dominion and the NRC Staff. We see no need to elaborate here on the Board's description and conclusions.

30. See "Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Detailed Written Summary Pursuant to 10 CFR Section 2.1113" (Mar. 18, 2002).

31. See *id.* at 2-3.

32. As an example, CCAM/CAM's attorney at the beginning of her presentation outlined the three questions she planned to address:

When does the energy level taken to create a paper mountain in these proceedings equal the energy that is being given off and will be in the future from two missing high level radioactive spent fuel rods, and is there a point when that energy level will be equal to the energy being emitted by those spent fuel rods, and is there a point under law that will make it all right at that point, if the rods are never found? ... The second question is, of course, where are the rods? ... And the third question is, why wasn't the fact of the missing rods disclosed during the earlier portion of these proceedings when we went through a rather intensive time-limited discovery process?

Transcript of Hearing at 708-709 (Apr. 2, 2002) ("Tr.").

33. See Tr. at 728; see also, e.g., Tr. at 730, 736, 740, 744, 826, 836, 837, 839.

34. LBP-02-16, 56 NRC at ___, slip op. at 13.

35. Shearon Harris, CLI-01-11, 53 NRC at 386.

36. LBP-01-17, 53 NRC 398 at 407. The Board reopened the proceeding specifically because none of the licensee's affidavits provided information regarding the relationship, if any, between current operations at Millstone Unit 3 and the errors leading to the misplacement or loss of the two fuel rods from Millstone Unit 1.

37. The NRC Staff issued the requested license amendment on November 28, 2000, after concluding that the amendment posed "no significant hazards considerations" under 10 C.F.R. § 50.92. See 65 Fed. Reg. 75,736 (Dec. 4, 2000).

38. Millstone 1 is a boiling water reactor, while Millstone 3 is a pressurized water reactor. See note 7.

39. See LBP-02-16, 56 NRC at ___, slip op. at 8-12.

40. See "Summary of Facts, Data, and Arguments on Which Dominion Nuclear Connecticut Will Rely at the Reopened Proceeding Subpart K Oral Argument" at 9-21 (Mar. 18, 2002).

41. Antone Cerne inspected and supervised other NRC inspectors during Millstone 3 refueling activities in May-June, 1999, and in February-March, 2001. He stated that

the entire body of administrative controls employed in the refueling operations that I have inspected contains both the procedural specificity and the redundancy necessary to preclude a single human error from presenting a challenge to nuclear safety at Millstone Unit 3.

Cerne Affidavit at ¶ 14.

42. To reopen the proceeding, the intervenors bear the burden of establishing that the criteria of 10 C.F.R. § 2.734 are met. Thereafter, to move on to a further evidentiary hearing, the intervenors' written submission and oral argument had to meet the criteria described in 10 C.F.R. § 2.1115. However, after the intervenors met their threshold burden, the ultimate burden of proof rested with the proponent of the license amendment. Dominion amply met that burden here. Of course, it is not possible for a licensee to provide proof that uncertain future events could never occur. See CLI-01-03, 53 NRC at 27. For a fuller discussion of the Board's role in resolving fact questions in Subpart K proceedings, see Shearon Harris, CLI-01-11, 53 NRC 370, 383-386.

43. LBP-02-16, 56 NRC at ___, slip op. at 15-16.

44. The alleged discovery violation did not prejudice CCAM/CAM. They became aware of the missing rods, the proceeding was reopened, and CCAM/CAM had every opportunity to argue its point of view on the import of the missing Millstone 1 fuel rods for spent fuel handling and storage at Millstone 3.

45. Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC ___, ___, slip op. at 14 (Oct. 1, 2002), quoting Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998).

46. 10 C.F.R. § 2.1113.

47. As a result, the Board should not have entertained discussion of it during oral argument.

48. See LBP-02-16, 56 NRC at ___, slip op. at 15-16. This is not to say that the alleged reporting delay is insignificant. The NRC's Office of Investigations conducted a thorough inquiry into whether there was any deliberate effort to delay reporting the loss to the NRC. The investigation is described in a written report that CCAM/CAM attached as an exhibit to their cursory written summary. The Office of Investigations "did not substantiate that either the licensee or licensee personnel/contractors deliberately delayed properly reporting to the NRC that two fuel rods/pins were unaccounted for/missing/lost" from the Millstone 1 spent fuel pool. Office of Investigations Report on Case No. 1-2001-007, "Millstone Nuclear Power Station, Unit 1: Failure to Report Missing or Lost Radioactive Fuel Rods in a Timely Manner" at 1 (Sept. 28, 2001).

49. Petition for Review at 9.

50. Id. at 7.

51. CCAM/CAM, however, did not offer any sworn testimony or documents pertaining to the character issue in their written summary in the reopened proceeding, nor did they develop the issue adequately during their initial presentation regarding Contention 4. See note 6, supra, and LBP-00-26, 52 NRC at 189-91, 197-200; CLI-01-03, 53 NRC at 25-27.

52. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-67 (2001), reconsideration denied, CLI-02-01, 55 NRC 1 (2002), and references cited therein.

53. See CLI-01-24, 54 NRC at 366.

54. Id.

55. Id. at 367.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Form C-A, Memorandum and Order (CLI-02-01)(January 30, 2002), and Memorandum and Order (CLI-02-22)(November 21, 2002) have been served on the following via U.S. Mail, postage pre-paid, on February 28, 2003:

U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

Office of the Secretary
ATTN: Rulemaking and Adjudication Staff
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

Office of Commission Appellate Jurisdiction
U.S. Nuclear Regulatory Commission
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Atomic Safety and Licensing Board Panel
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A handwritten signature in cursive script, appearing to read "Ann P. Hodgdon", is written over a horizontal line.