IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE, Petitioner, v. UNITED STATES OF AMERICA and UNITED STATES NUCLEAR REGULATORY COMMISSION, Respondents, and DOMINION NUCLEAR CONNECTICUT, Intervenor.	Case No. 03-4372

FEDERAL RESPONDENTS' MOTION TO DISMISS

The Connecticut Coalition Against Millstone has filed this case challenging a decision by the U.S. Nuclear Regulatory Commission, CLI-02-22, 56 NRC 213, issued on November 21, 2002.[1] A copy of the decision is attached as Exhibit 1. Connecticut Coalition has invoked this Court's jurisdiction under the Administrative Orders Review Act, 28 U.S.C. §2341, et seq., commonly known as the Hobbs Act. However, as we point out below, the challenge is fatally flawed in that (1) it was filed more than 60 days after the decision that it challenges, and (2) it does not challenge a "final" agency action. Moreover, Connecticut Coalition cannot "amend" its petition to designate a later "final" order for which a petition would be timely. Accordingly, the petition for review should be dismissed.

I. Factual Background.

A. The Administrative Case.

The Millstone Power Station is a 3-unit nuclear power plant operated by Dominion Nuclear Connecticut under NRC license and located near New London, Connecticut. Dominion

[1]Decisions of the Commission are designated by the prefix "CLI" while decisions of the NRC's Atomic Safety and Licensing Board are designated by the prefix "LBP."

Nuclear has ceased operations at Unit No. 1 and is in the process of decommissioning it, but Units 2 and 3 are still in operation. In March, 1999, Northeast Utilities, the previous Millstone licensee, submitted an application for an amendment to the Millstone Unit 3 license.[2] If granted, the amendment would allow the storage of more spent fuel by allowing the licensee to install additional racks to hold spent fuel elements in a previously empty area of the spent fuel pool. Connecticut Coalition filed a request for a hearing and, together with the Long Island Coalition Against Millstone (which is not participating in this case), submitted eleven proposed "contentions" or claims to contest the application.

The Commission referred the application and the hearing request to the NRC's Atomic Safety and Licensing Board, which conducted a hearing on the application under the NRC's statutorily-mandated procedures for proceedings to expand spent fuel pools. See generally 42 U.S.C. §10101, et seq., 10 C.F.R. Part 2, Subpart K. The Licensing Board admitted both organizations as a "joint" party to the proceeding and admitted three contentions to be litigated. See LBP-00-02, 51 NRC 25 (Feb. 9, 2000). The three contentions, numbered 4, 5, and 6 in Connecticut Coalition's submission, all dealt with the means by which the licensee would prevent criticality accidents in the re-configured spent fuel pool. See LBP-00-02, 51 NRC at 32-41. After written submissions and oral argument, the Licensing Board issued a Memorandum and Order that resolved Contention 5 by adopting an agreed-upon license condition, rejected the other two admitted contentions (Contentions 4 and 6), and terminated the proceeding. See LBP-00-26, 52 NRC 181 (Oct. 26, 2000). Connecticut Coalition immediately sought Commission review of the Licensing Board's rejection of the other two admitted contentions.

Under the Atomic Energy Act, the NRC may issue an amendment on an immediately effective basis, subject to the possibility of its being withdrawn in a subsequent administrative

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[2]On March 31, 2001, Dominion Nuclear Connecticut purchased the Millstone facility from Northeast Utilities, the prior owner and licensee.

hearing, if the NRC makes a finding that the amendment involves "no significant hazards considerations." See 42 U.S.C. §2239(a). See also 10 C.F.R. §§50.91 and 50.92. The NRC Staff issued a "proposed" finding of no significant hazards considerations when it announced the application for the amendment and the opportunity for members of the public to request a hearing. See 64 Fed. Reg. 48672 (Sept. 7, 1999). On November 28, 2000, after the Licensing Board had terminated the proceeding but during the Commission's review, the NRC Staff made a finding that the amendment involved no significant hazards considerations and then issued the amendment. See 65 Fed. Reg. 75736 (Dec. 4, 2000). Thus, the Millstone operators were immediately able to implement the amendment, subject to the possibility that the Commission might grant a petition for review, reverse the Licensing Board, and revoke the amendment.

While Commission review of the two rejected contentions was proceeding, Connecticut Coalition filed a Motion to Reopen Contention 4 that eventually led to the Commission decision at issue in this case. The Motion to Reopen was based upon the discovery that two fuel rods had been missing from the Millstone Unit No. 1 spent fuel pool since approximately 1980. This information, according to the Connecticut Coalition, raised a question whether the licensee had sufficient administrative controls to keep track of the spent fuel rods that would be stored at Millstone Unit No. 3. The Commission referred the Motion to Reopen to the Licensing Board for further proceedings. See CLI-00-25, 52 NRC 355 (Dec. 21, 2000).

The Licensing Board initially denied the Motion to Reopen. But after reconsidering its decision, it reopened the proceeding with regard to Contention 4 and conducted a hearing with written submissions and an oral argument. Ultimately, the Licensing Board denied Connecticut Coalition's request for a full-scale evidentiary hearing on the newly discovered administrative

controls issue. See LBP-02-16, 56 NRC 83 (Aug. 8, 2002). The Commission decision under review in this case, CLI-02-22, affirmed that Licensing Board decision.[3] See Exhibit 1, supra.

However, CLI-02-22 was not the "final" decision in the Millstone proceeding. On November 1, 2001, while the Licensing Board was reviewing the administrative controls issue in the "reopened" proceeding, Connecticut Coalition submitted a new contention under the NRC's rules for "late-filed" contentions. The new contention alleged that in light of the attacks of September 11, 2001, the National Environmental Policy Act ("NEPA") required the NRC to prepare an Environmental Impact Statement ("EIS") discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool and specifically weighing the costs of a possible terrorist attack against the alternatives to spent fuel pool expansion such as dry cask storage.

The Licensing Board ruled that the contention was inadmissible under the Commission's regulations that prohibit litigation on issues arising out of "attacks and destructive acts by enemies of the United States" or "defense activities." See LBP-02-05, 55 NRC 131, 142-45 (Jan. 24, 2002), citing 10 C.F.R. §50.13. But the Licensing Board referred the decision to the Commission for further consideration. See LBP-02-05, 55 NRC at 145-46. The Commission grouped that referral together with three other cases that raised the same or similar issues and considered it separately from the administrative controls issue, a fact that the Commission noted in CLI-02-22. See CLI-02-22, 56 NRC at 221, n. 17.

On December 18, 2002, the Commission issued a decision in each of the four cases that raised the issue of the possible impacts of terrorism. In each case, the Commission held that NEPA did not require the Commission to prepare an EIS to consider terrorism issues. One

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[3]While the Licensing Board was considering the Motion to Reopen based upon the new claim, the Commission reviewed the Licensing Board's rejection of the original Contention 4 based upon the record to that date. Subsequently, the Commission denied both the petition for review of the Board's decision on the original Contention 4, see CLI-01-03, 53 NRC 22 (Jan. 17, 2001), and a separate petition for review of the Board's dismissal of Contention 6. See CLI-01-10, 53 NRC 353 (May 10, 2001). Those decisions are not at issue in this case.

of those four decisions was CLI-02-27, 56 NRC 367, which affirmed the Licensing Board's rejection of Connecticut Coalition's contention on NEPA and terrorism. A copy of that decision is attached as Exhibit 2. That decision was the last order in the Millstone Unit No. 3 spent fuel pool expansion proceeding. Prior to CLI-02-27, the possibility existed that the Commission could reverse the Licensing Board and deny the requested amendment; thus there was no "final order" in the proceeding until the issuance of CLI-02-27.

B. Procedural History of This Case.

The Commission issued CLI-02-22 on November 21, 2002. On December 23, 2002, Connecticut Coalition mailed a "Notice of Appeal" to the parties to the Unit 3 spent fuel pool proceeding, stating it "herewith serves notice of appeal to the United States Court of Appeals for the Second Circuit of the final decision of the United States Nuclear Regulatory Commission issued on November 21, 2002 denying its petition for an evidentiary hearing and terminating the proceedings." A copy of this "Notice" is attached as Exhibit 3. The NRC replied that it would "take no action on the Notice . . . We are aware of no statute or rule that authorizes such a filing." A copy of the Reply is attached as Exhibit 4. To our knowledge, Connecticut Coalition did not file the "Notice" with this Court and did not file a petition for review at that time.

On February 18, 2003, 60 days after the issuance of CLI-02-27, but 87 days after the issuance of CLI-02-22, Connecticut Coalition filed this petition for review challenging CLI-02-22, the decision referenced in the "Notice" of December 23, 2002. However, the petition did not seek review of CLI-02-27, the final order in the Millstone administrative proceeding.

Subsequently, on February 27, 2003, the Connecticut Coalition filed a "Pre-Argument Statement" with this Court in which the Coalition indicated that not only did it seek review of CLI-02-22, but also of CLI-02-01, a Commission decision in a completely unrelated proceeding involving a different license amendment that affected both Units 2 and 3 at the Millstone facility.

The Commission issued CLI-02-01, 55 NRC 1, on January 30, 2002, denying reconsideration of a 2001 order terminating the earlier Millstone proceeding. A copy of the February 27, 2003 Pre-Argument Statement is attached as Exhibit 5. A copy of CLI-02-01 is attached as Exhibit 6.

II. APPLICABLE LAW.

The Hobbs Act gives this Court jurisdiction over "all final orders of the [NRC] made reviewable by Section 2239 of title 42." 28 U.S.C. §2342(4) (emphasis added). Section 2239(b)(1) of Title 42 provides for judicial review of "[a]ny final order entered in any proceeding of a kind specified in" Section 2239(a). Section 2239(a), in turn, provides authority for the Commission to issue orders in "any proceeding under [the Atomic Energy Act] for the granting, suspending, revoking, or amending of any license . . .." (Emphasis added). The Hobbs Act also provides that "[a]ny party aggrieved by the final order may, within 60 days of its entry, file a petition to review in the court of appeals where venue lies." 28 U.S.C. §2344. A party must "designate the . . . order or part thereof to be reviewed." Fed. R. App. P. 15(a).

III. ARGUMENT.

A. The Petition For Review Is Untimely.

The Connecticut Coalition filed the instant Hobbs Act petition on February 18, 2003. On its face, the petition challenges a Commission decision issued on November 21, 2002, 87 days before the petition for review was filed. Petitions for review of agency decisions filed under the Hobbs Act must be filed within 60 days of the decision challenged by the petition. 28 U.S.C. §2344; Natural Resources Defense Council ("NRDC") v. NRC, 666 F.2d 595, 601-02 (D.C. Cir. 1981); New York v. United States, 568 F.2d 887, 892 (2d Cir. 1977). This requirement is jurisdictional. New York v. United States, supra. Here, the petition for review is 27 days late. Thus, even if the petition challenged a "final" order, which as we show below it does not, the petition should be dismissed as impermissibly out of time.

B. The Petition Does Not Challenge A "Final" Agency Action.

A Hobbs Act petition must also challenge a "final" agency decision. 28 U.S.C. §2342(4); 28 U.S.C. §2344. Here, the petition for review challenges CLI-02-22, which was not the Commission's final action on the Connecticut Coalition's challenge to Dominion Nuclear's license amendment request. Instead, CLI-02-22 was merely one more interlocutory decision resolving one of Connecticut Coalition's myriad challenges. The final decision, which Connecticut Coalition has not challenged, is CLI-02-27. Because the petition does not challenge a "final" agency action, this Court has an alternative ground on which to dismiss it.

A final decision is one that "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative proceeding." Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). Accord: Dickenson v. Zech, 846 F.2d 369, 371 (6th Cir. 1988). Thus, In the context of NRC decisions, courts have held that a "final" decision is one that completes or ends a proceeding of the type specified in 42 U.S.C. §2239(a), i.e., a decision that concludes a license or license amendment proceeding. See, e.g., City of Benton v. NRC, 136 F.3d 824, 825 (D.C. Cir. 1998) (per curiam) ("In a licensing proceeding, it is the order granting or denying the license that is ordinarily the final order."); Natural Resources Defense Council v. NRC, 680 F.2d 810, 815 (D.C. Cir. 1982) ("Strictly interpreted, then, a final order in the adjudicatory proceedings in this case would be a decision on the license amendments challenged by NRDC."); Citizens for a Safe Environment v. AEC, 489 F.2d 1018, 1021 (3d Cir. 1974) ("Viewed in this light a final order in a licensing proceeding under [42 U.S.C.] §2239(a) would be an order granting or denying a license."); Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970) (per curiam) (A Court will not review interlocutory orders of the Commission until it can review the agency's action on the license application).

Here, the Commission had two separate petitions pending before it in late 2002, either of which could have resulted in the Commission's issuing an order that would reverse the Licensing Board's decision and withdraw the license amendment. First, the Commission resolved the "administrative controls" contention, which it had earlier remanded to the Licensing Board to hear on a Motion to Reopen. That decision was CLI-02-22, issued on November 21, 2002. But that decision did not end the proceeding or grant any "rights" to Dominion Nuclear, i.e., it did not remove the threat of having the amendment withdrawn, because the Commission still had Connecticut Coalition's late-filed contention dealing with NEPA and terrorism pending before it. It was not until the Commission issued CLI-02-27 on December 18, 2002 resolving that separate issue that there was a "final" order in the license amendment proceeding.

As the D.C. Circuit noted in Thermal Ecology, an "aggrieved party" obtains review of various interlocutory decisions by challenging the final order granting or denying the contested application. 433 F.2d at 526. In this case, that would be the Commission order granting or denying Dominion Nuclear's application for a license amendment authorizing the expansion of the spent fuel pool's capacity at Millstone Unit No. 3. But the Millstone application did not receive "final" Commission approval until the issuance of CLI-02-27 on December 18, 2002. Thus, CLI-02-22 can only be characterized as an "interim" or "interlocutory" Commission Order, not a "final" Order.

Quite simply, the proper course of action would have been for Connecticut Coalition to have challenged both CLI-02-27 and CLI-02-22, perhaps specifying that it was challenging CLI-02-27 only as a prerequisite to challenging CLI-02-22 (if it did not wish to challenge CLI-02-27 specifically). But Connecticut Coalition did not do so, and because the petition for review does not challenge a final order, it should be dismissed.

C. Connecticut Coalition Cannot Substitute CLI-02-27 For CLI-02-22 In The Petition.

As we noted above, Connecticut Coalition filed its petition for review on the 60th day after the issuance of CLI-02-27, the "final" decision in the Millstone proceeding. However, the petition for review does not name that decision as one of the agency decisions challenged by this petition. Connecticut Coalition cannot now substitute the second decision, for which the petition is timely, for the decision named in the petition, for which the petition is not timely.

The D.C. Circuit recently reached that conclusion when reviewing a similar petition for review in City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998) (per curiam), which we cited above. In that case, several municipal utilities challenged two requested license amendments in proceedings before the Commission. On May 30, 1995, the NRC issued a preliminary order that was a prerequisite for issuing one of the requested amendments. Then on June 8, 1995, the NRC issued two orders granting the amendments. The utilities filed a petition for review, under the Hobbs Act, which named only the May 30 Order as the NRC Order to be reviewed, although the utilities' docketing statement cites both the May 30 Order and one of the June 8 Orders as Orders under review and contains one of the June 8 Orders as an attachment. See generally City of Benton, 136 F.3d at 825.

The NRC argued that the petition did not challenge a "final" order. The utilities argued that although they may have named the wrong order in the petition, neither the NRC nor the licensee who requested the amendment "was prejudiced because both knew that [the utilities] were challenging the order issuing the license." 136 F.3d at 825.

The Court of Appeals dismissed the petition. "Whichever order [the utilities] intended to ask this Court to review, it named the wrong order in its petition. Fed. R. App. P. 15(a) requires that [the] petition be dismissed for failing properly to designate the order to be challenged." 136 F.3d at 826 (emphasis in original) (citations omitted).

Here, Connecticut Coalition has filed a petition that names only CLI-02-22 as the NRC Order to be reviewed. Moreover, all of the steps it has taken since the conclusion of the NRC's proceedings have been consistent with a decision to challenge CLI-02-22 instead of CLI-02-27, i.e., the December 23, 2002 "Notice of Appeal," the February 18, 2003 Petition for Review, and the February 27 "Pre-Argument Statement." Thus, Connecticut Coalition cannot now argue that it really intended to challenge CLI-02-27. And even if it could, that argument cannot prevent this Court from dismissing the petition. City of Benton v. NRC, supra.

It is true that Connecticut Coalition included CLI-02-01, which was a "final" order in a license amendment proceeding, in the Pre-Argument Statement as a decision for review in this case. However, Connecticut Coalition did not challenge that decision in the Petition for Review. Moreover, that decision was issued on January 30, 2002, well over a year before the filing of the petition for review; thus, it is clearly outside the 60-day jurisdictional period of the Hobbs Act. Furthermore, that decision was issued in an entirely different administrative proceeding, albeit a proceeding involving two of the Millstone reactors, and Connecticut Coalition has not given any explanation of why inclusion of that decision is appropriate in the discussion of this case. Thus, inclusion of that decision in this case cannot cure the defects in Connecticut Coalition's petition for review.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review.

Respectfully submitted,

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DATED: April 14, 2003.

Exhibit 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 50-423-LA-3**
(Facility Operating
License No. NPF-49)

DOMINION NUCLEAR
CONNECTICUT, INC.
(Millstone Power Station, Unit 3) **November 21, 2002**

In this license amendment proceeding to increase the storage capacity of the spent fuel pool at the Millstone Unit 3 reactor through the use of high-density storage racks, the Commission grants review and affirms the Board's order denying the Intervenors' request for a 10 C.F.R. Part 2, Subpart K evidentiary hearing on a reopened contention.

RULES OF PRACTICE: APPELLATE REVIEW

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

Review of final decisions of the licensing board in a Subpart K proceeding is governed by 10 C.F.R. § 2.786. 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.

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDINGS

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

The criteria for the board to designate issues for an adjudicatory hearing after the parties' written submissions and oral argument in a Subpart K proceeding are set out in 10 C.F.R. § 2.1115.

RULES OF PRACTICE: APPELLATE REVIEW

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

RULES OF PRACTICE: APPELLATE REVIEW

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.

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).

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDINGS

Section 2.1115 of 10 C.F.R. 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.

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 26.(2001). 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.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

LICENSING BOARDS: AUTHORITY; RESOLUTION OF ISSUES

Subpart K "authorizes the board to *resolve* disputed facts based on the evidentiary record made in the abbreviated hearing, without convening a full evidentiary hearing, if the board can do so with 'sufficient accuracy.'" *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 385 (2001). 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." *Id.*

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDINGS

Unsupported factual allegations are inadequate to produce a controversy that requires a Subpart K evidentiary hearing. *See Millstone*, CLI-01-3, 53 NRC at 27.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDINGS

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

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

RULES OF PRACTICE: APPELLATE REVIEW

In a Subpart K proceeding, 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." *Shearon Harris*, CLI-01-11, 53 NRC at 386.

RULES OF PRACTICE: COMMISSION REVIEW OF LICENSING BOARD DECISIONS; BURDEN OF PROOF

ADJUDICATORY PROCEEDINGS: SCOPE

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*. As the Board held, the record here amply shows the dissimilarities in procedures and practices in the two settings. *See* LBP-02-16, 56 NRC 83, 90-93 (2002). 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.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

RULES OF PRACTICE: REOPENING OF PROCEEDINGS; BURDEN OF PROOF; BURDEN OF GOING FORWARD

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 Subpart K 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 Millstone*, CLI-01-3, 53 NRC at 27.

RULES OF PRACTICE: CONTENTIONS (SCOPE); REOPENING OF PROCEEDINGS

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. Thus, the discovery violation was not properly within the reopened proceeding.

RULES OF PRACTICE: CONTENTIONS (SCOPE)

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.'" *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 157 (2002), *quoting Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 105 (1998).

RULES OF PRACTICE: HEARING PROCEDURES FOR SPENT FUEL POOL EXPANSION PROCEEDINGS

REGULATIONS: INTERPRETATION (10 C.F.R. PART 2, SUBPART K)

LICENSING BOARDS: AUTHORITY

RULES OF PRACTICE: CONTENTIONS (SCOPE)

The advance notice policy regarding contentions is particularly important in a Subpart K proceeding, as the parties must submit their evidentiary case 15 days prior to the oral argument. Strict adherence to the 10 C.F.R. § 2.1113 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. As a result, the Board should not have entertained discussion of it during oral argument.

We place strict limits on "character" contentions; specifically, they must relate *directly* to the proposed licensing action. *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-02-1, 55 NRC 1 (2002), and references cited therein. In the instant case, CCAM/CAM attempt to insert a "character" issue into a license amendment proceeding raising chiefly technical matters. 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.

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 3 ("Millstone 3") reactor through the use of high-density storage racks.[1] 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. BACKGROUND

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 1 ("Millstone 1").[7] CCAM/CAM also alleged a discovery violation by

[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 202-14. On petition for review, the Commission solicited briefs from the parties in this case and in a similar ongoing proceeding. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 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-01-3, 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 ¶ 9 (Mar. 18, 2002) ("Cerne Affidavit").

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

[8] *See* CLI-01-3, 53 NRC at 29; LBP-01-1, 53 NRC 75 (2001).

[9] *See* LBP-01-1, 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).

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 NNECO'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:

[13] *See* LBP-02-16, 56 NRC 83 (2002).

[14] *See id.* at 88-92.

[15] *See id.* at 97-98.

[16] *See id.* at 95.

[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-02-5, 55 NRC 131 (2002). We accepted the referral, which remains under Commission consideration. *See* CLI-02-5, 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).

(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

[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.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992).

[24] CLI-01-3, 53 NRC at 26.

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 hearing, 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

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

[26] *Id.*

[27] *See Millstone*, CLI-01-3, 53 NRC at 27.

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

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

[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 88-92. 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 708-09 (Apr. 2, 2002) ("Tr.").

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

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 4 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

[34] LBP-02-16, 56 NRC at 93.

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

[36] LBP-01-17, 53 NRC 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).

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]

[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 90-93.

[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 ¶ 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-01-3, 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 at 383-86.

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]

[43] LBP-02-16, 56 NRC at 95.

[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, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 157 (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.

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]

[48] *See* LBP-02-16, 56 NRC at 95. 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-01-3, 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-02-1, 55 NRC 1 (2002), and references cited therein.

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

[54] *Id.*

[55] *Id.* at 367.

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

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of November 2002.

Exhibit 2

nuclear facilities, including reactors.[25] We expect further improvements as our internal comprehensive review moves forward.

III. CONCLUSION

We decline in this proceeding to consider NIRS's AEA- and NEPA-related contentions regarding terrorist threats to the McGuire and Catawba plants, and we therefore direct the Board to reject those contentions.

IT IS SO ORDERED.

For the Commission[26]

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of December 2002.

[25] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 343-45.

[26] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 50-423-LA-3**

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Unit 3)

December 18, 2002

In this license amendment proceeding to increase the storage capacity of the spent fuel pool at the Millstone Unit No. 3 reactor through the use of high-density storage racks, the Commission affirms the Board's decision to reject the Intervenors' contention that the NRC needs to prepare an environmental impact statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool.

TERRORISM

NEPA

NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001, in conjunction with the license amendment to expand spent fuel pool storage capacity at Millstone Unit 3. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002). "[T]he possibility of a terrorist attack . . . is speculative and simply

too far removed from the natural or expected consequences of agency action to require a study under NEPA." *Private Fuel Storage*, CLI-02-25, 56 NRC at 349.

SAFEGUARDS AND SECURITY INFORMATION

NEPA

The NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review of the possible impacts of terrorism on a licensee's facility. *See Private Fuel Storage*, CLI-02-25, 56 NRC at 354-57.

NUCLEAR WASTE POLICY ACT

Congress has recognized the need for and encouraged high-density spent fuel storage at reactor sites. *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10131 *et seq.*

TERRORISM

NEPA

NEPA is not the right vehicle for considering the impact of terrorism. Our post-September 11th generic analysis of safeguards and security issues already includes reevaluation of interim spent fuel storage at power reactor sites. The Millstone 3 license amendment does not entail any technological challenges that warrant immediate site-specific treatment before our Staff concludes its assessment of security at all nuclear facilities we license or completes any generic rulemaking proceeding precipitated by the recent terrorist attacks.

MEMORANDUM AND ORDER

This proceeding arises from an application by Dominion Nuclear Connecticut, Inc. ("DNC" or "Licensee") for a license amendment to increase the storage capacity of Millstone Unit No. 3 spent fuel pool. On November 1, 2002, the Intervenors, the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "CCAM/CAM"), filed a proposed new contention that maintained that, in light of the September 11, 2001 terrorist attacks, the NRC now needs to prepare an environmental impact statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool and specifically weighing

the costs of an "accident"[1] against the cost of alternatives such as dry cask storage. The Licensing Board found the contention procedurally valid, but found it inadmissible, pursuant to 10 C.F.R. § 50.13.[2] The Board referred to the Commission its ruling on the question of section 50.13's applicability.[3] We accepted the Board's referral, pursuant to 10 C.F.R. § 2.730(f) and established a briefing schedule.[4] We asked the parties to address all issues, except the procedural issue, that they determine are relevant to admissibility of the terrorism contention and specifically to answer the question, "What is an agency's responsibility under NEPA [the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*] to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"[5]

DNC and the NRC Staff filed briefs that maintained that the NRC has no responsibility to consider intentional malevolent acts under NEPA, and CCAM/CAM filed a brief stating the opposite view.[6] For the reasons stated below, we affirm the Board's rejection of CCAM/CAM's terrorism contention, though for reasons different from those offered by the Board.[7]

I. BACKGROUND

On March 19, 1999, the Licensee filed an application for a license amendment to increase the storage capacity of its spent fuel pool from 756 assemblies to 1860

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[1] *See* Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone's Motion To Reopen the Record and Request for Admission of Late-Filed Environmental Contention, dated Nov. 1, 2001, at 7.

[2] *See* LBP-02-5, 55 NRC 131 (2002). Section 50.13 provides, in effect, that nuclear power reactor licensees need not defend against attacks by "enemies of the United States."

[3] *Id.* at 145.

[4] *See* CLI-02-5, 55 NRC 161 (2002).

[5] The Commission simultaneously agreed to review terrorism contentions and posed this same question in three other cases. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-3, 55 NRC 155 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-6, 55 NRC 164 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied*, unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-4, 55 NRC 158 (2002). We decide these cases today.

[6] The Nuclear Energy Institute, stating that its interests were aligned with those of the Applicant, filed a brief, along with a request that we consider it as an *amicus curiae*. We grant the request.

[7] This and several other recent Board decisions have relied on 10 C.F.R. § 50.13 to reject terrorism contentions. *See* LBP-02-5, 55 NRC at 142-45; *Private Fuel Storage*, LBP-01-37, 54 NRC at 486; *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 33, 34 (2002). The provision grew out of a policy judgment by the Atomic Energy Commission that it was our nation's "settled tradition" to "look[] to the military" for defense against enemy attacks, and that it was "impracticable" to expect a "civilian industry" to provide the necessary defense. *See Siegel v. AEC*, 400 F.2d 778, 782 (D.C. Cir. 1968). Since our decisions today rest on general principles regarding the scope of NEPA, we do not reach the application of section 50.13 as applied to the terrorism contentions that are raised in these cases. In our view, as we have explained, NEPA does not require a terrorism review.

assemblies.[8] The original design basis of the spent fuel pool at Millstone Unit 3 was 2169 assemblies; however, the current licensing basis for the plant is 756 assemblies.

Of the contentions CCAM/CAM originally raised in this proceeding, the Board admitted three: Contention 4, relating to the risk of criticality accidents because of the Licensee's alleged history of not being able to adhere to administrative controls (i.e., human oversight or monitoring of physical systems); Contention 5, contesting a technical specification amendment regarding surveillance of boron concentration in the spent fuel pool; and Contention 6, relating to the legal question whether General Design Criterion 62 allows the use of administrative controls to prevent criticality in the spent fuel pool. To resolve Contention 5, the Board adopted an agreed-upon license condition. The Board denied an evidentiary hearing as to Contentions 4 and 6,[9] and CCAM/CAM petitioned the Commission for review of the decision. On the original record, we denied review of the factual issues surrounding Contention 4, accepted review of the legal question involved in Contention 6,[10] and ultimately denied CCAM/CAM the relief they requested.[11]

During the pendency of the appeal, CCAM/CAM filed a motion for reconsideration of the Board's decision regarding Contention 4. We remanded the motion to the Board, which, on reconsideration, granted the motion and reopened the proceeding for the limited purpose of considering the effect, if any, the loss of two fuel rods at Millstone Unit 1 might have on the issues raised in Contention 4.[12] The Board ultimately denied CCAM/CAM's request for an evidentiary hearing and terminated the proceeding.[13]

CCAM/CAM raised the terrorism contention in the reopened proceeding. CCAM/CAM asserted that changed circumstances — i.e., the terrorist attacks on the World Trade Center and the Pentagon — demonstrate that severe fuel pool "accidents" caused by acts of malevolence or insanity are reasonably foreseeable and must be addressed in an EIS. The Board rejected the contention on the authority of 10 C.F.R. § 50.13 and referred its ruling to the Commission.[14]

[8] The Licensee at the time of filing the application was Northeast Nuclear Energy Company. On March 31, 2001, DNC became the Licensee and party in interest in this matter, due to a license transfer.

[9] *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-26, 52 NRC 181 (2000).

[10] *See* CLI-01-3, 53 NRC 22 (2001). The Commission recognized that the GDC 62 issue also affected the spent fuel pool expansion license amendment proceeding for the Shearon Harris nuclear power plant; therefore, we invited the Shearon Harris parties, Carolina Power & Light Company and the Orange County Board of Commissioners, to file *amicus curiae* briefs.

[11] *See* CLI-01-10, 53 NRC 353 (2001).

[12] *See* CLI-00-25, 52 NRC 355 (2000).

[13] *See* LBP-02-16, 56 NRC 83 (2002). The Commission upheld LBP-02-16 on November 21, 2002. *See* CLI-02-22, 56 NRC 213 (2002).

[14] *See* note 2, *supra*, and accompanying text.

II. DISCUSSION AND CONCLUSION

For the reasons we stated today in *Private Fuel Storage*, we find that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001, in conjunction with the license amendment to expand spent fuel pool storage capacity at Millstone Unit 3.[15] As we said in *Private Fuel Storage*, "the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA."[16] Moreover, the NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review.[17]

Our conclusion comports with the practical realities of spent fuel storage, which has been occurring at Millstone for nearly two decades and will continue, regardless of our decision today.[18] Congress has recognized the need for and encouraged high-density spent fuel storage at reactor sites.[19] Further, all that we decide today is that *NEPA* is not the right vehicle for considering the impact of terrorism. Our post-September 11th generic analysis of safeguards and security issues[20] already includes reevaluation of interim spent fuel storage at power reactor sites. The Millstone 3 license amendment does not entail any technological challenges that warrant immediate site-specific treatment before our Staff concludes its assessment of security at all nuclear facilities we license or completes any generic rulemaking proceeding precipitated by the recent terrorist attacks.

[15] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *accord Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).

[16] *Private Fuel Storage*, CLI-02-25, 56 NRC at 349.

[17] *See id.* at 354-57.

[18] *Cf. McGuire*, CLI-02-26, 56 NRC at 365.

[19] *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10131 *et seq.*

[20] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 343-45.

Exhibit 3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of DOMINION NUCLEAR CONNNECTICUT, INC.	:	Docket No. 50-423-LA-3
Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49)	:	DECEMBER 23, 2002

NOTICE OF APPEAL

The Connecticut Coalition Against Millstone herewith serves notice of appeal to the United States Court of Appeals for the Second Circuit of the final decision of the United States Nuclear Regulatory Commission issued on November 21, 2002 denying its petition for an evidentiary hearing and terminating the proceedings.

CONNECTICUT COALITION
AGAINST MILLSTONE

By: _____

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge CT 06876
Tel. 203-938-3952
Fed. Bar No. 10836

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of DOMINION NUCLEAR CONNNECTICUT, INC.	:	Docket No. 50-423-LA-3
Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49)	:	DECEMBER 23, 2002

CERTIFICATION

This is to certify that a copy of the foregoing was mailed on December 23, 2002 to the following via U.S. Mail, postage pre-paid, to the following:

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington DC 20555

David Repka, Esq.
Winston & Strawn
1400 L Streeet NW
Washington DC 20005

Lillian M. Cuoco, Esq.
Dominion Nuclear Connecticut, Inc.
Millstone Nuclear Power Station
Rope Ferry Road
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Ann P. Hodgdon, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555

Office of Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington DC 10555

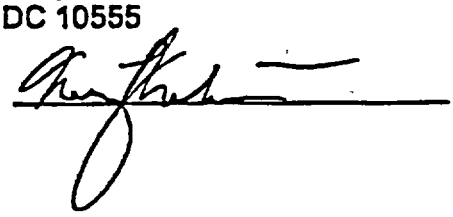


Exhibit 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

January 14, 2003

Nancy Burton, Esq.
147 Cross Highway
Reading Ridge, CT 06876

Re: *In the Matter of Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), Docket No. 90-423-LA-3

Dear Ms. Burton:

I recently received a copy of a document, entitled "Notice of Appeal," that you sent to our Office of the Secretary in connection with the above-captioned case. The document is dated December 23, 2002. The document states that it "serves notice of appeal to the United States Court of Appeals for the Second Circuit of the final decision of the United States Nuclear Regulatory Commission issued on November 21, 2002 denying [a] petition for an evidentiary hearing and terminating the proceedings."

Our office will take no action on the Notice of Appeal you sent to the Commission. We are aware of no statute or rule that authorizes filing such a document.

Sincerely,

John F. Cordes
Solicitor

cc: service list

Exhibit 5

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: CLI-02-01; CLI-02-27
APPROXIMATE NO. OF PAGES IN RECORD: In excess of 1000
JURISDICTION OF COURT OF APPEALS: 28 USC 2342, 2344
DATE ENTERED. 1/30/02; 11/21/02
NO. OF EXHIBITS: None
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.

ATTORNEY(S) FOR PETITIONER(S): Nancy Burton, Esq.
NAME
147 Cross Highway Redding Ridge CT 06876 203-938-3952
ADDRESS TELEPHONE

ATTORNEYS FOR RESPONDENT(S): Ann P. Hodgdon & Office of General Counsel 301-415-1587
* And see below. NAME
U.S. Nuclear Regulatory Commission, Washington DC 20555
ADDRESS TELEPHONE

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: Decision contrary to law, not supported by substantial evidence, arbitrary and capricious
RELIEF SOUGHT: Reversal of order and remand for evidentiary hearing.

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	NAME OF COUNSEL OF RECORD	TELEPHONE
Connecticut Coalition Against Millstone	Nancy Burton, Esq.	203.938.3952

2/27/03 DATE

SIGNATURE OF COUNSEL OF RECORD

Nancy Burton

* Attorney for Dominion Nuclear Connecticut, Inc.
David A. Repka, Esq.
Winston & Strawn
1400 L Street NW
Washington DC 20005-3502 Tel. 202-371-5700

Exhibit 6

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket Nos. 50-336-LA**
50-423-LA

DOMINION NUCLEAR
CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)

January 30, 2002

The Commission denies a petition for reconsideration of a Commission Memorandum and Order finding the Petitioners' sole contention inadmissible.

RULES OF PRACTICE: RECONSIDERATION PETITIONS

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. Petitions for reconsideration should not be used merely to re-argue matters that the Commission already has considered but rejected.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.36)

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.

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, 54 NRC 349 (2001). 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 44041), CLI-93-24, 38 NRC 187, 188 (1993); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3-4 (1988); *Nuclear Engineering Co.* (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, 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, 54 NRC at 355 & n.6, 364 (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

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

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. Accordingly, we deny their petition for reconsideration.

CONCLUSION

For the reasons given in this Decision, the Petitioners' petition for reconsideration of CLI-01-24 is *denied.*

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

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

[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).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

In the Matter of **Docket No. 70-03098-ML**

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel Fabrication Facility)

January 30, 2002

In this proceeding to authorize construction of a mixed oxide ("MOX") fuel fabrication facility, the Commission denies the motion of Georgians Against Nuclear Energy to reconsider CLI-01-28, 54 NRC 393 (2001), which denied a petition to suspend the proceeding based on the terrorist attacks of September 11, 2001.

RULES OF PRACTICE: RECONSIDERATION MOTIONS

Reconsideration motions "are an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000) (affirming Licensing Board's holding); *id.*, LBP-98-17, 48 NRC 69, 73-74 (1998). *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994). GANE has not demonstrated any factual or legal error in CLI-01-28 that warrants our reconsideration of the order.

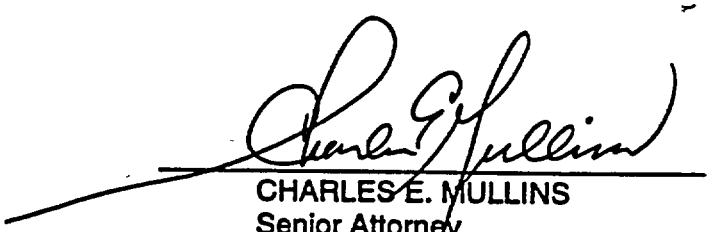
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE, Petitioner, v. UNITED STATES OF AMERICA and UNITED STATES NUCLEAR REGULATORY COMMISSION, Respondents, and DOMINION NUCLEAR CONNECTICUT, Intervenor.	Case No. 03-4372

I hereby certify under penalty of perjury that the FEDERAL RESPONDENTS' MOTION TO DISMISS was served by placing copies of the same in the United States Mail, postage prepaid, addressed to:

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge, Connecticut 06876

David A. Repka, Esq.
Winston & Strawn
1400 L. Street, N.W.
Washington, D.C. 20015-3052



CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1606
(301) 415-3200 (fax).

Dated: April 14, 2003.