

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

April 2, 2004  
DOCKETED  
USNRC

Before the Commission

April 7, 2004 (9:34AM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )  
 )  
DOMINION NUCLEAR CONNECTICUT, INC. )  
 )  
(Millstone Power Station, Units 2 and 3) )

Docket Nos. 50-336-LR  
50-423-LR

DOMINION'S ANSWER TO CCAM'S MOTION  
TO VACATE SECRETARY DETERMINATION

Introduction

Dominion Nuclear Connecticut, Inc. ("Dominion") hereby answers and opposes the motion to vacate<sup>1</sup> filed by the Connecticut Coalition Against Millstone's ("CCAM") on March 22, 2004. In a strained attempt to avoid application of the NRC rules of practice as recently amended, CCAM asks the Commission to "vacate" a determination by the NRC Secretary that a previous intervention request was premature. In essence, CCAM argues that it has the right to intervene and request a hearing on an application before it is even docketed – i.e., before a proceeding even commences. CCAM also argues that, because it filed its premature intervention request before recent amendments to 10 C.F.R. Part 2, the Millstone license renewal proceeding must now be governed by the old rules of practice. CCAM's arguments simply ignore the plain language of the NRC's rules and are without merit. Accordingly, CCAM's Motion should be denied.

<sup>1</sup> Motion to Vacate NRC Secretary Determination of Petition Prematurity and to Accept Petition to Intervene and Request for Hearing As of Date of Filing and to Apply "Old" CFR Rules to Said Petition (March 22, 2004) (hereinafter referred to as "CCAM's Motion").

### Statement of Facts

On January 14, 2004, the NRC published a final rule amending its hearing procedures. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (2004). These revised procedures apply to “proceedings noticed on or after the effective date [of February 13, 2004], unless otherwise directed by the Commission.” *Id.* Contemporaneously with the publication of this rule, the NRC placed guidance on its website showing the different scenarios under which the new or old rules would apply. This guidance makes it clear that where a notice of docketing and opportunity for hearing is published, the applicability of the new rules is determined by the date of that notice.<sup>2</sup>

Dominion tendered its application for renewal of the operating licenses for the Millstone Power Station, Units 2 and 3, on January 22, 2004. Pursuant to the NRC’s longstanding regulation at 10 C.F.R. § 2.101(a)(3), a tendered application for an operating license for a utilization facility is subjected to an acceptance review prior to docketing. On February 3, 2004, the NRC published in the Federal Register a Notice of Receipt. 69 Fed. Reg. 5,197 (2004). The Notice of Receipt stated, “[t]he acceptability of the tendered application for docketing, and other matters including the opportunity to request for hearing, will be the subject of subsequent Federal Register notices.” *Id.*

On February 12, 2004, CCAM filed a Petition to Intervene and Request for Hearing relating to this tendered application. In a letter to the Secretary of the NRC on February 13, 2004, Dominion observed that CCAM’s petition was premature since the application for renewal of the Millstone operating licenses was still undergoing an acceptance review by the NRC Staff and had not yet been docketed. By letter dated March 4, 2004, the NRC Office of the Secretary returned the petition to CCAM. The Secretary’s letter informed CCAM that Dominion’s application had not yet been docketed, and accordingly, the NRC had not yet issued a Federal

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<sup>2</sup> See <http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html>. CCAM has been fully aware of this guidance, having cited it in its March 1, 2004 letter to the Secretary and now attaching it to CCAM’s Motion.

Register notice announcing a proceeding and opportunity for hearing. The Secretary's letter therefore advised CCAM that there was not yet a proceeding in which CCAM could intervene.

Shortly before the Office of the Secretary returned CCAM's petition, CCAM wrote a letter asserting that because CCAM filed its petition prior to the changes to 10 C.F.R. Part 2, the "Coalition Petition proceedings must be conducted pursuant to the 'old' 10 CFR Part 2 rules." Letter from N. Burton to NRC Secretary (March 1, 2004). Dominion responded by letter dated March 4, 2004, pointing out that under the NRC rules, a proceeding commences when a notice of hearing or notice of proposed action under section 2.105 is issued, and that the date of this notice then determines whether the new hearing rules apply. The NRC Staff made similar observations in a letter dated March 10, 2004. Letter from M. Bupp to A. Vietti-Cook (March 10, 2004).

On March 12, 2004, the NRC published a Notice of Acceptance for Docketing and Notice of Opportunity for Hearing. 69 Fed. Reg. 11,897 (2004). On March 22, 2004, CCAM submitted its Motion to Vacate now before the Commission. By Order served on March 25, 2004, the Commission has retained jurisdiction over CCAM's Motion.

### Argument

#### **I. CCAM'S INTERVENTION PETITION WAS PREMATURE**

Under the NRC's rules, "[a] proceeding commences when notice of hearing or notice of proposed action under § 2.105 is issued." 10 C.F.R. § 2.318(a).<sup>3</sup> Therefore, any request to intervene before the NRC issues a notice of proposed action or notice of hearing is premature. One cannot intervene in a proceeding before a proceeding even exists.

CCAM argues that the new rules at 10 C.F.R. § 2.309(b)(4)(ii) provide that a petition to intervene and request for hearing are timely if filed within sixty days after the requestor receives actual notice of a pending application, regardless of whether or not a notice appears on the NRC

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<sup>3</sup> The same was true under the 10 C.F.R. Part 2 rules previously in effect. Those rules applied to adjudications initiated by orders, notices of proposed action, or notices of hearing. 10 C.F.R. § 2.700 (2003).

website or in the Federal Register. CCAM's Motion at 6.<sup>4</sup> This argument is clearly wrong. Under its explicit terms, 10 C.F.R. § 2.309(b)(4) applies only in a proceeding for which a notice of agency action is not published. A notice of proposed action is required for any reactor operating license, must provide an opportunity for hearing, and must be issued as soon as practicable after the application is docketed. 10 C.F.R. § 2.105(a)(10). With respect to the Millstone license renewal application, such a notice of proposed action was published in the Federal Register on March 12, 2004. Therefore, the provision to which CCAM refers, governing other types of proceedings for which a notice of proposed action is not used, is simply inapplicable.

Moreover, it would be absurd to entertain intervention requests before an application is found acceptable and docketed. As a matter of policy, it would make no sense to devote hearing resources to an application until it is determined to be acceptable for docketing.

**II. BECAUSE THE NOTICE OF PROPOSED ACTION WAS PUBLISHED AFTER THE EFFECTIVE DATE OF THE AMENDMENTS TO PART 2, THE NEW RULES OF PRACTICE APPLY TO THIS PROCEEDING**

The NRC's new rules of practice govern any hearing on Dominion's application for renewal of the Millstone Units 2 and 3 operating licenses. The new Part 2 rules apply to proceedings noticed on or after the effective date of the new rules (i.e. on or after February 13, 2004), unless otherwise directed by the Commission. See 69 Fed. Reg. 2,182 (2004). The notice of proposed action for the Millstone license renewal proceeding – the notice announcing the docketing and opportunity for hearing in accordance with 10 C.F.R. § 2.105(a)(10) – was published on March 12, 2004.

CCAM refers to the NRC's guidance to suggest that the NRC has interpreted its regulations in a manner that would have made make CCAM's February 12th petition timely, but CCAM misconstrues that guidance. See CCAM Motion at 1, 3. The scenarios in the NRC's

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<sup>4</sup> By relying on the new rules, CCAM is in fact admitting their applicability.

guidance on the "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings" all depend on when the notice of docketing and opportunity for hearing is issued. See <http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html>.

CCAM's incorrectly identifies the fifth and ninth scenario in the NRC's guidance as apt. The fifth scenario refers to an application that was docketed before February 13, 2004. Dominion's application was not docketed until March. The fifth scenario also applies to a proceeding in which no notice of docketing and opportunity for hearing is published. With respect to the Millstone license renewal application, a notice of docketing and opportunity for hearing was published in the Federal Register on March 12, 2004, initiating the proceeding. The ninth scenario describes a proceeding where a notice of docketing and opportunity for hearing is published on the NRC web site before February 13, 2004. With respect to the Millstone license renewal application, a notice of docketing and opportunity for hearing was not published on the NRC web site before February 13, 2004, but rather was published in the Federal Register on March 12. Thus, the scenario's in the NRC's guidance do not provide one whit of support for CCAM's position.

Finally, CCAM insinuates that the NRC withheld publication of its March 12th, notice until the new rules took effect in order to limit challenges by CCAM. CCAM has no basis for this snide attack on the NRC Staff's integrity. The NRC's procedures contemplate approximately 30 days to complete the acceptance review of a license renewal application,<sup>5</sup> and this has been the experience in every license renewal proceeding to date.

### **III. CCAM'S FAILURE TO RECOGNIZE AND ADHERE TO THE COMMISSION'S RULES IS DISORDERLY AND CONFUSING**

CCAM's Motion states that CCAM is resubmitting its Petition contemporaneously with its motion. CCAM's Motion at 1. A separate electronic message from CCAM transmits to the

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<sup>5</sup> See NRR Office Letter No. 805, "License Renewal Application Review Process" (June 19, 1998), Attachment 1, ¶ 2.2 ("An initial review of a completed application or partial submittals for a renewed license to determine the acceptability for review is expected to be completed within 30 days from the date of receipt.").

Secretary the petition "as earlier filed on February 12, 2004."<sup>6</sup> The Petition remains dated February 12, 2004, is unsigned, and is not accompanied by any certificate of service.<sup>7</sup> It appears identical to the previous, premature request, written without regard to the new rules. Thus, while the Petition lists certain items as contentions, it states that "CCAM will elaborate upon the basis for this petition in its formal submission of contentions" (CCAM Petition at 2), implying that the items in the Petition do not represent CCAM's formal contentions. Further, the Petition states that CCAM reserves the right to supplement its petition. CCAM's Petition at 11. While the old rules provided for the identification of contentions in a supplement to a petition, that procedure no longer exists under the new rules.<sup>8</sup>

Dominion assumes that CCAM has resubmitted this Petition to the NRC for acceptance as of February 13 and consideration under the old hearing rules, as CCAM's Motion insists that the NRC should do. Further, Dominion assumes that the items listed in CCAM's Petition are not CCAM's formal contentions (based on CCAM's statement that it will elaborate in a formal submission of contentions), and that CCAM intends to file a supplement as was allowed under the old rules. Because of the confusion created by CCAM's disregard for the new rules, and to avoid the unnecessary burden and expense of responding to a petition that apparently does not include CCAM's final specification of contentions,<sup>9</sup> Dominion intends (unless otherwise directed by the Atomic Safety and Licensing Board) to defer any answer to CCAM's intervention request until a petition conforming to the new rules (*i.e.*, a petition not dependent on further

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<sup>6</sup> Electronic message from Nancy Burton to the Commissioners, NRC Staff and Parties (March 22, 2004).

<sup>7</sup> While CCAM served a signed, paper copy of its Motion to Vacate, accompanied by a certificate of service, it has not served a signed, paper copy of its "resubmitted" petition. Therefore, this petition has not been properly served in accordance with 10 C.F.R. § 2.305(c).

<sup>8</sup> Under the new hearing rules, an intervention petition must provide a specification of the contentions which the person seeks to have litigated in the hearing, and amended or new contentions may only be filed after the initial filing with leave of the Presiding Officer upon a showing addressing the factors in 10 C.F.R. § 2.309(f)(2)(i)-(iii). 10 C.F.R. § 2.309(a), (f)(2).

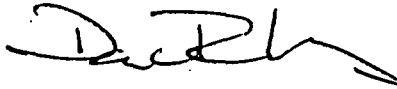
<sup>9</sup> CCAM has a history of wasting the resources of the Commission by initiating the hearing process without paying sufficient attention to its own obligations as a participant. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station Unit No. 2), CLI-03-14, 58 N.R.C. 207, 220 (2004).

supplementation) is submitted. If CCAM makes no further filing by the May 11 deadline for intervention requests, Dominion will submit its an answer within 25 days after the close of the period for intervention.

Conclusion

For all of the above-stated reasons, CCAM's motion should be denied.

Respectfully submitted,



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Dated: April 2, 2004

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NUCLEAR REGULATORY COMMISSION**

Before the Commission

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Dominion's Answer to CCAM's Motion to Vacate Secretary Determination," dated April 2, 2004, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 2nd day of April, 2004.

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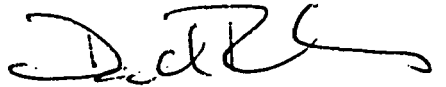
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A handwritten signature in black ink, appearing to read "D. R. Lewis", written over a horizontal line.

David R. Lewis