

August 18, 2004

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of |) | |
| |) | |
| DOMINION NUCLEAR CONNECTICUT, INC. |) | Docket Nos. 50-336-LR, 50-423-LR |
| |) | |
| (Millstone Power Station, Units 2 & 3) |) | ASLBP No. 04-824-01-LR |
| |) | |

NRC STAFF RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE'S
MOTION FOR RECONSIDERATION AND REQUEST FOR LEAVE TO AMEND PETITION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 (c), the NRC Staff ("Staff") hereby responds to the "Motion For Reconsideration and Request For Leave to Amend Petition" ("Motion") filed by the Connecticut Coalition Against Millstone ("CCAM") on August 9, 2004. CCAM moves for reconsideration of LBP-04-15, in which the Atomic Safety and Licensing Board ("Board") denied CCAM's petition for leave to intervene and request for hearing and terminated the proceeding.¹ In its Motion, CCAM also seeks leave to amend its intervention petition to provide further support for its contentions. As discussed below, CCAM has failed to demonstrate that: (1) the Commission's standards for motions for reconsideration have been met; and (2) good cause exists for its request to amend its petition at this late date. Accordingly, its Motion should be denied.

BACKGROUND

On January 22, 2004, Dominion Nuclear Connecticut, Inc. ("DNC") submitted applications to renew Operating License Numbers DPR-65 and NPF-49 for Millstone Power Station, Units 2 and 3, for an additional 20 years. CCAM filed a Petition to Intervene and Request for Hearing

¹ See *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Units 2 & 3), LBP-04-15, 60 NRC __ (slip op. July 28, 2004).

("Petition") with regard to DNC's license renewal applications. In its Petition, CCAM proffered six proposed contentions. In response to DNC's and the Staff's arguments that CCAM had neither demonstrated standing nor proffered an admissible contention, CCAM filed, on June 15 and June 16, 2004, a motion for leave to file an amended petition, an amended petition accompanied by supporting affidavits, a motion for leave to file a reply, and the reply, which provided new material in support of CCAM's standing and contentions.

On July 28, 2004, the Licensing Board issued its decision in LBP-04-15, in which it denied CCAM's Petition on the grounds that none of CCAM's proffered contentions satisfied the contention admissibility standards of 10 C.F.R. § 2.309(f)(1). Thereafter, on August 9, 2004, CCAM simultaneously filed: (1) the instant Motion; and (2) a Notice of Appeal of LBP-04-15.²

DISCUSSION

I. CCAM Has Not Demonstrated that Good Cause Exists for Its Request to Amend Its Petition

CCAM seeks leave to amend its Petition to provide further support for its contentions. Motion at 1. CCAM references and incorporates by reference affidavits of six individuals, and attachments thereto. *Id.* CCAM's late attempt to support its contentions must be denied as wholly lacking in good cause.³ First, CCAM has had several opportunities in this proceeding and extensive time to submit the material it now seeks to proffer in support of its contentions.⁴ Second,

² The Staff's response to CCAM's "Notice of Appeal" is being filed separately this day before the Commission. Therein, the Staff argues that CCAM's Appeal should be dismissed without prejudice to its being resubmitted following the issuance of a Board ruling on the instant Motion.

³ Moreover, CCAM's request and late-filed documents fail to address the late-filing factors set forth in 10 C.F.R. § 2.309(f)(2). See LBP-04-15, slip op. at 3. The complete failure to address late-filing criteria warrants rejection of the amended Petition. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998).

⁴ CCAM had until May 11, 2004, 60 days from the Staff's publication of its notice of agency action, to file a timely petition. See 10 C.F.R. § 2.309(b). CCAM filed its initial Petition on February 12, 2004. CCAM resubmitted its Petition on March 22, 2004. CCAM filed untimely amended
(continued...)

CCAM failed to state one reason why it did not or could not have provided this material earlier, despite being questioned extensively at the June 30th prehearing conference on why it failed to provide this support in a timely fashion. See Tr. at 41-54. Therefore, CCAM's request is grossly out of time and should be denied.

II. CCAM Has Not Demonstrated that Reconsideration of LBP-04-15 is Warranted

CCAM asserts that the Board's decision rejecting each of CCAM's six contentions was not justified "on the facts or the law" and that "considerations of public interest compel reconsideration" in light of information provided for the first time with its Motion. Motion at 2. For the reasons set forth below, CCAM's Motion should be denied.

A. Legal Standards Governing Motions For Reconsideration

Motions for reconsideration require a showing of "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." See 10 C.F.R. § 2.323(e). This new "compelling circumstances" standard was incorporated into New Part 2 as a higher standard than that previously used in Commission caselaw. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004). In promulgating this standard, the Commission stated that it is intended to permit reconsideration only where "manifest injustice would occur in the absence of reconsideration," and where the claim could not have been raised earlier. *Id.* The Commission stated that reconsideration should be an "extraordinary action" and should not be

⁴(...continued)

Petitions on June 15 and June 16, 2004. On the day of the prehearing conference, CCAM filed yet another motion for leave to supplement its Petition. The Board did not explicitly reject these filings, notwithstanding their lateness. LBP-04-15, slip op. at 3.

employed to reargue “facts and rationales which were (or should have been) discussed earlier.”

*Id.*⁵

B. Legal Standards Governing the Admissibility of Contentions

To gain admission to a proceeding as a party, a petitioner, in addition to establishing standing, must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). In LBP-04-15, the Licensing Board set forth the Commission caselaw regarding contention admissibility standards, in particular as they pertain to: (1) the need for adequate factual information or expert opinion; (2) materiality, alleged defects and errors; (3) improper challenges to the application; (4) challenges outside the scope of the proceeding; and (5) challenges to statutory requirements and regulations. See LBP-04-15, slip op. at 6-9. Nowhere in its Motion does CCAM assert that the Licensing Board misinterpreted the caselaw related to the admissibility of contentions.

C. Reconsideration of the Board's Rejection of CCAM's Contentions Is Not Warranted

1. *CCAM Proposed Contention I (Impacts of Millstone's Operations on Human Health)*

The Board rejected CCAM Contention I on the grounds that it consisted essentially of bare assertions and therefore failed to set forth the specific factual or legal basis required by 10 C.F.R. § 2.309(f)(1)(v). See LBP-04-15, slip op. at 9-11. The Board further found that CCAM had not shown how its allegations may be related to the potential detrimental effects of aging. *Id.* at 11.

⁵ Further, motions for reconsideration are limited to ten pages. See 10 C.F.R. § 2.323(e). CCAM's Motion is 12 pages long, and appends several affidavits that include additional substantive arguments. The Commission has stated, “We expect parties in Commission proceedings to abide by our current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393-94 (2001). The Board may disregard all or portions of a pleading designed to circumvent page-limit or other procedural rules.

In its Motion, CCAM asserts that the application does not address the issue of the effects on human health from continued radioactive effluent emissions to the air and water. Motion at 2. According to CCAM, license renewal proceedings require an analysis of whether the licensee can assure safe reactor shutdown during the renewal term. *Id.* at 2-3, 3-4. CCAM's position is that in license renewal proceedings, the NRC must consider "issues relative to safety" in the context of current knowledge about the human health effects of ionizing radiation. *Id.* at 4.

In support of its contention, CCAM for the first time provides affidavits of four individuals attesting to "personal and indirect familiarity" with people near Millstone who suffered from cancer. Motion at 5. CCAM provides for the first time the affidavits of Dr. Sternglass and Mr. Mangano, who discuss the health effects of radiation. Motion at 4. For the first time, CCAM references a 2003 DNC Radioactive Effluent Release Report. Motion at 4 & n.6. In its Motion, CCAM provides additional information regarding the State of Connecticut Department of Public Health Connecticut Tumor Registry. *Id.* at 3.

CCAM has failed to show that reconsideration of the Board's rejection of Contention I is warranted. CCAM's reassertion of its earlier arguments does not rise to the level of "compelling circumstances" as contemplated by the Commission for motions for reconsideration. Further, to the extent that CCAM relies on new information, CCAM has not demonstrated that its claims could not have been raised earlier. Finally, CCAM points to no error in the Board's decision, which relies in substantive part on CCAM's failure to provide adequate support for its contention, as it was filed and later amended. Nor do CCAM's blanket assertions regarding effluent releases and "issues related to safety" show any error with the Board's determination that CCAM has not demonstrated that its contention, as filed and amended, relates in any way to aging.

2. *CCAM Proposed Contention II (Terrorism)*

The Board rejected CCAM Contention II on the grounds that it failed to set forth "any specific supporting documentation" and that the Commission expressly determined that contentions

related to terrorism are beyond the scope of license renewal. See LBP-04-15 at 11-12 & n.47, citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 (2002). The Board, therefore, concluded that the contention is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii). LBP-04-15, slip op. at 12.

In its Motion, CCAM reasserts claims made in its Petition that the Department of Homeland Security has identified Millstone as a primary terrorist target. Motion at 5-7. CCAM for the first time cites to a December 2003 newspaper article and “other media reports” in support of its assertion. In addition, CCAM states that the NRC should reassess the rationale expressed in *McGuire* in light of these circumstances. In this regard, CCAM notes that Indian Point nuclear power station, located in New York, was a potential September 11th terrorist target and that Millstone is more similar to Indian Point than it is to McGuire. *Id.* at 6.

CCAM has failed to show that reconsideration of the Board’s rejection of Contention II is warranted. CCAM’s reassertion of its earlier arguments does not rise to the level of “compelling circumstances” as contemplated by the Commission for motions for reconsideration. Further, to the extent that CCAM relies on new information, CCAM has not demonstrated that its claims could not have been raised earlier. Finally, CCAM points to no error in the Board’s decision, which relies in substantive part on directly relevant Commission caselaw, and therefore CCAM has failed to demonstrate the existence of “compelling circumstances” with respect to reconsideration of the Board’s rejection of this contention.

3. *CCAM Proposed Contention III (Validity of NPDES Permit)*

In its Motion (at 7-8), CCAM merely reiterates its assertion that DNC lacks a valid National Pollutant Discharge Elimination System (“NPDES”) permit for the Millstone Power Station. The Board found this contention to be inadmissible, on the grounds that the issue raised by CCAM fell “solely within the purview” of the Connecticut State Department of Environmental Protection

("CDEP") and, therefore, was beyond the scope of the NRC license renewal proceeding. LBP-04-15, slip op. at 13-14. CCAM has not alleged -- let alone demonstrated -- any material error in the Board's determination which would render that determination invalid. Absent this requisite showing, CCAM has not demonstrated that reconsideration is appropriate for Contention III.

4. *CCAM Proposed Contention IV (Losses to the Indigenous Winter Flounder Population)*

The Board declined to admit Proposed Contention IV, which pertained to "irreversible harm to the environment" arising from continued operation of Millstone Units 2 and 3; in particular, CCAM alleged that plant operations have caused losses to the Niantic winter flounder population. The Board found that CCAM failed to substantiate its allegations with expert opinion or references, and, furthermore, failed to identify any portion of the license renewal application with which it took issue. LBP-04-15, slip op. at 14.

CCAM's argument in the Motion consists of an observation that CCAM's counsel quoted from a CDEP document that "intended to be offered as evidence in these proceedings" at the June 30th prehearing conference,⁶ and a statement that CCAM "is prepared to produce all pertinent documents . . . to prove this disputed contention" at hearing. Motion at 9. These statements miss the mark. The Board made clear in its Order that, in order to comply with the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v), a petitioner is obliged to identify supporting information with specificity. See LBP-04-15, slip op. at 7, 14 & n.60. CCAM has proffered no argument as to why it could not identify "all pertinent documents," including the referenced CDEP memorandum, in a particularized and timely fashion.⁷ Moreover, CCAM has not even addressed

⁶ See Memorandum from V. Crecco, Ph.D, DEP Marine Fisheries, to O. Inglese, DEP Water Bureau, dated August 28, 2003. This document is appended to the Motion as an exhibit.

⁷ Citing references to the Millstone docket, CCAM states that "[t]he NRC staff reviewing the application have had no difficulty identifying pertinent documents from state records." Motion at 9. However, the burden of identifying documents in support of proposed contentions is on the
(continued...)

the Board's determination regarding its failure to challenge DNC's compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B). In short, CCAM simply has not demonstrated "compelling circumstances" rendering the Board's decision on this proposed contention invalid.

5. *CCAM Proposed Contention V (Technical and Operational Defects)*

The Board rejected CCAM Contention V on the grounds that CCAM did not assert any aging-related problem. The Board found that, to the extent that the contention raises issues regarding historical defects, absent a link to aging-related issues, it is outside of the scope of the proceeding. In addition, the Board found that CCAM: (1) failed to cite a single specific deficiency, error or defect, and failed to provide sufficient supporting expert opinion, facts or documents; (2) failed to adequately analyze the applications; and (3) failed to cite to any particular section of either application or any specific system, structure or component as being deficient. Therefore, the contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) to provide specificity, and, to the extent that the contention can be construed as a contention of omission, it fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi) relating to the identification of each failure and the supporting reasons.⁸

⁷(...continued)
petitioner, not the NRC staff.

⁸ The Board also found that CCAM's argument related to Severe Accident Mitigation Alternatives ("SAMAs") that certain plant modifications that are examined for possible implementation should be required for implementation fails as an impermissible attack to the Commission's regulations. See LBP-04-15, slip op. at 16. CCAM asserts that the Board erred in concluding that CCAM's contention challenged an "NRC policy, when it clearly challenged decisionmaking . . ." In this regard, CCAM articulated its position that "once having been identified as features which would aid in protection of the public . . . these features should not be rejected on pure cost-benefit analysis grounds." *Id.* CCAM's position as to what the regulations should require with respect to SAMAs directly challenges the regulations at 10 C.F.R. § 51.53(c)(3)(ii)(L)(staff must consider alternatives to mitigate severe accidents). Therefore, reconsideration is not appropriate.

In its Motion, CCAM asserts that the Applicant has not addressed the issue of unplanned outages or factored it into its analysis.⁹ See Motion at 9-10. CCAM, relying on newly-supplied documents, claims that Millstone has experienced numerous unplanned outages. *Id.* at 10. CCAM states, without support, that excessive outages is a material issue “because it directly implicates the quality and depth of the applicant’s aging management assessment.” *Id.* Further, CCAM states that although DNC stated that it looked at historical information, there is no discussion of Unit 2’s history of excessive unplanned shutdowns, and “hence, their effect on aging.” *Id.* at 11.

CCAM has failed to show that reconsideration of the Board’s rejection of Contention V is warranted. CCAM’s reassertion of its earlier arguments does not rise to the level of “compelling circumstances” as contemplated by the Commission for motions for reconsideration. Further, to the extent that CCAM relies on new information, CCAM has not demonstrated that its claims could not have been raised in a timely fashion. Finally, CCAM points to no error in the Board’s decision, which found that CCAM failed to link its issues regarding historical defects (*i.e.*, unplanned outages) to any aging-related issue.

6. *CCAM Proposed Contention VI (Evacuation Planning)*

The Board rejected CCAM Contention VI on the grounds that it raises issues regarding the adequacy of existing emergency plans, which the Commission has stated are outside of the scope of license renewal. See LBP-04-15, slip op. at 17-18 & n.77, *citing Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9 (2001). The Board further found that the contention is inadmissible because it fails to provide sufficiently specific facts

⁹ CCAM quotes from a portion of the transcript in which counsel for DNC stated he did not think that a specific discussion of the shutdown history of the plant appeared in the application. *Id.* at 10. Chapter 4.3, however, is devoted to fatigue analyses. Tr. at 154. Fatigue analyses look at the number of cycles and transients expected for the remaining period of operation, and the projection would include the history of the shutdowns. Tr. at 164-65; see also Table 4.3-2 (“Upset Transients”) of DNC’s Environmental Report. Thus, the Board’s discussion of the applications’ consideration of shutdowns was correct. LBP-04-15, slip op. at 16.

and/or expert opinion supporting the contention to demonstrate that a genuine dispute exists on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi). See LBP-04-15, slip op. at 18.

CCAM asserts that the Board's determination the evacuation plans are outside its purview in license renewal proceedings was based on misplaced reliance that the NRC adequately updates emergency evacuation plans. Motion at 12. CCAM asserts that "faithfulness to reality" and common sense dictate that the evacuation zone surrounding Millstone should be extended beyond a 10-mile radius. *Id.*

CCAM has failed to show that reconsideration of the Board's rejection of Contention VI is warranted. CCAM misinterpreted the Board's reasons why its contention must be rejected - - the Board rejected the contention on the basis of the Commission's determination that such contentions are inadmissible in license renewal proceedings. Further, CCAM's blanket assertions disagreeing with the established evacuation zone do not demonstrate "a clear and material error" in the Board's application of the contention admissibility standards that rises to the level of "compelling circumstances." Therefore, CCAM's Motion should be rejected.

CONCLUSION

CCAM has failed to demonstrate that the Commission's standards for motions for reconsideration have been met and that good cause exists for its request to amend its petition at this late date. Accordingly, its Motion should be denied.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 18th day of August 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DOMINION NUCLEAR CONNECTICUT, INC.) Docket Nos. 50-336-LR, 50-423-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE'S MOTION FOR RECONSIDERATION AND REQUEST FOR LEAVE TO AMEND PETITION," in the captioned proceeding have been served on the following through electronic mail and with copies by deposit in the NRC's internal mail system, or through electronic mail with copies by deposit in the U.S. Postal Service as indicated by an asterisk, this 18th day of August, 2004:

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