

August 18, 2004

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

Before the Atomic Safety and Licensing Board

August 24, 2004 (4:04PM)

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

In the Matter of)	
)	
Dominion Nuclear Connecticut, Inc.)	Docket Nos. 50-336-LR
)	50-423-LR
(Millstone Nuclear Power Station,)	
Units 2 and 3))	ASLBP No. 04-824-01-LR
)	

**DOMINION'S ANSWER TO CCAM'S
MOTION FOR RECONSIDERATION AND
REQUEST FOR LEAVE TO AMEND PETITION**

Dominion Nuclear Connecticut, Inc. ("Dominion") hereby answers and opposes the Connecticut Coalition Against Millstone ("CCAM") Motion for Reconsideration and Request for Leave to Amend Petition, which CCAM filed on August 9, 2004.¹ CCAM has had five opportunities (its petition, amended petition, supplemental declaration, reply and oral argument) to establish an admissible contention, and has failed at every occasion to do so. At this juncture, the proceeding is properly before the Commission on CCAM's appeal, and CCAM deserves no further opportunities before this Board.

I. THIS PROCEEDING IS NO LONGER BEFORE THE LICENSING BOARD

Dominion respectfully submits that this proceeding is now on appeal before the Commission, and therefore, the Licensing Board no longer has jurisdiction to entertain CCAM's motion. Before filing its Motion for Reconsideration, CCAM filed a Notice of Appeal with the

¹ CCAM's Certificate of Service for this pleading is mistakenly dated July 9, 2004. CCAM provided a copy of this pleading to Dominion by electronic mail on August 9, 2004, but did not include the affidavits with the electronic submission.

Commission. Once CCAM filed its Notice of Appeal, jurisdiction over the dismissal of its contentions was transferred to the Commission. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 N.R.C. 23, 27 (1987) (once a Licensing Board issues its decision disposing of an issue and appeals are filed, the appeal board [now the Commission] has jurisdiction over new matters raised in connection with such issue.).² Under the NRC rules, only one presiding officer at a time will have jurisdiction over a particular matter. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 N.R.C. 681, 688 (1983); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86, 16 N.R.C. 1190, 1193 (1982).

II. CCAM'S MOTION FOR RECONSIDERATION IS IMPROPER

If the Licensing Board chooses to entertain CCAM's motion, it should deny it as improper. Under the NRC rules,

Motions for reconsideration may not be filed except upon leave of the presiding officer or Commission, upon 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.

10 C.F.R. § 2.323(e). CCAM has not sought the Licensing Board's or Commission's leave to file this motion, and has not shown any compelling circumstances. Moreover, a motion for reconsideration should not include new arguments or evidence unless a party demonstrates that its new material relates to a Board concern that could not reasonably have been anticipated.

Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10,

² See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 N.R.C. 755, 757 and n.4 (1983) (holding that a Licensing Board retains jurisdiction over a motion to reopen "until exceptions to an initial decision are filed"); Curators of the University of Missouri, CLI-95-1, 41 N.R.C. 71, 94 (1995) (discussing the Appeal Board's reasoning in Limerick approvingly and applying it to a motion for reconsideration).

19 N.R.C. 509, 517-18 (1984). CCAM's Motion is in fact simply an attempt to offer affidavits and arguments that could have been submitted with its original petition.

III. CCAM'S MOTION TO AMEND ITS PETITION IS UNTIMELY AND UNJUSTIFIED

CCAM's Motion is equally improper and unjustified as motion to amend its previous petition. Under the NRC's Rules of Practice, a late filed petition "will not be entertained" absent a balancing of five factors. 10 C.F.R. § 2.309(c). Further, contentions may only be amended after the initial filing with the leave of the presiding officer upon a showing (1) that the information upon which the amended contention is based was not previously available, (2) that the information upon which the amended contention is based is materially different than information previously available, and (3) that the amended contention has been submitted in a timely fashion based on the availability of the subsequent information. CCAM has made no attempt to address any of the standards that govern whether a late-filed petition and amended contentions should be accepted.

Where a late-filing petitioner fails to address the lateness factors, the Board may properly dismiss the petition without further consideration. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998) ("[T]he Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition.") (footnote omitted); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461, 465-66 (1985) ("[G]iven its failure even to address the . . . lateness factors, [a] [late] intervention petition [is] correctly denied because it [is] untimely.") "Late petitioners properly have a substantial burden in justifying their tardiness." Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975). "[T]he late petitioner must address each of [the] five factors and affirmatively demonstrate that, on

balance, they favor permitting his tardy admission to the proceeding.” Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 N.R.C. 350, 352 (1980) (quoting Nuclear Fuel Services, supra).

[T]he burden of persuasion on the lateness factors is on the tardy petitioner and . . . in order to discharge that burden, the petitioner must come to grips with those factors in the petition itself. The underlying reason for this requirement is particularly apparent in the context of the first factor. A licensing board hardly could determine whether there was justification for the untimely filing without knowing why the petition was not submitted by the prescribed deadline—information peculiarly within the possession of the petitioner. Likewise, in most instances at least, the board will not be able to assess confidently the third factor (the extent to which the petitioner’s participation may reasonably be expected to assist in developing a sound record) without having before it the petitioner’s reasons for believing that the factor weighs in his or her favor.

Pilgrim, ALAB-816, 22 N.R.C. at 466 (footnotes omitted). Therefore, because CCAM has utterly failed to discharge its burden of justifying its tardiness, its motion must be denied.

Further, it is obvious that the affidavits and the few other documents that CCAM now proffers could have been provided earlier, and therefore, that there is no good cause for any late filing. In addition, these materials do nothing to address the infirmities in CCAM’s contentions. CCAM essentially ignores the Licensing Board’s decision, which held that each of CCAM’s contentions either sought to raise issues outside of the scope of the proceeding or failed to identify any error in Dominion’s application. None of these defects in CCAM’s contentions is cured.

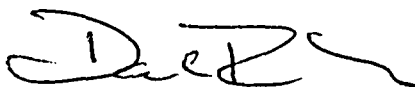
Finally, CCAM’s Motion should be dismissed in the interest of administrative finality. The Notice of Opportunity for Hearing in this proceeding gave CCAM until May 11 to prepare its petition and contentions, yet CCAM chose to resubmit on March 22 the petition that it had previously submitted prematurely on February 12, and took no advantage of the 60 day period that it was afforded. After the May 11 deadline had expired, and after Dominion and the NRC

Staff had submitted their answers to CCAM's petition, CCAM filed a late amendment to its petition and supporting affidavits. Although CCAM provided no justification for this late filing, Dominion – in the interest of avoiding further delays – did not object to this filing. Then, on June 29 – the eve of the prehearing conference – CCAM filed yet another motion to supplement its petition with a Declaration of Michael Steinberg. Thus, CCAM has already had three bites at the apple. CCAM also had ample opportunity to present all arguments supporting its contentions in its reply (submitted two days after the deadline for that pleading) and at the prehearing conference. In sum, CCAM had months to prepare its contentions, has previously amended its petition twice (both out of time), and had two opportunities to address the objections to its contentions. Further opportunities are simply unwarranted. It is time to bring this proceeding to closure.

IV. CONCLUSION

For all of these reasons, CCAM's Motion should be denied.

Respectfully Submitted,



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Dated: August 18, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion's Answer to CCAM's Motion for Reconsideration and Request for Leave to Amend Petition," dated August 18, 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 18th day of August, 2004.

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

David R. Lewis