UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE	:	04-3577-AG
V.	:	
UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL.	:	SEPTEMBER 3, 2004

PETITIONER'S OBJECTION TO MOTION TO DISMISS

The Petitioner, Connecticut Coalition Against Millstone ("Coalition") objects herewith to the Motion to Dismiss this Petition for Review dated August 16, 2004 and filed on behalf of the Government Respondents, the U.S. Nuclear Regulatory Commission ("NRC") and the United States of America. The Motion to Dismiss is supported by the Intervenor, Dominion Nuclear Connecticut, Inc. ("Dominion"), which filed a Response in Support of the Federal Respondents' Motion to Dismiss dated August 26, 2004.

The Respondents seek dismissal of this petition for review for alleged lack of jurisdiction and mootness.

The Motion to Dismiss is meritless and should be denied.

I. FACTUAL BACKGROUND

A. Introduction

The Connecticut Coalition Against Millstone filed a Petition to Intervene and Request for Hearing on February 12, 2004 with the NRC, thereby to challenge an

application by Dominion to extend the operating licenses for the two operating nuclear reactors at the Millstone Nuclear Power Station in Waterford, Connecticut.

On February 13, 2004, revised rules substantially curtailing hearing rights of intervenors in NRC licensing proceedings went into effect. The new rules virtually eliminate discovery and cross-examination of witnesses and were adopted by the NRC in acquiescence to nuclear industry pressure to facilitate the licensing process by diminishing public participation and scrutiny of the nuclear industry.

On February 13, 2004, the NRC dismissed the Petition to Intervene as premature. The NRC determined that a petition to intervene in the proceedings could be filed, and be subject to the "new" rules of procedure, only after the NRC published a notice of opportunity for hearing in the Federal Register.

The Petitioner, in moving to vacate the dismissal, called to the NRC Commissioners' attention a guidance document posted on the NRC website entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." A copy of this document is annexed hereto. Pursuant to the Fifth Scenario of this NRC document, the Petitioner represents that the NRC was bound to adjudicate its February 12, 2004 Petition to Intervene under the "old" rules.

The Respondents argue in their Motion to Dismiss that the February 12, 2004 Petition to Intervene was premature. The Respondents' Motion to Dismiss fails to address the NRC's guidance document, "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." The Petitioner argues that the Motion to Dismiss, being without merit, should be denied.

B. Procedural Background

On January 22, 2004, Dominion Nuclear Connecticut, Inc. formally submitted an application to the NRC to obtain relicensing of its Millstone Unit 2 and Millstone Unit 3 nuclear reactors. Millstone Unit 2 is currently licensed to operate until its 40-year license expires in the year 2015. Millstone Unit 3 is currently licensed to operate until its 40-year license expires in the year 2025. The license extension application, if granted, would extend Unit 2's operational life to the year 2035 and Unit 3's operational life to the year 2045. Millstone Unit 1 nuclear reactor was permanently retired prematurely in 1996, having operated since 1970. Submission of the license renewal application ("LRA") followed numerous contacts and private meetings between Dominion and the NRC staff concerning such application.

On February 3, 2004, NRC published "Dominion Nuclear Connecticut, Inc. Notice of Receipt and Availability of Application for Renewal of Millstone [Nuclear] Power Station, Units 2 and 3, Facility Operating License Nos. DPR-65 and NPF-49 for Additional 20-Year Period" in the Federal Register (69 FR 5197) as Docket Nos. 50-336 and 50-423.

By letters dated February 5, 2004, the NRC notified the Waterford (CT) Public Library and the Three Rivers Community College in Norwich (CT) that it was thereupon submitting to each respective facility a copy of the application as it had been filed with the NRC in Docket Nos. 50-336 and 50-423.

On February 6, 2004, Dominion met with NRC staff in Rockville, Maryland to formally discuss the LRA.

On February 6, 2004, the NRC posted on its official website a notice that the NRC would hold a public meeting in Waterford on February 17, 2004 regarding the LRA.

On February 8, 2004 or earlier, the NRC posted notice on its official website of the pendency of the Millstone LRA. The posting included the complete Millstone LRA, consisting of some 3,000 pages.

On February 12, 2004, the Coalition submitted its "Petition to Intervene and Request for Hearing" to the NRC's Office of the Secretary with a copy to the licensee. The Office of the Secretary emailed notice of its acknowledgment of the filing on February 12, 2004.

On February 13, 2004, revisions to 10 CFR Part 2 severely curtailing *inter alia* the right of intervenors in hearing procedures before the NRC became effective. The revisions are the subject of a challenge mounted in the U.S. Court of Appeals for the First Circuit on January 26, 2004 by Citizens Awareness Network, Inc. See Citizens Awareness Network et al. v. NRC, Nos. 04-1145 and 04-1359 (consolidated).

On or before February 16, 2004, the NRC posted on its official website, www.nrc.gov, a chart entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." Such chart posits various scenarios of potential events occurring with regard to license applications and interventions and it assigns applicability of "old" versus "new" rules. The fifth and ninth scenarios are particularly apt. They posit the following potential events:

Fifth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004.

Ninth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC web site before February 13, 2004, but not in Federal Register; hearing request/intervention petition received after February 13, 2004.

In both scenarios five and nine, case, the NRC has determined that the "old" CFR Regulations apply.

On February 17, 2004, representatives of the NRC, including NRC technical experts and two representatives from the Office of the General Counsel of the NRC, conducted a public meeting regarding the Millstone LRA in Waterford, as scheduled. During such meeting, NRC representatives stated that the NRC was not legally required to conduct a hearing on the application in the absence of a formal request for a hearing. The NRC expended a significant amount of money in preparing for the presentation, including commissioning a large mounted visual depiction of the Millstone Nuclear Power Station, assembling voluminous informational documents and transporting no fewer than seven (7) of its representatives to participate in the presentation.

The contents of the LRA as posted on the NRC website on or before February 8, 2004 remained unchanged in substance during the critical period prior to February 13, 2004.

On March 10, 2004, the NRC Secretary issued a letter of notification of its rejection of the CCAM Petition and returned the Petition to its sender by U.S. Mail. The Petition was resubmitted as originally filed.

On March 12, 2004, the NRC published "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period" under Docket Nos. 50-336 and 50-423.

On March 22, 2004, CCAM submitted its "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 Hearing Rules to Said Petition."

The licensee and NRC staff filed objections to such motion.

By order dated May 4, 2004, the NRC Commissioners issued CLI-04-12 whereby it dismissed the Motion to Vacate.

CCAM sought reconsideration of such order. The NRC Commissioners denied the motion on May 18, 2004. This petition for review, dated June 25, 2004, ensued. A copy of the Petition for Review is annexed hereto.

The Petition for Review seeks the following relief: a declaration that the Commission's action was unlawful; an order to convene an evidentiary hearing

pursuant to the applicable provisions of the Code of Federal Regulations in effect on February 12, 2004; and any other appropriate relief.

II. ARGUMENT

A. This Court Possesses Subject Matter Jurisdiction

The Respondents argue that this Court lacks subject matter jurisdiction because the NRC dismissal of CCAM's Petition to Intervene and Request for Hearing dated February 12, 2004 was not a "final order [of the NRC] made reviewable by section 2239 of Title 42[.] 28 U.S.C. §2342(4)."

The Respondents further argue that the NRC dismissal of the Petition to Intervene did not occur in a "proceeding of the kind specified in subsection (a)" of 28 U.S.C. §2239. Subsection (a) provides for hearings "for the granting, suspending, revoking or amending of any license . . ." 42 U.S.C. §2239(a)(1)(A).

Further, the Respondents argue that there was "no proceeding" and, hence, the NRC order does not fall within the review provisions of the Hobbs Act.

The Respondents' argument is pure sophistry.

Significantly, the Respondents utterly fail to address the fact that the NRC posted on its own website a chart to guide prospective parties to relicensing proceedings when petitions for hearing are to be conducted pursuant to NRC rules in effect prior to February 13, 2004 as opposed to NRC rules in effect on and after February 13, 2004. ("Applicability of Old and New 10 CFR Part 2 to NRC Proceedings," a copy of which is annexed hereto.)

The facts of this case fall clearly within the parameters of the Fifth Scenario, which provides as follows:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004.

The NRC dismissed the Petition to Intervene on the grounds that "there is not yet a proceeding in which to can seek to intervene" because the NRC had not yet published a notice of opportunity for a hearing in either the Federal Register. See Motion to Dismiss at pages 6-7. The dismissal relies heavily on the Commissioners' conclusion that a petition to intervene and request a hearing in a relicensing application need await the NRC's issuance of a "notice of hearing" or "notice of proposed action."

Yet, the NRC's own guidance document directs that a petition to intervene which is filed prior to February 13, 2004, in the absence of or prior to a notice of docketing and opportunity for hearing in either the Federal Register or NRC website, is to be adjudicated under the rules in effect prior to February 13, 2004. The NRC dismissal fails to recognize that the NRC's Fifth Scenario provides that a petition is deemed by the NRC to have been timely filed as long as the application was docketed prior to February 13, 2004 – as occurred here - even if "notice of docketing and opportunity for hearing [were] not published in either Federal Register or NRC website."

Thus, in dismissing the Petition to Intervene, the NRC violated its own guidance and policy.

In this case, the NRC docketed the application on February 3, 2004 and published such notice in the Federal Register. 69 FR 5197. As of February 13, 2004, the notice of opportunity for hearing had not yet been published in the Federal Register or the NRC website. Clearly, under the NRC's own guidance and interpretation of the law, the petition was filed timely.

The NRC's rejection of CCAM's argument, namely, that the facts of the present application clearly fall within the parameters of the Fifth Scenario, is clearly contrary to the logic of Scenario 5.

The Order states in pertinent part as follows:

> Moreover, in order for Scenario 5 to apply, the NRC Staff must not have published a notice of docketing and opportunity for a hearing. But in this case the Staff did, in fact, publish such a notice; thus, Scenario 5 cannot apply.

Clearly, whether or not such Federal Register notice was published is to be determined **as of February 13, 2004** in order for Scenario 5 to make any sense. The NRC did not "cure" the applicability of Scenario 5 with subsequent Federal Register notice.

Moreover, Scenario 5 assumes that a "proceeding" has commenced once an application has been submitted and docketed by the NRC regardless of whether a notice of docketing and opportunity for hearing had yet been published in the Federal Register or on the NRC website by February 13, 2004. As long as the petition to intervene and request for hearing was submitted prior to February 13, 2004, Scenario 5 dictates the petition was timely filed.

The Order is in error because it utterly disregards the NRC's own published guidance which sets specific parameters pursuant to which CCAM's petition qualifies for full consideration under the "old" CFR rules.

Because the Petition to Intervene was timely filed, the NRC order rejecting it was a final order which terminated the proceedings.

While the decisionmaking of a agency is generally accorded deference by the courts, this axiom does not apply where, as here, the agency is addressing an issue for the first time.

The Respondents' reliance on the decisions in Honicker v. NRC, 590 F.2d 1207 (D.C. Cir. 1978) and Dickenson v. Zech, 846 F.2d 369 (6th Cir. 1988) is misplaced. In both cases, the petitioners challenged the NRC's denial of "emergency relief," a form of relief not contemplated in NRC regulations or statutes. Thus, their requests were determined to be not among the "proceedings" provided for by statute and thus not suitable for judicial review under the Hobbs Act.

Unlike the petitioners in Honicker and Dickenson, the Petitioner herein petitioned to intervene in proceedings made legally available by virtue of Dominion's application for a license renewal, indisputably proceedings which fall within 42 U.S.C. §2239.

The Commission's rejection of the February 12, 2004 Petition to Intervene was a final decision on the petition. It "imposed an obligation" obligating the Petitioner to not proceed on the February 12, 2003 petition under pre-February 13, 2004 rules; it "denie[d] a right," namely the right to have the Petition

adjudicated under the pre-February 13, 2004 rules and it "fix[ed] some legal relationship" which permitted Dominion to avoid the consequences of a challenge to its application under the pre-February 13, 2004 rules. Honicker at 1209.

Therefore, the Petition for Review properly challenges a final decision in licensing proceedings which is subject to judicial review. This Court possesses subject matter jurisdiction.

B. The Petition for Review Is Not Moot

The Respondents argue that because the Petitioner filed a Petition to Intervene in the license renewal proceedings on March 22, 2004, and that proceedings are taking place on the March 22, 2004 Petition to Intervene,[1] that the issues on appeal have become moot. They assert that the Petitioner will be able to raise the issue of whether its March 22, 2004 petition should be adjudicated under the "old" v. "new" rules" **after the NRC's final decision in the current administrative proceeding**. They argue that in this way, "judicial economy" will be promoted.

The Respondents' argument is fanciful.

The Respondents would have the U.S. Nuclear Regulatory Commission, its adjudicatory arm (the Atomic Safety and Licensing Board), Dominion, the NRC Staff and the Petitioner go through the motions of an adjudication under "new" hearing rules which eliminate discovery and cross-examination of witnesses, including any and all procedural detours which may arise in the proceedings, only

[1] The Petitioner's "Motion for Reconsideration and Request for Leave to Amend Petition," presently pending before the Atomic Safety and Licensing Board Panel, is annexed hereto.

to face the prospect of having the entire administrative record thus developed vacated by a prospective appellate ruling that the NRC should have adjudicated the application under the "old" hearing rules.

Moreover, the NRC's guidance chart, "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings," clearly dictates under all scenarios that the March 22, 2004 Petition to Intervene be adjudicated pursuant to the "new" rules. The Petitioner could not plausibly challenge on appeal adjudication of the March 22, 2004 under the "new" rules and thus the issues raised in the present Petition for Review could not be raised – ever – under the Respondents' approach.

The Respondents' approach would promote squandering of administrative and judicial resources and ultimately deprive the Petitioner of appellate rights which are available by statute.

The Respondents have not established that the pertinent issues have become moot.

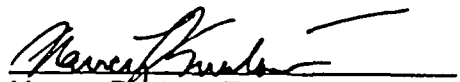
III. Conclusion

The NRC Commissioners erred in dismissing the February 12, 2004 Petition to Intervene. The Petition to Intervene was timely filed in proceedings the NRC had commenced by virtue of accepting and docketing the application prior to February 13, 2004. See "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings," Fifth Scenario.

The dismissal of the Petition to Intervene was a final judgment terminating the Petitioner's rights under law.

The Motion to Dismiss should therefore be denied.

CONNECTICUT COALITION AGAINST MILLSTONE
The Petitioner

By: 

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Applicability of Old and New 10 CFR Part 2 to NRC Proceedings

The following table associates a variety of potential notice, licensing, and regulatory scenarios with the applicable version of 10 CFR Part 2.

Proceeding status	Old Part 2	New Part 2
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in *Federal Register* but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted and granted by NRC before February 13, 2004	•	
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in *Federal Register* but not on NRC Web site before February 13, 2004; hearing request/intervention petition for intervention submitted before February 13, 2004, but not yet acted upon by NRC on February 13, 2004	•	
Notice of docketing and opportunity for hearing published in *Federal Register* but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted after February 13, 2004	•	
Pre-application meetings and correspondence occurring before February 13, 2004, but application submitted on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing *not* published in either *Federal Register* or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing *not* published in either *Federal Register* or NRC Web site; hearing request/intervention petition prepared and submitted on or after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the *Federal Register* before February 13, 2004, but *not* on NRC Web site; hearing request/intervention petition received before February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the *Federal Register* before February 13, 2004, but *not* on NRC Web site; hearing request/intervention petition received after February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Web site before February 13, 2004, but not in *Federal Register*; hearing request/intervention petition received after February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Web site on or after February 13, 2004, but *not* in *Federal Register*; hearing request/intervention petition submitted on or after February 13, 2004		•
Application submitted before February 13, 2004, but docketed by NRC on or after after February 13, 2004; notice of docketing and opportunity for hearing		•

not published in either *Federal Register* or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		
Application submitted but docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing published in either *Federal Register* or NRC Web site on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing *not* published in either *Federal Register* or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		•

* Commission may determine and order the application of either the superseded or new Part 2 provisions.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE, *Petitioner*	:	Docket No. 50-423 LA-3
v.	:	
U.S. NUCLEAR REGULATORY COMMISSION, *Respondent*	:	JUNE 25, 2004

PETITION FOR REVIEW

The proposed Intervenor, Connecticut Coalition Against Millstone (CCAM), hereby petitions this Court, pursuant to 28 U.S.C. Sections 2342 and 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure, to review the decision of the U.S. Nuclear Regulatory Commission issued on May 4, 2004 (Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 N.R.C.__. Slip Op.). This petition also seeks review of the Commission's decision dated May 18, 2004 denying CCAM's Motion for Reconsideration of such order.

In CLI-04-12, the Commission denied CCAM's Motion to Vacate and thereby issued a final ruling terminating proceedings on a petition filed by CCAM on February 12, 2004 to intervene and request a hearing in the matter of the license renewal application of Dominion Nuclear Connecticut, Inc.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. Section 2342. Venue lies in the Second Circuit pursuant to 28 U.S.C. Section 2343 in that

CCAM is based in the State of Connecticut, its membership principally resides in the State of Connecticut, and the subject of this petition, the Millstone Nuclear Power Station, is located in Waterford, Connecticut.

CCAM submits that the U.S. Nuclear Regulatory Commission decision was contrary to law, was not supported by substantial evidence and was arbitrary and capricious. More particularly, CCAM submits that the Commission acted in violation of 10 C.F.R. Part 2 and its own policy and guidance documents in rejecting the February 12, 2004 filing as legally improper and premature and in determining that any proceeding on the Millstone license renewal application need be considered pursuant to the applicable provisions of the Code of Federal Regulations in effect on February 13, 2004.The Connecticut Coalition Against Millstone requests a declaration that the Commission's action was unlawful; an order to convene an evidentiary hearing pursuant to the applicable provisions of the Code of Federal Regulations in effect on February 12, 2004; and any other appropriate relief.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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**

CONNECTICUT COALITION AGAINST MILLSTONE
MOTION FOR RECONSIDERATION
AND REQUEST FOR LEAVE TO AMEND PETITION

The Connecticut Coalition Against Millstone ("CCAM") moves herewith for reconsideration of the Atomic Safety and Licensing Board's ("Board") Memorandum and Order (Ruling on Standing and Contentions), LBP-04-15, issued on July 28, 2004, by which it dismissed the Coalition's Petition to Intervene and Request a Hearing on the application of Dominion Nuclear Connecticut, Inc. ("Dominion") to extend the operating licenses for Millstone Nuclear Power Station Unit 2 to the year 2015 and Unit 3 to the year 2025.

CCAM further seeks leave to amend its petition to provide further support for its contentions.

In support of this motion, CCAM attaches hereto and incorporates by reference herein affidavits, with attachments thereto, on behalf of the following:

1. Ernest J. Sternglass, Ph.D., Professor Emeritus of Radiological Physics at the University of Pittsburgh School of Medicine;
2. Joseph J. Mangano, National Coordinator of the Radiation and Public Health Project (RPHP) based in New York, N.Y.;
3. Cynthia M. Besade;

4. Carol Ward;

5. Milton C. Burton;

6. Michael Steinberg.

With regard to each of the contentions submitted by CCAM, the Board determined each was inadmissible.

CCAM argues herein that such conclusions are not justified on the facts or the law and further argues that considerations of the public interest compel reconsideration in light of the information provided in the referenced affidavits and attachments thereto.

1. **Contention 1 - Health**

CCAM's first contention asserts that:

(a) the "routine and unplanned releases of radionuclides and toxic chemicals into the air, soil and water have caused death, disease, biological and genetic harm and human suffering on a vast scale," and (b) "cancer clusters have been identified in many areas close to Millstone" since Units 2 and 3 became operational and that the cancers "are scientifically and medically linked to the routine and unplanned emissions of Millstone."

Dominion and the NRC Staff ("Staff") both refute this contention.

Dominion's application for license renewal nowhere addresses the issue of the effects on human health from the continued emissions to the air and water of radioactive effluent. See application.

As CCAM argued at the Board's June 30, 2004 proceedings, this issue is implicated in relicensing proceedings which require an analysis of whether the

licensee can, for instance, assure the reactors can be safely shut down during the relicensing term.

As stated, CCAM intends to rely in part on government documents which have compiled Millstone radioactive effluent emission history.[1] The government documents alluded to refer as well to the State of Connecticut Department of Public Health Connecticut Tumor Registry, and in particular the Connecticut Tumor Registry's publication entitled "Cancer Incidence in Connecticut Counties, 1995-99." This document was referred to in the declaration of Michael Steinberg, which was implicitly accepted by the Board despite its asserted lateness,[2] and in CCAM's arguments to the Board on June 30, 2004.[3] The official Connecticut Tumor Registry report released in January 2003 concludes that cancers affecting women are at their highest level in the New London area surrounding Millstone, in comparison with other areas within the state. The report finds that cancers affecting men in the New London area are exceeded only by cancer rates in Tolland County.[4] Mr. Steinberg's further examination of the Tumor Registry report appears on the NRC's website and is available in ADAMS ML041770179.

The meaning of the term "safety" is critical to this discussion, as CCAM argued at the Board's June 30, 2004 proceedings.[5] This issue is implicated in relicensing proceedings which require an analysis of whether the licensee can,

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[1] Some of these documents are referenced in Millstone and Me (Steinberg), and see e.g., Dominion Nuclear Connecticut, Inc. Millstone Power Station Units 1, 2 and 3 2003 Annual Radiological Environmental Operating Report of April 28, 2003 (available on NRC website at ADAMS, ML041270333) and Dominion Nuclear Connecticut, Inc. Millstone Power Station Units 1, 2 and 3 2003 Radioactive Effluent Release Report of April 29, 2004, Volumes I and II. (also available on the NRC website).
[2] LBP-04-15 at 12.
[3] Transcript of June 30, 2004 proceedings (hereinafter referred to as "TR") at page 29
[4] TR at 29
[5] TR at 30-31, 37-40.

for instance, assure the reactors can be safely shut down during the relicensing term.

The operational history of the Millstone nuclear reactors is instructive. As recently as March 7, 2003, Millstone Unit 2 suffered a reactor trip – and was not safely shut down. Over a 24-hour period following the trip, an "abnormal" release of radioactivity occurred which was acknowledged by Dominion to be "an increase in airborne radioactive material released to the environment that was unplanned or uncontrolled due to an unanticipated event. . . . The amount of iodines released was higher than normal due to fuel defects."[6]

As the affidavits of Dr. Sternglass and Mr. Mangano declare, extremely small doses of radioactivity carry with them serious health consequences. These health consequences may not be immediately apparent, but they can cause devastating illness and death.

It is CCAM's position that in the present relicensing proceedings, it is incumbent on the regulating authority to consider issues relative to safety in the context of current knowledge and information about the human health effects of even low doses of ionizing radiation. Sternglass Affidavit at paragraph 28; Mangano Affidavit at paragraph 11.

Dr. Sternglass points out that the Journal of the American Medical Association has recently published a study linking dental X-rays at low doses to pregnant women in their first trimesters and subsequent low birth weight. Sternglass Affidavit at paragraph 27.

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[6] See Dominion Nuclear Connecticut, Inc. Millstone Power Station Units 1, 2 and 3 2003 Radioactive Effluent Release Report at 2.1.4.

CCAM's contention is not based on theory alone. The Affidavits of Cynthia M. Besade, Michael N. Steinberg, Carol Ward and Milton C. Burton attest to personal and indirect familiarity with more than 67 victims of cancer who either worked at the Millstone Nuclear Power Station or lived nearby or spent considerable time in the immediate area. Certainly their affidavits do not comprise an exhaustive identification of cancer victims in the Millstone community nor among former Millstone workers.

The fact of high rates of cancer among women, men and children in the Millstone community – and planned and unplanned releases of radioactivity from Millstone to the environment - have previously been documented but to date have not been addressed in the ongoing "monitoring of Millstone operations by the NRC.

The present application is missing a significant chapter: a chapter seriously identifying and analyzing the health crisis CCAM believes Millstone has played a significant part in bringing to bear upon its host community.

CCAM has demonstrated its first contention is legally admissible.

2. **Contention 2 -Terrorism**

CCAM contends in its second contention that Millstone Units 2 and 3 are terrorist targets of choice. The amended petition further states:

The federal Office of Homeland Security has identified the Millstone Nuclear Power Station as a primary terrorist target. It is an unprotected nuclear weapon awaiting detonation. As long as Units 2 and 3 generate electricity, the facility is a key element of the region's infrastructure and all the more appealing as a terrorist

target. As a nuclear weapon, Millstone possesses the radiological potential of thousands of Nagasaki and Hiroshima-size bombs. While it is operating, Millstone cannot be protected against a malevolent attack.

The Board determined that this issue cannot be considered in a relicensing proceeding in light of the NRC decision in CLI-02-26 released on December 12, 2002 ("McGuire").

In the intervening time since the McGuire decision was released, the federal 911 Commission has released its report of the September 21, 2001 terrorist attacks, including in its findings that the terrorist masterminds considered diving fully fueled passenger jumbojets into the Indian Point Nuclear Power Plan 29 miles north of New York City – instead of flying directly over it as actually occurred.

In common with Indian Point – and in contrast to the McGuire and Catawba facilities in the Carolinas - Millstone is a critical component of the infrastructure of the Northeast Corridor linking metropolitan New York to metropolitan Boston. In common with Indian Point, Millstone is located on the shores of a water body near densely populated areas close to airports and it was not constructed to standards that would repel or resist such an attack.

CCAM re-asserts that the Millstone Nuclear Power Station has been identified by the federal Department of Homeland Security as a primary terrorist target. CCAM does not have access to the Department of Homeland Security's records. However, this fact was reported by then-Governor John G. Rowland to the news media in his release of a letter to the federal agency referencing that agency's

identification of Millstone as a "Connecticut site of 'high interest' for additional security protection."[7] Other media reports have quoted the federal agency staff as identifying Millstone as a primary terrorist target.

In light of these circumstances, the NRC should re-assess the rationale it expressed in McGuire in support of its disinclination to permit consideration of potential acts of terrorism in reactor relicensing proceedings.

The present application is seriously deficient in completely lacking information as to how the facility will be refurbished to withstand terrorist attack – or the design basis accidents which will most probably occur in the event of a terrorist attack.

CCAM has demonstrated its second contention is legally admissible.

Contention 3 - NPDES Permit

In contention 3, CCAM asserts that Millstone Units 1 and 2 operations require the uninterrupted flow through intake and discharge structures of cooling water, which conduct requires a valid National Pollution Discharge Elimination System permit and the facility lacks such a valid permit.

CCAM asserted in its Amended Petition applicant has submitted false information with regard to its permit status. As an example, Dominion represented that it had filed complete documentation of its NPDES permit.

However, Dominion withheld its Emergency Authorization ("EA") as issued by the Department of Environmental Protection in 2000.[8] This EA derives from earlier EAs which the DEP began to issue to Northeast Utilities

[7] See Hartford Courant, December 12, 2003, "Rowland: 'Let Us Do the Worrying'"
[8] See TR at 82.

("NU"), Dominion's predecessor, to enable it to legally conduct the activities for which it pleaded guilty to conducting as federal felonies in 1998. CCAM appends hereto a copy of the EA. The permit itself has expired as a matter of law; furthermore, the Connecticut Department of Environmental Protection has authorized waiver of the expired permit outside its lawful authority by virtue of the EA. In effect, Millstone has been operating with illegal "emergency authorizations" routinely since 1998. See attached statement of DEP Commissioner Arthur J. Rocque, Jr. ("I really hate these [EAs]. Statutes are very limited in what the [sic] define as 'emergency.' Continuing emergency is not even contemplated.")

The parties are in material dispute as to the validity of the NPDES permit and Dominion has submitted erroneous information with regard to the permit.

CCAM has demonstrated its third contention is legally admissible.

3. **Contention 4 – Irreversible Harm to the Environment**

CCAM asserts in its fourth contention that the operations of Millstone Units 2 and 3 have caused devastating losses to the indigenous Niantic winter flounder population; the operations of Millstone Units 2 and 3 have caused irreversible damage to the marine environment; and continued operations will increase the severity of the environmental damage.

CCAM has demonstrated its fourth contention is legally admissible.

The applicant's submissions acknowledge that Millstone operations have contributed to the collapse of the Niantic winter flounder; however, the applicant

attributes the collapse principally to other causes, including supposed overfishing.

On this point, there is a substantial difference as to material facts.

During the June 30, 2004 proceedings, CCAM quoted from a passage contained in one of the state DEP documents intended to be offered as evidence in these proceedings as follows:

> The adult flounder stock size in the Niantic River has already declined by 95% from 1986 (76,180 fish) to 2002 (4,124 fish).

This DEP memorandum, and others, support CCAM's contention that Do minion is principally responsible for the ongoing devastation to the local fish stocks and the marine environment, contrary to the representations contained in the application.

The NRC staff reviewing the application have had no difficulty identifying pertinent documents from state records.[9] CCAM, as stated, is prepared to produce all pertinent documents from governmental records and other sources to prove this disputed contention at hearing.

5. Contention 5 – Technical Defects

CCAM asserts in Contention 5 that both Units 2 and 3 suffer technical and operational defects which preclude safe operation. These defects have led to numerous unplanned shutdowns when the reactors go from 100 per cent power to zero power in less than one second – an extraordinary physical phenomenon which necessarily and obviously exposes the reactors and their components to

[9] See attached three letters to the NRC file from Richard Emch, project manager, dated May 24, 2004; May 24, 2004 and June 1, 2004.

sudden changes in heat and pressure of great magnitude. These experiences cause mental fatigue and embrittlement.

The applicant has not addressed this issue nor factored it into its analysis

During the June 30, 2004 proceedings, the following colloquy occurred:

> Judge Young: The earlier part that you mentioned, that there was apart that talked about operating experience, in that portion is there any specific discussion of the shutdown history or –
>
> Mr. Lewis: I don't think so. I don't think there is – I mean, and I think that the experience that we've looked at is: when have failures occurred, and why have they occurred, and what have people done to fox them? So I don't think that there is a specific discussion of, you know, what's been the shutdown history of the plant.

TR at 163.

CCAM appends hereto an exhibit, produced by Dominion in other proceedings, which purports to list Unit 2 and Unit 3 shutdowns and their triggering events. On May 5, 2003, Dominion was notified by the NRC that it had crossed the threshold from "Green" to "White" for "Unplanned Scrams Per 7000 Critical Hours." There had been four unplanned scrams between November 2003 and April 29, 2004.[10]

Unit 2's history of excessive numbers of scrams is an issue material to these proceedings because it directly implicates the quality and depth of the applicant's aging management assessment.

[10] See Letter to David A. Christian dated May 5, 2004 from A. Randolph Blough, attached hereto.

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[10] See Letter to David A. Christian dated May 5, 2004 from A. Randolph Blough, attached hereto.

Although the applicant, under leading questioning by the Board,[11] stated that it had looked at "historical" information in informing its analysis, and although the applicant cited to Section 4.3 of the Unit 2 and Unit 3 applications, it appears upon review of each section that the discussion of metal fatigue and its implications for the two reactors is closely mirrored, with no discussion of Unit 2's history of excessive unplanned shutdowns and, hence, their effect on aging. There is indeed a dispute as to material facts which can only be addressed at a hearing.

Similarly, the Board was incorrect in rejecting CCAM's contention as regards Tables G-3-2 and F-3-1 and the SAMA analysis. The Board incorrectly concluded that CCAM's contention challenged an NRC policy, when it clearly challenged decisionmaking which may permit Dominion to avoid implementation of safety measures to protect the public in a design basis accident. It is CCAM's position that, once having been identified as features which would aid in protection of the public under such circumstances, these features should not be rejected on pure cost-benefit analysis grounds.

As to the SAMAS issue, and as to CCAM's other issues of technical defects, CCAM has demonstrated its fifth contention is legally admissible.

Contention 6 – Evacuation

In its Sixth Contention, CCAM argues that neither Connecticut nor Long Island can be evacuated, although both may be required to be in the event of a terrorist attack, in the aftermath of a terrorist attack leading to a design-basis accident, or otherwise when necessary.

[11] See TR at 153, 159

The Board determined that evacuation plans are outside its purview in relicensing proceedings. Its rationale is based in part on its reliance that the NRC adequately updates emergency evacuation plans as appropriate.

However, this reliance is misplaced. At best, the evacuation zone encompasses a ten-mile radius from Millstone. Current circumstances and faithfulness to reality and common sensed dictate that Suffolk County, Long Island, with its 1.75 million residents – not to mention the residents of Hartford, the state's capital, and New Haven, the state's educational and cultural capital and all points ion between which are within 50 miles of Millstone -should be included in the evacuation plan although they are just a few miles beyond the 10-mile radius.

CCAM has demonstrated its sixth contention is legally admissible.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the foregoing "Petitioner's Objection to Motion to Dismiss" was delivered to the U.S. Postal Service, postage pre-paid, First Class, on September 3, 2004, for service upon the following:

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