

LBP-04-22

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

DOCKETED
USNRC

September 20, 2004 (3:25PM)

Before Administrative Judges:

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Dr. Paul B. Abramson, Chairman
Ann Marshall Young
Dr. Richard F. Cole

SERVED September 20, 2004

In the Matter of

DOMINION NUCLEAR CONNECTICUT, INC.

(Millstone Nuclear Power Station, Units 2
and 3)

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

ASLBP No. 04-824-01-LR

September 20, 2004

MEMORANDUM AND ORDER

(Denying Motion for Reconsideration and Request for Leave to Amend Petition)

Before the Licensing Board is an August 9, 2004, motion filed by Connecticut Coalition Against Millstone ("CCAM")¹ seeking reconsideration of LBP-04-15, 60 NRC __ (July 28, 2004), in which the Board denied CCAM's petition to intervene and request for hearing in the subject operating license renewal proceedings. In addition, CCAM requests leave to amend its petition to provide further support for its contentions. Both licensee Dominion Nuclear Connecticut, Inc. ("Dominion") and the NRC Staff oppose the motion and request.² For the reasons set forth below, we deny both the motion for reconsideration and the request for leave to amend the

¹ Connecticut Coalition Against Millstone Motion for Reconsideration and Request for Leave to Amend Petition (Aug. 9, 2004) [hereinafter CCAM Motion].

² See Dominion's Answer to CCAM's Motion for Reconsideration and Request for Leave to Amend Petition (Aug. 18, 2004) [hereinafter Dominion Answer]; NRC Staff Response to Connecticut Coalition Against Millstone's Motion for Reconsideration and Request for Leave to Amend Petition (Aug. 18, 2004) [hereinafter Staff Response].

petition.³

In our July 28 Memorandum and Order, we found each of the six contentions proffered by CCAM to be inadmissible under 10 C.F.R. § 2.309(f)(1) and denied CCAM's intervention petition.⁴ In its August 9 motion, CCAM asserts that the Board's conclusions "are not justified on the facts or the law" and that "considerations of the public interest compel reconsideration in light of the information" provided in affidavits and other documents delivered with or referenced by the motion.⁵

1. The Motion for Reconsideration. In ruling on CCAM's motion for reconsideration, we are bound by the standards set forth in 10 C.F.R. § 2.323(e), which require, in relevant part, that:

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

Additionally, the Commission has observed that a reconsideration motion should address the correction of an erroneous decision which resulted from a misapprehension or disregard of a critical fact or controlling legal principle or decision.⁶ Such a motion is not an opportunity to

³ We note that CCAM, contemporaneously with the filing of its motion for reconsideration, submitted a notice of appeal of LBP-04-15 to the Commission. See Notice of Appeal (Aug. 9, 2004). The Commission has since indicated that it is holding CCAM's appeal in abeyance pending Board action on the Motion for Reconsideration. Commission Order (Aug. 23, 2004) at 1 (unpublished). Given this indication from the Commission that we should decide CCAM's motion, we do not address the arguments of Dominion that we should not entertain CCAM's motion because we no longer have jurisdiction over the case. See Dominion Answer at 1-2.

⁴ See LBP-04-15, 60 NRC at ___ (slip op. at 9-18).

⁵ CCAM Motion at 2.

⁶ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000).

present new arguments or evidence, or a “new thesis,”⁷ unless, as provided in the rule, the moving party can demonstrate that the new material’s availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances, such as a “clear and material error” that renders the decision invalid.

Dominion argues that CCAM has not demonstrated that the new material it has submitted relates to any concern that could not reasonably have been anticipated.⁸ The Staff likewise urges, among other things, that there is no showing by CCAM of “compelling circumstances . . . which could not have reasonably been anticipated, that render[] the decision invalid.”⁹ Nor, the Staff asserts, has CCAM shown any relationship between the safety issues it asserts and aging.¹⁰

Under the Commission’s regulations and case law, we find CCAM’s motion to be without merit.

Although CCAM did not seek leave to file its motion as plainly required by section 2.323(e)¹¹, in the following analysis we consider the motion as if it had satisfied the requirements of that section.

As has been pointed out by both Dominion and the Staff, and as is required under 10 C.F.R. § 2.323(e), CCAM has not shown any compelling circumstances which could not have reasonably been anticipated and which, as a result of consideration at this time would render

⁷ See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

⁸ See Dominion Answer at 2-3.

⁹ Staff Response at 3 (quoting 10 C.F.R. § 2.323(e)).

¹⁰ See id. at 5.

¹¹ Section 2.323(e) also limits the length of any motion for reconsideration to ten pages, rendering CCAM’s 12-page motion procedurally defective in this respect as well.

our earlier decision invalid. Furthermore, as indicated above, CCAM neither pointed out any instance where we misapprehended or disregarded any controlling legal principle or critical fact which lead to an erroneous decision, nor made any attempt to establish that any of the material it submitted with its motion addresses any of the requirements of 10 C.F.R. § 2.323(e).

To the contrary, through the exhibits accompanying its motion, CCAM primarily seeks to provide new material, with no attempt to establish that this material addresses any of the relevant regulatory requirements.¹² Instead, CCAM has, once again, merely presented additional supporting documentation for its previously-filed contentions, along with bare conclusory assertions that our previous conclusions “are not justified on the facts or the law” and that “considerations of the public interest compel reconsideration in light of [that] information”.¹³

The material now proffered by CCAM includes: (1) the affidavits of two purported experts and four other individuals; (2) an August 5, 2004 report by one of the proffered experts relating to preexisting information; (3) a December 20, 1999, Connecticut Department of Environmental Protection (DEP) transmittal slip on which some handwriting is found; (4) a July 3, 2003, Questioned Document Opinion referring to the DEP transmittal slip; (5) an October 13, 2000, Emergency Authorization regarding a Millstone discharge to the Long Island Sound; (6) an August 28, 2003, DEP internal memorandum; (7) a September 17, 2003, Millstone outage listing report; a December 22, 2003, newspaper article; (8) a May 5, 2004, letter from the Staff to Dominion; and (9) two Notes to File from the NRC Environmental Section Project Manager dated May 24, 2004, and June 1, 2004. Some of these documents predate the initiation of these proceedings, and indeed some appear to have been in CCAM’s possession for some

¹² 10 C.F.R. § 2.323(e).

¹³ CCAM Motion at 2.

time,¹⁴ but none were provided with CCAM's February 12 or March 22, 2004, petitions to intervene, or with its June 14 submittal of a proposed amended petition, or with its June 16 late-filed reply, or (with one questionable exception) at the June 30 oral argument. And CCAM has given no reason whatsoever, either in any of its filings or in its oral presentation, why — despite having numerous opportunities to do so — it chose not to provide this information until now. For us to consider this new material, CCAM must provide legitimate reasons why the material was not provided earlier, together with a sound explanation of how those reasons satisfy the standards set out above.

In addition to delivering this new material, CCAM asserts¹⁵ that a document that was referred to in an attachment to a “declaration”¹⁶ that was hand-delivered to the Board at commencement of the June 30 oral argument was “implicitly accepted by the Board despite its asserted lateness.”¹⁷ We in fact made no specific ruling on that declaration or its references, but implicitly found then, and repeat here, that the declaration (and its related attachments) did not provide sufficient support for the contention for which it was offered.¹⁸

¹⁴ See, e.g., Questioned Document Opinion (July 3, 2003) (referring to Dec. 20, 1999 DEP Bureau of Water Management Transmittal Slip); Tr. at 107 (apparently quoting from Memorandum from Vic Crecco, DEP Biologist, to Ozzie Inglese, DEP Water Bureau Chief, (Aug. 28, 2003) at 2).

¹⁵ CCAM Motion at 3.

¹⁶ Declaration of Michael Steinberg (June 29, 2004) [hereinafter Steinberg Decl.].

¹⁷ CCAM Motion at 3.

¹⁸ The reference in question is to a “Connecticut Tumor Registry”, which was not delivered to us, but was merely identified in the attachment to the declaration through instructions regarding how to seek it out on the internet. Having made such a search, we located a publication entitled “Cancer Incidence in Connecticut Counties, 1995-99,” with a release date of January 2004, which simply reports, without making any conclusions or drawing any inferences whatsoever, bare statistical information regarding cancer incidence rates for various types of cancers in the various Connecticut counties. Any conclusions such as are postulated by CCAM and Mr. Steinberg would require substantial additional information and evaluation by experts in the relevant disciplines which have not been presented, and therefore,

Regarding CCAM's new materials, including the declaration of Ernest J. Sternglass and the affidavit and report of Joseph J. Mangano, CCAM has offered no reason whatsoever why they could not have been provided sooner.¹⁹ Given that the first petition filed by CCAM was submitted in February 2004, and that the adoption of the Agency's revised procedural rules resulted in an April 2004 deadline for its petition, CCAM had ample time to submit, in a timely manner, all of its materials which have been late-filed in this case, including the documents now submitted.

In sum, we find that: (a) CCAM has failed to properly petition this Board to submit its motion for reconsideration; (b) even if we presume that such a request had been appropriately made, CCAM has failed to satisfy the requirements of 10 C.F.R. § 2.323(e) governing reconsideration. We therefore deny CCAM's motion for reconsideration.

2. The Motion to Amend. We now examine whether CCAM's new materials, when taken together with CCAM's petition to amend, fulfill the requirements for amendment of its petition and contentions. Requests to amend contentions are governed by 10 C.F.R. § 2.309(f)(2), which provides:

[C]ontentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that --

- (I) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Nowhere in its filing does CCAM address any of these criteria. For example, CCAM has

even had the Board determined that this submission was timely, it fails, as stated in our July 28 Memorandum and Order, to satisfy the requirements of 10 C.F.R. § 2.309(f)(1).

¹⁹ Although the Mangano Report is dated August 5, 2004, and the Sternglass Declaration and Mangano Affidavit are dated August 8 and 9, 2004, respectively, the materials presented therein are not new and the information in both the affidavits and the Mangano Report address the same issues asserted since the beginning of this proceeding.

not even attempted to demonstrate that the information it now submits, including that contained in the Mangano affidavit and report or the Sternglass declaration, was “not previously available,” or that it is “materially different than information previously available,” or that as a result of earlier unavailability, CCAM’s present request to amend has been timely submitted.

As the Commission has very recently re-emphasized, “[the NRC] contention admissibility and timeliness requirements ‘demand a level of discipline and preparedness on the part of petitioners,’ who must examine the publicly available material and set forth their claims and the support for their claims at the outset.”²⁰ In the instant circumstances, CCAM has failed to demonstrate even a modicum of the necessary discipline and preparedness. Therefore, CCAM’s motion to amend its petition must be denied.²¹

In this instance, CCAM knew about the Dominion application in February, 2004, and it was not required by the Commission to file its petition until April. As previously indicated, this provided ample time to prepare an effective petition to intervene or to provide sound legal reason why this was not done. Having done neither, CCAM cannot now be heard to complain of our earlier findings, nor of our current findings that it has complied with neither the relevant standards for reconsideration or those for amendment of its petition.

CCAM does, however, continue to have the right to bring its concerns before the Commission under 10 C.F.R. § 2.206, and, if CCAM believes that revision of any NRC standards is necessitated, it may file a rulemaking petition with the Commission under 10 C.F.R. § 2.802. Finally, we note generally that, with respect to this proceeding, the careless

²⁰ Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC ___, __ (slip op. at 2-3) (Aug. 18, 2004) (quoting Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

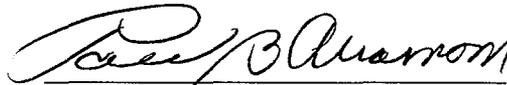
²¹ Even if we were to treat CCAM’s request as late-filed contentions, no attempt has been made to address the late-filing criteria at 10 C.F.R. § 2.309©), and thus CCAM could not prevail under this approach either.

disregard of relevant standards and procedures by CCAM counsel, and the disorganized manner in which the CCAM information has been presented, ill serves the interests of CCAM's members or those of other members of the public who might have a like interest.

In conclusion, for all the reasons set forth above, CCAM's August 9, 2004, motion for reconsideration and its request for leave to amend its petition are denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²²



Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE



Ann Marshall Young
ADMINISTRATIVE JUDGE



Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 20, 2004

²² Copies of this Memorandum and Order were sent this date by internet e-mail transmission to counsel for all participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DOMINION NUCLEAR) Docket Nos. 50-336-LR and
CONNECTICUT, INC.) 50-423-LR
)
)
(Millstone Nuclear Power Station,)
Unit Nos. 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION FOR RECONSIDERATION AND REQUEST FOR LEAVE TO AMEND PETITION) (LBP-04-22) have been served upon the following persons by electronic mail as indicated by an asterisk (*) on September 20, 2004, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail on September 21, 2004.

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Docket Nos. 336/423-LR
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(DENYING MOTION FOR
RECONSIDERATION AND REQUEST
FOR LEAVE TO AMEND PETITION) (LBP-04-22)

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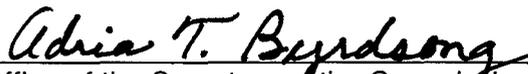
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Dated at Rockville, Maryland,
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