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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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'S BRIEF IN OPPOSITION TO APPEAL BY CONNECTICUT COALITION
AGAINST MILLSTONE OF LBP-04-15 AND LBP-04-22

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October 18, 2004

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the NRC staff ("Staff") hereby responds in opposition to Connecticut Coalition Against Millstone's ("CCAM") Notices of Appeal, filed by CCAM on August 9 and September 30, 2004.¹ CCAM is appealing two decisions of the Atomic Safety and Licensing Board ("Licensing Board"). The first, issued on July 28, 2004, denied CCAM's petition for leave to intervene and request for hearing in this matter. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81 (2004). The second, issued on September 20, 2004, denied CCAM's motion seeking reconsideration of LBP-04-15 and leave to amend its hearing request. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-22, 60 NRC ___ (slip op. Sept. 20, 2004). For the reasons discussed herein, the Licensing Board's decisions in LBP-04-15 and LBP-04-22 should be upheld.

STATEMENT OF CASE

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,

¹ See "Notice of Appeal" dated August 9, 2004 ("August 9 Appeal") and "Notice of Appeal" and "Memorandum in Support of Notice of Appeal" ("September 30 Appeal"), dated September 30, 2004.

Units 2 and 3, for an additional 20 years. In response to a notice of opportunity for hearing, CCAM filed a Petition to Intervene and Request for Hearing ("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 established standing nor proffered an admissible contention, CCAM filed, on June 15 and 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 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). LBP-04-15. Subsequently, on August 9, 2004, CCAM filed a motion for reconsideration of LBP-04-15, which also included a request to amend the Petition to provide further support for CCAM's proposed contentions. In addition, on the same date, CCAM filed a Notice of Appeal of LBP-04-15 with the Commission. On August 23, the Commission issued an Order holding CCAM's appeal in abeyance pending Licensing Board action on the motion for reconsideration.

On September 20, 2004, the Licensing Board issued an Order denying reconsideration, concluding that CCAM failed to satisfy the requirements of 10 C.F.R. § 2.323(e) governing reconsideration.² In addition, the Licensing Board denied CCAM's request to amend its Petition for failure to satisfy the Commission's late-filing requirements. On September 30, CCAM filed a second Notice of Appeal. Thereafter, on October 8, 2004, the Commission lifted its stay and directed DNC and the Staff to file a single response to both of CCAM's appellate filings.

² The Licensing Board also noted that CCAM failed to properly petition the Licensing Board to submit its reconsideration request.

ARGUMENT

A Licensing Board ruling will be affirmed where the “brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Board’s decision.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000), citing *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998). As discussed below, there has been no error of law or abuse of discretion by the Licensing Board – the Petition and request for reconsideration were properly denied and the appeals should be rejected. As determined by the Licensing Board, CCAM did not proffer an admissible contention.

I. CCAM’s Appeal of LBP-04-15

A. Legal Standards Governing the Admissibility of Contentions

As discussed by the Licensing Board in this proceeding, for a contention to be admissible, it must provide:

(1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner’s position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

LBP-04-15, 60 NRC at 88, citing 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the contention must be both “within the scope of the proceeding,” and “material to the findings the NRC must make to support the action that is involved in the proceeding.” *Id.*, citing 10 C.F.R. § 2.309(f)(iii), (iv). Failure to comply with *any* of these requirements is grounds for the dismissal of a contention. *Id.*, citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

B. The Licensing Board Properly Dismissed CCAM's Proposed Contentions for Failure to Meet the Requirements of 10 C.F.R. § 2.309(f)(1).

In its Petition, CCAM raised six proposed contentions. The Licensing Board correctly determined that each of these contentions was inadmissible. The Board's determination with respect to each contention is summarized *seriatim* below.

CCAM Contention I, which argued that the operations of Millstone Units 2 and 3 “have caused death, disease, biological and genetic harm and human suffering on a vast scale,” was rejected by the Licensing Board for its failure to set forth the specific factual or legal basis required by 10 C.F.R. § 2.309(f)(1)(v). LBP-04-15, 60 NRC at 91. The Board further found that CCAM had not shown how its allegations may be related to the potential detrimental effects of aging. *Id.* at 92.

CCAM Contention II argued, without specific supporting documentation, that Millstone Units 2 and 3 are “terrorist targets of choice.” The Licensing Board concluded that this contention was inadmissible for its failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii) (requiring that a contention be within the scope of the proceeding). *Id.*

CCAM Contention III argued that DNC currently lacks a valid National Pollutant Discharge Elimination System (“NPDES”) permit. The Licensing Board rejected this contention as outside the scope of the license renewal proceeding and outside the jurisdiction of the Licensing Board. *Id.* at 93.

In Contention IV, CCAM contended that the operations of Millstone Units 2 and 3 “have caused devastating losses to the indigenous Niantic winter flounder population” and that continued operation of the facility “will increase the severity of the environmental damage.” See CCAM Petition at 7. The Licensing Board declined to admit this contention for its failure to (1) take issue with the license renewal application, and (2) to provide any expert opinion or reference to substantiate its “general allegation.” LBP-04-15, 60 NRC at 94, citing 10 C.F.R. § 2.309(f)(1)(v), (vi).

CCAM Contention V asserted that Units 2 and 3 “suffer technical and operational defects which preclude safe operation.” *Id.* at 95. The Licensing Board, noting that CCAM did not cite a “single specific deficiency,” rejected this contention as failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) to provide specificity and to set forth each failure and its supporting reasons. *Id.* at 96.

Finally, CCAM Contention VI argued, without any factual support, that parts of Connecticut and Long Island “cannot be evacuated.” See CCAM Petition at 9. The Licensing Board declined to admit the contention because it was outside the scope of the license renewal proceeding. LBP-04-15, 60 NRC at 97. The Licensing Board noted that the contention would have failed to meet admissibility requirements in any event, for its failure to provide specific facts and/or expert opinion to support the contention. *Id.*, citing 10 C.F.R. § 2.309(f)(1)(vi).

At no point in its August 9 Appeal does CCAM explain why the Licensing Board’s rejection of any of these contentions was erroneous. The Appeal merely reiterates the original unsupported opinions articulated by CCAM in its Petition (as amended). CCAM’s blanket assertion that the Licensing Board’s “conclusions are not justified on the facts or the law” (Appeal at 1), does not obviate CCAM’s obligation to demonstrate how the Licensing Board’s decision was in error. See *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff’d*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (table) (“The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”). Moreover, CCAM argues, without more, that “considerations of the public interest compel reversal of the Board’s decision.” August 9 Appeal at 1. However, CCAM has not demonstrated any legal error or abuse of discretion by the Licensing Board in making its admissibility determinations. The Licensing Board applied the correct standards for evaluating the proposed

contentions, and CCAM has not shown that the Licensing Board's determinations are in any way inconsistent with longstanding Commission case law or the record in this proceeding.

C. The Licensing Board Properly Denied CCAM's Motion for Reconsideration.

In its September 30 Appeal, CCAM incorporates by reference its reconsideration request, and makes five further assertions, addressed in turn below.

First, CCAM argues that the Licensing Board “exalted form over substance” in rejecting the information supporting CCAM's Petition. In particular, CCAM complains that the Licensing Board rejected “without proper basis” the proffered expert testimony of Dr. Ernest Sternglass and Joseph Mangano, as well as the proffered testimony of Cynthia Besade. September 30 Appeal at 1-2. These three affidavits accompanied CCAM's August 9 request for reconsideration and motion to amend its Petition. The Licensing Board denied CCAM's motion to amend, citing the relevant standards for amending contentions. See LBP-04-22, slip op. at 6. Specifically, the Board noted that CCAM did not attempt to demonstrate that the new information was “not previously available,” “materially different from information previously available,” or that, as a result of earlier unavailability, CCAM's request to amend was timely submitted. *Id.*, slip op. at 7. CCAM does not, in its Appeal, *even argue* that the Licensing Board's determination was erroneous. As stated by the Licensing Board in LBP-04-22, CCAM's scattershot filings in this proceeding “failed to demonstrate even a modicum of the necessary discipline and preparedness” required by the contention admissibility rules. *Id.*

Next, CCAM states:

The Licensing Board accepted the filings of [DNC] regarding environmental and marine effects and validity of necessary permits as truthful and accurate, despite CCAM's proof to the contrary. Thereby, the Licensing Board ruled prejudicially and without basis to deny the petition and avoid a hearing on materially contested issues.

September 30 Appeal at 2. As noted above, the Licensing Board rejected Contentions III and IV because they were beyond the scope of the Licensing Board's jurisdiction and insufficiently

substantiated. As is clear from its decision in LBP-04-15, the Licensing Board made these holdings without any reference to the material supporting the license renewal application, but rather on the basis that the proposed contentions themselves were deficient. CCAM's argument on appeal does not demonstrate any error of law or abuse of discretion by the Licensing Board.

CCAM states, without reference to any contention, that it "established" that Units 2 and 3 cannot be shutdown safely "because [their] shutdowns release unsafe levels of radioisotopes into the environment." CCAM appears to be referencing arguments it made in connection with Proposed Contention I.³ Again, however, CCAM does fails to address the Licensing Board's reasons for denying this contention, and for denying CCAM's motion to amend its Petition. It is clear that CCAM failed to provide sufficient support for its contention in the first instance, and failed subsequently to fulfill the requirements for admission of its late-filed information supporting the contention. Absent any cogent argument that the Licensing Board's determinations were in error, CCAM's September 30 Appeal is insufficient. *See Advanced Medical Systems*, CLI-94-6, 39 NRC at 297, citing *Gen. Pub. Utils. Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 9 (1990)(holding, *inter alia*, that for each issue appealed, the precise portion of the record relied upon in support of the assertion of error must be provided).

Finally, CCAM asserts that the record in this proceeding demonstrates "that the licensee did not establish that it had evaluated the Millstone Unit 2 operational history of unplanned shutdowns as a discrete element in its application and therefore its analysis of metal fatigue and related issues is incomplete." September 30 Appeal at 3. As noted by the Licensing Board, however, the license renewal application incorporated historical data regarding emergency shutdowns (and other transient events) when developing the fatigue analysis of the components required to be examined in the aging analysis, and CCAM did not challenge this analysis.

³ See, e.g., "Connecticut Coalition Against Millstone Motion for Reconsideration and Request for Leave to Amend Petition," dated July 9, 2004, at 2-5.

LBP-04-60 NRC at 95. CCAM has not offered any basis in its Appeal to conclude that the Licensing Board was incorrect, either in this assessment or in its determination that CCAM Contention V was inadmissible for its failure, among other things, to challenge the application.

CONCLUSION

For the reasons articulated by the Licensing Board and for the reasons set forth above, the Commission should deny CCAM's appeals and affirm LBP-04-15 and LBP-04-22.

Respectfully submitted,

/RA/

Brooke D. Poole
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Dated at Rockville, Maryland
this 18th day of October, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL BY CONNECTICUT COALITION AGAINST MILLSTONE OF LBP-04-15 AND LBP-04-22" 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 October, 2004:

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