

RAS 11126

THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 01/31/06

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)
DOMINION NUCLEAR CONNECTICUT, INC.)
)
(Millstone Nuclear Power Station, Units 2 and 3))
_____)

Docket Nos. 50-336/423-LR

CLI-06-04

MEMORANDUM OPINION AND ORDER

I. Introduction.

The Connecticut Coalition Against Millstone ("CCAM") has filed a Motion to Reopen a closed proceeding involving the extension (or renewal) of the Millstone operating licenses. Our regulations require that the Motion to Reopen satisfy the criteria set out in 10 C.F.R. §2.326. On its face, the Motion before us does not satisfy those criteria; indeed, it does not even attempt to do so. Accordingly, as more fully described below, we deny the Motion to Reopen.

II. The Proceeding.

On March 12, 2004, the NRC Staff published a *Federal Register* Notice announcing an opportunity for a hearing with regard to Dominion Nuclear's applications to extend the operating licenses of Millstone Units 2 and 3 for an additional 20-year period. See 69 Fed. Reg. 11,897. On March 22, 2004, CCAM filed a petition for leave to intervene and a request for a hearing, which we referred to the Atomic Safety and Licensing Board Panel. The ASLBP established a three-member Licensing Board to review the petition and to conduct further proceedings.

In July of 2004, the Licensing Board issued a decision dismissing the Petition to Intervene. *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81 (2004). CCAM then filed a Motion for Reconsideration, which was denied by the Licensing Board. *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-22, 60 NRC 379 (2004). On appeal, the Commission affirmed the Licensing Board's decisions and terminated the proceeding. *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004).¹ On November 28, 2005, the NRC Staff issued the renewed licenses of the two Millstone units.

III. The Motion to Reopen.

On November 25, 2005, a few days before the Staff issued the renewed licenses, CCAM filed the instant motion to reopen the proceeding. CCAM claims that its motion "is premised upon newly discovered evidence of fraud, deceit, and cover-up" by the NRC Staff. Motion at 1. As a basis for their charge, CCAM asserts that the Millstone facility "releases levels of Strontium-90 to the environment which are in excess of its federal license," *id*; and that certain statements in Supplement 22 of the NRC's Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants that deal with the Strontium-90 issue at Millstone are incorrect. Motion at 2-7.² CCAM's dispute with both the Staff and the licensee centers on the significance (and cause) of the levels of Strontium-90 observed in milk taken from a goat herd pastured near the Millstone facility. The Motion also "seeks leave to submit an amended petition for leave to intervene." Motion at 1.

¹The Commission also recently denied a request for late intervention in this proceeding submitted by Suffolk County, New York. *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC ____ (Oct. 26, 2005).

²The Draft of Supplement 22 to the GEIS was issued by the NRC Staff on December 3, 2004. The comment period closed on March 2, 2005, and the final Supplement 22 was issued on July 18, 2005. See 70 Fed. Reg. 42,395 (July 22, 2005).

The Licensee has filed a very brief Response opposing the Motion; the NRC Staff chose not to file a Response.

IV. **Analysis.**

A. Jurisdiction.

Initially, we must determine if we have jurisdiction to consider this motion. CCAM designated the Motion as filed before “the Atomic Safety and Licensing Board,” but the Board has already dismissed the case and no longer has jurisdiction over the matter. See, e.g., *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773, 775 (1985). However, until the license has actually been issued, the Commission itself (as opposed to the Licensing Board) retains jurisdiction to reopen a closed case. See, e.g., *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-1, 37 NRC 1 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1 (1992). We reach the same result in another decision issued today. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-06- xx, 63 NRC xx (2006).³ As the licenses in question here (*i.e.*, the renewed licenses) had not been issued when CCAM filed its Motion, we have jurisdiction to consider the Motion to Reopen.⁴

B. Allegations of NRC Staff Misconduct.

Turning to the Motion, we first address CCAM’s allegations of misconduct by the NRC Staff. CCAM alleges that the Motion “is premised upon newly discovered evidence of fraud, deceit and cover-up by the NRC Staff.” Motion at 1. CCAM’s single allegation of fraud is the NRC Staff’s public response to CCAM’s comments on the Supplement to the GEIS on License

³Commissioner Jaczko abstained from that decision.

⁴If the Staff had issued the licenses *before* CCAM filed the Motion to Reopen, the Motion would be considered as a petition for enforcement action under 10 C.F.R. §2.206. *E.g.*, *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 67 (1992).

Renewal.

The NRC has issued a Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants and issues a Supplement dealing with site-specific items for each individual site when that particular license renewal is being considered. On December 3, 2004, the Staff issued a Draft Supplement 22 of the GEIS dealing with the renewal of the Millstone licenses. 69 Fed. Reg. 71,437 (Dec. 9, 2004). The comment period closed on March 2, 2005 and the final Supplement was issued on July 18, 2005. 70 Fed. Reg. 42,395 (July 22, 2005).

In its Motion, CCAM states that it submitted comments on the draft of Supplement 22, raising several issues including the Strontium-90 issue. Motion at ¶¶1-2, 3-5. CCAM has re-submitted those comments as an attachment to the Motion now before us. Motion at ¶1. CCAM alleges that the licensee responded to those comments, providing an explanation of the observed levels, and the NRC Staff accepted the licensee's explanation. Motion at ¶¶7-8, 20. CCAM then disputes the analysis of this issue contained in Supplement 22, Motion at ¶¶ 11-19, and alleges that by not identifying Millstone as the source of the excessive levels of Strontium-90, "Dominion and the NRC have engaged in fraud, deceit and cover-up for the purpose of justifying license extension." Motion at ¶21. CCAM offers no other support for its allegation of Staff misconduct.

CCAM's allegation of "fraud, deceit and cover-up" is frivolous. We have reviewed CCAM's comments disputing the Staff's decision in Supplement 22 of the GEIS and see no reason to consider the dispute anything other than a difference of opinion over a scientific question. The mere fact that the Staff appears to have accepted the licensee's explanation of the increased levels of Strontium-90 does not constitute "fraud, deceit, and cover-up."

Moreover, we find no reason to accept this allegation as sufficient "premise," see Motion at 1, for the Motion to Reopen itself. The NRC Staff published Supplement 22 in July of 2005, giving CCAM notice that the NRC Staff had rejected its comments. Yet CCAM has waited over

four months to file this Motion without any explanation of the delay.

C. The Motion to Reopen.

As a procedural matter, the Motion before us fails even to address the regulations that are applicable to a motion to reopen. Under our regulations,

a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied: (1) the motion must be timely . . . ; (2) the motion must address a significant safety or environmental issue; and (3) the motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. §2.326(a). In addition, the Motion “must be accompanied by affidavits that set forth the factual and/or technical bases for the movant’s claim that the criteria of paragraph (a) . . . have been satisfied.” 10 C.F.R. §2.326(b). Furthermore, “[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in §2.309(c).” 10 C.F.R. §2.326(d).

Initially, while CCAM does not explicitly say so, the Motion arguably does address a significant safety or environmental issue: the possible release of excessive amounts of Strontium-90 into the environment. But CCAM does not explain how the release of Strontium-90 falls within the framework of a license renewal proceeding, which “focuses on ‘the potential impacts of an additional 20 years of nuclear power plant operation,’ not on everyday operational issues.” *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC at 637-38, *quoting Florida Light and Power Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001). If the Millstone facility were releasing excessive amounts of Strontium-90 under its current license, that would be reason for corrective enforcement action of an “everyday operational issue,” CLI-04-36, *supra*. The alleged problem would not be a reason for denying license renewal.

Accordingly, we will treat the Motion as a request for action under the provisions of 10

C.F.R. §2.206 that the plant is releasing Strontium-90 in excess of the limits contained in its current license. Therefore, we refer CCAM's Strontium-90 concern to the NRC Staff for whatever action they deem necessary.

The other two criteria in Section 2.326(a) are "timeliness" and "whether a different result would have been reached in the case." CCAM does not address the timeliness factor at all. It never explains why it filed the motion eleven months after we terminated the case involving CCAM, nine months after CCAM first raised the Strontium-90 issue in its comments on the Draft Supplement 22 to the GEIS, and four months after the Staff issued the final Supplement 22 containing the position CCAM disputes. Thus, there is no reason for the Commission to consider CCAM's motion "timely." Similarly, CCAM makes no attempt to explain how we would have reached a different result had we considered the evidence that CCAM now presents.

Moreover, CCAM did not raise the Strontium-90 issue as a contention in the earlier proceeding before the Licensing Board. See *Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81 (2004). Thus, Section 2.326(d) of our regulations requires that a motion to reopen that proceeding address the provisions for filing a late-filed contention in 10 C.F.R. §2.309(c). Quite simply, if a party seeks to reopen a closed record and, in the process raises an issue that was not an admitted contention in the initial proceeding, it must demonstrate that raising this issue satisfies the requirements for a non-timely or "late-filed" contention. As with all other procedural requirements for reopening a closed proceeding, CCAM completely ignores this requirement.

In short, CCAM's blatant procedural defaults and its frivolous "fraud" assertion require us to deny its motion. Our procedural rules exist for a reason. We cannot consider a last-second reopening of an adjudication and a restart of Licensing Board proceedings based on a pleading that is defective on its face.

V. Actions of CCAM's Representative.

This is not the first Millstone proceeding where CCAM, acting through its representative (or counsel), Nancy Burton, has not followed established Commission procedures. See CLI-04-36, 60 NRC at 643-44. We previously warned Ms. Burton that “further disregard of our practices and procedures” would result in disciplinary action. CLI-04-36, 60 NRC at 644. Hence, today we order the Office of the Secretary to screen all filings bearing Ms. Burton's signature and not to accept or docket them unless they meet all procedural requirements. We direct the Secretary to reject summarily any non-conforming pleadings without referring them to the Atomic Safety and Licensing Board Panel or the Commission. See 10 C.F.R. §2.346(h).⁵

VI. Summary.

In sum, not only has CCAM failed to meet the standards in our regulations for reopening a closed record, it has not even attempted to meet those standards. Accordingly, the Motion to Reopen is denied, which renders moot CCAM's request for leave to submit an amended petition to intervene. But in view of the fact that CCAM has raised an issue that could plausibly affect public health and safety if it were true, we refer the motion to the Staff for treatment, as appropriate, under 10 C.F.R. §2.206. Finally, we direct the Office of the Secretary not to accept for filing or docketing any pleading signed by Ms. Burton that does not conform to the NRC's rules of practice.

⁵Any rejected pleading from Ms. Burton containing allegation material or a request for enforcement action will be forwarded to the staff for appropriate action in accordance with our normal procedures.

IT IS SO ORDERED.

For the Commission

***/RA by Andrew L. Bates Acting
For/***

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 31st day of January, 2006.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM OPINION AND ORDER (CLI-06-04) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal distribution.

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(CLI-06-04)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of January 2006