UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-423-OLA
Dominion Nuclear Connecticut, Inc.	)	
	)	
	)	
(Millstone Power Station Unit 3)	)	
	)	

NRC STAFF'S BRIEF IN OPPOSITION TO CCAM AND MS. BURTON'S APPEAL OF LBP-08-09

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June 26, 2008

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the Staff of the Nuclear Regulatory Commission ("Staff") hereby files its brief in opposition to the Connecticut Coalition Against Millstone and Ms. Nancy Burton's ("Petitioners") appeal of the decision of the Atomic Safety and Licensing Board ("Board"), LBP-08-09 dated June 4, 2008, which, *inter alia*, denied Petitioners' hearing request and petition to intervene. As discussed below, the Board properly found that Petitioners had not proffered an admissible contention. Accordingly, the Commission should affirm the Board's Order denying Petitioners' request for hearing and petition to intervene.

STATEMENT OF THE CASE

This proceeding involves an application by Dominion Nuclear Connecticut, Inc. ("DNC") for a license amendment to allow an increase in the authorized power level of the Millstone Power Station, Unit No. 3 ("Millstone"). On July 13, 2007, pursuant to 10 C.F.R. § 50.90, DNC requested an amendment to its operating license. The proposed amendment would change Millstone's license to increase its current limit of 3,411 MWth to a new maximum thermal power of 3,650 MWth. This requested power uprate amendment was proposed as a "Stretch Power Uprate" ("SPU") representing an increase of approximately 7 percent above the current

maximum authorized power level. In its License Amendment Request ("LAR") Dominion ("Applicant") used the guidelines in NRC Review Standard, RS-001[1], "Review Standards for Extended Power Uprates".[2]

On January 15, 2008, the NRC published in the Federal Register a "Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations" (73 Fed. Reg. 2546) ("Biweekly Notice") which described DNC's LAR (*Id.* at 2549) along with the Staff's proposed determination that the LAR to increase power involved no significant hazards consideration (*Id.* at 2549-50). The Biweekly Notice provided instructions on how to request a hearing regarding the LAR. The instructions reminded requestors to comply with the procedural requirements of the NRC's Electronic Submission Rule ("E-Filing Rule"), which requires E-Filing to be used, or request for a waiver of E-Filing. *Id.* at 2547-8.

On March 17, 2008, CCAM and Ms. Burton e-mailed a joint petition to intervene and request for hearing. The Petition raised nine (9) contentions. The Petition was accepted for docketing by the Office of the Secretary to the Commission and referred to the Atomic Safety and Licensing Board for appropriate action. On March 27, 2008, Chief Administrative Judge Hawkens provided notice that an Atomic Safety and Licensing Board was established to consider the Petitioners' request.

Dominion and the NRC Staff timely filed Answers on April 11, 2008. On June 4, 2008 the Board issued its Memorandum and Order (Order), LBP-08-09, granting Petitioners standing but denying all contentions as inadmissible.

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[1] RS-001 states that a SPU is typically characterized by power level increases "up to 7 percent and do not generally involve major plant modifications. Extended power uprates (EPUs) are higher power and generally involve significant plant modifications.

[2] The fact that the applicant used RS-001 is not in dispute. *See* Cover Letter to SPU LAR at 1 ("DNC developed this LAR utilizing the guidelines in NRC Review Standard, RS-001, [']Review Standard for Extended Power Uprates.['] In addition, requests for additional information (RAIs) regarding SPU and Extended Power Uprate (EPU) applications for other nuclear units were reviewed for applicability. Information that addresses many of those RAIs is included in this MPS3 SPU LAR.").

ISSUE PRESENTED

Petitioners have appealed the denial of their nine proffered contentions. Each contention is presented below. For purposes of this appeal, standing, which was granted, is not in dispute.[3] The issue presented is whether the Board committed an error of law or abuse of discretion in denying the admission of Contentions Numbered 1-9.

LEGAL STANDARDS

A. Legal Standards for the Admission of Contentions

To gain admission to an adjudicatory proceeding as a party, a Petitioner for intervention, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). *See* 10 C.F.R. § 2.309(a). *See also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the Petitioner must satisfy the following six requirements:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted. . . ;

(ii) Provide a brief explanation of basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) Provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the Petitioner disputes and the supporting reasons for each dispute, or, if the Petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the Petitioner's belief[;]

[3] Applicant had contended that Petitioner Ms. Burton had failed to establish her standing in an individual capacity.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage*, *L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); "Changes to Adjudicatory Process [Final Rule]", 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

The Petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. A contention will not be admitted if it is based solely on unsupported assertions and speculation. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). In addition, the Petitioner must demonstrate that the issue raised in the contention is 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." *See* 10 C.F.R. §§ 2.309(f)(1)(iii), (iv).

B. Scope of Commission Review of Board's Rulings

NRC regulation 10 C.F.R. § 2.311(b) provides that: "An order denying a petition to intervene and/or request for a hearing is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted." The legal standards applicable to the Commission's review of the Board's rulings are set forth by the Commission's decisions. The Commission has established that, in its review, the Commission will give deference to the Boards' determinations and will regularly affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion. *See PPL Susquehanna, LLC* (Susquehanna Steam Electric Station), CLI-07-25, 66 NRC 101, 104 (2007); *See also AmerGen Energy Company, LLC*, (Oyster Creek Nuclear

Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) citing *USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006).

Consistent with the Commission's standard of review, the Petitioners bear the responsibility of clearly identifying the errors in the decision below and ensuring that their brief contains sufficient information and argument to alert the other parties and the Commission to the precise nature of and support for the Petitioners' claims. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) at n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

ARGUMENT

A. There Was No Error of Law or Abuse of Discretion in the Board's Rulings

The Petitioners' appeal does not point to any error of law or abuse of discretion on the part of the Board. Moreover, the appeal does not contain sufficient information and arguments to alert the Staff, DNC or the Commission to the precise nature of and support for its appeal. Rather, the appeal serves to repeat the petition with the added claim that the Board did not understand the petition. In short, the appeal fails to establish a basis for Commission review of the Board's ruling. Each contention and the Board's proper ruling are addressed as follows.

B. The Licensing Board was Correct in Finding Contention 1 Inadmissible

Contention 1:

> The proposed power level for which Dominion has applied to uprate Millstone Nuclear Power Station Unit 3 exceeds the NRC's SPU regulatory "criteria." The SPU application fails to satisfy the first NRC "criterion" that the NRC has set the power limit for SPUs at ". . . *up to 7%* . . . (Emphasis added).

Petition at 7. (Emphasis in original)(Footnote omitted)

The Board stated that the Review Standard RS-001 was a guidance document and not law. Order at 16. Failing to follow RS-001 is not demonstrative of a failure to comply with NRC regulations. *Id.* at 17. The Board stated that there is not a different legal standard for uprating

more than 7%; there is no legal distinction between the regulatory requirements for a SPU and an EPU. *Id.* at 17.

The Board rejected the claim by the Petitioners that the LAR should receive a different treatment by the Staff based on being above 7% because the challenge to how the Staff performed its duties was outside the scope of the proceeding. *Id.*

The Board found that the historical information presented by the Petitioners failed to amount to a challenge to the LAR. *Id.* at 18.

The Board's Memorandum and Order is both logical and well-reasoned. The Board properly considered the information presented by the Petitioners and applied the standards of contention admissibility in a sound manner. The Board correctly determined that there is no regulatory criterion unique to uprates of over 7%.

On appeal, the Petitioners assert that the Board was mistaken in failing to treat an NRC Staff guidance document on power uprates as a binding regulation. *See* Appeal at 7. The Petitioner cites no rule, regulation, case law, or other authority in support of the notion that the Staff's guidance document Review Standard RS-001, which tells the Staff how to carry out its review, amounts to binding rules and required criteria for the LAR.

While there is no support for the Petitioners' arguments, there is, however, ample support for the Board's position. Citing past Commission and Board decisions, a Board recently observed that "compliance with a Staff guidance document does not, by itself, prove compliance with all regulatory requirements applicable in a licensing proceeding, and failure to comply with a guidance document does not demonstrate failure to comply with the relevant regulations." *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), 66 N.R.C. 169, 197 (October 31, 2007) (citing *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98, 100 (1995); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB- 852, 24 NRC 532, 544-45 (1986)).

The applicant used Review Standard RS-001 as a guidance document when developing its application. Just like a NUREG or Regulatory Guide, the Review Standard is advisory in nature and does not in itself impose legal requirements on either the Commission or DNC. *See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 397 (1995). The United States Court of Appeals for the Third Circuit recently determined that an NRC NUREG guidance document on decommissioning was not binding, did not determine any rights or obligations, did not have legal consequences, and was neither a rule nor a regulation. *New Jersey v. U.S. Nuclear Regulatory Comm'n*, 526 F.3d 98, 102 (C.A. 3, 2008).

The Board followed established precedent. The Board was, therefore, correct in ruling Contention 1 inadmissible.

C. The Licensing Board was Correct in Ruling Contention 2 Inadmissible

Contention 2:

> Dominion's application fails to meet the NRC's second "criterion" for a SPU application because Millstone Unit 3 already has had its design margins dramatically and substantially reduced.

Petition at 11.

The Petitioners' concerns over "design margins" referred to the design of the containment. *See* Petition at 12-18.

The Board analyzed Contention 2 as an omission, and alternatively as a challenge to the LAR, and rejected the proffered contention under both tests. Order at 18.

The Board rejected the contention under an omission test because, in fact, the information on the design and analysis of containment was not omitted. *Id.* at 19. The Board rejected the challenge to the adequacy of the LAR because the Petitioners failed to specify any particular portion of the LAR. *Id.* The Board also rejected the Petitioners' efforts to challenge the current licensing basis of the plant as outside the scope of the proceeding. *Id.* at 20-21.

The Commission should find the Board's logic and analysis to be correct. Nowhere in the petition did the Petitioners show exactly what they disputed.

On appeal, the Petitioners agree that there was no omission. Appeal at 10. Petitioners also state that they are not challenging the current licensing basis ("CLB") of the plant. Appeal at 11. However, Petitioners maintain that they have identified a disagreement with the information in the application. Appeal at 9-11.

The Appeal does not cure the deficiencies noted by the Board, nor does it show any error by the Board. Petitioners, rather than identifying specific analyses in the LAR that are disputed, instead claim they had set out in exquisite detail how the design was "maxed out". *See* Appeal at 11. However, as the Board found, the Petitioners did not identify specific analyses in the LAR that the Petitioners disputed. *See* Order at 19. The Board properly viewed the information provided by Petitioners' expert, which was mainly a summary of past licensing requests, as challenging the current operating license rather than challenging the uprate amendment request. Order at 20-21.

A petitioner/intervenor is required to include references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi). The petition failed to meet this fundamental requirement of the regulation, and the appeal fails to identify how the Board misapplied this basic requirement for admissibility. Accordingly, the Board was therefore correct in finding Contention 2 inadmissible.

D. The Licensing Board was Correct in Ruling Contention 3 Inadmissible

Contention 3:

> When compared to all other Westinghouse Reactors, Millstone Unit 3 is an "outlier" or "anomaly." Dominion's proposed uprate is the largest per cent power uprate for a Westinghouse reactor, while Millstone Unit 3 also has the smallest containment for any Westinghouse reactor of roughly comparable output.

Petition at 18.

The Board found that Contention 3 lacked specificity, and failed to show any omission from the LAR. Order at 21-22. Furthermore, the Board noted that, where Petitioners had argued for the LAR to contain an analysis of a 9% instead of a 7% increase in power, the

Applicant had already done an analysis for a 9% increase, thus the Petitioners failed to identify a dispute with the LAR. *Id.* at 22.

There are no errors in the Board's well-reasoned analysis of Contention 3. The Petition failed to specify where the application was allegedly wrong. Furthermore, the Petitioners failed to support different regulatory treatment for Millstone 3 for having the "smallest" containment.

On appeal, the Petitioners simply conclude that the Board "misconstrued" the contention and that the Board was "clearly erroneous." Appeal at 11-12. The appeal fails to present any supporting discussion as to how the Board erred. *See id.* The Petitioner presented no facts or arguments to adequately assist the Commission in finding the alleged error. *See id.* The Board's sound reasoning is correct in ruling Contention 3 inadmissible.

E. The Licensing Board was Correct in Ruling Contention 4 Inadmissible

Contention 4:

> Construction problems due to the unique sub-atmospheric containment design, coupled with the impact upon the containment concrete by the operation of the containment building at very high temperature, very low pressure and very low specific humidity, place the calculations used to predict stress on that concrete containment in uncharted analytical areas.

Petition at 23.

The Board observed that the Petitioners did not present any indication that any of the analyses of the peak pressure and temperature loads imparted on the Millstone Unit 3 containment during design basis accidents were flawed. Order at 24. Further, the Board found that the Petitioners provided no supporting factual materials and failed to provide any analyses or information indicating that these alleged conditions could have an adverse effect on the concrete. *Id.* The Board found that Contention 4 amounted to a challenge to the CLB of the facility, rather than a challenge to the LAR, and was outside the scope of this proceeding. *Id.* at 23-24. The Board also found that, should the challenge be viewed as within the scope of the proceeding, the Petitioners failed to provide facts, analyses, references, or other support to explain how the containment analyses in the LAR were flawed. *Id.* at 24.

The Board's reasoning is correct and reasonable. In any event, the Petitioners engaged in speculation, rather than providing any factual or analytical explanation about "uncharted areas" or pointing to discovered construction defects that were relevant to the uprate.

On appeal, Petitioners continue to assert that the applicant must analyze the alleged containment construction deficiencies, but Petitioners provide no specifics on these deficiencies and point to no NRC regulation that requires the applicant to perform an analysis of a vague allegation as part of a LAR. *See* Appeal at 12-13. The Petitioners claim that the Board erred in its "statement of confidence" (Appeal at 7) that the plant's CLB includes how the plant was constructed. Contrary to the implication, the Board expressed no "statement of confidence" or other opinion regarding the adequacy of the CLB with respect to Contention 4. *See* Order at 23. Instead, the Board found that "[t]o the extent Petitioners assert problems that fall within the CLB, this contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii)," (*Id.*) which requires that the petitioners demonstrate that the issue is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). The appeal misses the mark and fails to identify any error of law or abuse of discretion by the Board.

F. The Licensing Board was Correct in Ruling Contention 5 Inadmissible

Contention 5:

> The impact of flow-accelerated corrosion at Dominion's proposed higher power level for Millstone Unit 3 has not been adequately analyzed nor addressed.

Petition at 26.

The Board found that, contrary to the Petitioners' claim, flow accelerated corrosion was addressed in the LAR[4] and thus Contention 5 failed when viewed as a contention of omission. Order at 25. In the alternative, the Board correctly found that Petitioners gave no specifics about what they challenged. Accordingly, Contention 5 was inadmissible. Order at 26. The Board also found that the Petitioners failed to demonstrate any legal nexus between the FAC

[4] See LAR, Attachment 5 § 2.1.8, at 2.1-76 to 2.1-100.

program's compliance with NUREG-1800 and the requested power uprate. *Id.* Last, the Board found that the Petitioners again failed to specify how the FAC program failed to comply with regulatory requirements. *Id.* at 27.

Petitioners offered no supporting reasons as to why the FAC program was inadequately considered in the uprate. Petitioners, in their appeal, claim the application "does not contain an assessment of possible damage which may have occurred when Dominion recently illegally[5] operated at greater-than-authorized power." Appeal at 13 (Citing *see* Gundersen Declaration at paragraph 49G). In making this claim on appeal, Petitioners are expanding what their expert said; the Gundersen Declaration at ¶ 49G did not claim an omission from the LAR, but instead provided a general statement that FAC should be considered by the Staff during its review, and seemed to express a concern that further power increases beyond the 7% could lead to pipe failure.

On appeal, Petitioners repeat their original claims, but do not explain how the Board erred in its analysis. Appeal at 13-14. The Petitioners also allege that the FAC program cannot be accepted because it was not "represent[ed] to the NRC during public proceedings on its license [renewal] application" (Appeal at 14), but Petitioners fail to explain the relevance of this public proceeding claim to the denied contention. The Staff notes that the uprate LAR does discuss changes in flow (*e.g.* LAR, Attachment 5 at 2.1-86).

Petitioners stated that DNC is prepared not to follow a guidance document, as evidenced by having a "fixed price basis" for managing FAC. Appeal at 14. Petitioners offer no explanation of how this demonstrates either that the Board erred or that the applicant's payment

[5] Although the Petitioners do not specify the illegal operation, the Staff notes that the Millstone NRC inspection report dated February 7, 2008, described how, on November 10, 2007, during performance of control valve testing, Unit 3 reactor core thermal power reached 3482.6 MW on a four minute average. *See* Millstone Power Station - NRC Integrated Inspection Report 05000336/2007005 and 05000423/2007005 at 21 ("Because this violation was of very low safety significance and was entered into the licensee's corrective action program (CR-07-11322), this violation is being treated as an NCV, consistent with Section VI.A.1 of the NRC Enforcement Policy. (NCV 05000423/2007005-03, Failure to Maintain Core Thermal Power at or below 3411 MWTH.)). The NCV regarded a very short period of time the plant was operated at 102.1%.

methods are somehow relevant to the licensing request. Therefore the Commission should not overturn the Board's decision for Contention 5.

G. The Licensing Board was Correct in Ruling Contention 6 Inadmissible

Contention 6:

> Dominion's application for a Millstone Unit 3 7+ per cent uprate cannot be and should not be analyzed as a SPU application insofar as the NRC has not adopted standards nor regulatory requirements for reviewing SPU applications.

Petition at 31.

The Board found that Contention 6 was a rehash of the failed arguments of Contentions 1, 2, and 3. Order at 28. Citing its discussion for Contention 1, the Board concluded the issue raised was outside of the scope of the proceeding. *Id.*

The Board's was correct with their reasoned discussion; the Petitioners' request that the NRC adopt specialized SPU standards of review is not within the scope of a proceeding on the adequacy of a license application.

On appeal, the Petitioners again allege that the Board erred in not treating Review Standard RS-001 as a regulation. For the same reasons described in the response to Contention 1 above, the Board was correct. Again, as in Contention 1, Petitioners point to no error or rule of law to support their appeal position. The Board's ruling was, therefore, correct in finding Contention 6 inadmissible.

H. The Licensing Board was Correct in Ruling Contention 7 Inadmissible

Contention 7:

> Dominion has neglected to provide all information to the NRC staff as it has requested and therefore its application for Millstone Unit 3 uprate should be considered to be incomplete and inadequate.

Petition at 33-34.

The Board found that the Petitioners' challenge to the Staff's decision to accept the application was outside of the scope of the proceeding. Order at 29. The Board also stated that

the requests for additional information are routine, and do not give rise to an evidentiary hearing. *Id.* Further, the Petitioners failed to identify any error or omission in the application. *Id.*

The Board's analysis properly follows Commission precedence and is again correct. The Petitioners cannot merely state that an RAI has been issued in order to meet the requirements for admissibility in 10 C.F.R. § 2.309(f)(1).

The Commission has held repeatedly that the mere issuance of a staff RAI does not establish grounds for a litigable contention. *Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-06, 63 NRC 161,164 (2006) (citing See, *e.g.*, *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-37 (1999)).

On appeal, the Petitioners provide a single sentence stating that the Staff has asked for additional information since March 17, 2008. There is no effort by the Petitioners to identify how any Staff RAI supports the Appeal. Indeed, the Petitioners have not even identified the topic of the RAIs. No arguments or facts are presented in dispute of the Board's decision.

Additionally, the Petitioners' reference to the March 17th date suggests that the Petitioner is attempting to belatedly introduce new support to their contention, which is generally not permitted in an appeal. The Commission has held that absent extreme circumstances, the Commission will not consider an appeal on either new arguments or new evidence not previously presented to the Board. *USEC Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006) (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 140; *See also, e.g.*, *Sequoyah Fuels Corp*. (Gore Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC at 194). Accordingly, the Petitioners have failed to present any justification for disturbing the Board's decision on Contention 7.

I. The Licensing Board was Correct in Ruling Contentions 8 and 9 were Inadmissible [6]

Contention 8:

> The uprate will result in heightened releases of radionuclides and consequent exposures to plant workers and to the public estimated by Dominion to be 9 per cent but likely in excess of 9 per cent above current levels and such increases will result in corresponding 9 per cent (or more) increases of the risk of harmful health effects. Dominion's application for Millstone 3 uprate makes no provision for new shielding or other techniques to mitigate increased radionuclide release levels.

Petition at 37-38.

The Board found that the Petitioners identified no regulatory limit that was allegedly not being met, deficiency, or omission in the LAR. Order at 30. Petitioners provided no information to show that releases would exceed NRC limits, and did not contradict the Applicant's conclusion that the limits would be met. *Id.* at 30-31. Instead, the Board found that the Petitioners engaged in speculation insufficient to support admissibility. *Id.* at 31-32. The Board also rejected Contention 8 as a collateral attack on the Commission's regulations. *Id.* at 31.

The Commission should defer to the Board that Contention 8 fails to present a dispute with the application and fails to show how the uprate will exceed dose limits. Furthermore, the generic attack on dose limits is a dispute with NRC regulations, a type of dispute long held not to be admissible. Order at 11 (citing 10 C.F.R. § 2.335(a); *See also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003)). Again, the Board's ruling was, therefore, correct in finding Contention 8 inadmissible.

Contention 9:

> Dominion's application for a 7+ per cent power generation uprate at Millstone Unit 3 will result in significant new releases of radioactive material to the environment and it will result in discharges of significant volumes of water to the Long Island Sound at heightened temperatures, both of which consequences are inadequately addressed in the application.

Petition at 44.

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[6] The Petitioners' appeal combined Contentions 8 and 9 together, therefore, the Staff herein responded to the arguments together.

The Board found Contention 9 to be generalized and failed to dispute specific portions of the LAR. Order at 32. No expert opinion or support was proffered by the Petitioners. Order at 32-33. The Board therefore rejected the contention. *Id.* at 33. The Board further addressed a claim brought up by the Petitioners' that the National Pollutant Discharge Elimination System (NPDES) permit for Millstone Unit 3 was invalid or expired. *Id.* The Board properly rejected the NPDES claim as outside of the scope of the proceeding. *Id.*

The Board's findings for Contention 9 were correct and well-reasoned. The contention failed to provide information sufficient to show a genuine dispute with the application. Petitioners' failure to provide some facts or support for their contention fundamentally fails to meet 10 C.F.R. § 2.309(f)(1)(v).

Several of the Petitioners' claims in their appeal of Contentions 8 and 9 are related to 10 C.F.R. § 50.92(b). Appeal at 16-17; 21-23. Petitioners claim that their dispute is if the amendment presents a "significant" increase[7] in radiation within the meaning of 10 C.F.R. § 50.92, and that the Board did not fulfill its mandatory requirement for 10 C.F.R. § 50.92. *Id*. at 21. The term "significant" in 10 C.F.R. 50.92 is to determine when or if the NRC gives prior notice of issuing amendments. 51 Fed. Reg. 7744 (March 6, 1986). Petitioners' statement regarding if the Board fulfilled § 50.92 is simply incorrect, inasmuch as the Board has no duties under § 50.92. *See* id. Regarding the use of "significant" in the LAR (which said, "significant adverse change" (Appeal at 16)), the Petitioners fail to offer any support to show that the uprate would amount to an adverse change by, for example, causing releases to be beyond the regulatory requirements. *See* Appeal at 16-20. In other words, the Appeal still does not address one of the reasons the Board rejected the contention.

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[7] In the Appeal, Petitioners erroneously say "nine-fold" increase in radiation before correctly stating, on the same page, 9% increase. *See* Appeal at 16.

In a failed attempt to buttress their argument, the Petitioners claim that there are no limits set on releases of noble gases, and that Millstone is not required to monitor strontium-90 releases.[8] *Id.* at 21. These claims do not identify an error by the Board. Instead, such claims would challenge the NRC's regulations, and therefore would not be within the scope of this proceeding. 10 C.F.R. § 2.335.

The Petitioners dispute the Board's conclusion that the Petitioners' generalized contention on thermal discharge failed to address any part of DNC's environmental report. Appeal at 22. The appeal fails to address the Board's finding that Petitioners offered no support by, for instance, providing supporting expert analysis. See *Id.* In conclusion, the Board correctly ruled Contentions 8 and 9 as inadmissible.

J. The Petitioners Mischaracterize the Information in the Application

The Petitioners incorrectly allege that the Board's Order was "inaccurate and misleading" for stating that Dominion's application was developed using RS-001. Appeal at 4. The Petitioners take issue with a statement in the application wherein Dominion wrote, "the guidelines for an Extended Power Uprate have also been used in the LAR **with a small number of exceptions.** [Emphasis added.]" Appeal at 4 citing LAR, Attachment 1, at 13. The Petitioners attempt to create a controversy by incorrectly claiming:

> The "small number of exceptions" wherein the Millstone Unit 3 power uprate application does not conform to the NRC's guidelines for Extended Power Uprate are not identified by Dominion nor NRC Staff; nor indeed are specific instances wherein the application assertedly conforms to the NRC's guidelines for Extended Power Uprate identified.

Appeal at 4.

This statement regarding the contents of the application is incomplete. A review of the actual paragraph in the application reflects the following:

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[8] There is a substantial regulatory framework that governs release limits on radioactive gases and requires calculations or measurements of radioactive releases. *See e.g.* 10 C.F.R. § 20.1302.

> **As described in Attachment 5**, an extensive review of all systems, licensing basis and design basis requirements and all accident analyses has been performed to demonstrate that all requirements will be met at a maximum authorized reactor core power level of 3650 MWt. This review has been conducted in accordance with the guidelines given in RS-001. While it is concluded that the proposed power level change is classified as a Stretch Power Uprate, the guidelines for an Extended Power Uprate have also been used in the LR with a small number of exceptions.

LAR SPU, Attachment 1, "Descriptions, Technical Analysis and Regulatory Analysis for the Proposed Operating License and Technical Specifications Changes," Page 13. (Emphasis added).

It is unknown why Petitioners omitted the reference to Attachment 5 in the Petitioners' brief to the Commission, or even if Petitioners reviewed the referenced 1681- page Attachment 5. Even a cursory review of Attachment 5 will show that, contrary to Petitioners' assertion, the application did identify where it differed from RS-001. Indeed, the introductory text in Attachment 5 announces the following:

> The DNC evaluations have been formatted and documented in accordance with the template and criteria provided in RS-001, "Review Standard for Extended Power Uprates," Rev. 0. The LR documents the technical basis for the proposed changes necessary to implement the SPU in sufficient detail to permit the NRC staff to reach an informed determination regarding the consistency, quality, and completeness of the evaluation with respect to the areas within the NRC's scope of review. The technical evaluations presented in the LR include, when appropriate, a discussion of SPU effects on plant operating limits, functional performance requirements and design margins and describe the methods DNC used in reaching the conclusions. DNC has included any differences between the information in the review standard and the MPS3 design bases to enhance the NRC review.

LAR SPU, Attachment 5, Page 1-1.

Attachment 5 also describes how DNC did more than was listed in RS-001. *See* e.*g.*, *Id.* at Page 1-3 (listing sections within the LAR in addition to those specified in RS-001). In Attachment 5, DNC stated where additional information was appropriate. *See e.g.*, *Id.* at Page

2.2-164.[9] Further, the Applicant applied additional criteria other than those in RS-001. *See, e.g., id.* at Page 2.8-344.[10]

Finally, the Petitioners incorrectly assert that DNC failed to tell the Board that the NPDES permit for Millstone expired and has no legal effect. Appeal at 22. The LAR contained an extensive discussion of the status and renewal of the NPDES permit.[11] Readily-accessible public information from the State of Connecticut confirmed that the permit is valid, and provided the status of the renewal.[12] The Board's Order also correctly contained a discussion that concluded the NPEDS permits were not relevant for the proceeding. *See* Order at 33.

CONCLUSION

For the reasons well stated in the Board's Memorandum and as discussed above, the Petitioners did not proffer an admissible Contention. This appeal is not sufficient in that the

[9] "For [Bottom Mounted Instrumentation] BMI, NRC review standard RS-001 does not explicitly call out the SRP or any other guidance documentation. The DNC review focused on the effects of the proposed SPU on the structural integrity of the BMI components and their continued functionality, including the capability to maintain integrity of the RCPB, and withstand any adverse dynamic loads under the maximum pressures and temperatures associated with the SPU."

[10] "Specific review criteria are contained in SRP Section 15.6.3, Rev. 2 and other guidance provided in Matrix 8 of RS-001, Revision 0. Since MPS3 has obtained approval to use the Alternate Source Term (AST) methodology to calculate dose, the acceptance criteria for SRP Section 15.0.1, Rev. 0, apply, and supersede those provided in SRP Section 15.6.3, Rev. 2."

[11] "As a result, DNC's NPDES permit renewal application remains under review with the CTDEP, and the current NPDES permit and 316(a) and (b) determinations remain in effect until the State ultimately acts on DNC's application for renewal of the NPDES permit. Accordingly, the NPDES permit issued by CTDEP for MPS in December 1992 and transferred to DNC on March 31, 2001 constitutes the current CWA Section 316(a) and (b) determinations for MPS." SPU LRA Attachment 2 "Supplemental Environmental Report," Page 28.

[12] On Dec. 12, 2007, the Connecticut Department of Environmental Protection (DEP) announced a revised tentative decision, and public comment period, renewing a water discharge permit for the Millstone Power Station that both complies with the requirements of a recent federal court case and also contains previous provisions aimed at better protecting winter flounder and other aquatic life in Long Island Sound. The existing permit allows for the discharge of approximately 2.75 billion gallons of water per day – because it covered all three Millstone units, and Millstone Unit 1 was shut down in 1995 – an amount 20% percent greater than will be allowed under the recommended renewed permit. DEP will then restart the DEP's public hearing process and schedule a new date for a public hearing on the proposed permit, after which the DEP Commissioner will make the final decision on the proposed permit after considering the finding of the hearing officer and public comments. *See* DEP website at http://www.ct.gov/dep/cwp/view.asp?A=2794&Q=400780, last visited June 23, 2008.

Petitioners have failed to demonstrate that the Board's ruling is erroneous as a matter of law or reflects an abuse of discretion. Therefore, the Commission should affirm the Licensing Board's Decision denying CCAM and Ms. Burton's request for a hearing and petition to intervene.

Respectfully submitted,

/Signed electronically by/

David E. Roth
Counsel for NRC Staff

Dated at Rockville, Maryland
This 26th day of June 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DOMINION NUCLEAR CONNECTICUT, INC.	)	Docket No. 50-423-OLA
	)	
(Millstone Power Station, Unit No. 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF IN OPPOSITION TO CCAM AND MS. BURTON'S APPEAL OF LBP-08-09", dated June 26, 2008, have been served upon the following by the Electronic Information Exchange, this 26th day of June, 2008:

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