

September 22, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO CONNECTICUT COALITION AGAINST MILLSTONE AND
NANCY BURTON'S NEW CONTENTIONS AND REQUEST FOR LEAVE TO SUBMIT NEW
CONTENTIONS BASED ON RECEIPT OF NEW INFORMATION AND REQUEST FOR
CONTINUING WAIVER OF E-FILING REQUIREMENTS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "Connecticut Coalition Against Millstone [("CCAM's")] and Nancy Burton's [(collectively "Petitioners")] New Contentions and Request For Leave To Submit New Contentions Based On Receipt Of New Information and Request For Continuing Waiver Of E-Filing Requirements" which was e-mailed on August 27, 2008.¹ The Staff opposes admission of the new contentions and opposes a continuing waiver of e-filing requirements.

BACKGROUND

By letter dated July 13, 2007, Dominion Nuclear Connecticut, Inc. ("Licensee" or "Applicant") submitted a license amendment request (LAR) for Millstone Power Station Unit 3

¹ E-mail and attachments from nancyburtonct@aol.com to HearingDocket et al (August 27, 2008, 2:57 PM). The attachments were Millstone3UprateCCAMNewContentions82708[1].docx (47 kB) (the name is unaltered, *i.e.* "[1]" is part of the file name)("Late Petition"), Millstone 3 Uprate - Gundersen Declaration.pdf (155 kB) ("Gundersen Declaration"), Millstone 3 Uprate - Gundersen Declaration Signature Page.pdf (20 kB) ("Gundersen Signature").

("Millstone" or "MPS3") to increase the unit's authorized core power level from 3411 megawatts thermal (MWt) to 3650 MWt, and to make changes to technical specifications as necessary.² This requested change, designated by the NRC as a "stretch power uprate" ("SPU"), represents an increase of approximately seven percent above the current maximum authorized power level and does not involve major plant modifications.³ On January 15, 2008, the NRC published in the *Federal Register* a notice of consideration of issuance of the proposed amendment and opportunity for a hearing. *73 Fed. Reg. 2546, 2549 -2550*. In response to this notice, CCAM and Ms. Burton filed a petition dated March 17, 2008.⁴

On June 4, 2008, the assigned Atomic Safety and Licensing Board ("Board") found standing for Petitioners, but denied intervention for failure to proffer an admissible contention.⁵

² The letter and associated attachments are in a "package" in the Agency Document Access and Management System (ADAMS) under accession number ML072000384 ("Millstone Power Station Unit 3, License Amendment Request Stretch Power Update.").

³ See RS-001, "Review Standard For Extended Power Uprates," Rev. 0, Dec. 2003, at "Background" (Unnumbered):

The process of increasing the licensed power level at a commercial nuclear power plant is called a "power uprate." Power uprates are categorized based on the magnitude of the power increase and the methods used to achieve the increase. Measurement uncertainty recapture power uprates result in power level increases that are less than 2 percent and are achieved by implementing enhanced techniques for calculating reactor power. Stretch power uprates typically result in power level increases that are up to 7 percent and do not generally involve major plant modifications. EPU's result in power level increases that are greater than stretch power uprates and usually require significant modifications to major plant equipment. The NRC has approved EPU's for increases as high as 20 percent. This review standard is applicable to EPU's.

⁴ *Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing* (Mar. 17, 2008) (ML080840527) ("Original Petition").

⁵ Memorandum and Order (Ruling on Petition to Intervene and Request for Hearing), LBP-08-09, 67 NRC ____ (June 4, 2008)(slip op.)("LBP-08-09")

The Petitioners appealed LBP-08-09 to the Commission.⁶

While the appeal was pending, on August 7, 2008, Petitioners e-mailed⁷ a motion for leave to file "new and/or amended contentions" within thirty days of the July 28, 2008 posting on the NRC website of the official transcript of the July 8, 2008 Advisory Committee on Reactor Safeguards ("ACRS") subcommittee and for a continuing waiver of electronic filing requirements.⁸ The motion identified six "prospective contentions" on the following topics: (1) temperature spikes in the hot legs of the reactor; (2) increase of fluence on the wall of the vessel; (3) use assumptions relating to dose-after-an-accident; (4) steam generator tube repair; (5) gas accumulation; and (6) the analysis of thermal impacts as related to jellyfish and global warming.⁹ Petitioners stated they needed until August 27, 2008 to file "because of the complex nature of the technical review required and pre-existing professional commitments on the part of petitioners' nuclear safety expert; additional time is needed as well to engage a marinelife [sic] expert on the issue of the projected heightened temperature of the thermal plume."¹⁰

On August 12, 2008, the NRC Staff approved the uprate and issued the requested amendment.¹¹ The next day, the Commission denied the Petitioners' appeal for the same

⁶ E-mail from NancyBurtonCT@aol.com to secy@nrc.gov, *et al* (June 17, 2008, 9:52 a.m.) transmitting "Millstone3UprateAppealToCommission61608.wpd" (87 kB).

⁷ E-mail from NancyBurtonCT@aol.com to secy@nrc.gov, *et al* (August 12, 2008, 4:38 p.m.) transmitting "Millstone3UprateRevisedMotionLeaveNewContentions8708.wpd" (99 kB) ("Leave Request").

⁸ Leave Request at 1.

⁹ Leave Request at 2.

¹⁰ *Id.* at 3.

¹¹ The amendment and associated safety evaluation are in a "package" in the Agencywide Documents Access and Management System (ADAMS) at Accession No. ML082180137.

reasons given by the Board in LBP-08-09 and for additional reasons discussed in the order.¹²

On August 27, 2008, Petitioners filed this Late Petition which proffered New Contention 1 on hot leg temperature spikes and New Contention 2 on the issue of using RS-001 during the Staff's review. Five of the six "prospective contentions" mentioned in the August 7 motion were evidently abandoned without explanation by Petitioners.

As will be discussed below, New Contention 2, regarding the Staff's performance, was essentially Contention 6, which had already been rejected by the Board and Commission. Petitioners have previously been informed by the Board that challenges to how the Staff performs its review, such as New Contention 2, are fundamentally inadmissible. See *Millstone*, LPB-08-09, 67 NRC at ____ (slip op. at 17). By proffering New Contention 2, Petitioners are again disregarding the Board's and Commission's previous rulings and are demonstrating their unwillingness to comply with the Commission's rules.

DISCUSSION

I. Board Should Reject Filing for Failure to Comply with Commission's Rules

A. Failure to E-File Warrants Rejection

Despite a previous warning from the Commission,¹³ and contrary to assurances given to the Board, Petitioners have again failed to e-file their document. Further, they have failed even to discuss what steps, if any, they have taken to attempt to comply with the Commission's rules since their last e-filing waiver requests¹⁴ despite the changed circumstances evidenced by the

¹² *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC ____ (Aug. 13, 2008) (slip op. at 1-2), *aff'g Millstone*, LPB-08-09, 67 NRC ____ (slip op.).

¹³ *Id.* at slip op. at 5 n. 18 - n. 20.

¹⁴ "Connecticut Coalition Against Millstone And Nancy Burton Revised Motion For Leave To File Their New And/Or Amended Contentions Based On Receipt Of New Information And For Continuing Waiver Of Electronic Filing," August 7, 2008 at 15-16. In that request, Petitioners claimed unspecified (continued. . .)

file formats used in their latest filing.¹⁵

Because Petitioners again failed to follow the Commission's e-filing rules and provided no justification for their continued non-compliance, the Late Petition should be summarily rejected. See *Millstone*, CLI-08-17, 68 NRC ____ (slip op. at 5) (wherein the Commission noted that where Ms. Burton neither followed NRC electronic filing requirements nor sought a timely exemption from those requirements, the Commission might have rejected her filing summarily for violating NRC procedural regulations.).

B. No New Contentions May be Considered Because the License Was Already Issued

On August 12, several weeks before the submission of this Late Petition, the Millstone Unit 3 Uprate license amendment was issued.¹⁶ As the Staff has previously argued regarding a hypothetical motion to reopen, the termination of the proceeding and issuance of the license preclude the consideration of new and amended contentions. See NRC Staff's Initial Legal

(. . .continued)

technical difficulties and a \$500 cost of software as their reason not to file electronically. *Id.* at 16. In their subsequent filing dated August 25, 2008, Petitioners again requested a waiver by referring to their previous requests while stating that their circumstances had not changed. "Connecticut Coalition Against Millstone And Nancy Burton's Response To Atomic Safety And Licensing Board Panel's Memorandum And Order Dated August 14, 2008 Requesting Legal Briefs And Request For Continuing Waiver Of E-Filing Requirements," August 25, 2008 at 1-2. For the filing dated August 27, 2008, Petitioners again requested a waiver simply by referring to the previous requests. Late Petition at 14 ("The petitioners request a continuing waiver of the NRC's E-filing requirements for the reasons set forth in their pending motions for said waiver.")

¹⁵ The Staff notes that the Late Petition is now in the ".docx" format, which is the default file extension for Microsoft Office Word 2007 (<http://office.microsoft.com/en-us/word/HA100069351033.aspx>), instead of the previously-used Corel WordPerfect ".wpd" format (http://corel.custhelp.com/cgi-bin/corel.cfg/php/enduser/prnt_adp.php?p_faaid=757264). Also, Petitioners now have demonstrated an ability to create and scan .pdf files, inasmuch as the Gundersen Declaration and associated signature page are .pdf files.

¹⁶ The amendment and associated safety evaluation are in a "package" in ADAMS at ML082180137.

Briefing on Board's Questions (Aug. 25, 2008) at 6-7.

Furthermore, the Commission has an interest in "regulatory finality" and "sound case management." *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 391 (2001) (citing *see Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 40 (2001)). It is essential for good case management that Petitioners file contentions on the basis of the application and not delay their contentions until after the receipt of an ACRS transcript. See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC 31, 45. In the interest of expedition, the Commission's rules require the filing of contentions as early as possible. *Id.* (referring to the rules in former Part 2, which was changed February 14, 2004; See Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004)). Admitting these two newly-proffered late contentions would be contrary to the Commission's interest in sound case management.

II. Board Should Reject Contentions Under 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1)

A. Standards for New Contentions Under 10 C.F.R. § 2.309(f)(2) Not Met

In discussing the Commission's rules establishing a framework for considering contentions filed after the initial petition was due, another Board recently observed when new contentions are based on breaking new developments or information, they are to be treated as "new or amended" under 10 C.F.R. § 2.309(f)(2)(i)-(iii). *Shaw Areva Mox Services* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 210 n. 95 (2007) (noting that other boards also took this view; see, e.g., *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 NRC 391, 395-96 & n.3 (2006); and *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-05-32, 62 NRC 813, 821 & n.21 (2005)). Where the information is not new, the stricter standards of 10 C.F.R. § 2.309(c)(1)(i)-(viii) apply. See *id.*

As the Commission has previously informed Petitioners, the NRC does not look with favor on new contentions filed after the initial filing. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004). Section 2.309(f)(2) provides that a petitioner may file such late contentions "only upon a showing that -- (i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information." *Id.* (citing 10 C.F.R. § 2.309(f)(2)(i)-(iii)); *see also* 10 C.F.R. § 2.309(c)(1)).

In promulgating 10 C.F.R. Part 2, the Commission stated,

For [non-NRC-environmental-document-based] new or amended contentions the rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Include[d] in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the timing of availability of the subsequent information. See § 2.309(f)(2)(iii). . . . This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available.

Statements of Consideration, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

Inasmuch as Petitioners apparently intended to meet the standards of 10 C.F.R. § 2.309(f)(2)(i)-(iii)¹⁷ the Staff will address below why their late petition fails.

¹⁷ Erroneously, the Petitioners referred to 10 C.F.R. § 2.309(f)(3), which regards co-sponsoring a contention. See Late Petition at 2.

1. Material Was Previously Available

Neither of the proffered two new contentions was based on new information, despite Petitioners' claim to the contrary.

Regarding the hot leg contention, Petitioners believe discussions of the duration of temperature variations at an ACRS meeting on July 8, 2008, constituted "new" information because Petitioners were previously unaware of phenomenon. Late Petition at 2. The fact that temperature spikes were observed, and that the licensee planned to implement a four-second filter to address the spikes, has been available since the original application for a power uprate.¹⁸ Petitioners did not reference or cite any portion of the application wherein the applicant claimed that all spikes were four seconds or less in duration; the application made no such claim.

If Petitioners had a concern that the applicant omitted necessary information about the duration or amplitude of the spikes, or how the temperature variation associated with the spikes impacted the structural integrity of the reactor and attached piping, the Petitioners should have included that contention with their initial filing. See *Millstone*, CLI-04-36, 60 NRC at 636. Accordingly, the transcribed inquiry at ACRS regarding the duration of the spikes, which was quoted by Petitioners' Declarant, constitutes neither new nor materially different information, and does not support a late contention. See 10 C.F.R. § 2.309(f)(2)(i)-(ii).

For the New Contention 2 regarding Containment Analysis, Petitioners quote the ACRS

¹⁸ See e.g., Millstone Power Station Unit 3, License Amendment Request, Attachment 5, "SPU Licensing Report" at 2.4-10 ("As part of the overtemperature ΔT (OT ΔT) and overpower ΔT (OP ΔT) optimization, a 4 second filter is being added to the T_{hot} input, prior to the modules that calculate T_{avg} and ΔT , to smooth out temperature spikes observed in the T_{hot} signals.") (*available at* ML072000400).

The Staff's SER discussed the spikes. "Safety Evaluation By The Office Of Nuclear Reactor Regulation Related To Amendment No. 242 To Renewed Facility Operating License No. NPF-49" at 234 (*available at* ML081640535). ("NRC SER").

transcript for the purpose of discussing what analysis the NRC staff did or did not perform. Late Petition at 12. It is well established that the issue for a proceeding is the adequacy of the application, not the performance of the NRC Staff during its safety review.¹⁹

2. Filing Not Timely From Learning Of "New" Information

Even assuming the information from the ACRS meeting was new, which it was not, the Late Petition was still untimely, because both Ms. Burton and Mr. Gundersen were present and spoke at the July 8, 2008 ACRS subcommittee meeting,²⁰ and Mr. Gundersen attended and spoke at the ACRS full committee meeting on July 9, 2008,²¹ thus they had no reason to wait until receipt of a transcript to claim they now have new information. Under the well-established standards for late-filed contentions,²² the Petitioners should have filed within 30 days of the

¹⁹ See, e.g. *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC ___, (slip op. at 8) (Aug. 13, 2008) (citing *See Pa'ina Hawaii, LLC* (Materials License Application), CLI-08-3, 67 NRC 151, 168 n.73 (2008)); e.g., *Curators of the University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 121-22, aff'd on motion for reconsid., CLI-95-8, 41 NRC 386, 403 (1995)).

²⁰ See e.g., Transcript of the Advisory Committee on Reactor Safeguards Subcommittee on Power Uprates at 282 (July 8, 2008)

²¹ See e.g., Transcript of the Advisory Committee on Reactor Safeguards at 95 (July 9, 2008).

²² In discussing these standards, one Board noted that:

[T]he regulations do not set a specific number of days whereby we can measure or determine whether a contention is "timely" as required by 10 C.F.R. § 2.309(f)(2)(iii). The "timing" provision of section 2.309(b) cannot apply, for this provision would make all contentions filed after the initial notice period "nontimely," and a contention could never meet the requirements of 10 C.F.R. § 2.309(f)(2)(iii). Alternatively, given the significant effort involved in (a) identifying new information, (b) assembling the required expertise, and then (c) drafting a contention that satisfies 10 C.F.R. § 2.309(f)(1), it would be inappropriate to impose the very short 10-day rule of 10 C.F.R. § 2.323(a) on the filing of new contentions . . .

Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (May 25, 2006)

triggering event -- the ACRS meeting of July 8, 2008 --, not thirty days after receipt of the transcript. See *MOX Services*, LBP-07-14, 66 NRC at 210 n. 95. The proffered New Contention 1 is not based upon any complex technical discussion that could warrant waiting to review the ACRS transcript, but is instead based solely on the statement that some spikes lasted as long as fifteen seconds. See Late Petition at 8. There is simply no valid reason for Petitioners to wait until receipt of the transcript to craft either of the new contentions. They are now inexcusably late.

B. Standards For Non-Timely Contention Not Met

Given that the information upon which the New Contentions were based was not, in fact, new, the Board might consider the petition under the stricter standards of 10 C.F.R. § 2.309(c)(1)(i)-(viii). See *MOX Services*, LBP-07-14, 66 NRC at 210 n. 95. To consider a late petition, the Board must balance the following factors: (i) good cause for failure to file on time; (ii) the right to be made a party to the proceeding; (iii) the nature and extent of Petitioners' interest in the proceeding; (iv) the possible effect of any order that may be entered in the proceeding on that interest; (v) the availability of other means to protect the interest; (vi) the extent to which the interests will be represented by existing parties; (vii) the extent to which the Petitioner's participation will broaden the issues or delay the proceeding; and (viii) the extent to which the Petitioner's participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.309(c)(1)(i)-(vii). To be considered under the late contention standard, Petitioners were required to address those seven factors. 10 C.F.R. § 2.309(c)(2). The failure to comply with the Commission's pleading requirements for late filings constitutes sufficient grounds for rejecting Petitioners' intervention and hearing request if the Commission used that

standard.²³

C. Standards for Motion to Re-Open not Met

As the Staff has previously argued, this proceeding is terminated and the various motions by Petitioners did not preserve the possibility for the Board to consider a motion to re-open.²⁴

As the Commission has previously told Petitioners,

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.

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-04, 63 NRC 32, 38 (2006).

Therefore, even if the Board were to conclude that it could treat the Late Petition under the motion to re-open standards, the Board would still be required to reject the Late Petition for failure to address the procedural reopening requirements

²³ *Florida Power & Light Company, FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33-34 (2006).

²⁴ NRC Staff's Initial Legal Briefing On Board's Questions at 7 (Aug. 25, 2008).

III. The Filing Fails to Meet Contention Pleading Requirements

As stated above, the contentions are impermissibly late, improperly plead, and incorrectly filed. Moreover, the two new contentions fail the requirements of 10 C.F.R. § 2.309(f)(1).²⁵

A. New Contention 1

Temperature spikes in the hot legs of the Millstone 3 reactor - and the use of a new 4-second filter - present critical new and unreviewed safety issues not addressed by the application.

Late Petition at 2.

As bases for New Contention 1, Petitioners generally repeat what was said at the ACRS meeting, and then claim the information was "new" and that "Until the July 8, 2008 ASLB [sic] hearing[sic], the information provided by the applicant was vague and misleading regarding the issue of its hot leg random temperature fluctuation." Late Petition at 7. Petitioners then extensively refer to various portions of the license amendment application that discussed the spiking (*id.* at 8-10), yet conclude that the issue is "not addressed by the application" (*id.* at 10).

In support of the proffered contentions, Petitioners provided the Gundersen Declaration dated August 26, 2008. Mr. Gunderson was concerned that, for hot leg temperature spikes, the Petitioners, the ACRS, and the licensee did not have sufficient information to assess the "remaining safety margin" after plant modifications. Gundersen Declaration at 3. Mr. Gundersen then makes many speculative and sweeping assertions ranging from a claim that the applicant misrepresented the duration of spikes to the applicant failed to assess thermal stresses that were caused by different temperatures in different legs of the plant piping. *See id.*

²⁵ The Board provided the standard in *Millstone*, LPB-08-09, 67 NRC at ____ (slip op. at 8-14).

at 8-9.

B. Staff's Answer to New Contention 1

The Staff opposes admission of New Contention 1.

Petitioners fail to identify an omission from the application of legally required information, and thus fail to meet 10 C.F.R. 2.309(f)(1)(vi). On its face, the Late Petition contradicts an omission of the spiking issue when it cites various portions of the amendment application that discuss the spikes. See e.g. Late Petition at 10. Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue may be dismissed. *Millstone*, LPB-08-09, 67 NRC at ____ (slip op. at 14). Accordingly, this New Contention 1 should be dismissed.

Petitioners fail to provide any reason why the analyses and discussions in the application are deficient. For example, Petitioners give no reason why the applicant's choice of a four-second filter is incorrect²⁶ but instead "petitioners challenge" whether the filter would improve response to an accident. Late Petition at 5. Petitioners offer no independent insight or analysis to suggest that the applicant's analyses are incorrect. As the Board has already instructed the Petitioners, bare assertions and speculation is insufficient to support a contention. *Millstone*, LPB-08-09, 67 NRC at ____ (slip op. at 13). Additionally, Petitioners failed to state which analyses in the application they believe are incorrect as a result of the filter modification.²⁷

²⁶ It appears that Petitioners fundamentally fail to understand the purpose and use of the filter, inasmuch as they state that it is unclear how the filter works on a long spike. See Late Petition at 7. The Staff assessed the functioning of the filter and concluded it was acceptable, and would reduce the number of spurious alarm trips due to hot leg temperature spiking. NRC SER at 234.

²⁷ By contrast, the application states that the four-second filter was properly input as a parameter when the applicant calculated the overall thermal-hydraulic and nuclear response of the nuclear steam supply system and various control and protection systems using an NRC-approved methodology. LRA Attachment 5 at 2.4-29.

Petitioners' declarant, Mr. Gundersen, asserts that the applicant told ACRS that some spikes lasted 15 seconds as a basis for many sweeping and broad claims, including: misrepresentation by the applicant,²⁸ a gross breakdown in its calculational quality assurance,²⁹ failure to understand the phenomena,³⁰ failure to assess available data,³¹ failure to prove a four-second filter may be effective,³² failure to provide analysis of the impact of the fifteen-second spike,³³ possibly creating a new unanalyzed accident scenarios,³⁴ filtering out the true indicator of an incipient accident,³⁵ failure to conduct any assessment of the thermal stress caused by spikes,³⁶ and not giving information "in Discovery" and "until the hearing itself had commenced."³⁷ Gundersen Declaration at 8-10.

Regarding the sweeping speculations by Mr. Gundersen, such claims again demonstrate

²⁸ Mr. Gunderson fails to point to any portion of the application that states spikes were limited to under four seconds, nor does he explain why, if the applicant corrected itself during the ACRS meeting, the applicant misrepresented anything during ACRS.

²⁹ Mr. Gunderson fails to give even one example of an error in calculations in the application.

³⁰ Mr. Gunderson gives no example of the applicant misunderstanding the spiking.

³¹ Mr. Gunderson points to no unassessed data.

³² Mr. Gunderson does not state what additional proof was required, nor does he dispute the results of the analyses in the application.

³³ Mr. Gunderson simply ignores that the licensee stated that spikes cause alarms and trips.

³⁴ Mr. Gunderson identifies no new or analyzed accident.

³⁵ Mr. Gunderson fails to state how an accident would be filtered out, nor does he dispute the results of the analyses in the application.

³⁶ Mr. Gunderson identifies no design or operating limits on thermal stress that are impacted by the spikes. Neither does Mr. Gunderson provide even one example or calculation to support that the infrequent spikes cause thermal stress.

³⁷ Mr. Gunderson has apparently confused the review and reporting duties of the Advisory Committee on Reactor Safeguards with the hearing duties of the Atomic Safety and Licensing Board.

Petitioners willingness to disregard Board orders and Commission rules, inasmuch as the Board has already informed Petitioners that allegations that amount to unsupported speculation, are insufficient to support an admissible contention and fails to meet 10 C.F.R. § 2.309(f)(1)(v). See *Millstone*, LPB-08-09, 67 NRC at ____ (slip op. at 32).

C. New Contention 2

The NRC's review of the Millstone Unit 3 uprate application does not comply with mandatory legal standards set forth in the NRC's "Review Standard for Extended Power Uprates." [RS-001]

Late Petition at 10-12.³⁸

In support of New Contention 2, Petitioners claim that they learned at the ACRS meeting that the Staff had not done an independent in-depth analysis, although one was required by RS-001. See *id.* at 12. Petitioner's declarant Mr. Gundersen claims that according to RS-001, "the NRC is required by Statute to conduct an independent analysis[] (Page 2.1-3 of RS-001) when there is no similar plant design upon which to base conclusions."³⁹

Further, Petitioners claim the applicant mischaracterized its application as a "stretch" application instead of an extended power uprate to evade in-depth review by the NRC. See Late Petition at 13. The Petitioners conclude that the NRC must include independent calculations and confirmatory analyses. *Id.* at 13-14.

³⁸ No page 11 was included in the Late Petition. It appears to be an error in numbering pages, rather than a missing page.

³⁹ Mr. Gundersen then provides a quotation from Page 2.1-3 of RS-001 that partly contradicts his claim of statutory requirements: "Perform audits and/or independent calculations as deemed necessary and appropriate to support review of the licensee's application." Gundersen Declaration at 13 (quoting Page 2.1-3 of RS-001) (emphasis added). Mr. Gundersen provides no reference to any statute that requires an independent analysis. Contrary to his assertion, there is no statute requiring independent analyses, and RS-001 makes no such claim.

1. Staff's Answer to New Contention 2

The Staff oppose the admission of New Contention 2 for the reasons described below.

a. Impermissible to Admit Contention on Staff Performance

Petitioners' original Contention 6 claimed that the LAR could not be analyzed as a stretch power uprate because no regulatory standards had been adopted by the NRC, and that the NRC staff must analyze the LAR using the EPU standards of RS-001.⁴⁰

In affirming the Board's original ruling against Petitioners, the Commission informed Petitioners that "the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action, not the nature of the NRC Staff's review." *Millstone*, CLI-08-17, 68 NRC at ____ (slip op. at 8) (citing *see Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC at 168 n.73). The Commission also told Petitioners that "NRC policies and standards and the nature of the NRC Staff's licensing review are not subject to challenge in an adjudicatory hearing." *Id.* at 60 (citing *see, e.g., Pa'ina Hawaii*, CLI-08-3, 67 NRC at 168 n.73; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999)). Specifically regarding the RS-001, the Commission stated it "presents merely guidance and not regulatory requirements." *Millstone*, CLI-08-17, 68 NRC ____ (slip op. at 7-8, n. 27).

The submission of New Contention 2 which directly focuses on the nature and adequacy of the NRC Staff's review again demonstrates the Petitions disregard for the NRC's rules and requirements. Such disregard for the NRC's rules has historically resulted in cautions⁴¹ and an

⁴⁰ Original Petition at 31-33 (unnumbered in original).

⁴¹ For example, in one case, the Commission stated,

Finally, we join the Licensing Board in expressing displeasure at the CCAM attorney's consistent disregard for our procedural rules. As we noted just last year when criticizing CCAM's same counsel for similar dereliction, she is "no stranger[] to the NRC adjudicatory process." This

(continued. . .)

order⁴² against Petitioners.

b. Impermissible Attempt to Reargue Rejected Contention

New Contention 2 is essentially a subset of rejected original Contention 6.⁴³ The Board and the Commission have already rejected Petitioners argument for original Contention 6 that "a more intensive and comprehensive review must commence." *Millstone*, CLI-08-17, 68 NRC at ____ (slip op. at 13) (quoting Petition at 33). Nothing in the NRC's rules permit resubmission of the same rejected argument and contention in this manner. As the Commission has already told Petitioners on a previous adjudication, a petition for reconsideration should not be used merely to re-argue matters that the Commission already

(. . .continued)

is her fifth NRC adjudication since 1999, so she cannot credibly claim ignorance of our practices and procedures. As the Board's two orders in this proceeding and our own order today make clear, CCAM's attorney has repeatedly failed to provide support at the hearing for her client's contentions, as required under section 2.309(f) of our rules of practice and procedure. Further, the record in this proceeding indicates that CCAM's attorney has likewise ignored numerous other Commission adjudicatory procedures. Nor has her disregard for our procedures been limited to this proceeding. She has a similar record in four previous *Millstone* proceedings, where she has repeatedly failed to follow basic NRC adjudicatory procedures.

Dominion Nuclear Connecticut Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 643-644 (2004) (footnotes omitted).

⁴² *Millstone*, CLI-06-4, 63 NRC at 38-39 (requiring special screening of all Ms. Burton's filings).

⁴³ original Contention 6 was:

Dominion's application for a Millstone Unit 3 7+ per cent [sic] 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.

considered and rejected.⁴⁴ The same logic may be applied to Petitioners' proffered New Contention 2.

CONCLUSION

As discussed above, the Late Petition should be denied. The proceeding was already terminated before the submittal of the two new contentions. Additionally, the proffered contentions were not timely based on new information, and fail to meet the Commission's rules. They should be denied.

/Signed (electronically) by/

David E. Roth
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
(301) 415-2749
david.roth@nrc.gov
Date of signature: September 22, 2008

⁴⁴ *Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3) CLI-02-01, 55 NRC 1, 1 (2002) and cases cited therein.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DOMINION NUCLEAR CONNECTICUT, INC.) Docket No. 50-423-OLA
)
(Millstone Power Station, Unit No. 3)) ASLBP No. 08-862-01-OLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO CONNECTICUT COALITION AGAINST MILLSTONE AND NANCY BURTON'S NEW CONTENTIONS AND REQUEST FOR LEAVE TO SUBMIT NEW CONTENTIONS BASED ON RECEIPT OF NEW INFORMATION AND REQUEST FOR CONTINUING WAIVER OF E-FILING REQUIREMENTS", dated September 22, 2008, have been served upon the following by the Electronic Information Exchange, this 22nd day of September, 2008, with a courtesy copy e-mailed to Ms. Burton:

Administrative Judge
William J. Froehlich, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wjf1@nrc.gov

Administrative Judge
Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Administrative Judge
Dr. Michael F. Kennedy
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mfk2@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop – O-16G4
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

David R. Lewis, Esq.
Stefanie Nelson, Esq.
Matias Travieso-Diaz, Esq.
Maria Webb, Paralegal
Pillsbury Winthrop Shaw Pittman, LLP
2300 N. Street, NW
Washington, DC 20037-1122
E-mail: david.lewis@pillsburylaw.com ;
stefanie.nelson@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
maria.webb@pillsburylaw.com

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Connecticut Coalition Against Millstone
147 Cross Highway
Redding Ridge, CT 06876
Nancy Burton, Esq.
E-mail: nancyburtonct@aol.com

Dominion Resources Services, Inc.
120 Tredegar Street, RS-2
Richmond, VA 23219
Lillian M. Cuoco, Esq.
E-mail: Lillian.Cuoco@dom.com

/Signed (electronically) by/

David E. Roth
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
(301) 415-2749
david.roth@nrc.gov
Date of signature: September 22, 2008