

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 ON MOTIONS TO FILE NEW OR AMENDED CONTENTIONS

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311 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 (collectively "CCAM's") appeal¹ of the decision of the Atomic Safety and Licensing Board ("Board"), Memorandum and Order (Ruling on Motions to File New or Amended Contentions) dated October 27, 2008 (unpublished) (hereafter "Motion Order"), which, *inter alia*, denied CCAM's request to file several new or amended contentions.²

¹ On November 6, 2008, CCAM e-mailed the appeal. E-Mail from NancyBurtonCT@aol.com to HearingDocket@nrc.gov, *et al.* (Nov. 6, 2008 at 3:54 PM) transmitting "Millstone3UprateNoticeOfAppealNRC110608.wpd" (41 kB) ("Appeal").

² CCAM again has not e-filed its appeal and instead requested a waiver of the requirement for lack of computer capability. See Appeal at 1. Failure to e-file warrants the Commission's rejection of the CCAM's appeal. See *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC ____, ____ (Aug. 13, 2008) (slip op. at 5 n. 18 - n. 20), *aff'g Millstone*, LPB-08-09, 67 NRC ____ (June 4, 2008) (slip op.). CCAM has failed to discuss what technical difficulties it is still experiencing and what steps it has taken since CCAM's last requested a waiver to rectify the situation. Because CCAM failed to follow the Commission's e-filing rules and provided no justification for its continued non-compliance, the appeal should be summarily rejected. See *Millstone*, CLI-08-17, 68 NRC at ____ (slip op. at 5).

As discussed below, the Board properly found that CCAM had not met the standards for submitting new or amended contentions after the Board's denial of CCAM's original contentions. The Board correctly found that the prospective contentions submitted by CCAM through "placeholder" motions failed to address the contention admissibility requirements of 10 C.F.R. § 2.309, and did not eliminate the need to apply the legal standards pertinent to reopening a closed record. Furthermore, the Board correctly found that issuance of the license amendment precluded submission of additional contentions. Accordingly, the Commission should affirm the Board's Order that denied CCAM's motions to admit new or amended contentions.

STATEMENT OF THE CASE

I. Case History and Previous Board and Commission Rulings

This proceeding concerns the application of Dominion Nuclear Connecticut, Inc. ("Licensee" or "Applicant") for an amendment to its operating license for Millstone Power Station, Unit 3 ("Millstone" or "MPS3") in Waterford, Connecticut. By letter dated July 13, 2007, Dominion Nuclear Connecticut, Inc. submitted a license amendment request (LAR) for 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.³ 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.⁴

³ 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.").

⁴ 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

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.⁵ In response to this notice, CCAM filed a petition to intervene dated March 17, 2008.⁶

On June 4, 2008, the assigned Board found standing for CCAM, but denied intervention for failure to proffer an admissible contention. *Millstone*, LBP-08-09, 67 NRC ____, (slip op.). The Board terminated the proceeding on June 4, 2008, when it ruled that all nine of the proffered contentions were inadmissible. *Id.* at (slip op. at 34) (emphasis in original) ("Because CCAM and Ms. Burton have failed to provide a single admissible contention, the Board must DENY their hearing request and terminate this proceeding."). After the proceeding was terminated, CCAM submitted the motions that are the subject of the current appeal.

CCAM appealed LBP-08-09 to the Commission on June 17, 2008.⁷ On August 13, 2008, the Commission denied CCAM's appeal for the same reasons given by the Board in LBP-08-09 and for additional reasons discussed in the Commission's decision. *Millstone*, CLI-08-17, 68 NRC ____, (slip op. at 1-2). The Commission affirmed the Board's conclusion that all nine of the proffered contentions were inadmissible.

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.

⁵ Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations, 73 Fed. Reg. 2546, 2549-2550 (Jan.15, 2008).

⁶ *Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing* (Mar. 17, 2008) (ML080840527) ("Original Petition").

⁷ E-mail from NancyBurtonCT@aol.com to secy@nrc.gov, *et al.* (June 17, 2008, 9:52 a.m.) transmitting "Millstone3UprateAppealToCommission61608.wpd" (87 kB).

II. Four Motions that are the Subject of the Appeal

This brief concerns the appeal of the Board's rulings on four motions filed or transmitted by CCAM dated July 18, July 31, August 7, and August 27, 2008.

A. July 18 Motion

On July 18, the next day after filing the appeal of LBP-08-09, CCAM unsuccessfully attempted to file a motion⁸ for leave to file six new and/or amended contentions in the future after CCAM had experts review a then-unreleased transcript of the meeting of the Advisory Committee on Reactor Safety (ACRS) subcommittee. The Office of the Secretary rejected summarily CCAM's July 18 motion to file late contentions in this proceeding, given its failure either to comply with electronic filing requirements or to seek a waiver.⁹ In the rejected July 18 motion, CCAM stated: "By this motion, the petitioners seek leave to file their formalized new/amended contentions, supported by expert declarations, within ten (10) days of receipt of the transcript of the [July 8, 2008] ACRS proceedings."¹⁰ The July 18 Motion provided general information on six "prospective contentions" regarding (1) temperature spikes in the hot legs of the reactor; (2) increase of fluence on the wall of the vessel; (3) use of assumptions relating to accident dose; (4) steam generator tube repair; (5) gas accumulation; and (6) pre-seasonal

⁸ E-mail from NancyBurtonCT@aol.com to secy@nrc.gov, *et al* (July 18, 2008 4:40 PM) transmitting "Millstone3UprateMotionLeaveNewContentions7182008.wpd" (119 kB) ("Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File and/or Amended [sic] Contentions Based on Receipt of New Information." ("July 18 Motion")).

⁹ *Millstone*, CLI-08-17, 68 NRC at ____ (slip op. at 6 n.20) (citing see E-mail from Hearing Docket to Nancy Burton (July 21, 2008 15:48 EST)).

¹⁰ July 18 Motion at 2,3.

arrival of jellyfish as a function of global warming.¹¹ The July 18 Motion attached an article about jellyfish, but did not contain any expert support.¹²

B. July 31 Motion

On July 31, 2008, CCAM attempted to address the rejection of its July 18 motion by filing a request to accept the July 18 motion and for a waiver of electronic filing requirements.¹³ The July 31 motion sought to restore *nunc pro tunc* the July 18 motion but did not include or describe any contentions or prospective contentions.

C. August 7 Motion

On August 7, 2008, while both the appeal of LBP-08-09, and a ruling on the July 31 motion to waive e-filing and restore the July 18 motions were pending, CCAM e-mailed¹⁴ 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.¹⁵ The motion identified the same six "prospective contentions" as the July 18 Motion: (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

¹¹ *Id.* at 2; Motion Order at 4-5.

¹² Motion Order at 5.

¹³ Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File Their "Motion for Leave to File New and/or Amended Contentions Based on Receipt of New Information" Dated July 18, 2008, *Nunc Pro Tunc*, and for Continuing Waiver of Electronic Filing" (July 31, 2008).

¹⁴ E-mail from NancyBurtonCT@aol.com to secy@nrc.gov, *et al.* (August 7, 2008, 3:45 p.m.) transmitting "Millstone3UprateRevisedMotionLeaveNewContentions8708.wpd" (99 kB) ("August 7 Motion").

¹⁵ August 7 Motion at 1.

global warming.¹⁶ Rather than the ten days from posting of the transcript requested in the July 18 motion, CCAM now stated it 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 CCAM's 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."¹⁷

D. August 27 Motion

On August 27, 2008, CCAM filed a Petition which reflected a finalized version of the prospective Contention 1 on hot leg temperature spikes and a new Contention 2 on the issue of using RS-001 during the Staff's review. The topic of Contention 2 was not discussed as a potential "prospective contention" in the July 18, July 31 nor August 7 motions. Five of the six "prospective contentions" mentioned in the July 18 and August 7 motions were not presented as finalized nor as supported contentions in the August 27 motion. In other words, the August 27 Motion provided no "formalized new/amended contentions" on the topics of: increase of fluence on the wall of the vessel; use assumptions relating to dose-after-an-accident; steam generator tube repair; gas accumulation; and the analysis of thermal impacts as related to jellyfish and global warming. The August 27 motion also included a request for a continuing waiver of electronic filing requirements.¹⁸

¹⁶ *Id.* at 2; Motion Order at 7 n. 27.

¹⁷ *Id.* at 3.

¹⁸ August 27 Motion at 1

III. Staff Action on License Amendment Request

On August 12, 2008, the NRC Staff approved the power uprate and issued the requested license amendment.¹⁹ The license amendment approval date was after the Board had already ruled in LBP-08-09 that the original nine proffered contentions were inadmissible, but before the Commission had issued CLI-08-17 denying CCAM's requested appeal of LBP-08-09.

IV. Commission Referral of July 31 Motion

On August 11, 2008, the Secretary of the Commission referred the July 31 Motion and any further pleadings related to this motion to the Board.²⁰ The Board subsequently viewed the Commission order and a previous e-mail from the Office of the Secretary of the Commission as delegating jurisdiction to the Board to consider and resolve all four motions.²¹ On August 14, the Board requested legal briefs on four issues related to the pending motions. Memorandum and Order (Requesting Legal Briefs from CCAM, Dominion, and the NRC Staff) (August 14, 2008) ("Briefing Order"). Initial briefs were filed by CCAM, Dominion, and the NRC Staff on August 25, 2008. The Staff, and separately the Applicant, filed replies on September 2, 2008 pursuant to the Briefing Order; CCAM did not file a responsive brief.

V. Board Ruling on Motions

On October 27, 2008, the Board issued its Memorandum and Order. The Board granted the request in the July 31 Motion for a waiver of the e-filing requirements for the subsequent August motions. Motion Order at 7. The remainder of the ruling is summarized below.

¹⁹ The amendment and associated safety evaluation are in a "package" in the Agencywide Documents Access and Management System (ADAMS) at Accession No. ML082180137.

²⁰ Commission Order (Aug. 11, 2008) (unpublished).

²¹ Motion Order at 5-6 n. 22.

A. Board Ruling on July 18 and July 31 Motions

The Board denied the July 31 motion to reinstate the July 18 motion, as the Board found no good cause for the failure to e-file the July 18 motion. Motion Order at 6. Additionally, the Board noted that the July 18 motion did not address the criteria set out in 10 C.F.R. § 2.309(f)(1) (the requirements for admission of all contentions), 10 C.F.R. § 2.309(f)(2) (the additional requirements for admission of new or amended contentions), or 10 C.F.R. § 2.326 (the requirements for reopening a record). Motion Order at 4.

B. Board Ruling on August 7 Motion

The Board noted that the August 7 motion was "virtually identical" to the July 18 motion, and, like the July 18 Motion, lacked expert support and only provided general information on prospective contentions. Motion Order at 7 n. 27. The Board considered the August 7 motion to be a "place holder" that provided notice of an intent to file in the future, which is not permitted in the NRC's rules. *Id.* at 7-8. The Board concluded that because the Board had already denied the original nine contentions, the new or amended motions must meet the standards for reopening the record. *Id.* at 9. The "place holder" motion did not eliminate the need to file a motion to reopen to consider the new contentions. *Id.* Furthermore, any such motion to reopen must address the criteria of 10 C.F.R. §§ 2.326 and 2.309. *Id.* (citing *see Dominion Nuclear Connecticut, Inc.*(Millstone Nuclear Power Station, Units 2 and 3), CLI-06-04, 63 NRC 32, 35-36 (2006)). Moreover, the Board found that the August 7 motion failed to meet the above regulations, and only provided a single conclusory²² statement regarding 10 C.F.R. § 2.309(f)(2). Motion Order at 9-10.

²² CCAM alleges that the Board incorrectly concluded that CCAM failed to address the criteria of 10 C.F.R. § 2.309(f)(2). Appeal at 6-7 (citing Motion Order at 9). Here CCAM misreads the Board's order and fails to understand what is required under 2.309(f)(2). The Staff asserts that the Board correctly found that CCAM had merely made an insufficient conclusory statement regarding the criteria. See Motion Order at 9-10 and 10 n. 37 (citing *see* August 7 Motion at 2). Accordingly, CCAM fails to identify an error or abuse of discretion by the Board.

The Board further observed that the August 7 motion and the associated six prospective contentions failed to meet the contention admissibility requirements in that they failed to provide factual information or expert support. *Id.*

C. Board Ruling on August 27 Motion

The Board found that the proceeding was terminated prior to the receipt of the August 27 Motion. *Id.* at 11. The license was issued and the record was closed. *Id.*

Accordingly, the Board ruled that it was precluded from reopening the record to consider new or amended contentions. *Id.* In arriving at its conclusion, the Board considered precedent from the Commission's *Comanche Peak* decision which provided that once the license has been issued and proceeding terminated, the proceeding will not be reopened to consider new or amended contentions. *Id.* (citing *Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-12, 36 NRC 62, 67 (1992)).

On the basis of *Comanche Peak* holding, the Board denied the August 27 Motion for two new contentions. *See id.* at 11-12.

However, the Board further observed that even if CCAM was not precluded from reopening the record, the August 27 motion would still have failed because CCAM failed to address the standards for reopening, including why the proffered Contention 1 meets the nontimely filing requirements of 10 C.F.R. § 2.309(c). *Id.* at 12.

Still further, the Board observed that if CCAM could reopen the record, the two contentions in the August 27 motion would still fail because, contrary to CCAM's claim, they were not based on new information. *See id.* at 12-13. The Board found that Contention 1 (temperature spikes) in the August 27 Motion was based on information that was available in the application, not "new" information revealed at an ACRS meeting. *Id.* at 13. Contention 2

(Staff performance of its review) was a repackaging of original contention 6 which had already been rejected by the Board and the Commission, and is also not new. See *id.* at 14.

ISSUE PRESENTED

CCAM asserts that the Board misinterpreted the requirements for late-filed contentions and the record reopening requirements. Appeal at 7-8. Therefore, the issue presented is whether the Board committed an error of law or abuse of discretion in denying CCAM's motions to file new or amended contentions.

LEGAL STANDARDS

I. 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). 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 requirements of 10 C.F.R. § 2.309(f)(1). 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, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004) (to be codified at 10 C.F.R. pts. 1, 2, 50, 51, 52, 54, 60, 63, 70, 72, 73, 75, 76, and 110).

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.” 10 C.F.R. §§ 2.309(f)(1)(iii), (iv).

This agency does not look with favor on amended or 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 that for new or amended contentions, other than those based on NRC environmental documents:

[T]he 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.

69 Fed. Reg. at 2221.

II. Legal Standards on Motions to Reopen the Record

As the Commission stated in its recent decision regarding a motion to reopen a license renewal record in *Oyster Creek*:

“[A] party seeking to reopen a closed record to raise a new matter faces an elevated burden to lay a proper foundation for its claim. Commission practice holds that the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.” “New information is not enough . . . to reopen a closed hearing record at the last minute; the information must be significant and plausible enough to require reasonable minds to inquire further.” “The burden of satisfying the reopening requirements is a heavy one,” and “proponents of a reopening motion bear the burden of meeting all of [these] requirements.”

Amergen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC __, __ (Nov. 6, 2008) (slip op. at 13-14) (footnotes omitted; alterations in original).

Motions to reopen are governed by 10 C.F.R. § 2.326, which provides:

(a) 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. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(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.

(b) 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) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

...

(d) 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; *Oyster Creek*, CLI-08-28, 68 NRC at ___ (slip op. at 12-13).

10 C. F. R. § 2.326 was promulgated when the NRC made major procedural revisions to its adjudicatory process in 2004, however, this section restated the provisions of § 2.734 without change. 69 Fed. Reg. at 2224. Accordingly, decisions and rulemaking regarding 10 C.F.R. § 2.734 (pre-2004) provide persuasive authority to resolve this issue.

10 C.F.R. 2.734 became effective in 1986. Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19535 (May 30, 1986) (to be codified at 10 C.F.R. pt. 2). By 1984, the NRC had, through case law, established criteria under which "the evidentiary record in a closed formal licensing proceeding" conducted under subpart G of 10 CFR Part 2 (1984) may be reopened to admit new evidence. Criteria for Reopening Reports [sic] in Formal Licensing Proceedings, 49 Fed. Reg. 50189, 50189 (proposed December 27, 1984) (to be codified at 10 C.F.R pt. 2).²³ The Commission believed that the reopening criteria needed to be codified so that there would be no uncertainty as to what the rules require. *Id.*

III. Scope of Commission Review of Board's Rulings

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 in the Commission's decisions. The Commission will defer to the Boards' determinations and will regularly affirm Board decisions on

²³ The proposed rulemaking cited *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876 (1980) and *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station (ALAB-124, 6EAC 358 (1973) as cases that stand for the three criteria for a motion to reopen: 1) timely, or an exceptionally grave issue; 2) significant safety or environmental issue; 3) a different result reached from the newly proffered material. 49 FR at 50189.

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).

As the Commission has previously advised CCAM, consistent with the Commission's standard of review, CCAM bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. *Millstone*, CLI-04-36, 60 NRC at 637, n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

ARGUMENT

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

CCAM's appeal does not demonstrate any error of law or abuse of discretion on the part of the Board. No legal authority is presented to demonstrate any error or abuse of discretion by the Board. The appeal by CCAM is not specifically targeted to any one motion or contention, rather it asserts that the Board's ruling misinterpreted the regulations, was unreasonable and in clear error.

A. The Board Did Not Err in Interpreting the Commission's Reopening Regulations

CCAM states that the Board was empowered to consider CCAM's motions because the Secretary to the Commission's referral order held the record open and that final judgment was held in abeyance by the order. Appeal at 4-5. Further, CCAM argues that a motion to reopen is only needed if an evidentiary record exists. *Id.* at 6.

In ruling on the August 7 motion, the Board observed that both the NRC Staff and Dominion presented persuasive arguments for their view that the record had been closed both by the Board order and by the Commission denial (in its August 13 ruling) of CCAM's appeal and that the reopening standards must be satisfied, while CCAM offered no supporting NRC case law or regulatory provision for the opposite. Motion Order at 8. On appeal, CCAM still has not provided supporting information for its position that the motion to reopen is limited to when an evidentiary record exists. See Appeal at 6.

CCAM asserts that because it filed new motions before any "final judgment" had been entered in the proceeding, the motions, and the referral order from the Office of the Secretary of the Commission, acted to keep the record open. Appeal at 5-6. CCAM offers no legal authority for its position, or for that matter what constitutes "final judgment."

The Board addressed the impact of these additional filings, and made the reasonable conclusion that, absent any legal authority to the contrary, the "place holder" effect of the August 7 motion did not act to remove the requirement to reopen the record. Motion Order at 9. On appeal, CCAM still fails to provide authority to the contrary.

Accordingly, CCAM has not demonstrated any supporting error or abuse of discretion by the Board, and the Commission should affirm the Board's ruling.

B. The Board Did Not Err in Concluding that the Issuance of the LAR Barred it from Considering New or Amended Contentions

CCAM alleges that the licensing process was ongoing when it filed its motions. *Id.* at 6. CCAM alleges that the Board's misconstruing of the regulation bars CCAM from filing contentions. *Id.* at 7. However, the Board ruled correctly under these circumstances. The issuance of the license amendment in a situation where there are no admitted contentions precludes admission of new contentions. The Board followed established Commission precedent. See Motion Order at 11 (citing *Comanche Peak*, CLI-92-12, 36 NRC at 67).

The Staff asserts that the Board's well-reasoned finding on this point was also correct and in accordance with Commission practice, and should be affirmed.

C. The Board Did Not Err In Concluding The Information Regarding The Temperature Spiking Contention Was Not New.

CCAM states, without elaboration, that the Board was incorrect in finding that the information for the new Contention 1 for hot leg temperature spikes in the August 27 motion was not new. See Appeal at 7.

In ruling on the August 27 Motion, and concluding the information was not new, the Board pointed to specific information present in the LRA to demonstrate that the information was not new. Motion Order at 13 n. 52. The Board was correct that the information was not new. The fact that temperature spikes were observed, and that the licensee planned to implement a four-second filter to address the spikes, has been known since the original application for a power uprate.²⁴ The Board correctly observed that this is not new information merely because CCAM was not aware of it earlier. Motion Order at 13. CCAM has made no effort to explain why the information cited by the Board, and present in the application, was insufficient to put CCAM on notice. CCAM has failed to meet the Commission's existing requirement that places an ironclad obligation on CCAM to examine available information with sufficient care to enable CCAM to uncover any information that could serve as the foundation of a contention. See Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (to be codified at 10

²⁴ 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").

C.F.R. pt. 2) (quoting *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-687, 16 N.R.C. 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 N.R.C. 1041(1983)).

Again CCAM has failed to demonstrate error or abuse of discretion by the Board concluding the information on temperature spiking was not new.

CONCLUSION

For the reasons stated in the Board's Memorandum and Order and as discussed above, CCAM did not proffer an admissible contention through its motions, nor did it address the requirements to reopen the record to file new and amended contentions.

CCAM has 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 ruling denying CCAM's motions.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
This 17th day of November, 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 ON MOTIONS TO FILE NEW OR AMENDED CONTENTIONS", dated November 17, 2008, have been served upon the following by the Electronic Information Exchange, this 17th day of November, 2008 (with a courtesy copy via e-mail to CCAM):

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