UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

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

CLI-09-05

MEMORANDUM AND ORDER

Before us is an appeal by the Connecticut Coalition Against Millstone and Nancy Burton (collectively, CCAM) of an Atomic Safety and Licensing Board order rejecting its attempt to admit late-filed contentions in the captioned proceeding.[1] The Board found that CCAM had not provided justification for reopening the record in this matter, nor had they addressed factors that allow for filing late contentions under our rules of practice. In addition, the Board found that the proposed new contentions were not supported, regardless of when they were submitted. Both the NRC Staff and the licensee, Dominion Nuclear Connecticut, Inc. (Dominion), oppose CCAM's appeal. We affirm the Board's decision to reject the late-filed contentions.

[1] Memorandum and Order (Ruling on Motions to File New or Amended Contentions), (unpublished) (Oct. 27, 2008) (October 27 Order).

I. CHRONOLOGY OF THE CASE

This is the second appeal from CCAM that the Commission has considered in this proceeding.

In July 2007, Dominion sought an operating license amendment to increase the authorized core power level from 3,411 to 3,650 megawatts thermal at the Millstone Power Station, Unit 3, in Waterford, Connecticut. CCAM filed a timely petition to intervene and hearing request on nine proposed contentions.[2] The Board issued a Memorandum and Order, LBP-08-9,[3] denying a hearing on the ground that CCAM had not offered an admissible contention. CCAM appealed that decision.[4]

On July 18, 2008, while CCAM's appeal was pending before us, CCAM filed a motion before the Board for leave to file new contentions.[5] The motion provided a brief description of six contentions CCAM planned to file and support in a future pleading. CCAM claimed that it had only recently become aware of "new" information, on which the proposed contentions would be grounded, when its representative attended a July meeting of the Advisory Committee on Reactor Safeguards (ACRS). CCAM outlined six issues, which it claimed were raised by information at the ACRS meeting: "(1) temperature spikes in the hot legs of the reactor; (2) increase of fluence on the wall of the vessel; (3) use of AST [alternate source term] assumptions AND [sic] Reg. Guide 1.82 assumptions related to dose-after-an-accident; (4) steam generator tube repair;

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[2] *Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing* (Mar. 17, 2008).

[3] *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), LBP-08-9, 67 NRC 421 (2008).

[4] *Notice of Appeal* (June 16, 2008).

[5] *Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File and* [sic] *and/or Amended Contentions Based on Receipt of New Information* (July 18, 2008) (July 18 Motion).

(5) gas accumulation/decay heat removal/containment spray systems; and (6) a sudden surge in pre-seasonal arrival of jellyfish at Waterford, Connecticut."[6] CCAM requested leave to file the fully supported contentions within 10 days of "receipt" of the ACRS meeting transcript.[7]

Shortly thereafter, the Secretary of the Commission notified CCAM that its motion had not been accepted for docketing because it had not been properly filed through the Commission's electronic filing system for legal pleadings.[8] CCAM, which had previously been granted a waiver from the electronic filing rule, responded with a request for a continuing waiver and asked that the July 18 motion be accepted *nunc pro tunc*.[9] On August 7, 2008, CCAM filed a revised motion requesting leave to file new or amended contentions within 30 days of the publication of the ACRS meeting transcript.[10] The August 7 Motion was substantially identical to the July 18 Motion, aside from its request for more time to file new and amended contentions, and a request for a continuing exemption from e-filing.

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[6] *Id.* at 2.

[7] *Id.*

[8] E-mail from Emile Julian, Assistant for Rulemakings and Adjudications, Office of the Secretary, Nuclear Regulatory Commission, to Nancy Burton (July 21, 2008, 3:48 EDT). *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 38-39 (2006), where the Commission directed the Secretary to screen all filings by Ms. Burton and reject any that do not conform to the Commission's rules of practice, without referring them to the Board or Commission.

[9] *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* <u>Nunc Pro Tunc</u> *and for Continuing Waiver of Electronic Filing (*July 31, 2008) (July 31 Motion).

[10] *Connecticut Coalition Against Millstone and Nancy Burton Motion for Leave to File Their New And/or Amended Contentions Based on Receipt of New Information and for Continuing Waiver of Electronic Filing* (Aug. 7, 2008) (August 7 Motion).

On August 11, the Secretary of the Commission, pursuant to her authority under 10 C.F.R. § 2.346(i), referred CCAM's July 31 Motion to the Board "for any action it deems appropriate."[11] The Secretary's order also stated that any further related pleadings should be directed to the Board. Shortly thereafter, we issued a decision denying CCAM's appeal of the Board's initial order denying the hearing request.[12] By then the NRC Staff had already issued the contested license amendment, after finding, as required by rule and statute, "no significant hazards considerations."[13]

Two weeks later, on August 27, CCAM filed yet another motion, this one containing two proposed new contentions.[14] One of the proposed new contentions – concerning the temperature spikes in the hot legs of the reactor – related to one of the six issues cited in CCAM's earlier motions. The other proposed contention generally asserted that the NRC Staff's review of the application did not "comply with mandatory legal standards set forth in NRC's Review Standard for Extended Power Uprates."[15]

On October 27, 2008, the Board ruled on the various related motions. The Board denied CCAM's request to reinstate the July 18 Motion, but granted CCAM's request for a continuing waiver of NRC's e-filing requirements.[16] The Board further found that

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[11] Order (Aug. 11, 2008) (unpublished).

[12] *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-08-17, 68 NRC __ (slip op. Aug. 13, 2008).

[13] *See* Dominion Nuclear Connecticut, Inc.; Notice of Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration, 73 Fed. Reg. 49,922 (Aug. 20, 2008).

[14] *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* (Aug. 27, 2008) (August 27 Motion).

[15] *Id.* at 11.

[16] October 27 Order at 6-7.

CCAM's "placeholder" motion did not eliminate the requirement to file a motion to reopen the record pursuant to 10 C.F.R. § 2.326(a).[17] Finally, with respect to CCAM's August 27 motion to file two late contentions, the Board ruled that the NRC Staff's issuance of the license amendment had terminated the adjudicatory proceeding, leaving the Board unable to reopen it and consider the late contentions.[18] The Board also observed that, if it had been able to address the late contentions, it would have ruled them inadmissible for not addressing our reopening requirements and for not meeting our contention admissibility requirements.[19] CCAM now appeals the Board decision rejecting its two late contentions.

II. ANALYSIS

We accord the Board's judgment at the pleading stage substantial deference.[20] CCAM has not presented a plausible case for overturning the Board's decision. To prevail, CCAM must show that it presented the Board an adequately supported, admissible contention. CCAM must also justify its late filing. Finally, CCAM must demonstrate sufficient cause for reopening a closed record − a standard that it refused to address before the Board. CCAM has done none of these.

A. The Board's Rulings on the July 18, July 31, and August 7 Motions

We *affirm* the Board's rulings on CCAM's July 18 and July 31 Motions for the reasons the Board gave in its October 27 Order. CCAM's August 7 Motion apparently

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[17] The Board also noted that the "prospective contentions" set out in CCAM's August 7 Motion failed to satisfy the requirements for contention admissibility. *Id.* at 10.

[18] *Id.* at 12.

[19] *Id.*

[20] *See* CLI-08-17, 68 NRC __ (slip op. at 4); *see also PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

was intended to function as a "placeholder" for a further motion to be filed later. But our regulations, do not contemplate such filings, which are tantamount to impermissible "notice pleadings."[21]

We agree with the Board that CCAM's August 7 "placeholder" motion "did not eliminate the requirement for CCAM to file a motion to reopen the record." [22] The Board correctly determined that because it had already denied the intervention petition, "a motion to file new or amended contentions must address the motion to reopen standards."[23] In addition, the decision whether to reopen the record was the Board's to make. Here, this jurisdictional determination turns on the Secretary's August 11 Order. The Board correctly found that the Secretary's actions in referring the motions to it had effectively delegated jurisdiction over the motions to the Board. [24] Although the *record* was closed, the Board retained jurisdiction over a designated portion of the *proceeding*. The Secretary's August 11 Order referring the motions to the Board held open the proceeding as to the matters specified in that Order, notwithstanding our subsequent

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[21] In its appeal, CCAM also argues that it need not demonstrate compliance with the contention admissibility requirements prior to filing "new" contentions. Notice of Appeal at 7, citing 10 C.F.R. § 2.309(f)(1)(i)-(vi). CCAM is simply incorrect on this point. The plain language of the rule requires each proposed contention to satisfy those requirements. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008). *See also Florida Power & Light Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 34 (2006); *cf. Consumers Energy Co., Nuclear Management Co. LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 414 (2007), citing *Port Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 295 (2000) (our pleading standards do not allow for mere "notice pleading," or the filing of general, vague, or unsupported claims to be elaborated on at some later time).

[22] October 27 Order at 9.

[23] *Id.*

[24] *Id.* at 5-6 n.22.

ruling (in CLI-08-17) upholding the Board's decision to reject CCAM's original contentions.

Generally, once there has been an appeal or petition to review a Board order ruling on intervention petitions (or, where a hearing is granted, following a partial or final initial decision), jurisdiction passes to the Commission, including jurisdiction to consider any motion to reopen.[25] But here, the Secretary's referral of CCAM's July 31 Motion (and related motions) to the Board returned jurisdiction to the Board.[26] The authority given the Board to decide CCAM's motions included, if necessary, the authority to reopen the record of the proceeding, provided the reopening standards were met. Had there been no referral, we would have retained jurisdiction over CCAM's various motions, and the proceeding would have remained alive until we acted. The referral kept the proceeding alive until the Board acted.[27]

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[25] *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773 (1985).

[26] We further observe that, while the Secretary's August 11 referral held the proceeding open while the Board considered appropriate action, it did not operate to reopen the closed record. Whether the reopening standard is met requires a legal determination that is not within the scope of the Secretary's limited authority, and which the referral did not purport to make. *See generally* 10 C.F.R. § 2.346.

[27] We by no means encourage eleventh-hour motions filed in an effort to prolong an adjudication. Following the termination of a proceeding, as the Board correctly notes, the proper avenue for a person challenging an existing license is to file a request to modify, suspend, or revoke a license. October 27 Order at 11-12; *see generally* 10 C.F.R. § 2.206. *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 24 (2006) (after "final agency decision," the Commission retained jurisdiction to consider a reopening motion, as opposed to a § 2.206 action, because the license had not yet issued).

B. The Board's Ruling on the August 27 Motion

We also agree that the Board properly denied CCAM's August 27 Motion – which offered two new contentions. With respect to the particulars of the Board's ruling, however, a few matters merit additional discussion.

1. Issuance of License Amendment Did Not Terminate Proceeding

As an initial matter, we find that the Board erred in holding that the Staff's issuance of the license amendment terminated the proceeding and precluded the Board's reopening of the proceeding to rule on the August 27 Motion. *Comanche Peak*, the 1992 Commission decision on which the Board relied, is inapposite. That proceeding concerned an initial operating license. Under the rules of practice in place at that time, the intervenor was entitled to a hearing *prior to* issuance of the license.[28] By contrast, the rules of practice governing this license amendment proceeding expressly contemplate prompt Staff action on an application, notwithstanding the pendency of any adjudicatory proceeding, subject to certain identified exceptions, that do not apply here.[29] The bottom line is that adjudicatory proceedings on license amendments continue until they are over, even if the amendment is issued in the interim.

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[28] CLI-92-12, 36 NRC at 67; s*ee also Texas Utilities Electric Co*. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-93-1, 37 NRC 1, 3 (1993) (while issuance of a full power license "closed out" the notice of opportunity for hearing for Comanche Peak Unit 1, issuance of a low-power license did not terminate the proceeding for Unit 2).

[29] 10 C.F.R. § 2.1202(a). Further, 10 C.F.R. § 2.1210(c)(3) expressly provides for the circumstance in which a licensing action is taken prior to completion of a hearing. The presiding officer's initial decision must include the action the Staff shall take upon transmission of the decision, if the initial decision is inconsistent with Staff action on the application. Although a hearing was not granted in this case, we expect the Staff to likewise act on an application notwithstanding the pendency of hearing requests – be they timely or late-filed.

In addition, our regulations in 10 C.F.R. Part 50 have long contemplated issuance of a license amendment notwithstanding the pendency of an adjudicatory hearing, provided that the Staff makes certain required findings. *See* 10 C.F.R. § 50.91(a)(4) (permitting the Staff to issue an amendment to a reactor operating license

Continued …

In any event, the Board provides "further observations" stating alternate grounds for rejecting CCAM's August 27 Motion, which are more than sufficient to justify its ultimate result. As discussed below, we affirm the Board's ruling on the basis of those alternate grounds.

2. *CCAM's Proposed Contentions Failed to Satisfy Our Contention Admissibility Requirements*

We agree with the Board that CCAM did not proffer an admissible contention. The requirements for contention admissibility are described in our rules of practice[30] and are well-known to CCAM, which has participated in numerous NRC adjudicatory proceedings.[31] To be admitted for hearing, a contention must meet the following standards: provide a specific statement of the law or facts in dispute; explain the basis for its contention; show that the contention is within the scope of the proceeding and material to the findings that the NRC must make in order to support the action involved in the proceeding; and provide a statement of the facts or expert opinion which support the contention.[32] As we recently reminded CCAM, petitioners may not "skirt our contention rules by initially filing unsupported contentions, and later recasting or

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notwithstanding the pendency of an adjudicatory hearing if it determines that the licensing action involves "no significant hazards consideration"); Atomic Energy Act of 1954, as amended, § 189.a(2)(A), 42 U.S.C. § 2239.a(2)(A). The Staff issued a final no significant hazards consideration determination contemporaneously with issuance of the license amendment on August 12. NRC's issuance of a license amendment, after finding no significant hazards consideration, does not terminate an adjudicatory proceeding, but simply gives effect to the amendment prior to completion of the proceeding, and subject to the result of the proceeding.

[30] 10 C.F.R. § 2.309(f).

[31] *See* CLI-08-17, 68 NRC __ (slip op. at 5). *See generally Dominion Nuclear Connecticut*, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 644 n.56 (2004).

[32] *See generally* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

modifying their contentions on appeal with new arguments never raised before the Board."[33]

The contentions proffered in CCAM's August 27 Motion did not meet these standards. With respect to "new" Contention 1, concerning "temperature spikes in the hot legs" of the reactor, the Board observed that the temperature spikes at issue had been discussed in the initial license amendment application.[34] Therefore, in addition to being inexcusably late,[35] the proposed contention failed to address the information in the application and show a genuine dispute thereon.[36]

The Board noted that Contention 2 was "essentially a repackaged original Contention 6," which both the Board and the Commission had already rejected. As originally proffered, Contention 6 argued that the Staff's review was inadequate because the Staff has not adopted "regulatory standards" for its review of stretch power uprates.[37] The Board disapproved that argument in LBP-08-9 and we affirmed the Board's ruling in CLI-08-17, two weeks prior to CCAM's August 27 Motion.[38]

"New" Contention 2 stated that the NRC Staff's review of the application "does not comply with mandatory legal standards set forth in the NRC's "Review Standard for

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[33] *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-08-17, 68 NRC __ (slip op. at 4), citing *USEC*, CLI-06-10, 63 NRC at 458; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004); s*ee also* 10 C.F.R. § 2.309(f)(2).

[34] October 27 Order at 13, citing License Amendment Request, Attachment 5, SPU Licensing Report, at 2.4-10 (ADAMS Accession No. ML072000400).

[35] See discussion *infra*, section II.B.4.

[36] *See* 10 C.F.R. §2.309(f)(1)(vi). The Board observed that this contention was identical to "prospective contention" 1 in CCAM's July 18 and August 7 Motions. October 27 Order at 13.

[37] *See* CLI-08-17, 68 NRC __ (slip op. at 13-14).

[38] *Id*.

Extended Power Uprates." According to declaration of CCAM's expert, the ACRS transcript showed that the NRC Staff failed to perform a confirmatory analysis of certain calculations relating to the containment. CCAM maintained that this demonstrates the Staff's failure to comply with the review standard applicable for "extended power uprates." But this dispute over the standards guiding the Staff's review has already been addressed, and fails now for the reasons stated by the Board in LBP-08-9, and affirmed by us in CLI-08-17.[39]

In short, we agree with the Board's observations that neither of CCAM's proposed "new" contentions satisfied the requirements of our contention admissibility regulations.

3. CCAM Failed to Meet the Applicable Reopening Standards

Even had CCAM's contentions passed muster under 10 C.F.R. § 2.309(f)(1), its motion would still fail for failing to address, let alone meet, our reopening standards. CCAM was never admitted as a party to this license amendment proceeding and argues, therefore, that it need not file a motion to reopen.[40] CCAM is correct in noting that we once held that only a "party" to a proceeding may move to reopen a closed record.[41] But in a subsequent decision,[42] we indicated that a non-party seeking late intervention after the record has closed must address both the standard for late intervention and the

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[39] *See* LBP-08-9, 67 NRC at 433-36; CLI-08-17, 68 NRC __ (slip op. at 7-8). In any event, "new" Contention 2 would necessarily fail because it attacks the quality of the Staff's review rather than identifying a deficiency in the application. *Id.* at 14. *See also Pa'ina Hawaii, LLC,* CLI-08-3, 67 NRC 151, 168 n.73 (2008); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[40] Notice of Appeal at 7-8.

[41] *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-92-1, 35 NRC 1, 6 (1992).

[42] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 161-62 (1993).

standard for reopening a closed record[43] In addition, our rules of practice make it clear that the reopening standards – as well as the late intervention standards – must be met when an entirely new issue is sought to be introduced after the closing of the record.[44] The appropriate mechanism, therefore, for CCAM to have sought to raise a new issue where, as here, the record of the proceeding had closed upon the Board's disposition of CCAM's original contentions (LBP-08-9) was to address the reopening standards contemporaneously with a late-filed intervention petition, which must satisfy the standards for both contention admissibility and late filing.[45] CCAM did neither of these. We briefly consider each of these requirements in turn and find that, even had CCAM addressed the proper standards, its motion would not have succeeded.

As discussed above with respect to CCAM's August 7 Motion, CCAM was required to address successfully the reopening standards in 10 C.F.R. § 2.326 in order to litigate the new contentions proffered in its August 27 Motion. To reopen a closed record, the movant must show that its motion is timely[46] and addresses a "significant safety or environmental issue,"[47] and that a "materially different result would be or would have been likely had the newly proffered evidence been considered initially."[48]

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[43] *Id*. at 161 n.1.

[44] 10 C.F.R. § 2.326(d).

[45] *See generally* 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2). In LBP-08-9, the Board found CCAM had demonstrated standing; therefore, CCAM would not be required to address those standards anew. 67 NRC at 427-29.

[46] 10 C.F.R. § 2.326(a)(1). The rules provide that an "exceptionally grave" issue may be considered in the discretion of the presiding officer, even if untimely presented. *Id.*

[47] 10 C.F.R. § 2.326(a)(2).

[48] 10 C.F.R. § 2.326(a)(3). In addition, the motion must be accompanied by the factual and/or technical basis for the movant's claims, in affidavit form. 10 C.F.R. § 2.326(b).

CCAM did not address these standards before the Board or in its appeal. Even had CCAM addressed the reopening standards, however, we find that it would not have met them.

With respect to Contention 1, as discussed above, the Board found that CCAM's claims were not timely because the information on which CCAM relied was in the application from the outset.[49] As noted by the Board, information regarding the duration of temperature variations in the hot leg was available in the initial application, and could have been raised in CCAM's initial filing.[50] CCAM did not argue, and we do not find, that the information discussed at the August ACRS meeting was new at the time of the meeting, or that its consideration likely would have led to a materially different result with regard to issuance of the license amendment.[51]

Similarly, Contention 2, which inappropriately faults the Staff's review as inadequate, fails to meet this standard. We agree with the Board that this proposed contention, in essence, raises issues that CCAM attempted to raise in its original Contention 6.[52] For the reasons articulated by the Board, this proposed contention also fails to meet the reopening standards, and is therefore not litigable in this proceeding.[53]

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[49] October 27 Order at 12-13.

[50] *Id.* at 13 & n.52.

[51] In addition, CCAM's expert, Mr. Gundersen, does not explain how the temperature spikes present an "exceptionally grave" safety or environmental issue, and we find nothing in the August 27 Motion that indicates such an issue associated with the proposed "hot leg" contention.

[52] October 27 Order at 14, citing LBP-08-9, 67 NRC at 443-44; CLI-08-17, 68 NRC at __ (slip op. at 13-14).

[53] October 27 Order at 12-14. Here again, CCAM's expert does not articulate any specific environmental or safety risk, let alone a "serious" or "grave" risk, that would cause us to reconsider this issue notwithstanding its untimeliness.

4. CCAM Did Not Justify the Lateness of its Proposed New Contentions

Where the new material sought to be introduced in a motion to reopen does not deal with a matter previously in controversy, the person moving to reopen the record must also meet the standards in 10 C.F.R. § 2.309(c) for filing untimely contentions.[54] That provision sets forth eight factors, the most important of which is "good cause" for the failure to file on time.[55] Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available.[56]

In its July 18 and August 7 Motions, CCAM claimed that the criteria for "new or amended" contentions found at 10 C.F.R. § 2.309(f)(2) were satisfied because CCAM did not become aware of the six new issues until its representative attended the ACRS meeting.[57] In its August 27 Motion, CCAM did not address the late-filing criteria in either 10 C.F.R. § 2.309(c) *or* 10 C.F.R. § 2.309(f)(2). The Board correctly found that failure to address the requirements was reason enough to reject the proposed new contentions.[58] On appeal, CCAM attempts to make a case that its proposed new contentions are not untimely because they are based on new information – which would establish good

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[54] 10 C.F.R. § 2.326(d).

[55] *Diablo Canyon*, CLI-08-1, 67 NRC at 6.

[56] *See, e.g., id*. *See also Comanche Peak*, CLI-93-4, 37 NRC at 164-65, citing *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1764-65 (1982) (information "in the public domain" for six months did not establish "good cause" for late filing).

[57] None of the other factors in 10 C.F.R. § 2.309(c) or 10 C.F.R. § 2.309(f)(2) were addressed in these two CCAM motions.

[58] October 27 Order at 12. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347-48 (1998).

cause – and does not address the remaining factors in 10 C.F.R. §2.309(c).[59] In any event, however, we need not consider these remaining factors because CCAM has failed to articulate good cause for late filing.

CCAM did not justify its untimely attempt to raise these new issues. To show good cause, a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it. For the reasons noted by the Board, CCAM has failed to demonstrate good cause, as the information it relied upon was available earlier, and "is not new information merely because CCAM was not aware of it earlier."[60]

We conclude that neither of the two proposed contentions meets the applicable late-filing standards.

III. CONCLUSION

For the foregoing reasons, CCAM's appeal is *denied*, and the Board's decision is *affirmed* on the grounds articulated by the Board, and set forth above.

IT IS SO ORDERED.

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March, 2009.

[59] Notice of Appeal at 5-6.

[60] October 27 Order at 13.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 COMMISSION MEMORANDUM AND ORDER (CLI-09-05) have been served upon the following persons by Electronic Information Exchange and on Nancy Burton/CCAM by separate e-mail.

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DOCKET NO. 50-423-OLA
COMMISSION MEMORANDUM AND ORDER (CLI-09-05)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of March 2009