

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-08-09
DOCKETED 06/04/08
SERVED 06/04/08

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Paul B. Abramson
Dr. Michael Kennedy

In the Matter of

Dominion Nuclear Connecticut, Inc.
(Millstone Power Station, Unit No. 3)

Docket No. 50-423-OLA

ASLBP No. 08-862-01-OLA-BD01

June 4, 2008

MEMORANDUM AND ORDER

(Ruling on Petition to Intervene and Request for Hearing)

Before us is a petition to intervene and request for hearing filed by the Connecticut Coalition Against Millstone and Nancy Burton (collectively CCAM or Petitioners) concerning the application of Dominion Nuclear Connecticut, Inc. (Dominion or Applicant) for an amendment to its Operating License NPF-49 for Millstone Power Station Unit 3 (Millstone) in Waterford, Connecticut. The proposed Stretch Power Uprate License Amendment Request would increase the unit's authorized core power level from 3411 to 3650 megawatts thermal, and make changes to Technical Specifications as necessary to support operation at the stretch power level.

Both Dominion and the NRC Staff oppose Petitioners' request for hearing. For the reasons set forth below, we find that Petitioners, CCAM and Nancy Burton, have standing to intervene in the proceeding, but neither CCAM nor Nancy Burton has submitted an admissible contention as required by 10 C.F.R. § 2.309(a). Therefore, we deny Petitioners' request for an evidentiary hearing.

I. BACKGROUND

On July 13, 2007, pursuant to 10 C.F.R. § 50.90, Dominion requested an amendment to its NRC Operating License NPF-49 for its Millstone Power Station Unit 3.¹ The amendment was styled as a proposed Stretch Power Uprate (SPU) License Amendment Request (LAR) and would increase the unit's authorized core power level from 3411 megawatts thermal (MWt) to 3650 MWt, and make changes to Technical Specifications as necessary to support operation at the stretch power level.² Dominion stated that it developed its LAR utilizing the guidelines in NRC Review Standard, RS-001, "Review Standard for Extended Power Uprates."³ RS-001 states that a SPU is typically characterized by power level increases "up to 7 percent and do[es] not generally involve major plant modifications."⁴

On January 15, 2008, the Commission published a "Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations" (Notice).⁵ The Notice permitted any person whose interest may be affected by the proposed amendment to the Millstone Unit 3 license the opportunity to file a request for a hearing and petition for leave to intervene within 60 days of the Notice.⁶ It directed that any petition must set forth with particularity the specific contentions sought to be litigated.⁷

¹ The License Amendment Request was subsequently supplemented on July 13, September 12, November 19, December 13, and December 17, 2007. 73 Fed. Reg. 2546, 2549 (Jan. 15, 2008).

² Id. at 2549.

³ LAR, Attachment 5, SPU Licensing Report (ADAMS Accession No. ML072000400) at 1-1 [hereinafter LAR, Attachment 5].

⁴ Review Standard for Extended Power Uprates, RS-001, Revision 0 (Dec. 2003) (ADAMS Accession No. ML033640024) at Background [hereinafter Review Standard, RS-001].

⁵ 73 Fed. Reg. at 2546.

⁶ Id. at 2547, 2549-50.

On March 17, 2008, CCAM and Nancy Burton filed a joint petition to intervene and request for hearing.⁸ The petition states that the Dominion “application has grave potential to increase safety risks and diminish safety margins at Millstone Unit 3.”⁹ The petition contains nine proposed contentions and requests that the LAR be rejected.

Following the designation of this Licensing Board,¹⁰ Dominion¹¹ and the NRC Staff¹² timely filed Answers on April 11, 2008 to Petitioners’ petition to intervene and request for hearing. Dominion does not challenge CCAM’s standing to seek to participate in this proceeding nor does it object to Ms. Burton acting as CCAM’s representative.¹³ Dominion states, however, that “Ms. Burton has not demonstrated standing to intervene in her own right.”¹⁴ The NRC Staff does not contest the standing of CCAM nor of Nancy Burton individually.¹⁵ Both Dominion and the NRC Staff contend that CCAM and Nancy Burton have not proffered an admissible contention.¹⁶

⁷ Id. at 2547.

⁸ Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing (Mar. 17, 2008) [hereinafter CCAM Petition].

⁹ Id. at 1 (CCAM Petition filed with pages unnumbered).

¹⁰ Dominion Nuclear Connecticut, Inc.; Establishment of Atomic Safety and Licensing Board, 73 Fed. Reg. 18,010 (Apr. 2, 2008).

¹¹ Dominion Nuclear Connecticut’s Response to Connecticut Coalition Against Millstone and Nancy Burton’s Petition to Intervene and Request for Hearing (Apr. 11, 2008) [hereinafter Dominion Answer].

¹² NRC Staff Answer to Request to Intervene and for Hearing of the Connecticut Coalition Against Millstone and Nancy Burton (Apr. 11, 2008) [hereinafter NRC Staff Answer].

¹³ Dominion Answer at 4.

¹⁴ Id. at 4-5.

¹⁵ NRC Staff Answer at 1.

On April 22, 2008, CCAM and Nancy Burton timely filed a Reply to the Dominion and NRC Staff Answers.¹⁷

II. ANALYSIS

NRC regulations require that any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must: (1) establish that it has standing; and (2) offer at least one admissible contention.¹⁸

A. Standards Governing Standing

A petition for leave to intervene must provide certain basic information supporting the petitioner's claim to standing. The required information includes: (1) the nature of the petitioner's right under the governing statutes to be made a party; (2) the nature of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order on the petitioner's interest.¹⁹ In determining whether an individual or organization should be granted party status in a proceeding based on standing "as of right," the agency has applied contemporaneous judicial standing concepts that require a participant to establish: (1) it has suffered or will suffer "a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute[s]" (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury

¹⁶ Dominion Answer at 1; NRC Staff Answer at 25.

¹⁷ Connecticut Coalition Against Millstone and Nancy Burton Reply to Responses of NRC Staff and Dominion Nuclear Connecticut, Inc. to Petition to Intervene and Request for Hearing (Apr. 22, 2008) [hereinafter CCAM Reply]. Petitioners' replies were originally due on April 18, 2008, but Petitioners requested and were granted an extension of time to file a consolidated reply on April 22, 2008. See Licensing Board Order (Granting CCAM and Nancy Burton Request for Extension of Time to File Consolidated Reply) (Apr. 17, 2008).

¹⁸ 10 C.F.R. § 2.309(a).

¹⁹ 10 C.F.R. § 2.309(d)(1).

is fairly traceable to the challenged action; and (3) “the injury is likely to be redressed by a favorable decision.”²⁰

In addition to the traditional requirements for standing, the Commission has recognized that a petitioner may have standing based upon its geographical proximity to a particular facility.²¹ In appropriate circumstances, a petitioner’s proximity to the facility in question provides for a so-called presumption that “a petitioner has standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity.”²² However, in an uprate proceeding such as this one, demonstrating standing in this manner additionally requires a “determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”²³ The petitioner’s proximity to the proposed source of radioactivity must also be “judged on a case by case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”²⁴

²⁰ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

²¹ Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

²² Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), aff’d on other grounds, CLI-01-17, 54 NRC 3 (2001).

²³ Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995); see also PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 18 (2007); Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 553-54 (2004).

²⁴ Georgia Tech., CLI-95-12, 42 NRC at 116-17; see also Sequoyah Fuels Corp. & Gen. Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

An organization seeking to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf.²⁵ In determining whether a petitioner has met the requirements for establishing standing, the Commission has directed us to “construe the petition in favor of the petitioner.”²⁶

B. Rulings on Standing

1. CCAM

CCAM’s petition asserts it is “a public-interest organization founded in 1998 to educate the public about the Millstone Nuclear Power Station and engage in activities to protect the public health and safety of the community otherwise at risk from Millstone operations.”²⁷ The CCAM petition includes the name of one of its members, Ms. Cynthia M. Besade, who resides in Uncasville, Connecticut, approximately ten miles north-northeast of the Millstone Nuclear Power Station.²⁸ In her declaration, Ms. Besade asserts that “[a]ccording to Dominion’s own projections, the license amendment, if granted, will result in an estimated 9 per cent increase in radionuclide releases to the environment, including the air I and my family and friends and neighbors breathe, and such releases will increase health risks by the same proportion,” and

²⁵ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000).

²⁶ Georgia Tech., CLI-95-12, 42 NRC at 115.

²⁷ CCAM Petition at 2.

²⁸ CCAM Petition, Declaration of Cynthia M. Besade (Mar. 16, 2008) ¶¶ 2-3 [hereinafter Besade Decl.].

“will also heighten safety risks.”²⁹ Ms. Besade’s Declaration states she is a member of CCAM and authorizes Nancy Burton to represent her rights and interests in this case.³⁰

CCAM has demonstrated that the licensing action will affect at least one of its members, has identified that member by name and address, and has shown that it is authorized by that member to request a hearing on his or her behalf.³¹ We find that the organization CCAM has representational standing in this proceeding and the CCAM organization has designated Ms. Burton as its representative.

2. Nancy Burton

Ms. Burton seeks individual standing based on her seasonal residence in a cottage in Mystic, Connecticut, approximately ten miles downwind of Millstone Unit 3.³² Dominion objects to Ms. Burton’s assertion of individual standing.³³ Dominion states that Ms. Burton’s seasonal residency in Mystic is “too vague to demonstrate standing.”³⁴ Dominion further states the pleadings do not provide evidence of the likelihood of an “ongoing connection and presence.”³⁵ In her Reply Ms. Burton states she “shares frequent spring, summer and fall occupancy of a

²⁹ Id. ¶¶ 21-22.

³⁰ Id. ¶¶ 25-26.

³¹ Cf. Susquehanna, LBP-07-10, 66 NRC at 18 (citing Vermont Yankee, LBP-04-28, 60 NRC at 553-54).

³² CCAM Petition at 4; CCAM Reply at 3.

³³ Dominion Answer at 4-5.

³⁴ Id. at 5.

³⁵ Id. at 5 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 & n.3 (1998); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)).

summer cottage in Mystic.”³⁶ She also states she has done so “since 1970 and . . . expects to continue to do [so] into the future.”³⁷

Ms. Burton’s Declaration provides the street address of the cottage and it appears the cottage is approximately ten miles from the Millstone facility.³⁸ While Ms. Burton could have been more specific about the length and nature of her seasonal residency to establish a bond between the petitioner and the facility’s vicinity³⁹ and the likelihood of an ongoing and continuing connection and presence, we find Ms. Burton has met the requirements for individual standing in this proceeding.

C. Standards Governing Contention Admissibility

Section 2.309(f)(1) of the Commission’s regulations sets out the requirements that must be met if a contention is to be admitted. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner’s position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists in regard to a material

³⁶ CCAM Reply at 3.

³⁷ Id.

³⁸ CCAM Petition, Declaration of Nancy Burton (Mar. 17, 2008) ¶ 2 [hereinafter Burton Decl.].

³⁹ See Georgia Tech., CLI-95-12, 42 NRC at 116-17 (daily commute near vicinity of reactor sufficient to establish standing). But, occasional trips to areas located close to reactors have been found to be insufficient grounds to demonstrate a risk to the intervenor’s health and safety. See, e.g., Washington Public Power Supply System (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 337-38 (1979) (occasional trip, of unspecified frequency, to farm located near

issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.⁴⁰

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁴¹ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”⁴² The Commission has emphasized that the rules on contention admissibility are “strict by design.”⁴³ Further, contentions challenging applicable statutory requirements or Commission regulations are not admissible in agency adjudications.⁴⁴ Failure to comply with any of these requirements is grounds for the dismissal of a contention.⁴⁵

The application of these requirements has been further developed by NRC case law, as is summarized below:

reactor insufficient).

⁴⁰ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁴¹ 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

⁴² 69 Fed. Reg. at 2202.

⁴³ Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-1, 55 NRC 1 (2002).

⁴⁴ 10 C.F.R. § 2.335(a).

⁴⁵ 69 Fed. Reg. at 2221; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

1. Specific Statement and Brief Explanation of the Basis for the Contention (10 C.F.R. § 2.309(f)(1)(i) and (ii))

A contention must provide a “specific statement of the issue of law or fact to be raised or controverted.”⁴⁶ Additionally, a “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention.⁴⁷ The comment in the Commission’s Statements of Consideration prefacing its adoption of the revisions to our contention admissibility standards in 1989 that “a petitioner must provide some sort of minimal basis indicating the potential validity of the contention”⁴⁸ cannot be read in a vacuum. “The reach of a contention necessarily hinges upon its terms coupled with its stated bases.”⁴⁹ “Thus, where a question arises as to the admissibility of a contention, we look to both the contention and its stated bases.”⁵⁰ What actually is to be litigated must be determined by a Board through examination not only of the general formulation of the contention by the petitioner, but by examination of the bases and support actually offered.⁵¹ Therefore, Boards commonly reformulate, or expressly limit contentions to focus them to the precise matters which are supported.⁵²

2. Within the Scope of the Proceeding (10 C.F.R. § 2.309(f)(1)(iii))

⁴⁶ 10 C.F.R. § 2.309(f)(1)(i).

⁴⁷ 10 C.F.R. § 2.309(f)(1)(ii).

⁴⁸ 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

⁴⁹ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CL1-02-28, 56 NRC 373, 379 (2002).

⁵⁰ Seabrook, ALAB-899, 28 NRC at 97.

⁵¹ See Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 181 (2005).

⁵² See, e.g., AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 742 (2006).

A petitioner must demonstrate that the “issue raised in the contention is within the scope of the proceeding.”⁵³ The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.⁵⁴ Any contention that falls outside the specified scope of the proceeding must be rejected.⁵⁵

Challenges to NRC Regulations are similarly outside the scope of the proceeding. With limited exceptions, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁵⁶ Additionally, the adjudicatory process is not the proper venue to hear any contention that merely addresses petitioner’s own view regarding the direction regulatory policy should take.⁵⁷ Any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission’s regulatory process must be rejected.⁵⁸

3. Materiality (10 C.F.R. § 2.309(f)(1)(iv))

⁵³ 10 C.F.R. § 2.309(f)(1)(iii).

⁵⁴ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

⁵⁵ See Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

⁵⁶ 10 C.F.R. § 2.335(a); see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

⁵⁷ Peach Bottom, ALAB-216, 8 AEC at 21 n.33.

⁵⁸ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing Peach Bottom, ALAB-216, 8 AEC at 20-21).

In order to be admissible, the petitioner must demonstrate that a contention asserts an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding,”⁵⁹ that is to say, the subject matter of the contention must impact the grant or denial of a pending license application.⁶⁰ “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.⁶¹ This means that there must be some significant link between the claimed deficiency and the agency’s ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment.⁶²

4. Concise Allegation of Supporting Facts or Expert Opinion (10 C.F.R. § 2.309(f)(1)(v))

Contentions must be supported by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.”⁶³ “It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.”⁶⁴ “[F]ailure to do so requires that the contention be rejected.”⁶⁵

⁵⁹ 10 C.F.R. § 2.309(f)(1)(iv).

⁶⁰ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80 (1998).

⁶¹ Id. at 179.

⁶² Id. at 180.

⁶³ 10 C.F.R. § 2.309(f)(1)(v).

⁶⁴ Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 356 (2006).

⁶⁵ Id.; Palo Verde, CLI-91-12, 34 NRC at 155.

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is, however, not a hearing on the merits.⁶⁶ The petitioner does not have to prove its contention at the admissibility stage.⁶⁷ While adequate support and demonstration of a genuine issue of material fact are required to create an admissible contention under 10 C.F.R. § 2.309, the amount of support required to meet the contention admissibility threshold is less than is required at the summary disposition stage.⁶⁸ And, as with a summary disposition motion,⁶⁹ a “Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner.”⁷⁰

Nonetheless “mere ‘notice pleading’ is insufficient under these standards.”⁷¹ Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.⁷² A petitioner’s contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”⁷³ And if a petitioner neglects to provide the

⁶⁶ Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 151 (2006).

⁶⁷ Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

⁶⁸ 54 Fed. Reg. at 33,171 (“[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.”).

⁶⁹ See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-21, 58 NRC 338, 342 (2003).

⁷⁰ Palo Verde, CLI-91-12, 34 NRC at 155.

⁷¹ Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁷² Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996); rev’d in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

⁷³ Fansteel, CLI-03-13, 58 NRC at 203 (quoting GPU Nuclear Inc. (Oyster Creek Nuclear

requisite support for its contentions, the Board may not make assumptions of fact that favor the petitioner, or supply information that is lacking.⁷⁴ Likewise, simply attaching material or documents in support of a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.⁷⁵ Thus, the supporting facts or expert opinions provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention.⁷⁶

5. Genuine Dispute Regarding Specific Portions of Application (10 C.F.R. § 2.309(f)(1)(vi))

All contentions must "show that a genuine dispute exists" with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.⁷⁷ Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed.⁷⁸

Applying the above stated standards, we conclude below that the various contentions proffered by CCAM and Ms. Burton are not admissible.

Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

⁷⁴ Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 305.

⁷⁵ See Fansteel, CLI-03-13, 58 NRC at 204-05.

⁷⁶ See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

⁷⁷ 10 C.F.R. § 2.309(f)(1)(vi).

⁷⁸ See Sacramento Mun. Utility Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994).

D. Rulings on Petitioners' Contentions

1. CCAM Contention 1:

"The proposed power level for which Dominion has applied to uprate Millstone Nuclear Power Station Unit 3 exceeds the NRC's SPU regulatory 'criteria.' The SPU application fails to satisfy the first NRC 'criterion' that the NRC has set the power limit for SPUs at ' . . . up to 7%. . .'"⁷⁹

In Contention 1, CCAM argues that Dominion's proposed power uprate exceeds NRC regulatory criteria for a SPU, which CCAM contends is limited to seven percent.⁸⁰ Therefore, CCAM argues that the NRC cannot approve the LAR for the Millstone Unit 3 SPU – instead it must be reviewed as an Extended Power Upate (EPU).⁸¹

CCAM relies upon the Declaration of Arnold Gundersen to support this contention, as well as Contentions 2, 3, 4, and 5.⁸² Mr. Gundersen reaches his conclusion regarding Contention 1 by multiplying Dominion Millstone Unit 3's currently licensed output of 3411 thermal megawatts (MWt) by seven percent (3411 x 1.07) to get 3649.7 MWt.⁸³ This figure, CCAM argues, is the limit for a SPU at Millstone Unit 3.⁸⁴ CCAM argues that Dominion has

⁷⁹ CCAM Petition at 7 (emphasis in original).

⁸⁰ Id. at 7-8.

⁸¹ Id. at 9, 11.

⁸² Id. at 5. Mr. Gundersen is a Nuclear Engineer and has worked for a number of utilities, including four years as an engineer assigned to Millstone Unit 2 during its start-up phase. CCAM Petition, Exh. A., Declaration of Arnold Gundersen Supporting Connecticut Coalition Against Millstone in its Petition for Leave to Intervene, Request for Hearing, and Contentions (Mar. 15, 2008) Curriculum Vitae at 7 [hereinafter Gundersen Decl.].

⁸³ Gundersen Decl. ¶ 14.

⁸⁴ CCAM Petition at 9.

rounded its proposed power level up to 3650 MWt, which it concludes exceeds the purported seven percent limit for a SPU.⁸⁵

The NRC Staff and Dominion argue that Contention 1 raises no issue material to the findings that the NRC must make, provides insufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, and is an attack on the NRC regulatory process.⁸⁶

At the outset, we note that an applicant for a change in the operating conditions of its nuclear power plant (in this case, a power uprate) is required to comply with all relevant NRC regulations. The standard to be met is whether the application meets the requirements for a License Amendment. The relevant NRC regulations for a power uprate, be it a SPU or an EPU, are set forth in 10 C.F.R. §§ 50.90 to 50.92.⁸⁷ CCAM refers us to statements on the NRC website and to regulatory guidance documents (such as Review Standard RS-001),⁸⁸ but these references are not the applicable law. They are only guidance prepared by the Staff to indicate to an applicant the matters it should address.

Review Standard RS-001 sets forth the Staff guidance to an applicant seeking to increase its operating power level, listing, among other things, the information the applicant should provide and the matters it should address in applying for a license amendment to

⁸⁵ Id.

⁸⁶ See Staff Answer at 10; Dominion Answer at 11. For example, Dominion, in its Answer, states Contention 1 lacks a factual basis and fails to demonstrate a genuine material dispute with the LAR. Dominion Answer at 11. Dominion states that “[n]either Petitioners nor Mr. Gundersen explain how NRC guidance categorizing uprates raises any material dispute concerning the adequacy of the LAR.” Id. at 13. Dominion maintains that “Petitioners do not claim or show that categorizing the LAR as an SPU resulted in any material error or omission in the application.” Id.

⁸⁷ See 10 C.F.R. §§ 50.90 to 50.92; 73 Fed. Reg. at 2546, 2549.

⁸⁸ See CCAM Petition at 6, 8, 10.

increase its operating power.⁸⁹ The failure of an applicant to address any of those guidance topics or deviation from the guidance provided does not rise to the level of failure to comply with NRC regulations.

There is no different legal standard for an applicant wishing to upgrade its operating power by more than seven percent than for one requesting an increase of less than seven percent; i.e., there is no distinction between the legal requirements for a SPU and an EPU. The statement on the NRC's website that SPUs are typically less than a seven percent core power level increase has no impact upon which of the NRC's regulations is applicable or upon the regulations themselves, although it may describe, to some degree, how the Staff performs its reviews. But, challenges to how the Staff performs its reviews are outside the scope of this proceeding.⁹⁰ Furthermore, CCAM's challenge to whether the Dominion application should be treated as a SPU or EPU has no basis in the law and therefore, this Contention is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

If CCAM Contention 1 is construed to be a challenge to the LAR, it must specifically challenge the application to be admissible. This can either be in the form of an asserted omission from the application of required information or an asserted error in a specific analysis or other technical matter set out in the application.⁹¹ The former form of challenge must be

⁸⁹ Review Standard, RS-001 at Purpose.

⁹⁰ See Tennessee Valley Auth. (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 37 (2002) ("It is a well-established principle of NRC adjudication that 'contentions must rest on the license application, not on NRC Staff reviews' As the Commission stated when it amended the contentions rule, 'a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis' because 'the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than adequacy of the NRC Staff performance.'" (internal citations omitted) (emphasis in original).

⁹¹ 10 C.F.R. § 2.309(f)(1)(vi).

supported by specific reasons why the alleged omissions are relevant and material, and the latter form of challenge must be supported by reasons why the analysis is deficient.⁹² Although CCAM, through Mr. Gundersen's Declaration, provides a historical perspective on previous NRC power uprate approvals, no challenge to the Millstone Unit 3 power uprate LAR was presented.⁹³ Therefore, this contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

Finally, even if this contention were somehow found to challenge the LAR with the required specificity, CCAM has failed to present any support to indicate the materiality of this contention to the ultimate findings the Commission must make. CCAM has presented no indication that the fact that the requested power level increase rises 0.3 MWt above the 3649.7 MWt level (which would represent a seven percent increase in power) is in any way material to the findings the NRC must make. This contention, therefore, does not meet the materiality test in 10 C.F.R. § 2.309(f)(1)(iv).

As discussed above, CCAM Contention 1 fails to meet the standards set forth in Sections (iii), (iv), and (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission's regulations.

CCAM Contention 1 is rejected.

2. CCAM Contention 2:

"Dominion's application fails to meet the NRC's second 'criterion' for a SPU application because Millstone Unit 3 already has had its design margins dramatically and substantially reduced."⁹⁴

CCAM's second contention can be viewed as either a contention of omission or a challenge to the LAR. In either case it fails to satisfy the contention admissibility standards.

⁹² Id.

⁹³ See CCAM Petition at 10.

⁹⁴ Id. at 11.

Construed as a contention of omission, CCAM argues that the Millstone SPU application must be denied because “Dominion’s application entirely fails to consider the significant reduction in structural operating margins already in place at Millstone 3 prior to the present application for power uprate.”⁹⁵ However, CCAM errs because the effects of the requested power uprate upon containment pressure, and therefore upon the structural operating margins, are discussed in Attachment 5 to the LAR.⁹⁶ CCAM has erroneously posited an omission from the LAR, thus failing the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

On the other hand, CCAM’s contention could be construed as a concern that somehow the cumulative effect of the proposed power uprate and prior plant changes would challenge the ability of the facility to withstand the containment pressures associated with design basis events. However, CCAM neither challenges any specific analysis in the LAR regarding the containment pressurizations (set out in Table 2.6.1.3 of the LAR) nor supports their proposition by suggesting any particular containment design limit that would be challenged by the proposed power uprate. Contention 2 fails to challenge any specific portion of the LAR or to raise a genuine issue regarding any material fact, and therefore does not meet the standards set forth in sections (iv) and (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission’s regulations.

Finally, we note CCAM’s emphasis on the effects of previously approved changes in the plant’s operating conditions, each of which has already been considered and incorporated in Millstone Unit 3’s current facility operating license. Specifically, CCAM’s substantive argument here is that Dominion’s application fails to consider the reduction in structural operating margins caused by previous amendments to the Millstone Unit 3 license.⁹⁷ But the current application

⁹⁵ Id. at 12.

⁹⁶ See LAR, Attachment 5 at 2.6-1 to 2.6-221.

⁹⁷ See Gundersen Decl. ¶¶ 21-22.

for an amendment to the license to permit a power uprate must be evaluated against the current baseline (i.e., as against the status quo).⁹⁸ Thus the structural operating margins are evaluated considering the plant's current design limits (which are based upon the cumulative effect of the original license and all of the amendments previously approved).⁹⁹ Here, Petitioners' concerns regard only previously approved changes,¹⁰⁰ thus attacking the current state of the license, not the changes that would be affected by the proposed power uprate. Indeed, CCAM states that, "[t]he Millstone Unit 3 Containment structure and its requisite systems have already been 'stretched' by previous changes to its design basis when the Containment was converted from Sub-Atmospheric Containment to Dry Containment more than a decade ago" and that "the proposed changes to Containment systems and structures that have already been reanalyzed and fine tuned once over a decade ago constitutes a dramatic decrease in ' . . . the operating margins included in the design of a particular plant."¹⁰¹ These are all challenges to the current

⁹⁸ In determining whether an amendment to a license will be issued, the Commission is "guided by the considerations which govern the issuance of initial licenses," 10 C.F.R. § 50.92(a), i.e., the same regulatory criteria that govern the initial license issuance govern each amendment. Therefore, as amendments are approved, they become part of the licensing baseline, all evaluated against the same standards.

⁹⁹ See LAR, Attachment 5 at 2.6-1.

¹⁰⁰ In their supporting documentation, Petitioners and their expert, Mr. Gundersen, point only to a number of facility changes that they assert were previously implemented at Millstone Unit 3. See CCAM Petition at 12-17. These changes are now part of the current licensing baseline for Millstone Unit 3. This baseline is, for all practical purposes, what is referred to as the current licensing basis as defined in 10 C.F.R. § 54.3 for license renewal considerations. Because the applicant must evaluate the impact of the proposed change against the relevant regulatory criteria, the assertions based on previous facility changes are outside the scope of the proceeding and therefore fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

¹⁰¹ Gundersen Decl. ¶ 22 (emphasis in original).

operating license and are outside the scope of matters challengeable in a power uprate application, and therefore fail to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii).¹⁰²

CCAM Contention 2 is therefore rejected.

3. CCAM Contention 3:

“When compared to all other Westinghouse Reactors, Millstone Unit 3 is an ‘outlier’ or ‘anomaly.’ Dominion’s proposed uprate is the largest per cent power uprate for a Westinghouse reactor, while Millstone Unit 3 also has the smallest containment for any Westinghouse reactor of roughly comparable output.”¹⁰³

CCAM, in explaining the significance of this statement, argues that this should make a power uprate inappropriate because the integrity and adequacy of the Millstone Unit 3 containment is somehow compromised.¹⁰⁴

As in Contention 2, Contention 3 makes only general allegations concerning the Millstone Unit 3 containment, but never addresses specific sections of the LAR or challenges any analysis or conclusions set out in the LAR. In determining whether the Millstone Unit 3 containment is capable of performing its intended function, the NRC Staff looks to ensure that the regulatory requirements of 10 C.F.R. Part 50, Appendix A (specifically, General Design Criteria 16 and 50) are satisfied.¹⁰⁵ These criteria require that “the peak calculated containment pressure following a loss-of-coolant accident, or a steam or feedwater line break, should be less

¹⁰² See supra note 100. Challenges to the current licensing basis of the plant (in this instance, the characteristics of the sub atmospheric containment) are not within the scope of this license amendment proceeding – they are properly challenged through the process prescribed by 10 C.F.R. § 2.206.

¹⁰³ CCAM Petition at 18.

¹⁰⁴ Id. at 20-22. This argument relies on Mr. Gundersen’s observation that when Millstone Unit 3 is compared to twenty-five other domestic nuclear reactors, the ratio of the initial licensed power level to the containment volume shows that Millstone Unit 3 has the smallest power-to-volume ratio of any dry containment Westinghouse reactor in the nation. Gundersen Decl. tbls 2, 3, & 4.

¹⁰⁵ See 10 C.F.R. Pt. 50, App. A.

than the containment design pressure.”¹⁰⁶ Dominion, in its Answer, states that the LAR shows that the Millstone Unit 3 containment has a design limit well in excess of the calculated peak containment pressure.¹⁰⁷ But CCAM fails to controvert Dominion’s statement or to identify any specific deficiencies or omissions in the Applicant’s analysis of the peak containment pressure. Therefore CCAM has failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

In regard to the power level to be used in the accident analysis, CCAM argues that because of Dominion’s history of exceeding its licensed power, any analysis of the Millstone Unit 3 containment should use a nine percent additional power level.¹⁰⁸ However, although not for the reasons asserted by CCAM, that is precisely what the Applicant did.¹⁰⁹ Contention 3, therefore, does not raise a genuine material dispute with the LAR and fails to meet the standard set forth in section (vi) of 10 C.F.R. § 2.309(f)(1) of the Commission’s regulations.

CCAM Contention 3 is therefore rejected.

4. CCAM Contention 4:

“Construction problems due to the unique sub-atmospheric containment design, coupled with the impact upon the containment concrete by the operation of the containment building at very high temperature, very low pressure and very low specific humidity, place the calculations used to predict stress on that concrete containment in uncharted analytical areas.”¹¹⁰

¹⁰⁶ Standard Review Plan, NUREG-0800, Revision 3, PWR Dry Containments, Including Subatmospheric Containments (Mar. 2007) § 6.2.1.1.A, at 6.2.1.A-4 (NUREG-0800, Revision 2 (July 1981), which contains the same language, is referenced in Review Standard, RS-001 § 2.1, Matrix 6, at 1).

¹⁰⁷ Dominion Answer at 19 (citing LAR, Attachment 5 § 2.6.2.2.2).

¹⁰⁸ CCAM Petition at 21-22; Gundersen Decl. ¶ 44E.

¹⁰⁹ Dominion states that the containment peak pressure analysis is based on an initial power level of 3723 MWt, which is nine percent above the current licensed power level and precisely what was recommended by Mr. Gundersen. Dominion Answer at 20.

¹¹⁰ CCAM Petition at 23.

In Contention 4, Petitioners challenge the integrity of the Millstone Unit 3 containment based on a series of alleged “[c]onstruction problems due to the unique sub-atmospheric containment design.”¹¹¹ The support for this contention is a series of statements by CCAM’s expert witness Gundersen alleging errors and flaws that occurred during construction of the Millstone Unit 3 containment.¹¹² These statements all refer to matters that occurred in the 1970s,¹¹³ and which are now part of the Millstone Unit 3 current licensing basis (CLB).¹¹⁴ Petitioners make no connection of these potential issues to the requested power uprate LAR. Their argument provides no factual challenges to any specific portion of the LAR nor raises any genuine dispute with the Applicant over any fact material to the findings the NRC must make. Therefore CCAM Contention 4 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi). To the extent Petitioners assert problems that fall within the CLB, this Contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

CCAM further alleges that Dominion’s license amendment fails to assess adequately the long-term impact of a power uprate on the Millstone Unit 3 concrete containment.¹¹⁵ Here, as the foundation for this assertion, CCAM questions the impact over time that the operating environment (high temperature, low pressure and low specific humidity) will have on the containment.¹¹⁶ In this contention CCAM posits that during the life of Millstone Unit 3, the

¹¹¹ Id.

¹¹² Gundersen Decl. ¶¶ 48B-48H.

¹¹³ Id. ¶ 48.

¹¹⁴ See supra note 100 and accompanying text.

¹¹⁵ CCAM Petition at 23.

¹¹⁶ Id.; Gundersen Decl. ¶¶ 45, 47.

concrete containment will shrink and argues that Dominion has not done any studies of this phenomenon.¹¹⁷ However, CCAM offers no support for this proposition; rather, it refers to Mr. Gundersen's assertions regarding early construction problems and the alteration, over time, of the approved operating conditions at the plant.¹¹⁸ These are unsupported challenges to the Millstone Unit 3 CLB and are, therefore, outside the scope of this proceeding.¹¹⁹

Finally, as Dominion states in its Answer,¹²⁰ Contention 4 does not challenge any of the containment analysis conducted relevant to the power uprate. As noted above, the LAR contains an analysis of the peak pressure and temperature loads imparted on the Millstone Unit 3 containment during design basis accidents and finds those loads are within design limits.¹²¹ Petitioners do not present any indication that these studies are flawed, provide no factual materials to support their assertions, and fail to provide any analyses, references or sources indicating that these alleged conditions could have an adverse effect on the structural integrity of the containment concrete.¹²² Therefore, this contention fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

¹¹⁷ CCAM Petition at 23-24; Gundersen Decl. ¶ 45. Mr. Gundersen states a containment analysis is complicated for Millstone Unit 3 because, "for the first four years of its operation, [it] operated at the high temperature, low pressure, low specific humidity unique to its [s]ub-[a]tmospheric [c]ontainment and . . . thereby may have compromised the structural integrity of the concrete." Gundersen Decl. ¶ 47.

¹¹⁸ Mr. Gundersen alleges, among other things, major construction problems with the way the original concrete was poured, the amount of rebar used, concrete voids between rebar, and the construction techniques used to fill these rebar/concrete voids. Gundersen Decl. ¶ 48.

¹¹⁹ The Commission has held that license amendment proceedings are not a forum "to litigate historical allegations' or past events with no direct bearing on the challenged licensing action." Millstone, CLI-01-24, 54 NRC at 366.

¹²⁰ See Dominion Answer at 21-22.

¹²¹ See LAR, Attachment 5 § 2.6.1.2.

¹²² Furthermore, Dominion notes that "the evaluations performed in the Millstone license

Contention 4 is therefore rejected.

5. CCAM Contention 5:

“The impact of flow-accelerated corrosion at Dominion’s proposed higher power level for Millstone Unit 3 has not been adequately analyzed nor addressed.”¹²³

Petitioners’ expert, Mr. Gundersen, alleges that flow-accelerated corrosion (FAC) is a “significant risk” due to the application of a seven-plus percent uprate and the fact that the plant is “in the second-half of its engineered design life.”¹²⁴

CCAM asserts that FAC was “not addressed” in the LAR. However, FAC was indeed analyzed and addressed in the Licensee’s submittal. Dominion’s FAC information is contained in the SPU application dated July 13, 2007.¹²⁵ From a “contention of omission” perspective, Contention 5 is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi). At the same time, even if this contention were interpreted as asserting that the manner in which FAC was addressed was inadequate, CCAM Contention 5 makes no reference

renewal proceeding indicate that the [Millstone Unit 3] containment is not subject to temperatures that would reduce the strength or modulus of concrete.” Dominion Answer at 22. Dominion continues,

The ASME Code, Section III, Division 2, Subsection CC, indicates that aging due to elevated temperature exposure is not significant as long as concrete general area temperatures do not exceed 150° F and local area temperatures do not exceed 200° F. Accordingly, the NRC’s Generic Aging Lessons Learned Report (“NUREG 1801”) requires further evaluation only if temperatures exceed these limits.

Id. at 22-23 (citing Generic Aging Lessons Learned (GALL) Report (NUREG-1801, Vol. 2, Rev. 1) (Sept. 2005) at tbl II.A.1). Dominion’s license renewal application states: “No concrete structural components exceed specified temperature limits. General area temperatures remain below 150°F and local area temperatures remain below 200°F.” Id. at 23 (quoting MPS3 License Renewal Application, Reduction of Strength and Modulus of Concrete Structures due to Elevated Temperature § 3.5.2.2.1.3 (Jan. 20, 2004) (ADAMS Accession No. ML040260103) at 3-491).

¹²³ CCAM Petition at 26.

¹²⁴ Gundersen Decl. ¶ 49D.

¹²⁵ LAR, Attachment 5 § 2.1.8, at 2.1-76 to 2.1-100.

to the LAR, identifies no specific deficiencies in the FAC Program described in the LAR, and makes only vague and general statements about FAC and the impact of the SPU on FAC at Millstone Unit 3. CCAM raises no specific challenges to Dominion's LAR. Thus CCAM Contention 5 also fails to satisfy this aspect of the standard in 10 C.F.R. § 2.309(f)(1)(vi).¹²⁶

Petitioners further allege that the Licensee's application does not adequately address the guidance of NUREG-1800 and that the plant has not provided adequate information to determine if the Licensee has the proper management systems and staff to evaluate FAC.¹²⁷ Petitioners offer no explanation as to why conformance of the FAC Program with the GALL Report recommendations, or having proper management systems and staff to evaluate FAC, should be treated as a regulatory requirement for a power uprate LAR. Therefore, CCAM Contention 5 does not raise a material dispute relative to this proceeding and fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(iv).

¹²⁶ See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273, 286 n.8 (2001) ("As the Commission has frequently emphasized[,] . . . 'the burden of coming forward with admissible contentions is on their proponent . . . not the licensing board.' The Licensing Board may not properly supply missing information to a proffered contention to make it admissible.") (internal citations omitted).

¹²⁷ CCAM Petition at 29-30 (citing Gundersen Decl. ¶¶ 54-55). In its Answer, Dominion states that "[t]he LAR clearly points out that conformance of the [Millstone Unit 3] FAC Program with the guidance in the GALL Report [(which NUREG-1800 recognizes as providing an acceptable standard),] has already been established in the license renewal proceeding." Dominion Answer at 26. As Dominion explains, the NRC Staff evaluated the Millstone Unit 3 FAC Program against the guidance in the GALL Report and documented its evaluation in the Safety Evaluation Report (SER) (NUREG-1838) in the license renewal proceeding. Id. In its LAR, Dominion noted the NRC Staff's conclusion in the license renewal SER that:

"[T]he FAC Program is adequate to manage the aging effects for which it is credited. . . . The requirements, methods, and criteria of the existing FAC Program will continue to be implemented following the SPU; no changes to these elements are required as a result of the SPU. Evaluations of impact of the SPU on system parameters affecting FAC have been performed within the scope of the existing program. Therefore, the SPU does not affect the conclusions in the License Renewal SER regarding the FAC Program, and no new aging effects requiring management are identified."

Id. (quoting LAR, Attachment 5 at 2.1-86).

Finally, Petitioners allege that “Millstone Unit 3’s program for assessing [FAC] in Dominion’s proposed uprate of the plant fails to comply with 10 C.F.R. 50 Appendix B, XVI,”¹²⁸ but again provide no support for this assertion. Title 10 of the Code of Federal Regulations, Part 50, Appendix B, Criterion XVI requires that measures be established to assure that conditions adverse to quality are promptly identified and corrected.¹²⁹ As Dominion notes, “[i]t is indisputable that the FAC Program for [Millstone Unit 3] includes requirements for the identification and replacement of large and small bore piping segments whose predicted thickness is less than a specified fraction of the component’s nominal thickness. These requirements implement the provisions of Criterion XVI.”¹³⁰ Petitioners fail to specify in which respects Dominion’s FAC Program does not comply with Appendix B, Criterion XVI. The FAC Program for Millstone Unit 3 includes requirements addressing the provisions of the agency’s regulations, and CCAM fails to point to a single error or deficiency in this program. Accordingly, Contention 5 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 5 is therefore rejected.

6. CCAM Contention 6:

“Dominion’s application for a Millstone Unit 3 7+ per cent uprate cannot be and should not be analyzed as a SPU application insofar as the NRC has not adopted standards nor regulatory requirements for reviewing SPU applications.”¹³¹

In Contention 6, the Petitioners challenge the NRC’s lack of “specific guidance or standards which nuclear reactor licensees must meet in order to qualify for approval of SPU

¹²⁸ CCAM Petition at 28; Gundersen Decl. ¶¶ 50.

¹²⁹ 10 C.F.R. Pt. 50, App. B, Criterion XVI.

¹³⁰ Dominion Answer at 29 (citing LAR, Attachment 5 § 2.1.8, at 2.1-84 to 2.1-85).

¹³¹ CCAM Petition at 31.

applications.”¹³² Pointing to the information located on the Commission’s web site,¹³³ Petitioners rehash many of the same arguments they raised in Contentions 1, 2, and 3¹³⁴ to support their view that the Staff must have specific guidance for reviews of SPU applications. However, as we discussed in our ruling on CCAM Contention 1, there is no such regulatory requirement and challenges to the NRC regulatory process are inadmissible in this proceeding.¹³⁵ This contention fails to raise an issue within the scope of the proceeding, and therefore fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(iii). Further, it fails to identify any specific deficiencies or omissions in the LAR, and thus it fails to meet 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 6 is rejected.

7. CCAM Contention 7:

“Dominion has neglected to provide all information to the NRC staff as it has requested and therefore its application for Millstone Unit 3 uprate should be considered to be incomplete and inadequate.”¹³⁶

¹³² Id. at 32.

¹³³ The standards used by NRC staff to evaluate a SPU are stated on the NRC’s public web site. There it states,

Since many of the available stretch power uprates have already been approved by the NRC, and since only a limited number of stretch power uprate applications are expected in the future, there is no specific guidance for stretch power uprates. The NRC, therefore, uses previously approved stretch power uprates, along with RS-001, for guidance.

<http://www.nrc.gov/reactors/operating/licensing/power-uprates.html> (last visited May 31, 2008) (emphasis added).

¹³⁴ See CCAM Petition at 32-33.

¹³⁵ See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” Peach Bottom, ALAB-216, 8 AEC at 20.

¹³⁶ CCAM Petition at 33-34.

Petitioners' allegation is based on the issuance of Requests for Additional Information (RAI) by the NRC Staff to Dominion to support the NRC Staff's review of the LAR.¹³⁷

To the extent this contention rests upon a challenge to the NRC Staff's determination that the application was sufficiently complete to docket and initiate the review process, NRC case law is clear. The manner in which the NRC Staff conducts its sufficiency review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding.¹³⁸ Therefore, this contention fails to meet 10 C.F.R. § 2.309(f)(1)(iii).

Further, the RAI process is routine and customary in NRC licensing reviews. The fact that, at this stage, there are a number of RAIs outstanding does not give rise to an evidentiary hearing.¹³⁹ For this reason also, this contention fails to meet 10 C.F.R. § 2.309(f)(1)(iii).

Finally, Contention 7 fails to identify any specific deficiencies or omissions in the LAR, and thus it fails to meet 10 C.F.R. § 2.309(f)(1)(vi).

CCAM Contention 7 is rejected.

8. CCAM Contention 8:

"The uprate will result in heightened releases of radionuclides and consequent exposures to plant workers and to the public estimated by Dominion to be 9 per cent but likely in excess of 9 per cent above current levels and such increases will result in corresponding 9 per cent (or more) increases of the risk of harmful health effects. Dominion's application for Millstone 3 uprate makes no provision for new shielding or other techniques to mitigate increased radionuclide release levels. Since Millstone first went online in 1970, cancer incidences in the communities surrounding Millstone have become the highest in the state for many types of cancer; the Millstone host

¹³⁷ Id. at 34.

¹³⁸ Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 242 (1998); Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395-96 (1995); see also New England Power Co. (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280-81 (1978).

¹³⁹ See Oconee, CLI-99-11, 49 NRC at 336-37; Calvert Cliffs, LBP-98-26, 48 NRC at 242.

communities suffer high incidences of fetal distress, stillbirth, premature birth, genetic defects and childhood cancer. Cancer is widespread among current and former Millstone workers. Under these circumstances, Dominion's application is entirely inadequate to assure that the uprate will not endanger plant workers or the public to an unsafe and unacceptable degree. Dominion's application must be rejected."¹⁴⁰

Petitioners rely upon the Declaration of Dr. Ernest J. Sternglass, who refers to the conclusion of the 2005 National Academy of Sciences report entitled "Health Risks from Exposure to Low Levels of Ionizing Radiation" (BEIR VII - Phase 2), for the proposition "that there is no safe level or threshold of ionizing radiation exposure and that the smallest dose of low-level ionizing radiation has the potential to cause an increase in health risks to humans."¹⁴¹ Contention 8 also cites to the Declaration of Cynthia M. Besade, a CCAM member, who enumerates various cancer cases in the residential neighborhoods near Millstone.¹⁴² Here, however, Petitioners fail to identify any deficiencies or omissions in the LAR. Therefore this contention fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

To the extent Petitioners challenge the compliance of the maximum projected doses for the LAR with the NRC's safety standards, CCAM fails to point to any failure of the Applicant to comply with the NRC's requirements regarding radiological releases or exposures, and therefore presents no genuine dispute with the LAR. It offers nothing to indicate that the radiological consequences of these releases exceed any NRC regulatory limits. As Dominion

¹⁴⁰ CCAM Petition at 37-38.

¹⁴¹ CCAM Petition, Exh. B, Declaration of Ernest J. Sternglass, Ph.D. in Support of Connecticut Coalition Against Millstone and Nancy Burton Petition to Intervene and Request for Hearing (Mar. 15, 2008) ¶ 7 [hereinafter Sternglass Decl.]. Dr. Sternglass states, "[i]f the Millstone Unit 3 nuclear reactor is permitted to release radionuclides to the environment at levels 9 percent greater than current levels, it is likely that there will be a closely corresponding increase in adverse effects on human health." Sternglass Decl. ¶ 8. He concludes that "[o]ne would expect this to be the case based on our present experience and the accepted nearly linear relation between radiation exposure and adverse health effects – including illness, death and harm to developing fetuses – at this range." *Id.* ¶ 9.

¹⁴² CCAM Petition at 41-43 (citing Besade Decl.).

notes in its Answer, the LAR shows that radiological releases resulting from the uprate will remain within NRC regulatory dose limits.¹⁴³ Therefore this fails to raise a genuine dispute over a material fact and fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

Also, to the extent this contention calls for requirements in excess of those imposed by Commission regulations, it must be rejected as a collateral attack on the regulations.¹⁴⁴ As noted recently by another licensing board:

[W]hen a contention alleges that increases in radioactive releases create higher doses, but does not provide information or expert opinion to dispute the conclusion that the higher doses would still be under NRC regulatory limits, and no evidence has been presented to show that the higher levels will cause harm, sufficient information to show that a material dispute exists has not been provided and the contention making these claims should not be admitted.¹⁴⁵

For these reasons Contention 8 fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv).

Petitioners finally allege that the increases in radionuclide production and dispersion estimated by the Applicant may actually be greater “given the enhanced dynamics of Unit 3

¹⁴³ The LAR shows that,

with the SPU, the whole body dose to the maximally exposed individual is 0.00261 mrem/year from liquid effluents and 0.0203 mrem/year from gaseous effluents. This represents 0.087% and 0.406%, respectively, of the levels that are considered in the NRC regulations to be “as low as reasonably achievable.” The LAR also shows that the maximum dose from direct radiation is 0.1443 mrem/year, so “the current annual whole body dose from all pathways due to liquid releases, gaseous releases and direct shine is conservatively estimated at 0.17 mrem (i.e., 0.0026 + 0.0203 + 0.1433).” This calculated dose is far below the 100 mrem annual dose limit for members of the public permitted by 10 C.F.R. § 20.1301(a)(1), and is also a small fraction of the annual dose limit of 25 mrem to the whole body of any member of the public beyond the site boundary set forth in 40 C.F.R. § 190.10(a).

Dominion Answer at 39-40 (internal citations omitted).

¹⁴⁴ See Millstone, LBP-01-10, 53 NRC at 286-87; Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

¹⁴⁵ Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 266 (2007) (citing Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), LBP-03-12, 58 NRC 75, 83, 93-94, aff'd, CLI-03-14, 58 NRC 207 (2003)).

operations with faster-moving coolant and heightened temperatures.”¹⁴⁶ This allegation, which is unsupported speculation, is insufficient to support an admissible contention and fails to meet 10 C.F.R. § 2.309(f)(1)(v).

For the foregoing reasons, CCAM Contention 8 is rejected.

9. CCAM Contention 9:

“Dominion’s application for a 7+ per cent power generation uprate at Millstone Unit 3 will result in significant new releases of radioactive material to the environment and it will result in discharges of significant volumes of water to the Long Island Sound at heightened temperatures, both of which consequences are inadequately addressed in the application.”¹⁴⁷

Petitioners concede that the LAR addresses the environmental impact of the proposed uprate but conclude the proposed uprate “will have devastating environmental consequences, such as overheating the Long Island Sound and thereby destroying critical fish habitat and contaminating fruits and vegetables raised locally for sale for human consumption.”¹⁴⁸

Petitioners’ concerns are generalized and do not contest any specific portions or conclusions contained in the LAR, nor do they address any part of Dominion’s Supplemental Environmental Report (LAR, Attachment 2).¹⁴⁹ Therefore, Contention 9 fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(vi).

Further, Petitioners provide no supporting documentation or expert opinion that would support the proposition that there would be “significant adverse environmental impacts which

¹⁴⁶ CCAM Petition at 40.

¹⁴⁷ Id. at 44.

¹⁴⁸ Id. at 46.

¹⁴⁹ See generally id. at 44-46.

have not been adequately analyzed”¹⁵⁰ as a result of the thermal discharge and radiological effluent increases. Therefore, Contention 9 fails to meet the standards of 10 C.F.R. § 2.309(f)(1)(v).

In their Reply, Petitioners attack Dominion’s assertion that “the hotter thermal plume discharged from Millstone Unit 3 resulting from implementation of the SPU ‘will still be within the limits allowed by the plant’s National Pollutant Discharge Elimination System (NPDES) permit” by asserting that the permit expired in 1997.¹⁵¹ Whether Millstone Unit 3 has a valid NPDES permit is outside the scope of this uprate proceeding. Therefore this assertion fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).

CCAM Contention 9 is therefore rejected.

¹⁵⁰ Id. at 44.

¹⁵¹ CCAM Reply at 35 (quoting Dominion Answer at 45). CCAM raised a similar contention in the Millstone Units 2 and 3 license renewal proceeding. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-05, 60 NRC 81, 92-93 (2004). There CCAM alleged, “Millstone Units 1 and 2 operations require the uninterrupted flow through intake and discharge structures of cooling water, which conduct requires a valid National Pollution Discharge Elimination System permit and the facility lacks such a valid permit.” Id. The licensing board in the Millstone license renewal case held:

This contention raises an issue solely within the purview of the Connecticut State Department of Environmental Protection (DEP), which administers the Federal Water Pollution Control Act (FWPCA or “Clean Water Act”) within the jurisdiction of the State of Connecticut. While 10 C.F.R. § 51.45(d) requires an applicant seeking a license renewal to “list all Federal permits, licenses, approvals, and other entitlements which must be obtained in connection with the proposed action,” it does not impose a requirement that the applicant actually possess such permits at the time of application. Therefore, even if the CCAM allegation that Dominion does not have a “valid” DEP permit were accurate (and the Licensee has presented record testimony of the DEP to the effect that the current permit is valid), that would not be relevant for this proceeding. In short, CCAM asks to litigate before this Board the State of Connecticut’s DEP permitting process, a matter outside the scope of this proceeding and outside the reach of the jurisdiction of this Board. This contention is, therefore, inadmissible.

Id. at 93 (emphasis in original); see also Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 377 (The Clean Water Act “precludes [the NRC] from either second-guessing the conclusions in NPDES permits or imposing our own effluent limitations – thermal or otherwise.”).

III. CONCLUSION

In conclusion, although Petitioners CCAM and Nancy Burton have standing to participate in this proceeding, the Request for Hearing must be denied in its entirety because no admissible contention was presented. Under 10 C.F.R. § 2.309(f)(1), all six factors for contention admissibility must be met for the Board to admit a contention.¹⁵² Title 10 of the Code of Federal Regulations, § 2.309(f)(1)(iii) requires the petitioner to demonstrate that the issues raised in the contentions are within the scope of the proceeding.¹⁵³ As discussed above, all the contentions raised are either outside the scope of this proceeding, fail to raise issues that are material to the findings the NRC must make as required by 10 C.F.R. § 2.309(f)(1)(iv), fail to provide supporting facts or expert opinion as required by 10 C.F.R. § 2.309(f)(1)(v), or fail to raise specific deficiencies or omissions in the application as required by 10 C.F.R. § 2.309(f)(1)(vi). And because CCAM did not meet the required showing under all of the required contention admissibility factors, it cannot have its contentions admitted. Therefore, the Request for Hearing by CCAM and Nancy Burton is denied.¹⁵⁴

IV. ORDER

Because CCAM and Ms. Burton have failed to provide a single admissible contention, the Board must DENY their hearing request and terminate this proceeding.

¹⁵² 10 C.F.R. § 2.309(a).

¹⁵³ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁵⁴ On May 1, 2008 Dominion filed a Motion to Strike portions of CCAM and Nancy Burton's Reply to Responses to Petition to Intervene. Dominion Nuclear Connecticut's Motion to Strike Portions of Connecticut Coalition Against Millstone and Nancy Burton's Reply to Responses to Petition to Intervene (May 1, 2008). On May 12, 2008 CCAM and Nancy Burton filed an Answer to Dominion Nuclear Connecticut Inc.'s Motion to Strike. Connecticut Coalition Against Millstone and Nancy Burton's Answer to Dominion Nuclear Connecticut, Inc.'s Motion to Strike (May 12, 2008). The Board considered CCAM's Petition and its Reply. In light of our rulings today, we need not address Dominion's Motion or CCAM's Answer to the Motion to Strike. The matter is now moot.

For the foregoing reasons, it is this 4th day of June 2008, ORDERED that:

1. The hearing request of CCAM and Ms. Burton filed on March 17, 2008 is denied.
2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹⁵⁵

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 4, 2008

¹⁵⁵ Copies of this order were sent this date by the agency's E-Filing system to counsel for (1) applicant Dominion Nuclear Connecticut, Inc.; (2) the Connecticut Coalition Against Millstone and Nancy Burton; and (3) the NRC Staff. A courtesy copy was also sent to these individuals via e-mail.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY 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 LB MEMORANDUM AND ORDER (RULING ON PETITION TO INTERVENE AND REQUEST FOR HEARING) (LBP-08-09) have been served upon the following persons by Electronic Information Exchange (EIE), and to Nancy Burton by U.S. mail and email.

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DOCKET NO. 50-423-OLA
LB MEMORANDUM AND ORDER
(RULING ON PETITION TO INTERVENE AND REQUEST FOR HEARING) (LBP-08-09)

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[Original signed by Evangeline S. Ngbea
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of June 2008