April 2, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DOMINION NUCLEAR CONNECTICUT, INC.	)	Docket Nos. 50-336, 50-423
	)	
(Millstone Nuclear Power Station, Units 2 and 3)	)	
	)	

NRC STAFF'S RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE'S MOTION TO VACATE AND TO ACCEPT PETITION TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

Pursuant to the Commission's March 24, 2004, Order and 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "Motion to Vacate NRC Secretary Determination of Petition Prematurity And to Accept Petition to Intervene And Request For Hearing as of Date of Filing And to Apply 'Old' CFR Hearing Rules to Said Petition" submitted by Connecticut Coalition Against Millstone ("CCAM") on March 22, 2004 ("Motion"). In its Motion, CCAM requests that the Commission vacate the March 4, 2004, determination of the Secretary of the Commission that CCAM's February 12, 2004, Petition to Intervene and Request for a Hearing ("Petition") was not timely because there was not yet a proceeding in which CCAM could intervene. Furthermore, CCAM requests to have the former provisions of the Commission's Rules of Practice in 10 C.F.R. Part 2 ("Old Part 2") apply to the proceeding instead of the newly-revised rules of practice ("New Part 2"). *See* 69 Fed. Reg. 2182 (Jan. 14, 2004). The Staff submits, for the reasons set forth below, that CCAM's Motion should be denied.

BACKGROUND

On February 12, 2004, CCAM filed a Petition to Intervene and Request for a Hearing in regard to the application for renewal of the operating licenses held by Dominion Nuclear Connecticut, Inc. ("DNC") for the Millstone Nuclear Power Station, Units 2 and 3. On March 4, 2004, the Secretary of the Commission returned the Petition to CCAM, stating that since the Commission had not yet issued a notice of the proceeding and opportunity for a hearing there was not yet a proceeding in which CCAM could attempt to intervene. Subsequently, on March 12, 2004, the NRC published in the *Federal Register* a notice of opportunity for hearing regarding the application for renewal of the Millstone Units 2 and 3 operating licenses. *See* 69 Fed. Reg. 11897 (March 12, 2004). On March 22, 2004, CCAM filed the instant motion and resubmitted its Petition to Intervene and Request for Hearing. The Petition is identical to its February 12, 2004 Petition.

DISCUSSION

In its Motion, CCAM asserts that its petition to intervene is timely because it was filed within 60 days of CCAM's actual notice that the application was pending. The NRC Staff opposes the Motion because the Secretary correctly determined that CCAM's February 12, 2004 Petition was premature. Simply put, CCAM's Petition was premature because there was no proceeding in which CCAM could have intervened at the time of its February 12, 2004 Petition. "A proceeding commences when a notice of hearing or notice of proposed action under § 2.105 is issued." 10 C.F.R. § 2.318(a) (New Part 2); *see* 10 C.F.R. § 2.717(a) (Old Part 2).[1] Thus, CCAM's petition was premature because its February 12, 2004 Petition was filed before publication of the March 12, 2004 notice of opportunity for a hearing and notice of proposed action which signaled the commencement of the proceeding.

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[1] Section § 2.105(a), in turn, states, "[i]f a hearing is not required ... and if the Commission has not found that a hearing is in the public interest" Staff will publish a notice of proposed action in the *Federal Register.* 10 C.F.R. § 2.105(a).

CCAM asserts that the "key parameters" for determining the timeliness of the Petition are the date of the DNC application and the date of the CCAM Petition. Motion at 6. CCAM mistakenly focuses on the date of NRC receipt of the application rather than the date of the notice of hearing and notice of proposed action. As indicated earlier, a proceeding does not commence until a "notice of hearing or notice of proposed action under § 2.105 is issued." 10 C.F.R. § 2.318(a) (New Part 2); 10 C.F.R. § 2.717(a) (Old Part 2). While DNC's license renewal application was received on January 20, 2004, and a notice of receipt and availability of the application was published in the *Federal Register* on February 3, 2004, the Staff did not publish in the *Federal Register* a notice of a proposed action and notice of opportunity to request a hearing until March 12, 2004. *See* 69 Fed. Reg. 5197 (Feb. 3, 2004); 69 Fed. Reg. 11897 (March 12, 2004). Therefore, until the Staff published a notice of hearing or notice of proposed action, there was no proceeding in which to intervene.[2]

CCAM references the February 3, 2004 *Federal Register* notice and postings on the NRC website of the application itself and a public meeting on the application as events that determine whether a request for a hearing is timely. Motion at 2, 4-6. The notices on the agency's web site, cited by CCAM in its Motion, are notices of receipt of the application and notices of meetings planned as part of the agency's acceptance review, and the posting of the application itself—not notice of an opportunity to request a hearing published pursuant to 10 C.F.R. § 2.105. Accordingly, the Secretary was correct in concluding that CCAM's petition was premature.

In its Motion, CCAM argues that the provisions of Old Part 2 should apply to any

[2] In addition, Petitioner had no basis to construe the notice of receipt and availability of the application as a triggering event. By its terms, the notice of receipt of DNC's application states that "the acceptability of the tendered application for docketing, and other matters including an opportunity to request for a hearing will be the subject of subsequent *Federal Register* notices." 69 Fed. Reg. 5197 (Feb. 3, 2004).

proceeding on its Petition. CCAM's assertion is incorrect. The *Federal Register* notice of final rulemaking for the New Part 2 states that "the rules of procedure in the final rule apply to proceedings noticed on or after the effective date." 69 Fed. Reg. 2182 (Jan. 14, 2004). "A proceeding commences when notice of hearing or notice of proposed action under § 2.105 is issued." 10 C.F.R. § 2.318(a). While the application was received before the effective date of New Part 2 (February 13, 2004) the application was not found acceptable by the Staff until March. Notice of a proposed action and opportunity to request a hearing was not published until March 12, 2004, well after the effective date of the new rule.[3] Therefore, the revised Part 2 governs the proceeding.[4]

In further support of its argument that Old Part 2 should apply, CCAM relies on a chart on the NRC website entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." *Id.* In both the fifth and ninth scenarios cited by CCAM that appear on the NRC website, one of the prerequisites to application of the Old Part 2 is that the application was submitted and docketed by NRC before the effective date of New Part 2, but the notice of docketing and opportunity for hearing was not published in the *Federal Register.* Motion at 3-4. However, in the instant situation there was such a publication. As discussed above, the NRC published a notice of a proposed action and notice of opportunity to request a hearing in the *Federal Register* on March 12, 2004. *See* 69 Fed. Reg. 11897 (March 12, 2004). Since the NRC published a notice of opportunity for hearing in the *Federal Register*, neither scenario relied on by CCAM in its Motion

[3] CCAM suggests that the Staff may have influenced the date of publication of the *Federal Register* notice to ensure that the New Part 2 provisions will apply to the proceeding. Motion at 6. The Staff is required to make a determination on the adequacy of an application for docketing. See 10 C.F.R. § 2.101(a). This takes time. CCAM provides no basis to conclude that the date of the Staff's publication of the *Federal Register* notice was intended to dictate whether New Part 2 or Old Part 2 would apply.

[4] Beyond the clear applicability of the New Part 2 Rules of Practice by their own terms, CCAM fails to establish any harm from application of those rules.

to apply Old Part 2 is applicable to this proceeding.[5]

Finally, the Petitioner's March 22, 2004 Motion is untimely. NRC regulations at 10 C.F.R. § 2.323(a) (New Part 2) require that a motion must be made no later than ten days after the occurrence or circumstance from which the motion arises. Here, CCAM's Motion seeks to vacate the March 4, 2004, determination by the Secretary of the Commission. However, the Motion was filed eight days beyond the ten day period for filing such a motion.[6] Therefore, CCAM's Motion should be denied.

CONCLUSION

For the foregoing reasons, the Secretary was correct in returning CCAM's Petition as premature. CCAM's request to apply the old 10 C.F.R. Part 2 Rules of Practice to the Millstone Nuclear Power Station Units 2 and 3 License Renewal Application proceedings should be denied. Finally, CCAM's Motion was not timely and should be denied.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of April, 2004.

[5] CCAM argues that since no hearing is required, no notice of hearing is required. Motion at 6. Whether a notice of hearing is required to be published in the *Federal Register* is irrelevant since when a notice of hearing is published—as it was in this case—it is the actual publication of the *Federal Register* notice pursuant to 10 C.F.R. § 2.105 that commences the proceeding. *See* 10 C.F.R. § 2.318(a); *see also*, 10 C.F.R. § 2.105 ("If a hearing is not required ... and if the Commission has not found that a hearing is in the public interest" it will publish a notice of proposed action in the *Federal Register*.).

[6] In its Motion to Vacate, CCAM mistakenly cites March 10, 2004, as the date of the Secretary of the Commission's determination. Even using that incorrect date, CCAM's Motion would still be two days late.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CONNECTICUT COALITION AGAINST MILLSTONE'S MOTION TO VACATE AND TO ACCEPT PETITION TO INTERVENE AND REQUEST FOR HEARING" in the above-captioned proceeding have been served on the following through electronic mail and with copies by deposit in the NRC's internal mail system, or through electronic mail with copies by deposit in the U.S. Postal Service as indicated by an asterisk, this 2nd day of April, 2004:

Chief Administrative Judge
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