

RAS 7549

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:	:	DOCKET NOS. 50-336, 50-423
Nils J. Diaz, Chairman	:	DOCKETED
Edward McGaffigan, Jr.	:	USNRC
Jeffrey S. Merrifield	:	March 22, 2004 (9:17AM)
In re:	:	OFFICE OF SECRETARY
DOMINION NUCLEAR	:	RULEMAKINGS AND
CONNECTICUT, INC.	:	ADJUDICATIONS STAFF
(Millstone Nuclear Power Station)	:	
(Millstone Units 2 and 3)	:	MARCH 22, 2004

**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**

The Connecticut Coalition Against Millstone ("CCAM") moves that the U.S. Nuclear Regulatory Commissioners vacate forthwith the determination by the Secretary of the U.S. Nuclear Regulatory Commission ("NRC") to reject the Petition to Intervene and Request for Hearing ("Petition") filed by CCAM on February 12, 2004 as premature; that the Secretary be directed to accept said Petition as of the date of its filing; and that the Petition be considered and acted upon pursuant to the Code of Federal Regulations in effect as of February 12, 2004. Contemporaneously herewith, CCAM resubmits its Petition.¹

The Petition was timely and properly submitted under the Code of Federal Regulations in effect on February 12, 2004 and as the NRC has interpreted the pertinent Regulations. See "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings," a copy of which is annexed hereto as Exhibit A..

¹ The Secretary mailed its notification letter and returned the Petition on March 10, 2004.

Factual Background

On January 22, 2004, Dominion Nuclear Connecticut, Inc. formally submitted an application to the NRC to obtain relicensing of its Millstone Unit and Millstone Unit 3 nuclear reactors.

Submission of the license renewal application (“LRA”) followed numerous contacts between Dominion and the NRC staff concerning such application.

On February 3, 2004, NRC published “Dominion Nuclear Connecticut, Inc. Notice of Receipt and Availability of Application for Renewal of Millstone [Nuclear] Power Station, Units 2 and 3, Facility Operating License Nos. DPR-65 and NPF-49 for Additional 20-Year Period” in the Federal Register (69 FR 5197) as Docket Nos. 50-336 and 50-423.

By letters dated February 5, 2004, the NRC notified the Waterford (CT) Public Library and the Three Rivers Community College in Norwich (CT) that it was thereupon submitting to each respective facility a copy of the application as it had been filed with the NRC in Docket Nos. 50-336 and 50-423.

On February 6, 2004, Dominion met with NRC staff in Rockville, Maryland to formally discuss the LRA.

On February 6, 2004, the NRC posted on its official website a notice that the NRC would hold a public meeting in Waterford on February 17, 2004 regarding the LRA.

On February 8, 2004 or earlier, the NRC posted notice on its official website of the pendency of the Millstone LRA. The posting included the complete Millstone LRA, consisting of some 3,000 pages.

On February 12, 2004, the Coalition submitted its "Petition to Intervene and Request for Hearing" to the NRC's Office of the Secretary with a copy to the licensee. The Office of the Secretary emailed notice of its acknowledgment of the filing on February 12, 2004.

On February 13, 2004, revisions to 10 CFR Part 2 severely curtailing *inter alia* the right of intervenors in hearing procedures before the NRC became effective. The revisions are the subject of a challenge mounted in the U.S. Court of Appeals for the First Circuit on January 26, 2004 by Citizens Awareness Network, Inc., Docket No. 04-1145.

On or before February 16, 2004, the NRC posted on its official website a chart entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." Such chart (Exhibit A hereto) posits various scenarios of potential events occurring with regard to license applications and interventions and it assigns applicability of "old" versus "new" rules. The fifth and ninth scenarios are particularly apt. They posit the following potential events:

Fifth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004.

Ninth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC web site

before February 13, 2004, but not in Federal Register; hearing request/intervention petition received after February 13, 2004.

In each case, the NRC has determined that the "old" CFR Regulations apply. See Exhibit A.

On February 17, 2004, representatives of the NRC, including NRC technical experts and two representatives from the Office of the General Counsel of the NRC, conducted a public meeting regarding the Millstone LRA in Waterford, as scheduled. During such meeting, NRC representatives stated that the NRC was not legally required to conduct a hearing on the application in the absence of a formal request for a hearing. The NRC expended a significant amount of money in preparing for the presentation, including commissioning a large mounted visual depiction of the Millstone Nuclear Power Station, assembling voluminous informational documents and transporting no fewer than seven (7) of its representatives to participate in the presentation.

Upon information and belief, the LRA as posted on the NRC website on or before February 8, 2004 is unchanged in substance.

On March 10, 2004, the NRC Secretary issued a letter of notification of its rejection of the CCAM Petition and returned the Petition to its sender by U.S. Mail. The Petition, as stated, is being resubmitted as originally filed on this date.

On March 12, 2004, the NRC published "Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period" under Docket Nos. 50-336 and 50-423.

Legal Argument

It is clear from an examination of the “old” and “new” rules, and a review of pertinent materials made available by the NRC on its website and in the Federal Register, that the Petition must be docketed and considered by the NRC under the “old” rules.

The NRC’s website posting, Exhibit A, provides pertinent guidance. Such chart posits various scenarios of potential events occurring with regard to license applications and interventions and it assigns applicability of “old” versus “new” rules. The fifth and ninth scenarios are particularly apt. Under either scenario, NRC must accept the Petition under the “old” 10 CFR Part 2 rules.

There is no question but that the application was submitted on January 22, 2004, well before February 13, 2004. The NRC received the application for Dockets 50-336 and 50-423 and provided Federal Register notice under such dockets on February 3, 2004. On February 5, 2004 it officially forwarded copies to the Waterford Public Library and Three Rivers Community College under Dockets Nos. 50-336 and 50-423. Within six days of its receipt of actual notice of the pendency and docketing of the application, on February 12, 2004, the Coalition filed its Petition to Intervene and Request for Hearing. The Coalition filed its petition *prior to* the rule change.

Under the NRC’s own guidance, notice of opportunity for hearing as posted on the NRC website or in the Federal Register provides a triggering event which

may be a factor in determining the applicability of the “old” versus the “new” rule. Yet, it is noteworthy that the new rule, 10 CFR §2.309(b)(4)(ii), provides that a petition to intervene and request for hearing are timely filed if filed within ([S]ixty (60) days after the requestor [Petitioner] receives actual notice of a pending application . . .” *regardless* of whether or not a notice appears on the NRC website or in the Federal Register.

The key parameters here are (a) the date of Dominion’s application (January 22, 2004) and (b) the date of the Coalition’s intervention (February 12, 2004). Both critical events occurred prior to the effective date of the new rule, February 13, 2004. Since no hearing is required, and thus no notice of hearing is required, and the intervention was filed within 60 days of the Coalition’s actual notice of the pendency of the application, the Coalition’s petition must be processed under the “old” rule.

Moreover, the NRC published Federal Register notification on February 3, 2004 under Docket Nos. 50-336 and 50-423.

Since the LRA has not changed since it was posted on the NRC Web site on or before February 8, 2004, the circumstances give rise to the appearance that NRC simply withheld publication of its March 12, 2004 notice until after the “new” 10 CFR Part 2 rules legally took effect, subject to the legal challenge underway in the First Circuit, with or without the cooperation of Dominion, in order to limit challenges by CCAM and others to the LRA. The NRC Commissioners should not condone such conduct if such conduct occurred.

However, regardless of the motivation involved, under the facts and

circumstances as set forth herein, the NRC Commissioners should accept the Petition as timely filed pursuant to the "old" 10 CFR Part rules, vacate the Secretary's determination of prematurity, process the Petition under Docket Nos. 50-336 and 50-423 and adjudicate the petition pursuant to the Code of Federal Regulations in effect on the date the Petition was filed, that is, February 12, 2004.

Respectfully submitted,

**CONNECTICUT COALITION
AGAINST MILLSTONE**

By:



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Exhibit A

Applicability of Old and New 10 CFR Part 2 to NRC Proceedings

The following table associates a variety of potential notice, licensing, and regulatory scenarios with the applicable version of 10 CFR Part 2.

Proceeding status	Old Part 2	New Part 2
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted and granted by NRC before February 13, 2004	•	
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition for intervention submitted before February 13, 2004, but not yet acted upon by NRC on February 13, 2004	•	
Notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted after February 13, 2004	•	
Pre-application meetings and correspondence occurring before February 13, 2004, but application submitted on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition prepared and submitted on or after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the <i>Federal Register</i> before February 13, 2004, but <i>not</i> on NRC Web site; hearing request/intervention petition received before February 13, 2004	•	
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Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Web site on or after February 13, 2004, but <i>not</i> in <i>Federal Register</i> ; hearing request/intervention petition submitted on or after February 13, 2004		•

Application submitted before February 13, 2004, but docketed by NRC on or after after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		•
Application submitted but docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing published in either <i>Federal Register</i> or NRC Web site on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		•

- Commission may determine and order the application of either the superseded or new Part 2 provisions.

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Jeffrey S. Merrifield	:	
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DOMINION NUCLEAR	:	
CONNECTICUT, INC.	:	
(Millstone Nuclear Power Station)	:	
(Millstone Units 2 and 3)	:	MARCH 22, 2004

CERTIFICATION

I hereby certify that a copy of the foregoing "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" was mailed on March 22, 2004 via U.S. Mail, postage pre-paid to the following and emailed as indicated below:

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