RAS 7627

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:	:	**DOCKET NOS. 50-336, 50-423**
Nils J. Diaz, Chairman	:	
Edward McGaffigan, Jr.	:	
Jeffrey S. Merrifield	:	
In re:	:	
DOMINION NUCLEAR CONNECTICUT, INC.	:	
(Millstone Nuclear Power Station)	:	
(Millstone Units 2 and 3)	:	**APRIL 12, 2004**

DOCKETED
USNRC

April 20, 2004 (4:06PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

CONNECTICUT COALITION AGAINST MILLSTONE REPLY TO NRC STAFF AND DOMINION RESPONSE TO MOTION TO VACATE

The Connecticut Coalition Against Millstone ("CCAM") responds herewith to the NRC Staff and Dominion Nuclear Connecticut, Inc. ("Dominion) responses to CCAM's "Motion to Vacate 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 NRC Staff and Dominion both argue that CCAM's Petition, filed on February 12, 2004, was properly rejected by the Secretary as premature and that the "new" CFR rules adopted effective February 13, 2004 should apply.

The arguments are without merit.

I. It is not disputed that the Petition was filed on February 12, 2004.

The Petition was filed on February 12, 2004, the day before the CFR revisions took effect.

II. It is not disputed that the Petition was filed within 60 days of when CCAM received actual notice that the application was pending.

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SECY-02

A new CFR provision, 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 . . ."

This provision contains no qualifier regarding publication of any Federal Register notice.

III. The Petition qualifies as timely pursuant to scenarios 5 and 9 in the chart entitled "Applicability of Old and New 10 CFR 2 to NRC Proceedings" as appears on the NRC Website.

The Petition clearly qualifies as timely **as of the time it was filed** under both scenarios, as CCAM argued in its Motion to Vacate.

The NRC Staff and Dominion argue that NRC's publication of notice in the Federal Register **after the Petition was filed** and after February 13, 2004, when the new CFR rules took effect, negated the applicability of the two scenarios.

This argument is without merit.

The NRC Staff and Dominion both fail to recognize that each of the scenarios is addressed to the applicability of the "old" versus "new" CFR rules based on the circumstances on the date when the petition to intervene was filed. The NRC Staff and Dominion also both fail to recognize that the NRC chart recognizes that a petition is properly accepted as filed even in the absence of prior Federal Register notice publication.

Thus, the fifth scenario provides:

> 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.

Thus, while the NRC had received the application and had docketed it prior to February 13, 2004, its failure to publish a Federal Register notice prior to February 13, 2004 did not render premature a petition to intervene filed prior to February 13, 2004.

Similarly, the NRC Staff and Dominion's argument that publication of a Federal Register notice after February 13, 2004 nullified the applicability of scenario 5 is without merit. Both argue that the NRC is required to publish a Federal Register notice; yet, scenario 5 assumes "no publication." The only way to logically reconcile scenario 5 with the publication requirement is to assume that the NRC would eventually publish a Federal Register notice. However, such after-publication would not render a pre-February 13 petition premature. Otherwise, scenario 5 allowing a pre-February 13 petition would be defeated if the NRC published a Federal Register notice post-February 13. This strained interpretation should be rejected.

As stated, scenario 9 provides as follows:

> 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. [Emphasis added.]

Again, the NRC Staff and Dominion argue that, under the old CFR rules and

the new CFR rules, publication of the Federal Register notice is the triggering event before which a petition will be deemed prematurely filed. This argument simply disregards the clear language of scenario 9.

IV. The NRC Staff and Dominion Argue that the application was not found acceptable by the NRC Staff until March.

As CCAM has pointed out in its Motion to Vacate, the application as formally submitted by Dominion on January 22, 2004 did not change after the NRC published a Federal Register notice on February 3, 2004 as to its receipt and docketing of the application, nor after it posted the multi-thousand-page application on its website on or before February 8, 2004.

As CCAM has further pointed out, Dominion's submission of the formal application on January 22, 2004 followed numerous meetings and contacts between Dominion and NRC Staff. These sessions had reference to Dominion's earlier applications for license extension for the North Anna and Surry facilities. To the extent that Dominion or the NRC Staff suggest in their responses that the NRC Staff had not yet reviewed the Millstone submission for completeness prior to posting the 3,000-plus application on its website on or before February 8, 2004, CCAM requests that it be permitted to conduct limited discovery at this time into the entire pre-application and post-application process engaged in by Dominion and the NRC Staff to develop facts pertinent to this discussion. On the basis of the facts now known, Dominion and the NRC Staff's insistence that the NRC Staff engaged in a true "acceptance review prior to docketing" after it posted the application on its website is not very credible and the impression

remains that Dominion and the NRC Staff may have intentionally delayed Federal Register publication until after February 13, 2004 in order to frustrate and impede potential intervenors in this process.

V. The Commission has discretion in this matter.

As Dominion acknowledges, "[t]he new Part 2 rules apply to proceedings noticed on or after the effective date of the new rules (i.e., on or after February 13, 2003), **unless otherwise directed by the Commission.**" (Emphasis added.)

Under the facts and circumstances presented, the NRC should direct that the "old" Part 2 rules should apply to CCAM's Petition and Request for Hearing.

A contrary order would be inconsistent with the guidance of the NRC's own "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings" table.

VI. CCAM would suffer prejudice in these proceedings if the motion is not granted.

The NRC Staff response asserts in footnote 4 that "CCAM fails to establish any harm from application of [the "new" Part 2] rules."

The harm is manifest. The revisions severely curtail the rights and opportunities of petitioner-intervenors in the hearing process and are contrary to the letter and spirit of the Atomic Energy Act. Such diminished participation is contrary to the public interest and will hamper CCAM in its ability to fully and fairly participate.

10 CFR Part 2 was transparently revised, over substantial public objection, to eliminate meaningful public participation in reactor relicensing and other

proceedings.

Whether the NRC acted properly and lawfully in revising such rules remains to be seen. See Citizens Awareness Network, Inc. v. United States of America, Docket No. 04-1145 (U.S. Court of Appeals for the First Circuit).

Given the prospect that the "new" rules may be adjudicated to be nugatory, all parties will be prejudiced if the proceedings on the Millstone relicensing application have to be conducted twice because the NRC in error applied the "new" rules.

VI. The motion was timely filed.

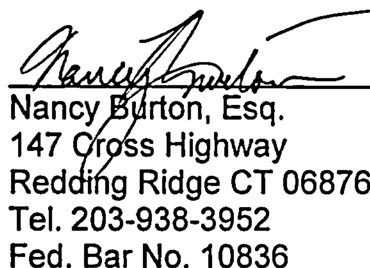
The NRC Staff argues that CCAM's Motion to Vacate was untimely filed on March 22, 2004, more than ten (10) days after the March 4, 2004 determination by the Secretary of the Commission. The NRC Staff neglects to note that the Secretary mailed the petition in an envelope postmarked on March 10, 2004. Given the intervening weekend (March 21 and 21), the motion was timely filed.

VII. Conclusion

For the foregoing reasons, CCAM requests that its motion be granted.

Respectfully submitted,

CONNECTICUT COALITION AGAINST MILLSTONE

By: 

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CERTIFICATION

I hereby certify that a copy of the foregoing "Connecticut Coalition Against Millstone Reply to NRC Staff and Dominion Response to Motion to Vacate"was mailed on April 12, 2004 via U.S. Mail, postage pre-paid to the following and emailed as indicated below:

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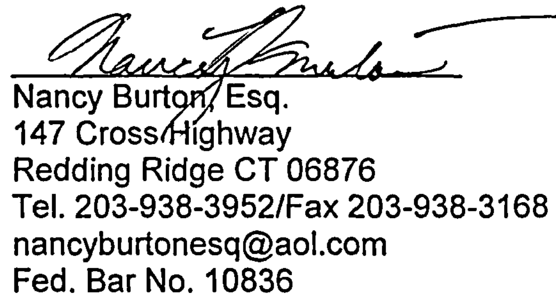

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