RAS 9547

COUNTY OF SUFFOLK

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USNRC

March 14, 2005 (7:35am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

STEVE LEVY
SUFFOLK COUNTY EXECUTIVE

CHRISTINE MALAFI
COUNTY ATTORNEY

DEPARTMENT OF LAW

ADDRESS ALL COMMUNICATIONS
IN THIS MATTER TO:

March 10, 2005

Office of the Secretary
U.S. Nuclear Regulatory Commission
Sixteenth Floor, One White Flint North
11555 Rockville Pike
Rockville, MD 20852
Attn: Rulemakings and Adjudication Staff

Re: Dominion Nuclear Connecticut, Inc.
(Millstone Nuclear Power Station, Units 2 &3)
Docket Nos.: 50-336 & 50-423
Reply and Supporting Documents

Honorable Sir/Madam:

Please accept for filing the enclosed Reply and Supporting Documents, submitted on behalf of the County of Suffolk, State of New York. An original and two copies are enclosed. The Affidavit of Service is attached at the back of the Reply.

Thank you for your attention to this matter.

Very truly yours,

CHRISTINE MALAFI
Suffolk County Attorney

By: Jennifer B. Kohn,
Assistant County Attorney

cc: Office of the Commission Appellate Adjudication, U.S.N.R.C.
Office of the Secretary Rulemakings & Adjudication Staff U.S.N.R.C.
David R. Lewis, Esq., Shaw Pittman LLP
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Template = SECY-035

SECY-02

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the matter of:

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station, Units 2 and 3)

REPLY

Docket Nos. 50-336, 50-423

Introduction

This reply is submitted in support of the Petition for Late Intervention of the County of Suffolk of the State of New York. The Nuclear Regulatory Commission's regulations require that consideration of a petition for late intervention is based upon a balancing of the eight (8) factors specified in 10 C.F.R. §2.309(c)(1). The NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York, dated February 28, 2005 (Hereinafter, "Staff Answer") admits that the County has satisfied five (5) of the eight (8) factors.

Standing; Nature Of The County's Right To Be Made A Party; Nature Of The County's Interest

The factors in §2.309(c)(1) related to standing include the nature of the petitioner's right to be made a party and the petitioner's property, financial or other interest in the proceeding[1]. These factors weigh heavily in favor of the County. The NRC Staff also concludes that these two factors support the County's request. Staff Answer at 6. For this reason, the Staff does not oppose the County's standing to

[1] 10 C.F.R. §§2.309(c)(ii) and (iii).

intervene in this matter. *Id.* It is indisputable that most, if not all of the County lies within the Millstone 10 and 50-mile emergency planning zones, that the County would be a primary provider and coordinator of emergency and public health services in the event of an emergency and also that many Suffolk County residents, workers and or tourists would be affected by an emergency.

Furthermore, in license renewal proceedings, there is a "proximity presumption." Persons who live, work or otherwise have contact with the area around the reactor have standing to intervene; a local government entity may similarly be granted standing based on proximity. *Power Authority of the State of New York (James Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3)*, CLI 00-22, 52 NRC 266, 294-5, 2000 NRC LEXIS 134 (N.R.C. 2000) (Organizations alleging safety and health impacts upon members who live five and one-half (5 ½) miles from Power Plant, as well as employees at the Plant, were held to have standing;[2] *Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3&4)*, 10 N.R.C. 183, 1979 NRC LEXIS 52, (ASLB 1979) (Residence within 15 miles from the Generating Station and allegations of health hazard and recreational impairment were sufficient to grant standing; petition for intervention, filed more than one (1) year after expiration of the intervention period, was granted.) In addition, the Appeal Board has held, as follows, that residence within 16 miles is sufficient to establish the interest of a petitioner who raises safety questions:

> The Appeal Board said that "close proximity has always been deemed to be enough, standing alone, to establish the requisite interest," and "the question of whether [Petitioner's] concerns are justified must be left for

[2] The *James Fitzpatrick* decision cites to *Vermont Yankee*, CLI-00-20, 52 NRC at _ , slip op. at 4-5; *Oyster Creek*, CLI-00-6, 51 NRC at 202-03; *Monticello*, CLI-00-14, 52 NRC at 47, three cases in which organizations were granted standing based on members who lived or were quite active close to the site.

> consideration when the merits of the controversy are reached."

Turkey Point, *Id.*, 1979 NRC LEXIS at *16, quoting *Virginia Electric Power Company (North Anna Power Station, Units 1 and 2)*, ALAB-146, 6 AEC 631, 634 (1973). Likewise, the County's close proximity to Millstone, supports its claim of standing and the County's claims should be determined on the merits. The NRC Staff has also concluded that the proximity presumption applies to the County's standing. Staff Answer at 6.

Moreover, no party has disputed that the County is charged by law with protecting the health and safety of the people of Suffolk County. The County has an interest in this licensing proceeding by virtue of such responsibilities. In *James Fitzpatrick*, *supra*, the N.R.C. granted intervention status to two local school districts and participant status to the County[3] where the facility was located, reasoning that there was a benefit to participation by interested local governments:

> As we indicated in Nine Mile Point, CLI-99-30, 50 NRC at 344, "the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc."

52 N.R.C. 266, 2000 NRC LEXIS 134 at *25.

Also, 42 U.S.C. §2239(a)(1) provides that:

> In any proceeding under this Act [42 USCS §§ 2011 et seq.], for the granting, suspending, revoking, or amending of any license or construction permit, ... the Commission shall grant a hearing upon the request of <u>any person whose interest may be affected by the proceeding</u>, and shall admit any such person as a party to such proceeding. (Emphasis added.)

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[3] In <u>Fitzpatrick</u>, the County did not seek intervention status.

The County certainly has an interest that would be affected by the proceeding.

The breadth and strength of the County's interest is distinguishable from that of Connecticut Coaltion against Millstone ("CCAM"), a citizen's group, whose petition to intervene was recently denied. The NRC has recognized that a County's interest is broader than that of private individuals. *Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant),* C.L.I. 75-4, 1 N.R.C. 273, 1975 NRC LEXIS 107 at *6 (N.R.C. 1975). Thus, the factors listed in §2.309(c)(1)(ii) and (iii) are compelling reasons why the County's petition for late intervention should be granted.

Protection Of Public Health And Safety In Suffolk County;/Other Means Whereby The County's Interest Could Be Represented/ Whether The Interest Will Be Represented By The Other Parties

As the N.R.C. Staff admits, the factors specified in 10 C.F.R. §2.309(c)(1) (v) and (vi) are satisfied by the County's papers. Staff Answer at 8. The County has demonstrated that there are no other parties and other means whereby the County's interest in protecting public health, safety and the environment will be protected. The real parties in interest here are the citizens who deserve to be protected, should an emergency arise. Suffolk County and its elected officials represent these people, who deserve a hearing, and who are not represented by any existing parties.

No intervenors have been admitted to this proceeding – the only parties are the license applicant and the NRC staff. The County's interest in this matter is protecting the public health and safety of its residents. This interest cannot adequately be represented by the NRC staff or the applicant. It has been held that:

> The annals of NRC adjudications reflect that the position taken by staff on a specific safety or environmental issue

> (in the fulfillment of its role as the protector of the general public interest) often is at odds with the views espoused by an intervenor seeking to vindicate either its personal interest or its independent perception respecting where the public interest lies. Indeed, it was doubtless in recognition of the potential for such divergence that the Congress elected to provide hearing rights to private citizens and organizations in Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239.

Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), 18 N.R.C. 1404, 1983 NRC LEXIS 2 at *7 (N.R.C. 1983).

In *West Valley, supra*, 1 N.R.C. 273, the Commission granted a County's petition for late intervention, recognizing the importance of allowing representation by County government based on its broad interests. *See also*, Chairman Rosenthal's Dissent in *Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and2)*, 2 NRC 631, 1979 NRC LEXIS 29, *34 (A.S.L.App. Bd. 1975), where, in discussing *West Valley*, the Dissent noted that to have excluded the County from that proceeding:

> would have had the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act.

Similarly, in the instant matter, the County is the representative of the people of Suffolk County and its concerns regarding public health and safety go to the core reason for regulation of nuclear power plants. In, short, as the NRC Staff concluded,[4] there are no other means whereby the County's interest will be protected and no other parties to represent that interest.

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[4] Staff Answer at ___.

Possible Effect of any Order

The NRC Staff also admitted that the criteria specified in 10 C.F.R. §2.309(c)(1)(iv), the possible effect of any order on the petitioner's interest, is satisfied by the County's application. NRC Staff Answer at 6-7. This factor is related to whether the NRC, Atomic Safety and Licensing Board, as the administrative tribunal, has the ability and jurisdiction to grant relief to the County. The County's requested relief is denial of the license renewal until adequate consideration of the issues raised, and the NRC absolutely has the authority to grant this relief.

The Dominion Answer contends that an order denying the application for renewal would not affect the County's interest, because the renewal does not impact Millstone's current licensing. Nonetheless, an order denying the renewal until the deficiencies are corrected would have a great impact on future public health and safety (and would, perhaps, push the applicant to examine the issue now during the current license period). Thus, the County's interest would be affected by an order. Note that Dominion's position does not address the merits of the risks and safety issues raised by the County, or offer to correct the deficiencies now during the current license period. Dominion seeks to continue operation through the license renewal periods with a deficient plan.

Good Cause/Prejudice to the Applicant

One of the listed factors in 10 C.F.R. §2.309(c)(1) is that the petitioner should show good cause for the failure to file on time. The County contends that good cause for late intervention has been demonstrated in its papers. Upon information and belief, the

N.R.C. and the license applicant gave no actual notice to the County. Upon information and belief, any petition based on the actual notice received would have been untimely.

The parties have asserted that Federal Register notice is deemed to be constructive notice. Although Federal Register notice may be sufficient in some instances, there are many other instances where Federal Register notice is deemed to be insufficient by law (which exception is recognized by 44 U.S.C. §1508). Modern concepts of due process often require actual notice. For example, under N.R.C. regulations, certain parties are entitled to actual notice of these proceedings; this requirement is a recognition that constructive notice is not effective as actual notice in many instances. Suffolk County is a neighboring municipality within the 10 and 50-mile emergency zones. That fact alone is a mitigating factor and a reason why its lateness should be excused, particularly where no license expiration or interruption of electric service is imminent.

Furthermore, "good cause" is only one of the factors cited in 10 C.F.R. §2.309(c)(1). **Even if, arguendo, good cause has not been shown, a late petition to intervene may nevertheless be granted upon a strong showing of the other factors required for late filing.** *Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Company)*, 58 N..R.C. 372, 2003 NRC LEXIS 204 at *12 (AS..L.B. Panel 2003), Staff Answer at 5. In other words, while good cause is a factor to be considered, its absence is not fatal. In *Pacific Gas And Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, 37 N.R.C. 433, 1993 NRC LEXIS 22, *3 (ASLB 1993), the Atomic Safety and Licensing Board held that:

> Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted. **But the good cause factor is not to be given**

> **controlling weight; all of them must be considered.** Indeed, in applying these factors, a Licensing Board has "broad discretion in the circumstances of individual cases." (Footnotes omitted. Emphasis added.)

(Quoting *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 N.R.C. 1041 (1982)).

This is a well-established doctrine. In *West Valley, supra*, 1975 NRC LEXIS at *4, the N.R.C. held that a Board has broad discretion in determining whether a non-timely intervention petition should be granted; in exercising that discretion the Board should look not only to the reason for the tardiness, but, also to the other factors listed in the relevant regulation. In *West Valley*, Petitioner Erie County's application for late intervention was granted, even though no good cause for lateness had been shown; the application was nine (9) months late.

Furthermore, In *Jamesport Nuclear, supra*, 2 NRC 631, the Dissent by Chairman Rosenthal, concluded that in considering a late intervention petition and deciding the "good cause" question, the Atomic Safety and Licensing Appeal Board may **not** confine itself to a consideration of whether the petitioner has advanced an adequate excuse for being late. According to then-Chairman Rosenthal, **even if the lateness is entirely unjustified, the Board must nonetheless look at the other factors spelled out in the regulation** (citing *West Valley, supra*, and referencing *Virgiia Electric and Power Co. (North Anna Station, Units 1 and 2)*, NRCI-75-9 395 (September 18, 1975). Otherwise, there would be no point to spelling out the other factors in the regulation. Chairman Rosenthal stated that:

> [I]n passing upon a late petition, we are under a **Commission-imposed duty** to take into account "[t]he

> nature of the petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding." ... supra. The message which this command imparts to me is that a late petition is entitled to some greater measure of solicitude if its sponsors have a clearly cognizable interest than if the claim of standing rests upon a much shakier foundation.
>
> * * *
>
> The *West Valley* petition was that of a county, seeking to advance its asserted (clearly cognizable) interest in the protection of the health and safety of the citizens of the county. To have excluded it from the proceeding would have had the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act. ... When that case was before us, I repeatedly emphasized this consideration in support of my minority view that, notwithstanding the lack of a good excuse for the tardiness, the petition should have been granted on the basis of the four Section 2.714(a) factors. NRCI-75/3 at 217, 219-22, 225. And the Commission appears to have rested its own determination to allow intervention -- made "with some reluctance" -- in part upon the fact that the petitioner county was representing governmental interests "presumably broader" than those of the private intervenors in the case. NRCI-75/4R at 275. But for that fact, the Commission very possibly would have reached a quite different result.

1975 NRC LEXIS at *35.

While one possible reason for application of a good cause requirement is administrative efficiency, one of the Congressional purposes for regulation of nuclear facilities is protection of public health and safety. Congress made protection of public health and safety an express purpose of the laws providing for development and use of nuclear energy. 42 U.S.C. §2012(d) and (e), 42 U.S.C. §2013(d). Furthermore, Congress expressly found that the necessity for protection from interstate damage from operation of nuclear facilities placed these facilities within interstate commerce. 42 U.S.C. §2012(f). These purposes far outweigh the need for expediting the instant license renewal

proceeding, especially where, as here, the licenses to be renewed do not even expire for 10 and 20 years, respectively.

Chairman Rosenthal's Dissent, in *Jamesport Nuclear*, at Note 16, stated that:

> In unmistakeable terms, the Act gives effect to the legislative concern that the public health and safety not be endangered by the operation of neclear facilities. See e.g. Section 104d., 42 U.S.C. 2134(d).

Nowhere in the answering papers submitted by either Dominion or the NRC Staff, is there a detailed discussion of the merits of the public safety issues raised by the County. The goal of the licensing proceeding is to protect public safety, as well as facilitate license applications. This factor, when balanced against the County's lack of timeliness, supports the County's application for late intervention.

Delay in the Proceeding: The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding.

The extent to which the petitioner's participation will inappropriately broaden the issues or delay the proceeding, a criteria listed in 10 C.F.R. §2.309(c)(1)(vii), is related to the requirement of timeliness. This factor seeks to address prejudice to the parties.

No party will be prejudiced by a delay to give due consideration to public safety. The applicant will most certainly not experience prejudice or harm. The license renewal application for Millstone is premature to begin with, since the current operating licenses do not expire for periods of 10 and 20 years, until July 2015 for Unit 2 and November 2025 for Unit 3. **No renewal is necessary until those licenses expire ten (10) and twenty (20) years from now, respectively. There would be no unfairness to the**

applicant to extend the license renewal process to consider important health and safety issues.

Furthermore, According to the schedule on the Nuclear Regulatory Commission site, a final Commission decision on this license renewal is not expected until 7/22/06. Surely the schedule would include time to consider important health and safety issues, with no interruption in electric service.

Dominion argues that these issues should not be considered because consideration would cost Dominion resources (i.e. money). This is not a valid reason to deny the County's Petition. Also, as to use of Commission resources, those resources should be dedicated to protecting public health and safety as required by the statute, in addition to expediting the proceeding on Dominion's behalf.

Moreover, these issues should be considered and the problems rectified whether or not the County intervenes in the proceeding. Suffolk County will use all means at its disposal to have this correction of deficiencies occur. Thus, the cost to Dominion and any cost to the N.R.C. will be a factor regardless of whether this petition is granted.

The United States Court of Appeals, Tenth Circuit, has held that:

> The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner.

Utah Association of Counties v. Clinton, 255 F.3d 1246, 1250 (10th Cir. 2001), quoting Sierra Club v. Espy, 18 F.3d at 1205. Similar reasoning should be applied here, where there would be absolutely no prejudice to the license applicant.

Broadening of the Issues

It has also been suggested that granting the County intervenor status would inappropriately broaden the issues, because the issues raised are new. If 10 C.F.R. §2.309(c)(1)((vii) were always interpreted in the negative way that Dominion suggests, no potential intervenor that raises valid new contentions would ever be granted intervention status. The County is raising valid contentions and should be granted a hearing. The issue here is not just whether the proceeding would be delayed, but whether there would be undue delay and broadening of the issues. In view of the circumstances, which include the importance of public health and safety, as well as the timetable for expiration of the current licenses, the County's petition should be granted.

Dominion also suggests that the County's intervenor status and contentions should be rejected because the intervenor status of Connecticut Coalition Against Millstone was rejected. As shown herein, the County's interest is broader and more substantial than Millstone, and its contentions are different. The County represents all of the residents and visitors in the County, and, in addition, the County is a primary coordinator and provider of emergency services. These two intervention applications are distinguishable and the County's Petition should be granted.

Development of a Sound Record

The last factor to be considered on a petition for late intervention is whether the petitioner's participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. §2.309(c)(1)(viii). The County's Petition meets the criteria, because the Petition shows that the County may reasonably be expected to assist in developing a

sound record. The County identifies issues to be raised with particularity. For example, the County's documents raises issues related to evacuation and other emergency issues, citing specific regulations which have not been complied with and other deficiencies in the emergency plans. These specific issues are not discussed in detail in Dominion's papers. Attached hereto are additional comments provided by Suffolk County Executive Steve Levy concerning the Generic Environmental Impact Statement prepared for the Millstone license renewal. These comments amplify the County's concerns.

The County's Petition is supported by specific citations to expert reports and opinions. For example, the Petition cites to reports authored by James Lee Witt, Associates, LLC, prepared on behalf of the New York State Power Authority.[5] Mr. Witt, the Chairman and CEO, is the former Director of the Federal Emergency Management Agency, and is undoubtedly an expert on emergency response generally and on the subject of Millstone radiological emergency plans. The County also cites to a report responding to the Witt report, prepared by FEMA.[6] Moreover, the County cites to testimony by Jim Wells, Director, Natural Resources and Environment, which testimony was contained in a U.S. General Accounting Office report.[7]

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[5] James Lee Witt Associates, LLC, *Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone.*

[6] *FEMA Reviews of the State and County Radiological Emergency Response Plans for the Indian Point Energey Center and Comments on the RFP Program, Planning and Exercise Issues Raised by Others*, February 21, 2003, Attachment B, Section 2, General FEMA/RAC Comments on the Draft NY State Report.

[7] "Nuclear Regulation, Emergency Preparedness Issues at the Indian Point 2 Nuclear Power Plant," Highlights of GAO-03-58, Testimony by Jim Wells, Director, Natural Resources and Environment, before the Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, House of Representatives, expected delivery date March 10, 2003, p.4.

The County also cites to its own experts, including Joseph Williams, Commissioner of Suffolk County Fire, Rescue and Emergency Services and Alexander M. Santino, head of the County's Office of Pollution Control. The County's papers are specific, detailed and supported by expert testimony and reports.

The County has many other experts at its disposal relative to the questions at hand, by virtue of its governmental functions. The County has providers of police, emergency and rescue services, health services, physicians, scientists, engineers, transportation experts and planners. The County conducts extensive environmental testing and ground and drinking water monitoring. The County is uniquely qualified to provide updated information about population, tourist attractions, roadways, health care providers, police services, farms and farm products, drinking water data and other information to address the health and safety needs of residents.

In *West Valley, supra,* 1 N.R.C. 273, the Commission granted intervention status to a County. On the question of developing a sound record, the Commission noted that while the record was inconclusive, the County had conducted air and water quality monitoring activities and was committed to conducting technical studies. Partly on this basis, the County was admitted as an intervenor. Similarly, in the present matter, the County has many pertinent documents in its files and experts who would testify on the relevant questions. The County's Petition specifically referenced the County's role in drinking and ground water quality monitoring. These capabilities are sufficient to support the County's ability to assist in developing a sound record.

Furthermore, in *Perry Nuclear, supra*, 18 N.R.C. 1404, it was held that an intervenor which has demonstrated its ability to contribute to the development of the

record on a particular contention need not also promise to provide expert witnesses or outline their testimony. For example, in *Perry*, it was sufficient that the proposed intervenor introduced evidence suggestive of a problem. The decision noted that the there was a divergence of opinion which the intervenor could help develop. In the present matter, the County's ability to provide the proffered evidence is indisputable, and similarly, there is a divergence of opinion.

Simply put, the instant Petition should be granted to amplify the safety issues and protect the people of Suffolk County. The Atomic Safety and Licensing Board should recognize that the County has raised valid contentions and has presented sufficient expert documentation for this stage of the proceedings. The County's allegations were specific, not conclusory, and the Petition for Late Intervention should be granted.

The County raised admissible contentions

This issue has already been discussed by the County in its Petition. Briefly, 10 CFR §50.47(a)(1), "Emergency Plans" (in the section on "Domestic Licensing of Production and Utilization Facilities, Standards for Licenses and Construction Permits") provides that:

> ... no initial operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is a **reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.**

Furthermore, the same regulation provides that no such finding is necessary for issuance of a renewed nuclear power reactor operating license. Under the cited regulation, the license renewal process assumes that the current licensing basis of currently operating plants provides an acceptable level of safety, with the possible

exception of the detrimental effects of aging on certain systems and components and possibly a few other issues.

The evidence presented by Suffolk County shows that under Millstone's current emergency and evacuation plans, there can be **no reasonable assurance** that adequate protective measures will be taken in the event of a radiological emergency. Thus, this assumption is an inadequate basis for the current license renewal proceeding. The County's assertion is particularly true where, as here, the renewed licenses for Millstone Units 2 and 3 will not expire until 2035 and 2045.

The "assumption" provided by 10 CFR §50.47(a)(1) has clearly been shown to be invalid and has been rebutted by the County's papers. No contrary evidence has been raised by the opposing party.

Although under 10 C.F.R. §50.47(a)(1), the issue of off-site emergency plans are usually considered in the context of initial licensing proceedings, the N.R.C. is authorized to grant an exception to the application of a specified Commission rule or regulation, based on special circumstances with respect to the subject matter of the proceeding. 10 C.F.R. §2.335(b) provides that.

> The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.

Id. The goal of 10 C.F.R. §50.47(a)(1) is to provide for public safety during a radiological emergency, while expediting license renewal proceedings by excluding specific issues relating to emergency planning The proceedings are to be expedited based upon an **assumption** that safety is provided. Minimization of harm to the public

from radiation may be inferred from satisfaction of the sixteen emergency planning standards contained in 10 C.F.R. §50.47(b) and other relevant agency criteria. *Commonwealth of Massachusetts v. United States Nuclear Regulatory Commission*, 924 F.2d 311 (D.C. Cir. 1991). The assumption of safety is based on compliance with the regulations. The County's papers show that these standards have not been met. The expected population growth (permanent and seasonal) and the other factors documented in the County's papers constitute special circumstances; these circumstances eliminate any assumption that public safety will be protected with the existing outdated plans. These special circumstances are sufficient for a waiver of 10 C.F.R. §50.47(a)(1), insofar as it pertains to when the off-site emergency issues may be considered.

An Affidavit submitted pursuant to 10 C.F.R. §2.335(b) is attached. This Affidavit identifies the aspects of the proceeding for which the waiver is requested and shows why the rule does not serve the purposes for which the regulation was adopted. The affidavit states with particularity the special circumstances alleged to justify the waiver or exception requested.

Furthermore, the County has asserted that the 10-mile emergency planning zone should be extended under the particular circumstances presented here. Under 10 CFR §50.47(c)(2), the ten (10) mile regulatory boundary for the emergency protection zone is only a guideline – the exact size and configuration is to be determined in relation to local factors such as demography, topography, land characteristics and access routes. The ten mile zone should be expanded for purposes of emergency planning. No waiver is needed for this purpose, insofar as the regulation already allows for adjustments of the zone boundaries due to local circumstances.

Conclusion

WHEREFORE, in the interests of justice, public health and safety, Petitioner County of Suffolk requests that it be permitted to intervene in the above-captioned proceeding and that it be granted a hearing and opportunity to raise the issues stated in the Petition. More specifically, the County of Suffolk requests that:

1) Pursuant to 10 CFR §50.47, an evacuation/emergency plan be funded and prepared for the Town of Southold and other relevant areas of Suffolk County;

2) The existing emergency/evacuation plans be updated by the Applicant to include current information.

3) That increased coordination between the Applicant and the County of Suffolk be required on a continuing basis.

DATED: Hauppauge, New York
March 10, 2005

Respectfully submitted,

CHRISTINE MALAFI
Suffolk County Attorney
Attorney for Petitioner
100 Veterans Memorial Highway
Hauppauge, New York 11788
(631) 853-4049

By: Jennifer B. Kohn
Jennifer B. Kohn
Assistant County Attorney

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the matter of:

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station, Units 2 and 3)

AFFIDAVIT

Docket Nos. 50-336, 50-423

STATE OF NEW YORK)
: ss.:
COUNTY OF SUFFOLK)

Jennifer B. Kohn, being duly sworn, deposes and says that:

1. I am an Assistant County Attorney in the Office of Christine Malafi, Suffolk County Attorney, who represents the Petitioner County of Suffolk, State of New York, in this proceeding. I am admitted to practice in the State of New York.

2. I am familiar with the facts and circumstances in the instant matter based on review of records and filed maintained by the County of Suffolk, discussions with my client and reports made available to the County.

3. This Affidavit is submitted in support of the Petition for Late Intervention and in support of the County's request for a waiver/exception pursuant to 10 C.F.R. §10 C.F.R. §2.335(b). The County seeks a waiver of 10 C.F.R. §50.47(a)(1), which states that:

> (a)(1) Except as provided in paragraph (d) of this section, no initial operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

No finding under this section is necessary for issuance of a renewed nuclear power reactor operating license.

A waiver or exception to the last sentence, in boldface, is sought.

4. The goal of 10 C.F.R. §50.47(a)(1) is to protect the public from radiation, while expediting license renewal proceedings. The proceedings are to be expedited based upon an assumption that safety is provided based on the current license and operating procedures.

5. Minimization of harm to the public from radiation is inferred from satisfaction of the sixteen emergency planning standards contained in 10 C.F.R. §50.47(b) and other relevant agency criteria. *Commonwealth of Massachusetts v. United States Nuclear Regulatory Commission*, 924 F.2d 311 (D.C. Cir. 1991). Thus, the assumption of safety is based on compliance with the emergency planning regulations.

6. The County's papers show that these standards have not been met. The current and expected population growth in permanent residents, the lack of a sufficient road network to carry persons in the event of an evacuation, and other reasons why the current emergency plans are inadequate are documented in the County's Petition for Late Intervention. The County's Petition also contains documentation concerning outdated information in the current Millstone emergency plans and other deficiencies thereof. The County's papers demonstrate that the standards in 10 C.F.R. §50.47 have not been met under the current license. For a more detailed discussion thereof, please refer to the Petition.

7. The deficiencies in the current emergency plans constitute special circumstances. These circumstances eliminate any assumption that public safety will be protected with the existing outdated plans.

8. Renewal of the Millstone Operating Units 2 and 3 licenses without consideration of these issues will only exacerbate any deficiencies and substantially prolong the applicant's ability to operate without adequate assurance of public safety. The population of Suffolk County will increase, not decrease, thereby making evacuation even more difficult.

9. These special circumstances are sufficient for a waiver of 10 C.F.R. §50.47(a)(1), insofar as it pertains to when the off-site emergency issues may be considered. The purpose of the rule – protection of public safety – will not be served if the issues raised by Suffolk County are not considered prior to license renewal.

Wherefore, it is respectfully requested that:

1) A waiver of 10 C.F.R. §50.47(a)(1) be granted, pursuant to 10 C.F.R. §50.47(a)(1); and

2) The relief requested by the Petition for Late Intervention be granted.

JENNIFER B. KOHN

Sworn to before me this 10th)
day of March, 2005.)

Notary Public

MARILYN A. ROMPEL
Notary Public, State of New York
No. 01RO4833126
Qualified in Suffolk County
Commission Expires Feb. 9, 2007

COUNTY OF SUFFOLK

OFFICE OF THE COUNTY EXECUTIVE

Steve Levy
COUNTY EXECUTIVE

Kevin S. Law
Chief Deputy County Executive

Michael J. Deering
Director of Environmental Affairs

February 23, 2005

Chief, Rules Review and Directives Branch
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, D.C. 20555-0001

Re: Millstone Power Station, Units 2 and 3, NUREG-1437, Supplement 22

Dear Chief:

A draft supplemental impact statement (SEIS) has been submitted to the Nuclear Regulatory Commission (NRC) by Dominion Nuclear Connecticut, Incorporated concerning the application to renew the operating license for Millstone Power Station, Units 2 and 3 for an additional 20 years. The County of Suffolk finds the document overly narrow in scope, and lacking detail with regard to the issues of concern to the 1.4 million residents of our county. It appears that public notifications to areas in Suffolk County within the 10 and 50 mile emergency planning zones were neglected; that there is no need to rush operating license renewal for the plants decades prior to their license expiration; and, that radiological emergency evacuation plans for Suffolk County were not addressed.

I was dismayed that a public hearing was not held in Suffolk County concerning the renewal application and that the Commission failed to contact local municipalities and environmental groups on eastern Long Island (Supplement 22, Appendix D, Organizations Contacted). An analysis of major points of view concerning significant problems and objections raised by federal, state or local agencies is required by 10 CFR 51.71 in a draft environmental impact statement. In accordance with NRC policy regarding public involvement in reactor license renewal and as Suffolk County residents may be adversely affected by the renewal, we request that a public hearing be held in Suffolk County where the NRC and Dominion can respond to these issues.

Suffolk County views the applications to renew Millstone's operating licenses as premature at this time. The current operating licenses do not expire for periods of 10 and 20 years, until July 2015 for Unit 2 and November 2025 for Unit 3. With the advance of science in the next two decades, it is likely that alternative cleaner energy sources and/or conservation will negate the need for license renewal for outmoded and hazardous nuclear generating plants. It is clearly self-serving for the Commission to conclude that environmental impacts for future generating and conservation alternatives would be greater than those operating Millstone (Supplement 22, pages *xix* and 8-51). The *NRC Fact Sheet on Reactor License Renewal* states that the license renewal

procedure is expected to take no more than 30 months. Why then is there a push to renew operating licenses decades before it is necessary to perform such a review?

Suffolk County is an important stakeholder in the application to renew the operating licenses because the plants are located within 10 miles NNE of the tip of Orient Point and seven miles WNW of Fishers Island in Suffolk County. Fishers Island and a portion of the Plum Island Animal Disease Laboratory, now operated by the Department of Homeland Security, are located within the Millstone Power Station's primary 10 mile Emergency Planning Zone (EPZ). In the event of an emergency, Fishers Island's residents are to be evacuated to either New London or Stonington Harbor and be bused north to Windham, CT. What is the fate of researchers and operations at Plum Island in the event of a severe accident at Millstone?

A 50-mile Ingestion Planning Zone is identified in the State of Connecticut's Radiological Emergency Plan in the event that a nuclear plant release is carried beyond 10 miles. This EPZ encompasses virtually all of Suffolk County east of the William Floyd Parkway in Brookhaven Township. Although ingestion suggests an assessment of food and drinking water, a release carried southward to Suffolk County is likely require additional public protective actions, up to and including evacuation. This had been deemed infeasible during the public discourse concerning the Shoreham nuclear plant due to the lack of adequate transportation infrastructure. Since that era, no new major east-west transportation facilities have been constructed, and there has been a significant increase in the population of eastern Suffolk County. Evacuation of eastern Suffolk County remains an infeasible scenario, a fact we consider to be a major factor impeding renewal of Millstone's operating licenses.

NRC regulations limit commercial power reactor licenses to 40 years, but also permit such licenses to be renewed where appropriate. In the case of Millstone, however, renewal for 20 years is not an appropriate public policy decision. The NRC recognizes that some structures and components of nuclear plants may have been engineered on the basis of an expected 40-year service life. Suffolk County is not reassured by the assumption made by the NRC in NUREG-1437, Vol.1, section 5.3.1.

> *"In assessing the impact on the environment from postulated accidents during the license renewal period, the assumption has been made that the license renewal process will ensure that aging effects on the plant are controlled and that the probability of any radioactive releases from accidents will not increase over the license renewal period."*

This does not appear to be a credible position in light of Dominion's statement (Supplement 22, page *xviii*) that it *"did not identify any major plant refurbishment activities or modifications as necessary to support the continued operation of Millstone for the license renewal period."* The county has difficulty reconciling the two positions that, 1) the NRC will "control" the effects of an aging plant forty years into the future, and yet 2) Dominion foresees no major maintenance activity as necessary for safe operation through the year 2045.

Other significant issues that are not adequately addressed in the SEIS include:

- The cumulative impact of routine operations to aquatic resources, although recognized as significant for winter flounder (Supplement 22, page 4-56), are not adequately addressed or mitigated by the SEIS.
- In the event of a severe accident at Millstone the probability of weighted consequences of a release to groundwater is stated to be small (Supplement 22, page 5-4). However, there is a potential for radioactive fallout directly onto the surface water bodies that serve as the

Fishers Island water supply. Radiological monitoring and the provision of an alternative public water supply for these Suffolk County residents are not addressed in the document.

- Dominion estimates that the dose to the population within 50 miles of the Millstone site from severe accidents to be between 12.8 and 17.4 person-rem. What is the expected dose to county residents living on Fishers Island and the North Fork that are in considerably closer proximity and what health risks are posed by this exposure?

Thank you for the opportunity to comment on this proposal and we look forward to hearing your response at a forum held in Suffolk County.

Sincerely,

Steve Levy

Steve Levy
Suffolk County Executive

Cc: Diane Screnci, Public Affairs Officer, United States Nuclear Regulatory Commission, 475 Allendale Road, King of Prussia. Pennsylvania 19406-1415
Kevin Law, Chief Deputy County Executive and General Counsel
Paul Sabatino II, Chief Deputy County Executive
Christine Malafi, County Attorney
Lynne Bizzarro, Deputy County Attorney
Michael Deering, Director of Environmental Affairs
Brian Harper, M.D. Commissioner, Department of Health
Vito Minei, Director, Division of Environmental Quality

STATE OF NEW YORK)
)SS:
COUNTY OF SUFFOLK)

The undersigned, being duly sworn, deposes and says: she is over the age of 18 years and associated with the Suffolk County Attorney. That on the 10th day of March, 2005 she served the within REPLY and AFFIDAVIT upon those set forth herein by depositing a true copy thereof enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Kathleen A. Dolce

Kathleen A. Dolce

Sworn to before me this
10th day of March, 2005

Kirk R. Cronk

Notary Public

KIRK R. CRONK
Notary Public, State Of New York
No.01CR6096040
Qualified In Suffolk County
Commission Expires July 21, 20 07

Office of the Secretary
U.S. Nuclear Regulatory Commission
Sixteenth Floor, One White Flint North, 11555 Rockville Pike
Rockville, MD 20852
Attention: Rulemakings and Adjudications Staff

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