

March 18, 2005 (5:16pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

March 18, 2005

Before the Atomic Safety and Licensing Board

In the Matter of)

Dominion Nuclear Connecticut, Inc.)

(Millstone Nuclear Power Station,)
Units 2 and 3))

) Docket Nos. 50-336 - LR
) 50-423 - LR
)
)

**DOMINION NUCLEAR CONNECTICUT'S RESPONSE TO SUFFOLK COUNTY'S
REQUEST FOR WAIVER OF COMMISSION REGULATIONS**

I. INTRODUCTION

Petitioner Suffolk County ("the County") filed on March 10, 2005 a document captioned "Reply" in which it responded to the answers by Licensee Dominion Nuclear Connecticut, Inc. ("Dominion")¹ and the NRC Staff² on February 28, 2005, opposing the County's February 1, 2005 "Petition for Late Intervention of the County of Suffolk of the State of New York" ("Petition"). The Reply contains, *inter alia*, a request under 10 C.F.R. § 2.335(b)³ that the Atomic Safety and Licensing Board ("Board") waive application of the bar in 10 C.F.R.

¹ Dominion Nuclear Connecticut's Answer to the Petition for Late Intervention of the County of Suffolk, dated February 28, 2005 ("Dominion's Answer").

² NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York, dated February 28, 2005 ("Staff's Answer").

³ 10 C.F.R. § 2.335(b) reads: "A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. 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. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise."

§50.47(a)(1) against consideration of the adequacy of emergency preparedness plans in license renewal proceedings. Reply at 16-17.⁴ The County's request is untimely and without basis, and should be rejected.

II. DISCUSSION

A. The County's Reply and Petition of Waiver Are Inexcusably Untimely

Dominion is providing this response pursuant to 10 C.F.R. § 2.335(b) to answer the arguments made in the County's petition of waiver. Before reaching those arguments, however, it is important to note that the County has again failed to abide by the NRC procedural rules governing the timing of submissions. Such a failure, coming as it does on the heels of the County's untimely Petition, must not be overlooked.

Pursuant to 10 C.F.R. § 2.309(h)(2), the County should have filed its Reply to both Dominion's and the Staff's Answers seven days after service of those answers, or March 7, 2005. However, the County did not serve its Reply until March 10, 2005. The Reply is thus untimely, and the County has offered no justification or good cause for the delay. The Licensing Board has available to it a "spectrum of sanctions" to address an offending party's failure to follow NRC's adjudicatory procedures, including the refusal to consider such an untimely filing. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). Such a sanction appears appropriate here.

The County's disregard for NRC adjudicatory procedures does not end there. The purpose of replies to answers to intervention petitions in NRC proceedings is to allow petitioners to respond to arguments in the answers that might have been difficult to anticipate in the

⁴ 10 C.F.R. §50.47(a)(1) reads in relevant part: "... [N]o 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."

intervention petitions, not to raise new issues. See *Houston Lighting and Power Company* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979). Indeed, a reply "should be narrowly focused on" arguments raised in the answers. *Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). The County was aware at the time it filed its original Petition that the emergency preparedness contentions it sought to raise were barred by 10 C.F.R. §50.47(a)(1). A request to waive the application of that regulation should have been included with the Petition. The fact that the County raises this issue belatedly in its Reply, rather than in its initial Petition, requires that it address the late-filing factors enumerated in 10 C.F.R. § 2.309(c)(1) as they apply to its waiver petition. See *Louisiana Energy Serv., L.P.* (National Enrichment Facility), LBP-04-14 60 NRC 40, 58 (2004); see also *Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-24, 36 NRC 149, 154 (1992). Having failed to address these late-filing factors, the County's untimely request is vulnerable to being stricken and, on that basis alone, should be disregarded by the Board. 10 C.F.R. § 2.319 (e); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), LBP-81-34, 14 NRC 637, 676-78 (1981) (granting a motion to strike part of a response to a summary disposition motion where the response is improper).⁵

⁵ In the Reply, the County claims that no petition for a waiver of the Commission regulations is needed in support of its assertion that Millstone's 10-mile plume exposure pathway emergency planning zone ("EPZ") should be extended. Reply at 17. The County had argued in its Petition that an extended EPZ was needed because "the 10 mile zone may not adequately protect health and safety of County residents under some circumstances." Petition at 11. However, the Commission has ruled that the 10-mile EPZ may not be adjusted on safety grounds, but "only on the basis of straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987). Thus, if the County sought an adjustment of the EPZ due to safety considerations, it should have submitted a petition for waiver of 10 C.F.R. § 50.47(c)(2) (which sets the 10-mile EPZ boundary) and articulate the special circumstances why the rule should not apply. *Id.* at 395, n.19. The County has not done as such, thus its challenge to the Millstone EPZ must be rejected as an impermissible attack on Commission regulations. *Id.* at 395; 10 C.F.R. § 2.335(a).

Apart from the Reply's vulnerability to sanctions by the Board – such as a refusal to consider the County's Reply in its entirety due to its untimeliness, or the striking of the petition of waiver – the County's Reply adds nothing of substance to the original Petition⁶ and its only novel argument, the petition for waiver, is without merit.

B. The County's Petition of Waiver Fails to Meet the Necessary Criteria.

The County's request for a waiver of the provisions of 10 C.F.R. § 50.47(a)(1) is based on two arguments: (1) The sixteen emergency planning standards contained in 10 C.F.R. § 50.47(b) "have not been met" at Millstone; and (2) "[t]he expected population growth (permanent and seasonal) and other factors documented in the County's papers constitute special circumstances" which eliminate the assumption that public safety will be protected. Reply at 17.⁷ Even if these arguments were valid (which they are not), neither presents "special

⁶ A brief reference to two salient aspects of the County's Reply illustrates the point. First, the County does not seek to justify the late filing of its Petition other than by arguing (without any supporting authority) that the notice of the license renewal proceeding in the Federal Register was insufficient. The County also does not deny that it had actual notice of the proceeding for at least six months before filing its Petition, and does not attempt to explain its inaction during that period. Thus, there is no justification on the record for the County's tardiness.

The second noteworthy aspect of the Reply is that the County has not sought to improve its poor showing with respect to the other factors to be weighed in considering late petitions to intervene. For example, the County has made no showing that it has the ability to contribute to a sound record under 10 C.F.R. § 2.309(c)(viii). While the County may well be "qualified to provide updated information" on emergency planning issues and may have "many pertinent documents in its files and experts who would testify on the relevant questions," Reply at 14, the County's Reply still does not identify such "updated information," still lacks any specific indication of what these "pertinent documents" are, and still does not supply any summary of the testimony that its expert witnesses would furnish. In short, the Reply does nothing to bolster the County's original Petition.

⁷ The Reply is accompanied by an affidavit from Jennifer B. Kohn, an attorney in the employ of the County, that purports to satisfy the requirement in 10 C.F.R. § 2.335(b) that a request for waiver of a Commission regulation must be accompanied by a supporting affidavit. However, Ms. Kohn's affidavit utterly fails to comply with the requirements in the regulation. It merely repeats the arguments in the Reply, does not identify "the specific aspect or aspects of the subject matter of the [license renewal] proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted," and does not "state with particularity the special circumstances alleged to justify the waiver or exception requested." Moreover, nowhere does Ms. Kohn aver that she has any special expertise or knowledge of emergency preparedness matters, or that she is in possession of any facts that demonstrate that the purposes of the rule (which she does not discuss) would fail to be served by applying it in this instance. The absence of a proper affidavit that complies with the requirements of 10 C.F.R. § 2.335(b) places the question of whether to entertain the petition for a waiver entirely within the Board's discretion and merits its denial. See *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 1B, 2A, and 2B), LBP-76-16, 3 NRC 485, 495 (1976); see also

circumstances with respect to the subject matter of the particular proceeding . . . such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.”

The Commission has set a high burden that a petitioner must meet to show the existence of “special circumstances”. *First*, the petitioner must plead one or more facts “not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived.” *Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied*, CLI-89-03, 29 NRC 234; CLI-89-07, 29 NRC 395. *Second*, the special circumstances raised must “undercut the rationale for the rule sought to be waived.” *Id.* *Finally*, the petitioner must demonstrate that “a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived,” because it would be inconsistent with the Commission’s responsibilities “to spend time and resources on matters that are of no substantive regulatory significance.” *Id.* The Board must reject the County’s petition for a waiver of 10 C.F.R. § 50.47(a)(1) because its arguments fall way short of meeting the three criteria set by the Commission for granting such petitions.

Both of the arguments raised by the County were propounded during the comment period that preceded the approval of the license renewal regulations, and both were explicitly *rejected* by the Commission. The Statement of Considerations that accompanied the final rule on nuclear power plant license renewal addressed the emergency planning considerations that led to the issuance of 10 C.F.R. § 50.47(a)(1). The Commission noted that 10 C.F.R. § 50.54(q) requires

Florida Power and Light Co. (Turkey Point, Units 3 and 4), LBP-01-06, 53 NRC 138, 155 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 n.74 (1981).

that a nuclear power plant licensee “maintain in effect emergency preparedness plans that meet the standards in § 50.47(b) and the requirements in appendix E to 10 CFR part 50. The requirements of § 50.47 and appendix E are independent of the renewal of the operating license, and they will continue to apply during the license renewal term.” *Final Rule, Nuclear Power Plant License Renewal*, 56 F.R. 64,943, 64,966 (Dec. 13, 1991). After enumerating the various means through which it assures itself that a licensee continues to meet the standards in § 50.47(b) and the requirements in appendix E to 10 CFR part 50, the Commission concluded that its regulations

require the routine evaluation of the effectiveness of existing emergency preparedness plans against the 16 planning standards and the modification of emergency preparedness plans when the standards are not met. Through its standards and required exercises, the Commission ensures that existing plans are adequate through the life of any plant even in the face of changing demographics and other site-related factors. Thus, these drills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness in light of changes in site characteristics that may occur during the term of the existing operating license, such as transportation systems and demographics. There is no need for a licensing review of emergency planning issues in the context of license renewal.

Id. Accordingly, “[t]he Commission has amended 10 CFR 50.47 to clarify that no new finding of emergency preparedness will be made as part of a license renewal decision.” *Id.* at 64,967.

Significantly, the Commission considered and rejected claims identical to those raised by the County here:

The Commission received a number of comments from public interest groups contending that current emergency preparedness plans are not adequate and that periodic revisions to existing emergency preparedness plans and the execution of emergency plan exercises were generally considered inadequate to keep pace with changing demographics, land use and transportation patterns. One commenter raised the issue that the evacuation time estimates would need to be reviewed in terms of the changes in demography. The issue of concerning the potential inadequacy of the existing plans, exercises, or evaluation time estimates

to account for such changes does not involve matters limited to the renewal of operating licenses.

Id. In short, there is nothing "special" about the "special circumstances" alleged by the County. The same circumstances were raised by others, the Commission "carefully considered" them in formulating the license renewal rule, and the Commission explicitly rejected them. *Id.* The County's allegations thus provide no grounds for the waiver of the regulation.

The County's asserted "special circumstances" also fail to undercut the rationale behind §50.47(a)(1). As part of its effort to focus license renewal proceedings on age-related degradation issues, *Id.* at 64,946, the Commission concluded that no consideration of emergency planning issues was necessary because its emergency planning requirements would "provide reasonable assurance that an acceptable level of emergency preparedness exists at any operating reactor at any time in its operating lifetime." *Id.* at 64,966. The County claims it has rebutted the rationale behind § 50.47(a)(1) by putting forth evidence that under Millstone's current emergency preparedness arrangements, "there can be *no reasonable assurance* that adequate protective measures will be taken in the event of a radiological emergency." Reply at 16 (emphasis in original). Even if the claims advanced by the County were correct (which they are not), an asserted lack of reasonable assurance is insufficient to uphold a petition of waiver under 10 C.F.R. § 2.335(b). *Houston Lighting and Power* (South Texas Project, Units 1 and 2), LBP-83-49, 18 NRC 239, 240 (1983) (discussing the former § 2.758). Furthermore, the County must present "persuasive evidence" that the situation at Millstone is so different from that at other nuclear power plants that § 50.47(a)(1) would not serve the purposes for which it was adopted. *See id.* Both the County's Petition and its Reply fail to make any comparison between the alleged deficiencies in Millstone's emergency plan with those of other nuclear power facilities. Therefore, the County has failed to demonstrate that application of 10 C.F.R. § 50.47(a)(1) to the

Millstone license renewal proceeding would undercut the Commission's rationale for promulgating the regulation.

Finally, the County has failed to demonstrate that a waiver of the 10 C.F.R. § 50.47(a)(1) prohibition against consideration of emergency preparedness in license renewal proceedings is necessary to address a significant safety problem such that the Commission must devote time and resources to a resolution of the matter *now*, in *this* proceeding.⁸ Indeed, the County itself attributes little urgency to the matter: it argues that a Commission Order denying Millstone's license renewal "would, perhaps, push the applicant to examine the [emergency planning] issue now during the current license period." Reply at 6. Thus, the County merely hopes to prod Dominion into examining the alleged emergency planning deficiencies at some time over the next ten to twenty years (the remaining duration of the current licenses for Millstone Units 2 and 3, respectively). It is therefore hard to fathom what significant safety issues exist that warrant waiving application of 10 C.F.R. § 50.47(a)(1) to the Millstone license renewal proceeding. The County has failed to demonstrate that Commission action is necessary now and, consequently, its petition for a waiver must be rejected.

III. CONCLUSION

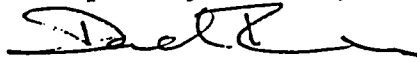
Part 54 centers the license renewal reviews on the most significant overall safety concern posed by extended power reactor operation – the detrimental effects of aging. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001). The Commission has determined that a license renewal proceeding is therefore not a

⁸ The County contradicts itself, first by stating that it has no other means by which it could pursue its interests in Millstone's emergency plan, Reply at 4-5, and then by stating "[emergency planning] 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." Reply at 11. If, as it contends, the County has other avenues to pursue its interests and, therefore, the NRC will have to deal with these emergency planning issues "regardless of whether [the County's] petition is granted," there is no reason for the Commission to expend time and resources on this issue in the license renewal proceeding.

forum "for a broad-based reassessment of all operational safety issues." *Id.* at 13. Emergency preparedness is independent of aging and is properly excluded from the scope of license renewal proceedings. *Id.* at 9-10. There is no basis for granting a waiver from that exclusion in this proceeding, and the County has offered none.

For the reasons set forth above, Dominion requests that the Board reject the County's request for a waiver of the provisions of 10 C.F.R. § 50.47(a)(1) and dismiss the Petition.

Respectfully submitted,



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Dated: March 18, 2005

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket Nos. 50-336-LR
Dominion Nuclear Connecticut, Inc.)	50-423-LR
)	
(Millstone Nuclear Power Station,)	
Units 2 and 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Dominion Nuclear Connecticut's Response to Suffolk County's Request for Waiver of Commission Regulations," were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 18th day of March, 2005.

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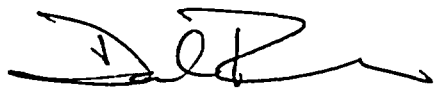
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A handwritten signature in black ink, appearing to read 'D. Lewis', written over a horizontal line.

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