

March 18, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DOMINION NUCLEAR CONNECTICUT, INC.)	Docket Nos. 50-336, 50-423
)	
(Millstone Power Station, Units 2 & 3))	ASLBP No. 05-837-01-LR

NRC STAFF MOTION TO STRIKE, IN WHOLE OR IN PART, THE REPLY OF
THE COUNTY OF SUFFOLK OF THE STATE OF NEW YORK AND RESPONSE TO
REQUEST FOR WAIVER PURSUANT TO 10 C.F.R. § 2.335(b)

INTRODUCTION

On March 10, 2005, the County of Suffolk of the State of New York (“County”) filed a Reply to “Dominion Nuclear Connecticut’s Answer to the Petition for Late Intervention of the County of Suffolk” and the “NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York.” In accordance with 10 C.F.R. § 2.323, the Staff of the Nuclear Regulatory Commission (“Staff”) herein files a motion to strike the County Reply, in whole or in part, because (1) it is impermissibly late; and (2) the reply purports to raise issues that were not encompassed in its original Petition. In addition, the Staff herein files a response, pursuant to 10 C.F.R. § 2.335(b), opposing the County’s request for a partial waiver of 10 C.F.R. § 50.47 in this proceeding.

BACKGROUND

The County submitted its late-filed intervention petition in this proceeding on February 1, 2005.¹ Both the Staff and applicant Dominion Nuclear Connecticut, Inc., filed answers

¹ See “Petition for Late Intervention of the County of Suffolk of the State of New York,” dated February 1, 2005 (“Petition”).

to the County Petition.² Pursuant to 10 C.F.R. § 2.309(h)(2), the County's Reply was due to be filed no later than March 7, 2005. Without any justification for its late filing, the County filed its Reply on March 10, 2005.³

DISCUSSION

A. The Reply Is Improper Under 10 C.F.R. § 2.309(h)(2).

As an initial matter, the County's reply provides no explanation whatsoever as to why its reply was not filed within the time prescribed by 10 C.F.R. § 2.309(h)(2).⁴ For that reason alone, the Licensing Board should reject the filing out of hand. Even if the Licensing Board declines to strike the Reply on the grounds of its lateness, however, on its face, the reply is improper in that it attempts to improperly expand the scope of the arguments set forth in the original Petition. To the extent that the Reply introduces new arguments, those new arguments should be stricken from the record in this proceeding.

The permissible scope of a reply such as the one filed by the County was explicitly set forth by the Commission in promulgating the recent revisions to the NRC's rules of practice when it stated:

Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or the NRC staff

² See "NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York," dated February 28, 2005; "Dominion Nuclear Connecticut's Answer to the Petition for Late Intervention of the County of Suffolk," dated February 28, 2005.

³ There is no certificate of service attached to the County's March 10 filing, which the Staff received, by first class mail, on March 11, 2005. The Staff understands that the applicant was served by e-mail on March 10, 2005. It is not clear to the Staff whether the Licensing Board in this proceeding was served at all. In addition, the Staff notes that, pursuant to 10 C.F.R. § 2.305(b), any paper required to be served on a party must be served upon the attorney of record. Brooke D. Poole filed a notice of appearance on behalf of the Staff on February 28, 2005, and has requested that any future filings made by the County be served on the Staff pursuant to that notice of appearance.

⁴ That section provides, "the requestor/petitioner may file a reply to any answer within seven (7) days after service of that answer."

answer; a seven-day period to prepare such a focused reply is not unreasonable. If there are special circumstances, the requestor/petitioner may request a short extension from the presiding officer.

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (January 14, 2004). No such extension of time was requested. Moreover, the County has attempted to use the opportunity to reply as a vehicle to introduce new arguments which should have originally been raised in its Petition. Specifically, the County's request for a Section 2.335 waiver may not now be raised in its Reply, and should be disregarded by the Licensing Board. See *Louisiana Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004) (finding that "reply" filings essentially constituted untimely attempts to amend the original petition that, not having been accompanied by any attempt to address the Commission's late-filing factors, cannot be considered). For these reasons, this portion of the reply should be stricken from the record and not further considered by the Licensing Board.

B. The County's Section 2.335 Petition Does Not Meet the Requirements for Waiver.

1. *The Regulatory Standards*

The regulations in 10 C.F.R. § 2.335(b) provide, in pertinent part:

A party to an adjudicatory proceeding 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,⁵ 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

⁵ Section 2.335(a) states, in pertinent part, "Except as provided in paragraphs (b), (c), and (d) of this section, no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part."

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.

It is well established that, in order to obtain a certification to the Commission of a petition for waiver of a Commission rule or regulation, the petitioner must make a *prima facie* showing that (1) special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation would not serve the purpose for which it was adopted; (2) the special circumstances undercut the rationale for the rule or regulation sought to be waived; and (3) there exists a significant safety problem related to that rule or regulation. See *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 595-97 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234, and CLI 89-7, 29 NRC 395 (1989); see also *Carolina Power & Light Co. & N.C. Eastern Mun. Power Agency* (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069, 2073 (1982).⁶ Moreover, “special circumstances” are present “only if the petition properly pleads 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.” *Seabrook*, CLI-88-10, 28 NRC at 596.

2. *The County Reply*

In support of its waiver petition, as a part of its Reply, the County attaches the affidavit of its counsel, Jennifer Kohn. No information on her experience in the subject area was offered.

Specifically, the Reply states (at 17):

This Affidavit [of Jennifer B. Kohn] 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 [A]ffidavit states with particularity the special circumstances alleged to justify the waiver or exception requested.

⁶ These cases reference 10 C.F.R. § 2.758, which was redesignated as Section 2.335 without substantive change. See 69 Fed. Reg. At 2219, Table 2.

In particular, the Kohn Affidavit requests a waiver of that portion of 10 C.F.R. § 50.47(a)(1)⁷ which states: “No finding under this section is necessary for issuance of a renewed nuclear power reactor operating license.” In the Kohn Affidavit, the County argues that special circumstances exist because the current Millstone emergency plans are allegedly deficient (as discussed in the original Petition), and that these “circumstances” eliminate any assumption that public safety will be protected with the existing outdated plans. Kohn Aff. ¶¶ 6, 7. This recitation falls far short of the proof necessary to make a *prima facie* case.

Quite simply, special circumstances do not exist based on the facts pled by the County.⁸ At the time the regulatory provision in question was promulgated, the Commission specifically addressed the issues brought up by the County, as follows:

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 light of the changes in demography. *The issue 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.*

In conclusion, the Commission has carefully considered the issues raised by commenters on the need to make a finding on the adequacy of existing emergency preparedness plans in order to grant a renewal license. For the reasons stated above, the

⁷ Section 50.47(a)(1) states, among other things, “[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.”

⁸ The Staff does not concede that any of the “deficiencies” referenced by the County in the Kohn Affidavit and discussed in its late-filed Petition constitute regulatory violations. In addition, the mere reference to its earlier Petition is insufficient to set forth special circumstances “with particularity.” *Cf. Shearon Harris*, LBP-82-119A, 16 NRC at 2073 (“Intervenors should be aware that as a practical matter, in most cases, a petition for waiver of a rule under section 2.758 [now section 2.335] will involve a substantial investment in time and effort”).

Commission concludes that the adequacy of existing emergency preparedness plans need not be considered anew as part of issuing a renewed operating license.

Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991) (emphasis added).

This language demonstrates, first, that the purported “deficiencies” the County has raised regarding Millstone in relation to license renewal are not unique to the facility and have been considered before. The issue of the adequacy of current emergency plans at operating reactors was addressed generically at the inception of the license renewal rules. Second, the “circumstances” articulated by the County do not undercut the rationale for the rule at 10 C.F.R. § 50.47(a)(1). On the contrary, as stated by the Commission in implementing the rule, “The requirements of Section 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.*” 56 Fed. Reg. at 64,966 (emphasis added). The Commission went on to conclude that “the current [emergency planning] requirements, including continuing update requirements for emergency planning, provide reasonable assurance that an acceptable level of emergency preparedness exists at any operating reactor *at any time in its operating lifetime.* *Id.* at 64,966-67 (emphasis added). Therefore, there is no need for a waiver of the provision requested by the County, as the emergency planning regulatory requirements of 10 C.F.R. § 50.47 *remain in force*, both now and during any future license renewal term.⁹ Third, as evidenced by the language of the 1991 final rule implementing the changes to Section 50.47(a)(1) for license renewal, the issue was considered explicitly in the rulemaking proceeding for the provision sought to be waived. As discussed above, in view of the operative, robust regulatory scheme, the Commission chose not to address

⁹ As such, if the County wishes to raise a safety issue regarding the current state of the Millstone emergency plans, there exists an avenue for such action. The County is entitled to file a request for action pursuant to 10 C.F.R. § 2.206.

emergency planning issues in license renewal. Because the County's issue was expressly considered by the Commission in implementing the license renewal rules, special circumstances are not present here. See *Seabrook*, CLI-88-10, 28 NRC at 596. Finally, the Kohn Affidavit, which merely references broad allegations made in its late-filed Petition, does not articulate a significant safety problem related to 10 C.F.R. § 50.47.

In summary, the County has not made a showing sufficient to demonstrate a *prima facie* case to partially waive 10 C.F.R. § 50.47(a)(1). For that reason, its petition should be denied.

CONCLUSION

For the reasons discussed herein, the County's Reply should be stricken in its entirety for its impermissible lateness. In the alternative, the Licensing Board should strike from the record the County's petition for waiver pursuant to 10 C.F.R. § 2.335(b) because (1) it impermissibly broadens the Petition, in contravention of the Commission's rules governing the contents of reply pleadings, and (2) in any event, the County has not made the requisite showing for a waiver pursuant to 10 C.F.R. § 2.335(b).

Respectfully submitted,

Brooke D. Poole
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of March 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DOMINION NUCLEAR CONNECTICUT, INC.) Docket Nos. 50-336, 50-423
)
(Millstone Power Station, Units 2 & 3)) ASLBP No. 05-837-01-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION TO STRIKE, IN WHOLE OR IN PART, THE REPLY OF THE COUNTY OF SUFFOLK OF THE STATE OF NEW YORK AND RESPONSE TO REQUEST FOR WAIVER PURSUANT TO 10 C.F.R. § 2.335(b) " 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 18th day of March, 2005:

Michael C. Farrar, Chief
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mcf@nrc.gov

Alan S. Rosenthal, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: RSNTHL@comcast.net

Peter S. Lam, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: psl@nrc.gov

Office of the Secretary
ATTN: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lillian M. Cuoco, Esq.*
Senior Nuclear Counsel
Millstone Power Station
Building 475/5
Rope Ferry Road (Route 156)
Waterford, CT 06385
E-mail: Lillian_Cuoco@dom.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz, Esq.*
Timothy J.V. Walsh, Esq.*
Shaw Pittman, LLP
2300 N St., NW
Washington, DC 20037-1128
E-mail: david.lewis@shawpittman.com
matias.travieso-diaz@shawpittman.com
timothy.walsh@shawpittman.com

Christine Malafi*
Suffolk County Attorney
H. Lee Dennison Building, 6th Floor
P.O. Box 6100
100 Veterans Memorial Highway
Hauppauge, NY 11788
E-mail:
Christine.Malafi@suffolkcountyny.gov

Brooke D. Poole
Counsel for NRC Staff