

RAS 10171

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/20/05
LBP-05-16

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

SERVED 07/20/05

Michael C. Farrar, Chairman
Alan S. Rosenthal
Dr. Peter S. Lam

In the Matter of

DOMINION NUCLEAR CONNECTICUT, INC.

(Millstone Nuclear Power Station,
Units 2 and 3)

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

ASLBP No. 05-837-01-LR

July 20, 2005

MEMORANDUM AND ORDER
(Concerning Belated Intervention Petition)

Introduction and Summary

The Setting. The County of Suffolk, New York, put before the agency in early February a belated request that it be allowed to intervene to challenge an aspect of the application of Dominion Nuclear Connecticut for 20-year extensions of its existing 40-year licenses for the second and third units of the Millstone Nuclear Power Station. Dominion's licenses are not set to expire until 2015 and 2025, respectively; we are told that the NRC Staff's evaluation of the license renewal applications is not scheduled to be completed until November of this year. Tr. at 20.

The Millstone Station is located in southeastern Connecticut, on the shore of Long Island Sound near New London. Suffolk County occupies the eastern sector of New York State's Long Island, with portions of the County's North Fork and several adjoining islands extending northeasterly across the Sound, reaching to less than 10 miles from the Millstone reactors.

Based upon that proximity, the County seeks to have admitted before us, and thereafter to litigate, a set of contentions that all focus on challenging the adequacy of Dominion's plan for dealing with potential post-accident emergency situations that might pose a radiological threat

to Suffolk residents and visitors. In presenting that challenge, the County focuses particularly on the demographic and related changes anticipated over the license renewal period and the peculiar geographic and other limitations that restrict evacuation of areas of the County.

The Arguments. Dominion and the NRC Staff oppose the County's intervention on three key grounds. As to timeliness, they argue that the petition, filed eight months after the deadline, was woefully and unjustifiably late (see 10 C.F.R. § 2.309(c)(1)(i)), and does not benefit sufficiently from the offsetting factors that the applicable regulation instructs us to consider (id. at (ii)-(viii)); as to content, they claim that the contentions are not framed or supported in a manner that meets the agency's stringent pleading requirements (see id. at § 2.309(f)(1)); and in any event, as to jurisdiction, they point out that the County seeks to raise issues that Commission regulations and decisions say are to have no part in license renewal proceedings (see id. at § 50.47(a)(1), and CLI-04-36, issued earlier herein, 60 NRC 631, 640 (2004)).

Countering, the County points out that Commission precedents leave room for belated interventions even where a petition is inexcusably late (see, e.g., Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-04, 1 NRC 273 (1975)). On that score, the County argues that for a number of reasons, particularly the ten-year time frame before the expiration of the first of the licenses' current terms, considerations of untimeliness should not bar its intervention in light of the support it finds in the offsetting regulatory factors.

As to content, the County argues that its contentions were adequately pleaded in light of their stated purpose and the County's inherent expertise in the subject matter. To overcome the jurisdictional hurdle, the County asked (albeit in a reply filing) for a waiver of, or exception to, the Commission-imposed proscription against our entertaining emergency plan issues, on the grounds that the purposes for which the Commission adopted that ban would not be served by its application to the County's petition here (see 10 C.F.R. § 2.335(b)). Under subsections (c)-(d) of that Rule, we can deny such a request ourselves but not surprisingly may not grant it;

instead, if we think it might be meritorious, we must send it to the Commission, which authored the underlying proscription, for determination of whether a waiver/exception is warranted.

The Negotiations. As previously recounted,¹ partway through a conference call we convened on April 12, it appeared from the parties' presentations (see Tr. at 43-44, 51 et seq.) that all three -- while holding disparate views on many aspects of the legitimacy of the pending petition -- "might hold common views on certain values underlying the petition, i.e., on the benefits that could be achieved by the establishment of a long-term working relationship centered on their mutual interest in well-conceived emergency plans protecting residents not just of southeastern Connecticut but also of areas of Suffolk County." April 15 Memorandum of Conference Call, p. 1. Seeing that commonality, we suggested that the parties "utilize the pending dispute as a springboard for establishing just such a relationship (see, e.g., Tr. at 57-58)" as a way of settling the matter. Ibid.

In thus building on the participants' views to suggest settlement possibilities, the Board noted that two of its members were then facing obligations in another proceeding that involved more pressing priorities than were then presented herein.² Because this Board was thus not able to turn immediately to the pending matters, we suggested (Tr. at 89-90) that

no decisional delay would be incurred were the parties to attempt to agree upon a Memorandum of Understanding, or other similar arrangement, that would not only guide the resolution of any current controversy among them but would, more importantly, provide a framework for cooperative solutions of similar emergency planning matters that might arise over the coming years and even decades (if the sought-after license renewals are granted) of operation of the Millstone reactors.

April 15 Memorandum at 2. In other words, based on their own expressions, we thought the participants had the chance to settle not only the specifics of this intervention request but also

¹ Our description herein of the genesis, conduct and outcome of the negotiations is taken largely verbatim from three of our prior unpublished Orders, entered on April 15, May 11, and June 3, 2005. We omit quotation marks except where they serve to emphasize particular aspects of what we said on those occasions.

² See Tr. at 89, referring to Private Fuel Storage (Independent Spent Fuel Storage Installation), Docket # 72-22-ISFSI, in which a lengthy April 6 oral argument had only recently been held on the State of Utah's Motion for Reconsideration of that Board's decision on "F-16 Aircraft Accident Consequences."

any related matters that would likely arise over the lengthy future, and urged them to attempt to do so.

Given the existence of three factors -- i.e., the parties' apparent receptivity to the Board's settlement suggestion; the Board's evaluation of relative decisional priorities and timing; and the Commission's emphasis on the value of settlements (10 C.F.R. § 2.338) -- we indicated we would hold the matters before us in abeyance pending receipt by May 6 of a progress report on the parties' discussions (see Tr. at 90). That report, we said, would likely indicate that one of three situations existed: (1) that settlement chances were "hopeless and you want the case decided;" (2) that "you've settled the thing and the petition can be withdrawn;" or (3) that "you're making progress and need more time" (Tr. at 93-94). As we later elaborated, "if those discussions are ultimately successful, the now-pending matters could then be dismissed by agreement, with the short-term-focused adjudication thus terminated in favor of long-term non-adjudicatory solutions" (April 15 Memorandum at 2).

On the anticipated date of May 6, the three participants filed with us separate "progress reports on the interaction among them that we had thought might enable the matter pending in front of us to be settled." May 11 Memorandum. Although, as will be discussed below, we found certain arguments contained in the reports filed by Dominion and the Staff to be problematic, in the circumstances we chose not to address those aspects then; instead, we took a positive focus by simply saying that it appears from the three reports "that a scheduled settlement meeting had to be postponed but that rescheduling efforts, to which all parties are committed, are underway." Ibid. We concluded with an exhortation: "Pending further order of this Board, two of whose members remain occupied with a more pressing matter, the parties are encouraged to continue their settlement efforts" Ibid.

A settlement meeting was indeed held on May 18. Each participant subsequently filed a report expressing its view of the meeting; the last such report was received on May 26.

These caused us to observe that “the upshot of those reports, it is fair to say, is that, while some progress was achieved in promoting an ongoing relationship, and in sharing information, among the participants, settlement of the matter pending before us is not foreseeable.” June 3 Status Memorandum, p. 1 (emphasis added).

After commending the parties for undertaking those settlement efforts, we noted that the more pressing matter that had demanded our priority attention had also been completed the previous week,³ and that we were thus then in position to turn our attention to deciding the merits of the County’s pending intervention petition and the oppositions thereto. June 3 Memorandum at 1-2. We observed then that our decision on the pending petition would involve the key issues that had been discussed on the conference call and that we would “also be passing upon the legitimacy of certain other arguments presented by the participants.” *Id.* at 2. We now address all these matters.

The Result. This matter is not as simple as Dominion and the NRC Staff would have it; indeed, it is far more complex. In the first place, and as we explain in Part I below, the County’s belatedness does not preclude its participation, once the relevant offsetting factors are properly evaluated. Nor, as we indicate briefly in Part II, are the asserted contention-drafting weaknesses of the sort that should block consideration of a pleading of this nature by a highly-motivated and crucially-affected local government entity on matters for which it is legally responsible.

We consider in Part III, below, the jurisdictional barrier to the petition, and the exemption request that seeks a way around that barrier. Finding that request to have a colorable basis, we CERTIFY it to the Commission for resolution.

As adverted to on page 4 above and just before the start of this section, we also put to rest in Part III other matters reflected in the opposing filings. Because of their collateral nature, we do so largely in footnotes (nn. 13 and 14 and accompanying text).

³ See Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC ____ (May 24, 2005).

BELATEDNESS OF FILING

The County's intervention petition was filed very late, and the reasons it gave for the delay (contained in its papers and not recounted here) do not rise to the level of "good cause." Even if what the County says about the insufficiencies of constructive notice had merit, the County legislature's adoption of a resolution on the subject of the Millstone license renewals demonstrates that there was actual notice of those proposed renewals at a relatively early date. We are not necessarily unsympathetic to the problems inherent in the County's efforts, under a new administration, to launch its participation in an unfamiliar forum governed by specialized rules -- but even with those handicaps, there was no good cause for such belatedness.

That does not, however, end our inquiry. Even under the old Rules of Practice, which were not as grammatically clear as the current ones, other factors listed in the regulations were to be weighed against the presence or absence of good cause. Notably, in the case in which that weighing process was enunciated, the late-filing petitioner was a County that had sought to intervene nine months late, without good cause -- indeed, without any cause. The Commission allowed its intervention (after two lower tribunals did not). Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-04, 1 NRC 273 (1975), reversing ALAB-263, 1 NRC 208 (see also the dissenting opinion of the Appeal Board Chairman, 1 NRC at 217), which had affirmed LBP-75-04, 1 NRC 89.

Under the current Rules, the need for balancing all the relevant factors (of which there are now more than there were in the old Rules) -- regardless of the absence of good cause for the late filing -- is made explicit, thus incorporating the Commission's West Valley interpretation. In turning to the current factors (10 C.F.R. § 2.309(c)(1)), we observe that their evaluation and weighting depends in no small measure on how an overriding conceptual analysis is performed.

Specifically, several of the factors will be seen to weigh against the County, if it is taken as a given that emergency planning may not ever be considered in a license renewal

proceeding. Under the assumption that emergency planning might be considered, however, they cut in the County's favor.

We decline to adopt the former approach for purposes of our analysis of the factors. Instead, for that limited purpose we think it better to presume -- without deciding -- that emergency planning might be a legitimate subject of consideration. See Tr. at 29. Adopting such a presumption for those limited purposes cannot, in the final analysis, be harmful to the interests of Dominion and the Staff. For while that presumption does indeed help the County on the "factors" evaluation (as well as on the "contention pleading" issue discussed in Pat II below), if Dominion and the Staff eventually prove correct on the jurisdictional matter, their position -- that the County should be denied intervention -- will prevail on that self-sufficient ground, thereby mooted the (incorrectly premised) "factors" and "pleading" analyses (see p. 19, below). In contrast, if those two analyses are premised on lack of jurisdiction, the County's participation might be rejected on a "factors" analysis without ever directly reaching the jurisdictional question; that result, if it were later seen to be incorrect, would not be so readily remediated.

Under the approach outlined above, it is plain that the balance of the factors weighs heavily in the County's favor. Indeed, the Staff (and to a lesser extent Dominion) would appear to have no great quarrel with that result (if our premise were taken as the starting point).

Factors 2, 3, and 4. These three factors involve the nature of a petitioner's right to become a party, the nature and extent of its interest, and the possible effect of an order on that interest. Dominion's papers discuss these three factors together, urging that all three cut against the County -- but only because Dominion believes that emergency planning cannot be a part of the proceeding (an argument that, once again, would be dispositive if we were willing to adopt that assumption). In contrast, the Staff considers these three factors to favor the County, in that the Staff is willing to concede (1) the County's standing, (2) the legitimacy -- and indeed

importance -- of the County's interest in protecting its citizens, and (3) the impact of any possible orders on that County interest.

We find the Staff's analysis to be closer to the mark. The Rules of Practice long conferred a special status on any State and local governments that wished to participate in some fashion in the adjudicatory process (see 10 C.F.R. § 2.715(c) (former rules)); now those rules confer automatic full-participation standing on such governmental bodies if they have jurisdiction over the geographical area in which the reactor at issue is located (see id. at § 2.309(d)(2)(i) (current rules)).

It is a very small step to rely on similar reasoning to find standing on behalf of a local government having jurisdiction over a geographical area admittedly affected by reactor operations, with respect to an issue that stems precisely from those effects. The same concepts apply to the "nature and extent" of the County's interests under the third factor, and to the "possible effect" of any order on those interests. The sum of all three factors, then -- standing, interest, and impact -- strongly favors the County's petition.

Factor 5. The Staff appears to concede that there are no other means by which the County's interests will be protected (Feb. 28 Answer at 6), but Dominion trots out the venerable provisions of 10 C.F.R. § 2.206 (Feb. 28 Answer at 10). That regulation holds out the promise that those dissatisfied with Staff or Commission action can, outside of the adjudicatory process, file with the Staff a petition seeking the modification of an existing license.

The venerability of § 2.206 is also its undoing for present purposes. When Board members inquired at oral argument about its usefulness, it was virtually conceded that, as we suspected, the number of times that provision has been successfully invoked in the past 30 years can be counted on a very few fingers. See Tr. at 40-41, 49-50. ⁴

⁴ Compare the analysis referred to in note 5, below.

To be sure, the infinitesimal § 2.206 success rate might simply reflect that the number of meritorious petitions filed over those several decades was indeed next to none, and that had petitions generally been better grounded, relief would have been granted in more instances. Whatever a careful, thorough historical analysis might show,⁵ at this point we find no basis for treating, and do not recognize, § 2.206 as a practical “other means” available for protecting the County’s interests within the meaning of the fifth factor in the regulatory criteria. In the absence of any other stated such means, this factor too, then, strongly favors the County, as the Staff recognizes.

Factor 6. Both the Staff and Dominion concede that the County’s interests will not “be represented by existing parties.” Even if there were a private party currently pressing a similar contention (as the Connecticut Coalition Against Millstone organization tried unsuccessfully to do at an earlier stage herein), it would be difficult to ignore the County’s overriding, paramount interest in -- and responsibility for -- this particular subject and to assert that such an interest could be represented by any other entity. In any event, this factor strongly favors the County.

Factor 7. Both the Staff and Dominion argue that the County’s participation will “broaden the issues” and “delay the proceeding.” This is true as far as it goes, but we question how much weight can be given this factor in a proceeding which was brought over a decade before the expiration of the first of the existing licenses, and in which the Staff’s safety review is not due to be concluded for another several months.⁶ At worst, this factor counts minimally against the County.

⁵ See “The Regulatory Process for Nuclear Power Reactors, A Review,” the August 1999 report of a diverse stakeholder panel assembled by the Center for Strategic and International Studies, pp. 51-53, regarding “Petitions under 10 CFR 2.206.”

⁶ Moreover, there might be serious due process concerns if it were always the case that the Staff and an applicant were allowed to take as long as the subject matter demanded to conduct their extra-judicial analyses, but that an intervenor’s time to do its analogous work within the framework of the hearing were to be severely restrained. See generally Private Fuel Storage (Independent Spent Fuel Storage Installation), as-yet-unpublished Final Partial Initial Decision (publicly-available version) (ADAMS accession # ML050620391), Feb. 24, 2005, Appendix-5 - Appendix-8.

Factor 8. Based on the timing and content of the County's initial filing, both the Staff and Dominion urged that it could not "reasonably be expected" that the County's participation would "assist in developing a sound record." Whatever might have been said about that appraisal at that time, its accuracy has since been undermined not only by the County's subsequent filings but by the sense of purpose demonstrated by the several members of the County's new executive team who were present during the conference call and whose commitment to participate and contribute was summarized by Chief Deputy County Executive Paul Sabatino, II (Tr. at 86-88). Based on the later filings and the expressed oral and written commitments, we now are able to find that this factor also weighs heavily in the County's favor.

In sum, then, six of the seven factors count heavily in the County's favor, and are only minimally, if at all, offset by the other factor (concerns about delay) in the circumstances presented here. This result should not be surprising, for the balancing of the factors accurately reflects the underlying situation here, the upshot of which is this: the County's showing on the seven factors is a strong one precisely because of its status as a local government and because of the nature of its contention. Unlike the typical petitioner, the County is seeking to intervene on a subject that it is not only expert in, but about which it is required by its government role to take on a heavy responsibility in finding and implementing solutions.

That a County in such a situation can have its unjustified belatedness excused -- as was Erie County's in West Valley -- does not establish an alarming precedent undercutting the rules for the benefit of all dilatory petitioners. Rather, it simply recognizes the different role and strengths that a local government can, in the public interest, bring to our proceedings.

ADEQUACY OF PLEADING

We need devote little time to this matter, in light of the questions on related subjects we address in Parts I and III. Perhaps the County could have drafted its first pleading, the actual intervention petition, in a manner that would have conformed more precisely to the outline of the governing regulation (10 C.F.R. § 2.309(f)(1)(i),(ii), (v) and (vi)).⁷ But the substance sought after by that regulation was present. When considered in light of the quality and contribution of the County's later pleadings (i.e., its March 10 reply), the petition's complaints, objectives, and underpinnings are clear. At the same time, the County's focus has improved markedly as it gained familiarity with agency rules and procedures.⁸ At this juncture, there is little question about what the County is seeking through its petition, and it is clear that the County has the expertise and commitment to address the subject fully and responsibly.

Moreover, in the final analysis the subject at hand is one about which the County -- more so than Dominion or the Staff -- will be held to account by its populace if the need to activate the emergency plan ever arises. The reasoning behind, and the purposes served by, the increased stringency of the agency's rules on pleading and supporting contentions -- a history recited by Dominion and the Staff in an effort to have us reject the County's petition -- are not undercut by our finding that, given its acknowledged crucial role and substantive expertise on the subject matter, the County's pleading was adequate for the matter it is seeking to present.

⁷ The matters covered by Subsections (iii) and (iv) of 10 C.F.R. § 2.309(f)(1) relate to the scope of the proceeding and thus are, by their nature, more properly subsumed in and resolved by the discussion in Part III, below.

⁸ See, e.g., the County's letter report of May 10, 2005.

Put another way, there may be reasons to hold other prospective intervenors to a higher standard when applying the contention pleading rules to them, in order to assure that they have made a serious commitment to the process, have come forward with a specific focus, and are capable of making -- and prepared to make -- a knowledgeable contribution on real issues, elements which seem to underlie the periodic changes that have made those pleading rules increasingly stringent. Cf. 69 Fed. Reg. 2182, 2190 (Jan. 14, 2004). But, focusing here on the contribution the County might make through the adjudicatory route, there is no doubt in our minds, from the various presentations it has thus far made to us, that the County's position, commitment, and expertise have been clearly demonstrated through the totality of its written and oral presentations, both through legal counsel and through County officials.⁹

In sum, the contentions pleading rule provides us no basis for excluding the County from participation.¹⁰ We turn, then, to whether the matter it wishes to bring before us is amenable to consideration in this type of proceeding.

⁹ See the Commission's discussion of the interests served by the "strict contention rule" in Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999), particularly the instruction that "the rule helps to insure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions." By the totality of its presentations thus far, the County has demonstrated that it will contribute far more than that minimum here, if allowed to do so.

¹⁰ We thus need not consider whether there would be an inherent unfairness in limiting the County to one drafting opportunity when applicants are regularly bestowed, both prior to and in the midst of the hearing process, many opportunities to amend their presentations. See Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-03-05, 57 NRC 69, 82 (2003), and Final Partial Initial Decision, Feb. 24, 2005 (see n. 6, above), Appendix-7 - Appendix-8, especially note 12.

REQUEST FOR JURISDICTIONAL EXEMPTION/WAIVER

The Commission's regulations, as well as a Commission decision issued at an earlier stage of this very proceeding, make it clear that questions of emergency planning are not ordinarily to be considered in connection with a nuclear utility's request for a renewal of its reactor operating license. 10 C.F.R. § 50.47(a)(1), and CLI-04-36, 60 NRC 631, 640 (2004).¹¹ That limitation flows from the underlying approach the Commission adopted long ago regarding such renewal requests, *i.e.*, that only matters dealing with the aging of plant equipment are to be considered, and that emergency planning need not be considered, there being other ways to deal with "changing demographics and other site-related factors" such as "transportation systems." See 56 Fed. Reg. 64943, 64967 (Dec. 13, 1991). As Dominion and the Staff see it, then, this matter is as simple a one as can ever be presented to a Licensing Board -- they say we plainly have no jurisdiction over the set of contentions put forward by the County.

That position is what triggered the County's March 10 request for an exemption. As permitted by the Rules of Practice, the County has attempted to establish that its situation presents unusual circumstances that were not contemplated by the "aging issues only" regulation and that an exemption from that regulation is thus appropriate here under 10 C.F.R. § 2.335(b) (see Tr. at 70-76; see also Tr. at 86-89). Dominion and the Staff counter by arguing, in effect, that there are no special circumstances here and that we should simply apply the rule as written.

In fact, they say, we should have done so some time ago. Indeed, their papers at least hint at an assertion that we were in error for having suggested that settlement discussions -- to be conducted during a period in which we had explained we were constrained by other (far higher priority) obligations from turning to this matter in any event -- might serve the parties' and the public's interests. Their papers also seem to argue that, because they believe this matter should be dismissed for lack of jurisdiction, our urging the parties to conduct settlement

¹¹ See also Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9-10 (2001).

negotiations contravened settled principles precluding Licensing Boards from attempting to direct the Staff in the performance of its non-adjudicatory regulatory functions.¹²

In the final analysis, while the County's exemption request is not an overpowering one, it has sufficient content to certify it to the Commission. Before explaining below why we come to that result, we cover in footnotes our rejection of the collateral positions taken by Dominion and the Staff, the first dealing with our jurisdiction to suggest settlement negotiations,¹³ and

¹² NRC Staff's Status Report, May 6, at 2; Dominion's letter report, May 6, at 2.

¹³ We begin with the elemental notion that, although the parties were indeed urging that we had no jurisdiction, whether we have it or not is a question for us, not for them, to determine. Under basic jurisdictional concepts, a tribunal invariably has jurisdiction to determine whether it has jurisdiction. United States v. Ruiz, 536 U.S. 622, 628 (2002) ("a federal court always has jurisdiction to determine its own jurisdiction"); see also United States v. United Mine Workers of America, 330 U.S. 258, 290-92 (1947); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3536 at 535 (2d ed. 1984) (" 'Jurisdiction to determine jurisdiction' refers to the power of a court to determine whether it has jurisdiction over the parties to and the subject matter of a suit. If the jurisdiction of a federal court is questioned, the court has the power and the duty, subject to review, to determine the jurisdictional issue."). Accordingly, until we -- not the parties -- made that determination, we had adequate jurisdiction to proceed as we did.

Building on that foundation, we note that, even where it appears that a tribunal may ultimately be found to lack jurisdiction over a matter, we are aware of no principle that would preclude that tribunal, before addressing that question, from simply suggesting to the parties that there may be a way to settle their grievances by way of discussions among themselves. If the parties succeed in doing so in that circumstance, they could then include in their settlement agreement a provision that calls for the petitioner/claimant/plaintiff, as the case may be, simply to withdraw its initiating papers, leaving the tribunal with nothing to decide and thus no need ever to pass upon whether it had jurisdiction over the (settled) subject matter. We envisioned that a successful outcome to the settlement discussions would have led to a result of that nature here (see p. 4, above).

In short, the parties' insistence on immediate dismissal was inappropriate at a phase of the proceeding in which, given our inability to turn to the matter, settlement discussions held some real promise and cost our decision-making process no real time. At the very least, those discussions were worthwhile in the sense that the matters that Dominion reports it presented to the County at the May 18 meeting (May 23 letter report, p. 2) appear to have served the public interest in commendable fashion.

the second with whether that suggestion interfered with the Staff's performance of its regulatory obligations.¹⁴

Having done so, we can turn to the merits of the County's exemption request. We find that, although emergency planning issues are ordinarily and intentionally excluded from license renewal proceedings, the Long Island situation begs for some attention herein.

In the first place, the petitioning County is not located in the same State as the reactor, and thus the usual political forces and administrative relationships that might help the County draw attention to its concerns, outside the adjudicatory process, are not at work. Secondly, both in its papers and at the conference (see Tr. at 71-74, 86-89), the County has stressed matters -- including population density (both permanent and vacation), forecasted changes therein, and geographical and roadway limitations -- that all combine to make it appropriate for the Commission to consider the question whether the County's concerns are so unusual that they should be addressed in this license renewal process, even though generally such matters were explicitly excluded from the original rule's jurisdictional reach (see p. 13, above).¹⁵

¹⁴ The license renewal proponents both make arguments to the apparent effect that, by urging settlement discussions, we were attempting to direct the Staff in the performance of its non-adjudicatory regulatory role. On that point, we are well aware of the strictures against our even contemplating the exercise of supervisory authority over the Staff; even unbidden, we have in other contexts called attention to those strictures. See, e.g., Private Fuel Storage (Independent Spent Fuel Storage Installation), Final Partial Initial Decision, Feb. 24, 2005 (see n. 6, above), Appendix-7.

In any event, it is beyond our understanding how the settlement suggestions we made here could possibly be interpreted as evincing any intention whatsoever to direct the Staff in how it performs its substantive emergency planning regulatory duties. Particularly since Dominion and the Staff had the absolute right to have ended the settlement discussions simply by advising us at any point that they did not want them to continue (cf. 10 C.F.R. § 2.338; see also CFC Logistics, LBP-04-24, 60 NRC 475, 481 (2004)), it is difficult to imagine how anything we had said could have been understood to be "directing" the Staff to do anything.

To be sure, we had suggested that one possible approach to settlement could involve agreeing on a Memorandum of Understanding or similar approach defining future relationships. But how such an approach would be implemented, if it were even adopted, was left entirely to the parties to discuss without any input whatsoever from us.

¹⁵ During the conference call, we did inquire as to whether there was a degree of sameness to all emergency plan controversies (Tr. at 72). But upon closer examination, the difficulties imposed by Long Island's population growth, geographical limitations, and roadway system, combine to make this situation a candidate for special treatment.

In that regard, the initial Millstone licensing process, like others, contemplated that a 40-year period would represent not only the anticipated dependable life of the plant's equipment, but also the foreseeable growth life of the plant's surroundings. In an appropriate case, the Commission should have the opportunity to determine whether to grant an exemption so that the growth of the external area could be given some consideration in the adjudicatory process, along with the aging of the internal equipment.

The situation is therefore a suitable one for the Commission to consider whether an exemption is appropriate. Alternatively, the Commission may simply choose to exercise its supervisory authority over the Staff to direct the Staff to interact with the County in a manner that would moot the adjudication.

In that connection, we would add that it is our view that the adjudicatory process may not be the best place for those units of local government which are not opposed to a facility's existence but which genuinely wish to work on enhancing its safety to hammer out their areas of disagreement with the Staff. This case is not the first time where it has appeared to Board members that a more collaborative approach is in order (see next paragraph, below). By this, however, we mean a true collaboration, not a "relationship" in which the Staff treats the local government's inquiries as little more than random "citizen mail." Cf. Tr. at 79; compare NRC Staff's Status Report, May 6, at 2. The Commission, but not this Board, is empowered to ordain that result.

To elaborate, we believe it unfortunate that, so often, the NRC Staff on the one hand, and State and local governmental entities on the other, find themselves in an adversarial relationship with regard to the grant or denial of applications for licenses or amendments thereto. To be sure, such a relationship might be unavoidable in circumstances where, for some reason or another, the governmental body is unalterably opposed to construction or operation of the facility that is the subject of the application for an authorizing license. Thus, for

example, Suffolk County's adamant opposition, many years ago, to the proposed Shoreham nuclear power facility necessarily could be addressed only in the context of an adjudicatory proceeding in which the competing views of the parties to the proceeding (including the NRC Staff) could be aired and considered by a Licensing Board.¹⁶

In a number of recent cases, however, we have seen participation by a State or local governmental body that is not raising objections to the very existence of a particular facility. Rather, its interest lies instead in ensuring that the activity that is contemplated by the license or license amendment application in question is conducted with due regard for the public health and safety and for the preservation of environmental values.

The matter before us provides one example of such a case. In sharp contrast to its historic opposition to the Shoreham facility, Suffolk County says it is not here seeking to preclude future Millstone operation through a denial of the requested operating license extensions. To the contrary, the County indicates, it is simply desirous of ensuring that its citizens will be adequately protected should there be a radiological accident at the facility.

Other relatively recent examples include the concerns voiced by the State of Oklahoma with regard to the decommissioning of certain NRC-licensed facilities within its borders on which radioactive material had accumulated. As with Suffolk County here, in those cases Oklahoma was doing no more than carrying out a clear governmental responsibility of taking whatever steps it deemed necessary to ensure that the health and safety of its citizens was not put at undue risk. `See FMRI, Inc. [formerly Fansteel, Inc.] (Muskogee, Oklahoma Facility), LBP-04-08, 59 NRC 266 (2004), and Sequoyah Fuels Corporation (Gore, Oklahoma Site), LBP-04-30, 60 NRC 665 (2004).

¹⁶ For a brief recap of that history, see, e.g., the background statement in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 24-26 (1986).

As the Commission has emphasized and we have observed, it is not our role to superintend the manner in which the NRC Staff discharges its regulatory review functions. That said, we do not think that we exceed the bounds of our authority in expressing our view that the adjudicatory process might not be the best place for State and local governmental units such as Suffolk County in this case (and Oklahoma in the just-cited matters) to work out their differences with the Staff. In the final analysis, the ultimate responsibility and therefore objective of all governmental bodies – including the NRC – is necessarily the same: protection of the public health and safety and the environment. And, although there might well be room for reasonable differences of opinion as to what measures need to be undertaken to achieve that common goal, it seems quite clear to us that the goal could most efficiently and effectively be achieved not through butting heads in opposition in a hearing room, but rather through putting heads in combination in a conference room (or other non-adjudicatory setting).

We are, of course, not privy to the discussions that take place between the Staff on the one hand, and State and local governmental bodies on the other, with regard to license or license amendment applications that are of concern to the latter. In light, however, of the issues that ended up before a presiding officer in the Fansteel and Sequoyah cases, we entertain considerable doubt that a truly collaborative effort was undertaken. As we see it, given the common objective in both those cases, a satisfactory resolution of Oklahoma's concerns could and should have been reached without the need for litigation. Although we have no basis for laying blame there on anyone for the failure to obtain such resolution, the Staff's report of the outcome of the settlement negotiation we suggested in this case leaves at least some doubt as to the Staff's appreciation of the extent of the correlative responsibility of State and local governments to ensure the health and safety of its citizens.

We conclude by emphasizing that our certification of the exemption request to the Commission should not be read as reflecting endorsement of the County's expansive views as to how far NRC review of emergency planning should reach geographically. The applicable regulations set those geographic bounds. The County is free to make its own plans for areas farther removed, but doing so is within its bailiwick, not the NRC's.

The matter thus comes down to this. In the absence of the Commission's granting an exemption or waiver from its general rule limiting the scope of license renewal proceedings, the emergency planning contentions the County wishes to litigate may not be entertained here. If the County fails to obtain the sought-after exemption/waiver, the matter must be dismissed. In that event, as already indicated (pp. 6-7, above), a retrospective look at the regulatory factors discussed in Part I might well result in a different balance, and certainly the County's intervention pleadings would run afoul of the two criteria in the contentions pleading rule (see Part II, n. 7, above) that invoke jurisdictional notions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DOMINION NUCLEAR) Docket Nos. 50-336-LR and
CONNECTICUT, INC.) 50-423-LR
)
)
(Millstone Nuclear Power Station,)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CONCERNING BELATED INTERVENTION PETITION) (LBP-05-16) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

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Dated at Rockville, Maryland,
this 20th day of July 2005