

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 BRIEF IN RESPONSE TO  
COMMISSION MEMORANDUM AND ORDER CLI-05-18

---

Brooke D. Poole  
Mauri T. Lemoncelli  
Counsel for NRC Staff

August 18, 2005

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF THE CASE .....	1
DISCUSSION .....	4
A.    The County's Waiver Request Was Improperly Certified to the Commission and Should Be Denied. ....	4
1.    The County's Waiver Request and the Licensing Board Ruling .....	4
2.    Regulatory Standards for Certification and Granting of a Waiver Request .....	6
3.    The County Failed to Meet the Three-Part Test for Certification of a Waiver Request .....	7
B.    The County's Untimely Petition Failed to Satisfy the Criteria for Late Filing. ....	12
1.    The County's Late Petition and the Licensing Board's Ruling .....	12
2.    Regulatory Standards for Late-Filed Petitions .....	12
3.    The County Failed to Satisfy the Criteria for Admissibility of a Late-Filed Petition .....	14
C.    The County's "Emergency Planning" Contention Failed to Satisfy the Contention Requirements of 10 C.F.R. §2.309(f) .....	16
D.    The Licensing Board Improperly Postponed Its Ruling on Contention Admissibility Pending Settlement Discussions. ....	18
CONCLUSION .....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>Baltimore Gas &amp; Elec. Co.</i> (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325 (1998) .....	13
<i>Curators of the Univ. of Mo.</i> , CLI-95-1, 41 NRC 71 (1995) .....	19
<i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-18, 62 NRC __, slip op. (Aug. 4, 2005) .....	<i>passim</i>
<i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631 (2004) .....	17
<i>Duke Energy Corp.</i> (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328 (1999) .....	17
<i>Florida Power &amp; Light Co.</i> (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3 (2001) .....	17
<i>Long Island Lighting Co.</i> (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383 (1987) .....	10
<i>North Atlantic Energy Serv. Corp.</i> (Seabrook Station, Unit 1), CLI-99-28, 50 NRC 291 (1999) .....	18
<i>Northern States Power Co.</i> (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25 (1972) .....	7
<i>Nuclear Fuel Servs., Inc. &amp; N.Y. State Atomic &amp; Space Dev. Auth.</i> (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975) .....	16

<i>Public Serv. Co. of N.H.</i> (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231 (1989) .....	7,11
<i>Public Serv. Co. of N.H.</i> (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573 (1988), <i>reconsideration denied</i> , CLI-89-3, 29 NRC 234, and CLI-89-7, 29 NRC 395 (1989) .....	7, 8
<i>State of New Jersey</i> (Department of Law and Public Safety), CLI-93-25, 38 NRC 289 (1993) .....	13, 15
<i>Texas Utils. Elec. Co.</i> (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62 (1992) .....	13, 14, 15
<i>Yankee Atomic Elec. Co.</i> (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1998) .....	5
 <u>Atomic Safety and Licensing Appeal Board:</u>	
<i>Detroit Edison Co.</i> (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759 (1978) .....	14
<i>Duke Power Co.</i> (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460 (1977) .....	13
<i>Long Island Lighting Co.</i> (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387 (1983) .....	14
<i>Tenn. Valley Auth.</i> (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418 (1977) .....	15
<i>Washington Pub. Power Supply System</i> (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167 (1983) .....	15

Atomic Safety and Licensing Board:

<i>Carolina Power &amp; Light Co. &amp; N.C. Eastern Mun. Power Agency</i> (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069 (1982) .....	7
<i>Cleveland Elec. Illuminating Co.</i> (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-80, 18 NRC 1404 (1983) .....	15
<i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 & 3), LBP-05-16, 62 NRC __, slip op. (July 20, 2005) .....	<i>passim</i>
<i>Louisiana Energy Servs.</i> (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004) .....	19
<i>Pac. Gas &amp; Elec. Co.</i> (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002), <i>pet. for review denied</i> , CLI-03-12, 58 NRC 185 (2003) .....	16, 19
<i>Private Fuel Storage, LLC</i> (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, <i>reconsideration granted in part</i> <i>and denied in part</i> , LBP-98-10, 47 NRC 288, <i>aff'd</i> , CLI-98-13, 48 NRC 26 (1998) .....	.8

REGULATIONS

10 C.F.R. § 2.309 .....	16
10 C.F.R. § 2.309(a) .....	19
10 C.F.R. § 2.309(b) .....	2, 19
10 C.F.R. § 2.309(c) .....	<i>passim</i>
10 C.F.R. § 2.309(c)(1) .....	2, 3, 12-12-3, 16
10 C.F.R. § 2.309(d) .....	19
10 C.F.R. § 2.309(f) .....	<i>passim</i>

	<u>Page</u>
10 C.F.R. § 2.309(f)(1) .....	17
10 C.F.R. § 2.309(f)(2) .....	13
10 C.F.R. § 2.309(h) .....	19
10 C.F.R. § 2.309(i) .....	19
10 C.F.R. § 2.315(c) .....	17
10 C.F.R. § 2.335 .....	7
10 C.F.R. § 2.335(a) .....	6
10 C.F.R. § 2.335(b) .....	3, 6
10 C.F.R. § 2.335(d) .....	3
10 C.F.R. § 2.338 .....	18, 19-20
10 C.F.R. § 2.338(f) .....	20
10 C.F.R. § 50.47(a)(1) .....	<i>passim</i>
10 C.F.R. § 50.47(b) .....	8
10 C.F.R. § 50.54(q) .....	8
10 C.F.R. § 50.54(t) .....	8, 9
10 C.F.R. § 50.54(t)(1) .....	8
10 C.F.R. Part 50, Appendix E .....	8, 9
44 C.F.R. Part 350 .....	11

#### MISCELLANEOUS

“Dominion Nuclear Connecticut, Inc., Millstone Power Station, Units 2 and 3; Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of the Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period”, 69 Fed. Reg. 11,897 (Mar. 12, 2004) .....	2
---	---

	<u>Page</u>
Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) . . . . .	5, 13, 19
Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991) . . . . .	8, 9-10
Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) . . . . .	20

August 18, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 BRIEF IN RESPONSE TO  
COMMISSION MEMORANDUM AND ORDER CLI-05-18

INTRODUCTION

Pursuant to the Commission's Memorandum and Order of August 4, 2005,<sup>1</sup> the staff of the Nuclear Regulatory Commission ("Staff") herein addresses the question certified to the Commission in the Atomic Safety and Licensing Board's ("Licensing Board") Memorandum and Order dated July 20, 2005.<sup>2</sup> As directed by the Commission, the Staff also addresses three other questions raised by the Commission *sua sponte* in connection with the Licensing Board Order.

STATEMENT OF THE CASE

This proceeding relates to the January 20, 2004 applications of Dominion Nuclear Connecticut, Inc. ("DNC") to renew Operating License Numbers DPR-65 and NPF-49 for Millstone Power Station, Units 2 and 3, for an additional 20 years. On March 12, 2004, the NRC published in the *Federal Register* a notice of acceptance for docketing and opportunity for

---

<sup>1</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-18, 62 NRC \_\_\_, slip op. (Aug. 4, 2005).

<sup>2</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-05-16, 62 NRC \_\_\_, slip op. (July 20, 2005) ("Licensing Board Order").



a hearing regarding the license renewal applications.<sup>3</sup> In the notice, and in accordance with regulations, the NRC established a sixty-day period for interested persons to file petitions to intervene and requests for hearing, such that timely petitions were due to be filed by May 11, 2004. See 10 C.F.R. § 2.309(b). Approximately seven months after the date specified to file intervention petitions, petitioner County of Suffolk ("County") filed a Motion to Intervene,<sup>4</sup> which was rejected by the Secretary of the Commission on December 27, 2004, for failure to address the late-filing factors set forth in 10 C.F.R. § 2.309(c)(1).<sup>5</sup>

The County filed a petition for late intervention on February 1, 2005, in which it proffered three contentions, all of which related to emergency planning issues.<sup>6</sup> In response to NRC Staff and DNC answers opposing the Petition,<sup>7</sup> the County filed an untimely reply on March 10, 2005, in which it, for the first time, requested a partial waiver of 10 C.F.R. § 50.47(a)(1).<sup>8</sup> Both the

---

<sup>3</sup> See Dominion Nuclear Connecticut, Inc., Millstone Power Station, Units 2 and 3; Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period, 69 Fed. Reg. 11,897 (Mar. 12, 2004).

<sup>4</sup> See "Motion to Intervene of the County of Suffolk of the State of New York," dated December 14, 2004.

<sup>5</sup> See Letter from A. Vietti-Cook, Secretary of the Commission, to C. Malafi, Suffolk County Attorney, dated December 27, 2004. The Secretary noted in her letter that the County could file a petition for late intervention up to the time that the NRC made a final decision either to grant or deny DNC's license renewal applications.

<sup>6</sup> See "Petition for Late Intervention of the County of Suffolk of the State of New York," dated February 1, 2005 ("Petition"). To date, the Staff has treated the County's proffered issues as three separate contentions. However, following the Commission's reference in CLI-05-18, the Staff will address the issues here as a single contention.

<sup>7</sup> 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 ("NRC Staff Answer"); "Dominion Nuclear Connecticut's Answer to the Petition for Late Intervention of the County of Suffolk," dated February 28, 2005.

<sup>8</sup> See "Reply and Supporting Documents," dated March 10, 2005 ("County Reply").

NRC Staff and DNC opposed the waiver request.<sup>9</sup> Thereafter, the Licensing Board convened a telephonic prehearing conference on April 12, 2005, at which time the Licensing Board directed the participants to enter into settlement discussions.<sup>10</sup> Following a May 18, 2005, settlement meeting, each of the participants reported to the Licensing Board that the issues raised by the County's Petition were not resolved.<sup>11</sup> Thereafter, on July 20, 2005, the Licensing Board issued LBP-05-16, holding that (1) a balancing of the late filing factors in 10 C.F.R. § 2.309(c)(1) justifies entertaining the late petition; (2) the contentions proffered by the County are adequately pled; and (3) there is a *prima facie* basis for the County's waiver request. The Licensing Board therefore certified to the Commission the question of whether the County's requested waiver should be granted.<sup>12</sup>

In CLI-05-18, the Commission granted review of, and requested participant views on, the certified question. In addition, the Commission invited the participants in this proceeding to address three additional questions that the Commission raised *sua sponte*:

- (1) Was the County's late-filed contention admissible under the criteria for considering late-filed pleadings and contentions set out in 10 C.F.R. § 2.309(c)?

---

<sup>9</sup> See "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)," dated March 18, 2005 ("Staff Motion to Strike"); "Dominion Nuclear Connecticut's Response to Suffolk County's Request for Waiver of Commission Regulations," dated March 18, 2005.

<sup>10</sup> See Tr. at 57-58, 88-94. The Licensing Board held the matter in abeyance pending reports of the participants on the settlement negotiations. See *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), Memorandum of Conference Call, slip op. (Apr. 15, 2005); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), Memorandum, slip op. (May 11, 2005).

<sup>11</sup> See "NRC Staff's Second Status Report," dated May 20, 2005; Letter to Administrative Judges from D.R. Lewis, counsel for DNC, dated May 23, 2005; Letter to Administrative Judges from C. Malafi, Suffolk County Attorney, dated May 26, 2005.

<sup>12</sup> LBP-05-16, 62 NRC \_\_\_, slip op. at 20. See 10 C.F.R. § 2.335(d) (requiring that, where the presiding officer determines that a *prima facie* showing on a waiver request has been made, the presiding officer shall certify the matter directly to the Commission).

- (2) Did the County's contention regarding "emergency planning" satisfy the contention requirements in 10 C.F.R. § 2.309(f)?
- (3) Under the circumstances of this case, did the Licensing Board properly postpone its contention-admissibility decision pending settlement talks?

CLI-05-18, slip op. at 2.

### DISCUSSION

The Staff is of the view that the certified question regarding the County's waiver request is of consequence only after a decision is made with respect to the underlying question of the County's ability to participate in this proceeding. Nevertheless, the Staff addresses the questions set by the Commission in the order they are presented in CLI-05-18.

A. The County's Waiver Request Was Improperly Certified to the Commission and Should Be Denied.

1. *The County's Waiver Request and the Licensing Board Ruling.*

10 C.F.R. § 50.47, "Emergency Plans," subsection (a)(1), provides:

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 operating license.* (emphasis added).

The County requested a waiver of the application of the second sentence of Section 50.47(a)(1), which eliminates a separate emergency planning review in connection with an application for renewal of a plant operating license. As noted above, the County initially proffered its waiver request in the County Reply dated March 10, 2005.<sup>13</sup> In support of its

---

<sup>13</sup> As discussed in the Staff Motion to Strike, the County Reply was procedurally deficient, as it (1) was filed out of time, (2) was improperly served, and (3) improperly raised new arguments (e.g., the waiver request) in a reply. With respect to the late filing, the County offered no justification, stating only that the errors were "inadvertent." See Letter to Administrative Judges from C. Malafi, Suffolk County Attorney, dated March 23, 2005; electronic mail message from J. Kohn, Assistant County Attorney, to Administrative Judges dated March 22, 2005. With regard to the improper filing and service, petitioners (continued...)

waiver petition, the County attached the affidavit of its counsel. See Staff Motion to Strike at 4. Referencing its Petition, the County stated, without further elaboration, “[t]he current and expected population growth in permanent residents, the lack of 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]. The County’s Petition also contains documentation concerning outdated information in the current Millstone emergency plans and other deficiencies thereof.” County Reply, Affidavit of Jennifer B. Kohn, ¶¶ 6. The County then concluded that “[t]he deficiencies in the current emergency plans constitute special circumstances.” *Id.* ¶¶ 7.

In certifying the County’s waiver request to the Commission, the Licensing Board stated, “[W]hile the County’s exemption request is not an overpowering one, it has sufficient content to certify it to the Commission.” LBP-05-16, slip op. at 14. The Licensing Board based its determination on two considerations, as follows:

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 [citation omitted], the County has stressed matters – including population

---

<sup>13</sup>(...continued)

are “expected to comply with [the Commission’s] basic procedural rules especially ones as simple to understand as those establishing filing deadlines.” *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998). Such procedural defaults alone suffice to justify rejection of the County Reply. *Id.*

Moreover, the County’s waiver argument was not made in its late-filed Petition, but rather, contrary to Commission requirements, was first presented in its Reply. In promulgating the recent revisions to the NRC’s rules of practice, the Commission articulated the permissible scope of a reply as follows: “Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer . . .” Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004). As the Staff argued before the Licensing Board, the County, which cited selected portions of 10 C.F.R. § 50.47(a)(1) in its original Petition (see Petition at 14-15) should have anticipated the Staff’s (and DNC’s) arguments with respect to the scope of the license renewal proceeding and requested the partial waiver of Section 50.47(a)(1) at the outset. See Tr. at 69-70.

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 [reference omitted].

*Id.*, slip op. at 15. For the reasons set forth below, these considerations are not sufficient to merit a grant of the County’s waiver request.

2. *Regulatory Standards for Certification and Granting of a Waiver Request.*

10 C.F.R. § 2.335(b) provides, in pertinent part:

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)<sup>[14]</sup> 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.<sup>[15]</sup>

The Commission applies a three-part test for certification of a waiver petition:

- (1) the waiver petitioner must have presented “special circumstances” in the sense that the petitioner has properly pleaded 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 rulemaking proceeding leading to the rule sought to be waived;
- (2) those special circumstances must be such as to undercut the rationale for the rule sought to be waived.

---

<sup>14</sup> 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.”

<sup>15</sup> Procedurally, section 2.335(b) requires that the petition be accompanied by an affidavit (1) identifying the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule would not serve the purposes for which it was adopted, and (2) setting forth with particularity the “special circumstances” alleged to justify the waiver or exception requested.

- (3) from “the petition and other allowed papers” it should be evident that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived.

*Public Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989), quoting *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). Further, a petition for waiver or exception should be granted only in “unusual and compelling circumstances.” *Northern States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972).

3. *The County Failed to Meet the Three-Part Test for Certification of a Waiver Request.*

As discussed in the Staff Motion to Strike, the issues articulated in the Reply, the accompanying affidavit,<sup>16</sup> and the referenced Petition fail to meet the Commission’s three-part test articulated above.

First, the County failed to demonstrate “special circumstances.” As discussed above, with regard to “special circumstances,” the petitioner must allege facts not in common with a large class of facilities that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding for the rule sought to be waived. *Seabrook*, CLI-89-20, 30 NRC at 235. The 1991 rule that implemented the provision at issue established the requirements that an applicant for reactor operating license renewal must meet, the information that must be submitted to the NRC for review, and the application procedures. Final Rule,

---

<sup>16</sup> As a procedural matter, the Staff is of the view that the affidavit, which only references the Petition, fails to set forth special circumstances “with particularity.” Cf. *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) (“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.”).

Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991).<sup>17</sup> The rule was founded on two principles: first, that, with the exception of age-related degradation unique to license renewal, and possibly a few other issues related to safety only during extended operation, the regulatory process is adequate to ensure that the licensing bases of currently operating plants provide and maintain an acceptable level of safety for operation. *Id.* at 64,946. Second, each plant's current licensing basis must be maintained during the renewal term. *Id.* In keeping with these principles, the Commission explicitly considered the role of emergency planning considerations in the license renewal review. In particular, the Commission, in the statements of consideration for the final license renewal rule, noted the following:

- 10 C.F.R. § 50.54(q) requires that a licensee maintain in effect emergency preparedness plans that meet the standard in 10 C.F.R. § 50.47(b) and the requirements of 10 C.F.R. Part 50, Appendix E. These requirements are independent of license renewal, and will continue to apply during the license renewal term.
- 10 C.F.R. § 50.54(t) requires a detailed annual review of the facility's emergency preparedness plan by persons who have no direct responsibility for its implementation.<sup>18</sup>

---

<sup>17</sup> Explicit statements in the statement of considerations are a primary source for determining the purposes for which the rule was adopted. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 239, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998), citing *Seabrook*, CLI-88-10, 28 NRC at 598-600.

<sup>18</sup> The periodicity of this review has since been revised. 10 C.F.R. § 50.54(t)(1) currently provides:

The licensee shall provide for the development, revision, implementation, and maintenance of its emergency preparedness program. The licensee shall ensure that all program elements are reviewed by persons who have no direct responsibility for the implementation of the emergency preparedness program either: (i) At intervals not to exceed 12 months or, (ii) As necessary, based on an assessment by the licensee against performance indicators, and as soon as reasonably practicable after a change occurs in personnel, procedures, equipment, or facilities that potentially could adversely affect emergency preparedness, but no longer

(continued...)



This review includes an evaluation of the continued adequacy of applicable and appropriate communication and working relationships with State and local governments.

- Under 10 C.F.R. Part 50, Appendix E, licensees must perform an annual exercise of their emergency preparedness plans and be evaluated by the NRC against definitive performance criteria.<sup>19</sup>

*Id.* at 64,966. The Commission concluded:

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. The NRC has determined that the current 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 64,966-64,967. Moreover, the Commission explicitly addressed, in response to public comment, the very issues relevant to population density and transportation raised by the County:

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

---

<sup>18</sup>(...continued)

than 12 months after the change. In any case, all elements of the emergency preparedness program must be reviewed at least once every 24 months.

<sup>19</sup> As in the case of Section 50.54(t), discussed above, the periodicity of these exercises has since changed. See 10 C.F.R. Part 50, Appendix E, Section IV.F.2.b, which states, *inter alia*, "Each licensee at each site shall conduct an exercise of its onsite emergency plan every 2 years"; and Section IV.F.2.c., which states, *inter alia*, "Offsite plans for each site shall be exercised biennially with full participation by each offsite authority having a role under the plan."



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

*Id.* at 64,967 (emphasis added). From the foregoing, it is thus clear that in its rulemaking, the Commission addressed generically the concerns raised by the County, *viz.*, changing demographics and transportation systems. The broad allegations raised by the County here fail to overcome the threshold necessary to demonstrate special circumstances unique to Millstone not considered by the Commission in the license renewal rulemaking so as to warrant consideration of emergency preparedness issues in this particular license renewal proceeding.<sup>20</sup>

With respect to the question of whether the so-called “special circumstances” undercut the rationale for the rule sought to be waived, the County has failed to make such a

---

<sup>20</sup> The Licensing Board placed some importance on the fact that the County is not located in the same State as the Millstone facility. However, several facilities have 10-mile emergency planning zones (“EPZs”) that cross state boundaries, including the Quad Cities, Beaver Valley, Seabrook, Grand Gulf, Vermont Yankee and Peach Bottom facilities. With respect to Millstone in particular, Fishers Island, which is a Hamlet of the Town of Southold, New York, and located about 7.5 miles east/southeast of the Millstone facility, is included in the 10-mile EPZ and is addressed in the State of Connecticut’s Radiological Emergency Response Plans (“RERP”). Because of the logistics associated with the island’s location, there is an operational agreement between officials of Fishers Island, the Town of Southold, Suffolk County, the State of New York, and the State of Connecticut to include Fishers Island in the Connecticut RERP, as opposed to the New York RERP. Accordingly, the State of Connecticut RERP has incorporated the planning effort for Fishers Island. See Letter from L. Reyes, Executive Director for Operations, NRC, to the Honorable T. Bishop, U.S. House of Representatives, dated March 10, 2005, ADAMS Accession No. ML050410421. See also *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987) (“In our view, the proper interpretation of the [EPZ] rule would call for adjustment to the exact size of the EPZ only on the basis of such 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.”).

demonstration. Indeed, a *grant* of the requested waiver would undercut the purpose of the license renewal rule. As discussed above, the principal rationale for the rule is that, age-related degradation aside, the ongoing regulatory process is adequate to ensure an acceptable level of safety for operation of a nuclear plant during the license renewal term. Given the obvious diversity of site characteristics at facilities licensed by the Commission, the factual representations by the County are, as one would expect, specific to the County and this facility. Nevertheless, such information is not in itself sufficient to establish that the normal, ongoing reviews associated with emergency planning for Millstone are not adequate to appropriately deal with the underlying issues as contemplated by the regulation.<sup>21</sup> In not performing an emergency planning review, the rule is operating as intended.

Because special circumstances have not been established, the Commission need not reach the third prong of the test. In any event, however, the County has not made the requisite showing. Justifying a waiver requires that a petitioner establish that the issue raised is a significant safety problem. “[T]he Commission intended that the indication of a significant safety problem be something more than simply showing that exceptional circumstances undercut a rule with some basis in safety....” *Seabrook*, CLI-89-20, 30 NRC at 244. As discussed in the Staff Motion to Strike (at 7), the Kohn Affidavit and other County papers merely

---

<sup>21</sup> The County’s particular concerns were considered during original licensing. Formal submission for regulatory review of the Radiological Emergency Response Plans (RERPs) for the Millstone nuclear facility occurred in 1982. Formal approval of the RERPs was granted by FEMA in October 1984, pursuant to 44 CFR Part 350. The mainland Town of Southold, NY, which is about 11 miles from Millstone, is not included in the 10-mile EPZ for Millstone. However, as discussed above, Fishers Island is included in the 10-mile EPZ. The 50-mile ingestion pathway EPZ for the Millstone nuclear facility includes the Town of Southold, and all of the eastern Long Island communities in Suffolk County, New York. The State of New York is responsible for the planning effort for the 50-mile EPZ on Long Island. See Letter from L. Reyes, Executive Director for Operations, NRC, to the Honorable T. Bishop, U.S. House of Representatives, dated March 10, 2005, ADAMS Accession No. ML050410421.

reference broad allegations, and do not articulate a significant safety problem related to 10 C.F.R. § 50.47(a)(1), let alone one that can only be resolved by virtue of a rule waiver.

For these reasons, 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), and the waiver request should therefore be denied.

B. The County's Untimely Petition Failed to Satisfy the Criteria for Late Filing.

1. *The County's Late Petition and the Licensing Board's Ruling.*

In its Petition, filed some seven months after the date for filing a timely petition to intervene, the County argued that it received no timely actual notice of the opportunity to intervene, and that publication of notice in the *Federal Register* was insufficient to put the County on notice to allow meaningful participation in the proceeding. Petition at 5. In addition, the County argued generally that the other late-filing factors weighed in its favor. See Petition at 2-5; *see generally* County Reply.

In LBP-05-16, the Licensing Board concluded, first, that the Petition was filed “very late” and without good cause. LBP-05-16, slip op. at 6. However, the Licensing Board found that six out of the other seven late filing considerations set forth in 10 C.F.R. § 2.309(c), weighed in favor of the County; without elaboration, the Licensing Board concluded that the County’s showing on those other factors was a strong one “because of its status as a local government and because of the nature of its contention.” *Id.*, slip op. at 10. For the reasons discussed below, the Staff disagrees, and argues that the balance of late-filing factors tips against the County in this matter.

2. *Regulatory Standards for Late-Filed Petitions*

The Commission's regulations require that a late petitioner must demonstrate that its request should be granted, based upon a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1). That regulation provides, in pertinent part:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).<sup>22</sup> Petitioners seeking admission of late petitions bear the burden of showing that a balancing of these factors weighs in favor of admittance. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998).

The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where the showing of good cause for the lateness is not persuasive, however, “petitioner’s demonstration on the other factors must be particularly strong.”

*Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3),

---

<sup>22</sup> Although these regulations were revised recently (see Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), they incorporate the substance of the Commission’s long-standing late-filed contention requirements. Compare 10 C.F.R. § 2.309(c) and (f)(2), with 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004); see also 69 Fed. Reg. at 2221.

ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest, are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.

3. *The County Failed to Satisfy the Criteria for Admissibility of a Late-Filed Petition.*

As an initial matter, the Staff agrees with the Licensing Board's conclusion that the reasons given by the County for its delay in filing do not rise to the level of "good cause." As such, the County's showing with respect to the other factors must be "particularly strong." *Comanche Peak*, CLI-92-12, 36 NRC at 73.

In its Answer, the Staff did not dispute that factors (ii), (iii), (iv), (v), and (vi)<sup>23</sup> weigh in favor of the County. See NRC Staff Answer at 5-6. However, factor (vii) weighs strongly against the County, as the grant of the Petition at this late stage would result in a broadening of the issues and/or substantial delay. Indeed, because the Petition raises a contention related to emergency planning, admission of the County's late Petition would, for the reasons discussed in Section A, *supra*, and Section C, *infra*, impermissibly broaden the scope of issues considered in a license renewal proceeding. Factor (vii) is of "immense importance" in the overall balancing process. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 402 (1983), citing *Detroit Edison Co.* (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 761-62 (1978).

In addition, with respect to factor (viii), the County's ability to assist in the development of a sound record, the Licensing Board concluded that, based on its subsequent filings (presumably, the County Reply) and by the "sense of purpose" demonstrated by representatives of the County present during the prehearing teleconference, this factor weighs

---

<sup>23</sup> As noted above, factors (v) and (vi) are the least important of the factors. *Comanche Peak*, CLI-92-12, 36 NRC at 74.

heavily in the County's favor. LBP-05-16, slip op. at 10. Even assuming, for the sake of argument, that the emergency planning issues proffered by the County were within the scope of this proceeding, the Staff believes this factor weighs against the County. In its Reply, the County referenced citations to two documents cited in the Petition, and noted that it has many experts at its disposal relative to the emergency planning questions at issue. See County Reply at 14. The Commission has, however, established requirements that the intervenor show with particularity the "precise issues" the petitioner plans to address, and that it "identify its potential witnesses, and summarize their proposed testimony." *Comanche Peak*, CLI-92-12, 36 NRC at 74; see also *State of New Jersey*, CLI-93-25, 38 NRC at 296. This, the County did not do. Rather, the County, in its Reply, noted that, in the *Perry* case,<sup>24</sup> the Licensing Board weighed this factor in favor of the intervenor, even in the absence of witness affidavits. Whether correctly decided in *Perry* or not, that Licensing Board decision does not create binding precedent. Rather, the Staff is of the view that the subsequent Commission precedent cited by the Staff controls. Accordingly, this factor must weigh strongly against the County.<sup>25</sup>

In summary, the Staff concludes that while five of the late filing factors may weigh in favor of the County, three weigh against it. A numerical preponderance of factors weighing in favor of the County is not determinative. As discussed above, the factors are accorded relatively different weights based upon their importance. The factors that weigh against the County – lack of good cause, the extent to which the County's participation will broaden the issues and delay the proceeding, and the extent to which the County may be reasonably be

---

<sup>24</sup> *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-80, 18 NRC 1404 (1983).

<sup>25</sup> See *Washington Pub. Power Supply System* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1180 (1983)("[a]lthough [this] factor is important in the determination of all late petitions, . . . it assumes yet greater importance in cases, such as that at bar, in which the grant or denial of the petition will also decide whether there is to be any adjudicatory hearing"); *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Units 1 & 2), ALAB-413, 5 NRC 1418, 1422 (1977).

expected to assist in developing a sound record – are accorded considerably greater weight than the other factors. Therefore, in the absence of good cause, the Staff does not find that the seven additional factors weigh *strongly* in favor of the County. Accordingly, the County has not satisfied the balancing test of 10 C.F.R. § 2.309(c), and its late-filed Petition should be denied.<sup>26</sup>

C. The County's "Emergency Planning" Contention Failed to Satisfy the Contention Requirements of 10 C.F.R. §2.309(f).

Regarding the compliance of the County with the Commission's contention pleading rules, set forth at 10 C.F.R. § 2.309(f), the Licensing Board concluded that "the County's pleading was adequate for the matter it is seeking to present." LBP-05-16, slip op. at 11. In so doing, the Licensing Board suggested that governmental entities such as the County need not be strictly required to comply with the strictures of the contention pleading rules.<sup>27</sup> The Staff, however, is of the view that, to the extent they seek to participate as a party pursuant to 10 C.F.R. § 2.309, all participants should be held to the same rigorous standards for submission of contentions set forth in 10 C.F.R. § 2.309(f) as are all other petitioners – no exception is created by that rule. To permit otherwise would contravene established precedent and impermissibly frustrate the purposes underlying the Commission's requirements for contentions in an NRC proceeding. *Cf. Pac. Gas & Elec. Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 453-460 (2002), *pet. for review*

---

<sup>26</sup> The Licensing Board notes that in the *West Valley* case, the Commission allowed intervention of a County, in the absence of good cause, on the basis of a balancing of the other late filing factors. LBP-05-16, slip op. at 6, citing *Nuclear Fuel Servs., Inc. & N.Y. State Atomic & Space Development Auth.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975). It should be noted that, in that case, the Commission determined that the intervenor, Erie County, had proffered an admissible contention under the rules then in effect. *Id.* at 275. As the Staff argues below, that is not the case here.

<sup>27</sup> See LBP-05-16, slip op. at 12 ("[T]here 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 period changes that have made those pleading rules increasingly stringent.")(emphasis in original).



*denied*, CLI-03-12, 58 NRC 185 (2003)(holding that, to the extent they seek to raise their own issues, governmental entities otherwise participating pursuant to 10 C.F.R. § 2.715(c) (now 2.315(c)) are to be held to the same requirements, to the extent they seek to raise their own issues, for the submission of contentions as Section 2.714 (now Section 2.309) petitioners).

To permit litigation of an issue that does not meet Section 2.309(f) would plainly thwart the purposes of the contention requirements. The filing of issues that fall short of the admissibility requirements of Section 2.309(f) would constitute “notice pleading,” which is strictly prohibited under the NRC’s regulatory scheme. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 338 (1999). Irrespective of the County’s expertise with respect to emergency planning issues relevant to its populace, to warrant admission as a party, it nevertheless must proffer contentions that conform to the governing regulation.

As discussed in the NRC Staff Answer, the emergency planning contention raised by the County is inadmissible for litigation in this license renewal pleading. In short, the issues raised are plainly outside the scope of the proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iii), because emergency planning issues are outside the scope of license renewal.

10 C.F.R. § 50.47(a)(1). *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 640 (2004); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9-10 (2001).<sup>28</sup> In addition, the contention is not material to the findings the NRC must make to support the action that is involved in the proceeding; and does not set forth a specific factual or legal basis.

10 C.F.R. § 2.309(f)(1)(iv), (vi). These reasons form an additional, independent basis upon which the Petition should be denied.

---

<sup>28</sup> As noted above, the Staff takes the position that the waiver argument has no merit, and that these applicable regulations and Commission case law would be operative in this proceeding.



D. The Licensing Board Improperly Postponed Its Ruling on Contention Admissibility Pending Settlement Discussions.

As a general proposition, the Staff appreciates the benefits of resolving matters without the need for adjudicatory intervention. Indeed, the Staff agreed to and did participate in discussions with the other participants in this matter.<sup>29</sup> The Commission looks with favor upon settlements. See, e.g., *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-28, 50 NRC 291, 293 (1999). Likewise, the Staff is supportive of settlement agreements that serve to avoid time-consuming and costly litigation, and to resolve issues in the public interest. See 10 C.F.R. § 2.338. With respect to this proceeding, the Staff has made a concerted effort to facilitate discussions on the emergency planning issues of concern to the County. In particular, the Staff took pains to ensure that all relevant governmental participants were present at the May 18 meeting, including representatives of the NRC headquarters and regional staff, the Federal Emergency Management Agency and the New York State Emergency Management Office.<sup>30</sup> Under the circumstances of this case, however, the objections to the County's Petition expressed in the Staff's (as well as DNC's) papers raised fundamental questions affecting the very ability of the County to participate in this matter. For this reason, the Staff took the position

---

<sup>29</sup> Regarding this participation, the Licensing Board, in LBP-05-16, intimated that the NRC Staff did not participate in these discussions (and, indeed, in discussions in *other*, unrelated proceedings) in good faith. See LBP-05-16, slip op. at 18 ("In light, however, of the issues that ended up before a presiding officer in the *Fansteel* and *Sequoyah [Fuels]* cases, we entertain considerable doubt that a truly collaborative effort was undertaken. . . . 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.") The Staff takes umbrage at the Licensing Board's suggestion. Further, in any event, the outcomes of the *Fansteel* and *Sequoyah Fuels* proceedings are of no moment here.

<sup>30</sup> The Staff takes quite seriously its responsibility to establish and maintain effective communications and working relationships with affected governments, including local governments. This includes participation in the resolution of contested issues before the Licensing Board. Of course, participation in a settlement discussion is no guarantee of success. Further, in this matter, as always, the issues in the proceeding must necessarily pertain to the adequacy of DNC's license renewal applications, and not the adequacy of the Staff's review. See *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121 (1995).

throughout this proceeding that it regarded its discussions with the other participants as relating to its ongoing regulatory processes with respect to emergency planning.

Specifically, at the time the settlement talks took place, three issues were pending before the Licensing Board with respect to the County's Petition: (1) whether the Petition met the criteria for untimely intervention petitions and contentions (see 10 C.F.R. § 2.309(c)); (2) whether the County had demonstrated standing to intervene in the proceeding (see 10 C.F.R. § 2.309(d)); and (3) whether the County's proffered contention satisfied the NRC's contention admissibility requirements (see 10 C.F.R. § 2.309(f)). As noted, all three of these issues are determined as dictated by longstanding NRC regulations. See generally 10 C.F.R. § 2.309 (a)-(b). Until the presiding officer determines that these requirements are met, a petitioner is not a party to an adjudicatory proceeding.<sup>31</sup> Such a determination is to be made within forty-five (45) days after the filing of answers and replies pursuant to 10 C.F.R. § 2.309(h), absent an extension from the Commission.<sup>32</sup> 10 C.F.R. § 2.309(i).

By its terms, 10 C.F.R. § 2.338,<sup>33</sup> which governs the settlement of issues proposed for litigation in a proceeding, applies to *parties* to proceedings. See, e.g., 10 C.F.R. § 2.338 ("Parties are encouraged to employ various methods of alternate dispute resolution to address the issues without the need for litigation in proceedings subject to this part.") (emphasis added); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981)

---

<sup>31</sup> 10 C.F.R. § 2.309(a) ("Any person whose interest may be affected by a proceeding *and who desires to participate as a party* must file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing.") (emphasis added). See *Louisiana Energy Servs. (National Enrichment Facility)*, LBP-04-14, 60 NRC 40, 53, *aff'd*, CLI-04-25, 60 NRC 223 (2004); *Diablo Canyon*, LBP-02-23, 56 NRC at 437.

<sup>32</sup> Briefing in this matter was completed on March 23, 2005. The Licensing Board did not seek an extension of time to rule from the Commission.

<sup>33</sup> When the Commission revised its rules of practice in 10 C.F.R. Part 2, Section 2.338 was created as a new provision intended to "consolidate and amplify" the previous rules pertaining to settlement (10 C.F.R. §§ 2.203, 2.759, 2.1241). The Commission noted, however, that it intended no change in the bases for accepting a settlement under the new rule. See 69 Fed. Reg. at 2225.

("The *parties* should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues.") In the absence of a ruling by the Licensing Board on the County's party status, settlement negotiations while the County's Petition was pending before the Licensing Board were premature. Such an interpretation is logical in a proceeding such as this one, where the petitioner is not only inexcusably late in seeking to intervene, but attempts to raise a broadly-worded contention, lacking both specific factual and legal basis, and falling outside the scope of the proceeding. Without one or more clearly-framed, admitted contentions, it is difficult to focus settlement discussions, and the proceeding, if held in abeyance pending settlement discussions, will likely stall.<sup>34</sup>

For these reasons, the Licensing Board should not have postponed its decision on the Petition pending settlement discussions.<sup>35</sup>

### CONCLUSION

For the reasons set forth above, the County's waiver request should be denied. Furthermore, (1) the County's late-filed Petition was not admissible under the criteria set out in 10 C.F.R. § 2.309(c) for late-filed petitions and contentions; (2) the County's contention related

---

<sup>34</sup> The settlement regulations themselves recognize that delay should be avoided. 10 C.F.R. § 2.338(f) states, "The conduct of settlement negotiations does not divest the presiding officer of jurisdiction and does not automatically stay the proceeding. *A hearing must not be unduly delayed because of the conduct of settlement negotiations.*" (emphasis added).

<sup>35</sup> As noted at the outset of this discussion, the Staff maintains that settlement discussions outside the confines of the adjudicatory process may be productively undertaken when circumstances warrant.

to emergency planning did not satisfy the contention requirements set out in 10 C.F.R. § 2.309(f); and (3) the Licensing Board improperly postponed its decision on the Petition pending settlement discussions.

Respectfully submitted,

*/RA/*

Brooke D. Poole  
Mauri T. Lemoncelli  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 18<sup>th</sup> day of August, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Mauri T. Lemoncelli
Address:	Office of the General Counsel Mail Stop 0-15D21 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001
Telephone Number:	(301) 415-1778
Fax Number:	(301) 415-3725
E-mail Address:	mtl1@nrc.gov
Admissions:	District of Columbia
Name of Party:	NRC Staff

Respectfully submitted,

**/RA/**

Mauri T. Lemoncelli  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 18<sup>th</sup> day of August, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 BRIEF IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-05-18" and the notice of appearance of Mauri T. Lemoncelli, in the 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 18<sup>th</sup> day of August, 2005:

Michael C. Farrar, Chairman  
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.\*  
Pillsbury Winthrop Shaw Pittman, LLP  
2300 N St., NW  
Washington, DC 20037-1128  
E-mail: david.lewis@pillsburywinthrop.com  
matias.travieso-diaz@pillsburywinthrop.com  
timothy.walsh@pillsburywinthrop.com

Christine Malafi, Esq.\*  
Jennifer Kohn, Esq.\*  
Suffolk County Attorney  
H. Lee Dennison Building, 6<sup>th</sup> Floor  
P.O. Box 6100  
100 Veterans Memorial Highway  
Hauppauge, NY 11788  
E-mail:  
Christine.Malafi@suffolkcountyny.gov  
jennifer.kohn@suffolkcountyny.gov

**/RA/**

---

Mauri T. Lemoncelli  
Counsel for NRC Staff