

August 18, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

August 18, 2005 (2:41pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

\_\_\_\_\_)  
)  
In the Matter of )  
)  
DOMINION NUCLEAR )  
CONNECTICUT, INC. )  
(Millstone Nuclear Power Station, )  
Units 2 and 3) )  
\_\_\_\_\_)

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

**MOTION OF THE NUCLEAR ENERGY INSTITUTE  
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION  
TO SUFFOLK COUNTY'S REQUEST FOR  
AN EXEMPTION FROM OR WAIVER OF 10 C.F.R. § 50.47(a)(1)**

The Nuclear Energy Institute ("NEI") hereby seeks leave to file the simultaneously-submitted brief *amicus curiae* with the Nuclear Regulatory Commission ("NRC" or "Commission") in the above-captioned proceeding. On August 4, 2005, the Commission issued Memorandum and Order CLI-05-18, accepting certification from the Atomic Safety and Licensing Board ("Licensing Board") on the question of "whether to grant Suffolk County's request for an exemption from (or waiver of) 10 C.F.R. § 50.47(a)(1) (which provides that

Template = SECY-037

SECY-02

emergency planning issues are not germane to license renewal determinations).”<sup>1</sup> The Licensing Board certified this matter to the Commission in its “Memorandum and Order (Concerning Belated Intervention Petition),” LBP-05-16, 62 NRC \_\_ (July 20, 2005 slip op. at 13-20). The certification stems from a late petition to intervene filed in this previously-terminated proceeding, in which Suffolk County, New York seeks to have admitted several contentions challenging the adequacy of the emergency plan of license renewal applicant Dominion Nuclear Connecticut, Inc. (“Dominion”).<sup>2</sup>

Although the Commission will also address three additional questions raised by the Licensing Board’s July 20, 2005 Memorandum and Order, NEI’s *amicus* brief addresses only the certified question. NEI believes that its *amicus* brief will complement the briefs filed by the parties in response to the Commission Order, and thereby assist the Commission in determining whether or not the requested exemption from NRC requirements is appropriate.

NEI offers a unique perspective concerning the question that has been certified in this proceeding. NEI is the organization responsible for establishing unified policy on issues that affect the U.S. nuclear industry, including the regulatory aspects of generic operational and technical issues. NEI’s members

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<sup>1</sup> *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-18, 62 NRC \_\_ (Aug. 4, 2005 slip op. at 1) (“Commission Order”).

<sup>2</sup> In *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004), the Commission affirmed the Atomic Safety and Licensing Board’s denial of the intervention petition filed by the Connecticut Coalition Against Millstone (“CCAM”), ruling that all of CCAM’s proposed contentions (including one that raised emergency planning and evacuation issues) were inadmissible. The Commission also affirmed the Licensing Board’s denial of CCAM’s motion for reconsideration, affirmed its denial of CCAM’s request to provide additional support for its contentions, and terminated the license renewal proceeding. 60 NRC at 644-45.

include all entities licensed to operate the 103 commercial nuclear power plants in the United States.<sup>3</sup> Many of these NRC reactor licensees would potentially be affected by the issuance of an exemption from, or waiver of, Section 50.47(a)(1) to allow consideration of emergency planning in a license renewal proceeding. In sum, NEI represents the industry's collective interest in ensuring an informed determination on this important legal question. NEI therefore wishes to be heard on the certified question.

NEI also has a clear and direct interest in the certified question. On behalf of the U.S. nuclear industry, NEI (and its predecessor organizations) have long been involved in NRC license renewal issues. Before the promulgation of the initial license renewal rule, NEI participated in the Steering Committee on Nuclear Plant Life Extension and workshops on license extension. NEI submitted extensive comments on the NRC proposed rule that resulted in the promulgation of 10 C.F.R. Part 54 in 1991. NEI participated in a 1993 NRC workshop on license renewal. Further, NEI submitted extensive comments on the proposed amendments to 10 C.F.R. Part 54 promulgated in 1995. NEI also commented on the proposed amendments to 10 C.F.R. Part 51 that led to the promulgation in 1996 and 1999 of NRC requirements for addressing license renewal-related environmental issues. Moreover, NEI continues to address key license renewal issues with the NRC Staff. For example, NEI was instrumental in assisting with the development of the NRC

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<sup>3</sup> NEI's membership also includes nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Generic Aging Lessons Learned (GALL) Report, which provides the technical basis for the NRC Standard Review Plan for license renewal.

Moreover, NEI also represents the commercial reactor industry on emergency planning issues, such as those raised by the certified question. Suffolk County's proposal to inject generic questions relating to emergency plans and preparedness into NRC license renewal proceedings, in contravention of clear Commission policy and precedent, has broad regulatory and adjudicatory implications for all current and future NRC license renewal applicants.

Further, NEI's participation in this proceeding as *amicus curiae* will not prejudice or unduly burden any other party. As an amicus, NEI will necessarily "take the proceeding as it finds it." NEI does not propose to inject new issues into the proceeding or seek to alter the record developed by the parties.<sup>4</sup>

NEI has been authorized by legal counsel for applicant Dominion and legal counsel for the NRC Staff to represent that the applicant and the NRC Staff do not oppose NEI's motion for leave to file a brief as *amicus curiae*. NEI has also consulted with legal counsel for Suffolk County on this matter, but, to date, the County has not indicated whether or not it opposes grant of this motion.

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<sup>4</sup> See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 97 (1997) (The Commission granted the motion of the Nuclear Energy Institute to file an *amicus curiae* brief in the appeal of the Atomic Safety and Licensing Board's second partial initial decision concerning the licensing of the Claiborne Enrichment Center, a proposed uranium enrichment facility.). See also *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987) (The NRC Appeal Board allowed a U.S. Senator from New Hampshire to participate as *amicus curiae* in the offsite emergency planning phase of an operating license proceeding.).

For the foregoing reasons, NEI respectfully moves the Commission to accept its brief *amicus curiae*, and requests that the Commission consider the important emergency planning and license renewal issues affecting the U.S. reactor industry as discussed therein.

Respectfully submitted,



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Dated: August 18, 2005

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OPPOSING SUFFOLK COUNTY'S REQUEST FOR  
AN EXEMPTION FROM OR WAIVER OF 10 C.F.R. § 50.47(a)(1)**

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OPPOSING SUFFOLK COUNTY'S REQUEST FOR  
AN EXEMPTION FROM OR WAIVER OF 10 C.F.R. § 50.47(a)(1)**

I. INTRODUCTION

On August 4, 2005, the Nuclear Regulatory Commission (“NRC” or “Commission”) issued Memorandum and Order CLI-05-18 accepting Licensing Board certification<sup>1</sup> of the question of “whether to grant Suffolk County’s request for an exemption from (or waiver of) 10 C.F.R. § 50.47(a)(1) (which provides that emergency planning issues are not germane to license renewal determinations).”<sup>2</sup> The certification stems from a late petition to intervene filed by Suffolk County,

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<sup>1</sup> See Memorandum and Order, LBP-05-16, 62 NRC \_\_\_\_ (“Board Memorandum and Order”).

<sup>2</sup> Memorandum and Order, p. 1. The Commission also expressed its “inten[t] to consider, *sua sponte*, three other questions – (1) whether Suffolk County’s late-filed contention was admissible under the criteria for considering late-filed pleadings and contentions set out in 10 C.F.R. § 2.309(c); (2) whether Suffolk County’s contention regarding ‘emergency planning’ satisfied the contention requirements in 10 C.F.R. § 2.309(f); and (3) whether, under the circumstances of this case, the Board properly postponed its contention-admissibility decision pending settlement talks.” *Id.*, p. 2. Because of the particular interests of *amicus curiae* Nuclear Energy Institute, Inc. (“NEI”), this brief addresses only the certified question.

New York in this previously-terminated proceeding.<sup>3</sup> In the petition, the County belatedly sought to have admitted, and thereafter litigated, a set of contentions all focused on challenging the adequacy of Dominion's emergency plan.<sup>4</sup> Setting aside the questionable propriety of entertaining the County's petition in a *terminated* proceeding, its request for exemption from or waiver of 10 C.F.R. § 50.47(a)(1) should be denied.

## II. ANALYSIS

### A. There Is No Legal Basis for Exemption or Waiver

The Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.*, provides for the issuance of operating licenses for nuclear power plants and allows renewal. Prior to 1992, 10 C.F.R. § 50.51 implemented the Commission's authority with respect to the issuance of operating licenses, but the NRC's regulations provided no procedures for renewal applications. The nuclear industry expressed considerable interest in operating nuclear plants beyond their initial term of operation, and undertook several initiatives to support plant life extension. The industry also urged the NRC to develop standards and procedures for license renewal, so that utilities would know what would be required to obtain a renewed operating license.<sup>5</sup>

On July 17, 1990, the Commission issued for public comment a proposed rule for license renewal. A final rule was issued on December 13, 1991, effective

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<sup>3</sup> See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 645 (2004) ("CLI-04-36").

<sup>4</sup> See Board Memorandum and Order, p. 1.

<sup>5</sup> See 56 Fed. Reg. 64,943 (1991).

January 13, 1992. The final rule established requirements that an applicant for renewal of a nuclear power plant operating license must meet; the information that must be submitted for review for the NRC to determine whether requirements have, in fact, have been met; and application procedures. The fundamental purpose of the rule was “to ensure a reasoned process” for license renewal and provide the regulatory guidance necessary for extending nuclear power plant licenses beyond 40 years.<sup>6</sup>

Four-and-a-half years later, the Commission revised its nuclear power plant license renewal regulations.<sup>7</sup> A principal purpose of the modifications was to simplify and clarify the renewal rule.<sup>8</sup> In undertaking its revision of the rules, the Commission emphasized the essential importance of having a “predictable and stable regulatory process clearly and unequivocally defining the Commission’s expectations for license renewal.”<sup>9</sup> Such a process, the Commission noted, was essential to “permit[ting] licensees to make decisions about license renewal without being influenced by a regulatory process that is perceived to be uncertain, unstable, or not clearly defined.”<sup>10</sup>

From their initial issuance, a common feature of the NRC’s license renewal regulations has been exclusion of the need to consider emergency planning. As adopted in 1991, 10 C.F.R. § 50.47(a)(1) provided, in pertinent part, that “No finding

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<sup>6</sup> *See id.*

<sup>7</sup> *See* 60 Fed. Reg. 22,461 (1995).

<sup>8</sup> *See id.* at 22,463.

<sup>9</sup> *Id.* at 22,462.

<sup>10</sup> *Id.*

under this section is necessary for issuance of a renewed nuclear power operating license.” That provision remains unchanged to this day.

In the statement of considerations accompanying adoption of the 1991 rule, the Commission noted that it was not necessary to review each renewal application against standards and criteria applicable to new or future plants in order to assure that, during the period of extended operation, public health and safety was assured. This is because, from the time of initial licensing, each operating plant is continually inspected and reviewed as a result of new information gained from operating experience. Ongoing regulatory processes provide reasonable assurance that, as new issues and concerns arise, measures are implemented to assure that operation is not inimical to public health and safety.<sup>11</sup>

Specifically with respect to emergency planning, the Commission noted that its regulations imposed requirements and performance objectives to protect the public health and safety by ensuring the existence, implementation, revision, and maintenance of emergency preparedness for licensed nuclear power plants. These requirements are imposed throughout the life of the plant and continue to apply during the renewal term. The Commission noted that emergency planning requirements are continually reviewed for adequacy, and that periodic exercises are conducted to evaluate performance against definitive criteria. Following the exercises, findings are made concerning the success of the emergency plan and, in

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<sup>11</sup> See 56 Fed. Reg. 64,943, 64,945.

some cases, weak and deficient areas requiring correction are identified. These processes continue during the renewal term.<sup>12</sup> The Commission concluded:

Through its standards and required exercises, the Commission ensures that existing plans are adequate throughout the life of any plant *even in the face of changing demographics and other site-related factors*. Thus, these drills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness in light of changes in site characteristics that may occur during the term of the existing operating license, *such as transportation systems and demographics*. *There is no need for a licensing review of emergency planning issues in the context of license renewal.*

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. *The Commission has amended 10 CFR 50.47 to clarify that no new finding on emergency preparedness will be made as part of a license renewal decision.*<sup>13</sup>

When the Commission undertook the major revision of the renewal rule in 1995, emphasizing the importance of a “predictable and stable” renewal process, it observed that, from the beginning, “*The first principle of license renewal was that, with the exception of age-related degradation unique to license renewal and possibly a few other issues related to safety only during the period of extended operation of nuclear power plants, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an*

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<sup>12</sup> *Id.* at 64,966.

<sup>13</sup> *Id.* at 64,966-67 (emphasis added).

*acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security.*"<sup>14</sup> Within this context, the Commission thoroughly evaluated emergency planning considerations addressed in the original license renewal rulemaking and concluded that "These evaluations and conclusions are still valid . . . ." <sup>15</sup>

Considered against this backdrop, it is clear that no basis exists for granting "an exemption from (or waiver of)" Section 50.47(a)(1) of the Commission's regulations, as the County requests. The Commission has developed and refined its license renewal regulations, including the section in question, over a period extending back more than 15 years, when they were first proposed. Under NRC regulations, the only ground for the requested relief "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 was adopted."<sup>16</sup> There is nothing special with respect to the subject matter of the instant proceeding that meets these requirements. Emergency plans are continuously evaluated, exercised, and revised to assure their adequacy at Millstone, just as they are elsewhere. As a result, changing transportation systems, demographics, and other site-related factors are fully accommodated.

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<sup>14</sup> 60 Fed. Reg. 22,461, 22,464 (emphasis added).

<sup>15</sup> *Id.* at 22,468.

<sup>16</sup> 10 C.F.R. § 2.335(b).

The NRC maintains an aggressive regulatory program to oversee all facets of plant operation, including emergency planning. For license renewal, the Commission has found it unnecessary to include in its review all issues monitored, reviewed, and constantly resolved, as needed, by ongoing regulatory oversight. The Commission has found it both unnecessary and inappropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during license renewal review.<sup>17</sup> As the Commission has explained on numerous occasions, the issue of emergency planning is specifically excluded from such review. In fact, in this very proceeding, the Commission found the exclusion of a contention dealing with emergency planning to be proper because such issues fall outside of the scope of license renewal proceedings.<sup>18</sup> As the Commission also clearly and carefully explained in its *Turkey Point* decision:

Just as . . . oversight programs help ensure compliance with the current licensing basis during the original license term, they likewise can reasonably be expected to fulfill this function during the renewal term. In short, the regulatory process commonly is "the means by which the Commission continually assesses the adequacy of and compliance with" the current licensing basis.

For an example of how the ongoing regulatory process works to maintain safety, we can look at the issue of emergency planning. The Commission has various regulations establishing standards for emergency plans. . . . These requirements are independent of license renewal and will continue to apply during the renewal term.

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<sup>17</sup> See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 ("*Turkey Point*") (2001).

<sup>18</sup> See CLI-04-36, 60 NRC at 640-41.



They include provisions to ensure that the licensee's emergency plan remains adequate and continues to meet sixteen performance objectives. Through mandated periodic reviews and emergency drills, "the Commission ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics, and other site-related factors . . . . [D]rills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness." 56 Fed. Reg. at 64,966. *Emergency planning, therefore, is one of the safety issues that need not be re-examined within the context of license renewal.*<sup>19</sup>

The Commission has held that *Turkey Point* is "dispositive of this issue" in this proceeding.<sup>20</sup>

B. The Issue Raised is More Properly Addressed in Rulemaking

If appropriate for consideration at all, the matter of evaluating emergency planning within license renewal proceedings would be more appropriately addressed by rulemaking. Certainly there is nothing unique about Suffolk County. Most or all facilities seeking license renewal will involve a county or other governmental entity that is arguably "highly-motivated," with "jurisdiction over a geographical area admittedly affected by reactor operations," and a "sense of purpose," that "will be held to account by its populace if the need to activate the emergency plan ever arises."<sup>21</sup> As a result, allowing consideration of emergency planning issues in the instant proceeding will effectively modify the provision of 10 C.F.R. § 50.47(a)(1) pursuant to which such matters currently "fall outside the scope

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<sup>19</sup> *Turkey Point*, 54 NRC at 9 (citation omitted, emphasis added).

<sup>20</sup> CLI-04-36, 60 NRC at 641.

<sup>21</sup> Compare Board Memorandum and Order, pp. 5, 8, 10, 12 (emphasis omitted).

of license renewal proceedings.”<sup>22</sup> Clearly, any agency action with such a result is more appropriately considered, if at all, within the context of rulemaking.<sup>23</sup>

C. Important National Policy Considerations Militate Against Disrupting the License Renewal Process

As a matter of national policy, with the enactment of the Atomic Energy Act of 1954 Congress explicitly recognized the benefits of nuclear energy and established a framework for nuclear power plant licensing. Today, nuclear power plays a critical role in the nation’s electricity supply. Nuclear plants generate 20% of the electricity consumed in the United States,<sup>24</sup> and constitute approximately 70% of the nation’s emission-free electricity generation.<sup>25</sup> Continued and increased nuclear generation will benefit the domestic economy as well as energy diversity and independence.

A fundamental imbalance between supply and demand defines the nation’s current energy crisis. If energy production increases this decade at the same rate as it did the last, projected energy needs will far outstrip expected levels of production. This imbalance – if allowed to continue – will inevitably undermine the U.S.

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<sup>22</sup> CLI-04-36, 60 NRC at 640 (citation omitted).

<sup>23</sup> The Administrative Procedure Act defines “rule” as “the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy . . . .” 5 U.S.C. § 551(5) (emphasis added). In this regard, it is relevant to note that a rulemaking petition is currently pending before the Commission (PRM-54-02) seeking to have the scope of license renewal proceedings expanded to encompass, *inter alia*, emergency planning. See 70 Fed. Reg. 34,700 (2005).

<sup>24</sup> See Nat’l Comm’n on Energy Policy, *Ending the Energy Stalemate; A Bipartisan Strategy to Meet America’s Energy Challenges* p. 57 (Dec. 2004), available at <http://www.energycommission.org>.

<sup>25</sup> See *id.*

economy, standard of living, and national security.<sup>26</sup> In its Report, the National Energy Policy Development Group recommended that the President support the expansion of nuclear energy in the United States as a major component of national energy policy. Specific recommendations included encouraging the uprating of existing nuclear plants and – directly pertinent to the instant case – relicensing them.<sup>27</sup>

Consistent with the NEPD Group Report, the Administration has made nuclear power a key component of its strategy for satisfying the nation's energy needs. Last spring, President Bush emphasized nuclear power above all other approaches to achieving greater energy independence by applying technology to increase domestic production from existing energy sources.<sup>28</sup> This summer, the President visited the Calvert Cliffs Nuclear Power Plant and highlighted the importance of nuclear energy in supplying additional safe, clean, reliable electricity.<sup>29</sup> Earlier this month, the President signed the Energy Policy Act, directed at strengthening the economy, improving the environment, and making the country more secure. During the signing, the President noted:

Nuclear power is another of America's most important sources of electricity. Of all our nation's energy sources, only nuclear power plants can generate massive amounts of

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<sup>26</sup> National Energy Policy, Report of the National Energy Policy Development Group p. vii (May 2001) ("NEPD Group Report").

<sup>27</sup> See NEPD Group Report, p. 5-17.

<sup>28</sup> See President Discusses Energy at National Small Business Conference (April 27, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/print/20050427-3.html>.

<sup>29</sup> See President Discusses Energy Policy, Economic Security (June 22, 2005), available at <http://www.whitehouse.gov/news/releases/2005/06/print/20050622.html>.

electricity without emitting an ounce of air pollution or greenhouse gases.<sup>30</sup>

Operators of the 103 commercial power reactors in the U.S. fleet have been working both to increase the output and, as in the instant proceeding, extend the operating lives of existing plants in order to meet the nation's growing demand for energy. With respect to the former point, since the late 1970s, the NRC has approved 105 power uprates of existing reactors, adding more than 4,400 megawatts electric of generating capacity.<sup>31</sup> With respect to the latter point, applications for reactor operating license renewals have been granted by, or are now pending before, the NRC for almost 50 nuclear power plants.<sup>32</sup> The effect of these renewals will be to provide energy production equivalent to almost 1,000 reactor-years of operation. The amount of electricity that will result would otherwise require the consumption of more than 11 billion barrels of oil; more than 3 billion tons of coal; or more than 69 trillion cubic feet of natural gas. The Commission should not disrupt the stable, predictable, and effective license renewal process it has carefully developed and refined over more than 15 years by allowing exemptions from or waivers of its regulations.

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<sup>30</sup> See President Signs Energy Policy Act (August 8, 2005), available at <http://www.whitehouse.gov/news/releases/2005/08/print/20050808-6.html>.

<sup>31</sup> See U.S. Nuclear Regulatory Commission, *Status Report on Power Uprates*, SECY-05-0098, 3 (Jun. 2, 2005), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/2005>.

<sup>32</sup> Information on the license renewal process and status of reviews is available at <http://www.nrc.gov/reactors/operating/licensing/renewal.html>.

### III. CONCLUSION

For the foregoing reasons, the question of whether or not to grant Suffolk County's request for an exemption from or waiver of 10 C.F.R. § 50.47(a)(1), as certified in the Board Memorandum and Order, should be answered in the negative.

Respectfully submitted,



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Dated: August 18, 2005



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August 18, 2005

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Washington, DC 20555-0001

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

Dear Ms. Vietti-Cook:

Enclosed please find for filing the original and two copies of: (1) the "Motion of the Nuclear Energy Institute for Leave to File Brief as *Amicus Curiae* in Opposition to Suffolk County's Request for an Exemption or Waiver of 10 C.F.R. § 50.47(a)(1)," (2) the "Brief of *Amicus Curiae* Nuclear Energy Institute Opposing Suffolk County's Request for an Exemption from or Waiver of 10 C.F.R. § 50.47(a)(1)," and (3) the "Notice of Appearance" of Michael A. Bauser, all dated August 18, 2005. Distribution has been made as indicated in the enclosed "Certificate of Service."

Sincerely,

  
Michael A. Bauser

Enclosures

