

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

BEFORE THE NUCLEAR REGULATORY COMMISSION

SUFFOLK COUNTY'S BRIEF
IN SUPPORT OF PETITION FOR LATE INTERVENTION

Submitted by:

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I. INTRODUCTION

The County of Suffolk (the “County”), a municipal corporation of the State of New York, pursuant to 10 C.F.R. §2.309(c) requests and petitions for late intervention in the above-captioned license renewal proceedings and requests a hearing. Under 10 C.F.R. §2.335(b), the County also seeks a waiver of 10 C.F.R. §50.47(a)(1), insofar as that regulation bars consideration of emergency planning issues in a license renewal proceeding. This Brief is submitted in support of the Petition and the request for a waiver.

Dominion Nuclear Connecticut (“Dominion”) has applied for 20-year extensions of its existing 40-year licenses for the second and third units of the Millstone Nuclear Power Station (“Millstone”). Absent the extension, the licenses would expire in 2015 and 2025, respectively. Millstone is located in Waterford, Connecticut, on the shore of Long Island Sound near New London. Suffolk County is located in the eastern part of New York State’s Long Island. Portions of the County, including Plum and Fishers Islands, are less than 10 miles from the Millstone reactors. Portions of the County’s shoreline, in the Town of Southold, are within 11 miles of the reactors. Much of the County is within a 50-mile radius of the reactors.

The County requests its contentions be admitted to challenge the adequacy of Dominion’s plan for dealing with potential post-accident emergency situations that pose a radiological threat to Suffolk residents and visitors. The County’s challenge is based primarily upon the County’s demographic and related changes anticipated over the license renewal period and the unique geographic and other limitations that restrict evacuation of areas of the County. The County has also submitted comments concerning the Draft Supplemental Environmental Impact Statement.¹

The County’s requests meet the appropriate criteria, are supported by the public interest, and should be granted.

¹ See Attachments to County’s Reply, dated March 10, 2005.

II. SUFFOLK COUNTY'S LATE-FILED PETITION AND CONTENTIONS ARE ADMISSIBLE UNDER THE CRITERIA 10 C.F.R. §2.309(c)

The regulations of the Nuclear Regulatory Commission ("NRC") require that consideration of a Petition for Late Intervention be based upon a balancing of the eight (8) factors specified in 10 C.F.R. §2.309(c)(1). Utilizing these factors, the Atomic Safety and Licensing Board ("ASLB") stated that if a waiver were to be granted, and if emergency planning was a valid subject for consideration:

[A] balancing of the relevant factors set out in the agency's Rules of Practice justifies our entertaining the County's late-filed intervention petition....

and that:

[S]ix of the seven factors [other than the criteria in 10 C.F.R. §2.309(c)(i)] 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.

ASLB Order,² at 26 and 12. The Staff Answer³ admits that the County has satisfied five (5) of the eight (8) factors. Point II discusses the factors set forth in 10 C.F.R. §2.309(c)(1)(ii) through (viii), while the factor concerning lateness and good cause, 10 C.F.R. §2.309(c)(1)(i), is discussed in Point III.

² Memorandum and Order, LBP-05-016, 62 NRC ____ (ASLB July 20, 2005) (hereinafter, "ASLB Order").

³ NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York, dated February 28, 2005 ("Staff Answer").

**A. Standing; Nature of Petitioner's Right to be Made a Party;
Extent of Petitioner's Interest in the Proceeding**

Pursuant to 10 C.F.R. §2.309(c)(1)(ii) and (iii), the NRC must consider the nature of the County's right to be made a party to the proceeding and the nature and extent of the County's property, financial, or other interest in the proceeding. These factors weigh heavily in favor of the County. The ASLB Order, at 8-9, held that:

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.

Furthermore, the ASLB Order, at 8, found, that the Staff had conceded: (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. The usual practice of the NRC is to defer to the ASLB's judgments on threshold standing questions.⁴

Undisputed is that much of the County lies within the Millstone 10- and 50-mile emergency planning zones, that the County would be a primary provider and coordinator of emergency and public health services in the event of an emergency, and that many Suffolk

⁴ *Northeast Nuclear Energy Company (Millstone Nuclear Power Station, Unit No. 3)* CLI-98-20, 48 NRC 183, 1998 LEXIS 78, *1 (NRC 1998).

County residents, workers, and/or tourists would be affected by an emergency at Millstone.

Facts supporting these assertions are set forth in the County's Petition at 2-4.

The County has standing to intervene in this matter. Although Millstone is located in Connecticut, its off-site/emergency evacuation plan includes portions of the County within its 10-mile plume Emergency Planning Zone ("EPZ"). In addition, much of the remainder of the County is located within 50 miles of Millstone, within the Ingestion EPZ.⁵ The northern shore of the Town of Southold is only 11 miles from Millstone. Due to this close proximity, the eastern towns of Long Island would be affected should a nuclear accident or disaster occur. Thus, the County has standing to intervene on this matter.⁶

In license renewal proceedings, there is a "proximity presumption." Persons who live, work, or otherwise have contact with the area around the reactor have standing to intervene; a local government entity may similarly be granted standing based on proximity. *Power Authority of the State of N. Y. (James Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3)*, CLI 00-22, 52 NRC 266, 294-5, 2000 NRC LEXIS 134 (NRC 2000) (organizations alleging safety and health impacts upon members who live five and one-half miles from Power Plant, as well as employees at the Plant, held to have standing);⁷ *Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3&4)*, 10 NRC 183, 1979 NRC LEXIS 52, (ASLB 1979) (residence within 15 miles from the Generating Station and allegations of health hazard and recreational impairment were sufficient to grant standing; petition for intervention, filed more than one (1) year after expiration of the intervention period, was granted). In addition, the

⁵ See Dominion application, Appendix E- Environmental Report, Figure 2-1, Page E-2-47.

⁶ See 10 C.F.R. § 2.309(d)(2).

⁷ The *James Fitzpatrick* decision cites to *Vermont Yankee*, CLI-00-20, 52 NRC at __, slip op. at 4-5; *Oyster Creek*, CLI-00-6, 51 NRC at 202-03; *Monticello*, CLI-00-14, 52 NRC at 47, three cases in which organizations were granted standing based on members who lived or were quite active close to the site.

Appeal Board has held, as follows, that residence within 16 miles is sufficient to establish the interest of a petitioner who raises safety questions:

The Appeal Board said that "close proximity has always been deemed to be enough, standing alone, to establish the requisite interest," and "the question of whether [Petitioner's] concerns are justified must be left for consideration when the merits of the controversy are reached."⁸

It is clear that the County's close proximity to Millstone supports its claim of standing. The Staff Answer, at 6, conceded that the County's standing is supported by the proximity presumption.

Under the NRC's regulations, Millstone's offsite emergency plan is required to meet many standards related to coordination with local governments within the emergency zone, such as Suffolk County.⁹ No party has disputed that the County is under an obligation, by law, to protect the health and safety of the people of Suffolk County. A recent report by the United States General Accounting Office noted that in New York State, counties and other local governments are responsible for radiological preparedness.¹⁰ In the event of a radiological threat or emergency, Suffolk County must oversee, coordinate and, in some instances, provide or cooperatively provide, emergency response services. Suffolk County's Emergency Operations Center, Fire Rescue Communications Center, Department of Health Services, and Police Department would be involved. As a primary provider and coordinator of emergency response services, both during and after a potential Millstone event, Suffolk County should be permitted to intervene in this proceeding.

⁸ *Turkey Point*, 10 N.R.C. 183, 1979 NRC LEXIS at *16, quoting *Virginia Electric Power Co. (North Anna Power Station, Units 1 and 2)*, ALAB-146, 6 AEC 631, 634 (1973).

⁹ See, e.g., 10 C.F.R. §§50.47(b)(1), (b)(3), and (b)(5).

¹⁰ "Nuclear Regulation, Emergency Preparedness Issues at the Indian Point 2 Nuclear Power Plant," Highlights of GAO-03-58, Testimony by Jim Wells, Director, Natural Resources and Environment, before the Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, House of Representatives, expected delivery date March 10, 2003, p.4.

The County is charged, by New York State law, with the duty to protect the health and welfare of its permanent residents and temporary visitors.¹¹ By virtue of these responsibilities, the County will be held accountable if the need to execute emergency planning ever arises.¹² Suffolk County comprises a population of approximately 1,750,000 people. As of 2003, the population of Suffolk County residing within the 50-mile emergency planning zone was 216,555,¹³ and, during peak tourist seasons, the number of persons within the County's popular tourist areas (most of which are within this 50-mile radius) may grow as many as ten times.¹⁴ Further, the resident population of Fishers Island during the summer months may include more than 4,000 workers.¹⁵ The worker population at Plum Island varies between approximately 200 and 300 people; many of these workers also live in Suffolk County. These persons would be affected directly by a radiological emergency or necessary evacuation. Other resources that could be impacted by a Millstone event include farms and produce, fish, and other fauna, and drinking, ground, and surface water. In addition to health impacts, the County's economic interests, relying heavily on agricultural and tourism industries, would be adversely affected by a Millstone radiological emergency for which no adequate evacuation plans exist.

The County has an interest in this licensing proceeding by virtue of those mandated responsibilities. In *James Fitzpatrick*, the NRC granted intervention status to two local school districts and participant status to a County were the facility was located, reasoning that there was a benefit to participation by interested local governments:

¹¹ New York State laws which make the County responsible for public health and safety include, *inter alia*, the State's Municipal Home Rule Law, County Law, Public Health Law, and Environmental Conservation Law.

¹² ASLB Order at 13.

¹³ James Lee Witt Associates, LLC, *Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone* ("JLW"), p.90.

¹⁴ Personal communication between Jennifer B. Kohn, Assistant County Attorney, and Joseph Williams, Commissioner of Suffolk County Fire, Rescue and Emergency Services, 1/27/05.

¹⁵ JLW, p.88.

As we indicated in Nine Mile Point, CLI-99-30, 50 NRC at 344, "the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc." ¹⁶

Further, 42 U.S.C. §2239(a)(1) provides that:

In any proceeding under this Act [42 USCS §§ 2011 et seq.], for the granting, suspending, revoking, or amending of any license or construction permit, ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding (emphasis added).

The County certainly has an interest that would be affected by this proceeding.

The breadth and strength of the County's interest is distinguishable from that of the Connecticut Coalition against Millstone ("CCAM"), a citizen's group, whose petition to intervene was recently denied. The County is not setting forth a position against Millstone, but, rather, seeks a seat at the table for purposes of discussion and impact on safety and health issues affecting the County as a whole. The NRC has recognized that a County's interest is broader than that of private individuals.¹⁷ Thus, the factors listed in §2.309(c)(1)(ii) and (iii) compel the granting of the County's petition for late intervention so that the issues may be decided on the merits.

B. Possible Effect of Any Order

10 C.F.R. §2.309(c)(1)(iv) requires that the "possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest" be considered. The ASLB Order, at 9, held that this factor strongly favors the County's Petition. NRC Staff also admitted that this criteria has been satisfied by the County.¹⁸ Whether the NRC, as the administrative

¹⁶ 52 NRC 266, 2000 NRC LEXIS 134 at *25. In *James Fitzpatrick*, the County did not seek intervention status.

¹⁷ *Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant)*, C.L.I. 75-4, 1 NRC 273, 1975 NRC LEXIS 107 at *6 (NRC 1975).

¹⁸ Staff Answer at 6-7.

tribunal, has the ability and jurisdiction to grant relief to the County is related to this factor. The County's requested relief is only that adequate consideration be given to the issues raised by the County within the renewal proceeding. 10 C.F.R. §2.335(b) absolutely gives the NRC the authority and jurisdiction to permit intervention and grant the requested waiver.

An Order allowing the County's health and safety issues to be considered would have a great impact on future public health and safety (and would, perhaps, push the applicant to examine the issue now, during the current license periods). Thus, the County's interest would be affected by an Order. Clearly, the NRC has the authority to grant the relief requested and the relief requested would greatly impact the County and its residents.

C. Availability of Other Means to Protect County's Interest; Extent to Which the County's Interest Is Represented by Existing Parties

10 C.F.R. § 2.309(c)(1)(v) and (vi) also require consideration of the availability of other means to protect the County's interest and the extent to which the County's interests will be represented by existing parties. As the ASLB held, and the NRC Staff admits, these factors are satisfied by the County's papers.¹⁹ There are no alternative means whereby the County's interest will be protected. The ASLB Order, at 10, concluded that:

We find no basis for treating, and do not recognize, § 2.206 as a practical "other means" available for protecting the County's interests.... In the absence of any other stated such means, this factor too, then, strongly favors the County, as the Staff recognizes....

Furthermore, the County has demonstrated that there are no other parties representing, protecting, or speaking for the interests of the County and its citizens. The ASLB held that:

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

¹⁹ ASLB Order at 9-10, Staff Answer at 8.

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.

No intervenors have been admitted and there are no existing parties that are qualified to or represent interests similar to the County. County citizens are entitled to be protected by their elected officials, should a Millstone emergency arise.

The County's interest in this matter cannot adequately be represented by the NRC staff or the applicant. It has been held that:

The annals of NRC adjudications reflect that the position taken by staff on a specific safety or environmental issue ... often is at odds with the views espoused by an intervenor seeking to vindicate either its personal interest or its independent perception respecting where the public interest lies. Indeed, it was doubtless in recognition of the potential for such divergence that the Congress elected to provide hearing rights to private citizens and organizations in Section 189 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239.²⁰

In *West Valley*,²¹ the NRC granted a County's petition for late intervention, recognizing the importance of allowing representation by County government based on its broad interests. *See also* Chairman Rosenthal's Dissent in *Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2)*, 2 NRC 631, 1979 NRC LEXIS 29, *34 (A.S.L.App. Bd. 1975), (to have excluded the County from that proceeding "would have had the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act"). Similarly, the County here is the representative of the people of Suffolk County, and its concerns regarding public health and safety go to the core reason for regulation of nuclear

²⁰ *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2)*, 18 NRC 1404, 1983 NRC LEXIS 2 at *7 (NRC 1983).

²¹ 1 NRC 273.

power plants. As the ASLB rightly found, there are no other means or parties to protect the County's interest.

**D. The County's Intervention Will Not Cause Undue Delay
and Will Focus On Public Health and Safety**

As required by 10 CFR §2.309(c)(1)(vii), the NRC will consider the extent to which the County's participation will broaden the issues or delay the proceeding. The County's participation as an intervenor will not cause inappropriate delay. Granting the County's Petition will ensure that health and safety of the County's residents and visitors are protected to the maximum extent possible and will facilitate compliance with NRC regulations.

No party will be prejudiced by the delay in giving appropriate consideration to these important public health and safety issues. Dominion will most certainly not experience prejudice or harm, as its license renewal application for Millstone is premature to begin with, as the current operating licenses do not expire for periods of 10 and 20 years, until July 2015 for Unit 2 and November 2025 for Unit 3. Furthermore, according to the schedule on the NRC website, a final NRC decision on this license renewal is not expected until July 22, 2006. The Staff does not expect to finish its review until November 2005.²² NRC's schedule must include time to consider vital health and safety issues, with no interruption in electric service.

The ASLB recognized this, and stated that the broadening of the issues and resulting delay of proceedings are outweighed by the health and safety issues because Dominion's application "was brought over a decade before the expiration of the first of the existing licenses, and...Staff's safety review is not due to be concluded for another several months. At worst, this factor counts minimally against the County."²³ Moreover, "the requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing

²² ASLB Order at 1.

²³ ASLB Order at 10-11(footnote omitted).

the original parties by the failure to apply sooner.”²⁴ This is true in the County’s intervention request, since there is absolutely no prejudice to Dominion by the County’s participation.

Dominion suggests that granting the County intervenor status would inappropriately broaden the issues, because the issues raised are new. However, if the regulations are negatively interpreted, no potential intervenor with valid new contentions would ever be granted intervention status. The issue here is not whether the proceeding would be delayed. The issue is whether the delay and broadening of the issues would be undue. Under the circumstances, and considering the great importance of public health and safety, and the long timetable for expiration of the current licenses, the County’s petition should be granted.

E. Petitioner's Participation Will Assist in Developing a Sound Record

10 C.F.R. §2.309(c)(1)(viii) requires the NRC to consider the extent to which the County’s participation “may reasonably be expected to assist in developing a sound record.” The ASLB Order, at 11, held that:

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.

The County’s Petition meets the criteria, as it has been established that the County will assist in developing a sound record. The County identifies issues to be raised with particularity.

²⁴ *Utah Ass’n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001), *quoting Sierra Club v. Espy*, 18 F.3d at 1205.

For example, the County cites specific regulations that have not been complied with by Dominion, and other deficiencies in Dominion's emergency plans. Attached to the County's Reply are additional comments provided by Suffolk County Executive Steve Levy concerning the Draft Supplemental Environmental Impact Statement prepared for the Millstone license renewal. These comments amplify the County's concerns.

The County's Petition is further supported by specific citations to expert reports and opinions. For example, the Petition cites to reports authored by James Lee Witt, Associates, LLC, prepared on behalf of the New York State Power Authority.²⁵ Mr. James Witt, former Director of the Federal Emergency Management Agency, is undoubtedly an expert on emergency response, generally and with reference to Millstone. The County also cites to a report responding to the Witt report, prepared by FEMA.²⁶ Moreover, the County cites to testimony by Jim Wells, Director, Natural Resources and Environment, which testimony was contained in a U.S. General Accounting Office report.²⁷

The County cites to its own experts, including Joseph Williams, Commissioner of Suffolk County Fire, Rescue and Emergency Services and Alexander M. Santino, head of the County's Office of Pollution Control. The County has many other experts at its disposal relative to the questions at hand, by virtue of its governmental functions. The County has providers of police, emergency and rescue services, health services, physicians, scientists, engineers, transportation experts, and planners, all of whom are experts in their respective fields. The County conducts extensive environmental testing and ground and drinking water monitoring. The County is

²⁵ James Lee Witt Associates, LLC, *Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone*.

²⁶ *FEMA Reviews of the State and County Radiological Emergency Response Plans for the Indian Point Energy Center and Comments on the RFP Program, Planning and Exercise Issues Raised by Others*, February 21, 2003, Attachment B, Section 2, General FEMA/RAC Comments on the Draft NY State Report.

²⁷ "Nuclear Regulation, Emergency Preparedness Issues at the Indian Point 2 Nuclear Power Plant," see footnote 4.

uniquely qualified to provide updated information about population, tourist attractions, roadways, health care providers, police services, farms and farm products, drinking water data, and other information to address the important health and safety needs of residents in connection with a Millstone emergency.

In *West Valley*,²⁸ the Commission granted intervention status to a County. On the question of developing a sound record, it was noted that, while the record was inconclusive, that County had conducted air and water quality monitoring activities and was committed to conducting technical studies. Partly on this basis, that County was admitted as an intervenor. Similarly, in the present matter, Suffolk County has many pertinent documents in its files and experts who would testify on the relevant questions. The County specifically references its role in drinking and ground water quality monitoring. These capabilities support the County's ability to assist in developing the record.

Furthermore, in *Perry Nuclear*,²⁹ it was held that an intervenor demonstrating its ability to contribute to the development of the record on a particular contention need not also promise to provide expert witnesses or outline its testimony. It is sufficient that the proposed intervenor introduce evidence suggestive of a problem. The *Perry* decision noted that there was a divergence of opinion that the intervenor could help develop. In the Millstone matter, the County's ability to provide the proffered evidence is indisputable, and similarly, there is a divergence of opinion. In sum, as the ASLB held, the County's participation will, and may reasonably be expected to, assist in developing a sound record.

²⁸ 1 NRC 273.

²⁹ 18 NRC 1404.

III. THE COUNTY'S LATENESS SHOULD BE EXCUSED AND THE PETITION GRANTED

10 C.F.R. §2.309(c)(1)(i) requires that the County show good cause for its failure to file on time. The County has shown good cause for its late intervention request in its papers and testimony. Upon information and belief, the County received no official notice of the subject license renewal proceedings. Publication notice in the Federal Register was insufficient to put the County on notice to allow meaningful timely participation in the hearing. Although Federal Register notice may be sufficient in some instances, there are many instances where Federal Register notice is deemed to be insufficient by law (which exception is recognized by 44 U.S.C. §1508), and insufficient under modern due process. Actual notice of the license renewal proceedings was not received until well after the deadline for timely intervention had expired. Thus, any petition based on the actual notice received would have been untimely. When the notice was received, the County was in the midst of a transition to a new governmental team led by a new County Executive, for the first time in twelve years.

Moreover, the County should be permitted to intervene based on the strength of its showing on the other seven factors listed in 10 C.F.R. §2.309(c)(1). The County's close proximity to Millstone and its responsibilities pertaining to emergency planning are mitigating factors and reasons why the County's lateness must be excused, particularly where no license expiration or interruption of electric service is imminent. The ASLB Order, at page 12, recognized that there are situations where "unjustified belatedness [may be] excused and that doing so "does not establish an alarming precedent undercutting the rules [and] it simply recognizes the different role and strengths that a local government can, in the public interest, bring to the proceedings."

“Good cause” is only one of the factors cited in 10 C.F.R. §2.309(c)(1). Even if, arguendo, good cause has not been shown, a late petition to intervene may nevertheless be granted upon a strong showing of the other factors required for late filing.³⁰ In other words, while good cause is a factor to be considered, its absence is not fatal. In *Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*,³¹ the ASLB held that:

Absent good cause, a petitioner must make a stronger showing on the other factors in order to have a contention accepted. **But the good cause factor is not to be given controlling weight; all of them must be considered.** Indeed, in applying these factors, a Licensing Board has “broad discretion in the circumstances of individual cases.”

This is a well-established doctrine. In *West Valley*,³² the NRC held that there is broad discretion in determining whether a non-timely intervention petition should be granted. We should look not only to the reason for the tardiness, but also to the other factors listed in the relevant regulation. Petitioner Erie County’s application for late intervention, made nine months late, was granted, even though no good cause for lateness had been shown.

Furthermore, in *Jamesport Nuclear*,³³ the dissent by then-Chairman Rosenthal concluded that in considering a late intervention petition and deciding the “good cause” question, the ASLB may **not** confine itself to a consideration of whether there has been advanced an adequate excuse for being late. According to Chairman Rosenthal, **even if the lateness is entirely unjustified, the Board must nonetheless look at the other factors spelled out in the regulation.**³⁴

³⁰ *Maine Yankee Atomic Power Co., (Maine Yankee Atomic Power Station)*, 58 N.R.C. 372, 2003 NRC LEXIS 204 at *12 (A.S.L.B. Panel 2003); Staff Answer at 5.

³¹ 37 NRC 433, 1993 NRC LEXIS 22, *3 (ASLB 1993) (footnotes omitted, emphasis added) (*quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI- 83-19, 17 NRC 1041 (1982)).

³² 1975 NRC LEXIS at *4.

³³ 2 NRC 631.

³⁴ *Citing West Valley, and referencing Virginia Electric and Power Co. (North Anna Station, Units 1 and 2)*, NRCI-75-9 395 (September 18, 1975).

Otherwise, there would be no point to requiring the other factors in the regulation. Chairman Rosenthal stated that:

[I]n passing upon a late petition, we are under a **Commission-imposed duty** to take into account "[t]he nature of the petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding.... [A] late petition is entitled to some greater measure of solicitude if its sponsors have a clearly cognizable interest

* * *

The *West Valley* petition was that of a county, seeking to advance its asserted (clearly cognizable) interest in the protection of the health and safety of the citizens of the county. To have excluded it from the proceeding would have had the effect of leaving those citizens without representation by their own local government on matters at the very heart of the Atomic Energy Act.³⁵

While a possible reason for the good cause requirement is administrative efficiency, it is abundantly clear that an important Congressional purpose for regulation of nuclear facilities is protection of public health and safety. Congress made protection of public health and safety an express purpose of the laws providing for development and use of nuclear energy.³⁶

Furthermore, nuclear energy facilities were placed within interstate commerce because Congress expressly found a need for protection from interstate damage caused by operation of nuclear facilities.³⁷ The ASLB Order, at 24, found that:

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.³⁸

³⁵ 1975 NRC LEXIS at *35.

³⁶ 42 U.S.C. §§2012(d) and (e) & §2013(d).

³⁷ 42 U.S.C. §2012(f).

³⁸ See also Chairman Rosenthal's Dissent, in *Jamesport Nuclear*, at Note 16, stated: "In unmistakable terms, the Act gives effect to the legislative concern that the public health and safety not be endangered by the operation of nuclear facilities. See e.g. Section 104d, 42 U.S.C. 2134(d)."

These purposes far outweigh the need for expediting the instant license renewal proceeding, especially where, as here, the licenses to be renewed do not even expire for 10 and 20 years, respectively.

The goal of the licensing proceeding is to protect public safety, and then to facilitate license renewal applications. Public health and safety should not be compromised on a technicality. This goal, balanced against the County's lack of timeliness, supports the County's application for late intervention.

IV. SUFFOLK COUNTY'S CONTENTION REGARDING EMERGENCY PLANNING SATISFIED 10 C.F. R. §2.309(F)

The ASLB Order, at 26 and 13-16, stated that, "[g]iven its purpose and its proponent, that petition's set of contentions is adequately pleaded[.]" The ASLB then went on to say:

[T]he substance sought after by [10 C.F.R. § 2.309(f)(1)(i),(ii), (v) and (vi)] 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 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 ... 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 ... 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.

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 ... a knowledgeable contribution on real issues ... 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.³⁹

In sum, the contentions pleading rule provides us no basis for excluding the County from participation, (footnote omitted).

Thus, the ASLB held that the County's pleadings, taken as a whole, meet the NRC requirements, and that holding should be recognized here.

A. 10 C.F.R. §2.309(f)(1)(i), (ii) and (v)

Suffolk County's Petition and subsequent papers adequately met the criteria set forth in 10 C.F.R. §2.309(f). The County has alleged very specific facts regarding its proximity to Millstone, unique geographic circumstances, demographics, and the lack of major roadways available for evacuation. Most areas of Suffolk County are not protected by existing emergency plans and there are deficiencies in existing plans. The County has demonstrated that 10 C.F.R. §50.47(a) fails to provide sufficient assurance that public safety will be protected in the Dominion proceeding and that a waiver of the regulation should be granted. The County's assertions are supported by references to specific written reports and to expert opinions. In its papers, and during the Conference Call with the ASLB, the County also offered information regarding the nature and depth of its expertise in the area of emergency services. All relevant criteria were met by the County.

B. 10 C.F.R. §2.309(f)(1)(iii) and (iv)

³⁹ This Footnote is from the ASLB Order. *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.

The County has established, pursuant to 10 C.F.R. §2.309(f)(1)(iii) and (iv) that the issues raised by its contention are within the scope of the proceeding and that the County's contentions are material to the findings needed to support the action that is involved in the proceeding. Analysis of these factors relates to the County's request for a waiver of 10 C.F.R. §50.47(a)(1). If a waiver or exemption is granted, the County's contentions would be within the scope of the proceeding and germane to the relicensing proceeding.

C. 10 C.F.R. §2.309(f)(1)(vi)

The County has complied with 10 C.F.R. §2.309(f)(1)(vi), in that the County's papers provide sufficient information to show that a genuine dispute exists with Dominion on a material issue of law and fact. The County specifically referenced specific portions of the application (including the applicant's environmental report and safety report) that the County disputed and pointed out Dominion's failures. The County's dispute with Dominion relates to the adequacy of emergency planning for areas of Suffolk County. With reference to existing plans, the County's documents detail specific deficiencies, such as outdated material used in the plans, and refer to specific regulations with which Dominion has not complied. The County also asserts that emergency planning should be completed with respect to areas where no plans now exist.

Dominion disputes the County's contentions that it has or should have any responsibility for an evacuation/emergency plan for the Town of Southold and other areas in Suffolk County. Further, Dominion has argued that emergency planning falls outside the scope of this proceeding. Thus, there are many areas of genuine dispute.

D. 10 C.F.R. § 2.309(f)(2)

The County has complied with 10 C.F.R. § 2.309(f)(2) by basing its contentions on documents and other information available, such as the application, and other supporting

documents filed by Dominion. The specific documents relied upon by the County were discussed above. The County also filed specific contentions related to Dominion's compliance with the National Environmental Policy Act, which were attached to the County's Reply.

The second part of 10 C.F.R. § 2.309(f)(2) relates to amendment of contentions or the filing of new contentions. The heart of the County's contentions, that 10 C.F.R. §50.47(a) does not adequately protect the public under the circumstances and that there are deficiencies in emergency planning, have been clear from the start of this proceeding. Thus, there was no amendment of the contentions or filing of new ones.

V. THE NRC SHOULD GRANT SUFFOLK COUNTY'S REQUEST FOR AN EXEMPTION FROM 10 C.F.R. §50.47(a)(1)

Although, under 10 C.F.R. §50.47(a)(1), the issue of off-site emergency plans are usually considered in the context of initial licensing proceedings, and not license renewal proceedings, the NRC is authorized to grant an exception to the application of a specified Commission rule or regulation, based on special circumstances. 10 C.F.R. §2.335(b) provides:

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.

The County seeks a waiver from the language of 10 C.F.R. §50.47(a)(1) which states that

“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 reactor operating license.” (emphasis added).

There is a colorable prima facie case for the County's request for a waiver or exemption from the general jurisdictional rule (and precedent) barring consideration of emergency plan issues in license renewal proceedings.⁴⁰ Furthermore, the ASLB held that:

The Commission's regulations ... 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).⁴¹ That limitation flows from the underlying approach the Commission adopted long ago ... *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).

* * *

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 ...⁴²

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

⁴⁰ ASLB Order at 26.

⁴¹ Footnotes 14 and 15 are from the ASLB quotation. *See also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9-10 (2001).

⁴² During the conference call, [the County] 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.

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.⁴³

The goal of 10 C.F.R. §50.47(a)(1) is to provide for public safety during a radiological emergency, while expediting renewal proceedings. The license renewal process assumes that the current licensing basis of operating plants provides an acceptable level of safety, with the possible exception of the detrimental effects of aging on certain systems. However, under the Millstone emergency plans, there is no reasonable assurance that adequate protective measures will be taken in the event of a radiological emergency.

Minimization of harm to the public from radiation may be inferred from satisfaction of the sixteen emergency planning standards contained in 10 C.F.R. §50.47(b) and other relevant agency criteria.⁴⁴ This assumption of safety is based on compliance with the regulations, however, the County has shown that there is no compliance by Dominion. Moreover, the expected population growth and other factors documented in the County's papers eliminate any assumption that public safety will be protected by Dominion's use of already existing, outdated plans. Therefore the 10-mile emergency planning zone should be extended.⁴⁵ If the license extensions are granted with no changes in the scope or extent of emergency plans, the existing plans would be in effect for the next 41 years and those plans clearly do not protect the County. These special circumstances are more than sufficient to support a waiver of 10 C.F.R. §50.47(a)(1).

⁴³ ASLB Order at 17, 21-22.

⁴⁴ *Commonwealth of Massachusetts v. United States Nuclear Reg. Comm'n*, 924 F.2d 311 (D.C. Cir. 1991).

⁴⁵ Under 10 C.F.R. §50.47(c)(2), the ten (10) mile regulatory boundary for the EPZ zone is only a guideline – the exact size and configuration is to be determined in relation to local factors such as demography, topography, land characteristics and access routes. No waiver is needed for an expansion of the 10-mile zone, insofar as the regulation already allows for adjustments of the zone boundaries due to local circumstances.

An Affidavit submitted pursuant to 10 C.F.R. §2.335(b) is attached to the County's Reply. This Affidavit identifies the aspects of the proceeding for which the waiver is requested and shows why the rule does not serve the purposes for which the regulation was adopted. The Affidavit states with particularity the special circumstances which justify the requested waiver and exception.

The unsupported position of Dominion and the NRC Staff continues to be that the current level of emergency planning is adequate to support the relicensing application and that, within the context of the relicensing proceeding, there is no legal or other requirement for emergency planning beyond the 10-mile plume exposure EPZ. It has also been stated that the 10-mile EPZ provides a sufficient basis for planning outside the EPZ, should such planning become necessary.

The County, on the other hand, has no reason believe that the public health and safety issues raised by the County's Petition were ever considered in the initial Millstone licensing proceeding, or in any of the subsequent regulatory processes. Suffolk County's concerns are particularly strong in light of the determinations made by the State and the County regarding evacuation of Suffolk County and Long Island at the time when the Shoreham Plant was still being contemplated. The County continues to have unanswered questions about its ability to protect the approximately 1.7 million residents who live in close proximity to the Millstone Power Station-some within 11 miles of it-and the many seasonal visitors to Suffolk. **There is no plan in place to protect these persons,** and the unique geographic circumstances make "ad hoc planning" an unacceptable basis for such protection. Emergency planning in the State of Connecticut is jurisdictionally and geographically irrelevant to the Town of Southold and to the County. Also, the County doubts that there is any satisfactory public health response to a severe radiological emergency other than population evacuation. Furthermore, as part of emergency

planning, data produced through computer modeling could show the possible impacts of a severe radiological emergency on the County.

In addition, the County of Suffolk views the re-licensing applications for Millstone II and III as premature at this time. In the years 2035 and 2045, Millstone Units II and III will have been operating for 60 and 59 years respectively. Given the age, wear-and-tear, and checkered history of operation of these facilities, capital improvement, maintenance, and operational plans should be developed and subjected to public scrutiny. Dominion's capability to operate Millstone safely should also be demonstrated as part of the relicensing proceeding. Moreover, environmental concerns have been raised by the County and should be addressed.

Exclusion of the County's health and safety issues from the scope of the relicensing proceeding allows these issues to be disregarded. The County strongly urges the NRC to carry out the important function of protecting public health and safety. An adverse ruling on the County's requests could potentially leave many persons vulnerable and unprotected in the event of a radiological emergency. Reliance upon previously developed evacuation/emergency plans, without update or expansion of the EPZ, for the instant license renewals would be arbitrary and capricious, unreasonable, an abuse of discretion, unsupported by substantial evidence, and unwarranted by the facts. In sum, the County's request for a waiver should be granted.

**VI. UNDER THE CIRCUMSTANCES OF THIS CASE, THE BOARD PROPERLY
POSTPONED ITS CONTENTION-ADMISSIBILITY DECISION PENDING
SETTLEMENT TALKS**

10 C.F.R. §2.338, which encourages the fair and reasonable settlement and resolution of issues in dispute, authorizes the ASLB to encourage settlement discussions. The discussions here were completely voluntary. The ASLB neither directed the NRC Staff on how to perform its administrative functions nor ordered it to conduct a hearing. The ASLB

made it clear that it was seeking to resolve the dispute. Furthermore, encouraging settlement talks was within the scope of the proceeding because one of its purposes is to:

produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.⁴⁶

The proposed discussions were within the parameters of this objective, and support the statutory goal of protecting public safety.⁴⁷ Furthermore, it was for the ASLB to determine whether or not relief can be granted, and whether the matter of evacuation should be considered herein. In short, the ASLB's encouragement of settlement discussions was appropriate under the circumstances.

VII. CONCLUSION

WHEREFORE, in the interests of justice and public health and safety, Petitioner County of Suffolk requests that it be permitted to intervene in the above-captioned proceeding and that, pursuant to 10 C.F.R. §2.335(b), a waiver of 10 C.F.R. §50.47(a)(1) be granted.

DATED: Hauppauge, New York
 August 17, 2005

Respectfully submitted,
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⁴⁶ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 1998 NRC LEXIS 86 at *2.

⁴⁷ See 42 U.S.C. §2012(d), (e), (f) and 42 U.S.C. §2013(d).

2006

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COUNTY OF SUFFOLK



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DEPARTMENT OF LAW
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Re: Dominion Nuclear Connecticut, Inc.
(Millstone Nuclear Power Station, Units 2 & 3)
Docket Nos.: 50-336 LR & 50-423 LR

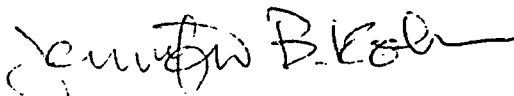
Honorable Sir/Madam:

Please accept for filing the enclosed the County of Suffolk's Brief in Support of Petition for Late Intervention dated August 17, 2005. An original and two copies are enclosed herewith. The Affidavit of Service is annexed at the end of the original document.

Thank you for your attention to this matter.

Very truly yours,

CHRISTINE MALAFI
Suffolk County Attorney


By: Jennifer B. Kohn,
Assistant County Attorney

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August 17, 2005
U.S. Nuclear Regulatory Commission

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