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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	Docket Nos. 50-336 - LR
Dominion Nuclear Connecticut, Inc.	)	50-423 - LR
	)	
(Millstone Nuclear Power Station, Units 2 and 3)	)	ASLBP No. 05-837-01-LR
	)	

BRIEF OF DOMINION NUCLEAR CONNECTICUT IN RESPONSE TO CLI-05-18 CONCERNING SUFFOLK COUNTY'S LATE PETITION AND WAIVER REQUEST

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INTRODUCTION

Dominion Nuclear Connecticut, Inc. ("Dominion") submits this brief in response to the Commission's Memorandum and Order, CLI-05-18, in the Millstone license renewal proceeding. The Commission's Memorandum and Order accepted review of the question certified to it by the Atomic Safety and Licensing Board ("Board") whether to grant Suffolk County's ("County") request for an exemption from 10 C.F.R. § 50.47(a)(1), which provides that no finding on emergency planning is required for issuance of a renewed license. The Commission's Memorandum and Order also solicits views on 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." CLI-05-18, slip. op. at 2. Dominion provides comments on these questions as well.

As discussed in this brief, the Commission should deny the County's waiver request and dismiss the intervention petition. In essence, this case involves a hearing request that (1) was inexcusably late, (2) sought to raise issues outside the scope of the proceeding, (3) failed to include a timely or supported waiver request, and (4) failed to include any contention that would be admissible even if the waiver were granted – indeed, the central contention constitutes an impermissible challenge to the NRC's rule establishing a 10-mile plume exposure pathway emergency planning zone ("EPZ"). The County's the intervention petition and waiver request clearly fail to satisfy the NRC's standards.

STATEMENT OF FACTS

On January 20, 2004, Dominion applied to renew the operating licenses for Millstone Power Station, Units 2 and 3. On March 12, 2004, the NRC Staff published in the Federal Register a notice of an opportunity for hearing on this application. Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operation Licence Nos. DPR-65 and NPF-49 for an Additional 20-Year Period, 69 Fed. Reg. 11,897 (Mar. 12, 2004). The notice provided that any person whose interest might be affected by the license renewal proceeding and who wished to participate as a party to the proceeding must file a written request for a hearing and intervention petition within sixty days of the date of publication of the notice in the Federal Register, or May 11, 2004. Id.

One petitioner timely sought a hearing on Dominion's application. Dominion Nuclear Connecticut, Inc., (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004). On December 8, 2004, the Commission denied that petitioner's appeal of the Licensing Board's orders that had rejected its proffered contentions as inadmissible. Id. The Commission, *inter alia*, specifically affirmed the rejection of a contention alleging that Long Island cannot be

evacuated, because its prior holding that emergency planning issues fall outside the scope of license renewal proceedings was "dispositive." Id. at 640, citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001). With its decision, the Commission terminated the adjudicatory proceeding. Id. at 645.

On December 17, 2004, more than seven months after the deadline for timely intervention, the County filed its petition for intervention in this proceeding. Motion to Intervene of the County of Suffolk of the State of New York (Dec. 17, 2004). By letter dated December 27, 2004, the Commission rejected the County's non-timely filing for failing to address the late-filing factors contained in 10 C.F.R. 2.309(c), but advised that the County could file a petition for late intervention up to the time the NRC issues a final decision on the application. Letter from A. Vietti-Cook to C. Malafi (Dec. 27, 2004). On February 1, 2005, the County re-filed its intervention petition.[1] The Petition proffered three contentions on emergency planning, notwithstanding the Commission's ruling in this very proceeding that such issues fall outside its scope.

Dominion and the NRC Staff filed answers opposing the Petition.[2] Both argued that the late intervention was not warranted by a balancing of the factors specified in 10 C.F.R. § 2.309(c), that the emergency planning contentions which the County sought to raise were outside the scope of a license renewal proceeding, and that none of the contentions met pleading requirements. While the County had asserted that it had not received notice of the license

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1 Petition for Late Intervention of the County of Suffolk of the State of New York, dated January 28, 2005 ("Petition").

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

renewal proceedings, Dominion pointed out that the Suffolk County legislature had passed a resolution in June 2004 – six months before the County filed its petition – reflecting awareness of Dominion's application and authorizing the engagement of special counsel to intervene "to prevent this license from being renewed." Dominion's Answer at 7 and Att. 1.

On March 10 – three days after the deadline for replies and without seeking leave – the County submitted a Reply. The belated reply included a request for waiver of 10 C.F.R. § 50.47(a), although the County offered no justification for making this request for the first time in its Reply. The waiver request was accompanied by an affidavit by the County's attorney, which in essence asserted that alleged deficiencies in the Millstone emergency plans constitute special circumstances for a waiver. Affidavit of Jennifer B. Kohn (March 10, 2005), ¶ 7.

Dominion submitted a response to the County's new waiver request,[3] pointing out that the request did not meet the standards for granting waivers from the Commission regulations. The NRC Staff also responded,[4] moving to strike the Reply because it was late and improperly raised matters that were not encompassed in the County's original petition, and explaining why the County's waiver request did not meet the requirements for a waiver.[5]

On April 12, 2005, the Board conducted a teleconference to discuss the parties' positions. At the end of that teleconference, the Board asked the parties to meet to try to work out an

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3 Dominion Nuclear Connecticut's Response to Suffolk County's Request for Waiver of Commission Regulations (March 18, 2005).

4 NRC Staff Motion to Strike, In Whole or 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) (March 18, 2005). The Board never ruled on this motion or addressed either the untimeliness of the County's Reply or the propriety of seeking a waiver for the first time in a reply.

5 Id. at 3-7.

understanding or settlement, and to report back after doing so. Tr. 89-94. See also Memorandum of Conference Call (April 15, 2005).

As requested by the Board, Dominion, Suffolk County, and the NRC Staff, accompanied by representatives for the Federal Emergency Management Agency ("FEMA") and the New York State Emergency Management Office, met on May 18, 2005. The parties were not able to reach a resolution. As reported by Dominion,

> [T]he County identified its fundamental concern as a desire to see a plan or study demonstrating with some degree of specificity that there could be an evacuation of Suffolk County (an area that extends more than 50 miles from the plant) or that sheltering would be effective in this area in the event of a nuclear incident at Millstone. The County also asserted that the Millstone licenses should not be renewed without this study or plan. Because the fundamental position of the County is that an evacuation plan is required (or a study must be prepared showing that such a plan is unnecessary) for the entire county, Dominion does not believe that further discussions in this proceeding would be constructive in resolving the hearing request. As previously argued, the emergency planning contentions of the County are beyond the scope of the license renewal proceeding. Moreover, as also previously argued, a contention advocating an expansion of the 10-mile plume exposure pathway EPZ is a challenge to the NRC regulations. See Dominion Nuclear Connecticut's Answer to the Petition for Late Intervention of the County of Suffolk (Feb. 28, 2005) at 17. See also Long Island Lighting Co. (Shoreham Nuclear Power Station, Units 1), CLI-87-12, 26 NRC 383, 395 (1987); General Public Utilities Corp. (Three Mile Island Nuclear Station, Unit 1), DD-94-3, 39 NRC 163, 180-81 (1994); Citizens Task Force of Chapel Hill, DPRM-90-1, 32 NRC 281, 291-92 (1990).

Letter from D. Lewis to the Board (May 23, 2005).

Thereafter, the Board issued its Memorandum and Order (Concerning Belated Intervention Petition), which referred the waiver request to the Commission. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 NRC __, slip op. (July 20, 2005). The Board held that (1) a balancing of the relevant factors justified entertaining the County's late intervention, (2) given its purpose and its proponent, the petition's set of contentions is adequately pleaded, and (3) there is a colorable *prima facie* basis for the

County's request for a waiver. Id. at 20. As discussed below, each of these findings was clearly erroneous.

ARGUMENT

I. SUFFOLK COUNTY'S WAIVER REQUEST DID NOT MEET THE APPLICABLE STANDARDS FOR THE GRANTING OF A WAIVER

The County's waiver request does not meet the applicable standards for a waiver of the Commission's regulations and therefore should be denied. Under the NRC's rules of practice, the sole ground for granting a waiver is that special circumstances with respect to the subject matter of the particular proceeding exist such that the application of the rule would not serve the purposes for which the rule was adopted. 10 C.F.R. § 2.335(b). Here, there are no special circumstances that would prevent the purposes of 10 C.F.R. § 50.47(a)(1) from being accomplished.

10 C.F.R. § 50.47(a)(1) was promulgated as part of the NRC's license renewal rules. Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,967, 64,976 (Dec. 13, 1991). Those rules are intended to make license renewal a stable and predictable process. Nuclear Power Plant License Renewal, 60 Fed. Reg. 22,461, 22,463, 22,484 (May 8, 1995). As the Commission has explained, "We sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC staff to focus its resources on the most significant safety concerns at issue during the renewal term." Turkey Point, 54 NRC at 7. To this end, the Commission has confined the scope of the 10 C.F.R. Part 54 license renewal review to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope is based on the principle,

established in the rulemaking proceeding, that with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently-operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Consequently, license renewal does not focus on operational issues, because these issues "are effectively addressed and maintained by ongoing agency oversight, review, and enforcement." CLI-04-36, 60 NRC at 638 (2004) (footnote omitted).

Emergency planning is just such an operational program. Turkey Point, CLI-01-17, 54 NRC at 9. As the Commission explained when it first promulgated its license renewal rules, 10 C.F.R.§ 50.54(q) requires that a nuclear power plant licensee "maintain in effect emergency preparedness plans that meet the standards in § 50.47(b) and the requirements in appendix E to 10 CFR part 50. The requirements of § 50.47 and appendix E are independent of the renewal of the operating license, and they will continue to apply during the license renewal term." 56 Fed. Reg. at 64,966. After enumerating the various means through which it assures itself that a licensee continues to meet the standards in § 50.47(b) and the requirements in appendix E to 10 C.F.R. Part 50, the Commission concluded that its regulations

> require the routine evaluation of the effectiveness of existing emergency preparedness plans against the 16 planning standards and the modification of emergency preparedness plans when the standards are not met. Through its standards and required exercises, the Commission ensures that existing plans are adequate through 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.

Id. Accordingly, "[t]he Commission . . . amended 10 CFR 50.47 to clarify that no new finding of emergency preparedness will be made as part of a license renewal decision." Id. at 64,967.

The Commission has set a high burden that a petitioner must meet to show the existence of "special circumstances" justifying waiver of a rule. First, the petitioner must plead one or more facts "not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *recons. denied*, CLI-89-03, 29 NRC 234; CLI-89-07, 29 NRC 395 (1989). Second, the special circumstances raised must "undercut the rationale for the rule sought to be waived." Id. Third, the petitioner must demonstrate that "a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived," because it would be inconsistent with the Commission's responsibilities "to spend time and resources on matters that are of no substantive regulatory significance." Id.

Suffolk County's waiver request does not allege facts "not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived" (see Seabrook, supra). The County referred to "the current and expected population growth" and the "lack of a sufficient road network" (Affidavit of J. Kohn, ¶ 6; Reply at 17), but in promulgating the license renewal rules, the Commission considered and rejected these very concerns:

> The Commission received a number of comments from public interest groups contending that current emergency preparedness plans are not adequate and that periodic revisions to existing emergency preparedness plans and the execution of emergency plan exercises were generally considered inadequate to keep pace with changing demographics, land use and transportation patterns. One commenter raised the issue that the evacuation time estimates would need to be reviewed in terms of the changes in demography. The issue of 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.

Id. Nor are changing demographics or concerns with the adequacy of roads uncommon. In short, there is nothing "special" about the "special circumstances" alleged by the County. The same circumstances were raised in the license renewal rulemaking proceeding, carefully considered by the Commission in formulating the license renewal rule, and rejected. Id. The County's allegations thus provide no grounds for the waiver of the regulation.

Second, even if the County's concerns were valid, they would not prevent achieving the rule's purposes or undercut its rationale. The Commission intended to limit license renewal to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. The County has made no showing of any circumstance uniquely relevant to the period of extended operation. Indeed, it is clear that the County's concerns with the sufficiency of the emergency plans apply to the situation as it exists today and have no particular connection to license renewal. Further, the rationale underlying the license renewal rules is that the existing regulatory process effectively address operational issues like emergency planning. While the County asserts that alleged deficiencies in the current emergency plans, including those stemming from population growth and the road network, constitute special circumstances (Affidavit of J. Kohn, ¶ 7; Reply at 17), it has never demonstrated the current regulatory process, with its regime of exercises, drill and independent evaluations, is insufficient to maintain the adequacy of emergency preparedness.

At most, the County suggests that alleged deficiencies in the plan rebut the assumption of adequacy of current emergency plans. See Reply at 17; Affidavit of J. Kohn, ¶ 7. Even if the

allegations of deficiencies had some merit (which they do not), they would not undercut the rationale of the license renewal regulations. In explaining why emergency planning does not come within the NRC's safety review at the license renewal stage, the Commission stated:

> The Commission cannot conclude that its regulation of operating reactors is "perfect" and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all time in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.

Turkey Point, 54 N.R.C. at 10, quoting 56 Fed. Reg. at 64,945. Thus, even if some deficiency in an emergency plan were shown, it would merely be a matter that should be brought to the NRC's attention and resolved through the existing regulatory process, and would not prevent the rule from achieving its intended purpose.

Third, the County never demonstrated that the rule needs to be waived to address a "significant safety problem" (see Seabrook, supra). The County alleged that the evacuation plans for the areas of Suffolk County within the 10-mile plume exposure pathway EPZ (i.e., Fishers Island and Plum Island[6]) were inadequate because a 1997 evacuation time estimate had used data from the 1990 U.S. Census and 1992 telephone surveys. Petition at 5-7. However, the current evacuation time estimate for Millstone was prepared in 2002 using the 2000 U.S. census data (see Dominion's Answer at 17 and Att. 2), so the County's assertions concerning the

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[6] Fishers Island, which is located about 7 ½ miles east-southeast of Millstone, is included in Connecticut's Radiological Emergency Response Plan for Millstone. Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), DD-99-12, 50 NRC 246, 250 (1999). Plum Island, which is located approximately 10 miles south of Millstone across the Long Island Sound, is a federal facility with its own emergency plan.

previous 1997 estimate are simply irrelevant.[7] The County also alleged that there is no evacuation plan in place for the Town of Southold and other areas beyond the 10-mile EPZ (Petition at 10), but never provided any information demonstrating that an expansion of the EPZ was needed to protect the public health and safety. Indeed, the County has never sought a waiver of 10 C.F.R. § 50.47(c)(2), which establishes a 10-mile EPZ as sufficient to protect the public health and safety. Long Island Lighting Co. (Shoreham Nuclear Power Station, Units 1), CLI-87-12, 26 NRC 383, 395 (1987); General Public Utilities Corp. (Three Mile Island Nuclear Station, Unit 1), DD-94-3, 39 NRC 163, 180-81 (1994); Citizens Task Force of Chapel Hill, DPRM-90-1, 32 NRC 281, 291-92 (1990).

Certainly, the affidavit accompanying the County's waiver request provided no demonstration of the existence of a significant safety problem. That affidavit was executed by Jennifer Kohn, the County's attorney, and merely asserted that the matters discussed in the pleadings constituted special circumstances. Nowhere does Ms. Kohn aver that she has any special expertise or knowledge of emergency preparedness matters, or that she possesses personal knowledge of any facts demonstrating a significant safety problem. Clearly, the requirement for an affidavit exists to ensure that rules are not waived without a sound evidentiary basis. If the mere allegations of counsel suffice, the certainty provided by the NRC's regulations would be eviscerated.

For all these same reasons, the Board erred in holding that there was a colorable prima facie basis for the County's waiver request. The Board's Memorandum and Order did not

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[7] The County also faulted the 1997 report for not having considered evacuating the population of Fishers Island to Stonington, but failed to note that this change was implemented in 1999. See Millstone, DD-99-12, 50 NRC at 251-53.

meaningfully discuss or apply the standards that must be met under the regulations and case law to support the granting of a waiver. See LBP-05-16 at 13-16.

Instead, the Board stated that "the Long Island situation begs for some attention" for two reasons. First, the Board observed that County is not located in the same State as Millstone, so that the usual political forces and administrative relationships that might help the County draw attention to its concerns are not at work. Id. at 15. There are numerous nuclear power plants with emergency planning zones extending into adjacent states,[8] so this is not a fact "not common to a large class of applicants or facilities" and certainly not one that undercuts the rationale of the NRC's license renewal rules. Further, any need for additional measures on Long Island would be a matter for New York to consider as part of its planning for the portion of the 50-mile ingestion pathway EPZ, so the County's relationship with Connecticut is of no account. Second, the Board referred to the County's assertions of population changes and roadway limitations, already addressed above.

Ultimately, the Board found that the County's waiver request was "not an overpowering one" (LBP-05-16 at 14) and that its *prima facie* showing was only "colorable" (id. at 26), but nevertheless certified the question so that the Commission could consider it, perhaps based on "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." Id. at 18. Dominion respectfully submits that the Staff's opposition in an adjudicatory context to an very late petition that sought to raise issues outside of the scope of this proceeding reflected only respect for the limits that the Commission's rules impose in adjudications, and not any apparent lack of

[8] Dominion estimates that eleven other plants (Seabrook, Vermont Yankee, Salem, Catawba, Vogtle, Farley, Grand Gulf, Quad Cities, Prarie Island, Fort Calhoun, and Cooper) are within 10 miles of an adjacent state, and another 14 plants are within 50-miles of an adjacent state.

appreciation for the Suffolk County's responsibilities. The Staff had no objection to meeting with the County to discuss its concerns (see Tr. at 91) and in fact expended considerable effort in arranging for the participation of officials from FEMA and the New York State Emergency Management Office in that meeting. In any event, a waiver should only be granted based on a strong evidentiary demonstration that special circumstances undercut the rationale of the rules and waiver is necessary to address a significant safety issue. Such circumstances are entirely absent in this proceeding.

II. SUFFOLK COUNTY'S PETITION SHOULD ALSO HAVE BEEN DISMISSED BECAUSE OF ITS UNTIMELINESS AND FAILURE TO ADVANCE CONTENTIONS MEETING PLEADING REQUIREMENTS

Examination of the questions raised *sua sponte* by the Commission also demonstrates that the County's Petition and should have been denied forthwith. The Petition was inexcusably late, and the contentions that it raised did not meet pleading standards. Therefore, a prompt ruling dismissing the Petition was in order.

A. Suffolk County's Late-Filed Contention Was Not Admissible Under the Criteria for Considering Late-Filed Pleadings and Contentions Set Out in 10 C.F.R. § 2.309(c)

The answer to the first of the Commission's *sua sponte* questions on whether the untimeliness of the Petition should be excused is emphatically no. 10 C.F.R. § 2.309(c)(1) establishes a balancing process to be used in deciding whether a nontimely petitions to intervene and contentions should be entertained,[9] and the balancing of these factors weighs against acceptance of the County's late filing.

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[9] 10 C.F.R. § 2.309(c)(1) reads:

(c) Nontimely filings. (1) Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety

In weighing the County's belated Petition to Intervene, the Board recognized that "[t]he County's intervention petition was filed very late, and the reasons it gave for the delay ... do not rise to the level of "'good cause'." LBP-05-16, slip op. at 6. Commission case law places most importance on whether the petitioner has demonstrated sufficient good cause for the nontimely filing.[10] Good cause is "the weightiest of the late intervention standards."[11] Indeed, failure to demonstrate good cause – the situation here – requires the petitioner to make a "compelling" showing with respect to the other factors.[12] The good cause for lateness factor has even greater importance in this case since, but for its extreme tardiness, the County would have been able to

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and Licensing Board designated to rule on the request and/or petition and contentions that the request and/or petition should be granted and/or the contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the 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 Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000).

11 State of New Jersey (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993).

12 Id.; Texas Utilities Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-04, 37 NRC 156, 165 (1993) and CLI-88-12, 28 NRC 605, 610 (1988).

participate in a then ongoing licensing proceeding on this matter, which has since been terminated. See Millstone, CLI-04-36, 60 NRC at 631, 645.

The Board, however, did not give the inexcusable lateness of the County's petition the weight it is afforded by the Commission case law. Instead, it followed an earlier Commission decision, Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-04, 1 NRC 273 (1975), which had granted Erie County's belated petition to intervene in the West Valley licensing proceeding. LBP-05-16, slip op. at 6, 10. In the West Valley case, however, there was an ongoing proceeding which Erie County would have simply joined, whereas in this instance there will be a proceeding only if Suffolk County's request for a hearing is granted. The West Valley case is also distinguishable because in that case Erie County had proffered contentions that would have been admissible had they been timely tendered (see 1 NRC at 275-76), and Erie County's intervention would not have broadened the issues or delayed the proceeding. Thus, the situation in West Valley was quite unlike the one presented here and the Board erred in relying on that case.

A proper analysis of the remaining factors that must be weighed in accordance with 10 C.F.R. § 2.309(c)(1) dictates that the County's Petition be dismissed for untimeliness.[13] For example, with respect to factor (v), the availability of other means whereby the petitioner's interest will be protected, the Board questioned the effectiveness of remedies provided by the Commission's regulations such as the filing of petitions under 10 C.F.R. § 2.206 and the filing of rulemaking petitions under 10 C.F.R. § 2.802. LBP-05-16, slip op. at 8-9, referring to the

[13] In the Board's analysis, factors (ii) through (iv) in 10 C.F.R. 2.309(c)(1) are subsumed in the analysis whether the emergency preparedness contentions sought to be raised by the County are cognizable in a license renewal proceeding, see LBP-05-16, slip op. at 7-8, and are thus addressed in Section I above. As shown there, consideration of those factors also dictates that the Petition be denied.

"venerability" of § 2.206 and finding "no basis for treating", and refusing to recognize, "§2.206 as a practical 'other means' available for protecting the County's interests within the meaning of the fifth factor in the regulatory criteria." Id. at 9.[14] However, the Commission, in this very proceeding, has pointed to filing a § 2.206 petition as an alternative method for a party to raise operational issues (as the County seeks to do here). CLI-04-36, 60 NRC at 638.[15] Dismissing the effectiveness of section 2.206 is also contrary to NRC regulations and practice, under which "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." 10 C.F.R. § 2.335(a).

Moreover, there are yet other means to protect the County's interests. Suffolk County may raise its concerns with the New York State Emergency Management agency, which is responsible for emergency preparedness in the portions of the 50-mile ingestion pathway EPZ in New York. The sufficiency of emergency preparedness in this area is also subject to FEMA oversight and review. Thus, factor (v) weighed strongly against accepting the late filing.

Factor (vii) in 10 C.F.R. § 2.309(c)(1) requires consideration of "[t]he extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding." In the

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[14] The Board states that, when Board members inquired at the telephone conference call abut the usefulness of the 10 C.F.R. § 2.206 remedy, "it was virtually conceded that, as we suspected, the number of times that provision has been successfully invoked in the past 30 years can be counted on a very few fingers." LBP-05-16, slip op. at 8. This is incorrect. Counsel for both Dominion and the NRC Staff declined to speculate as to the number of times the § 2.206 procedure had been successfully invoked and pointed out that such statistics are irrelevant to whether the remedy is meaningful, which must be assumed for purposes of this proceeding. Tr. 40-43, 49-50. If there was any "concession" that the 10 C.F.R. § 2.206 remedy was ineffective, it came from the Board, not the parties. See, e.g., Tr. 50.

[15] The Commission has also specifically ruled that a 10 C.F.R. § 2.206 petition is an adequate alternative to filing a contention in a licensing proceeding as a way to challenge emergency planning arrangements. Consolidated Edison of New York and Port Authority of State of New York (Indian Point Units 2 and 3), CLI-82-15, 16 NRC 27, 37 (1982).

Comanche Peak proceeding, the Commission ruled that this factor weighed heavily against the petitioner, because granting the petition "will result in the establishment of an entirely new formal proceeding" and this "will perforce broaden the now non-existing adjudicatory issues and delay conclusion of the proceeding." 37 NRC at 167. The Board concluded, nonetheless, that "[a]t worst, this factor counts minimally against the County." LBP-05-16, slip op. at 9. This conclusion was reached by questioning "how much weight can be given to this factor in a proceeding which was brought over a decade before the expiration of the first of the existing licenses, and in which the Staff's safety review is not due to be concluded for several other months." Id., footnote omitted. This line of reasoning runs contrary to the position taken by the Commission in enacting the License Renewal Rule. In the rulemaking proceeding, the Commission specifically addressed the timing of the filing of license renewal applications and explained that a lead time of up to 20 years for filing such applications was warranted because if the application was denied the licensee would need 10 to 12 years of lead time to plan for new fossil generation and 12 to 14 years of lead time for nuclear or other generation. 56 Fed. Reg. 64,943, 64,963 (1991). In addition, Dominion has a right to expeditious action on its license application, and the Millstone license renewal schedule would certainly be threatened if a hearing were to commence now. Currently, the ACRS letter in this proceeding is scheduled to be issued in September, and where there is no hearing, a renewed license is typically issued within a couple of months thereafter. If a licensing proceeding were to start now, a renewed license could be delayed until at least the middle of next year, for the NRC Staff estimates that the license renewal process is typically extended by eight months if there is a contested proceeding leading to an adjudicatory hearing.[16]

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[16] See *Reactor License Renewal Process*, available at

Factor (viii), the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record, also points in favor of dismissing the County's Petition. Commission case law places substantial importance on whether a nontimely petitioner's participation in the proceeding will assist in the development of a sound record.[17] Indeed, this factor "assumes yet greater importance in cases ... in which the grant or denial of the petition will also decide whether there is to be any adjudicatory hearing."[18] For this factor to weigh in favor of granting a nontimely petition, the petitioner must precisely specify the issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.[19] The Board does not dispute that the County's Petition fails to meet these requirements.[20] Instead, it opines that "[w]hatever 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" during the conference call with the parties convened by the Board. LBP-05-16, slip op. at 10. The County's "subsequent filings," however, still do not begin to satisfy the specificity requirements

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http://www.nrc.gov/reactors/operating/licensing/renewal/process.html#review-time.

17 Comanche Peak, CLI-93-04, 37 NRC at 165.

18 Id. at 166.

19 Id.; see also Comanche Peak, CLI-88-12, 28 NRC at 611 and State of New Jersey, CLI-93-25, 38 NRC at 296.

20 In its Petition, the County devotes only six lines to discussing this factor and makes no attempt to describe in any detail how its participation would help develop a sound record. Petition at 4-5. The County also fails to identify any potential witnesses and, consequently, provides no summary of proposed testimony. With respect to evidence on which it intends to rely, the County merely provides a general list of references that includes (1) the Millstone license renewal application; (2) non-specific documents maintained by federal, state, and local agencies; (3) unidentified documents that might be disclosed in discovery; (4) non-specific "information" possessed by the County relevant to the proceeding; and (5) a general reference to "other sources indicated within" the Petition. Id. at 14.

cited above.[21] Moreover, the Board made a subjective assessment of the "sense of purpose" of the County's representatives instead of requiring an objective demonstration of the County's ability to assist in developing a sound record.[22] Such a shift was not warranted by the facts or the regulations and case law.

In short, most of the factors listed in 10 C.F.R. §2.309(c)(1) militate for rejection of the County's intervention petition, particularly those that under Commission case law have been found to have the greatest weight. Thus, the untimeliness of the County's petition was grounds by itself for denying that petition.

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21 In its Reply, the County makes no showing that it has the ability to contribute to a sound record under 10 C.F.R. § 2.309(c)(viii). It avers that it is "qualified to provide updated information" on emergency planning issues and has "many pertinent documents in its files and experts who would testify on the relevant questions" (Reply at 14), but still does not identify the information and documents in its possession, and still does not supply any summary of the testimony that its expert witnesses would furnish.

22 The Board cites the statement of Chief Deputy County Executive Paul Sabatino, II during the prehearing telephone conference (Tr. 86-88) as evidence of the County's "commitment to participate and contribute" to the adjudication of the contentions propounded by the County. LBP-05-16, slip op. at 10. With all due respect, all that the cited statement by Mr. Sabatino shows is an intent by the County to use intervention in this license renewal proceeding as a way to force the Staff and Dominion to provide a satisfactory resolution to the County's current concerns. As Mr. Sabatino put it:

> Number two, with this issue of a willingness to sit down and talk and discuss and dialogue and be cooperative, again, I go back to the point that you have to be in a position of strength, though. We need to be able to deal with these parties as co-equals. We're only get to that status if we are in a situation where the other party is going to have the incentive that our counsel mentioned before to take us seriously.

Tr. 86-97; see also Tr. 58, 61. These acknowledged aims are consistent with the publicly stated position of the Suffolk County Executive Steve Levy regarding the Millstone license renewal proceeding: "Our goal at the outset was to get into play," Levy said Monday. "Now that we have a say, we can ask for anything we want" – even if that includes Millstone's closure should officials fail to provide adequate emergency plans." The Independent Hamptons, *Finally, a Seat at the Millstone Table* (July 29, 2005), *available online at* http://www.indyeastend.com/cgi-bin/indep/news.cgi?action=article&category=News&id=7511 .

B. The County's Contentions Did Not Satisfy the Pleading Requirements in 10 C.F.R. § 2.309(f)

In addition to failing to justify its late filing, the County failed to satisfy the pleading requirements for admissible contentions set forth in 10 C.F.R. § 2.309(f)(1).[23] Each of the three "contentions" proffered by the County was vague and generalized, and failed to include a basis demonstrating the existence of a genuine dispute over a material issue. The County's first contention alleged that a 1997 evacuation time estimate was outdated, but since Millstone current estimate is one prepared in 2002, these assertions did not raise any genuine, material issue. The County's second contention alleged that there is no evacuation plan for the areas of Suffolk County beyond the 10-mile plume exposure pathway EPZ, but there was no basis showing that such evacuation would be necessary and this contention is any event an impermissible challenge to 10 C.F.R. § 50.47(c)(2). The County's last contention was a vague, generalized allegation that existing plans do not consider spontaneous evacuation (irrelevant to Suffolk County since it is

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[23] 10 C.F.R. § 2.309 (f)(1) provides:

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

not part of the evacuation zone), the unique consequences of a terrorist attack (beyond the scope of this proceeding for separate reasons[24]), or the unique characteristics of Suffolk County (vague but presumably a challenge to 10 C.F.R. § 50.47(c)(2) establishing 10-miles as the size of an EPZ). See Petition at 6-14. None of these contentions would be admissible even if emergency planning were within the scope of the proceeding.

Unquestionably, the failure of a proposed contention to comply with any one of the requirements in 10 C.F.R. §2.309(f)(1) is grounds for its dismissal. Millstone, CLI-04-36, 60 NRC at 636; *Changes to the Adjudicatory Process,* 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (citation omitted), *recons. denied,* CLI-02-1, 55 NRC 1 (2002). The Commission has explained that a "strict contention rule" serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring 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. Oconee, CLI-99-11, 49 NRC at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. Id. As the Commission reiterated in incorporating these same standards into the newly revised Part 2

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[24] See CLI-04-36, 60 NRC at 638.

rules, "[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues." 69 Fed. Reg. at 2,189-90.

The Board did not hold the County to the standards established by the NRC regulations. Declaring that "[w]e need devote little time to this matter," it allowed that "[p]erhaps the County could have drafted its first pleading, the actual intervention petition, in a manner that would have conformed more precisely to the outline of the governing regulations." LBP-05-16, slip op. at 11. However, the Board set off the role that the County plays in emergency response planning against the need to comply with the regulatory requirements in the pleading of contentions and concluded that, in that context, the County's efforts were adequate:

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

Id. (emphasis in original). The Board stated that "there may be reasons to hold other prospective intervenors to a higher standard when apply the contention pleading rules to them" (id. at 12), but instead focused on "the contribution that the County might make" and concluded that the contentions pleading rule provided no basis for excluding the County from participation. Id.[25]

[25] The Board also referred to the "quality and contribution of the County's later pleadings (i.e., its March 10 reply)" as "improving markedly" the County's focus. LBP-05-16, slip op. at 11. We respectfully disagree that the "County's focus" improved in its Reply. The Reply made no effort to sharpen the focus of the County's contentions. Certainly, the Reply included no request to

The importance of the County's mission does not obviate conformance with the Commission's rules governing admissible contentions. The Commission's rules on pleading contentions provide no exemption for intervenors who happen to be public agencies. Indeed, "[p]aragraphs (f)(1) and (2) of § 2.309 incorporate the longstanding contention support requirements of former § 2.714—no contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met." 69 Fed. Reg. at 2,221 (emphasis added). 10 C.F.R. § 2.309(d)(2) explicitly provides that a public entity that desires to participate as a party must meet the contention requirements of paragraph (f) of that section.

> Under the agency's rules, [the special relationship that exists between state and local governmental entities and their citizens] does not provide the basis for the Licensing Board to essentially waive or suspend the requirements governing contention formulation and the late-filed submission of contention amendments or revisions.

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58, aff'd, CLI-04-25, 60 NRC 223 (2004). Accordingly, the Board erred in failing to hold the County to the established standards.

The Board also erred in referring the Petition to the Commission without having made specific ruling on whether at least one of the County's proffered contentions raised a genuine, material dispute. As previously discussed, none of Suffolk County's contentions did so.

The purposes of these pleading requirements were made clear by the Commission in adopting the new Part 2 rules:

> The Commission seeks to ensure that the adjudicatory process is used to address real, concrete, specific issues that are appropriate for litigation. . . . The Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing. This principle applies regardless of whether

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amend the County's contentions or any showing that the requirements of 10 C.F.R. § 2.309(f)(2) for amended contentions had been met.

> a hearing is to be conducted under informal or formal procedures. The § 2.309(f) contention requirement is intended to support an early NRC determination whether there are issues that are appropriate for and susceptible to NRC resolution with respect to an NRC regulatory/licensing action.

69 Fed. Reg. at 2,202. Such purposes would be subverted if some parties, because of their status or other considerations, were deemed above complying with the need to frame "real, concrete, specific issues that are appropriate for litigation." The County failed to meet its obligation to frame admissible contentions. Its Petition, therefore, should be dismissed.

C. The Board Should Not Have Postponed its Contention-Admissibility Decision Pending Settlement Talks

As noted above, at the end of the April 12, 2005 teleconference the Board requested that the parties engage in settlement discussions while two members of the Board were engaged in finalizing their decision in another proceeding. Tr. 88-91; LBP-05-16, slip op. at 3-4. The Board subsequently continued to encourage the parties to continue settlement discussions (see Unpublished Memorandum dated May 11, 2005) and only discontinued its efforts to promote settlement when the parties advised that they had held a settlement meeting which had proved unsuccessful. Unpublished Status Memorandum dated June 3, 2005.

From the above chronology it is unclear whether the Board chose to postpone issuing its decision pending the results of settlement talks. It is a fact, however, that over three months elapsed from the telephone conference call and the issuance of the Board's decision. If any portion of that time was expended by the Board awaiting the outcome of settlement discussions, doing so would have been contrary to the long-standing Commission goal of fostering the fair and timely completion of licensing proceedings. See, e.g., Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 46 Fed. Reg. 28,533 (1981); Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 63 Fed. Reg. 41,872

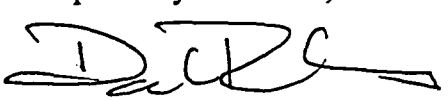
(1998); 69 Fed. Reg. at 2,182-83. While settlement of disputes is encouraged by the Commission and provided for in the regulations, see 10 C.F.R. § 2.338, such settlement efforts are entirely voluntary and must not unduly delay licensing proceedings. 10 C.F.R. § 2.338(f).

On a related point, the Board expressed its "doubts 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," LBP-05-16, slip op. at 18, and discussed at some length the appropriateness of a collaborative effort between the NRC Staff and the County. Id. at 16-19. These expressions by the Board, though evidencing a laudable concern for the health and safety of the citizens of Suffolk County, may be interpreted as an attempt to provide direction to the Staff on how to conduct its reactor oversight responsibilities – such an attempt, of course, would be beyond the Board's jurisdiction and authority. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-89-12, 11 NRC 514, 516-17 (1980).

CONCLUSION

For all of the foregoing reasons, the Commission should deny Suffolk County's waiver request and its petition for intervention.

Respectfully submitted,



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Dated: August 18, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	Docket Nos. 50-336-LR
Dominion Nuclear Connecticut, Inc.	)	50-423-LR
	)	
(Millstone Nuclear Power Station, Units 2 and 3)	)	ASLBP No. 05-837-01-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of "Brief of Dominion Nuclear Connecticut in Response to CLI-05-18 Concerning Suffolk County's Late Petition and Waiver Request," dated August 18, 2005, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 18th day of August, 2005.

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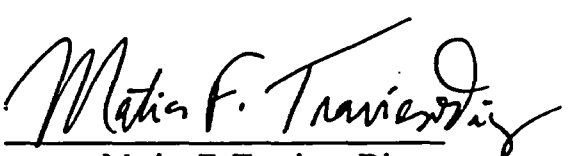

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