

August 25, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
DOMINION NUCLEAR CONNECTICUT, INC.)	Docket Nos. 50-336, 50-423
)	
(Millstone Power Station, Units 2 & 3))	ASLBP No. 05-837-01-LR

NRC STAFF RESPONSE TO SUFFOLK COUNTY BRIEF
IN SUPPORT OF PETITION FOR LATE INTERVENTION

INTRODUCTION

Pursuant to the Commission's Memorandum and Order of August 4, 2005,¹ the staff of the Nuclear Regulatory Commission ("Staff") herein responds to "Suffolk County's Brief in Support of Petition for Late Intervention" ("County Brief") filed on August 18, 2005. As discussed below and in the "NRC Staff Brief in Response to Commission Memorandum and Order CLI-05-18" ("Staff Brief"), dated August 18, 2005, the County has failed to demonstrate that its very belated petition for leave to intervene should be granted, or, assuming for purposes of argument that it is permitted to intervene, that a waiver of the Commission's regulations is warranted in these circumstances.

DISCUSSION

The pertinent background of this proceeding has been set forth in the Staff Brief and need not be restated. Rather, the Staff here addresses several of the arguments made in the County Brief.

1. In support of its argument that it has demonstrated good cause for its untimely intervention request, the County once again asserts that it received "no official notice" of the

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

opportunity to intervene because publication of notice in the *Federal Register* was insufficient to put the County on notice to allow meaningful participation in the proceeding. County Brief at 14. The County asserts that, in certain instances, *Federal Register* notice is insufficient under law and due process. *Id.*

These justifications fall short of the mark. As explained by the Staff below,² the Federal Register Act expressly provides that publication of a notice in the *Federal Register* constitutes notice to “all persons residing within the States of the Union.” 44 U.S.C. § 1508; *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 646-647 n.18 (1975); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), LBP-79-21, 10 NRC 183, 192 (1979) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), which held that publication in the *Federal Register* gives legal notice to all citizens). Therefore, ignorance of the publication of the *Federal Register* notice does not constitute good cause for a belated hearing request. *Consolidated Edison Co. of New York* (Indian Point, Unit No. 2), LBP-82-1, 15 NRC 37, 40 (1982). Moreover, a *Federal Register* notice constitutes *actual* notice to all persons, whether or not the notice is actually seen. *Jersey Central Power & Light Co.* (Oyster Creek Nuclear Generating Station), LBP-77-58, 5 NRC 500, 506 n.4 (1977) (citing 44 U.S.C. § 1508).

Furthermore, the flimsiness of the County’s argument with respect to actual notice was noted by the Licensing Board when it found that “[e]ven if what the County says about the insufficiencies of constructive notice had merit, the County legislature’s adoption of a resolution on the subject of the Millstone license renewals demonstrates that there was actual notice of

² See “NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York,” dated Feb. 28, 2005 at 4-5 (“NRC Staff Answer”).

those proposed renewals at a relatively early date.”³ As such, the County has not established good cause for late filing.

2. The County next baldly asserts that, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), it has referenced specific portions of Dominion Nuclear Connecticut’s (“Dominion”) license renewal application, including both the environmental report and safety report, and has alleged specific deficiencies. County Brief at 19. To the contrary, the County has challenged Dominion’s emergency plan, which is not part of the license renewal application. Therefore, the County fails to demonstrate that a genuine dispute exists with the applicant on a material issue of law or fact. To do so, as the Staff has previously pointed out, the County must include references to specific portions of the *license renewal application* that it disputes and the supporting reasons for each dispute, or, if the County believes that the *license renewal application* lacks information on a relevant matter as required by law, it would have had to identify each failure and the supporting reasons for its belief.⁴ The County simply does not take issue with anything required to be in - or purportedly left out of – the license renewal application in any of the County’s filings. Accordingly, the County fails to provide the requisite specificity for contention admissibility.

3. The County argues that, pursuant to 10 C.F.R. § 2.309(f)(2), it “filed specific contentions related to Dominion’s compliance with the National Environmental Policy Act, which were attached to the County’s [March 10, 2005] Reply.” County Brief at 20. Except for a reference to a comment letter on the Draft Supplemental Environmental Impact Statement

³ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-05-16, 62 NRC ___, slip op. at 6 (July 20, 2005) (emphasis in original).

⁴ See 10 C.F.R. § 2.309(f)(1)(vi). See *also* NRC Staff Answer at 15.

prepared in connection with Dominion's license renewal application,⁵ the County raises no contention pertaining to the National Environmental Policy Act in either its original Petition or its Reply.⁶ Moreover, to the extent that the County sought to raise new issues in its Reply, such issues are improper and do not merit consideration under the NRC's rules of practice.⁷

4. Finally, in its argument regarding a waiver request pursuant to 10 C.F.R. § 2.335(b), the County failed to address the three-part test for certification of a waiver petition articulated by the Commission.⁸ See County Brief at 20-24. The Staff has addressed the three-part test and has demonstrated why special circumstances are not present in this case.⁹ As the County has made no attempt to address the three-part test and refute the Staff's argument, the waiver request should be denied.

CONCLUSION

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

⁵ See "Reply and Supporting Documents," dated March 10, 2005 at 13, *referencing* Letter from S. Levy to Chief, Rules Review and Directives Branch, NRC, "Millstone Power Station, Units 2 and 3, NUREG-1437, Supplement 22," dated Feb. 23, 2005.

⁶ See "Petition for Late Intervention of the County of Suffolk of the State of New York," dated Feb. 1, 2005; Reply and Supporting Documents.

⁷ Regarding the permissible scope of a reply, the Commission has stated: "Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer" Final Rules, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

⁸ See *Public Serv. Co. of N.H. (Seabrook Station, Units 1 & 2)*, CLI-89-20, 30 NRC 231, 235 (1989).

⁹ See "NRC Staff Motion to Strike, In Whole or In Part, the Reply of the County of Suffolk of the State of New York and Response to Request for Waiver Pursuant to 10 C.F.R. § 2.335(b)," dated March 18, 2005 at 3-7.

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

Respectfully submitted,

Mauri T. Lemoncelli
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO SUFFOLK COUNTY BRIEF IN SUPPORT OF LATE INTERVENTION" in the captioned proceeding have been served on the following through electronic mail and with copies by deposit in the NRC's internal mail system, or through electronic mail with copies by deposit in the U.S. Postal Service as indicated by an asterisk, this 25th day of August, 2005:

Michael C. Farrar, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mcf@nrc.gov

Alan S. Rosenthal, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: RSNTHL@comcast.net

Peter S. Lam, Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: psl@nrc.gov

Office of the Secretary
ATTN: Rulemaking and Adjudications Staff
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: HEARINGDOCKET@nrc.gov

Office of Commission Appellate
Adjudication
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lillian M. Cuoco, Esq.*
Senior Nuclear Counsel
Millstone Power Station
Building 475/5
Rope Ferry Road (Route 156)
Waterford, CT 06385
E-mail: Lillian_Cuoco@dom.com

David R. Lewis, Esq.*
Matias F. Travieso-Diaz, Esq.*
Timothy J.V. Walsh, Esq.*
Pillsbury Winthrop Shaw Pittman, LLP
2300 N St., NW
Washington, DC 20037-1128
E-mail: david.lewis@pillsburylaw.com
matias.travieso-diaz@pillsburylaw.com
timothy.walsh@pillsburylaw.com

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

Mauri T. Lemoncelli
Counsel for NRC Staff