

August 25, 2005 (4:12pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE NUCLEAR REGULATORY COMMISSION

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

**SUFFOLK COUNTY'S REPLY BRIEF
IN FURTHER SUPPORT OF PETITION FOR LATE INTERVENTION, IN
RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-05-18**

Submitted by:

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August 25, 2005

TEMPLATE = SECY-021

SECY-02

TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

I. WAIVER.....1

 a. Special Circumstances Not Common to a Large Class.....1

 b. Special Circumstances Not Considered During the Rulemaking.....2

 c. Rationale Behind 10 C.F.R. §50.47(a)(1).....3

 d. The County Raises a Significant Safety Problem.....6

II. SUFFOLK COUNTY’S PLEADINGS MET THE CRITERIA
 IN 10 C.F.R. §2.309(c)(1).....8

III. THE COUNTY’S PETITION AND SUBSEQUENT DOCUMENTS
 MET THE CONTENTION PLEADINGS RULE IN 10 C.F.R. §2.309(f).....9

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

FEDERAL CASES

Jones v. Roper, 311 F.3d 923 (8th Cir. 2002).....5

North Anna Environmental Coalition v. U.S.N.R.C., 533 F.3d 655, 174 U.S. App.
D.C. 428 (D.C. Cir. 1976).....4

FEDERAL ADMINISTRATIVE CASES

*Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station Units 2
and 3)*, LBP-05-16, 62 NRC __ (slip op.)(ASLB July 20, 2005) passim

Louisiana Energy Services, L.P. (National Enrichment Facility), ASBLP No. 04-
826-01-ML, 60 N.R.C. 40, 2004 NRC LEXIS 166 at *27 (ASLB 2004)9

Nuclear Fuel Services (West Valley Reprocessing Plant), 1 N.R.C. 273 (1975)8

Public Service Co. of New Hampshire, (Seabrook Station, Units 1 & 2), CLI 89-
20, 30 N.R.C. 231, 1989 NRC LEXIS 55, *3-4 (NRC 1989)1

FEDERAL STATUTES

42 U.S.C. §§2133(c) & (d).....4

42 U.S.C. §2232(a)4

FEDERAL REGULATIONS

10 C.F.R. §2.2069

10 C.F.R. §2.309(c)(1) and (f)1, 8, 9, 10

10 C.F.R. §2.335(b)1, 10

10 C.F.R. §50.47(a)(1) and (c)(2)..... passim

FEDERAL RULES

Fed.R. App. Proc. 29(b).....5

MISCELLANEOUS

*Final Rule: Nuclear Power Plan License Renewal, Part IV(s), “Emergency
Planning Considerations,”* 58 F.R. 649432

James Lee Witt Associates, LLC, <i>Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone</i> , p.107	8
Letter to the Chief, Rules Review and Directives Branch, NRC, from Suffolk County Executive Steve Levy, dated February 23, 2005.....	7
Letter to Hon. Timothy Bishop, U.S. Representative, from Luis A. Reyes, Executive Director for Operations, NRC, dated March 10, 2005	3
Letter to Michael C. Farrar, Chief, from J. Kohn, dated March 23, 2005.....	6
<i>Planning Basis for the Development of State and Local Water Nuclear Power Plants</i> , NUREG 0396 (NRC/EPA 1978)	3, 6, 7

This Brief is submitted by the County of Suffolk ("County") in reply to the Briefs of Dominion, Staff, and proposed amicus curiae, and in further support of the County's Petition for Late Intervention, and Request for a Waiver, made pursuant to 10 C.F.R. §2.309(c) and 2.335(b), respectively. The County also seeks a waiver of 10 C.F. R. §50.47(a)(1).

I. WAIVER

The County's papers meet the requirements enunciated by the Nuclear Regulatory Commission ("NRC") to justify a waiver, and, thus, the waiver request should be granted. The County: (a) has presented "special circumstances;" (b) has properly pleaded facts to establish that its position is not common, that its positions were not considered in the rulemaking proceeding, that special circumstances undercut the rationale for the rule sought to be waived; and (c) has shown that it is evident that a waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived.¹

a. Special Circumstances Not Common to a Large Class

The County is a governmental entity, mandated by law to coordinate and provide emergency services and to protect the health and safety of its residents and visitors. The County's geographic circumstances are unique, in terms of its close proximity to Connecticut's Millstone Nuclear Power Plant ("Millstone"), despite the fact that the County is located in New York. The lack of major roads in the area of the County closest to Millstone and the geographical disconnect from Connecticut and its roadways are additional facts to be considered. Overall and seasonal population growth in the County during Millstone's current licensing period, together with the other listed factors, make the County's circumstances special. The determinations made by the State and the County regarding possible evacuation during the time

¹ *Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2)*, CLI 89-20, 30 NRC 231, 235, 1989 NRC LEXIS 55, *3-4 (NRC 1989).

the Shoreham Plant was being contemplated help establish the unique factors for Suffolk County. Considering all of these factors together, the circumstances are clearly unique and special to the County, and are not common to a large class of applicants or facilities. The papers submitted by Dominion, the Staff, and the proposed amicus curiae do not establish that any other party has even remotely comparable circumstances.

b. Special Circumstances Not Considered During the Rulemaking

It has been argued that, during the NRC's adoption of 10 C.F.R. 50.47(a)(1), the NRC generally considered issues of demographic changes, transportation, and changes in land use. However, Dominion, the Staff, and the proposed amicus curiae have failed to show how substantial changes in demographics or other factors **outside the EPZ**, but still in close proximity to the reactor, were considered. The NRC made the following statements when it adopted the rule enunciated in 10 CFR §50.47(a)(1):

Through its standards and required exercises, the Commission ensures that **existing plans** are adequate throughout the life of any plant even in the face of changing demographics and other **site-related** factors. Thus, these drills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness **in light of changes in site characteristics** that may occur during the term of the existing operating license, such as transportation systems and demographics. There is no need for a licensing review of emergency planning issues in the context of license renewal.²

The rationale for the rule describes numerous safeguards which assure continued updating and refinement of the existing emergency plans, through ongoing regulation.³ Furthermore, 10 C.F.R. §50.47(a)(1) must be read together with 10 C.F.R. §50.47(c)(2), which establishes the 10 mile radius guideline for a plume EPZ, and usually limits the scope of requirements for emergency plans. 10 C.F.R. § 50.47(a)(1) does not normally require consideration of emergency

² *Final Rule: Nuclear Power Plan License Renewal*, Part IV(s), "Emergency Planning Considerations," 58 F.R. 64943 (emphasis added).

³ *Id.*

planning during license renewals because the law presumes that existing plans are adequate to protect public safety, in light of conditions at or near the site, within the EPZ. Here, the County has sufficiently rebutted that presumption. While there is an understanding that emergency measures could be expanded on an *ad hoc* basis beyond the EPZ, as necessary,⁴ the County's unique situations make it highly unlikely that *ad hoc* planning would be sufficient during an emergency.

The initial Millstone licensing, rulemaking, and regulation did not consider or provide, in a generic way, for updates and changes in the areas external to the EPZ. Upon information and belief, during the rulemaking process, there was no consideration of the unique circumstances presented here, such as geographic isolation and transportation difficulties relative to Suffolk County; nor were such circumstances considered when the operating license for Millstone was granted. The ASLB correctly held that the County's situation was sufficiently unique to warrant consideration as to whether an exemption is appropriate.⁵ The NRC should also hold that special circumstances are grounds for a waiver.

c. Rationale Behind 10 C.F.R. §50.47(a)(1)

To apply 10 C.F.R. §50.47(a)(1) in the present matter would undercut the purposes for which the rule was promulgated. While expedition of license renewals may be one reason for the rule, there can be no doubt that statutory mandates make protection of public health and safety a paramount consideration in this and all licensing rules. A nuclear power plant plan must provide adequate protection to health and safety, license issuance must not be inimical to the

⁴ Letter to Hon. Timothy Bishop, U.S. Representative, from Luis A. Reyes, Executive Director for Operations, NRC, dated March 10, 2005. *Also see Planning Basis for the Development of State and Local Water Nuclear Power Plants*, NUREG 0396 (NRC/EPA 1978) at 16.

⁵ *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station Units 2 and 3)*, LBP-05-16, 62 NRC ___ (slip op.) (ASLB July 20, 2005) ("ASLB Order") at 21-22.

health and safety of the public, and there must be “reasonable assurance” of such protection. These are preconditions to the NRC’s ability to license the plant.⁶ License renewal is subject to the same statutes⁷ and it would be inaccurate and illogical to contend that a renewal is subject to a lesser standard. The NRC is obliged to carry out this statutory mandate, whether undertaking initial licensing or license renewal. Furthermore, 10 C.F.R. §50.47(a)(1), read in its entirety, emphasizes that there must be reasonable assurance that adequate emergency measures will be taken to protect health and safety.

The circumstances set forth by the County establish an urgent need for consideration of health and safety issues during this particular license renewal. The County has sufficiently rebutted the presumption that there are reasonable assurances that adequate emergency measures can be taken at present. Despite contentions to the contrary, the ongoing regulatory processes, periodic reviews, and emergency drills here do not provide or maintain an acceptable level of safety, independent of the license renewal process. If the County’s concerns had been addressed in the initial emergency plans and regulation, or if initial review and drills pertained to Suffolk County, this argument might be persuasive. However, since these existing plans and requirements do not even apply to most of Suffolk County (portions of Fishers and Plum Islands are included), the existing plans and processes do not in any way ensure the safety of the County’s populace. Moreover, it is impossible that planning done for the State of Connecticut could apply or be extended to Suffolk County, should the need arise. Also, since both Millstone and the NRC Staff have expressed the view that there is no legal requirement to accomplish emergency planning outside the existing EPZ, no voluntary emergency planning for Suffolk

⁶ 42 U.S.C. §§2133(d) and 2232(a); *North Anna Environmental Coalition v. U.S.N.R.C.*, 533 F.3d 655, 659, 174 U.S. App.D.C. 428 (D.C. Cir. 1976).

⁷ 42 USC §§2133(c) & (d).

County will likely be conducted by these parties without County intervention. Notably, no party has suggested that emergency planning for Suffolk County (other than Fishers and Plum Islands) was even considered at the initial licensing of Millstone. Therefore, it is abundantly clear that ongoing regulation and review will not in any way address the concerns appropriately raised by Suffolk County.

The issue presented here relates to circumstances that exist today, during this license renewal process, and not what may have been years ago. Under the special circumstances pleaded here, it is clear that there is no reasonable assurance that adequate protective measures can and will be taken in Suffolk County in the event of a radiological emergency. Thus, application of the rule would undercut its purposes. The County's Petition is in harmony with the goals of the NRC, because the County seeks to protect public health and safety.

The Nuclear Energy Institute ("NEI") Brief⁸ emphasizes the importance of predictability and stability in the license renewal process. However, since the NRC is statutorily mandated to consider public health and safety on license renewals, as well as initial licensing, these concerns should not be glossed over in the name of convenience. NEI's suggestion that national energy policy considerations argue against the County's motion are irrelevant. The instant proceeding is not a referendum on the importance, desirability, or environmental friendliness of nuclear facilities generally. The County does not seek revision of rules generally, or even the denial of the subject license renewals. The County seeks only to waive the rule in this particular instance under the circumstances presented. The County also differs with NEI's inference that the

⁸ NEI states that the County has not indicated whether or not it opposes grant of the motion for leave to file an amicus brief. NEI Amicus Curiae Brief at 4. For the record, NEI's counsel was well aware, based on personal communications with Christine Malafi, the County refused to consent to the filing. Furthermore, the County opposes the motion because the Amicus Curiae Brief provides no new useful information or arguments which are germane to this proceeding. *Jones v. Roper*, 311 F.3d 923, 927 (8th Cir. 2002); Fed.R. App. Proc. 29(b).

County's motion would disrupt the license renewal process generally, or even the instant proceeding. Dominion's claim, at page 19 of its Brief, regarding the County's reasons for intervention, must be taken in context. The County has repeatedly stated that it is not seeking to close or shut Millstone, but only seeking to fully protect its residents and visitors. Formal requests for permission to participate and to enable the County's positions on public safety and evacuation to be seriously considered are not inconsistent, and do not translate into opposition. The County seeks a seat at the table to discuss current safety issues, recognizing that the subject licenses for Millstone 2 and 3 do not expire for 10 and 20 years, respectively, that a final NRC decision on this license renewal is not expected until July 22, 2006, and the completion of the Staff review is not expected until November 2005. In sum, strict application of 10 C.F.R. §50.47(a)(1) would not serve the purposes of the rule and the County's request for a waiver should be granted.⁹

d. The County Raises a Significant Safety Problem

A waiver is necessary to address, on the merits, a significant safety problem related to the rule sought to be waived. The County's Petition raises important safety concerns related to evacuation and other emergency measures. There can be no doubt that a severe radiological emergency would affect persons well beyond the 10 mile EPZ.¹⁰ Dominion infers that the County should have also sought a waiver of 10 CFR §50.47(c)(2), which contains the guideline of a 10 mile plume EPZ.¹¹ It has also been suggested that adjustments to the exact size of the EPZ were made in the past only on the basis of straightforward administrative considerations,

⁹ The formal request for a waiver was made in the County's Reply, in response to arguments raised by Dominion and the Staff, but the substance of the relief requested was evident initially in the Petition. The Reply included an Affidavit based on files and reports maintained by the County and personal communications with County experts. All parties addressed the waiver. See Letter to Michael C. Farrar, Chief, from J.Kohn, dated March 23, 2005.

¹⁰ See, e.g. NUREG 0396 at I-39-I-39.

¹¹ Dominion Brief at 11.

and not on the basis of the types of concerns raised by the County. This interpretation is out of line with the plain English of 10 CFR §50.47(c)(2), which provides that:

Generally, the plume exposure pathway EPZ for nuclear power plants shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries (emphasis added).

For instance, “[g]iven a core-melt accident, there is a near 100% chance of exceeding the 10 rem thyroid [Protective Action Guide] from milk ingestion at 1 mile, ... a 40% chance at 25 miles from a power plant.”¹² Similarly, data shows that in a core-melt situation, there is potential for radiation exposure exceeding the levels at which illnesses and injuries occur, in areas way beyond the 10-mile limit.¹³ Among other safety issues, the potential dose exposures from a severe accident at a 50 mile radius from Millstone and also potential dangers to persons on Fishers and Plum Islands were addressed in Suffolk County’s comments on the Draft Supplemental Environmental Impact Statement, Supplement 22, submitted by Dominion.¹⁴ The data cited in the County’s comments was taken from Supplement 22. The probability of such accidents and exposures may be low, according to the NRC figures, but they remain a possibility. Moreover, given the difficulties of evacuation of Suffolk County, the potential exposure rates for the County might very well be higher.

In addition to the more general concern about evacuation, the County raised specific contentions about deficiencies in the existing plans.¹⁵ Section VII(A) of the Petition contains almost three pages of serious issues, with documented references to the facts and the regulatory

¹² NUREG 0396 at I-41.

¹³ *Id.* at I-37-39.

¹⁴ Letter to the Chief, Rules Review & Directives Branch, NRC, from Suffolk County Exec. Steve Levy, dated Feb. 23, 2005.

¹⁵ See the County’s Petition, §VII(A) at 6, *et seq.*

criteria that were not met: Dominion's Brief addresses just one allegation in the County's Petition, and ignores the numerous other allegations of deficiencies. For instance, the County's Petition, at 8, alleged that there was no plan for Plum Island evacuees brought to Orient Point.¹⁶ This contention has not been disputed. The generic rule about excluding emergency planning from license renewal is inadequate to assure public health and safety, under the circumstances presented here. The County's Petition meets the criteria for a waiver and the relief requested should be granted.

II. SUFFOLK COUNTY'S PLEADINGS MET THE CRITERIA IN 10 C.F.R. §2.309(c)(1)

The ASLB held that on a Petition for Late Intervention, 10 C.F.R. §2.309(c)(1) requires a balancing of all the factors listed herein, regardless of whether the lateness is excusable.¹⁷ The County's strong showing on standing and its mandated governmental responsibilities in planning for and providing emergency services weighed heavily in the ASLB's decision, as they should. The County's expertise and strong showing of commitment also remain persuasive. The ASLB held that should the County's request for a waiver be granted, the balance of the factors support a grant of the County's Petition for Late Intervention. It is the position of the County that adequate consideration of health and safety issues outweigh any minimal delay caused by giving the County an opportunity to be heard.

Dominion asserts that there are other means whereby the County's interest may be redressed, an assertion that the County and ASLB specifically refute,¹⁸ including the possibility

¹⁶ James Lee Witt Associates, LLC, *Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone*, p.107.

¹⁷ See ASLB Order, p.12; see also *Nuclear Fuel Services (West Valley Reprocessing Plant)*, CLI-75-04, 1 NRC 273 (1975), in which the late-filing County petitioner was permitted to intervene nine-months late, without a showing of good cause. As the ASLB held, the County's Petition and subsequent pleadings met six of the seven criteria (other than a showing of good cause for a late filing), listed in 10 C.F.R. §2.309(c)(1), and the balance was minimally offset, if at all, by the seventh factor, concerns about delay.

¹⁸ *Id.* at 16.

of a motion pursuant to 10 C.F.R. §2.206. However, since the County does not seek to modify, suspend, or revoke Dominion's license, a motion under 10 C.F.R. §2.206 would be inappropriate. As to raising issues with New York State Emergency Management Agency, it is preferable to address these issues in the current proceeding, because the responsibility for addressing these issues should remain, in part, with Dominion, as the licensee, and the renewal process provides an incentive to Dominion to rightly shoulder that responsibility. The County fully intends to protect the people of Suffolk County and will consider all options necessary. In short, the ASLB's decision and findings were well supported and should be granted deference.

III. THE COUNTY'S PETITION AND SUBSEQUENT DOCUMENTS MET THE CONTENTION PLEADINGS RULE IN 10 C.F.R. §2.309(f)

The ASLB held that, given the County's acknowledged crucial role and substantive expertise on the subject matter, the County's pleading was adequate for the matter which it seeks to present.¹⁹ The ASLB was correct in considering the County's Petition, as well as its Reply and subsequent filings,²⁰ and was correctly persuaded that the County had made a serious commitment to the process and would make a knowledgeable contribution on real issues.²¹ The County's pleadings were specific and well-documented, referencing specific regulations that had not been complied with by Millstone and providing specific documents and expert opinions. The County also asked for specific relief. Contrary to the Staff's assertions, the County's pleadings went far beyond "notice pleading." In addition, the County's contentions are germane and material to the proceeding, if the requested waiver is granted.

Most importantly, the County's contentions focused on real, concrete issues that directly affect the health and safety of County residents and visitors, issues of genuine dispute that the

¹⁹ *Id.* at 14.

²⁰ *Louisiana Energy Services, L.P. (National Enrichment Facility)*, ASBLP No. 04-826-01-ML, 60 NRC 40, 2004 NRC LEXIS 166 at *27 (ASLB 2004).

²¹ *Id.* at 15.

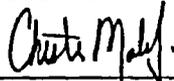
NRC has the capability to hear, consider, and address. There has been no consideration of the safety of Suffolk County residents outside the 10-mile radius, either in the initial licensing proceeding or at the renewal stage. This is not speculative. The County's pleadings met the requirements of 10 C.F.R. §2.309(f) and, contrary to the suggestions of Dominion, the County seeks no exemption because it happens to be a public agency. Moreover, the NRC has a real responsibility to protect the people of Suffolk County under its governing statutes. In short, the ASLB's holding that the contentions pleading rule does not bar the County's participation in these proceedings should be upheld.

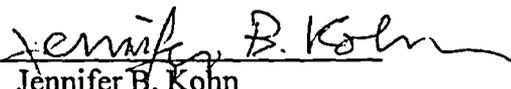
IV. CONCLUSION

WHEREFORE, in the interests of justice and public health and safety, Petitioner County of Suffolk again 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
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In the Matter of)

DOMINION NUCLEAR CONNECTICUT, INC.)
(Millstone Nuclear Power Station, Units 2 and 3))

Docket Nos. 50-336-LR & 50-423-LR
ASLBP No. 05-837-01-LR

-----)
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

)SS:

COUNTY OF SUFFOLK)

The undersigned, being duly sworn, deposes and says: he is over the age of 18 years and associated with the Suffolk County Attorney. That on the 25th day of August, 2005 he served the within SUFFOLK COUNTY'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR LATE INTERVENTION, IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-05-18 dated August 25, 2005, upon those set forth herein by depositing a true copy thereof enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York, with copies by electronic mail as indicated.

Denis P. Tureski
Denis P. Tureski

Sworn to before me this
25th day of August, 2005

Kirk R. Cronk
Notary Public

KIRK R. CRONK
Notary Public, State Of New York
No. 01CR8096040
Qualified in Suffolk County
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Re: **Dominion Nuclear Connecticut, Inc.**
(Millstone Nuclear Power Station, Units 2 &3)
Docket Nos.: 50-336 LR & 50-423 LR, ASLBP No. 05-837-01-LR

Honorable Sir/Madam:

Please accept for filing Suffolk County's Reply Brief in Further Support of Petition for Late Intervention, in Response to Commission Memorandum & Order CLI-05-18. An original and two copies are enclosed herewith along with the Affidavit of Service which 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,
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Page -2-

August 25, 2005

U.S. Nuclear Regulatory Commission

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