

August 25, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
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August 25, 2005 (4:11pm)

Before the Commission

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

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

DOMINION NUCLEAR CONNECTICUT'S REPLY TO  
SUFFOLK COUNTY'S BRIEF IN RESPONSE TO CLI-05-18

INTRODUCTION

As provided for in the Commission's Memorandum and Order, CLI-05-18, in the Millstone license renewal proceeding,<sup>1</sup> Dominion Nuclear Connecticut, Inc. ("Dominion") submits this reply to "Suffolk County's Brief in Support of Petition for Late Intervention," dated August 17, 2005 ("County's Brief"). The County's Brief provides no new insights on the certified question of whether to grant Suffolk County's ("County") waiver request, or on the specific questions posed by the Commission. Rather, it largely repeats the positions taken in the County's previous filings or quotes directly from the Board's Memorandum and Order<sup>2</sup> that referred the waiver request to the Commission. Therefore, for the reasons previously articulated,<sup>3</sup> it remains appropriate for the Commission to deny the County's waiver request and dismiss its intervention petition.<sup>4</sup>

<sup>1</sup> Dominion Nuclear Connecticut, Inc., (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-18, 62 N.R.C. \_\_ (Aug. 4, 2005), slip op. at 2.

<sup>2</sup> Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), LBP-05-16, 62 N.R.C. \_\_ (July 20, 2005), slip op. at 5, 20.

<sup>3</sup> See Brief of Dominion Nuclear Connecticut in Response to CLI-05-18 ("Dominion's Brief").

<sup>4</sup> Petition for Late Intervention (Jan. 28, 2005) ("County's Petition" or "Petition")

## DISCUSSION

### I. NOTWITHSTANDING THE ARGUMENTS RAISED IN ITS BRIEF, THE COUNTY DOES NOT MEET THE STANDARDS FOR GRANTING A WAIVER FROM 10 C.F.R. § 50.47(a)(1)

The County makes three main arguments in support of its request for a waiver of 10 C.F.R. § 50.47(a)(1). First, it claims that special circumstances exist because “the expected population growth and other factors documented in the County’s papers eliminate any assumption that public safety will be protected by Dominion’s use of already existing, outdated plans” and “[t]herefore the 10-mile emergency planning zone should be extended.” County’s Brief at 22. Dominion’s Brief has already shown that expected population growth and the other factors that were raised in the County’s waiver request do not constitute special circumstances. See Dominion’s Brief at 8-11. Further, the County has provided no credible evidence that the emergency response plans for Millstone are deficient. Those plans were submitted to the Federal Emergency Management Agency (“FEMA”) and approved in 1984 pursuant to 44 C.F.R. § 350.12(b) and remain in effect. The adequacy of those plans is periodically confirmed through inspections by the NRC Staff and exercises conducted by the NRC and FEMA. See 44 C.F.R. § 350.9.

In making this argument, the County erroneously asserts that “[n]o waiver is needed for an expansion of the 10-mile zone, insofar as the regulation already allows for adjustments of the zone boundaries due to local circumstances.” County’s Brief at 22 n.45. The Commission has ruled that the 10-mile EPZ may not be adjusted on safety grounds, but “only on the basis of such straightforward administrative considerations as avoiding EPZ boundaries that run through the middle of schools or hospitals, or that arbitrarily carve out small portions of governmental jurisdictions.” Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 N.R.C. 383, 395 (1987). Thus, because the County is seeking a broad expansion of the EPZ

on purported safety grounds, it should have submitted a petition for waiver of 10 C.F.R. § 50.47(c)(2) (which sets the 10-mile EPZ boundary) and articulated the “special circumstances” why the rule should not apply. The County has not done this and therefore its challenge to the Millstone EPZ must be rejected as an impermissible attack on Commission regulations that establish a 10-mile EPZ and deem it sufficient to protect the public health and safety. Id. at 395, n.19; see also, General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), DD-94-3, 39 N.R.C. 163, 180-81 (1994); Citizens Task Force of Chapel Hill, DPRM-90-1, 32 N.R.C. 281, 291-92 (1990).

The second argument made by the County is that an affidavit attached to the County’s Reply<sup>5</sup>

identifies the aspects of the proceeding for which the waiver is requested and shows why the rule does not serve the purposes for which the regulation was adopted. The Affidavit states with particularity the special circumstances which justify the requested waiver and exception.

County’s Brief at 23. The affidavit in question, however, sets forth no facts amounting to special circumstances, but merely repeats the allegations made in the County’s original petition to intervene and asserts that

The County’s papers demonstrate that the standards in 10 C.F.R. §50.47 have not been met under the current license. For a more detailed discussion thereof, please refer to the Petition.

Affidavit of Jennifer B. Kohn (Mar. 10, 2005) at ¶ 6. Therefore, that affidavit provides no independent support for granting the exemption sought by the County.<sup>6</sup>

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<sup>5</sup> County’s “Reply” (Mar. 10, 2005).

<sup>6</sup> The affidavit, which was executed by the County’s counsel, could in no event be credited with providing support for the County’s exemption request because it does not establish that counsel has any independent knowledge of, or expertise in, the matters attested to in the affidavit.

The last argument raised in the County's Brief is that "[t]he County continues to have unanswered questions about its ability to protect the approximately 1.7 million residents who live in close proximity to the Millstone Power Station – some within 11 miles of it – and the many seasonal visitors to Suffolk." County's Brief at 23. "Unanswered questions" by the County do not constitute a demonstration of a "significant safety problem"<sup>7</sup> or "compelling circumstances"<sup>8</sup> required for a waiver. Moreover, in reality, none of the residents of the County would require "protection" from Suffolk County in the event of a radiological release from Millstone. The vast majority of them live outside the 10-mile EPZ and are protected by the State's plan.<sup>9</sup> Those who reside on Fishers Island, which is located about 7.5 miles east-southeast of the Millstone facility, are covered by the State of Connecticut's Emergency Response Plan, through an agreement between officials of Fishers Island, the Town of Southold, Suffolk County, the State of New York, and the State of Connecticut.<sup>10</sup> Therefore, this last argument is also without basis.<sup>11</sup>

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<sup>7</sup> Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 N.R.C. 573, 597 (1988), *recons. denied*, CLI-89-3, 29 N.R.C. 234; CLI-89-7, 29 N.R.C. 395 (1989).

<sup>8</sup> Northern States Power Co. (Monticello Nuclear Generation Plant, Unit 1), CLI-72-31, 5 A.E.C. 25, 26 (1972).

<sup>9</sup> To the extent that those individuals reside within the 50-mile ingestion pathway EPZ, the State of New York, not the County, is charged with providing post-accident remedial actions. For exposures in the ingestion pathway EPZ, it is the affected state's emergency plan that applies. "Each State shall specify the protective measures to be used for the ingestion pathway, including the methods for protecting the public from consumption of contaminated foodstuffs." NUREG-0654/FEMA-REP-1, Rev. 1, Criteria for the Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants (1980), Section II.J.11 (emphasis added).

<sup>10</sup> Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 2 and 3), DD-99-12, 50 N.R.C. 246, 250-51 (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.

<sup>11</sup> The County also argues: "In addition, the County of Suffolk views the re-licensing applications for Millstone II and III as premature at this time. In the years 2035 and 2045, Millstone Units II and III will have been operating for 60 and 59 years respectively. Given the age, wear-and-tear, and checkered history of operation of these facilities, capital improvement, maintenance, and operational plans should be developed and subjected to public scrutiny. Dominion's capability to operate Millstone safely should also be demonstrated as part of the relicensing proceeding. Moreover, environmental concerns have been raised by the County and should be addressed."

## II. THE COUNTY HAS PROVIDED NO REASON WHY ITS LATE PETITION TO INTERVENE SHOULD BE ENTERTAINED

The County's Brief attempts to prevail on the eight-factor balancing test set forth in 10 C.F.R. § 2.309(c)(1) by claiming that its untimely Petition (1) was not inexcusably late, and (2) the remaining factors dictate that the Petition be entertained despite its lateness. To excuse its nine-month lateness in filing, the County asserts that "[a]ctual notice of the license renewal proceedings was not received until well after the deadline for timely intervention had expired." County's Brief at 14. This argument lacks credibility, because the County had actual notice of the Millstone license renewal efforts by no later than June 2004, when its Legislature passed a resolution noting that "Millstone Nuclear Power Plant, Units 2 and 3, has requested the Nuclear Regulatory Commission (NRC) to extend their operating license for an additional 20 years" and authorizing the engagement of special counsel to "prosecute an action, such as filing an amicus curiae brief or a motion to intervene" in order to "prevent this license from being renewed."<sup>12</sup>

In any event, it is uncontested that notice of the filing of the license renewal application was duly published in the Federal Register.<sup>13</sup> Under federal statutes, United States Supreme Court authority, and Commission case law, upon publication of a notice of opportunity for a hearing in the Federal Register such notice "shall be deemed to have been given to all persons

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County's Brief at 24. No support is offered for these broad claims, none of which was raised as a proposed contention in the County's Petition.

<sup>12</sup> See Attachment 1 to Dominion's Answer to the County's Petition (February 28, 2005). A recent newspaper article suggests that the County may have been focused on participating in the Millstone license renewal process even earlier, when the County Executive began his term last year. Kitty Merrill, *Finally, A Seat at the Millstone Table*, The Independent (July 29, 2005), available online at <http://www.indyeastend.com/cgi-bin/indep/news.cgi?action=article&category=News&id=7511> The County Executive was elected in November 2003. See <http://www.co.suffolk.ny.us/webtemp3.cfm?dept=19&id=2358>

<sup>13</sup> *Dominion Nuclear Connecticut, Inc., Millstone Power Station, Units 2 and 3; Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating license Nos. DPR-65 and NPF-49 for an Additional 20-Year Period*, 69 Fed. Reg. 11,897 (Mar. 12, 2004).

residing within the States of the Union and the District of Columbia....”<sup>14</sup> Failure to read the Federal Register will not excuse a nontimely petition to intervene.<sup>15</sup> Thus, good cause for a nontimely intervention petition cannot exist where a party merely asserts that the official notice provided in the Federal Register was insufficient.<sup>16</sup> The County has failed to allege any specific deficiency with the Federal Register notice, thus it is subject to the “constructive notice” that is attributed to all United States residents upon publication in the Federal Register. As the Board ruled, the Petition was filed “very late” without good cause. LBP-05-16, slip op. at 6.

The first factor in 10 C.F.R. § 2.309(c)(1) – good cause for the failure to file on time – is “the weightiest of the late intervention standards.”<sup>17</sup> Failure to demonstrate good cause requires the petitioner to make a “compelling” showing with respect to the other factors.<sup>18</sup> The County’s Brief fails to make any showing, let alone a compelling one, that the remaining seven factors outweigh the County’s lateness.

Much of the County’s discussion focuses on factors (ii), (iii) and (iv) in 10 C.F.R. § 2.309(c)(1). County’s Brief at 2-8. That discussion, however, confuses whether the County would theoretically have *standing* to participate in the Millstone license renewal proceeding with the question of whether the County’s interest in emergency preparedness issues is an interest that

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<sup>14</sup> 44 U.S.C. § 1508; Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947) (holding that publication in the Federal Register gives legal notice to all citizens); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 N.R.C. 631, 647 n.18 (1975); Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-79-21, 10 N.R.C. 183, 192 (1979).

<sup>15</sup> See Tennessee Valley Authority (Browns Ferry Units 1 and 2), ALAB-341, 4 N.R.C. 95, 95-96 (1976); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 N.R.C. 73, 79 (1990), aff’d, ALAB-950, 33 N.R.C. 492 (1991).

<sup>16</sup> Turkey Point, LBP-79-21, 10 N.R.C. at 191-92 (1979).

<sup>17</sup> State of New Jersey (Department of Law and Public Safety), CLI-93-25, 38 N.R.C. 289, 296 (1993).

<sup>18</sup> Id.; Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 165 (1993) & CLI-88-12, 28 N.R.C. 605, 610 (1988).

would be cognizable in a license renewal proceeding. Since, absent a waiver of the provisions of 10 C.F.R. § 50.47(a)(1), such an interest is not cognizable, these factors do not help the County make the “compelling” showing needed to outweigh the lack of good cause for its late filing.

The other factors addressed in the County’s Brief, factors (vii) and (viii), make a compelling case *against* consideration of the Petition.<sup>19</sup> With respect to factor (vii), the extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding, the County takes exception to Dominion’s argument that accepting the Petition would necessarily broaden the issues because the issues raised by the County are new.<sup>20</sup> The County retorts: “if the regulations are negatively interpreted, no potential intervenor with valid new contentions would ever be granted intervention status.” County’s Brief at 11. This is, of course, incorrect. In the primary case relied on by the County and the Board, Nuclear Fuel Services (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273 (1975), Erie County’s untimely petition to intervene was accepted, but only because the anticipated hearing schedule would accommodate the county’s late intervention. CLI-74-4, 1 N.R.C. at 276. It is unquestionable that acceptance of the Petition would both broaden the issues and delay the renewal of the Millstone licenses.<sup>21</sup>

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<sup>19</sup> The County dismisses, based on the Board’s decision, factor (v) (the availability of other means whereby the County’s interest will be protected). County’s Brief at 8. The Board’s erroneous assessment of this factor is addressed in Dominion’s Brief at 15-16.

<sup>20</sup> Dominion actually stated that allowing consideration of the Petition would by necessity broaden the issues in this proceeding, since no proceeding is currently ongoing. See Comanche Peak, CLI-93-4, 37 N.R.C. at 167.

<sup>21</sup> The County admits that there could be a delay in the renewal of the licenses, but argues that “[t]he issue here is not whether the proceeding would be delayed. The issue is whether the delay and broadening of the issues would be undue.” County’s Brief at 11, emphasis in the original. No citation is provided for this interpretation of 10 C.F.R. § 2.309(c)(1)(vii), which contains no reference to “undue” delays. Nor is such a distinction found in the cases.

Regarding factor (viii), the extent to which “the petitioner’s participation may reasonably be expected to assist in developing a sound record,” the County seeks to bolster its inadequate showing in the Petition<sup>22</sup> by referring to the “additional comments provided by Suffolk County Executive Steve Levy concerning the Draft Supplemental Environmental Impact Statement prepared for the Millstone license renewal” which was attached by the County to its Reply. County’s Brief at 12. Resorting to this extraneous material is not helpful to the County’s case because the acceptability of a belated Petition against the factors in 10 C.F.R. § 2.309(c)(1) is to be determined based on the Petition itself, not new materials filed with a reply. See Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521, 525 (1979). To have this late material considered would have required that the County address in its Reply the late-filing factors enumerated in 10 C.F.R. § 2.309(c)(1), which it failed to do. Having failed to address these late-filing factors, Mr. Levy’s comments must be disregarded. 10 C.F.R. § 2.319 (e); Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 N.R.C. 40, 58 (2004). In addition, the cited comments from Mr. Levy address environmental issues that are not included in, or are related to, the County’s contentions. Therefore, Mr. Levy’s comments are irrelevant to the lateness factors.<sup>23</sup>

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<sup>22</sup> The County’s Petition devotes only seven lines to discussing this factor and makes no attempt to describe in any detail how its participation would help develop a sound record (assuming, contrary to fact, that the contentions it seeks to raise are within the scope of a license renewal proceeding). See 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 discussed in the Petition. Petition at 14. The County’s failure to identify experts, summarize their proposed testimony, and point to the documents it intends to produce and rely on requires the analysis of this factor to weigh against granting the Petition.

<sup>23</sup> The County also cites Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-80, 18 N.R.C. 1404 (1983) as holding that “an intervenor demonstrating its ability to



**III. THE COUNTY'S BRIEF DOES NOT SHOW THAT THE PETITION SATISFIES THE PLEADING REQUIREMENTS IN 10 C.F.R. § 2.309(f)**

The County's Brief contains a short discussion of the requirements for admissible contentions in 10 C.F.R. § 2.309(f) and how the Petition purportedly satisfies them. County's Brief at 17-20. The County's discussion borrows heavily from the Board's decision (see County's Brief at 17-18), which acknowledged 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), but was willing to overlook the pleading deficiencies because of "the contribution that the County might make" (LBP-05-16, slip op. at 12). Dominion has already addressed the shortcomings in the Board's reasoning and its failure to make a specific ruling on whether at least one of the County's proffered contentions raised a genuine, material dispute as required by 10 C.F.R. § 2.309(f).<sup>24</sup> The County's broad protestations of compliance with the regulation are belied by its failure to provide the necessary details on its claims.<sup>25</sup> Such vague assertions regarding a petitioner's ability or resources are insufficient. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 N.R.C. 1725, 1730 (1982); Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 N.R.C. 1760, 1766 (1982).

The County also asserts that it "also filed specific contentions related to Dominion's compliance with the National Environmental Policy Act, which were attached to the County's

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contribute to the development of the record on a particular contention need not also promise to provide expert witnesses or outline its testimony. It is sufficient that the proposed intervenor introduce evidence suggestive of a problem." County's Brief at 13. Suffice it to say that the Perry decision is inconsistent with Commission rulings (see, e.g., Comanche Peak, CLI-93-4, 37 N.R.C. at 165) and with the approach reflected in the revised Rules of Practice (see 10 C.F.R. § 2.309(f)(1)).

<sup>24</sup> See Dominion's Brief at 19-24.

<sup>25</sup> See County's Brief at 18-20.

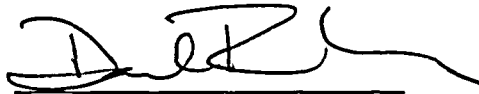
Reply.” County’s Brief at 20. The County’s Reply did not raise additional contentions, but merely provided a copy of a letter commenting on the draft environmental impact statement as support for the County’s alleged ability to contribute to the proceeding. See County’s Reply at 13. Further, the County’s Brief itself acknowledges that “there was no amendment of the contentions or filing of new ones” in the Reply (County’s Brief at 21), and it certainly would have been improper to do so in a reply filing.

### CONCLUSION

For the foregoing reasons and those stated in Dominion’s Brief, the Commission should deny Suffolk County’s waiver request and its petition for intervention.

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(Millstone Nuclear Power Station,	)	ASLBP No. 05-837-01-LR
Units 2 and 3)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Dominion Nuclear Connecticut's Reply to Suffolk County's Brief in Response to CLI-05-18," dated August 25, 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 25th day of August, 2005.

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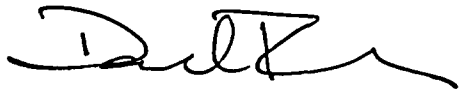
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