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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 10/26/05

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)

DOMINION NUCLEAR CONNECTICUT, INC.)

Docket Nos. 50-336-LR & 50-423-LR

(Millstone Nuclear Power Station, Units 2 and 3)

CLI-05-24

MEMORANDUM AND ORDER

On July 20, 2005, the Board issued a Memorandum and Order (LBP-05-16, 62 NRC 56) certifying to the Commission the question whether to grant Suffolk County New York's request for an exemption from (or waiver of) the final sentence of 10 C.F.R. § 50.47(a)(1) (providing that emergency-planning issues are not germane to license renewal determinations). The Board also concluded that Suffolk County's tardiness in submitting its petition to intervene was excusable under the late-filing standards of 10 C.F.R. § 2.309(c) and that the petition to intervene satisfied the contention requirements of 10 C.F.R. § 2.309(f).

On August 4, we issued CLI-05-18, agreeing to review the certified question, posing three additional questions to the parties, and setting a briefing schedule. 62 NRC _____. We have reviewed all briefs, including an *amicus curiae* brief from the Nuclear Energy Institute.¹ In today's order, we address the certified question, deny the requested exemption/waiver, review

¹ We grant the Nuclear Energy Institute's August 18th motion for leave to file that brief.

sua sponte the remainder of LBP-05-16, and offer guidance on a number of issues addressed in LBP-05-16.

I. BACKGROUND

On March 12, 2004, the NRC staff published notice of Dominion Nuclear Connecticut's ("Dominion") application for license renewal of the Millstone Nuclear Power Station, Units 2 and 3, and advised that interested persons who wished to intervene must file a petition by May 11, 2004.² On December 17, 2004 -- more than seven months past that deadline -- Suffolk County filed its initial petition to intervene. The Secretary of the Commission rejected Suffolk County's petition on the ground that it had failed to address the Commission's late-filing standards.³ Suffolk County filed a second petition to intervene on February 1, 2005, and sought a hearing on three contentions relating to emergency planning.⁴ The NRC staff and Dominion Nuclear Connecticut, Inc. ("Dominion" or "licensee") opposed the petition to intervene, arguing *inter alia*

² 69 Fed. Reg. 11,897 (March 12, 2004).

³ 10 C.F.R. § 2.309(c).

⁴ The three contentions are:

- (1) The evacuation plan for areas in Suffolk County within the ten (10) mile emergency zone is inadequate and fails to comply with federal regulations regarding such plans.
- (2) The Town of Southold and the County have unique characteristics which should be considered in an evacuation/emergency plan pursuant to 10 C.F.R. 50.47.
- (3) Offsite evacuation plans and other emergency plans maintained by the Millstone facility fail to protect the people of Suffolk County.

All three of these contentions concern emergency planning and were therefore submitted under the Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.* The county submitted no contentions under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* See NRC Staff's Response to Suffolk County Brief in Support of Petition for Late Intervention, dated Aug. 25, 2005, at 3-4.

that it did not meet the standards governing late filing and that the contentions were outside the scope of a license renewal proceeding.⁵

On April 12, 2005, the Atomic Safety and Licensing Board held a pre-hearing conference to consider Suffolk County's late-filed petition to intervene. At that conference, the Board indicated that it would not be able to turn immediately to Suffolk County's petition. Although Suffolk County had not yet been admitted as a party, the Board suggested that all participants in this proceeding (the NRC Staff, Suffolk County and Dominion) use the three weeks following the prehearing conference to attempt to establish the framework for a "long-term working relationship" that might result in termination of the "short-term focused adjudication in favor of long-term non-adjudicatory solutions."⁶ The Board stated that it would hold the proceeding in abeyance pending receipt of a report on the parties' progress.⁷

On May 6th, the NRC Staff informed the Board that the participants had been unable to meet due to scheduling difficulties, and requested that the Board lift its stay and rule on Suffolk County's intervention petition.⁸ The Staff also assured the Board that, as part of its ongoing regulatory processes, it would continue to engage Suffolk County regarding its emergency-planning concerns, but was of the belief that communication on such issues should be divorced

⁵ See NRC Staff Answer Opposing the Petition for Late Intervention of the County of Suffolk of the State of New York (February 28, 2005); Dominion Nuclear Connecticut's Answer to the Petition for Late Intervention of the County of Suffolk (February 28, 2005).

⁶ Board Memorandum of Conference Call at 2 (April 15, 2005).

⁷ *Id.* The Board indicated that two of its members were devoting virtually all of their attention to issuing a final decision in the longstanding *Private Fuel Storage* adjudication.

⁸ NRC Staff's Status Report (May 6, 2005).

from the instant adjudication.⁹ In a May 11th Memorandum, the Board again encouraged the parties to pursue settlement but did not indicate when it would issue a decision.¹⁰

The settlement meeting eventually took place on May 18th, with the participants concluding that they could not resolve the issues pending in this proceeding. Between May 20th and 26th, echoing the Staff's earlier request, all three litigants urged the Board to rule on Suffolk County's petition for review.¹¹ In apparent response to this unanimous request for action, the Board on June 3rd issued a Status Memorandum explaining that the hearing in *Private Fuel Storage*, which had occupied the time of two of the Board's members, had now concluded and that the *Millstone* Board "will now be turning its attention to deciding the merits of Suffolk County's pending intervention petition and the oppositions thereto."¹² On July 20th -- seven weeks later -- the Board issued LBP-05-16.

On July 28th, we accepted review of the certified question and requested briefs on three additional 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.

⁹ *Id.*

¹⁰ Board Memorandum (May 11, 2005).

¹¹ NRC Staff's Second Status Report (May 20, 2005); Letter from David R. Lewis (attorney for Dominion) to the Board (May 23, 2005); Letter from Christine Malafi (attorney for Suffolk County) to the Board (May 26, 2005).

¹² Unpublished "Status Memorandum," slip op. at 1-2 (June 3, 2005).

II. THE BOARD'S ORDER

The Board's decision is divided into three parts. The first part considers the late-filing issue, weighs the eight factors set out in 10 C.F.R. § 3.209(c), and concludes that on balance the Board should entertain the untimely petition.¹³ The Board acknowledges that Suffolk County has shown no good cause for the tardiness of its petition for review (the first and most important¹⁴ of the eight factors), which was submitted nine months after the deadline for such filings. It finds, however, that six of the remaining seven factors support consideration of the petition, with the remaining factor carrying little weight in the opposite direction. The Board stressed in particular Suffolk County's status as a governmental entity seeking late intervention.¹⁵

The second part of the Board's decision addresses the adequacy of the petition for review itself.¹⁶ Applying the standards in section 2.309(c), the Board observes that the County "could have drafted its ... intervention petition ... in a manner that would have conformed more precisely to the outline of the governing regulation."¹⁷ But the Board then concludes that "the substance sought after by that regulation was present," and "[w]hen considered in light of the quality and contribution of the County's later pleadings ... the petition's complaints, objectives, and underpinnings are clear."¹⁸ The Board bases this ruling on Suffolk County's "serious commitment" to the adjudicatory process, the "specific focus" of its contention, its ability to

¹³ LBP-05-16, 62 NRC at __-__, slip op. at 6-10.

¹⁴ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000).

¹⁵ LBP-05-16, 62 NRC at __-__, slip op. at 8-10.

¹⁶ *Id.*, 62 NRC at __-__, slip op. at 11-12.

¹⁷ *Id.*, 62 NRC at __, slip op. at 11.

¹⁸ *Id.*

make “a knowledgeable contribution on real issues,”¹⁹ and its accountability to its constituents if the emergency plan were ever activated.²⁰

The third part of LBP-05-16 considers Suffolk County’s request for an exemption from (or a waiver of) the regulatory provision barring emergency-planning issues from consideration in license renewal proceedings.²¹ The Board concludes that Suffolk County’s exemption request, while “not overpowering ... has sufficient content to certify it to the Commission.”²² In support, the Board relies on the following confluence of circumstances surrounding Suffolk County’s interest in the Millstone facility: the County’s population growth, its geographical limitations, and Long Island’s roadway system.²³ The Board also places considerable reliance on the fact that the county is not in the same state as the reactor and therefore lacks “the usual political forces and administrative relationships that might help [it] draw attention to its concerns, outside the adjudicatory process.”²⁴

Finally, the Board in the third part of the order also addresses, *sua sponte*, three issues unrelated to its decision to certify the exemption question – whether the Board exceeded its jurisdiction in suggesting settlement negotiations;²⁵ whether, in urging settlement discussions, the Board was attempting to direct the NRC Staff in the performance of its non-adjudicatory

¹⁹ *Id.*, 62 NRC at ___, slip op. at 12.

²⁰ *Id.*, 62 NRC at ___, slip op. at 11.

²¹ *Id.*, 62 NRC at ___-___, slip op. at 12-19.

²² *Id.*, 62 NRC at ___, slip op. at 14.

²³ *Id.*, 62 NRC at ___ n.15, slip op. at 15 n.15. See also Suffolk County’s Brief in Support of Petition for Late Intervention, dated Aug. 17, 2005, at 1.

²⁴ LBP-05-16, 62 NRC at ___, slip op. at 15.

²⁵ *Id.*, 62 NRC at ___ n.13, ___, ___, slip op. at 14 n.13, 16, 18.

duties;²⁶ and whether the NRC Staff has, in this and other proceedings, made sufficient efforts to establish a collaborative relationship with local governments regarding health and safety issues.²⁷

III. DISCUSSION

A. Certified Question Regarding Exemption

As stated above, the Board has certified to us the question whether to grant Suffolk County's request for an exemption from (or waiver of) the final sentence of 10 C.F.R.

§ 50.47(a)(1) ("No finding under this section ['Emergency plans'] is necessary for issuance of a renewed nuclear power reactor operating license"). We answer this question in the negative.

We agree with the Board that Suffolk County has a significant interest in the Millstone facility having a strong and workable emergency plan, and that the factors of population density, anticipated changes in population, geographical limitations, and roadway limitations are relevant to a plan's strength and workability. In fact, section 50.47(c)(2) of our regulations explicitly lists these same factors as relevant for consideration when determining the plume exposure pathway emergency-planning zone.²⁸

But for us to grant an exemption or waiver of section 50.47(a)(1) and thereby permit the adjudication of emergency-planning issues in this proceeding, we must first conclude under our regulations and case law that (i) the rule's strict application "would not serve the purposes for which [it] was adopted;"²⁹ (ii) the movant has alleged "special circumstances"³⁰ that were "not

²⁶ *Id.*, 62 NRC at ___ n.14, slip op. at 15 n.14.

²⁷ *Id.*, 62 NRC at ___-___, slip op. at 16-18.

²⁸ 10 C.F.R. § 50.47(c)(2).

²⁹ 10 C.F.R. § 2.335(b). See also *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989) (regarding the regulatory exemption of public utilities from the NRC's financial qualifications rule); *Public Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsid'n denied*, CLI-89-3, 29 NRC 234 (continued...)

considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;³¹ (iii) those circumstances are “unique”³² to the facility rather than “common to a large class of facilities;”³³ and (iv) a waiver of the regulation is necessary to reach a “significant safety problem.”³⁴ The use of “and” in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.³⁵ As we explain below, Suffolk County fails to satisfy this burden.

Regarding the first of these factors, Suffolk County asserts that one of the purposes of section 50.47 was to ensure the protection of public health and safety, that Millstone’s emergency plan does not provide such protection, and that the Commission should therefore waive the final sentence of section 50.47(a)(1) in order to address the flaws in Millstone’s plan.³⁶ Of course, *all* our Part 50 regulations are aimed, directly or indirectly, at protecting

²⁹(...continued)
& CLI-89-7, 29 NRC 395 (1989); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 239, *reconsid’n granted in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d*, CLI-98-13, 48 NRC 26 (1998).

³⁰ 10 C.F.R. § 2.335(b).

³¹ *Seabrook*, CLI-89-20, 30 NRC at 235; *Seabrook*, CLI-88-10, 38 NRC at 597. See also *Private Fuel Storage*, LBP-98-7, 47 NRC at 238.

³² See *Seabrook*, CLI-88-10, 28 NRC at 597; *Statement of Policy: Further Commission Guidance for Power Reactor Operating Licenses*, CLI-81-16, 14 NRC 14, 16 (1981) (Separate Views of Chairman Ahearne and Commissioner Hendrie) and authority cited; *Private Fuel Storage*, LBP-98-7, 47 NRC at 238, 240.

³³ *Seabrook*, CLI-88-10, 28 NRC at 597. See also *Seabrook*, CLI-89-20, 30 NRC at 235; *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-75-34, 1 NRC 626, 675 (1975), *aff’d*, ALAB-355, 4 NRC 397 (1976); *Private Fuel Storage*, LBP-98-7, 47 NRC at 238.

³⁴ *Seabrook*, CLI-88-10, 28 NRC at 597, 599; *Seabrook*, CLI-89-20, 30 NRC at 235.

³⁵ See *Seabrook*, CLI-88-10, 28 NRC at 596-97.

³⁶ Suffolk County’s Reply Brief in Further Support of Petition for Late Intervention, in Response to Commission Memorandum and Order CLI-05-18, dated Aug. 25, 2005, at 4.

public health and safety.³⁷ But that does not mean that they are all suitable subjects for litigation in a license renewal proceeding. They are not. In fact, the primary reason we excluded emergency-planning issues from license renewal proceedings was to limit the scope of those proceedings to “age-related degradation unique to license renewal.”³⁸ Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the Millstone license renewal application. Consequently, it makes no sense to spend the parties’ and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging. Indeed, at an earlier stage of this very proceeding, the Commission approved a Board decision excluding an emergency-planning contention.³⁹ As explained at the end of this section of the order, NRC regulations provide two other procedural mechanisms (10 C.F.R. §§ 2.206 and 2.802) by which Suffolk County may pursue its concerns about Millstone’s current emergency plan.

³⁷ See generally *Seabrook*, CLI-89-20, 30 NRC at 244 (“the vast majority of Commission rules have some basis in safety”).

³⁸ Final Rule, “Nuclear Power Plant Renewal,” 56 Fed. Reg. 64,943, 64,961 (Dec. 13, 1991). See also *id.* (“The final rule is carefully structured to establish a regulatory process that is precisely directed at age-related degradation unique to license renewal”); Final Rule, “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,464, 22,481 (May 8, 1995); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9, 10 (2001) (because emergency-planning issues are already the focus of ongoing regulatory processes, they do not fall within the NRC’s safety review at the license renewal stage). *Turkey Point* addressed the now-rescinded 10 C.F.R. § 2.758, which was redesignated in 2004 as section 2.335 without substantive change. See Final Rule, “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2224 (Jan. 14, 2004).

The scope of a license renewal proceeding may, of course, also include environmental issues but, as indicated in note 4, *supra*, Suffolk County has proffered none. As close as Suffolk County has come to doing so was its filing of a copy of a February 23, 2005 letter from the county commenting on the NRC Staff’s Draft Environmental Impact Statement. See Suffolk County’s Reply, dated March 10, 2005, at 13 and unnumbered attachment. See also Dominion Nuclear Connecticut’s Reply to Suffolk County’s Brief in Response to CLI-05-18, dated Aug. 25, 2005, at 9-10.

³⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 640 (2004).

Concerning the second waiver factor -- lack of consideration of the issue in the rulemaking -- we stressed in the Final Rule which added the final sentence to section 50.47 that the litigated issues must be “unique to the license renewal” period:

[T]he final rule amends § 2.758 [now § 2.335] to make clear that challenges to the ... rule could be made in the formal hearing so that certain other issues claimed to be necessary to ensure adequate protection *only during the renewal term* could be admitted in a formal hearing.... *Issues that have relevance during the term of operation under the existing operating license as well as license renewal would not be admissible* under the new provision of § 2.758 [now § 2.335] because there is *no unique relevance of the issue to the renewal term*.⁴⁰

And we expressly addressed the issues of demography and transportation -- issues on which Suffolk County and the Board heavily rely:⁴¹

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*.... [T]hese 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*.⁴²

As for the third waiver factor -- uniqueness -- we cannot accept Suffolk County’s argument that its circumstances are “unique” to the Millstone facility rather than “generic.”⁴³ Suffolk County’s principal claim to uniqueness is grounded in the county’s proximity to a nuclear power facility located in an adjoining state.⁴⁴ But Suffolk County is hardly unique in this respect. Suffolk County also claims to be unique due to changes in its demographics and roadway

⁴⁰ Final Rule, “Nuclear Power Plant Renewal,” 56 Fed. Reg. at 64,961-62 (emphases added).

⁴¹ See note 23, *supra*.

⁴² Final Rule, “Nuclear Power Plant Renewal,” 56 Fed. Reg. at 64,966-67 (emphases added).

⁴³ See, e.g., Suffolk County’s Reply Brief in Further Support of Petition for Late Intervention, in Response to Commission Memorandum and Order CLI-05-18, dated Aug. 25, 2005, at 1-2.

⁴⁴ *Id.* at 1.

limitations.⁴⁵ Yet, as our above quotation from the Statement of Considerations to the “Nuclear Power Plant Renewal” Final Rule suggests, this is an important but common problem addressed by the NRC’s ongoing regulatory program. Other jurisdictions are subject to demographic trends similar to those of Suffolk County.

Because Suffolk County’s waiver request does not satisfy the first three required threshold standards for a waiver, we hold that Suffolk County’s emergency-planning concerns do not qualify for a waiver or exemption under our rules. (Given this holding, we need not decide whether Suffolk County has met its burden regarding the fourth required conclusion -- that a waiver of the regulation is necessary to reach a “significant safety problem.”)

But this holding does *not* mean that Suffolk County is bereft of appropriate means by which to bring its emergency-planning concerns to this Agency’s attention. It may, for instance, file a petition for rulemaking under 10 C.F.R. § 2.802⁴⁶ – the appropriate means for requesting Commission consideration of *generic* issues such as Suffolk County’s challenge to section 50.47’s exclusion of emergency-planning issues. (Indeed, one of Suffolk’s nearby counties – Westchester – has taken just that route to challenge this same exclusion.⁴⁷) Suffolk County also has a second alternative means for seeking Commission consideration of its arguments regarding the Millstone emergency plan. Because Suffolk County criticizes the Millstone facility’s emergency plan as inadequate,⁴⁸ Suffolk County may wish to file a petition under 10

⁴⁵ *Id.*

⁴⁶ See 10 C.F.R. § 2.335(e). See also *Turkey Point*, CLI-01-17, 54 NRC at 12; Final Rule, “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. at 22,481.

⁴⁷ See “Petition for Rulemaking; Notice of Receipt,” 70 Fed. Reg. 34,700, 34,701-02 (June 15, 2005) (seeking a revision of the Commission’s license renewal regulations to require review of emergency evacuation, demographics, siting, population density, and transportation infrastructure).

⁴⁸ See, e.g., Letter from Jennifer B. Kohn (attorney for Suffolk County) to the Board, dated May 26, 2005, at 3; Suffolk County’s Reply, dated March 10, 2005, at 17 & attached (continued...)

C.F.R. § 2.206 for enforcement action against Dominion.⁴⁹ Finally, we observe that the NRC's ongoing oversight programs assure the adequacy of the Millstone emergency plan, removing any need to examine the plan in the context of an aging-focused license renewal proceeding.⁵⁰

B. Late-Filing Issue

Section 2.309(c)(1) of the Commission's regulations sets forth the following factors to be considered and balanced when determining whether to consider a late-filed petition to intervene:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy] 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;

⁴⁸(...continued)

Affidavit of Jennifer B. Kohn, dated March 10, 2005, at 2, ¶¶ 6, 7. *But see* Suffolk County's Reply Brief in Further Support of Petition for Late Intervention, in Response to Commission Memorandum and Order CLI-05-18, dated Aug. 25, 2005, at 9 ("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").

⁴⁹ See Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. at 22,481.

⁵⁰ See *id.* at 22,463-64, 22,486; Final Rule, "Nuclear Power Plant Renewal," 56 Fed. Reg. at 64,045. *Cf. Seabrook*, CLI-89-20, 30 NRC at 244 ("even were there to have been a showing in the matter before us that the rationale of the rule was undercut, the Commission sees no indication that [the licensee's] financial uncertainty will overcome the substantial protections that the Commission has in place by means of all its requirements to prevent the occurrence of a significant nuclear safety problem").

(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.⁵¹

The Board rejected Suffolk County's argument that the lack of actual notice (as opposed to constructive notice via the *Federal Register*) constituted good cause for missing the filing deadline by nine months.⁵² But despite the absence of good cause for lateness (factor 1), the Board still found the remaining late-filing factors sufficiently favorable to Suffolk County's position to overcome the tardiness of its petition. The Board relied heavily on our 1975 *West Valley* decision, where we granted Erie County's nine-month-late petition to intervene despite the absence of good cause.⁵³

We disagree with the Board that the late-filing issue in this proceeding is controlled by *West Valley*. That case was an ongoing proceeding at the time Erie County sought late intervention,⁵⁴ while the instant case had already been terminated by the time Suffolk County sought intervention. Also, most of Erie County's issues were "substantially identical" to those previously admitted in the *West Valley* proceeding, and the evidentiary hearing was about a half-year in the future.⁵⁵ Thus, Erie County's admission into the *West Valley* proceeding would not have resulted in an expansion of the issues or a delay in the proceeding. By contrast, Suffolk County's contentions are new to the instant case and, as noted above, the proceeding

⁵¹ 10 C.F.R. § 2.309(c)(1).

⁵² LBP-05-16, 62 NRC at ___, slip op. at 6.

⁵³ *Nuclear Fuel Serv., Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

⁵⁴ *Id.* at 275-76.

⁵⁵ *Id.* at 276.

was already closed at the time Suffolk County filed its February 1st petition to intervene.⁵⁶ And finally, Erie County's contentions, being nearly the same as those already admitted, were themselves admissible, whereas Suffolk County's contentions are not (for the reasons set forth *infra* at Part III.C of this order).

As we have repeatedly ruled in considering late-filed contentions, we and the licensing boards give the "good cause" factor the most weight.⁵⁷ To demonstrate good cause, a petitioner must show not only why it could not have filed within the time specified in the notice of opportunity for hearing, but also that it filed as soon as possible thereafter.⁵⁸ If a petitioner cannot show good cause, then its demonstration on the other factors must be "compelling."⁵⁹ We agree entirely with the Board's finding that Suffolk County's nine-month late contention did not meet our good cause standard. The Board correctly viewed *Federal Register* publication of a notice of hearing opportunity as legally adequate notice.⁶⁰ But we do not agree with the

⁵⁶ In fact, even Suffolk County's *first* petition (filed Dec. 17, 2004 and rejected by the Commission's Office of the Secretary) was submitted *after* the date on which this proceeding was closed (December 8, 2004). See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (Dec. 8, 2004) (terminating proceeding).

⁵⁷ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000); *State of New Jersey* (Department of Law and Public Safety's Requests Dated Oct. 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

⁵⁸ *New Jersey*, CLI-93-25, 38 NRC at 295.

⁵⁹ *Id.* at 296. See also *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 73-75 (1992); *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610, *reconsid'n denied*, CLI-89-6, 29 NRC 348 (1989), *aff'd sub nom. Citizens for Fair Util. Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990).

⁶⁰ "Publication in the *Federal Register* is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice." *California v. FERC*, 329 F.3d 700, 707 (9th Cir. 2003). See also 44 U.S.C. §§ 1507, 1508. The Commission's own regulations repeatedly provide for notice *via* the *Federal Register*. 10 C.F.R. §§ 2.104 (notice of hearing), 2.105 (notice of proposed action), 2.106 (notice of issuance of license or license amendment). See also *Private Fuel Storage, L.L.C.*, LBP-98-7, 47 NRC at 173.

remainder of the Board's "late-filing" ruling allowing Suffolk County to pursue its contentions. The Board either gave insufficient weight to the "good cause" factor or accorded too much to the remaining "late-filing" factors.

The Board was right that our second and third factors -- which relate to a potential intervenor's standing -- weigh in favor of considering Suffolk County's petition. We recognize Suffolk County's interest in ensuring a strong emergency plan at the Millstone facility. But, as we ruled both in today's decision⁶¹ and in a prior decision in this docket,⁶² emergency-planning issues fall outside the scope of this license renewal proceeding. Consequently, any Suffolk County briefs and evidence -- and any Commission order -- in this proceeding would not protect or affect Suffolk County's interest in emergency planning (fourth factor).

We disagree with the Board that Suffolk County has no other means by which to protect its interests regarding emergency planning (fifth factor). As explained at pages [11-12](#) *supra*, Suffolk County has two other avenues by which to pursue those interests. It could, under 10 C.F.R. § 2.802, submit a petition for rulemaking to amend 10 C.F.R. § 50.47, or it could file a petition under 10 C.F.R. § 2.206 requesting that the NRC Staff take enforcement or other action with regard to the Millstone facility's emergency plan.⁶³ We also observe that (while not

⁶¹ See our discussion of the certified question, at pages [7-12](#), *supra*.

⁶² *Millstone*, CLI-04-36, 60 NRC at 640.

⁶³ The Board or its individual members in this proceeding have repeatedly expressed skepticism regarding section 2.206 petitions' likelihood of success. See LBP-05-16, 62 NRC at ___, slip op. at 8-9; Tr. at 40-41, 49-50. Indeed, one judge said at the pre-hearing conference that "in the last thirty years or so, there have been no more than one or two [such petitions] granted." Tr. at 40-41. Such skepticism is entirely unwarranted and inappropriate in light of the Director Decisions ("DDs") that rule upon section 2.206 petitions. Sixteen of this decade's 26 DDs granted at least some of the requested relief -- either by a direct grant or by noting that Staff action prior to the DD's issuance had already provided the relief sought. See DD-00-3 (prior staff action resulted in the grant of all relief sought); DD-04-4, DD-03-2, DD-02-2, DD-01-5, DD-01-4, DD-01-2, DD-00-5, and DD-00-4 (eight decisions directly granting partial relief); DD-05-1, DD-04-3, DD-04-1, DD-02-7, DD-02-6, DD-02-4, and DD-02-3 (seven decisions granting partial relief *via* prior Staff action). Compare DD-04-2, DD-03-3, DD-03-1, (continued...)

required to do so) Suffolk County has submitted no comments on Westchester County's currently-pending petition for rulemaking,⁶⁴ which raises issues similar to those that Suffolk County seeks to raise in this adjudication.

We agree with the Board that no other current parties could adequately represent those interests (sixth factor). There are no other parties because the instant adjudication was terminated on December 8, 2004.⁶⁵

We agree with the Board that the seventh factor (delay or expansion of proceeding) weighs against Suffolk County.⁶⁶ The grant of the Petition at this late stage of the adjudicatory proceeding would necessarily broaden the issues (there are now none) and delay the proceeding (originally closed last December). Indeed, the Petition would require reopening a closed administrative adjudicatory record.⁶⁷ But we disagree with the slight amount of weight the Board accords this factor. The Board concludes that the weight should be "minimal[]"

⁶³(...continued)

DD-02-5, DD-02-1, DD-01-3, DD-01-1, DD-00-6, and DD-00-1 (ten decisions denying all requested relief). Moreover, the Board's remarks contradict our ruling in this same proceeding just nine months ago -- that if CCAM, the previous unsuccessful petitioner to intervene, "has information supporting its claim that Millstone's operation has caused 'human suffering on a vast scale,' its remedy would not be a narrowly focused license renewal hearing, but a citizen's petition under 10 C.F.R. § 2.206." *Millstone*, CLI-04-36, 60 NRC at 638.

⁶⁴ See "Petition for Rulemaking; Notice of Receipt," 70 Fed. Reg. at 34,701-02 (seeking a revision of the Commission's license renewal regulations to require review of emergency evacuation, demographics, siting, population density, and transportation infrastructure).

⁶⁵ *Millstone*, CLI-04-36, 60 NRC at 640.

⁶⁶ See LBP-05-16, 62 NRC at ___, slip op. at 9.

⁶⁷ See *Comanche Peak*, CLI-92-12, 36 NRC at 75 (citation and internal quotation marks omitted):

[B]arring the most compelling countervailing considerations[,] an inexcusably tardy petition [to intervene] would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedules.... [I]n this case, there is no formal [adjudicatory] proceeding at all. Thus, granting the petition will result in the establishment of an entirely new formal [adjudicatory] proceeding, not just an alteration of an already established hearing schedule.

because the Staff's safety review will not be issued for several more months and the license renewal would itself not take effect for about a decade. This line of reasoning ignores our policy of expediting the handling of license renewal applications – which rests on the lengthy lead time necessary to plan available sources of electricity.⁶⁸

And finally, we conclude that Suffolk County's participation would not assist in developing a sound record (the eighth factor). This factor would weigh in Suffolk County's favor only if its emergency-planning concerns fell within our license renewal inquiry. But as we reiterate in today's decision, license renewal is not a forum for considering emergency planning issues.

Given our conclusions above regarding each of the factors, we disagree with the Board's ruling that the balance of late-filing factors weighs in favor of considering Suffolk County's petition to intervene.

C. Adequacy of the Petition to Intervene

For each admissible contention, a petition to intervene must, among other things:

- (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; [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

⁶⁸ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-11, 58 NRC 130, 131 (2003), CLI-01-27, 54 NRC 385, 391 (2001), & CLI-01-20, 54 NRC 211, 214-16 (2001).

required by law, the identification of each failure and the supporting reasons for the petitioner's belief.⁶⁹

The failure of a proposed contention to meet any one of these requirements is grounds for its dismissal.⁷⁰

Suffolk County's contentions are fatally flawed. As explained above, emergency planning is not pertinent to a license renewal proceeding.⁷¹ Suffolk County's three emergency-planning contentions therefore fail, on their face, to satisfy the above admissibility requirements. Moreover, as Dominion and the NRC Staff argue,⁷² it is not at all clear that Suffolk County's emergency-planning contentions -- even were they material to license renewal -- are sufficiently detailed or focused to permit a meaningful hearing. Contrary to the Board's view, government entities seeking to litigate their own contentions are held to the same pleading rules as everyone else.⁷³

⁶⁹ 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi) (emphasis added).

⁷⁰ Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. at 2,221; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁷¹ 10 C.F.R. § 50.47(a)(1).

⁷² See Brief of Dominion Nuclear Connecticut in Response to CLI-05-18 Concerning Suffolk County's Late Petition and Waiver Request, dated Aug. 18, 2005, at 20-24.

⁷³ See *Louisiana Energy Serv., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 453-57 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185 (2003).

IV. GUIDANCE REGARDING BOARD'S ENCOURAGEMENT OF SETTLEMENT

We have no problem with boards encouraging settlement by parties to an adjudication. Indeed, we have a long-standing policy favoring settlements.⁷⁴ But the Board in this proceeding appears to have lost sight of two significant countervailing factors when it delayed an initial ruling on contention-admissibility for a length of time to accommodate settlement discussions.

A. Policy of Prompt Decisionmaking

Apart from our policy of encouraging settlements, we have an equally important policy supporting prompt decisionmaking⁷⁵ – a policy that carries added weight in *license renewal* proceedings such as this one. We have expressed this “prompt decisionmaking” policy repeatedly and explicitly in our case law.⁷⁶ We have also expressed it less directly in 10 C.F.R. § 2.309(i). That Rule *requires* a board to rule on any petition to intervene and/or request for hearing within 45 days of receiving the answers and replies associated with that petition and/or request. The last reply brief in this proceeding was filed on March 10th, triggering the 45-day period. The Board's order thus might have been expected by April 25th, more than twelve weeks prior to its actual issuance on July 20th.

We recognize that the Board was not silent during this period. The Board indicated that it hoped that the participants could reach a settlement -- at least until the Board received the NRC Staff's Status Report on May 20th indicating that settlement talks had been unproductive.⁷⁷ We also recognize that, until May 24th, two of the *Millstone* Board's members were heavily involved in the *Private Fuel Storage* proceeding, and that the Board considered this factor to be

⁷⁴ See, e.g., Final Rule, “Changes to Adjudicatory Process,” 69 Fed. Reg. at 2209, and cited authority; 10 C.F.R. § 2.338; *Sequoyah Fuels Corp.*, CLI-97-13, 46 NRC 195 (1997).

⁷⁵ See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, *passim* (1998).

⁷⁶ See note [69](#), *supra*.

⁷⁷ NRC Staff's Second Status Report (May 20, 2005).

at least a partial justification for suspending its decisionmaking process in this proceeding.⁷⁸ Even so, by May 20th, the Board presumably was aware that settlement talks had proved fruitless.⁷⁹ On June 3rd, the Board said it would “now turn[] its attention to deciding” the issues surrounding the petition to intervene. Those issues are straightforward, all of them had been fully briefed and debated by April 12th, and the administrative record regarding them is quite short. But no decision issued for two months after the collapse of settlement talks. Under the circumstances, we see no reason why the Board could not have prepared its decision more quickly, and could not perhaps have made some progress on it simultaneously with the settlement talks.⁸⁰ The use of parallel tracks (simultaneous adjudication and negotiation) has the effect of spurring the parties to settlement.⁸¹

B. Premature Encouragement of Settlement

The second difficulty we have with the Board’s encouragement of settlement is its timing. Until a board has addressed the threshold issues of standing and admissibility of contentions, the proceeding is too inchoate to call for aggressive Board encouragement of settlement. In this case, however, the Board, not the litigants themselves, was the moving force behind seeking settlement. The Board pressed the NRC Staff and the licensee to expend

⁷⁸ See “Memorandum of Conference Call” at 1-2 (April 15, 2005); “Status Memorandum” at 1-2 (June 3, 2005), referring to *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319 (May 24, 2005).

⁷⁹ Even assuming *arguendo* that the settlement talks and the two Board members’ involvement in the *PFS* proceeding amounted to an appropriate *de facto* stay of the *Millstone* proceeding, section 2.309(i) would still have required the board to issue its order no later than July 8th.

⁸⁰ In fact, both the licensee and the NRC suggested just this approach. See, e.g., Letter from David R. Lewis (Dominion’s counsel) to the Board at 2 (May 6, 2005); NRC Staff’s Status Report at 2-3 (May 6, 2005).

⁸¹ Indeed, section 2.338(f) of our regulations can be read to imply our preference for this approach: “The conduct of settlement negotiations ... does not automatically stay the proceeding. A hearing must not be unduly delayed because of the conduct of settlement negotiations.” 10 C.F.R. § 2.338(f).

time and resources negotiating with another litigant who had not yet been admitted as a party, about contentions that had not yet been found pertinent. For example, at one point, a member of the Board stated on the record that he believed “[t]he NRC staff has an *obligation* ... to work with you [Suffolk County] and the licensee in these circumstances.”⁸² Similarly, the Board’s Chairman stated at the end of the conference:

What my colleagues and I ... would like you all to do is ... to ... see if you can't work out some memorandum of understanding that might say [“]here is how we're going to work on the issues today, the issues next week, and if the company gets its license renewal, on the issues over the next 40 years.[”]⁸³

Suffolk County certainly viewed the Board’s “encouragement” as a form of pressure and welcomed it, stating that “[w]hile Dominion and the NRC staff state that they are committed to meeting with the County, the County feels that the request by the Board gives the parties *added incentive* to ensure that the meeting takes place”⁸⁴ and that “[r]uling on the County’s motion [for summary disposition] at this time would *take away the parties’ incentive* to continue these discussions.”⁸⁵ In our view, while no doubt acting in good faith to facilitate meetings among Suffolk County, the NRC Staff and Dominion, the Board inappropriately stepped outside its own adjudicatory realm and into the NRC Staff’s non-adjudicatory realm.⁸⁶ By pressing the Staff to negotiate, the Board assumed a supervisory role of directing the Staff to use its time and resources in negotiations with a non-party over a potential non-issue. As we have stated repeatedly over the last quarter-century, boards lack the authority to supervise the NRC Staff in

⁸² Transcript of April 12, 2005 Pre-Hearing Conference (“Tr.”) at 60 (emphasis added).

⁸³ Tr. at 89.

⁸⁴ Letter from Jennifer B. Kohn (Suffolk County’s counsel) to the Board at 2 (May 10, 2005) (emphases added).

⁸⁵ *Id.* at 3 (emphases added).

⁸⁶ *Compare Rockwell International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 720 (1989) (stating that “the Presiding Officer quite properly has encouraged settlement” between the licensee and the *intervenors*), *aff’d*, CLI-90-5, 31 NRC 337 (1990).

the performance of its regulatory duties.⁸⁷ We regret that we have to repeat this directive yet again. In our practice, “any party’s participation in the settlement process is voluntary.”⁸⁸

V. CONCLUSION

(1) We *answer* the certified question in the negative and *deny* Suffolk County’s request for an exemption from (or waiver of) 10 C.F.R. § 50.47(a)(1).

(2) We *find* that the balance of late-filing factors weighs against considering Suffolk County’s petition to intervene.

(3) We *find* that Suffolk County’s three emergency-planning contentions fall outside the scope of, and are immaterial to, this proceeding, and that those contentions are therefore inadmissible.

(4) Based on the three preceding conclusions, we *terminate* this adjudicatory proceeding.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of October, 2005.

⁸⁷ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) (“licensing boards do not sit to . . . supervise or direct NRC Staff regulatory reviews”), citing *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998); *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121 (1995) (“As a general matter, the Commission’s licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews”); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980).

⁸⁸ *Rocketdyne*, CLI-90-5, 31 NRC at 340.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-24) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution, with copies by electronic mail as indicated.

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Docket Nos. 336/423-LR
COMMISSION MEMORANDUM AND ORDER
(CLI-05-24)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of October 2005