UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 05/04/04

SERVED 05/04/04

COMMISSIONERS

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-04-12

MEMORANDUM AND ORDER

I. **Introduction**.

This matter is before the Commission on a Motion filed by the Connecticut Coalition Against Millstone ("CCAM"), the petitioner in this proceeding. CCAM seeks to vacate a letter signed by the Secretary of the Commission on March 4, 2004, returning its initial petition to intervene in this proceeding as premature. Both the NRC Staff and the licensee, Dominion Nuclear Connecticut, have filed Answers in opposition to the Motion. In addition, CCAM has tendered a Reply, which although unauthorized by our rules,[1] we have accepted even though it was not accompanied by a Motion for Leave to File. As more fully discussed below, we deny the Motion to Vacate.

II. **Background**.

This case involves a question of whether to apply the "new" Part 2 Rules of Practice to this proceeding, or whether the filing of the petition to intervene was sufficient to require

[1] *See* 10 C.F.R. §2.323(c) ("New" Part 2).

application of the "old" Part 2 Rules. On January 14, 2004, we published a final rule amending the agency's Rules of Practice contained in 10 C.F.R. Part 2. *See* "Final Rule: Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). These revised procedures apply to "proceedings noticed on or after the effective date, unless otherwise directed by the Commission." *Id.* According to the Notice, the new rules took effect on February 13, 2004. In addition, the Commission published guidance on its Website providing different scenarios and explaining whether the new rules or the old rules would apply in each case.[2]

On January 22, 2004, Dominion Nuclear submitted two applications for license renewal of both Unit 2 and Unit 3 of the Millstone facility. On February 3, 2004, the NRC published a "Notice of Receipt" of the applications, 69 Fed. Reg. 5197, which advised the public that "[t]he acceptability of the tendered application for docketing, and other matters including the opportunity to request a hearing, will be the subject of subsequent Federal Register notices." *Id.* On February 12, 2004, CCAM filed a Petition to Intervene and Request for Hearing relating to the submitted application, even though the NRC had not yet published a Federal Register notice docketing the application and providing the opportunity to request a hearing. Accordingly, on March 4, 2004, the Secretary of the Commission returned the petition, advising CCAM that the petition had been filed prematurely because "[t]he NRC Staff is still reviewing the Application and has not yet docketed it. Accordingly, there is not yet a proceeding in which you can seek to intervene." Letter of March 4, 2004, at 1.

On March 12, 2004, the NRC Staff published a Federal Register Notice announcing that it had accepted the Applications for docketing and persons who wished to intervene in the proceeding and request a hearing could do so. *See* "Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating

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[2] *See* http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html.

License Nos. DPR-65 and NPF-49," 69 Fed. Reg. 11897 (Mar. 12, 2004). On March 22, 2004, CCAM filed the instant Motion, seeking to "vacate" the Secretary's letter and reinstate the petition to intervene and request for hearing as of the original date of submission. Quite simply, CCAM argues that its petition was filed on February 12, 2004, so the old Part 2 Rules of Procedure should apply to the proceeding. In addition, CCAM also re-submitted its petition to intervene.

On March 25, 2004, we issued an Order that: (1) referred the re-submitted petition to the Atomic Safety and Licensing Board "for appropriate action[,]" and (2) retained jurisdiction over the Motion to Vacate and invited the NRC Staff and the licensee to respond to the Motion. On April 2, 2004, both the Staff and the licensee filed Answers to the Motion. On April 12, 2004, CCAM submitted its unauthorized Reply which we have now accepted.

Upon review, we conclude that, assuming arguendo that the Motion to Vacate is timely,[3] the Secretary correctly returned the original petition as premature: there was no proceeding in existence in which CCAM's Petition to Intervene and Request for Hearing could have been filed.

III. **Analysis**.

It is axiomatic that a person cannot intervene in a proceeding before the proceeding actually exists. Otherwise, persons could file petitions to intervene in proceedings that may - or may not - occur years in advance of the applicant or licensee seeking the action sought to be

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[3]Under the new rules, the Motion to Vacate appears to be untimely, as it must be filed within 10 days of the date of the "occurrence or circumstance from which the motion arises." 10 C.F.R. §2.323(a). As the Secretary issued the letter on March 4 and the Motion was not filed until March 22, the Motion appears to be untimely. However, CCAM alleges that the Secretary did not mail the letter until March 10, six days after being signed (although CCAM did not take the simple step of attaching a copy of the envelope as proof of its allegation). Moreover, the old rules - the application of which is at issue in this decision - do not contain the 10-day limitation. *See* 10 C.F.R. §2.730. Finally, the Secretary cited to the old Part 2 Rules in her letter rejecting the petition.

Because we find the Motion to be without merit, we need not reach the issue of timeliness of the Motion in this decision.

challenged. For reactor licensing actions, such as that involved here, under both the old Part 2 and the new Part 2, there must either be a "notice of hearing" or a "notice of proposed action." *See*, *e.g.*,10 C.F.R. §2.318(a) (new Part 2) ("A proceeding commences when a notice of hearing or a notice of proposed action under §2.105 is issued."); 10 C.F.R. §2.700 (old Part 2) ("The general rules in this subpart govern procedure in all adjudications *initiated by the issuance* of... a notice of hearing [or] a notice of proposed action issued pursuant to §2.105...") (emphasis added). Thus, issuance of a "notice of hearing" or a "notice of proposed action" is a prerequisite to the initiation of a "proceeding."

In this case, Dominion Nuclear submitted an Application for license renewal for the two Millstone facilities on January 20, 2004, and the NRC Staff published a Federal Register Notice announcing "receipt" of that submission on February 3, 2004. But that notice was not a "notice of proposed action" or a "notice of hearing" under 10 C.F.R. §2.105, which remains unchanged in the new Part 2 in relevant part. Section 2.105(d) states that a "notice of proposed action *will* provide that, within thirty (30) days from the date of publication in the Federal Register, . . . [a]ny person whose interest may be affected by the proceeding may file a request for a hearing or a petition for leave to intervene . . .." 10 C.F.R. §2.105(d)(2) (emphasis added). Thus a notice of proposed action must include a notice of opportunity for a hearing.[4] In this case, the NRC Staff did not publish either a "notice of proposed action" or "notice of opportunity for a hearing" until March 12, 2004, when it published the "Notice of Acceptance for Docketing . . . and Notice of Opportunity for a Hearing." The "Notice of Receipt" published by the Staff on February 3, 2004, did not contain a notice of opportunity for a hearing; therefore, it cannot constitute a "notice of proposed action" for purposes of the rule and cannot initiate a "proceeding" under the Commission's regulations.

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[4]In fact, the terms "notice of proposed action" and "notice of opportunity for a hearing" appear to be interchangeable.

In summary, there was no “proceeding” in existence in which CCAM could intervene until March 12, 2004, because the Staff did not issue a “Notice of Opportunity for a Hearing” until that date. Therefore, CCAM’s original petition, which was filed on February 12, 2004, before the publication of Notice of Docketing and Opportunity for a Hearing, was clearly premature and was correctly rejected by the Secretary.

We turn now to the question of which Part 2 Rules will apply to this proceeding. As we noted above, the new Part 2 applies to all proceedings “noticed” on or after February 13, 2004. Inasmuch as this proceeding was noticed after that date, the new Part 2 Rules will apply to this proceeding.

The petitioner argues that two of the various “scenarios” published on the NRC’s Website to assist in determining whether the new Part 2 will apply to proceedings initiated during the transition period (transition from the old Part 2 to the new Part 2) support its claim. Under each scenario, if the prerequisites are satisfied, the proceedings will be conducted under the old Part 2 Rules of Procedure. The two scenarios are:

> Scenario 5: Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004;
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> Scenario 9: Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for a hearing published on NRC Web site before February 13, 2004, but not in the Federal Register; hearing request/intervention petition received after February 13, 2004.

http://www.nrc.gov/what-we-do/regulatory/adjudicatory/applicability-of-old-new-part2.html. *See generally* Motion to Vacate at 3-4.

Even a cursory review demonstrates petitioner’s error. Initially, both scenarios require that the application not only be “submitted” to the NRC before February 13, 2004, but that the NRC Staff must have “docketed the application” before that date. But the NRC Staff did not accept the two applications in this case for docketing until March 12, when it published the

Federal Register notice announcing that fact. Moreover, in order for Scenario 5 to apply, the NRC Staff must not have published a notice of docketing and opportunity for a hearing. But in this case the Staff did, in fact, publish such a notice; thus, Scenario 5 cannot apply. Likewise, in order for Scenario 9 to apply, the NRC Staff must have published a notice of docketing and opportunity for a hearing on the NRC's Website but not in the Federal Register; however, as we have noted above, the Staff did publish a notice of docketing in the Federal Register. Thus, it is clear that neither scenario applies to this case.

The petitioner also argues that its initial filing is valid under 10 C.F.R. §2.309(b)(4)(ii). Motion to Vacate at 6. But that argument fails for the same reason: that rule, by its own terms, explicitly applies only to "proceedings for which a Federal Register notice of agency action is not published . . ." *Id.* Thus, this provision is also inapplicable to the instant case, because a Federal Register notice was indeed issued by the Staff for this application.

The petitioner also ignores the process used by the Staff in its acceptance review of the application. An application is neither accepted for full review by the NRC staff nor automatically noticed for a possible hearing when it is submitted; instead, the Staff reviews it to ensure it contains the information and analyses reguired in a proper application to allow the staff's full review of the proposed licensing action. If the application does not provide the necessary content, it is returned to the applicant for appropriate changes and possible re-submission. Until an application has been accepted by the NRC Staff, there is not certainty that there will be a proceeding in which a hearing may be requested. In this case, the NRC Staff initiated its docketing review when Dominion Nuclear submitted the applications in January and issued the notice of opportunity to request a hearing when the acceptance review was completed.

Before us now, the petitioner alleges that the NRC Staff "deliberately" did not docket the applications until after February 13, 2004, the effective date of the new Part 2 Rules. Motion to Vacate at 6; Reply at 4-5. Briefly, petitioner alleges that because the NRC had conducted

several meetings with the applicant on this subject, it should not have needed any time to conduct its acceptance review. However, nothwithstanding any such meetings, the Staff is still required to make an affirmative finding on the adequacy of the licensee's application for docketing purposes. *See* 10 C.F.R. §2.101(a)(1)-(3). Here, the Staff's review appears to have been completely normal. We have no reason to question the Staff's conduct of the docketing review and -- other then unsupported innuendo -- the petitioner has given us none.

Finally, the petitioner correctly points out that the Commission has the discretion to waive the application of the new Part 2 Rules of Practice and allow the hearing to proceed under the old Part 2 Rules. Reply at 5. However, the petitioner has given us no reason to take such a step other than its claim that "[t]he revisions [i.e., the new Part 2] severely curtail [its] rights and opportunities . . . in the hearing process." Reply at 5. Simply put, CCAM has not presented any injury specific to itself that would warrant our suspension of the normal rules applicable to all proceedings commenced after February 13, 2004.

IV. **Conclusion**.

In view of the foregoing, we deny the motion to vacate. Because the pleadings before us contain some reference to matters now pending before the Licensing Board, we refer all pleadings before us to the Board for review with regard to matters now pending there, such as the licensee's claim that the new petition is defective. Dominion Nuclear Answer at 5-7.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of May 2004