UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR, 50-286-LR
(Indian Point Nuclear Generating Units 2 and 3)	)	

CLI-12-18

MEMORANDUM AND ORDER

I. INTRODUCTION

The Atomic Safety and Licensing Board recently issued an order granting, in part, the State of New York's motion for cross-examination of witnesses at the upcoming evidentiary hearing in this proceeding on Entergy Nuclear Operations, Inc.'s (Entergy) application for the renewal of its operating licenses for Indian Point Nuclear Generating Units 2 and 3.[1] In response, Entergy filed an "emergency petition for interlocutory review" of the Board's order, and additionally requested expedited briefing on its petition.[2] We granted Entergy's request for

[1] *See* Order (Order Granting, in part, New York's Motion for Cross Examination) (Sept. 21, 2012) (unpublished) (corrected Sept. 25, 2012) (Board Order).

[2] *Entergy's Emergency Petition for Interlocutory Review of Board Order Granting Cross-Examination to New York State and Request for Expedited Briefing* (Sept. 28, 2012) (Entergy Petition). Entergy also filed an application to stay the Board's order or the hearing pending our resolution of its petition. *See Entergy's Application to Stay Board Order Granting Cross-*

(continued . . .)

expedited briefing.[3] New York opposes Entergy's petition for interlocutory review.[4] The NRC Staff supports the petition.[5] For the reasons outlined below, we deny Entergy's request for interlocutory review of the Board's order, but provide guidance to the Board as it moves forward with evidentiary hearings in this case.

II. ANALYSIS

Pursuant to 10 C.F.R. § 2.341(f)(2), we may at our discretion grant a party's request for interlocutory review of a Board decision. We grant review only where the party demonstrates that the issue for which it seeks review:

> (i) threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated" through an appeal following the presiding officer's final decision; or
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> (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.[6]

Here, Entergy claims that the Board's order will have a "pervasive" and "unusual" effect on the basic structure of the proceeding.[7] Entergy notes that the Board's order did not identify "specific individuals" who may be subject to New York's cross-examination, and claims that it therefore will need to spend time preparing each of its witnesses "on a broad number of topics

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Examination to New York State or, in the Alternative, to Grant a Partial Stay of the Hearing Pending the Commission's Decision on Entergy's Emergency Petition for Interlocutory Review (Sept. 28, 2012). Our decision today renders moot Entergy's stay request.

[3] *See* Order (Oct. 2, 2012) (unpublished).

[4] *See State of New York Combined Opposition to Entergy's Requests for Emergency Stay and Interlocutory Review of the Board Order Granting Limited Cross Examination* (Oct. 1, 2012). Entergy replied in opposition to New York's answer. *See Entergy's Reply to New York State's Opposition to Entergy's Emergency Petition for Interlocutory Review* (Oct. 8, 2012).

[5] *See NRC Staff's Answer to Entergy's Emergency Petition for Interlocutory Review, and Application for Stay, of the Board's Order of September 21, 2012* (Oct. 5, 2012).

[6] *See* 10 C.F.R. § 2.341(f)(2).

[7] Entergy Petition at 9.

for which New York *might* seek cross examination."[8] Entergy further claims that the parties at the hearing will be "likely to disagree on the scope, duration, and substance of the testimony on cross-examination," and that "[a]dditional hearing time dedicated to these issues is assured."[9]

Entergy also argues that the Board's order threatens Entergy with immediate and irreparable harm. Entergy claims that the order grants New York an "essentially unfettered right to examine witnesses without granting Entergy the same right."[10] Entergy states that the Board's order is "silent on Entergy's conditional request that if New York's Motion for cross-examination were granted, Entergy should be granted the same opportunity."[11] Entergy additionally claims that Judge Lawrence McDade (the Board Chair), in a recent teleconference, indicated that New York will be able to conduct cross-examination without any "demonstration" of need, while other parties would have an opportunity to cross-examine on "discrete issues through oral motions at hearing," but only if they demonstrate a "sufficiently compelling request."[12] Entergy therefore argues that by "subjecting Entergy's witnesses to wide-ranging cross-examination by New York," without according Entergy the same "reciprocal right," the order prejudices Entergy "in a way that cannot be undone after the hearing."[13]

We find that Entergy's petition does not meet our standards for interlocutory review. We view the Board's order in light of Judge McDade's clarifying statements made at the September 24 teleconference. Judge McDade explained that he expected the cross-examination to be limited given the nature of a Subpart L proceeding, where the Board itself will first conduct its

[8] *Id.* at 8-9.

[9] *Id.* at 9.

[10] *Id.*

[11] *Id.* at 7.

[12] *See id.* 7-8.

[13] *Id.* at 10.

own "thorough" questioning of the witnesses based on written questions that the parties themselves already have submitted to the Board.[14] Judge McDade further stated that cross-examination would be permitted "if New York is able to identify areas that the Board missed," and if the questions and answers prove of value to the Board's understanding of the issues; the process would not be an occasion to "ask anything you want if you're curious."[15] He further emphasized that cross-examination would not be "open-ended," and that the Board will "cut off" any questioning that is "repetitive" or "not relevant to the issues."[16] Both Judge McDade and New York suggest that if the Board's questioning of the witnesses proves to be sufficiently complete, additional questions on cross-examination may be unnecessary.[17]

While the Board's order failed to provide any explanatory details, Judge McDade's comments at the teleconference reflect an intent to allow only limited, supplemental questions, not an "unfettered" opportunity to pose extensive, unfocused, or immaterial questions. Whether the Board's ruling was reasonable or not, its result—a potential for limited cross-examination—cannot be said to impact the "basic structure of the proceeding in a pervasive or unusual manner" warranting interlocutory review. We fully expect the Board to conform to Judge McDade's stated intention to prohibit open-ended, lengthy cross-examination, and to restrict any permitted cross-examination to material inquiries that the Board did not already cover.

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[14] *See* Teleconference Transcript (Sept. 24, 2012), at 1236 (Tr.).

[15] *Id.* at 1238.

[16] *Id.*

[17] *Id.* at 1236; *State of New York Combined Opposition to Entergy's Requests for Emergency Stay and Interlocutory Review of the Board Order Granting Limited Cross-Examination* (Oct. 1, 2012), at 6 (because the Board has "likely . . . already . . . prepared extensive cross-examination plans, it is possible that neither the State nor other parties will see fit to ask additional questions at the conclusion of the Board's examination of the parties' experts).

We turn next to Entergy's claim of irreparable, prejudicial harm. As Entergy points out, the Board's order curiously did not address Entergy's request for a reciprocal opportunity to cross-examine witnesses. Judge McDade, however, made clear at the teleconference that counsel for Entergy *can* request the opportunity to question witnesses at the hearing. Outlining the approach he anticipates, Judge McDade described that after the Board concludes its questioning, counsel for the parties would have a "reasonable opportunity to interrogate the witnesses" in the event that "the Board has missed something," but again, questions could not be "repetitive" or "just going over the same ground as the Board."[18] We hold the Board to its word that it will provide Entergy and the Staff (as well as any other parties participating on these contentions) a full and fair opportunity to request cross-examination, and we expect that the Board will act on any such requests fairly and evenhandedly, including taking into consideration any cross-examination opportunities granted to New York. While there is no right to "reciprocal" cross-examination, the parties should be accorded equivalent treatment under the applicable regulatory standard.[19]

We conclude on a note of caution. Without the additional assurances that Judge McDade provided at the teleconference, we would have been inclined to vacate the Board's decision as unduly vague and overbroad. The only reason the Board gave for granting cross-examination—the observation that the proceeding involves a "voluminous and technical record"[20]—does not, without more, support ordering cross-examination in a Subpart L proceeding. The Statements of Consideration for the Subpart L hearing rules even specify that

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[18] *See* Tr. at 1236-37, 1242-43.

[19] For example, we find troubling that the Board did not base its decision on any specific showing by New York, and also did not address Entergy's request for cross-examination or its offer to submit its own cross-examination plan.

[20] Board Order at 6.

"the complexity and number of issues" in a proceeding do *not* "per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing."[21]

If large records and complexity justified cross-examination, such questioning would be commonplace at many, if not most, Subpart L hearings. That was not the intent of Subpart L., which was designed to shift most questioning of witnesses from parties to the Board itself. The Commission envisioned a need for cross-examination principally "in circumstances involving disputes over the occurrence of an activity or the credibility of a material witness."[22] Given that the parties provide pre-filed direct testimony in Subpart L cases, and further submit a list of confidential proposed questions for the Board to ask the witnesses, the need for the parties themselves also to conduct questioning should be a "rare circumstance," except where questions of witness credibility, motive, or intent are at issue.[23] Cross-examination, in other words, should be reserved for cases where the Board determines that it is truly necessary to develop a sound record.

We recognize, however, that it is the Board that has the responsibility in the first instance to oversee the development of the case record and to ensure that it has adequate information to issue a reasoned decision on the contested matters. And the Board is in the best position to determine whether cross-examination is necessary to ensure a fair and complete record. Here the Board has determined that cross-examination is "necessary to ensure development of an adequate record."[24] While we will not disturb the Board's decision, we fully expect future boards

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[21] Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2196 (Jan. 14, 2004).

[22] *Id.*

[23] *See id.*, 69 Fed. Reg. at 2196, 2205. *See also id.* at 2204-05 (rejecting the proposed rule's "numerous and complex issues" criterion for the use of formal procedures). *See generally* 10 C.F.R. § 2.1207(a).

[24] Board Order at 6.

to explain the necessity of cross-examination in greater detail than a broad-brush reference to a proceeding's "voluminous" or "technical" nature.[25]

III. CONCLUSION

Entergy's petition for interlocutory review is *denied*. We expect that the Board will rigorously oversee any cross-examination it allows and limit the cross-examination by all parties to supplemental and genuinely material inquiries, necessary to develop an adequate and fair record for decision.

IT IS SO ORDERED.[26]

For the Commission

NRC SEAL

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of October 2012.

[25] We note, additionally, that boards considering a departure from the usual hearing format should issue rulings sufficiently in advance of a scheduled hearing, so that the parties have adequate time for any necessary preparations, and so that we have a meaningful opportunity to exercise our oversight role.

[26] Commissioner Apostolakis did not participate in this matter.