

RAS 2542

LBP-00-34

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/22/00

ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/22/00

Before Administrative Judge:

Charles Bechhoefer,
Presiding Officer

In the Matter of

POWER AUTHORITY OF THE STATE OF
NEW YORK and ENTERGY NUCLEAR
FITZPATRICK LLC, ENTERGY NUCLEAR
INDIAN POINT 3 LLC, and ENTERGY
NUCLEAR OPERATIONS, INC.

(James A. FitzPatrick Nuclear Power Plant
and Indian Point Nuclear Generating Unit No.
3)

Docket Nos. 50-333-LT
and 50-286-LT
(consolidated)

ASLBP No. 01-785-02-LT

December 22, 2000

MEMORANDUM AND ORDER

(Approving Withdrawal of Cortlandt/Hendrick Hudson School District)

On December 15, 2000, the Town of Cortlandt, New York, and the Hendrick Hudson School District [collectively, Cortlandt], intervenors in this 10 C.F.R. Part 2, Subpart M License-Transfer proceeding, filed a Notice of Withdrawal, seeking to withdraw from this proceeding with prejudice their request for a hearing and petition for leave to intervene, together with the issue raised by them--i.e., the first issue admitted by CLI-00-22, concerning, in Cortlandt's words, "Entergy Indian Point's liability for certain financial obligations of Entergy FitzPatrick." For the reasons that follow, the Presiding Officer approves both the withdrawal of Cortlandt as well as the dismissal of the issue raised solely by them.

In a response dated December 18, 2000, the Licensees urged that the Presiding Officer "promptly accept and approve Cortlandt's withdrawal and that all the issues raised by Cortlandt in this proceeding, and particularly Issue 1 as set forth in CLI-00-22, should be promptly

dismissed.” In support, the Licensees cite, inter alia, Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382-83 (1985):

Where there is more than one intervenor in a case, the withdrawal of one . . . serve[s] to remove the withdrawing party’s contentions from litigation. The Commission has made it clear, in this regard, that the mere acceptance of contentions at the threshold stage does not turn them into cognizable issues for litigation independent of their sponsoring intervenor.

South Texas, supra, 21 NRC at 382-83 (footnotes omitted). The Licensees further add that my acceptance of Cortlandt’s withdrawal and dismissal of its contention is consistent with the Commission’s expressed desire in CLI-00-22 for the parties to attempt to settle their issues amicably.

On the other hand, CAN, an intervenor, in a response dated December 18, 2000, does not object to Cortlandt’s withdrawal, as such, but reads CLI-00-22 as permitting the litigation of Cortlandt’s Issue 1 by any of the intervenors or interested governmental entities. It cites CLI-00-22’s direction to the “parties to organize their presentations . . . around the following two issues:” (slip op. at 50, emphasis supplied), together with CLI-00-22’s direction that “[t]he parties’ filings and arguments must be confined to the contours of these two issues (id., emphasis supplied). The Licensees, on December 20, 2000, filed a reply to CAN’s response concerning the continuing litigability of the issue sponsored solely by Cortlandt, emphasizing their view that nothing in CLI-00-22 overrides the general NRC precedent that would require dismissal of the issue sponsored solely by the withdrawing party.

The Presiding Officer does not read the portions of CLI-00-22 cited by CAN as obviating the general NRC precedent to the effect that, when an intervenor withdraws, its issues are also withdrawn. Accordingly, the Presiding Officer is approving the withdrawal, with prejudice, requested by the Town of Cortlandt and the Hendrick Hudson School District, and the dismissal of their contention. I note, however, that although the requested withdrawal is with prejudice, the dismissal of Contention 1 does not constitute an adjudication on the merits of that

contention. As pointed out in South Texas, supra, further consideration by the Presiding Officer (there, an Atomic Safety and Licensing Board) of the dismissed contention, should another party seek to litigate it, would require a balancing of the factors applicable to late-filed contentions. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114 (1999). Further, the circumstance that an intervenor is permitted to participate in litigation of another intervenor's issues, e.g., through cross-examination, "does not elevate the [first] intervenor's status to that of a co-sponsor of the contentions." ALAB-799, supra, 21 NRC at 382-83.

In light of the foregoing, the request for withdrawal of the Town of Cortlandt and the Hendrick Hudson School District, with prejudice, is hereby granted. The contention submitted by them is hereby dismissed, without prejudice.

IT IS SO ORDERED.

/RA/

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2000

[Copies of this Memorandum and Order have been e-mailed or telefaxed this date to counsel for, or representatives of, each of the parties and participating governmental entities.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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POWER AUTHORITY OF THE STATE OF)
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(James A. FitzPatrick Nuclear Power Plant)
and Indian Point Nuclear Generating)
Unit No. 3))

Docket Nos. 50-333-LT and
50-286-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (APPROVING WITHDRAWAL OF CORTLANDT/HENDRICK HUDSON SCHOOL DISTRICT) (LBP-00-34) have been served upon the persons listed below by electronic mail. Each recipient will also receive a paper copy of this document.

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Docket Nos. 50-333-LT and 50-286-LT
LB MEMORANDUM AND ORDER
(APPROVING WITHDRAWAL OF
CORTLAND/HENDRICK HUDSON
SCHOOL DISTRICT) (LBP-00-34)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December 2000