

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 2819

**DOCKETED 03/06/01
SERVED 03/06/01**

COMMISSIONERS

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

_____)
In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK and)
ENTERGY NUCLEAR INDIAN POINT 2, LLC,)
and ENTERGY NUCLEAR OPERATIONS, INC.)
)
(Indian Point Nuclear Generating)
Units Nos. 1 and 2))
_____)

Docket Nos. 50-003-LT
and 50-247-LT
(consolidated)

CLI-01-08

MEMORANDUM AND ORDER

This proceeding involves an application seeking the Commission's authorization for Consolidated Edison Company of New York ("ConEd") to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point Nuclear Generating Unit Nos. 1 and 2 ("the Indian Point plant") to Entergy Nuclear Indian Point 2, LLC ("Entergy Indian Point 2") and Entergy Nuclear Operations, Inc. ("Entergy Nuclear Operations"), respectively. The Indian Point plant is located in Westchester County, New York, beside the Hudson River. Its property lies partially within the Town of Cortlandt and entirely within the Hendrick Hudson School District. ConEd and the Entergy companies (collectively "applicants") submitted both a redacted and an unredacted version of their application to the Commission on December 12, 2000, pursuant to Section 184 of the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2234,

and section 50.80 of the Commission's regulations.¹ The redacted version omitted financial information relevant to the expected costs of the plant's operation and maintenance.

On January 29, 2001, the Commission published in the Federal Register a notice of the Indian Point 2 application. See 66 Fed. Reg. 8122. In response to this notice, the Commission received petitions to intervene and requests for hearing from two entities wishing to oppose the license transfer application. The petitioners are Citizens Awareness Network ("CAN") and the Town of Cortlandt together with the Hendrick Hudson School District (collectively "Cortlandt"). Petitioners CAN and Cortlandt, as well as Entergy Nuclear Operations, have participated as parties in the Commission's still-pending license transfer proceeding involving the Indian Point 3 reactor. See Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant and Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000) (hereinafter referred to as "Indian Point 3").

CAN, pointing to a lack of access to the complete transfer application and to a delay in access to the redacted application, presents no specific issues for consideration but instead alludes only generally to certain concerns regarding the financial and technical qualifications of the Entergy companies. CAN makes two threshold procedural requests. First, it seeks the suspension or revocation of the instant proceeding, pending further developments in matters CAN deems related. In the alternative, if the Commission refuses to suspend or terminate proceedings, CAN seeks access to the unredacted version of the license transfer application and additional time to frame issues. Cortlandt, although it has already presented several

¹ See 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing). See also 10 C.F.R. § 50.80, which reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

issues, likewise seeks access to the unredacted application, and more time to frame additional issues.

For the reasons set forth below, we decline to suspend or terminate the proceeding, but we do direct ConEd and Entergy to give CAN and Cortlandt access to an unredacted version of the transfer application within seven days, pursuant to confidentiality arrangements similar to those agreed to in the Indian Point 3 case. We also grant CAN and Cortlandt an additional 20 days, after obtaining the unredacted application, to submit (or revise) issues. To obtain a hearing, petitioners must meet the standards set out in 10 C.F.R. § 2.1306. We will rule on petitioners' standing and on the admissibility of their issues after we have all pleadings in hand.

A. CAN's Motion for Suspension or Revocation of this Proceeding

CAN seeks a suspension or revocation of the proceeding until the Commission completes the Indian Point 3 license transfer proceeding, and also until the NRC completes consideration of CAN's Petition for Enforcement Action pursuant to 10 C.F.R. § 2.206 concerning ConEd's alleged regulatory violations at Indian Point 2.² CAN argues that neither the financial nor technical qualifications of the Entergy companies can be adequately evaluated until completion of the ongoing reviews of the design and licensing bases of the reactor (in the section 2.206 review) and the financial qualifications of Entergy Indian Point 2's affiliate companies (in the Indian Point 3 adjudication).³ CAN also maintains that continuation of the present proceeding, in view of CAN's concurrent participation in other proceedings (including

² CAN also points out that the Public Citizens' Critical Mass Energy Project has filed a separate petition pursuant to section 2.206, also challenging the licensing basis of Indian Point 2, albeit on grounds different from those in CAN's section 2.206 petition.

³ Although CAN is hardly clear on this point, we assume that it refers here to Entergy Nuclear Operations and/or the two Entergy affiliates (Energy Global Investments and Entergy International Ltd.) that are offering supplemental financial guarantees to Entergy Indian Point 2.

the Indian Point 3 hearing), would stretch its resources so tightly that it would constitute a de facto barrier to meaningful participation in this case.

Concerning CAN's first argument, the Commission historically has been reluctant to suspend pending adjudications to await developments in other proceedings, particularly in the license transfer area, where transactions frequently are time-sensitive, where related proceedings are common, and where the Commission has announced publicly its commitment to expeditious decisionmaking. See Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 343 (1999). Situations may arise where efficiencies might be gained from suspending an adjudication due to the presence of overlapping issues in multiple NRC proceedings; in that instance, suspension of the proceeding would be consistent with our policy to expedite proceedings. For example, in this situation, the Indian Point 3 proceeding is much further along than is the instant case. If intervenors believed that resolution of an issue in that proceeding would fully resolve one of their admitted issues here, it would not make sense to force re-litigation of the issue here. However, at this time we are much too early in the proceeding to even consider the matter of overlapping issues, since we have yet to evaluate the admissibility of any issue -- CAN has not even submitted issues. Simply put, the mere possibility that the outcome of the IP3 proceeding may relate to future admissible issues in this proceeding provides no basis for delaying the filing of issues, for the simple reason that we must know what the issues are before we can make a determination about whether they overlap.

The Commission has also stated that a petition filed under 10 C.F.R. § 2.206 may not be used to avoid an existing forum in which an issue is being or is about to be litigated. See Consolidated Edison Co. of NY (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981). If CAN believes an issue is relevant to the ongoing adjudicatory

proceeding, CAN should raise this issue following the schedule and process set forth for admission of issues into the license transfer proceeding -- as opposed to seeking a suspension or revocation of this proceeding pending the conclusion of the NRC staff's review of a section 2.206 petition.

For these reasons, we see no basis for delaying the present license transfer case indefinitely on CAN's theory that new and material information may arise out of collateral matters such as the pending hearing in Indian Point 3 or the pending 2.206 petition in Indian Point 2. Our license transfer rules allow petitioners to submit late-filed issues, where appropriate. See 10 C.F.R. § 2.1308(b). Our late-filing rule, not a suspension of proceedings, is the best means for handling newly-arising issues.

Turning to CAN's second argument, it is true, as CAN stresses, that multiple simultaneous proceedings place burdens on the parties. But litigation inevitably results in the parties' loss of both time and money. We cannot postpone cases for many weeks or months simply because going forward will prove difficult for litigants or their lawyers. In Nine Mile Point, we rejected an argument for delay all but identical to CAN's:

[W]e decline to adopt the co-owners' suggestion that we further suspend this proceeding until conclusion of the proceeding currently pending before the New York Public Service Commission. In support of this suggestion, the co-owners allege that simultaneous litigation in multiple forums imposes a "tremendous burden" on all parties.... We fail to see how the burden on the co-owners is any greater than that placed on numerous other parties in our proceedings -- parties who are regularly participants in proceedings concurrently conducted by other state and federal agencies.

* * * * *

[C]o-owners have not explained why suspension of our proceeding pending completion of the New York Public Service Commission's case would reduce the financial burden which this litigation places on the parties. The burden would appear the same, whether incurred simultaneously or sequentially.... For all these reasons, we deny co-owners' request that we suspend this proceeding pending conclusion of the New York Public Service Commission's proceeding.

50 NRC at 343-44. We find the reasoning in Nine Mile Point equally applicable here.

B. CAN's and Cortlandt's Motions for Extension of Time

CAN and Cortlandt each seek an extension of time within which to file its respective issues. CAN claims that it needs access to the unredacted version of the Indian Point 2 license transfer application if CAN is to prepare sufficiently specific and supported issues regarding the Entergy companies' qualifications to own and operate the plant. CAN asserts that it was unable until just before its original February 20th filing deadline to obtain a copy of even the redacted version -- due to difficulties with the Commission's automated document retrieval system ("ADAMS") -- and that, even then, CAN was only able to gain access to a partial copy of the redacted version. Cortlandt, while it apparently obtained the redacted application in sufficient time to frame some issues, also seeks access to the unredacted application to frame additional issues.

The Commission grants the requests by CAN and Cortlandt for access to the unredacted version of the application and for an extension of time within which to raise issues regarding that application. We have granted similar requests in the past, and both the terms of and reasons for those grants apply equally to the instant proceeding.⁴ As we indicated recently in the Indian Point 3 case:

Subpart M calls for "specificity" in pleadings. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.

⁴ See, CLI-00-22, 52 NRC at 291-92 (granting access to unredacted application in Indian Point 3 case); Power Auth'y of the State of NY (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3), Docket Nos. 50-333-LT and 50-286-LT, two unpublished Commission orders dated July 18 and 20, 2000 (granting extensions of time due to unavailability of documents on ADAMS).

CLI-00-22, 52 NRC at 300 n.23. Moreover, because CAN and Cortlandt also lacked access to a complete copy of the redacted application, we grant them each an extension of time within which to submit (or revise) any issues bearing on even non-confidential portions of the application.

Accordingly, within seven days after the issuance date of this order, the applicants and petitioners should enter into a confidentiality agreement along the same general lines as the one into which the parties entered in the Indian Point 3 case, and the complete, unredacted application shall then be made available to petitioners. If a confidentiality agreement proves impracticable, the applicants and petitioners shall notify the Commission by the end of that same seven-day period, describe the obstacles to agreement, and propose terms for entry of a suitable protective order.

Within 20 days of the parties' entry into a confidentiality agreement giving petitioners access to the complete application, petitioners may each submit new or revised issues challenging the Entergy companies' financial or technical qualifications to own and/or operate the Indian Point 1 and 2 facilities.⁵ New or revised responses and replies shall be filed on the schedule specified in 10 C.F.R. § 2.1307. References in pleadings to confidential information shall be filed under seal.

⁵ Our rules establish a general 20-day period for submitting issues in license transfer cases. See 10 C.F.R. § 2.1306(c)(1). We see no basis for granting Cortlandt's request for thirty (or more) days for submitting issues.

IT IS SO ORDERED.

For the Commission⁶

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of March, 2001.

⁶Commissioner Merrifield was not present at the affirmation of this Memorandum and Order. Had he been present, he would have affirmed his prior vote to approve this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CONSOLIDATED EDISON COMPANY)
OF NEW YORK)
and)
ENTERGY NUCLEAR INDIAN POINT 2, LLC,) Docket Nos. 50-003-LT
and) and 50-247-LT
ENTERGY NUCLEAR OPERATIONS, INC.) (consolidated)
)
(Indian Point Nuclear Generating)
Unit Nos. 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-01-08) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail.

Office of Commission Appellate
Adjudication**
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lawrence J. Chandler, Esq.**
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ljc@nrc.gov; ogclt@nrc.gov)

Timothy L. Judson*
Central New York-Citizens Awareness
Network
140 Bassett St.
Syracuse, NY 13210
(E-mail: cnycan@rootmedia.org)

Paul V. Nolan, Esq.*
5515 North 17th Street
Arlington, VA 22205
(E-mail: pvnpy@aol.com)

Brent L. Brandenburg, Esq.*
Consolidated Edison Company of New York
4 Irving Place, Room 1830
New York, NY 10003
(E-mail: brandenburgb@coned.com)

Douglas Levanway, Esq.*
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205
(E-mail: del@wisecarter.com)

Docket Nos. 50-003-LT and 50-247-LT
(consolidated)
COMMISSION MEMORANDUM AND
ORDER (CLI-01-08)

David A. Repka, Esq.*
Mark J. Wetterhahn, Esq.*
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502
(E-mail: drepka@winston.com;
mwetterh@winston.com)

Jay E. Silberg, Esq.*
Matias F. Travieso-Diaz, Esq.*
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
(E-mail: jay.silberg@shawpittman.com;
matias.travieso-diaz@shawpittman.com)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of March 2001