

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/05/07

ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/05/07

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating
Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

December 5, 2007

MEMORANDUM AND ORDER

(Denying the Village of Buchanan's Hearing Request and Petition to Intervene)

In a letter dated November 15, 2007, postmarked November 23, 2007, and received by the Board on November 29, 2007, which was signed by Daniel E. O'Neill as Mayor, and James Seirmarco as the Village Liaison to Indian Point, the Village of Buchanan, New York (Buchanan) requested that it be granted Intervener status in this proceeding.¹ In its Hearing Request and Petition to Intervene Buchanan did not proffer an admissible contention. 10 C.F.R. §2.309. Accordingly, we must deny this request.

A. Synopsis of this Proceeding

The proceeding before the Board is a license renewal application for the Indian Point Nuclear Facility that was submitted on behalf of Entergy Nuclear Operations (Entergy or the Applicant). Under Nuclear Regulatory Commission (NRC) regulations, license renewal proceedings are governed by 10 C.F.R. Part 54, and are generally limited to "a review of the

¹ Village of Buchanan Hearing Request and Petition to Intervene (Nov. 15 2007) (hereinafter "Buchanan Petition").

plant structures and components that will require an *aging* management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited *aging* analyses.”² Entergy submitted a license renewal application for Indian Point Nuclear Generating Units 2 and 3 on April 30, 2007. A notice of the application and an opportunity to request a hearing on the application was published in the *Federal Register* on August 1, 2007.³ Requests for hearings and petitions to intervene were originally due on October 1, 2007, however, the Commission extended the original deadline to November 30, 2007.⁴

B. Buchanan’s Petition to Intervene

In its Petition, Buchanan presents as its basis for being involved in the proceeding that the Indian Point facility is located within Buchanan, is subject to its laws and jurisdiction, and is provided municipal services by Buchanan.⁵ Accordingly, Buchanan states that it would like the proceeding to take into account several factors which it believes are important to its citizens. First, Buchanan cites the health and environmental benefits of the facility. The Petitioner states that the operation of the facility reduces the need to burn fossil fuels for electricity and that if it was not available Buchanan would have to get its energy from fossil fuels which would create additional air pollution.⁶ Second, Buchanan states that the use of nuclear power reduces the

² Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363-64 (2002) (quoting Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 212 (2001)).

³ 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁴ 72 Fed. Reg. 55,834 (Oct. 1, 2007).

⁵ Buchanan Petition at 1.

⁶ Id. at 2-3.

need to import energy sources from abroad.⁷ Third, Buchanan states that there are significant economic, tax and financial benefits to the village and the region from the facility.⁸ Finally, Buchanan asserts that nuclear energy is one of the safest available ways of producing energy.⁹

C. Standards Governing Contention Admissibility

Section 2.309(f) of Title 10 of the Code of Federal Regulations sets out the requirements that must be met if a contention is to be admitted in an agency licensing or enforcement adjudication. An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁰

⁷ Id. at 3.

⁸ Id. at 4. Buchanan notes that: (1) Indian Point currently pays \$34 million in property taxes annually; (2) the energy supplied by Indian Point supplies its recipients with a 20% savings in electricity costs; (3) the Metropolitan Transportation Authority uses electricity from the facility to power the New York City subway system and Metro-North commuter trains thereby keeping fare costs low; and (4) a rate increase caused by a more expensive energy source would discourage the use of mass transit leading to traffic congestion and increased air pollution caused by the additional cars on the road. Id.

⁹ Id.

¹⁰ 10 C.F.R. § 2.309(f)(1)(I) - (vi).

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”¹¹ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”¹² The Commission has emphasized that the rules on contention admissibility are “strict by design.”¹³ Failure to comply with any of these requirements is grounds for the dismissal of a contention.¹⁴ The application of these requirements has been further developed as summarized below:

1. Brief Explanation of the Basis for the Contention

A “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention.¹⁵ “[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.”¹⁶ The brief explanation helps define the scope of a contention – “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.”¹⁷

¹¹ 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004); see also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

¹² 69 Fed. Reg. at 2202.

¹³ Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-1, 55 NRC 1 (2002).

¹⁴ 69 Fed. Reg. at 2221; see also, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

¹⁵ 10 C.F.R. § 2.309(f)(1)(ii).

¹⁶ 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

¹⁷ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1

2. Within the Scope of the Proceeding

A petitioner must demonstrate that the “issue raised in the contention is within the scope of the proceeding,”¹⁸ which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.¹⁹ Any contention that falls outside the specified scope of the proceeding must be rejected.²⁰

3. Materiality

To be admissible, a petitioner must demonstrate that the contention asserts an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding.” In other words, the Petitioner must demonstrate that the subject matter of the contention would impact the decision on a pending matter.²¹ “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.²² This means that there must be some significant link between the claimed deficiency and either the health and safety of the public, or the environment.²³

4. Concise Allegation of Supporting Facts or Expert Opinion

and 2; Catawba Nuclear Station, Units 1 and 2), CAI-02-28, 56 NRC 373, 379 (2002).

¹⁸ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁹ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

²⁰ Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

²¹ 10 C.F.R. § 2.309(f)(1)(iv).

²² Portland Cement Ass’n. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Adm’r, E.P.A., 417 U.S. 921 (1974).

²³ Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996), rev’d in part on other grounds, CLI-96-7, 43 NRC 235 (1996); see also Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

Contentions must be supported by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.”²⁴ It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.²⁵ Failure to do so requires that the contention be rejected.²⁶

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.²⁷ The petitioner does not have to prove its contention at the admissibility stage.²⁸ The contention admissibility threshold is less than is required at the summary disposition stage.²⁹ Nevertheless, while a “Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner,”³⁰ the Petitioner must provide some support for his contention, either in the form of facts or expert testimony.³¹

²⁴ 10 C.F.R. § 2.309(f)(1)(v).

²⁵ Georgia Institute of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995), vacated in part and remanded on other grounds and aff’d in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995).

²⁶ Palo Verde, CLI-91-12, 34 NRC at 155.

²⁷ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

²⁸ Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

²⁹ Compare 10 C.F.R. § 2.710(c). “[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.” 54 Fed. Reg. at 33,171.

³⁰ Palo Verde, CLI-91-12, 34 NRC at 155.

³¹ Id.

In this regard, “[m]ere ‘notice pleading’ is insufficient. A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”³² Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking.³³ Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.³⁴ Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention.³⁵

In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed supply adequate support for the contention.³⁶ But at the contention admissibility stage all that is required is that the petitioner provide “some alleged fact, or facts, in support of its position.”³⁷

5. Genuine Dispute Regarding Specific Portions of Application

All contentions must “show that a genuine dispute exists” with regard to the license

³² Fansteel, Inc. (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

³³ Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

³⁴ Yankee Nuclear, LBP-96-2, 43 NRC at 90.

³⁵ See Fansteel, CLI-03-13, 58 NRC at 205.

³⁶ Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

³⁷ 54 Fed. Reg. at 33,170. “This requirement does not call upon the intervener to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” Id.

application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.³⁸ Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.³⁹

6. Challenges to NRC Regulations

In addition to the requirements set out above, with limited exceptions not applicable in this case, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁴⁰ By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission’s regulatory process must be rejected.⁴¹ Additionally, the adjudicatory process is not the proper venue for the evaluation of a petitioner’s own view regarding the direction regulatory policy should take.⁴²

D. Board’s Ruling on Buchanan’s Request For Hearing And Petition to Intervene

The Board finds that Buchanan has not raised an admissible contention. The issues which Buchanan has proffered are outside the scope of this proceeding for several reasons. The contentions asserted by Buchanan are not in any way related to plant aging issues at the Indian Point facility. The contentions do not raise any genuine disputes with the Application on

³⁸ 10 C.F.R. § 2.309(f)(1)(vi).

³⁹ Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); see also Texas Utilities Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

⁴⁰ 10 C.F.R. § 2.335(a); see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

⁴¹ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing Peach Bottom, ALAB-216, 8 AEC at 20-21).

⁴² Peach Bottom, ALAB-216, 8 AEC at 21 n.33.

any material issue of law or fact. Buchanan does not demonstrate that its issues are material and it has not offered any basis in support of any contention. Furthermore, Buchanan does not provide statements of fact or expert opinions supporting its positions.

E. Potential Future Actions

The Board advises Buchanan that pursuant to the provisions of 10 C.F.R. § 2.311 any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

The Board also advises Buchanan that even though it has not been admitted to this proceeding as a party pursuant to 10 C.F.R. § 2.309, it may nevertheless participate in this proceeding with respect to admitted contentions as an “interested governmental body” pursuant to 10 C.F.R. § 2.315.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247/286-LR
)
)
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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING THE VILLAGE OF BUCHANAN'S HEARING REQUEST AND PETITION TO INTERVENE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of December 2007