

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/12/07

ATOMIC SAFETY AND LICENSING BOARD

SERVED 12/12/07

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 12, 2007

MEMORANDUM AND ORDER

(Denying the City of New York's Petition for Leave to Intervene)

Before this Board is a Petition for Leave to Intervene dated November 29, 2007, that was submitted on behalf of New York City (NYC) by Michael J. Delaney, Vice President - Energy Department, New York City Economic Development Corporation.¹ While NYC has demonstrated standing, in its Hearing Request and Petition to Intervene it did not proffer an admissible contention under 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 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

¹ Amended Petition for Leave to Intervene and Statement of Interest of the City of New York (Nov. 29, 2007) (hereinafter “NYC Petition”).

evaluation of time-limited *aging* analyses.”² Entergy submitted a license renewal application for Indian Point Nuclear Generating Units 2 and 3 on April 23, 2007 and supplemented the application on May 3, 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. NYC's Petition for Leave to Intervene

In its Petition, NYC presents several reasons for being granted permission to intervene in this proceeding. Firstly, parts of NYC are within the ingestion planning zone of 50 miles from the Indian Point facility.⁵ The residents of NYC depend on food and water sources that are located within the 10-mile exposure zone.⁶ Finally, Indian Point provides NYC and its residents with lower-cost electric power and a decision on the re-licensing of the plant will have an effect on their rates.⁷

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

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 NYC Petition at 3.

⁶ Id.

⁷ Id. at 3-4.

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.⁸

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."⁹ 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."¹⁰ The Commission has emphasized that the rules on contention admissibility are "strict by design."¹¹ Failure to comply with any of these requirements is grounds for the dismissal of a contention.¹² The application of

⁸ 10 C.F.R. § 2.309(f)(1)(i) - (vi).

⁹ 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).

¹⁰ 69 Fed. Reg. at 2202.

¹¹ 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).

¹² 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).

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.¹³ “[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.”¹⁴ 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.”¹⁵

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,”¹⁶ which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.¹⁷ Any contention that falls outside the specified scope of the proceeding must be rejected.¹⁸

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

¹³ 10 C.F.R. § 2.309(f)(1)(ii).

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

¹⁵ 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 and 2; Catawba Nuclear Station, Units 1 and 2), CAI-02-28, 56 NRC 373, 379 (2002).

¹⁶ 10 C.F.R. § 2.309(f)(1)(iii).

¹⁷ Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

¹⁸ Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

matter of the contention would impact the decision on a pending matter.¹⁹ “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.²⁰ 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.²¹

4. Concise Allegation of Supporting Facts or Expert Opinion

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.”²² It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.²³ Failure to do so requires that the contention be rejected.²⁴

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.²⁵ The petitioner does not have to

¹⁹ 10 C.F.R. § 2.309(f)(1)(iv).

²⁰ 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).

²¹ 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).

²² 10 C.F.R. § 2.309(f)(1)(v).

²³ 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).

²⁴ Palo Verde, CLI-91-12, 34 NRC at 155.

²⁵ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

prove its contention at the admissibility stage.²⁶ The contention admissibility threshold is less than is required at the summary disposition stage.²⁷ Nevertheless, while a “Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner,”²⁸ the Petitioner must provide some support for his contention, either in the form of facts or expert testimony.²⁹

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.’”³⁰ 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.³¹ Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.³² 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

²⁶ Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

²⁷ 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.

²⁸ Palo Verde, CLI-91-12, 34 NRC at 155.

²⁹ Id.

³⁰ 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)).

³¹ Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

³² Yankee Nuclear, LBP-96-2, 43 NRC at 90.

admission of the contention.³³

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.³⁴ 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.”³⁵

5. Genuine Dispute Regarding Specific Portions of Application

All contentions must “show that a genuine dispute exists” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute.³⁶ 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.³⁷

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

³³ See Fansteel, CLI-03-13, 58 NRC at 205.

³⁴ 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).

³⁵ 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.

³⁶ 10 C.F.R. § 2.309(f)(1)(vi).

³⁷ 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).

adjudicatory proceeding.”³⁸ 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.³⁹ 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.⁴⁰

D. Board’s Ruling on NYC’s Petition for Leave to Intervene

While NYC would have standing to intervene, the Board finds that it has not raised an admissible contention. The issues which NYC has proffered are outside the scope of the proceeding. The contentions asserted (that the residents of NYC depend on food and water sources that are located within the 10-mile exposure zone, that Indian Point provides NYC and its residents with lower-cost electric power and a decision on the re-licensing of the plant will have an effect on their rates⁴¹) are not related to plant aging issues at the Indian Point facility and do not raise any genuine disputes with the Application on any material issue of law or fact. In addition, NYC has not offered any basis in support of its contentions and does not provide statements of fact or expert opinions supporting its positions.

E. Potential Future Actions

The Board advises NYC 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.

³⁸ 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).

³⁹ 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).

⁴⁰ Peach Bottom, ALAB-216, 8 AEC at 21 n.33.

⁴¹ NYC Petition at 3-4.

The Board also advises NYC 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. However, since no contentions have been admitted to date, a request pursuant to Section 2.315 at this time would be premature. Instead, NYC may petition to participate as an interested governmental body with regard to any admitted contention within thirty (30) days of the contention being admitted by this Board.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴²

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
December 12, 2007

⁴² A copy of this Order was sent this date by First Class Mail to: Mayor Daniel E. O'Neill, the representative for the Village of Buchanan. Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the New York City Economic Development Corporation; (2) Counsel for the NRC Staff; (3) Counsel for Entergy; (4) Manna Jo Green, the representative for Clearwater; (5) Counsel for WestCan, CAN, RCCA, PHASE and the Sierra Club - Atlantic Chapter; (6) Sherwood Martinelli, the representative for FUSE; (7) New York Affordable Reliable Electricity Alliance; (8) Nancy Burton as the representative of CRORIP; (9) Counsel for Westchester County; (10) Counsel for the State of New York; (11) Counsel for the State of Connecticut; (12) Counsel for the Town of Cortlandt; and (13) Counsel for Riverkeeper, Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

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

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of December 2007