

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 New York Affordable Reliable Electricity Alliance's Petition to Intervene)

In a letter dated November 28, 2007, which was signed by Arthur Kremer on behalf of the New York Affordable Reliable Electricity Alliance (NYAREA), that not-for-profit trade association requested it be recognized as a party in this proceeding.¹ However, in its Petition to Intervene NYAREA does not proffer an admissible contention as required 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

¹ New York Affordable Reliable Electricity Alliance's Petition to Intervene (Nov. 28, 2007) (hereinafter “NYAREA Petition”).

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 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. NYAREA's Petition for Leave to Intervene

In its Petition, NYAREA presents several reasons for being granted permission to intervene in this proceeding. First, two members of the organization (Con Edison and the New York Power Authority) are wholesale purchasers of energy from the Indian Point facility who would lose a low cost supplier of energy if the license for Indian Point is not renewed.⁵ In addition, several of its members live and do business near the facility. It also represents various labor unions whose income is directly related to Indian Point.⁶ Furthermore, NYAREA asserts that if the license is not renewed there will be a severe economic impact on the community; the reliability of the grid will decrease and blackouts will increase by 700%; air quality in the region will worsen; and lower income and minority communities will be disproportionately impacted.⁷

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 NYAREA Petition at 2-3.

⁶ Id. at 3.

⁷ Id. at 3-5.

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.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

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.

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 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

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).

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).

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 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

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

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

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 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

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).

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)).

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 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

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.

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).

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 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 NYAREA’s Petition to Intervene

The Board finds that NYAREA has not raised an admissible contention. The issues which NYAREA has proffered are outside the scope of this proceeding. The contentions asserted 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, NYAREA has not offered any basis in support of its contentions and does not provide statements of fact or expert opinions supporting its positions.

E. Conclusion

The Board advises NYAREA that pursuant to the provisions of 10 C.F.R. § 2.311 any

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).

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.

appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴¹

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
December 12, 2007

⁴¹ 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 NEW YORK AFFORDABLE RELIABLE ELECTRICITY ALLIANCE'S PETITION TO INTERVENE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwin E. Turk, Esq.
Lloyd B. Subin, Esq.
Beth N. Mizuno, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwood Martinelli
FUSE USA
351 Dyckman Street
Peekskill, New York 10566

Docket Nos. 50-247/286-LR
 LB MEMORANDUM AND ORDER (DENYING THE NEW YORK
 AFFORDABLE RELIABLE ELECTRICITY ALLIANCE'S PETITION TO
 INTERVENE)

Michael J. Delaney, Vice President - Energy
 New York City
 Economic Development Corporation
 110 William Street
 New York, NY 10038

Arthur J. Kremer, Chairman
 New York AREA
 347 Fifth Avenue, Suite 508
 New York, NY 10016

Martin J. O'Neill, Esq.
 Kathryn M. Sutton, Esq.
 Paul M. Bessette, Esq.
 Mauri T. Lemoncelli, Esq.
 Morgan, Lewis & Bockius LLP
 1111 Pennsylvania Avenue, NW
 Washington, DC 20004

Manna Jo Greene, Director
 Hudson River Sloop Clearwater, Inc.
 112 Little Market St.
 Poughkeepsie, NY 12601

Daniel E. O'Neill, Mayor
 Village of Buchanan
 James Seirmarc, M.S., Liaison to Indian Point
 236 Tate Avenue
 Buchanan, NY 10511

Robert D. Snook, Esq.
 Assistant Attorney General
 of the State of Connecticut
 55 Elm Street
 P.O. Box 120
 Hartford, CT 06141-0120

Charlene M. Indelicato, Esq.
 Westchester County Attorney
 Justin D. Pruyne, Esq.
 Assistant County Attorney
 148 Martine Avenue, 6th Floor
 White Plains, NY 10601

Thomas F. Wood, Esq.
 Daniel Riesel, Esq.
 Sive, Paget & Riesel, P.C.
 460 Park Avenue
 New York, NY 10022

Andrew M. Cuomo, Esq.
 Attorney General of the State of New York
 John J. Sipos, Esq.
 Assistant Attorney General
 The Capitol
 Albany, NY 12224-0341

Nancy Burton
 147 Cross Highway
 Redding Ridge, CT 06876

Docket Nos. 50-247/286-LR
LB MEMORANDUM AND ORDER (DENYING THE NEW YORK
AFFORDABLE RELIABLE ELECTRICITY ALLIANCE'S PETITION TO
INTERVENE)

Joan Leary Matthews, Esq.
Senior Counsel for Special Projects
Office of General Counsel
New York State Department of
Environmental Conservation
625 Boadway
Albany, NY 12224

Weschester Citizen's Awareness Network
(WestCan), Citizens Awareness Network
(CAN), etc.

Susan H. Shapiro, Esq.
21 Perlman Drive
Spring Valley, NY 10977

Richard L. Brodsky
Assemblyman
5 West Main Street
Suite 205
Elmsford, NY 10523

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

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