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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY LICENSING BOARD PANEL

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In re:

License Renewal Application Submitted by

Entergy Nuclear Indian Point 2, LLC,  
Entergy Nuclear Indian Point 3, LLC, and  
Entergy Nuclear Operations, Inc.  
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Docket Nos. 50-247-LR and 50-286-LR

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

DPR-26, DPR-64

WESTCHESTER COUNTY'S REPLY

Filed on February 8, 2008

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TEMPLATE = SECY-037

SECY-02

## **PRELIMINARY STATEMENT**

Westchester County respectfully requests that the Board grant its petition to intervene as a party in this proceeding since Westchester County has complied with 10 C.F.R. § 2.309(f)(3). As this Board has previously recognized, Westchester County should be permitted to participate as an interested governmental body under 10 C.F.R. § 2.315(c). Westchester County also respectfully submits that the plain text of § 2.309(f) does not require that a petitioner-intervenor set forth an independent, admissible contention before it may adopt or co-sponsor another petitioner's contention.

## **PROCEDURAL BACKGROUND**

Westchester County submitted a Notice of Intention to Participate and Petition to Intervene in the Indian Point relicensing proceeding as a "party" pursuant to 10 C.F.R. § 2.309. *See* Westchester County Notice of Intention to Participate and Petition to Intervene (Dec. 7, 2007). Westchester County sought to adopt New York State's contentions, and did not offer any contentions of its own. *Id.* In the alternative, Westchester County sought "interested governmental body" status pursuant to 10 C.F.R. § 2.315(c). *Id.*

As an initial matter, Entergy and Staff concede Westchester County's standing. *See* Answer of Entergy Nuclear Operations, Inc., Opposing Westchester County's Notice of Intention to Participate and Petition to Intervene ("Entergy Answer")(Jan. 22, 2008) at 5; NRC Staff's Response to Petitions for Leave to Intervene by [seven parties including] Westchester County ("Staff Response")(Jan. 22, 2008), at 15.

However, Entergy and Staff have opposed Westchester County's petition on grounds that Westchester County has failed to offer any admissible, stand-alone contentions as Entergy and

Staff believe is required by 10 C.F.R. § 2.309(f). Entergy and Staff did not object to Westchester County's request to obtain interested governmental party status pursuant to 10 C.F.R. § 2.315(c). *See* Entergy Opposition; Staff Opposition at 132, n.30, 94. Westchester County respectfully disagrees with Entergy and Staff's interpretation of 10 C.F.R. § 2.309(f).

## ARGUMENT

### POINT I

#### **The Plain Language of 10 C.F.R. § 2.309(f)(3) Allows Westchester County to Adopt Another Petitioner's Contentions Without Setting Forth a Separate, Admissible Contention**

10 C.F.R. § 2.309(d)(2) provides in relevant part that "[a] local governmental body (county, municipality or other subdivision) ... that desires to participate as a party in the proceeding shall submit a request for hearing/petition to intervene. The request/petition must meet the requirements of this section (including the contention requirements in paragraph (f) of this section)." Section (f) then requires that "a request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised." For each contention, the request or petition must, in relevant part:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted,
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing,... [and]

(vi)... provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact....

10 C.F.R. § 2.309(f)(1). Entergy and NRC Staff argue that this language requires Westchester County to have put in at least one independent admissible contention itself before it can adopt or co-sponsor another petitioner-intervenor's contention. Entergy Answer at 24; Staff Response at 132. Entergy offers section 2.309(c)(2) in favor of the proposition that "to intervene in an NRC licensing proceeding, a petitioner must proffer at least one admissible contention." Entergy Opposition to Westchester County at 6. However, the plain language of the regulation, 10 C.F.R. § 2.309(f)(1), does not explicitly require the submission of one admissible contention so long as the petitioner-intervenor "sets forth with particularity the contentions to be raised." 10 C.F.R. § 2.309(f)(1). Contrary to Entergy's argument, the language of 10 C.F.R. § 2.309(f)(1) does not preclude Westchester County from receiving party-status because it identified New York State's contentions as the contentions it intends to adopt or co-sponsor.

Pursuant to 10 C.F.R. § 2.309(f)(3), contentions may be sponsored by two or more requestors/petitioners.<sup>1</sup> 10 C.F.R. § 2.309(f)(3) states:

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<sup>1</sup>Although the term "requestor" is nowhere defined in the regulations, it appears to refer to a petitioner requesting to co-sponsor a contention.

If two or more requestors/petitioners seek to co-sponsor a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requestor/petitioner seeks to adopt the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

Westchester County agreed that New York State would be its representative for the 32 contentions it sought to adopt. *See* Westchester Petition to Intervene. Westchester County has complied with the language of the requirements in 10 C.F.R. § 2.309(f)(3).

As Entergy notes, “While the regulation acknowledges that two or more petitioners may co-sponsor a contention, *it does not address whether the petitioner who seeks co-sponsorship may be granted party status merely by incorporating contentions only by reference to another party’s pleading.*” Entergy Answer to Westchester County at 23 (emphasis added). Entergy’s lengthy brief in response to Westchester County’s petition<sup>2</sup> offers only one relevant case, *Consolidated Edison Co.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 131-33 (2001), as the basis for its position, and Staff cites no caselaw in favor of its position. The Commission in *Consolidated Edison* (a license transfer case, not a relicensing matter), did not have before it the question at hand (in that case, both petitioner-intervenors had submitted at least one admissible contention). However, the Commission offered as dicta (a “cautionary note”) the following language:

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<sup>2</sup>Much of Entergy’s 28-page response brief to Westchester County’s petition appears to be a generic summary of Entergy’s interpretation of relicensing regulations on the whole, and, therefore, would not be relevant to the question of whether Westchester may intervene under § 2.309(f)(3) as a party by adopting and co-sponsoring New York State’s contentions.

[We will not] permit wholesale incorporation by reference by a Petitioner who, in a written submission, merely establishes standing and attempts, without more, to incorporate the issues of other petitioners. Further, we would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own. Our contention-pleading rules are designed, in part, "to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions."

*Consolidated Edison Co.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC at 133 (citing to *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)). Although *Consolidated Edison* cited to *Duke Energy* to support its statement, Westchester County notes that *Duke Energy* did not involve the situation present here or discussed in the 2001 *Consolidated Edison* decision. For these reasons, Westchester County respectfully suggests that *Consolidated Edison's* dicta should not control here.

Moreover, the passage of time and the subsequent development of the Commission's regulations have overtaken any persuasive force that *Consolidated Edison's* 2001 "cautionary note" may have had. When the Commission issued *Consolidated Edison*, 10 C.F.R. Part 2 did not contain § 2.309(f)(3) – or even a Subpart C. Compare 10 C.F.R. Part 2 (2001), p. 42 ("Subpart C [Reserved]") with 10 C.F.R. Part 2 (2007). A review of the 2001 edition of 10 C.F.R. Part 2

reveals that the regulations did not contain a provision equivalent to the current § 2.309(f)(3). *See* 10 C.F.R. § 2.714 (2001).<sup>3</sup> Two and a half years after *Consolidated Edison*, the Commission revamped its intervention regulations. *See generally* 69 Fed. Reg. 2182 (January 19, 2004). As part of this regulatory restructuring, the Commission promulgated 10 C.F.R. § 2.309(f)(3), a new provision that permitted petitioners to adopt contentions presented by other petitioners and plainly does not contain the restrictions that Entergy seeks to impose by taking *Consolidated Edison* out of its historical context. The Commission examined the proposed § 2.309(f)(3) as part of the rule making process. *See, e.g.*, 69 Fed. Reg. at 2202, 2221. Had the Commission wished to add the requirement that Entergy and the Staff now urge, it could have attempted to do so. It did not, however. Accordingly, Westchester County respectfully submits that to the extent *Consolidated Edison* intended its “cautionary note” to be more than dicta in 2001, it should not now be read as grafting an additional requirement onto the subsequently-promulgated 10 C.F.R. § 2.309(f)(3), a requirement that appears nowhere in that subsection. Westchester County also notes that Entergy and the Staff’s reading of 10 C.F.R. § 2.309(f)(3) serves no purpose here as Westchester’s admission as a party through § 2.309(f)(3)’s authorized adoption process will not delay the administrative proceeding or prejudice the applicant or the Staff.

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<sup>3</sup>That *Consolidated Edison* was decided when a different generation of NRC regulations applied is clear from its reference to § 2.714, a provision that no longer exists. *See* 59 N.R.C. at 134, n. 20.

## POINT II

### **Westchester County is Entitled to Interested Local Governmental Body Status Pursuant to 10 C.F.R. § 2.315(c)**

In the alternative, Westchester County is assured the right of participation provided by 10 C.F.R. § 2.315(c). Section 2.315(c) establishes a right of participation by an interested local governmental body representative including the right to:

introduce evidence, interrogate witnesses where cross-examination by the parties where cross-examination by the parties is permitted..., advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the admitted contentions.

10 C.F.R. § 2.315(c). Pursuant to an earlier ASLB order in this proceeding, Westchester County will have 30 days from the date of a contention being admitted to petition for interested governmental status under 10 C.F.R. § 2.315(c). *See* Licensing Board Order (Denying Westchester County's Request for a 30-Day Extension of Time Within Which to Submit an *Amicus Curiae* Brief) at 2 (Nov. 28, 2007), ML073320465. However, Westchester County wishes to reiterate its intention to proceed as an interested local governmental body pursuant to 10 C.F.R. § 2.315(c) should the Board find in Entergy and Staff's favor on the issue of Westchester County's party status. Notably, neither Entergy nor Staff oppose Westchester County's request for interested local governmental body status pursuant to 10 C.F.R. § 2.315(c). *See* Entergy Opposition; Staff Opposition at 132, n. 30, 94.

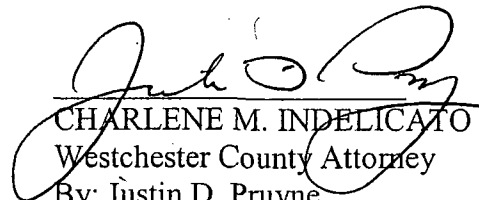


## CONCLUSION

For the above reasons, Westchester County respectfully requests that the Board grant its petition for a hearing and to intervene, granting Westchester County party status pursuant to 10 C.F.R. § 2.309(d)(2). Westchester County further requests that the contentions offered by New York State, and co-sponsored or adopted by Westchester County, be accepted. In the alternative, Westchester County seeks interested governmental body status pursuant to 10 C.F.R. § 2.315(c).

DATED: February 8, 2008  
White Plains, New York

Respectfully Submitted,



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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD PANEL**

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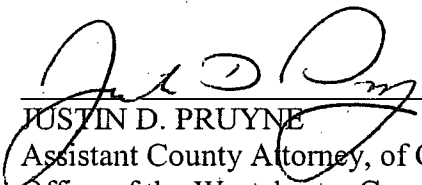
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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.302(b) and §§ 2.305(b) and (f), I hereby certify that copies of the foregoing Notice of Appearance and Notice of Intention to Participate and Petition to Intervene have been served upon the parties indicated on RIDER "A" by first class mail and, where indicated, also by electronic mail.

  
JUSTIN D. PRUYNE  
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Office of the Westchester County Attorney

Dated at White Plains, New York this 8<sup>th</sup> day of February, 2008

**CERTIFICATE OF SERVICE  
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