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August 11, 2008 (3:56pm)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop**

In the Matter of

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

**ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point Nuclear Generating Units 2 and 3)**

**ASLBP No. 07-858-03-LR-BD01
August 11, 2008**

NOTICE OF APPEAL

Connecticut Residents Opposed to Relicensing of Indian Point ("CRORIP") and its designated representative, Nancy Burton (collectively, "Petitioners"), herewith serve notice of appeal¹ to the U.S. Nuclear Regulatory Commission ("NRC") with regard to the decisions of the Atomic Safety and Licensing Board ("ASLB") Panel by Memorandum and Order ("Order on Petition") dated July 31, 2008 denying Petitioners' Petition to Intervene and Request for Hearing ("Petition to Intervene") dated December 10, 2007, and by Order ("Order on Waiver") dated July 31, 2008 denying Petitioners' 10 C.F.R. §2.335 Petition ("Petition for Waiver") dated December 10, 2007, in accordance with the provisions of 10 C.F.R. §2.311.

The ASLB Panel's Orders on Petition and Waiver misapprehend the facts and are

¹ The petitioners incorporate by reference herein their Petition to Intervene and Request for Hearing, their Reply to Answers of the applicant and staff, their 10 C.F.R. §2.335 waiver petition and the transcript of the ASLB Panel's hearing on March 12, 2008, accessible as ADAMS ML 080740259, pages 713-747.

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without legal basis.

Factual Background

CRORIP is an *ad hoc* organization of Connecticut organizations and individuals opposed to relicensing of the Indian Point Nuclear Power Station ("Indian Point"). Nancy Burton, who resides approximately 30 miles from Indian Point in Fairfield County, Connecticut, is CRORIP's designated representative as well as an individual intervenor-petitioner in these proceedings.

On December 10, 2007, the petitioners filed a Petition to Intervene and Request for Hearing, accompanied by a 10 C.F.R. §2.335 Petition for Waiver.

The Petition to Intervene asserted a single contention, as follows:

Health risks from the cumulative effects of radiation exposure traceable to Indian Point routine and accidental releases during the projected relicensing term are substantial, have not been adequately accounted for in the LRA and constitute new information which must be but which has not been analyzed under 10 CFR Part 51.

The NRC's Generic Environmental Impact Statement ("GEIS") deems health effects from nuclear power plant operations a "Category 1" issue which need not be considered during relicensing proceedings absent new and significant information or a waiver of the rule.

However, the petitioners pointed to new and significant information about health effects of exposure to radiation²; moreover, the petitioners petitioned for waiver of

² See Petition and accompanying Declarations of Joseph Mangano and Dr. Helen M. Caldicott.

application of the GEIS categorization of health issues as a "Category " issue in the relicensing proceeding. The petitioners relied on the following facts to support their filings:

1. The GEIS was published in 1996; its analysis of radiation releases from nuclear power plants and effects on human health were based on studies undertaken in the **1970s and 1980s** during the infancy of the nuclear power plants before occurrences of leakages from aging and cracked components. **The GEIS asserts that radiation releases from nuclear power plants will decrease over time.**

2. Facts informing the GEIS are inapplicable to Indian Point, whose operational life has been characterized by some of the highest releases of radiation to the air of any commercial nuclear power station in the nation, and which are increasing, according to the applicant's own reports to the NRC.

3. During the past six years, Indian Point's capacity factor has risen by 40 per cent - a number correlating with at least equal increases in radiation releases to the air.

4. Since publication of the GEIS, Indian Point has been granted several applications to amend its operating license to allow for power generation uprates; the percentage of uprate correlates with increased percentage of radiation releases to the air and a corresponding increase in health risks.

5. Epidemiological studies undertaken since 1996 correlate heightened cancer risks in communities nearest Indian Point.

6. Analysis of strontium-90 in baby teeth of children near Indian Point establishes a link between childhood cancer incidence, proximity to Indian Point and heightened

strontium-90 levels.

7. The applicant asserts that radiation found in the environment near the nuclear power plant is “background radiation” and is not attributable to its nuclear power plant operations which admittedly release significant quantities of radiation to the air; this position is patently false.

Legal Argument

The petitioners’ contention satisfies the standards of admissibility set forth in 10 C.F.R. § 2.309.

In every respect, the contention meets the NRC’s legal standards. The ASLB Panel did not identify any failings by the petitioners in complying with the technical and substantive standards of 10 C.F.R. §2.309

The ASLB Panel rejected the contention for the one stated reason: that it was “outside the scope of this proceeding”³ because the issue of health effects of Indian Point’s radiation releases is a GEIS Category 1 issue and the ASLB Panel found contemporaneously that the petitioners did not qualify for a waiver of the Category 1 issue.

The standards for waiver are set forth in 10 C.F.R. §2.335.

10 C.F.R. §2.335(b) provides:

. . . The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not

³ Order on Petition at 224.

serve the purposes for which the rule or regulation was adopted. . . .

The obvious purpose for adoption of the rule was to avoid unnecessary proceedings over issues so in common among nuclear power plants that it would be inefficient to deal with them in relicensing proceedings.

Clearly, the petitioners demonstrated that Indian Point radiation releases are very different from the findings and standards incorporated in the GEIS with regard to health issues and radiation releases and exposures.

For example, although the GEIS stated that radiation releases from nuclear power plants would decrease over time. The GEIS was published in 1996. Since 1996, radiation releases from Indian Point have increased substantially. Such increases are in part attributable to Indian Point's substantially increased capacity factor as well as recently allowed power uprates.

Indeed, the ASLB Panel chairman found that the increased capacity factor is site-specific to Indian Point⁴ - and thus the Order on Waiver is inconsistent with the ASLB Panel chairman's own finding: the evidence of the 40 per cent increase in capacity factor of the past six years constitutes a *prima facie* showing of special circumstances unique to Indian Point that is a prerequisite to the grant of a waiver as the petitioners request.

There is no evidence before the ASLB Panel that any other nuclear power plant in the nation has experienced a 40 per cent capacity factor increase during the past six years. Thus, the evidence submitted by the petitioners establishes a *prima facie* case of

⁴ Transcript of March 12, 2008 proceedings, at 726.

a site-specific condition warranting granting of the waiver. Nor is there any evidence before the ASLB panel that a 40 per cent capacity rate increase was considered as a factor by the GEIS.

Similarly, the GEIS's projection that radiation releases by nuclear power plants would decrease over time after 1996 has been flatly contradicted by Indian Point's operations since at least 1996, according to the effluent releases reports filed annually by the applicant. There is no evidence before the ASLB Panel that this is a circumstance common to other nuclear power plants.

Thus, the ASLB Panel was in error in dismissing the Petition for Waiver on the grounds that GEIS's projections of future ranges of doses as being within permissible doses has any relevance to Indian Point's unique operations, which do not conform with GEIS "findings."

The ASLB Panel misconstrues the Petition for Waiver as not presenting "evidence that radiation levels differ for Indian Point as a unique problem compared to other nuclear power plants."⁵ That is exactly what the Declaration of Joseph Mangano achieved: a science-based expose of how Indian Point's releases have been among the highest in the nation and are rising drastically - by 40 per cent over the past six years.

Moreover, the ASLB Panel set an impossible hurdle for any petitioner to overcome, in making a *prima facie* case of special circumstances, by stating : "Even if excessive radiological emissions have occurred at Indian Point they would pertain to current

⁵ Order on Waiver at page 5.

operations and therefore would not be within the scope of this proceeding.”⁶ Excessive radiological emissions are within the scope of this proceeding both as “new and significant information” and as evidence of special circumstances. Under the ASLB Panel’s overly broad ruling, it is impossible to establish a *prima facie* case based on known current circumstances. This surely constitutes sure an unreasonable interpretation of its rules. Future radiation releases exceeding limitations can hardly be postulated to occur except based on information known about current and past operations.

In error, the ASLB Panel rejected the petitioners’ Petition for Waiver based on considerations of the “Reference Man” standard. As the petitioners’ request has specific reference to Indian Point and its unique operational history - including its 40 per cent increase in capacity factor over the past six years - the petitioners have established a *prima facie* case for special circumstances existing at Indian Point which compel granting of the waiver sought.

The petitioners clearly pleaded facts not common to a large class of applicants or facilities that were not considered either explicitly or by necessary implication in the proceeding leading to the rule sought to be waived.” Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988). Thus, as GEIS projected radiation releases would go down over time and at Indian Point they have dramatically risen, and the applicant has provided no analysis of the health risks during the relicensing period due to the phenomenon of dramatically

⁶ Order on Waiver at footnote 18.

increasing radiation releases to the environment. Accordingly, the petitioners have satisfied the legal standard for waiver.

Conclusion

The ASLB Panel should have granted the Petition for Waiver and found the petitioners' contention admissible.

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RELICENSING OF INDIAN POINT
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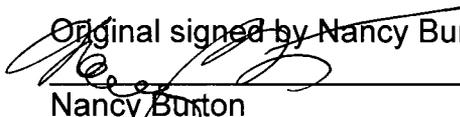
50-247-LR and 50-286-LR

AUGUST 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the August 11, 2008 CONNECTICUT RESIDENTS OPPOSED TO RELICENSING OF INDIAN POINT AND ITS DESIGNATED REPRESENTATIVE NANCY BURTON'S "NOTICE OF APPEAL" dated August 11, 2008 were served on this 11th day of August, 2008 upon the persons listed below, by first class mail and by email as shown below.

Original signed by Nancy Burton



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