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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

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

August 21, 2008

**ENTERGY NUCLEAR OPERATIONS, INC. ANSWER OPPOSING APPEAL OF  
CONNECTICUT RESIDENTS OPPOSED TO RELICENSING OF INDIAN POINT**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.311(b), Entergy Nuclear Operations, Inc. (“Entergy”) submits this brief in opposition to the “Notice of Appeal” filed by Connecticut Residents Opposed to Relicensing of Indian Point and Nancy Burton (collectively, “CRORIP”) in the Indian Point Nuclear Generating Units 2 and 3 license renewal proceeding.<sup>1</sup> On July 31, 2008, the Atomic Safety and Licensing Board (“Board”) issued an Order denying the CRORIP “Petition to Intervene and Request for Hearing,” filed on December 10, 2007 (“Petition to Intervene”).<sup>2</sup> In a separate, accompanying Order, the Board also denied the CRORIP 10 C.F.R. § 2.335 Petition, filed on December 10, 2007.<sup>3</sup> On August 11, 2008, CRORIP appealed both Board decisions. As discussed more fully below, the Board properly denied both the Petition to Intervene and the 10 C.F.R. § 2.335 Petition. Accordingly, the Commission should affirm the Board’s decisions.

<sup>1</sup> Notice of Appeal (Aug. 11, 2008) (“Appeal”). There is some ambiguity with regard to whether CRORIP intended to file its Appeal before the Board or the Commission. Although CRORIP notes in the text that it seeks Commission review, the caption of the Appeal indicates that it is before the Board.

<sup>2</sup> Licensing Board Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP-08-13, 68 NRC \_\_ (July 31, 2008) (slip op. at 3, 224) (“LBP-08-13”).

<sup>3</sup> See Licensing Board Order (Denying CRORIP’s 10 C.F.R. § 2.335 Petition) (July 31, 2008) (unpublished) (“Waiver Petition Order”).

TEMPLATE = SECY-037

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## II. PROCEDURAL HISTORY

On December 10, 2007, CRORIP concurrently filed its Petition to Intervene and a 10 C.F.R. § 2.335 Petition in this proceeding. In its Petition to Intervene, CRORIP proffered only one contention, Contention EC-1, which alleged that:

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 [license renewal application (“LRA”)] and constitute new information which must be but which has not been analyzed under 10 CFR Part 51.<sup>4</sup>

CRORIP alleged that historically high levels of radiological emissions at Indian Point provide a basis for its concern about potential releases during the license renewal term.<sup>5</sup> Citing to the attached declarations of Joseph J. Mangano (“Mangano Declaration”)<sup>6</sup> and Helen M. Caldicott (“Caldicott Declaration”), CRORIP asserted a purported statistical link between elevated levels of strontium-90 in baby teeth of children living in the region surrounding Indian Point and heightened cancer incidence in the same region that should have been addressed in the LRA.<sup>7</sup> Notably, CRORIP did not claim that exposure to radiation in surrounding areas exceeds the regulatory limits set by the Commission.

In apparent recognition that Contention EC-1 was outside the scope of this proceeding, CRORIP submitted a 10 C.F.R. § 2.335 Petition that requested a waiver from the findings of NUREG-1437, “Generic Environmental Impact Statement (“GEIS”) for License Renewal of Nuclear Plants” (1996), in two areas: (1) “its exclusion of radiation exposures to the public and

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<sup>4</sup> Petition to Intervene at 4.

<sup>5</sup> *Id.*

<sup>6</sup> Mr. Mangano, in his declaration, incorporated by reference his appended September 12, 2007 report entitled, “Public Health Risk to Fairfield County, CT of Keeping the Indian Point Nuclear Reactors Open” (“Mangano Report”).

<sup>7</sup> Petition to Intervene at 5.

occupational radiation exposures during the license renewal term as Category 1 . . . issues which do not require site-specific analysis,” and (2) “its use of the ‘Reference Man’ dose models from 1980.”<sup>8</sup> The 10 C.F.R. § 2.335 Petition included an affidavit by Nancy Burton (“Burton Affidavit”), which incorporated by reference the Mangano Declaration and Mangano Report. The Burton Affidavit also cited a study that purported to find that women have a greater chance than men of getting cancer from radiation exposure.<sup>9</sup>

Entergy opposed CRORIP’s Petition to Intervene and 10 C.F.R. § 2.335 Petition on the grounds that (1) the human health impacts from radiological releases are addressed in the GEIS and are listed in Table B-1, Appendix B to Subpart A of 10 C.F.R. Part 51 as Category 1 issues; and (2) Category 1 issues are outside of the scope of the proceeding and may not be challenged in an adjudication absent the grant of a waiver pursuant to 10 C.F.R. § 2.335.<sup>10</sup> Entergy further noted that the contention was generic in nature and amounted to a challenge to the Commission’s permissible dose regulations in 10 C.F.R. Part 20.<sup>11</sup> Entergy also established that CRORIP failed to show *any* instance where emissions from Indian Point exceeded NRC requirements.<sup>12</sup> The NRC Staff also opposed CRORIP’s Petition to Intervene and 10 C.F.R. § 2.335 Petition.

In its reply to the Entergy and NRC Staff answers, CRORIP expanded upon its earlier claim regarding upward trends in radiological releases and asserted, for the first time, that “the Indian Point capacity factor rose by nearly 40 per cent in six years” and that this increased

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<sup>8</sup> 10 C.F.R. § 2.335 Petition at 1.

<sup>9</sup> *Id.* ¶ 16.

<sup>10</sup> Answer of Entergy Nuclear Operations, Inc. Opposing Request for Hearing, Petition to Intervene and Petition for Waiver of Connecticut Residents Opposed to Relicensing of Indian Point, at 30-36 (Jan. 22, 2008).

<sup>11</sup> *Id.* at 43.

<sup>12</sup> *Id.* at 38-40.

capacity is associated with a corresponding increase in radioactive releases.<sup>13</sup>

The Board denied CRORIP's Petition to Intervene because CRORIP's sole contention, Contention EC-1, sought to raise generic issues challenging a Commission regulation, contrary to 10 C.F.R. § 2.309(f)(1)(iii).<sup>14</sup> In its separate Order denying CRORIP's 10 C.F.R. § 2.335 Petition, the Board found that CRORIP failed to allege "special circumstances" that were not considered in the GEIS rulemaking.<sup>15</sup> The Board also found that CRORIP failed to present evidence that there are any circumstances "unique" to Indian Point rather than common to a large group of nuclear power plants.<sup>16</sup> Specifically, the Board examined the Mangano Declaration and found that "Mr. Mangano does not identify circumstances that are unique to Indian Point."<sup>17</sup> With regard to CRORIP's request for waiver of the use of the "Reference Man" dose models, the Board found that CRORIP was asking for a "general regulatory change" that presented issues that were not limited to the Indian Point license renewal proceeding.<sup>18</sup>

### III. STANDARD OF REVIEW

"An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted."<sup>19</sup> As indicated in prior Commission decisions, "the Commission affirms Board

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<sup>13</sup> Connecticut Residents Opposed to Relicensing of Indian Point (CRORIP) and Nancy Burton's Reply to Answers of NRC Staff and Entergy Nuclear Operations, Inc. Opposing Request for Hearing, Petition to Intervene and Petition for Waiver, at 23 (Feb. 8, 2008) ("Reply").

<sup>14</sup> LBP-08-13, slip op. at 224.

<sup>15</sup> Waiver Petition Order at 6.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 5-6 (citation omitted).

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> 10 C.F.R. § 2.311(c). Taken by itself, the Waiver Petition Order would not be reviewable on appeal pursuant to 10 C.F.R. § 2.311. See *La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-95-7, 41 NRC 383, 384 (1995) (holding that licensing board rulings denying waiver requests are not considered final for purposes of appeal). However, given that the issue of waiver is inextricably intertwined with the Board's decision to deny CRORIP's

rulings on admissibility of contentions if the appellant 'points to no error of law or abuse of discretion.'"<sup>20</sup> Given the Commission's delegation to the Licensing Board of the initial screening of 10 C.F.R. § 2.335 petitions, this standard should also govern review of a denial of such a petition.<sup>21</sup> Furthermore, consistent with this standard, "[t]he appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."<sup>22</sup> As discussed in greater detail below, CRORIP has failed to point to any error of law or abuse of discretion in either of the Board's decisions and therefore, its Appeal should be denied.

#### **IV. THE BOARD DECISIONS ARE CORRECT AND SUPPORTED BY THE RECORD IN THIS PROCEEDING**

The Board properly found that CRORIP's 10 C.F.R. § 2.335 Petition failed to make the required *prima facie* showing of special circumstances that is required before the Board could certify the petition to the Commission. Having rejected the 10 C.F.R. § 2.335 Petition, the Board also correctly rejected CRORIP's Petition to Intervene.

As Entergy noted in its Answer, Contention EC-1 directly challenged the findings of the GEIS, which are codified in Table B-1, Appendix B to Subpart A of 10 C.F.R. Part 51. Table B-1 classifies the issues that CRORIP seeks to challenge as Category 1 issues. Specifically,

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Petition to Intervene, it may be appropriate for the Commission to consider the Board's decision regarding CRORIP's waiver request in reviewing LBP-08-13.

<sup>20</sup> *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 NRC 631, 637 (2004) (quoting *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)).

<sup>21</sup> See 10 C.F.R. § 2.335(d) (delegating the initial determination regarding a petition for waiver to the presiding officer and indicating that the petition should be certified to the Commission only if the petition makes a *prima facie* showing). See also *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002) (indicating procedural rulings are reviewed using the abuse of discretion standard).

<sup>22</sup> *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

Table B-1 lists human health impacts from “[r]adiation exposures to public (license renewal term)” as a Category 1 issue and indicates that such impacts would be SMALL because “[r]adiation doses to the public will continue at current levels associated with normal operations.” Similarly, Table B-1 classifies “[o]ccupational radiation exposures (license renewal term)” as a Category 1 issue and further indicates that such impacts would be SMALL because “[p]rojected maximum occupational doses during the license renewal term are within the range of doses experienced during normal operations and normal maintenance outages, and would be well below regulatory limits.” Under 10 C.F.R. § 51.53(c)(3)(i), a license renewal applicant may, in its site-specific environmental report (“ER”), refer to and adopt the generic environmental impact findings found in Appendix B, Table B-1, for all Category 1 issues.<sup>23</sup>

The Commission has repeatedly held—most recently in the *Vermont Yankee* and *Pilgrim* license renewal proceedings—that because the generic environmental analyses of the GEIS have been incorporated into NRC regulations, “the conclusions of [those] analys[es] may not be challenged in litigation unless the rule [10 C.F.R. § 51.53(c)(3)(i)] is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.”<sup>24</sup> The Commission emphasized that “[a]djudging Category 1 issues site by site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.”<sup>25</sup>

Consistent with this Commission precedent, the Board correctly found that CRORIP

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<sup>23</sup> An applicant, however, must include evaluations of site-specific Category 2 impacts and any “new and significant information” regarding generic Category 1 impacts. 10 C.F.R. § 51.53(c)(3)(ii), (iv).

<sup>24</sup> *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 (2007), *aff’d Massachusetts v. NRC*, 522 F.3d 115 (1st Cir. 2008); *see also Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 12 (2001).

<sup>25</sup> *Vermont Yankee*, CLI-07-3, 65 NRC at 21.

could only challenge Category 1 issues if it was granted a waiver pursuant to 10 C.F.R.

§ 2.335.<sup>26</sup> The Board described CRORIP's burden regarding its 10 C.F.R. § 2.335 Petition as follows:

[I]n order to secure a waiver, Petitioners must show that circumstances exist, which are specific to the ongoing proceeding and are of a nature that the purpose for which the challenged regulation was promulgated would be perverted if applied as written in the ongoing proceeding. This provision requires, at a minimum, that circumstances specific to this proceeding "undercut the rationale for the rule sought to be waived." Accordingly, in the Section 2.335 context, "[s]pecial circumstances are present only if the petition properly pleads one or more 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."<sup>27</sup>

In its Order, the Board clearly established that CRORIP failed to allege any "special circumstances" that were not considered in the GEIS rulemaking. Specifically, the Board examined the Commission's rationale for the determination that radiological human health impacts were generic and SMALL and concluded that this finding was based on compliance with NRC regulations addressing permissible doses.<sup>28</sup> Given this purpose, the Board properly rejected CRORIP's allegations of "special circumstances" because "CRORIP does not allege that radiation doses to the public or occupational workers rise above the permissible levels set by regulation."<sup>29</sup>

The Board also properly found that CRORIP failed to present any evidence that there are circumstances "unique" to Indian Point rather than common to a large group of nuclear power

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<sup>26</sup> See LBP-08-13, slip op. at 224; Waiver Petition Order at 2.

<sup>27</sup> Waiver Petition Order at 3 (quoting *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573, 597 (1988)). See also *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-05-24, 62 NRC 551, 560 (2005).

<sup>28</sup> Waiver Petition Order at 4 (quoting Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,476 (June 5, 1996)).

<sup>29</sup> *Id.* at 5.

plants.<sup>30</sup> In fact, when asked to address this specific factor at the pre-hearing conference, CRORIP conceded that it had not examined release levels of other plants and thus, was in no position to say whether the issue it raised was unique or was generic.<sup>31</sup> CRORIP was also unable to offer to the Board any information that showed Indian Point radiological releases exceeded NRC regulatory limits.<sup>32</sup>

Finally, the Board appropriately rejected CRORIP's request for waiver of the use of the "Reference Man" dose models after concluding that CRORIP was asking for a "general regulatory change" that presented issues that would not be limited to the Indian Point license renewal proceeding.<sup>33</sup>

Upon rejecting CRORIP's 10 C.F.R. § 2.335 Petition, the Board properly found Contention EC-1 inadmissible and denied CRORIP's Petition to Intervene.<sup>34</sup>

**V. CRORIP HAS IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION WITH RESPECT TO THE BOARD'S RULINGS**

On appeal, CRORIP claims that the Board erred in denying its 10 C.F.R. § 2.335 Petition because "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."<sup>35</sup> CRORIP further claims that while "the GEIS stated that radiation releases from nuclear power plants would decrease over time . . . radiation releases from Indian Point have increased substantially."<sup>36</sup> As support for this argument, CRORIP claims that the Board

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<sup>30</sup> *Id.* at 6.

<sup>31</sup> Tr. at 735 (Mar. 12, 2008).

<sup>32</sup> *Id.* at 728-30.

<sup>33</sup> Waiver Petition Order at 6-7.

<sup>34</sup> LBP-08-13, slip op. at 224.

<sup>35</sup> Appeal at 5.

<sup>36</sup> *Id.*



improperly ignored its evidence regarding an alleged “40 per cent capacity factor increase during the past six years.”<sup>37</sup> CRORIP also claims in its Appeal that the Board “misconstrues” its 10 C.F.R. § 2.335 Petition because the Mangano Declaration shows “how Indian Point releases have been among the highest in the nation and are rising drastically.”<sup>38</sup>

These arguments, however, ignore the Board’s decision (and the regulatory history cited therein), which demonstrates that the findings regarding radiological health impacts in the GEIS were based on compliance with NRC standards.<sup>39</sup> CRORIP has failed to articulate any reason why the Board’s conclusion regarding the rationale behind the Category 1 impact listing for radiological health impacts was incorrect. Given that the Category 1 impact was premised on compliance with NRC regulatory limits, there was no need for the Board to consider CRORIP’s allegations regarding increased releases or increased capacity factors absent a demonstration of the exceedence of regulatory limits, which CRORIP failed to do. Thus, CRORIP does not identify any error of law or abuse of discretion.

The CRORIP Appeal also asserts that the Board “set an impossible hurdle for any petitioner to overcome in making a *prima facie* case of special circumstances” because the Board indicated that “[e]ven if excessive radiological emissions have occurred at Indian Point they would pertain to current operations and therefore would not be within the scope of the proceeding.”<sup>40</sup> CRORIP, however, misconstrues the Board’s ruling. The Board did not indicate that it is impermissible to establish special circumstances by using current information, but rather

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<sup>37</sup> *Id.* In its Appeal, CRORIP’s suggestion that the Board Chairman actually made a “finding” that “the increased capacity factor is site-specific to Indian Point” is disingenuous at best. Appeal at 5 (citing Tr. at 726 (Mar. 12, 2008)). It is clear from the context of the cited exchange that the Board Chairman was merely probing the logic of CRORIP’s argument and was not making a factual “finding” on the 10 C.F.R. § 2.335 Petition.

<sup>38</sup> *Id.*

<sup>39</sup> Waiver Petition Order at 4.

<sup>40</sup> Appeal at 6-7 (citing Waiver Petition Order at 5-6 n.18).

that, because the license renewal environmental review is concerned with the impacts during the license renewal term,<sup>41</sup> a petitioner cannot raise issues that are concerned with the impact of current operations without showing that such impacts are likely to continue in the license renewal term. Thus, this argument also presents no error of law or abuse of discretion.

CRORIP further asserts that the Board erred in denying the request for waiver of the “Reference Man” standard because the 10 C.F.R. § 2.335 Petition included specific information regarding the Indian Point operational history, including the “40 per cent increase in capacity factor over the past six years.”<sup>42</sup> As indicated above, the Board properly considered and rejected the argument that any potential increase in dose constitutes special circumstances. Accordingly, there is no reason to reverse the Board’s decision.

Finally, in its Appeal, CRORIP incorrectly claims that the Board “did not identify any failings by the petitioners in complying with the technical and substantive standards of 10 C.F.R. § 2.309.”<sup>43</sup> This assertion again ignores the plain language of the Board’s Order, which indicates “that CRORIP’s contention is outside the scope of this proceeding.”<sup>44</sup> Accordingly, there was no error of law or abuse of discretion in the Board finding Contention EC-1 inadmissible.

## VI. CONCLUSION

For the foregoing reasons, the Commission should reject CRORIP’s Appeal and affirm the Board’s Orders.

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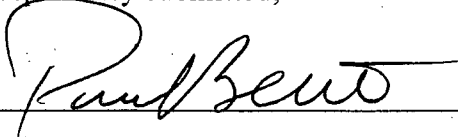
<sup>41</sup> See, e.g., 10 C.F.R. § 51.53(c)(3)(ii) (requiring that an ER “contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term”).

<sup>42</sup> Appeal at 7.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> LBP-08-13, slip op. at 224.

Respectfully submitted,



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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of )	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC. )	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3) )	August 21, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Entergy Nuclear Operations, Inc. Answer Opposing Appeal of Connecticut Residents Opposed to Relicensing of Indian Point" dated August 21, 2008, were served this 21st day of August, 2008 upon the persons listed below, by first class mail and, except where indicated by an asterisk, by e-mail as shown below.

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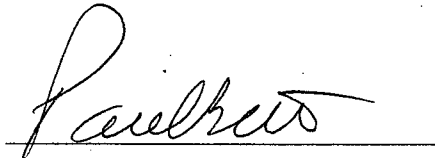
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