

RAS-E-180

September 22, 2008 (4:57pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

September 22, 2008

**APPLICANT'S ANSWER TO NEW YORK STATE'S MOTION REQUESTING
CONSIDERATION OF ADDITIONAL MATTERS IN THE LICENSING BOARD'S
FORTHCOMING SCHEDULING AND CASE MANAGEMENT ORDER**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") hereby files this Answer to New York State's ("New York") "Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order" ("Motion"), dated September 10, 2008. In its Motion, New York submits four proposals "for the Board's consideration, and requests that the Board, after consultation among the parties and between the parties and the Board, incorporate certain additional deadlines and protocols in its upcoming scheduling and case management order."¹ Entergy herein provides its position with respect to each of the four proposals contained in New York's Motion.²

¹ Motion at 3-5.

² On page 3 of its Motion, New York states that it submits "five issues for the Board's consideration." (emphasis added). As noted above, however, the Motion identifies only four discrete issues. On September 9, 2008, when New York counsel contacted Entergy counsel by e-mail in advance of filing the Motion per the consultation requirement of 10 C.F.R. § 2.323(b), New York counsel identified six proposed items for potential inclusion in the Motion. When New York counsel contacted NRC Staff counsel the next day, New York counsel identified only five proposed items for consideration. E-mail from S. Turk, NRC Staff, to J. Dean, State of New York, "State of New York, proposed motion re IP scheduling order," (Sept. 10, 2008). The reason for these disparities is not clear, though New York may simply have decided to drop two of its proposals as a result of the consultation process.

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II. DISCUSSION

Entergy's positions regarding New York's four proposals are set forth below. Entergy opposes the proposals, with the exceptions and qualifications stated below.

A. Site Visit (Item I of Motion)

New York Proposal

The Board's scheduling and case management order should authorize a site visit to Indian Point Units 1, 2, and 3 "at some reasonable time prior to the date for submission of prefiled direct testimony," and should "include parties' counsel, staff, and experts, as necessary."³

Entergy Response

New York does not indicate the intended purpose of, or legal basis for, its request for a site visit. To the extent that New York requests a site visit as a means to obtain discovery in this proceeding, Entergy opposes the request.⁴ As Staff counsel noted in response to New York counsel's inquiry regarding the Staff's position on this proposal, "[a] discovery expedition for the State's lawyers and experts is unwarranted and inappropriate."⁵ In short, New York provides no legal or regulatory basis in its Motion to support such a request.⁶

Assuming that New York views the proposed site visit to be a discovery tool, it has not

³ Motion at 3.

⁴ On this point, Entergy notes that Riverkeeper previously has suggested that it be given "permission to enter upon land or other property, for inspection and other purposes." See Riverkeeper, Inc.'s Request to the Atomic Safety and Licensing Board Regarding the Use of Subpart G and L Hearing Procedures for Admitted Contentions" at 4 (Aug. 21, 2008). Entergy similarly opposes such a request. See Applicant's Answer to Intervenors' Requests for the Application of Subpart G Procedures to Certain Admitted Contentions (Sept. 15, 2008) at 36-37.

⁵ E-mail from S. Turk, NRC Staff, to J. Dean, State of New York, "State of New York, proposed motion re IP scheduling order," (Sept. 10, 2008).

⁶ Entergy recognizes that 10 C.F.R. § 2.707(b) permits parties to Subpart G hearings to request permission to enter upon "designated land or other property . . . for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, *within the scope of § 2.704.*" (emphasis added). Unless the Board rules otherwise, however, this proceeding is presumptively governed by Subpart L procedures. See 10 C.F.R. § 2.310(a). Moreover, Section 2.707(b) states explicitly that any requests made under that section must be "within the scope of § 2.704;" *i.e.* "relevant to disputed issues." See 10 C.F.R. § 2.704(a)(1)-(2); *see also* 10 C.F.R. § 2.705(b)(1) (stating that scope of discovery in Subpart G proceedings, including discovery sought under 10 C.F.R. § 2.707, is limited "to any matter, not privileged, that is *relevant to the subject matter involved in the proceeding.*" (emphasis added).

explained how such a site visit would yield information relevant to any of its admitted contentions. The majority of New York's admitted contentions relate to the adequacy of Entergy's aging management programs ("AMPs") for certain plant structures and components that would not be readily visible or observable during a site tour. Specifically, these admitted contentions relate to AMPs for: (1) corrosion or leaks in *buried* systems, structures, and components; (2) *inaccessible* medium-voltage and low-voltage cables and wiring; (3) electrical transformers; (4) containment (water-to-cement ratio); (5) embrittlement of the reactor pressure vessel and associated internals; and (6) environmentally-assisted metal fatigue. New York makes no mention of any one of its admitted contentions, much less explains why a site visit is necessary for the resolution of those contentions.

Similarly, New York does not explain why a site visit would be necessary to the resolution of its admitted environmental contentions. Two of those contentions relate to the adequacy of Entergy's severe accident mitigation alternative ("SAMA") analyses and essentially challenge Entergy's use (including certain inputs or assumptions) of the MACCS2 computer code and the ATMOS module of that code. New York's other two admitted environmental contentions relate to Entergy's alleged need to consider: (1) energy conservation in the context of its "no-action" alternative analysis, and (2) the impact of increased real estate values in the vicinity of the plant purportedly caused by the non-renewal of the Indian Point operating licenses. New York again does not explain why a site visit is necessary to the resolution of contentions involving use of a computer code, energy conservation, or hypothetical changes in the real estate values of *offsite* properties.

Insofar as previous Licensing Boards have arranged for site visits, those visits have been principally for the benefit of the Board, *not* the parties. As such, the Board presumably may request a site visit if it concludes that such a visit might be "appropriate and helpful *to the Board* in the resolution of contentions."⁷ For example, the Board might request a site visit if it believes that such a

⁷ *Tennessee Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC __ (slip. op. Sept. 12, 2008) at 78 (seeking the parties' views regarding, *inter alia*, the usefulness of a site visit to the Board's resolution of

visit would facilitate its consideration of evidence at the hearing.⁸ Entergy, of course, would accommodate the Board if, in its sound discretion, the Board finds that a site visit would be appropriate and helpful to the Board's resolution of any admitted contention. If the Board requires a site visit, then Entergy understands that the Board would identify the purpose of the visit and issue appropriate procedures in advance of the visit.⁹

B. Conference Among Parties Regarding Production of Electronically Stored Information ("ESI") (Item II of Motion)

New York Proposal

To facilitate the Board's consideration of these ESI issues, as well as other case management and scheduling issues, it would be helpful for the parties to participate in a conference, in advance of submitting any case management and scheduling proposals, among themselves and/or with the participation of a representative of the Board or its staff, to seek to find common ground and identify conflicts, to better focus these issues for Board consideration. New York also seeks the Board's guidance on issues it, and other parties, should consider related to production of ESI.¹⁰

Entergy Response

Entergy supports aspects of this proposal; *i.e.*, insofar as it concerns the contemplated scheduling of a conference among the parties to discuss the mandatory disclosure process. Entergy

admitted contentions) (emphasis added). *See also Entergy Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), Docket No. 50-271 Licensing Board Order (Scheduling Site Visit) (July 17, 2007) at 1 (unpublished) ("The purpose of the visit is to allow *the Board* to view areas of the plant, and appropriate balance of plant areas, *that may be relevant to the contentions in this proceeding.*") (emphasis added) (hereinafter, "VY Site Visit Order").

⁸ *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-30, 58 NRC 454, 472 n.25 (2003) (citing *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 84 (1977)) (stating that "Commission adjudicators have long employed site visits as a way of assisting in reaching sound decisions," and that site visit observations may be used by the Board to confirm the evidence presented or "as a trigger for resolving [] disparities on the record through Board questions of witnesses and other similar techniques").

⁹ *See, e.g., VY Site Visit Order, Appendix A, "Site Visit Procedures – Vermont Yankee License Renewal Proceeding"* (limiting participation of the Applicant, Staff, and Intervenor to two counsel and two additional persons each; limiting participation of an Interested State to one counsel and one additional person; limiting questions to those posed by the Board only regarding site features and locations; stating need to follow normal site security and safety procedures; etc.).

¹⁰ Motion at 3-4.

assumes, however, that such a conference would be held only after the Board determines the applicable hearing procedures under 10 C.F.R. § 2.310. In addition, Entergy understands that such a conference would be conducted under the auspices (although not necessarily with the direct participation) of the Board. Entergy agrees that the required disclosures could be voluminous and include the production of ESI, and that early discussions among the parties regarding applicable disclosure protocols could be advantageous to the Board's development of its case management order and to the efficient conduct of this proceeding. For example, Licensing Boards overseeing other NRC adjudications have directed the parties to discuss, *inter alia*, matters related to the required disclosures under 10 C.F.R. § 2.336(a), prior to a prehearing conference with the Board.¹¹

At this juncture, while Entergy is amenable to participating in a conference with the other parties regarding applicable mandatory disclosure protocols, it would prefer to await specific direction from the Board.¹² In support of such direction, Energy respectfully suggests that any conference among the parties focus on practical or logistical matters associated with the disclosure process. Such matters might include, but not necessarily be limited to, schedule and format of production, production costs and responsibilities, the need to produce publicly available information, the need for privilege logs, and the schedule for supplemental disclosures. Entergy asserts, however, that such a conference should *not* include discussion of the scope of each party's disclosure obligations relative to particular admitted contentions, and, in this regard, objects to New York's

¹¹ See, e.g., *Bellefonte*, LBP-08-16, slip op. at 75-78 (directing the parties to conduct a conference within ten days of the date of the Board's order to make arrangements for the required disclosures); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Docket No. 50-0219, Notice of Conference Call (Conference Call to Discuss Matters Relating to Case Scheduling and Management) (Apr. 5, 2006) (unpublished) (instructing parties to prepare for discussion of case scheduling and management issues with the Board, and referring to the parties' advance efforts to develop a "protocol" for mandatory disclosures); *Entergy Vermont Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Licensing Board Order (Scheduling Prehearing Conference Call) (Oct. 11, 2006) (unpublished) (identifying various procedural matters, including mandatory disclosures, to be discussed at prehearing conference call, and directing the parties to confer before the call to discuss those procedural matters and, where possible, to develop joint positions or proposals).

¹² 10 C.F.R. § 2.329(a) states that the Board "may . . . direct the parties or their counsel to appear at a specified time and place for a conference or conferences before trial." As noted above, previous Boards have provided parties with guidance as to what issues they should confer about and/or be prepared to discuss *before* the prehearing conference.

supposition that Entergy is required and/or able to provide New York with access to particular computer models or records that may be proprietary to third parties.¹³ Such discussions would be premature and unwarranted at this stage of the proceeding.

C. Deadline for Filing Waiver Petitions Pursuant to 10 C.F.R. § 2.335 (Item III of Motion)

New York Proposal

The Board should establish a deadline (*e.g.*, within 45 days after the Board's issuance of its initial scheduling and case management order) for the submission of waiver petitions under Section 2.335. Given that Section 2.335 does not specify such a deadline, the Board's establishment of such a deadline would add predictability to the process and promote efficiency.¹⁴

Entergy Response

At this juncture, Entergy objects to New York's proposal. New York has not provided sufficient explanation or context for Entergy to conclude that a deadline for the submission of waiver petitions is warranted. New York does not indicate whether it intends to submit such a petition, or whether it believes that another party (including Entergy and the Staff) may submit a waiver petition. Entergy, while not questioning the Board's authority to establish a deadline, does not presently see the need for a deadline at this stage of the proceeding, and assumes that the parties to this proceeding understand the need to submit such petitions as soon as practicable.¹⁵

¹³ It is further unclear to Entergy why New York apparently desires access to the CHECWORKS code. That code pertains to Entergy's AMP for flow-accelerated corrosion ("FAC") and is not relevant to any admitted New York contention. Riverkeeper, which has not joined in New York's Motion, is the only party with an admitted contention related to FAC and Entergy's use of CHECWORKS. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC ___, slip op. at 162-69 (July 31, 2008).

¹⁴ New York Motion at 5.

¹⁵ *See, e.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982) ("Section 2.758 [now Section 2.335] does not specify a time limit for filing a petition. However, . . . any such petitions should be prepared and filed as soon as practicable. Such a petition filed inexcusably late in the proceeding would be viewed with disfavor and possibly denied on that basis alone.").

D. Advance and Timely Notification to the State and Other Parties of Meetings and Communications Between Entergy and the NRC Staff (Item IV of Motion)

New York Proposal

The Board should order NRC Staff to provide notice of all future meetings and phone calls between Entergy and NRC Staff concerning the license renewal application and/or this proceeding sufficiently in advance to allow representatives of New York or other parties or participants to attend the meeting or listen in on the phone conversation. The Board also should require the NRC Staff, whenever it sends a written communication (including e-mails) to Entergy about this matter, to also transmit the communication to counsel for the State at the same time and in the same manner. If Entergy sends a communication to the NRC Staff, it also should be required to simultaneously send the communication to the State's counsel and all other parties and participants.¹⁶

Entergy Response

Entergy opposes this proposal for the same reasons expressed by Staff counsel in his September 10, 2008, e-mail response to New York counsel. The NRC does, in fact, provide advance and timely notification to the State and other parties of meetings between Entergy and the Staff, in accordance with well-established procedures that apply to all NRC licensing proceedings.¹⁷ Inasmuch as the Staff conducts telephone calls with the Applicant as part of its application review process, summaries of those calls are made public. Requiring the Staff and Entergy to “copy” New York *counsel* on all written communications between those two entities (*i.e.*, the regulator and the regulated)—even those not relevant to any admitted New York contention—is both unreasonable and unworkable, and clearly would impose undue and unwarranted administrative burden on the Staff

¹⁶ New York Motion at 5-6.

¹⁷ *See, e.g.*, NRC Management Directive 3.5, “Attendance at NRC Staff Sponsored Meetings” (Revised Apr. 10, 2007) (defining types of agency meetings open and closed to public and procedures for planning, scheduling, noticing, announcing, and documenting public and nonpublic meetings); *see also* NUREG/BR-0297, “NRC Public Meetings” (Aug. 2002).

and Entergy.¹⁸

New York also ignores the fact that it is a party to this license renewal proceeding only with respect to its admitted contentions. Neither its admission as a party relative to those admitted contentions nor the fact that it is a state give it *carte blanche* to intrude upon the NRC regulatory process, including routine communications between the NRC Staff and Entergy that bear no relation to New York's admitted contentions. New York provides no legal basis to conclude otherwise. New York's fourth proposal simply appears to be part and parcel of its broader strategy to expand the scope of discovery beyond that permitted by Commission regulations.¹⁹

Entergy also disagrees with New York's assertion that the State will somehow be "disadvantaged" by the Board's refusal to grant its fourth proposal.²⁰ NRC regulations require the Staff to maintain a hearing file and all parties to disclose records relevant to the admitted contentions. This will ensure that New York, like every other party to this proceeding, has timely access to information *relevant* to its admitted contentions. Additionally, if New York believes that it has acquired any new and significant information, it can avail itself of the NRC's late-filing procedures for new and amended contentions.

¹⁸ As the Staff noted in its September 15 response to New York's request for the use of Subpart G procedures (p. 28 n.33), contrary to New York's assertion, Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021(l), which is incorporated in 10 C.F.R. § 2.315(c) ("Participation by a Person Not a Party"), does not confer "super-party" status on the State of New York.

¹⁹ In its September 18 response supporting New York's Motion, Riverkeeper takes New York's proposal one step further, stating that "the parties should also be copied with documents that are designated *as related to the current operation and any other aspect of the plant's operation*, in order to allow the parties to evaluate the potential relevance of the documents to license renewal." Riverkeeper, Inc.'s Response in Support of New York State Motion Requesting Consideration of Additional Matters at 2 (Sept. 18, 2008) (emphasis added). Clearly, this *de facto* discovery request is unduly broad and burdensome, and seeks information beyond the scope of this license renewal proceeding or any admitted contention.

²⁰ Motion at 5.

III. CONCLUSION

For the foregoing reasons, with the exceptions and qualifications stated above, Entergy opposes the proposals set forth in New York's Motion.

Respectfully submitted,



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Dated at Washington, DC
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
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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.) ASLBP No. 07-858-03-LR-BD01
)
(Indian Point Nuclear Generating Units 2 and 3))
_____) September 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to New York State's Motion Requesting Consideration of Additional Matters in the Licensing Board's Forthcoming Scheduling and Case Management Order," dated September 22, 2008, were served this 22nd day of September, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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