UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NANCY BURTON,	:	
Petitioner	:	
v.	:	**PETITION FOR REVIEW**
UNITED STATES OF AMERICA	:	
UNITED STATES NUCLEAR	:	
REGULATORY COMMISSION	:	
ENTERGY NUCLEAR OPERATIONS, INC.	:	
Respondents	:	**January 5, 2009** ::

Nancy Burton, petitioner in the above case, hereby petitions the United States Court of Appeals for the 2d Circuit for review of the final order entered by the United States Nuclear Regulatory Commission on the 6th day of November, 2008 ("CLI-08-27")(thereby affirming and adopting orders of the Atomic Safety and Licensing Board dated July 31, 2008 as set forth hereinabelow, and for which review is also sought).

(1) Nature of the Proceedings as to which review is sought.

The proceedings below concern the pending application to the respondent, U.S. Nuclear Regulatory Commission ("NRC"), by Entergy Nuclear Operations, Inc. ("Entergy") to renew the operating licenses of its Indian Point Nuclear Generating Units 2 and 3.

The petitioner, an individual residing in Redding, Connecticut, petitioned the NRC to become an intervening party to the proceedings on December 10, 2007 pursuant to 10 C.F.R. §2.309 and for a hearing on her single contention, which alleged that Entergy's license renewal application did not adequately account for health risks to local populations from the cumulative effects of radiation exposure from routine and

accidental releases of radiation from Indian Point Units 2 and 3.

In addition, the petitioner filed a request for waiver pursuant to 10 C.F.R. §2.335 in which she sought a waiver of NRC regulations adopting NUREG-1437, the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996)("GEIS") by which the NRC excluded the issue of occupational and radiation exposures during the license renewal term from site-specific analysis in relicensing proceedings.

The Atomic Safety and Licensing Board ("ASLB") established by the NRC to consider all challenges to the Entergy license renewal application rejected the petitioner's petition to intervene and request for a hearing as well as her request for 10 C.F.R. §2.335 waiver by separate orders entered on July 31, 2008 (attached hereto).

The petitioner filed an appeal of the ASLB's decisions with the NRC. By Memorandum and Order (CLI-08-27) dated November 6, 2008 (attached hereto), the NRC affirmed the ASLB decision and dismissed petitioner's petition to intervene and request for hearing and her request for 10 C.F.R. §2.335 waiver. This petition for review seeks review of the three said decisions and orders..

(2) Facts upon which venue is based.

The petitioner, Nancy Burton, resides in the state of Connecticut, which is within the judicial circuit of the U.S. Court of Appeals for the 2d Circuit. Therefore, venue is based on the residence of the petitioner, in accordance with 28 U.S.C. § 2343.

(3) Grounds on which relief is sought.

The petitioner contends that the agency decisions are unreasonable, clearly

erroneous and that the agency's dismissal of the petition was arbitrary, capricious and in abuse of its discretion.

More particularly, the petitioner contends that, contrary to the agency's decision-making, the challenged contention satisfies the legal standards of 10 C.F.R. §2.309 and the challenged waiver request satisfies the legal standards of 10 C.F.R. § 2.335.

(4) Relief prayed for.

The petitioner prays that her petition be sustained; that her petition be found to present an admissible contention pursuant to 10 C.F.R. § 2.309; that her waiver request be found to satisfy the requirements of 10 C.F.R. §2.335 and that this matter be remanded to the agency for a hearing on the merits of said petition.

THE PETITIONER
NANCY BURTON

Nancy Burton
147 Cross Highway
Redding Ridge CT 06876
Tel. 203-938-3952

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NANCY BURTON,	:	
Petitioner	:	
v.	:	**PETITION FOR REVIEW**
UNITED STATES OF AMERICA,	:	
UNITED STATES NUCLEAR	:	
REGULATORY COMMISSION,	:	
ENTERGY NUCLEAR OPERATIONS, INC.	:	
Respondents	:	January 5, 2009

CERTIFICATE OF SERVICE

I, Nancy Burton, hereby certify that a copies of the foregoing Petition for Review, Memorandum and Order (CLI-08-27((November 6, 2008), Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)(July 31, 2008) and Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing)(July 31, 2008)(pages I - 15, 221-225, 229) were sent via U.S. Mail, postage pre-paid, on January 5, 2009 to the following:

United States Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530-0001

United State Nuclear Regulatory Commission
Washington DC 20555-0001

Entergy Nuclear Operations, Inc.
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

DOCKETED
USNRC

November 6 2008 (1:30pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED NOVEMBER 6, 2008

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

CLI-08-27

MEMORANDUM AND ORDER

This proceeding concerns the application of Entergy Nuclear Operations, Inc. (Entergy) to renew the licenses for Indian Point Nuclear Generating Units 2 and 3. Before us is an appeal, filed jointly by Nancy Burton and Connecticut Residents Opposed to Relicensing of Indian Point (collectively, CRORIP).[1] CRORIP appeals two companion decisions of the Atomic Safety and Licensing Board in this matter: first, the Board's denial of a petition filed by CRORIP pursuant to 10 C.F.R. § 2.335; and second, the Board's denial of CRORIP's petition to intervene and request for hearing.[2] We deny CRORIP's appeal.

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[1] *Notice of Appeal* (Aug. 11, 2008)(CRORIP Appeal). Both the NRC staff and Entergy filed answers opposing the CRORIP Appeal. *NRC Staff's Answer in Opposition to CRORIP'S Appeal from LBP-08-13 and the Licensing Board's "Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)"* (Aug. 21, 2008); *Entergy Nuclear Operations, Inc. Answer Opposing Appeal of Connecticut Residents Opposed to Relicensing of Indian Point* (Aug. 21, 2008).

[2] Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition)(unpublished)(July 31, 2008)(Waiver Order); LBP-08-13, 68 NRC __ (July 31, 2008), slip op. at 3, 5, 221-24. The Board held that, while CRORIP established standing, its sole proposed contention fell outside the scope of the license renewal proceeding and was therefore inadmissible.

As a general matter, a board ruling denying a waiver request is interlocutory in nature, and therefore not appealable until the board has issued a final decision resolving the case.[3] Here, however, the Board's denial of CRORIP's waiver request is inextricably intertwined with its decision, in LBP-08-13, to wholly deny CRORIP's intervention petition – a decision which CRORIP may appeal immediately.[4] Pursuant to Section 2.335, CRORIP sought a waiver of NRC regulations adopting NUREG-1437, the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996) (GEIS), with regard to, first, the exclusion from site-specific analysis of occupational and public radiation exposures during the license renewal term,[5] and second, the NRC's use of the "Reference Man" dose models to calculate permissible levels of radiation exposure.[6] CRORIP's single proposed contention, in turn, argued that Entergy's license renewal application did not adequately account for the health risks to local populations from the cumulative effects of radiation exposure from routine and accidental releases of radiation from the plant[7] – in effect, challenging the same rules that CRORIP sought to waive in its Section 2.335 petition.

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[3] *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995). Section 2.335 (formerly 10 C.F.R. § 2.758) itself provides for immediate certification to the Commission *only* when the board finds a *prima facie* case in favor of a waiver. *Id.*; 10 C.F.R. § 2.335(d).

[4] 10 C.F.R. § 2.311. *See* LBP-08-13, 68 NRC __, slip op. at 229 (noting that the Board's decision is subject to appeal in accordance with Section 2.311).

[5] Waiver Order, slip op. at 4-6. *See Connecticut Residents Opposed to Relicensing of Indian Point and its Designated Representative's 10 C.F.R. § 2.335 Petition* (Dec. 10, 2007) (Waiver Petition), at 6-7.

[6] Waiver Order, slip op. at 6-7. *See* Waiver Petition at 1,7. *See generally* 10 C.F.R. §§ 51.95(c); 51.53(c)(3)(i); 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1.

[7] LBP-08-13, 68 NRC __, slip op. at 222-23, citing *Connecticut Residents Opposed to Relicensing of Indian Point and its Designated Representative's Petition to Intervene and Request for Hearing* (Dec. 11, 2007), at 4-5.

When considering whether to undertake "pendent" appellate review of otherwise non-appealable issues, the Commission, in the interest of efficiency and looking to analogous rulings by federal appeals courts, has expressed a willingness to take up otherwise unappealable issues that are "inextricably intertwined" with appealable issues.[8] We believe that the CRORIP Appeal presents an appropriate occasion to exercise pendent jurisdiction. The two decisions are so closely related that, in order to decide the immediately appealable challenge to the Board's decision in LBP-08-13, we must necessarily consider the validity of the Board's Waiver Order. We find that CRORIP's challenges to both decisions are appropriately considered simultaneously.[9]

We further find the Board's decisions regarding CRORIP's waiver request and intervention petition to be comprehensive and well-reasoned. The CRORIP Appeal fails to demonstrate that either of the Board's rulings was in error. For the reasons the Board has given, we therefore *deny* the CRORIP Appeal and *affirm* the Waiver Order and the Board's denial of CRORIP's intervention petition in LBP-08-13.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
This 6th day of November, 2008.

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[8] *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 19-20 (2001) (declining to exercise pendent jurisdiction where (among other things) the challenged "interlocutory" issues were not "inextricably intertwined" with the two immediately appealable issues), citing *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996).

[9] *See Gilda Marx*, 85 F.3d at 679.

LBP-08-13
DOCKETED 07/31/08
SERVED 07/31/08

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

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)	July 31, 2008

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MEMORANDUM AND ORDER
(Ruling on Petitions to Intervene and Requests for Hearing)

I. INTRODUCTION

Pending before the Board are Requests for Hearing and Petitions to Intervene filed by seven Petitioners in response to a Notice of Opportunity for Hearing issued on October 1, 2007,[1] concerning an application by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") to renew its operating license for the Indian Point Energy Center ("IPEC" or "Indian Point"), for twenty years beyond the current expiration date of September 9, 2013, for Unit 2 ("IP2") and December 12, 2015, for Unit 3 ("IP3").[2] Petitions are pending that were filed by the State of New York ("NYS"),[3] the State of Connecticut ("Connecticut"),[4] Riverkeeper, Inc. ("Riverkeeper"),[5]

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[1] Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period: Extension of Time for Filing of Requests for Hearing or Petitions for Leave To Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007). This notice extended the deadline listed in the original notice, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134 (Aug. 1, 2007), for the filing of requests for hearing or petitions for leave to intervene in the proceeding from October 1, 2007 to November 30, 2007.

[2] Indian Point is located in Buchanan, New York, on the Hudson River, approximately thirty-five miles north of New York City,

[3] New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) [hereinafter NYS Petition].

[4] Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut, for the License Renewal Proceeding for Indian Point Nuclear Generating Unit Nos. 2 and 3, DPR-26 and DPR 64 (Nov. 30, 2007) [hereinafter Connecticut Petition].

[5] Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant (Nov. 30, 2007) [hereinafter Riverkeeper Petition].

Hudson River Sloop Clearwater ("Clearwater"),[6] the Town of Cortlandt, New York ("Cortlandt"),[7] Connecticut Residents Opposed to Relicensing Indian Point ("CRORIP"),[8] and Westchester County, New York ("Westchester").[9] In addition, five petitioners who sought to be admitted have been dismissed from the proceeding.[10] Entergy and the NRC Staff filed Answers addressing these Petitions.[11] Each Petitioner filed a Reply.[12]

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[6] Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing (Dec. 10, 2007) [hereinafter Clearwater Petition].

[7] Town of Cortlandt Request for Hearing and Petition to Intervene (Nov. 29, 2008) [hereinafter Cortlandt Petition].

[8] Connecticut Residents Opposed to Relicensing of Indian Point and Its Designated Representative's Petition to Intervene and Request for Hearing (Dec. 11, 2007) [hereinafter CRORIP Petition].

[9] Westchester County's Notice of Intention to Participate and Petition to Intervene (Dec. 7, 2007) [hereinafter Westchester Petition].

[10] Petitions to Intervene were filed by the Village of Buchanan, New York, the City of New York, the New York Affordable Reliable Electricity Alliance, and Friends United For Sustainable Energy ("FUSE"). Those organizations were dismissed early on in this proceeding. Licensing Board Order (Denying the Village of Buchanan's Hearing Request and Petition to Intervene (Dec. 5, 2007) (unpublished); Licensing Board Order (Denying the City of New York's Petition for Leave to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Denying the New York Affordable Reliable Electricity Alliance's Petition to Intervene) (Dec. 12, 2007) (unpublished); Licensing Board Order (Granting the NRC Staff's Motion to Strike FUSE's Superceding Request for Hearing) (Feb. 1, 2008) (unpublished). In addition, a Petition to Intervene was submitted by Westchester Citizen's Awareness Network, Rockland County Conservation Association, Public Health and Sustainable Energy, the Sierra Club - Atlantic Chapter and Richard Brodsky (collectively "WestCAN") on December 10, 2007. We dismiss WestCAN from this proceeding in an Order that accompanies this Memorandum. Licensing Board Order (Striking WestCAN's Request for Hearing) (July 31, 2008) (unpublished).

[11] Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy NYS Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut (Jan. 22, 2008) [hereinafter Entergy Connecticut Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Riverkeeper Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Hudson River Sloop Clearwater Inc's Petition to Intervene and Request for Hearing (Jan. 22, 2008) [hereinafter Entergy Clearwater Answer]; Answer of

(continued...)

A petitioner who seeks leave to intervene as a party in an adjudicatory proceeding must (1) establish standing, and (2) proffer at least one admissible contention.[13] For the reasons discussed below, we grant the Requests for Hearing and Petitions to Intervene of NYS, Riverkeeper, and Clearwater, because we conclude that they have each established standing and have proffered at least one admissible contention. We deny the Requests for Hearing and Petitions to Intervene of CRORIP, Cortlandt, Connecticut, and Westchester. Although each has established standing, we conclude that they have failed to proffer an admissible contention.

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[11](...continued)
Entergy Nuclear Operations, Inc. Opposing Town of Cortlandt Request for Hearing and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Cortlandt Answer]; 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 (Jan. 22, 2008) [hereinafter Entergy CRORIP Answer]; Answer of Entergy Nuclear Operations, Inc. Opposing Westchester County's Notice of Intention to Participate and Petition to Intervene (Jan. 22, 2008) [hereinafter Entergy Westchester Answer]. NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County at 26 (Jan. 22, 2008) [hereinafter NRC Staff Answer].

[12] New York State Reply in Support of Petition to Intervene (Feb. 22, 2008) [hereinafter NYS Reply]; Reply of Richard Blumenthal, Attorney General of Connecticut to Entergy's and NRC Staff's Answers to Hearing Request and Petition to Intervene with Respect to Indian Point License Renewal Proceeding (Feb. 8, 2008) [hereinafter Connecticut Reply]; Riverkeeper, Inc.'s Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene (Feb. 15, 2008) [hereinafter Riverkeeper Reply]; Hudson River Sloop Clearwater Inc's Reply to Entergy and the [NRC] Responses to Clearwater Petition to Intervene and Request for Hearing (Feb. 8, 2008) [hereinafter Clearwater Reply]; Town of Cortlandt's Reply to (1) NRC Staff's Response to Town of Cortlandt's Request for Hearing and Leave to Intervene and (2) Answer of Entergy Nuclear Operations, Inc. Opposing Town of Cortlandt's Request for Hearing and Leave to Intervene (Feb. 8, 2008) [hereinafter Cortlandt Reply]; 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 (Feb. 8, 2008) [hereinafter CRORIP Reply]; Westchester County's Reply (Feb. 8, 2008) [hereinafter Westchester Reply]. The participants in this proceeding also filed numerous supplemental briefs pursuant to unpublished Board Orders.

[13] See 10 C.F.R. § 2.309(a).

However, Cortlandt, Westchester, and Connecticut may participate in the hearing as interested governmental entities pursuant to 10 C.F.R. § 2.315(c).

II. STANDING ANALYSIS

A. Standards Governing Standing

A petitioner must provide basic information supporting its claim to standing in order to satisfy the requirements of 10 C.F.R. § 2.309(d)(1)(ii)-(iv). This information must include (1) the nature of the petitioner's right to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. In addition, the NRC generally follows judicial concepts of standing,[14] which require that a petitioner "(1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision," commonly referred to as "'injury in fact,' causality, and redressability."[15]

In order for organizations to demonstrate standing to intervene, they must allege that the challenged action will cause a cognizable injury to the organization's interests or to the interests of its members.[16] When seeking to intervene as the representative for its members, an organization must identify a member by name and address, show how that member would be affected by the licensing action, and demonstrate that the member has authorized the

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[14] Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998).

[15] Id. (citing Steel Co. v. Citizens for a Better Env't., 523 U.S. 83, 102-04 (1998); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir. 1995)).

[16] Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 65 NRC 41, 52 (2007).

organization to request a hearing on his or her behalf.[17] In addition, the NRC applies a so-called proximity presumption, whereby a petitioner is presumed to have standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within fifty miles of the nuclear power reactor.[18] Meanwhile, a State or local governmental entity that wishes to be a party in a proceeding that involves a facility located within its boundaries is automatically deemed to have standing.[19]

B. Rulings on Standing

Neither Entergy nor the NRC Staff has challenged the standing of the Petitioners whose Requests for Hearing and Petitions to Intervene are currently before the Board. Each organization seeking to intervene in this proceeding has demonstrated institutional injury to the organization itself and also demonstrated that it is authorized to represent members who individually have standing. Accordingly, the Board finds that each Petitioner has demonstrated standing to intervene in this proceeding.

III. CONTENTION ANALYSIS

A. Standards Governing Contention Admissibility

Pursuant to 10 C.F.R. § 2.309(f), 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

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[17] Id.

[18] See, e.g., Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146-50 (2001) (applying the presumption in an operating license renewal proceeding); Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (observing that the presumption applies in proceedings for nuclear power plant "construction permits, operating licenses, or significant amendments thereto").

[19] 10 C.F.R. § 2.309(d)(2)(i)-(ii).

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 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.[20]

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[21] 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."[22] The Commission has emphasized that the rules on contention admissibility are "strict by design."[23] Failure to comply with any of these requirements is grounds for the dismissal of a contention.[24]

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[20] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

[21] Changes to Adjudicatory Process 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004); see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 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).

[22] 69 Fed. Reg. at 2,202.

[23] 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).

[24] 69 Fed. Reg. at 2,221; see also Private Fuel Storage, LLC (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).

The application of these requirements has been further developed as summarized below:

i. 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.[25] "[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention."[26] The brief explanation helps define the scope of a contention – the reach of a contention necessarily hinges upon its terms and its stated bases.[27]

ii. Within the Scope of the Proceeding

A petitioner must demonstrate that the "issue raised in the contention is within the scope of the proceeding,"[28] which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[29] Any contention that falls outside the specified scope of the proceeding must be rejected.[30]

iii. Materiality

In order 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

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[25] 10 C.F.R. § 2.309(f)(1)(ii).

[26] Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

[27] See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002); see also 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).

[28] 10 C.F.R. § 2.309(f)(1)(iii).

[29] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

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

is involved in the proceeding." That is, the Petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application.[31] "Materiality" requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.[32] 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.[33]

iv. 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."[34] It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately.[35] Failure to do so requires that the contention be rejected.[36]

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.[37] The petitioner does not have to

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[31] 10 C.F.R. § 2.309(f)(1)(iv).

[32] 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).

[33] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75-76 (1996), rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996).

[34] 10 C.F.R. § 2.309(f)(1)(v).

[35] Georgia Institute of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1 (1995), and CLI-95-12, 42 NRC 111 (1995).

[36] Palo Verde, CLI-91-12, 34 NRC at 155.

[37] Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16

(continued...)

prove its contention at the admissibility stage.[38] The contention admissibility threshold is less than is required at the summary disposition stage.[39] Nevertheless, while a "Board may appropriately view [p]etitioners' support for its contention in a light that is favorable to the [p]etitioner,"[40] a petitioner must provide some support for his contention, either in the form of facts or expert testimony.

"Mere '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.'"[41] Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking.[42] Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.[43]

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[37](...continued)
NRC 1649, 1654 (1982).

[38] Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

[39] See 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.

[40] Palo Verde, CLI-91-12, 34 NRC at 155.

[41] Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

[42] Georgia Tech, LBP-95-6, 41 NRC at 305. See also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[43] Yankee Nuclear, LBP-96-2, 43 NRC at 90.

Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention.[44]

In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that the petitioner does indeed supply adequate support for the contention.[45] But at the contention admissibility stage, all that is required is that the petitioner provide an expert opinion or "some alleged fact, or facts, in support of its position."[46]

v. 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.[47] Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.[48]

vi. 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

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[44] See Fansteel, CLI-03-13, 58 NRC at 204.

[45] 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).

[46] 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.

[47] 10 C.F.R. § 2.309(f)(1)(vi).

[48] 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).

adjudicatory proceeding."[49] 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.[50] 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.[51]

Applying the above-stated standards, our rulings on the various contentions are outlined in Parts VI through XII below.

IV. CONTENTION ADOPTION

Several petitioners in this proceeding seek to "adopt" or "incorporate" the contentions of other petitioners.[52] While the regulations allow for a petitioner to adopt the contentions of another petitioner,[53] they do not address specifically whether a petitioner may adopt another petitioner's contention without demonstrating that it has standing and submitting at least one admissible contention of its own. However, the Commission addressed this issue in a prior

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[49] 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).

[50] 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).

[51] Peach Bottom, ALAB-216, 8 AEC at 20.

[52] See infra pp. 147, 189, 203-05, 210, 221 and note 932.

[53] 10 C.F.R. § 2.309(f)(3).

> 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.

Indian Point proceeding.[54] In that case, the Commission allowed two petitioners, each of whom had proffered an admissible contention of its own, to adopt the other's contentions.[55] However, the Commission cautioned that it would not accept incorporation by reference of another petitioner's issues where the adopting petitioner had not independently met the requirements for admission as a party by demonstrating standing and submitting at least one admissible issue of its own.[56] While in that case the Commission did not rule on contention adoption by petitioners who had not offered any admissible contentions, based on the clear statement of the Commission's view, we conclude that in order for a petitioner to adopt the contention of another petitioner, it must first demonstrate that it has standing and submit its own admissible contention.

The issue of contention adoption was addressed by a Licensing Board in a more recent decision during a license renewal proceeding for the Vermont Yankee facility.[57] We do not, however, believe the facts and issues in that case are germane to those currently before the Board. In that case, two petitioners, each of which had submitted an admissible contention, sought to adopt the contentions of a third petitioner, and of each other.[58] The applicant opposed the adoption of the contentions because it believed that the petitioners should have addressed the criteria for nontimely contentions in their filings, while the NRC Staff did not oppose the adoption "so long as each party demonstrates an independent ability to litigate any contention

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[54] Consol. Edison Co. of NY (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001).

[55] Id. at 131-32.

[56] Id. at 133.

[57] Entergy Nuclear Vermont Yankee, LLC, (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 206-08 (2006).

[58] Id. at 206.

for which it becomes the primary sponsor."[59] The Board, in ruling that the petitioners could adopt the contentions, found unpersuasive the Commission's dicta in the earlier Indian Point decision that an adopting party must demonstrate an independent ability to litigate.[60] That Board did not address, however, the fundamental point relevant here, that a petitioner must demonstrate standing and present its own admissible contention to adopt the contentions of other petitioners.

Furthermore, we note that if a petitioner were not required to demonstrate standing and submit at least one admissible contention (to independently secure standing as a party to the proceeding) before being allowed to adopt the contentions of others, our hearing process would be unworkable. In the immediate proceeding for instance, all of the millions of citizens living within a fifty-mile radius of Indian Point – who could demonstrate standing by virtue of their proximity to the plant – would be able to become parties to this proceeding without putting in the time and effort necessary to submit an admissible contention. If only a few score of such petitioners sought to adopt contentions, our proceeding would be significantly impacted. Allowing the admission of numerous, minimally involved parties would make conducting a fair and efficient proceeding impossible. Accordingly, the Board will not allow a petitioner who has not submitted an admissible contention to adopt the contentions of other petitioners.

V. SCOPE OF NUCLEAR POWER GENERATING FACILITY RELICENSING PROCEEDINGS

The scope of proceedings challenging technical issues in the context of relicensing proceedings for nuclear powered electrical generating facilities is "limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an

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[59] Id.

[60] Id. at 207-08.

evaluation of time-limited aging analysis."[61] In addition, review of environmental issues in this proceeding is limited by 10 C.F.R. §§ 51.71(a) and 51.95(c) to site-specific environmental impacts.

A. Environmental Review Pursuant to Part 51

10 C.F.R. Part 51 divides environmental issues for license renewal into generic and site-specific components. The issues that have been dealt with generically are identified as Category 1 issues. Other issues that require site-specific analysis, are identified as Category 2 issues. Category 1 issues are not subject to challenge in a relicensing proceeding because they "involve environmental effects that are essentially similar for all plants [and] need not be assessed repeatedly on a site-specific basis."[62] Absent a waiver pursuant to 10 C.F.R. § 2.335, these Category 1 issues cannot be addressed in a license renewal proceeding.[63] Category 2 issues, on the other hand, are not "essentially similar" for all plants because they must be reviewed on a site-specific basis; accordingly, challenges relating to these issues are properly part of a license renewal proceeding.[64]

B. Part 54, Technical Review for Reactor Relicensing

Previously, the Commission determined that the safety issues relevant to reactor relicensing are significantly different from, and defined more narrowly than, those relevant during the original licensing proceedings that authorize facility construction and operation. Under that determination, certain safety issues that were reviewed for the initial license have

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[61] Florida Power & Light Co. (Turkey Point Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000) (citing 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal; Revisions, Final Rule, 60 Fed. Reg. 22,461 (May 8, 1995)).

[62] Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11 (2001).

[63] Id. at 12.

[64] Id. at 11.

been closely monitored by NRC inspection during the license term and need not be reviewed again in the context of a license renewal application.[65] The impacts of other matters, such as metal fatigue, corrosion, embrittlement, etc., are directly related to the detrimental results of aging. 10 C.F.R. Part 54 is designed to provide a thorough review of these impacts during the relicensing proceeding to ensure that they will be adequately managed so that the plant can be safely operated during the extended period of operation. These safety issues are the focus of the NRC Staff's technical review of the application for license renewal.[66]

The Current Licensing Basis ("CLB") refers to all of the Commission requirements applicable to a licensed nuclear power facility. More specifically, the CLB

> includes plant-specific design basis information documented in the plant's most recent Final Safety Analysis Report, and any orders, exemptions, and licensee commitments that are part of the docket for the plant's license, i.e., responses to NRC bulletins, generic letters, and enforcement actions, and other licensee commitments documented in NRC safety evaluations or licensee event reports.[67]

Ongoing NRC oversight programs are the mechanisms through which compliance with the CLB is monitored and ensured. The CLB need not be reviewed again and is not subject to attack in a license renewal proceeding.[68]

VI. NEW YORK STATE CONTENTIONS

A. NYS-1

THE LICENSE RENEWAL APPLICATION (LRA) VIOLATES 10 C.F.R. § 54.13 BECAUSE IT IS NEITHER COMPLETE NOR ACCURATE AND THUS, IN ORDER TO PROTECT THE DUE PROCESS AND 42 U.S.C. § 2239 RIGHTS OF THE INTERVENORS, THE BOARD SHOULD

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[65] Nuclear Power Plant License Renewal, Final Rule, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991); Turkey Point, CLI-01-17, 54 NRC at 7.

[66] See 10 C.F.R. §§ 54.21, 54.29.

[67] Turkey Point, CLI-01-17, 54 NRC at 9.

[68] Id. at 9-10.

preclude further consideration under NEPA."[1134] Finally, Cortlandt cites to a Sandia National Laboratory report, not mentioned in its Petition, that found that a plane crashing into a spent fuel pool would create a fireball leading to a large radioactive release.[1135]

ii. Board Decision - Cortlandt MC-3

Cortlandt MC-3 is inadmissible as explained above in the Board's decision on NYS-27, Connecticut EC-1, Riverkeeper EC-2, and Clearwater EC-6.[1136] The Commission has determined that the environmental impact of a terrorist attack on Indian Point is not within the scope of this proceeding.

XI. WESTCHESTER COUNTY PETITION

In its Petition Westchester does not offer a single contention, but seeks to support and adopt the NYS contentions discussed in Part VI above.[1137] Because Westchester has not submitted an admissible contention of its own, it is barred from adopting the contentions of any other party.[1138] Westchester's request to adopt the NYS contentions is therefore denied. Westchester may, however, participate in this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.315(c).

XII. CONNECTICUT RESIDENTS OPPOSED TO RELICENSING OF INDIAN POINT (CRORIP) CONTENTIONS

A. CRORIP EC-1

HEALTH RISKS FROM THE CUMULATIVE EFFECTS OF RADIATION EXPOSURE TRACEABLE TO INDIAN POINT ROUTINE AND ACCIDENTAL RELEASES DURING THE

[1134] Id. at 15 (citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-80-8, 11 NRC 297, 307 (1980), Potomac Alliance v. U.S. Nuclear Regulatory Comm'n, 682 F.2d 1030, 1036-37 (D.C. Cir. 1982)).

[1135] Id. at 15-16.

[1136] See supra Parts VI.AA.ii, Part VII.A.ii, VIII.D.ii, IX.F.ii.

[1137] Westchester Petition at 1.

[1138] See supra Part IV.

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.[1139]

i. Background – CRORIP EC-1

In its sole contention, CRORIP alleges that the LRA has not adequately taken account of the health risks to local populations from the cumulative effects of radiation exposure from the routine and accidental releases of radiation from Indian Point.[1140] The alleged basis for the contention is that Indian Point released the fifth highest amount of radiation between 1970 and 1993 compared to other nuclear power stations, and that there has been a six-fold increase in the release of fission gases from the fourth quarter of 2001 to the first quarter of 2002.[1141] According to CRORIP, this information "provide[s] a basis for concern about the potential releases of radiation during the projected relicensing period as the facility ages and cracks and leaks which have been detected currently inevitably worsen over time."[1142] CRORIP contends that the issue is material to the proceeding because the NRC must decide whether Indian Point can operate safely through the renewal period and, according to CRORIP, "Indian Point operations beyond the current licensing period will subject the public to undue health and safety risks which have not been adequately analyzed."[1143] Finally, CRORIP maintains that a statistical link has been established between elevated levels of the fission product strontium-90 in the baby teeth of children living near Indian Point and heightened incidences of cancer and related

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[1139] CRORIP Petition at 4.

[1140] Id.

[1141] Id.

[1142] Id.

[1143] Id. at 5.

diseases in the same population and that this information should have been addressed by Entergy in the LRA.[1144]

Entergy argues that the contention is inadmissible as it attempts to raise a generic issue already covered by the GEIS.[1145] Entergy asserts that the Petition and its supporting Declarations do not provide "any assertion or information showing that the Applicant has not and is not operating Indian Point Units 2 and 3 in accordance with the Commission's requirements with respect to radiological release. . . . [And] there is no basis for concluding that the pending application fails to satisfy NRC requirements for license renewal."[1146] Entergy points out that this same issue, again supported by Mr. Mangano, was raised and rejected in McGuire/Catawba, where that Licensing Board found that the matter is a Category 1 issue that does not require a site-specific analysis and that it is outside the scope of this proceeding.[1147] Entergy also maintains that the contention lacks specificity and is outside the scope of the proceeding in violation of 10 C.F.R. § 2.309(f)(iii). Essentially, Entergy believes this contention "is nothing more than a challenge to the Commission's permissible doses set by 10 C.F.R. Part 20, which simply cannot be contested in an individual license renewal proceeding such as this."[1148]

[1144] Id. (citing the Declaration of Joseph Mangano and the Declaration of Dr. Helen M. Caldicott).

[1145] Entergy CRORIP Answer at 30.

[1146] Id.

[1147] Id. at 31 (citing McGuire/Catawba, LBP-02-4, 55 NRC 49). Entergy also points to another case where CRORIP's designated representative, Nancy Burton proffered a similar contention that was rejected by the Board. Millstone, LBP-04-15, 60 NRC at 90-92. On review, the Commission found the contention to impermissibly deal with an operational issue not within the scope of license renewal. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 37 (2006).

[1148] Entergy CRORIP Answer at 43 (citing 10 C.F.R. § 2.335(a); Turkey Point, CLI-01-17, 54 NRC at 3).

The NRC Staff also opposes the admission of the contention because it is a challenge to a Category 1 issue, which is generic for all applicants and beyond the scope of license renewal proceedings.[1149]

CRORIP's Reply deals largely with the issue of the Section 2.335 waiver, which the Board deals with in an accompanying order, and does not need to address here.[1150] The only argument offered by CRORIP in its Reply regarding CRORIP EC-1 being within the scope of the proceeding is to point to its Petition for Waiver as "a clear set of circumstances which are unique to Indian Point and therefore qualify for waiver of the Category 1 rule."[1151]

ii. Board Decision – CRORIP EC-1

The Board finds that CRORIP's contention is outside the scope of this proceeding. It is a direct challenge to the Commission's GEIS for the relicensing of nuclear power generating facilities. As explained in our denial of CRORIP's Section 2.335 Petition,[1152] CRORIP has not pointed us to facts that are unique to the Indian Point facility. Likewise, CRORIP has not demonstrated that the application of the regulation here would be inconsistent with its purpose. Having denied the Section 2.335 Petition, we find this contention inadmissible.

XIII. CONCLUSION

Based on the preceding, the following Petitioners are admitted as Parties to this license renewal proceeding for the IPEC: New York State, Riverkeeper, and Clearwater. While not admitted as Parties to this proceeding pursuant to 10 C.F.R. § 2.309, the State of Connecticut,

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[1149] NRC Staff Answer at 107.

[1150] 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 (Feb. 8, 2008) [hereinafter CRORIP Reply].

[1151] Id. at 30.

[1152] Licensing Board Order (Denying CRORIP's 10 C.F.R. § 2.335 Petition) (July 31, 2008) (unpublished).

This Memorandum and Order is subject to appeal in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review must be filed within ten days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[1156]

/RA/
Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/
Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/
Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
July 31, 2008

[1156] A copy of this Order was sent this date by E-mail and First Class Mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for the Town of Cortlandt; (8) Counsel for Westchester County; (9) Counsel for New York City - Economic Development Corporation; (10) Mayor Daniel E. O'Neill, Representative for the Village of Buchanan; (11) Nancy Burton, Representative of CRORIP; and (12) Counsel for WestCAN, RCCA, PHASE and the Sierra Club - Atlantic Chapter; and Richard Brodsky.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/31/08
SERVED 07/31/08

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

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)	July 31, 2008

ORDER
(Denying CRORIP's 10 C.F.R. § 2.335 Petition)

The Board denies the petition to expand the scope of this license renewal proceeding that was filed jointly by Nancy Burton and Connecticut Residents Opposed to Relicensing of Indian Point (CRORIP) pursuant to 10 C.F.R. § 2.335.[1] As discussed below, we take this action because the petition fails to make the prima facie showing of special circumstances that is a prerequisite to the granting of any exception to, or waiver of the regulations governing this matter.

In this case, CRORIP sought the waiver of two specific regulatory provisions that had been promulgated by the Nuclear Regulatory Commission (NRC or Commission) to govern the scope of licensing renewal proceedings for nuclear powered electricity generating plants.[2]

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[1] Connecticut Residents Opposed to Relicensing of Indian Point and its Designated Representative's 10 C.F.R. § 2.335 Petition (Dec. 10, 2007) [hereinafter CRORIP Section 2.335 Petition].

[2] The regulatory authority relating to license renewal is found in 10 C.F.R. Parts 51 and 54. Part 51, concerning "Environmental Protection Regulations for Domestic Licensing and

(continued...)

Specifically, the Petitioners sought a waiver from the NRC's Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS) in the following areas: (1) "its exclusion of radiation exposures to the public and 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."[3] In support of this petition, CRORIP alleged, but did not demonstrate, the existence of special circumstances which it urged would justify the waiver of parts of the GEIS and expand such analysis into a site-specific inquiry.[4]

A party can successfully challenge issues outside of the proscribed scope of a nuclear generating plant relicensing proceeding only by petitioning for, and being granted, a waiver.[5] Section 2.335 expressly allows this Board, on motion of a party, to certify a request for a waiver

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[2](...continued)
Related Regulatory Functions," implements NEPA requirements relating to license renewal. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit 1), 66 NRC 41, 62-65 (2007). Part 54 concerns the "Requirements for Renewal of Operating Licenses for Nuclear Power Plants," and addresses safety-related issues in license renewal proceedings. Pursuant to this regulation the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs" is the issue that defines the scope of safety review in license renewal proceedings. Florida Power & Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 4 (2001).

[3] CRORIP Section 2.335 Petition at 1.

[4] Id. at 1-2. A summary of CRORIP's alleged special circumstances appears below at page 5. CRORIP also argues in support of its Petition that the process which produced the GEIS did not include components such as public input and operational conditions occurring post-adoption of the GEIS. Id. at 5. Assuming that these statements are accurate, they nevertheless offer no support for CRORIP's Section 2.335 Petition because they constitute a general challenge to the regulation rather than a site-specific challenge based on circumstances unique to Indian Point. See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005). If CRORIP believes that the NRC's GEIS is defective, it may proceed with a petition for rulemaking under 10 C.F.R. § 2.802. It is not appropriate for CRORIP to challenge the validity of a NRC Regulation in the context of this proceeding.

[5] Turkey Point, CLI-01-17, 54 NRC at 11-13.

to the Commission, which will then decide whether special circumstances exist to justify a waiver to consider issues beyond the normal scope of a license renewal proceeding.[6] However, the findings which the Board must make in order to support the certification of a waiver petition to the Commission are very limited and very specific. Section 2.335(b) provides:

> A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. 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 serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise (emphasis added).

Accordingly, in 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."[7] 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."[8]

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[6] See 10 C.F.R. § 2.335(b).

[7] Public Service Co. Of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988).

[8] Id.

The GEIS was an amendment to the requirements of Part 51 for the purpose of establishing environmental review requirements for license renewals "that were both efficient and more effectively focused."[9] In order to increase efficiency and focus, the Commission categorized issues on which it found "generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants," to be Category 1 issues.[10] Category 1 issues involve "environmental effects that are essentially similar for all plants," and thus "need not be assessed repeatedly on a site-specific basis, plant-by-plant."[11] The regulations promulgating the GEIS set forth the purpose behind this human health standards as follows:

> The Atomic Energy Act requires the Nuclear Regulatory Commission to promulgate, inspect and enforce standards that provide an adequate level of protection of the public health and safety and the environment. The implementation of these regulatory programs provides a margin of safety. A review of the regulatory requirements and the performance of facilities provides the bases to project continuation of performance within regulatory standards. For the purposes of assessing radiological impacts, the Commission has concluded that impacts are of small significance if doses to individuals and releases do not exceed the permissible levels in the Commission's regulations.[12]

For NEPA purposes, the Commission determined that occupational radiation exposure during the license renewal period is small where the projected maximum occupational doses during the license renewal term are within the range of doses experienced and permitted during normal operations.[13]

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[9] Turkey Point, CLI-01-17, 54 NRC at 11.

[10] Id. (citing 10 C.F.R. Part 51, Subpt, A, App. B).

[11] Id.

[12] See Final Rule: Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,476 (June 5, 1996), amended by 61 Fed. Reg. 66,537 (Dec. 18, 1996).

[13] 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1. Petitioners do not claim that exposure to radiation in surrounding areas exceeds the regulatory limits set by the Commission.

Given the purpose underlying the characterization of public and occupational radiation levels as Category 1 issues, the Board must consider whether CRORIP has demonstrated the existence of special circumstances which could justify waiving the Commission's regulations. In this proceeding, the alleged "special circumstances" relied upon by Petitioners are increased levels of Strontium-90 and cancer related illnesses in areas surrounding the Indian Point nuclear facility.[14] CRORIP does not allege that radiation doses to the public or occupational workers rise above the permissible levels set by regulation; rather, the Petitioners point to a study completed by their expert that evidenced increased levels of Strontium-90 in baby teeth.[15]

However, CRORIP has presented no evidence that radiation levels differ for Indian Point as a unique problem compared to other nuclear power plants. Rather, this issue is common to a large group of nuclear power plants. Instead CRORIP argues that:

> Indian Point's radiological emissions cannot be completely disregarded as a possible factor in the high levels of strontium-90 found in baby teeth near the plant and the correlation found between high strontium-90 levels and elevated cancer incidences in communities closest to the plant.[16]

CRORIP has submitted the Declaration of Joseph Mangano to support this argument.[17] The Mangano Declaration, however, does not represent that radiological releases that have occurred in the past, or which may reasonably be anticipated in the future at Indian Point have, or likely will exceed established radiological dose limits.[18] Likewise Mr. Mangano does not

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[14] Declaration of Joseph J. Mangano (Nov. 30, 2007) submitted as an exhibit with [CRORIP] and It's Designated Representative's Preliminary Petition to Intervene and Request for Hearing (Dec. 10, 2007) [hereinafter Mangano Declaration].

[15] Id.

[16] CRORIP Section 2.335 Petition at 6-7.

[17] Id.

[18] Even if excessive radiological emissions have occurred at Indian Point they would pertain to current operations and therefore would not be within the scope of this proceeding.

(continued...)

identify circumstances that are unique to Indian Point. To the contrary, as pointed out by the NRC Staff in their reply to CRORIP's petition, Mr. Mangano states that:

> "Like all nuclear reactors" Indian Point Units 2 and 3 produce numerous fission products, including "Cesium-137, Iodine-31 and Strontium-90," and "like all nuclear power reactors, Indian Point 2 and 3 emit radioactivity, in the form of gasses and particles, into the air and water on a routine basis."[19]

The Board finds that the evidence presented by CRORIP fails to show special circumstances unique to the Indian Point nuclear facility (or an identified group of nuclear facilities) that would support a waiver of GEIS rules under Section 2.335(b). The Commission enacted the GEIS Category 1 exclusions with the recognition that radiation exposure is a safety issue affecting a large class of facilities.[20] The purpose behind those rules is to utilize an efficient and safe measure for regulating radiation exposure and dose levels that could properly protect the interests of the public.

CRORIP also asks for a waiver of the use of the "Reference Man" dose models used to calculate permissible levels of radiation exposure.[21] CRORIP cites to a study that reports "women have a 52 percent greater chance than men of getting cancer from radiation exposure . . . . [y]et, radiation protection regulations applicable to U.S. nuclear power plants is still stuck in the past - their 'reference' person is a man."[22] For the Reference Man dose model, CRORIP is asking for a general regulatory change to take into account the actual doses of radiation

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[18](...continued)
Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 37-38 (2006).

[19] NRC Staff's Response to the Petition for Waiver of Commission Regulations Filed by [CRORIP] at 8 (Jan. 22, 2008) (quoting Mangano Declaration ¶¶ 3-4).

[20] See NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (May 1996); 61 Fed. Reg. at 28,467; 10 C.F.R. Part 51, Subpt. A, App. B.

[21] CRORIP Section 2.335 Petition at 7.

[22] Id.

absorbed by women, children and fetuses – and state that "a central principle of environmental health protection – protecting those most at risk – women, children and fetuses – is missing from the regulatory framework."[23]

CRORIP's issue is not limited to the issue of relicensing at Indian Point, but rather presents an argument against use of the Reference Man dose in any relicensing proceeding. CRORIP fails to show any special circumstances warranting a different dose model for permissible dose levels for the area specifically surrounding Indian Point. Rather, Petitioners issue a generalized grievance with Commission rules and regulations in the form of a rule waiver. "An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process."[24] The Board cannot find any evidence of special circumstances justifying a certification of the issue of the NRC's use of the "Reference Man" dose models to the Commission. As noted by the Commission, Petitioners may file a petition for rulemaking under 10 C.F.R. § 2.802, which would be "the appropriate means for requesting Commission consideration of generic issues . . . . "[25]

For the foregoing reasons, this Board cannot certify CRORIP's challenge to the applicability of the challenged Commission Regulations to this license renewal proceeding because the petition fails to make a prima facie showing of special circumstance warranting a Section 2.335 waiver.

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[23] Id.

[24] Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 252 (2006); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974).

[25] Millstone, CLI-05-24, 62 NRC at 562.

Accordingly, CRORIP's petition to waive portions of the NRC's GEIS and "Reference Man" dose models is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[26]

/RA/
Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/
Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/
Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, MD
July 31, 2008

[26] A copy of this Order was sent this date by First Class Mail to: (1) Nancy Burton as the representative of CRORIP; (2) Counsel for the NRC Staff; (3) Counsel for Entergy; (4) Counsel for the State of New York; (5) Counsel for the State of Connecticut; (6) Counsel for Riverkeeper, Inc.; (7) Manna Jo Green, the representative for Clearwater; (8) Counsel for WestCan, CAN, RCCA, PHASE and the Sierra Club - Atlantic Chapter; (9) Counsel for Westchester County; and (10) Counsel for the Town of Cortlandt.