

April 13, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO STATE OF NEW YORK'S
"MOTION TO STRIKE ENTERGY'S MOOTNESS
ARGUMENT FROM ITS MARCH 24, 2009 ANSWER
TO THE STATE OF NEW YORK'S DSEIS CONTENTIONS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to the "Motion To Strike Entergy's Mootness Argument From Its March 24, 2009 Answer To The State Of New York's DSEIS Contentions" ("Motion") filed by the State of New York ("New York" or "State") on March 31, 2009. For the reasons set forth below, the Staff believes that New York's Motion -- although grounded upon a correct view of proper litigation procedures -- should be denied; at the same time, however, the Staff believes that the Atomic Safety and Licensing Board ("Board") should disregard the assertions of mootness made by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") with respect to New York Contentions 9 and 17, at this time, unless the Board determines to rule *sua sponte* on the potential mootness of New York Contentions 9 and 17 or the Applicant files a motion to dismiss those contentions as moot.

DISCUSSION

On February 27, 2009, the State filed five amended and new contentions¹ concerning the Staff's Draft Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996), regarding the license renewal application for Indian Point Units 2 and 3.² On March 24, 2009, answers to New York's five DSEIS contentions were filed by Entergy³ and the Staff.⁴

In its response to New York's new and amended environmental contentions, Entergy recited Commission precedent regarding the potential dismissal of a contention on grounds of mootness, Entergy Response at 11-12, in support of its assertions that New York Contentions 9 and 17, as environmental contentions of omission, have been rendered moot by the issuance of the Staff's Draft SEIS and therefore "should" or "should now be,"⁵ or "must be"⁶ dismissed as moot. In response, New York challenges Entergy's assertions, stating that Entergy should have, but did not, file a motion to dismiss Contentions 9 and 17 as moot, and it moves to strike "Entergy's mootness arguments and request from its March 24, 2009 Answer." Motion at 2.

¹ "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," dated February 27, 2009 ("New York's DSEIS Contentions").

² "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment," NUREG-1437 Supplement 38 (December 2008) ("Draft SEIS" or "DSEIS").

³ "Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State," filed March 24, 2009 ("Entergy's Response").

⁴ "NRC Staff's Answer to Amended and New Contentions Filed By the State of New York and Riverkeeper, Inc., Concerning the Draft Supplemental Environmental Impact Statement," filed March 24, 2009 ("Staff Response").

⁵ See Entergy's Response, at 2, 16, 37, and 66.

⁶ See Entergy's Response, at 17, 19, 37, and 39.

The Staff shares New York's view that under proper litigation procedures, a request for affirmative relief should be made in the form of a properly titled motion. Indeed, the Staff has recently expressed this view in response to a pleading filed by another intervenor in this proceeding, where that party had sought affirmative action by the Board but its "failure to properly describe the nature of its filing effectively failed to provide proper notice to other parties that a response to its filing might be required."⁷ The Staff believes that principles of fairness require that requests for relief be properly titled, to assure proper notice is provided to parties who may oppose the requested relief. *See generally*, 10 C.F.R. § 2.323(b); Fed. R. Civ. P., Rule 7(b)(1) ("A request for court order must be made by motion").

While a motion for summary disposition or to dismiss a contention as moot may not be strictly required,⁸ here, the Applicant's inclusion of mootness arguments in its response to the State's new and amended contentions may limit the ability of other parties to respond to those arguments. To be sure, under 10 C.F.R. § 2.309(h)(2), the State is explicitly afforded an opportunity to reply to the Applicant's Answer, and it therefore has not been prejudiced by the Applicant's inclusion of its mootness arguments in its Response; at the same time, however, the time afforded for the State to reply to the Applicant's Response under § 2.309(h)(2) (*i.e.*, 7 days) is shorter than the 10-day period afforded by 10 C.F.R. § 2.323(c), potentially adversely affecting its ability to reply. Further, although other parties (including the Staff) are afforded the right to respond to motions filed under 10 C.F.R. § 2.323, no opportunity is afforded for such

⁷ "NRC Staff's Answer to "Riverkeeper, Inc.'s Preservation of Right to Amend Contention TC-2 – Flow Accelerated Corrosion Based Upon NRC Staff's Safety Evaluation Report With Open Items," dated March 30, 2008, at 2.

⁸ *See, e.g., USEC, Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC 433, 444-45 (2006) (a mooted contention may be resolved "as part of the contention admission phase of the proceeding" rather than by the filing of a motion for summary disposition).

parties to reply to arguments contained in a response filed under 10 C.F.R. § 2.309(h) – and indeed, the filing of such a response is barred by 10 C.F.R. § 2.309(h)(3).

Notwithstanding this view, the Staff believes that the Applicant's assertions of mootness should not be stricken from its Answer. To the contrary, those arguments provide relevant information that places the State's new and amended contentions in proper context, assuring that the interrelationship of the State's new assertions can be understood and compared to the State's admitted contentions. Rather than striking those arguments, the Staff believes that the Board should disregard the Applicant's assertions that New York Contentions 9 and 17 "should" or "must" be dismissed as moot at this time;⁹ further, the Staff believes that if the Applicant wishes to pursue its views regarding the mootness of those contentions, it can and should properly file a motion to dismiss the contentions as moot, in accordance with 10 C.F.R. § 2.323.

CONCLUSION

For the foregoing reasons, the Staff respectfully opposes New York's Motion, but recommends that the Board disregard the Applicant's assertions that New York Contentions 9 and 17 should or must be dismissed as moot at this time.

Respectfully submitted,



Sherwin E. Turk
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 13th day of April 2009

⁹ Alternatively, the Board may rule *sua sponte* on the mootness of New York Contentions 9 and 17, and may, if it chooses, solicit the parties' views on that issue.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'STATE OF NEW YORK'S "MOTION TO STRIKE ENTERGY'S MOOTNESS ARGUMENT FROM ITS MARCH 24, 2009 ANSWER TO THE STATE OF NEW YORK'S DSEIS CONTENTIONS,'" dated April 13, 2009, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 13th day of April, 2009:

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