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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY LICENSING BOARD

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In re:

License Renewal Application Submitted by

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.

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

ASLBP No. 07-858-03-LR-BD01

DPR-26, DPR-64

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

NRC Staff released its Draft Supplemental Environmental Impact Statement ("DSEIS") on December 22, 2008. On February 27, 2009, the State of New York submitted five contentions based on the Staff's DSEIS. Entergy and NRC Staff submitted Answers to the State's contentions on March 24, 2009.[1] In Entergy's Answer, Entergy attempts to have this Board dismiss previously-admitted Contentions NYS-9 and NYS-17. The State respectfully submits that such a request is not authorized by the Commission's regulations absent a timely motion.

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[1]*See* Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State (Mar. 24, 2009) ("Entergy Answer"); 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 (Mar. 24, 2009).

TEMPLATE = SECY-041

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Accordingly, the State now moves to strike Entergy's mootness arguments and request from its March 24, 2009 Answer.

CERTIFICATION OF CONSULTATION PURSUANT TO 10 C.F.R. § 2.323

Prior to filing this motion, on Monday, March 30, 2009, and Tuesday, March 31, 2009, Assistant Attorneys General John Sipos and Janice Dean contacted Kathryn Sutton, Esq., Paul Bessette, Esq., and Martin O'Neill, Esq., counsel for Entergy via electronic mail and via teleconference to discuss resolution of this matter. A copy of AAG Sipos's initial March 30 email is attached as Exhibit A.

During a teleconference held on the afternoon of March 30 with AAG Dean and Messrs. Bessette, O'Neill, and Sipos, counsel for Entergy stated Entergy's belief that Entergy's procedural approach (*i.e.*, raising mootness of an already admitted contention within a contention admissibility pleading regarding different contentions and not via motion) to be warranted pursuant to *In the Matter of USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (Apr. 3, 2006). Counsel for Entergy and the State discussed *USEC*. Counsel for Entergy further stated their opinion that had Entergy proceeded via motion for summary disposition, no time-limit would have applied to such filing and that Entergy would not have been bound by the 10-day time limit found in 10 C.F.R. § 2.323.

Thereafter, counsel for the State again reviewed *USEC*, and the parties (via Messrs. Bessette, O'Neill, and Sipos) had a second phone conference on March 31, 2009 during which the State confirmed that its reading of *USEC* differed from Entergy's. Parties have a good faith disagreement about the appropriate reading of the *USEC* case and the application of 10 C.F.R. § 2.323 to Entergy's request for affirmative action by the Board.

BECAUSE ENTERGY EFFECTIVELY MADE A MOTION TO DISMISS NYS CONTENTIONS 9 AND 17 THAT DOES NOT COMPLY WITH THE COMMISSION'S PROCEDURAL REGULATIONS, ENTERGY'S REQUEST SHOULD BE STRICKEN

As part of its response to contentions to which it should have been responding in its March 24 Answer to the State of New York's DSEIS contentions, Entergy attempted to, in essence, move to dismiss Contentions NYS-9 and NYS-17 as moot. *See* Entergy Answer at 3; *see also* Applicant's Answer at 37 (re NYS Contention 9); *id.* at 17 (re NYS Contention 17). Entergy's request is untimely, and is non-compliant with motion rules.

A. Entergy's Motion is Untimely

10 C.F.R. § 2.323 states that "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." The occurrence from which Entergy's present request arises was the filing of the DSEIS on December 22, 2008, and Entergy should therefore have filed a motion regarding the DSEIS within 10 days of the Staff's issuance of the DSEIS in full compliance with 10 C.F.R. § 2.323. Entergy has criticized the State for failing to raise arguments in a timely fashion (*see, e.g.*, Entergy Answer at 58), and, if it wishes to continue such argument, Entergy itself must meet the same standard to which it seeks to hold intervenors. Entergy, however, has not done so. Instead, Entergy waited more than three months after the issuance of the DSEIS to raise mootness issues and now attempts to excuse its untimely filing and request by misapplying the ruling in *USEC.*

B. Entergy Evaded the Consultation Requirement

The Commission's regulation controlling motions also states that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve

the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." 10 C.F.R. § 2.323(a). These requirements apply to every motion, including motions for summary disposition. Here, Entergy has attempted to raise, without complying with the motion requirements, the equivalent of a motion to dismiss Contentions 9 and 17 on grounds of mootness. However, Entergy did not attempt to consult with New York State regarding the merits of its mootness claims or to see if there was some common ground upon which agreement could be reached.

The Board has previously stated its strong support for the importance of the consultation requirement. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Feb. 4, 2009), at 3 (the Board expects "a real effort on the part of the parties to resolve the issues presented before the motion is filed."); *accord Entergy Nuclear Operations, Inc.*, Memorandum and Order (Scheduling Oral Argument on the Admissibility of Contentions) (Feb. 29, 2008), at 6, n 6.[2] By attempting to have two admitted contentions dismissed as moot without going through the motion process, Entergy deprives intervenors of the opportunity to consult and possibly resolve the issue and burdens intervenors with the obligation to respond within the shorter seven-day window of time allocated to respond to Entergy's objections to the State's DSEIS-related contentions. If, as required by 10 C.F.R. § 2.323, Entergy had filed a timely motion regarding the alleged mootness of admitted

[2] *See also Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), 62 NRC 828, 837 (2005); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 & 2), ASLBP-07-851-01-LRBDO1, 65 NRC 281, 298 n.54 (2007) (movant must include certification with any motion other than one made orally on the record that "movant has made a sincere effort to contact the other parties and resolve the matter, and that this effort was unsuccessful.")

Contentions 9 and 17, the State would have been afforded a ten-day response window (*see* 10 C.F.R. § 2.323(c)), and would have been able to answer the mootness claim when it was not also burdened with responding to Entergy and Staff objections to its DSEIS claims. The State notes that NRC Staff recently argued that when a party seeks an affirmative action from the Board, the party must do so via motion subject to consultation. *See* 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" (filed Mar. 30, 2009), at 2-3.

C. The Commission in USEC Did Not Likely Intend to Allow Parties to Bypass 10 C.F.R. § 2.323's Consultation, Reply Time, and Motion Procedure Rules.

Counsel for the Applicant has relied upon one line in a 2006 Commission ruling in support of its procedural approach. In the *USEC* case, the Commission, considering an intervenor who had raised an environmental contention based upon the applicant's Environmental Report but who then raised no similar contention based upon the DEIS, stated, in dicta, that

> [i]n such cases in which an earlier contention based upon an applicant's environmental report is rendered moot by the NRC's environmental impact statement, resolution of the mooted contention requires no more than a finding by the presiding officer that the matter has become moot. While this might be accomplished through a motion for summary disposition, it also may be accomplished as part of the contention admissibility phase of the proceeding.

In the Matter of USEC Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (Apr. 3, 2006). This case is not applicable outside of the circumstances local to the case, and it is improper to read into the Commission's language the intent to bypass 10 C.F.R. § 2.323's consultation, reply time, and motion procedure rules.

There is a distinct difference between the facts of *USEC*, in which the ASLB had rejected all of the intervenor's proposed contentions "chiefly on the ground that [the intervenor] had not provided sufficient factual or expert support to establish a material issue of fact or law," 63 NRC at 438, and the extensive and detailed contentions that the State has raised here against the ER and which this Board admitted for further litigation. The State submits that the Commission's *dicta*[3] in *USEC* did not authorize parties to bypass the motion rules but instead only observed, at most, that where there is no question that the contention is moot it may be sufficient to alert the hearing board to this fact during the admissibility proceeding related to that very same contention. Any other result would create an exception to 10 C.F.R. § 2.323's requirement that "all motions" must abide by the regulation's requirements which does not currently exist in the regulation. It is noteworthy that the single *pro se* petitioner in *USEC* did not raise the issue of whether USEC's mootness argument was properly raised in the appeal process. *See* Geoffrey

[3] The equivocal nature of the Commission's *dicta* is underscored by the following discussion:

> In this respect, we agree with the Board that admitting such a contention likely would have led to the submittal of "a curing [license application] amendment ... which thereupon would be appropriate for summary disposition. The net result of such a process would add no additional information, but would simply create unnecessary additional work for the parties and unnecessary delay - both of which the Commission has continuously encouraged licensing boards to avoid."' LBP-05-28, 62 NRC at 625. We consider it prudent, however, for the Board to have had some documentation in hand from the applicant (in the form of a response to a request for additional information or a revision to the application) or from the NRC Staff, in the form of an environmental impact statement, prior to considering the environmental report omission to have been cured. Nevertheless, we note that the Board had other separate, acceptable bases for the rejection of Petitioner's contentions.

USEC, 63 NRC at 445, n.65.

Sea's Reply Brief on Appeal of LBP-05-28 (Nov. 8, 2005), ML053200270. Even the Commission does not have the authority to amend its own rules without going through the requisite Administrative Procedure Act rulemaking procedures. To accept Entergy's expansive interpretation of the *dicta* in *USEC* would require a conclusion that such a regulatory amendment has occurred, when it fact no such amendment has taken place. Elsewhere the Commission has contemplated mootness being raised in the context of a summary disposition motion. *See In the Matter of Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-17 (July 23, 2002), ML022040633 at 14 (stating that whether a contention is moot is a "factual question best addressed by the Licensing Board in the first instance, perhaps in response to a summary disposition motion.").

Moreover, any such exception would work a manifest injustice on intervenors, who would be subject, as the State is here, to the obligation to defend (within the shorter 7-day timeframe allocated to replies to answers (*see* 10 C.F.R. § 2.309(g)(2)), substantive allegations about contentions admitted many months prior, which threaten their right to adjudicate issues at the hearing while simultaneously responding to responses to newly-proposed contentions. Surely, the Commission did not intend to create this loophole in the motion practice regulations; if this were the case, any applicant need only include arguments which would otherwise be filed as motions within the less burdensome contention admissibility pleadings, and no consultation or longer reply time would ever be afforded intervenors. In this proceeding, Entergy has frequently argued that the Commission's Part 2 contention admissibility regulations are "strict by design" when it has been to Entergy's advantage. The same standard should also apply to the Commission's Part 2 motion regulations. Entergy had ample time to raise its mootness claim

immediately after the DSEIS was published but elected not to do so, apparently seeking the strategic advantage of waiting until after the State of New York filed its additional contentions and forcing the State to address the unrelated issue of mootness of already admitted contentions in the course of its short reply time for responding to the objections to admission of newly filed contentions. A ruling on the merits of Entergy's mootness "request" which did not comport with the Commission's procedural regulations, would undermine the consistent application of the Part 2 regulations to intervenors, NRC Staff, and applicants.

During the consultation process initiated by the State of New York that preceded this motion, Entergy also asserted that it could have raised the mootness argument via a motion for summary disposition, to which, it asserts, the 10-day requirement of § 2.323 does not apply. However, there is no indication in § 2.323 that its 10-day time limit has an exception for summary disposition motions. *See* 10 C.F.R. § 2.323 ("All motions must be addressed to the Commission or other designated presiding officer. A motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises"). Where the Commission intended a motion for summary disposition to differ from a regular motion, the regulations clearly indicate as much. *See, e.g.*, 10 C.F.R. § 2.710(a)(allowing a reply by the moving party). Section 2.710(a) does not exempt motions for summary disposition from 10 C.F.R. § 2.323's timing requirements. To the extent this proceeding is governed by Subpart L, the requirements of § 2.323 are applicable. *See* 10 C.F.R. § 2.1204(a)("In proceedings under this subpart, requirements for motions and requests and responses to them are as specified in § 2.323"). The summary disposition language under Subpart L also says nothing about eliminating the time for filing summary disposition motions though, like § 2.710, it provides a

"no later than" date for such motions. By their own terms, neither section 2.710(a) (which applies to Subpart G proceedings) nor 2.1205(a) (which applies to Subpart L proceedings) exempts motions for summary dispositions from 10 C.F.R. § 2.323's timing requirements.

CONCLUSION

For the above reasons, the State asks the Board to strike those portions of Entergy's Answer in which Entergy argues that Contentions 9 and 17 are moot, specifically: the paragraph on the bottom of p. 2 and the top of p.3; the section entitled "Potential Mooting of 'Contentions of Omission' by Issuance of the DSEIS'" on pp. 11-12; the reference to mootness in the last paragraph on p.16; references to mootness in arguments (3) and (4) on pp. 17-19 and on the top of p. 27; argument (5) on pp. 37-39; and reference to mootness in the Conclusion on p. 66.

Respectfully submitted,
March 31, 2009

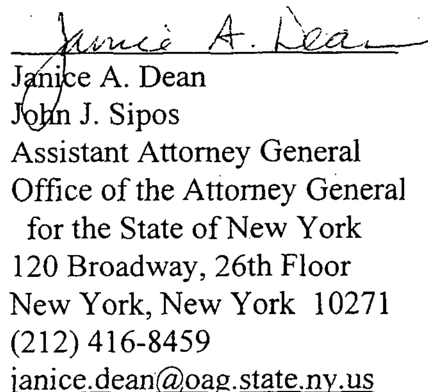

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EXHIBIT A

From: John Sipos
To: ksutton@morganlewis.com; martin.o'neill@morganlewis.com; pbessette@morganlewis.com
CC: Dean, Janice; Matthews, Joan
Date: 3/30/2009 9:11 AM
Subject: invocation of section 2.323 consultation process

Good morning Kathryn, Paul, and Martin:

In reviewing the Applicant's answer to the State's February 27, 2009 DSEIS contentions, we have noticed that in certain locations the answer requests the ASLB to dismiss earlier-admitted contentions as moot. See, for example, Applicant's Answer at 37 (re NYS Contention 9); id. at 17 (re NYS Contention 17). As we understand the Commission's procedural regulations, such request must be made via a motion. Because this request has not been made via a motion as required by the Commission's regulations, the State requests that the Applicant withdraw any such requests for the dismissal of the State's previously-admitted contentions.

In accordance with 10 CFR 2.323, we are sending this email to advise you of the State's view of this issue, to commence the consultation process, and to inform you that we will contact you later today via telephone to discuss this matter.

We are hopeful that the consultation process will obviate the need to pursue the matter further via motion practice. However, in the event that we are unable to resolve the issue, the State reserves the option to pursue the issue via a motion asking the ASLB to remove the dismissal request from the answering papers.

We will telephone you this afternoon after lunch.

John