

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
ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-0247-LR and
50-286-LR
ASLBP No. 07-858-03-LR-BD01
June 16, 2009

Order

(Ruling on New York State's New and Amended Contentions)

The Nuclear Regulatory Commission ("NRC") Staff issued a Draft Supplemental Environmental Impact Statement ("Draft SEIS") on December 22, 2008.¹ On February 4, 2009, this Licensing Board issued a Memorandum and Order which inter alia extended, until February 27, 2009, the deadline for the submission of new or amended contentions based on issues arising from the Draft SEIS.² Thereafter, on February 27, 2009, the State of New York ("New York" or "State") filed new and amended contentions concerning the Draft SEIS relating to the license renewal application of Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3").³ In this petition, New York seeks to amend three admitted contentions (NYS-12-A, 16-A, and 17-A) and asks the Board to admit two new contentions (NYS-33 and 34). Both Entergy and the NRC Staff submitted answers thereto, with Entergy arguing that all of the new and amended contentions should be

¹ "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplemental 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment," NUREG-1437 Supplement 38 (Dec. 2008).

² Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) (Feb. 4, 2009) at 2-3 (unpublished).

³ State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement (Feb. 27, 2009) [New York Petition].

denied,⁴ while the NRC Staff does not oppose the admission of NYS-12-A, opposes the admission of NYS-16-A and 17-A in part, and opposes in their entirety the admission of NYS-33 and 34.⁵ New York filed a combined reply to Entergy and the NRC Staff.⁶ As explained in detail below, the Board admits the three amended contentions, admits one new contention, NYS-33, but does not admit the other new contention, NYS-34.

I. Legal Standards Governing New and Amended Contentions

Pursuant to 10 C.F.R. § 2.309(f)(2), a new or amended contention dealing with an issue arising under the National Environmental Policy Act (“NEPA”) is admissible if there “are data or conclusions” in the Draft SEIS that differ “significantly” from the applicant’s environmental documents.⁷ Otherwise, a new or amended contention can only be filed with leave of the Board, upon a showing that the information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion.⁸ If a new or amended contention does not meet these requirements it may nevertheless be admitted under 10 C.F.R. § 2.309(c), governing nontimely filings, which bases admission on a balancing of eight different factors.⁹ In addition to the above regulations, any new or amended contention must meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).¹⁰

⁴ Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State (Mar. 24, 2009) [hereinafter Entergy Answer].

⁵ 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) [hereinafter NRC Staff Answer].

⁶ State of New York Combined Reply to Entergy Nuclear Operations, Inc. and NRC Staff in Support of Contentions 12-A, 16-A, 17-A, 33, and 34 (Mar. 31, 2009) [hereinafter New York Reply].

⁷ 10 C.F.R. § 2.309(f)(2).

⁸ *Id.* § 2.309(f)(2)(i)-(iii).

⁹ *See id.* § 2.309(c).

¹⁰ These requirements were discussed in detail in our Order ruling on petitions to intervene. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 60-64 (2008).

II. New York's Amended Contentions

- A. NYS-12-A – NRC's analysis and agreement with Entergy's severe accident mitigation alternatives (SAMA) analysis for Indian Point Unit 2 and Unit 3 does not accurately reflect decontamination and clean up costs associated with a severe accident in the New York metropolitan area and, therefore, underestimates the cost of a severe accident and fails to consider mitigation measures which are related to license renewal in violation of NEPA.¹¹

In NYS-12-A, New York asserts that the NRC Staff "accepted Entergy's flawed SAMA analysis" in its Draft SEIS, without "conducting an independent evaluation" of the issues raised by New York in its original petition, and did not "reconcile" New York's concerns with Entergy's analysis.¹² New York repeats many of its arguments supporting the original NYS-12 in an effort to show that Entergy's SAMA analysis in its License Renewal Application is faulty, and contends that the acceptance of this "flawed analysis" by the NRC Staff in the Draft SEIS violates NEPA and NRC regulations.¹³

Entergy responds by asserting that New York has not met the requirements of 10 C.F.R. § 2.309(f)(2) for the admission of an amended contention in that it does not allege that the Draft SEIS contains data or conclusions that are significantly different from those in Entergy's Environmental Report ("ER").¹⁴ Entergy suggests that there is no need to "re-designate" the contention "to reflect its status as an admitted challenge" to the Draft SEIS.¹⁵ The NRC Staff maintains that the amended contention does not raise any issues or arguments not contained in NYS-12, but simply recasts them as issues regarding the Draft SEIS.¹⁶ The NRC Staff does not oppose the admission of this amended contention.¹⁷

The Board concurs with the Private Fuel Storage decision cited by Entergy that an intervenor is not required to amend an admitted contention "to constitute a litigable issue

¹¹ New York Petition at 2.

¹² Id. at 3.

¹³ Id. at 2-5.

¹⁴ Entergy Answer at 13.

¹⁵ Id.

¹⁶ NRC Staff Answer at 12.

¹⁷ Id.

statement relative to the substance” of the Draft SEIS.¹⁸ However, the Board finds that while there is not a significant difference in data or conclusions between the ER and the Draft SEIS, and that the amended contention is not based on new information as required by 10 C.F.R. § 2.309(f)(2), the amended contention is nevertheless admitted. We see no issue with an intervenor proactively asking the Board to recognize that an admitted contention relative to the ER challenges the same issue when included in the Draft SEIS. Considering the similarities with the original NYS-12, New York has satisfied the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) as we discussed in our original order.¹⁹ That being said, the Board admits the contention and consolidates it with NYS-12.

- B. NYS-16-A – The [Draft SEIS] improperly accepted Entergy’s population dose estimates of radiation released in a severe accident despite the Licensing Board’s Admission of the State of New York’s contention that the air dispersion model used by Entergy in its SAMA analysis will not accurately predict the geographic dispersion of released radionuclides and will result in an inaccurate estimate of the costs of human exposure.²⁰

In NYS-16-A, New York asserts that the Draft SEIS improperly accepted Entergy’s population dose estimates of radiation released in a severe accident. In their new petition, New York repeats many of its arguments supporting the original NYS-16 in its effort to show that the ATMOS model is flawed and inaccurate.²¹ In addition, New York contends that the Draft SEIS “fails to address any of the issues raised” in NYS-16.²² Further, New York asserts that unless the NRC Staff prepares a more accurate SAMA analysis “based on a remodeling of the atmospheric dispersion of a release of radionuclides using a more accurate EPA approved dispersion model,” the SAMA analysis will violate NEPA.²³

¹⁸ Entergy Answer at 13 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-26, 54 NRC 199, 208 (2001)).

¹⁹ Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 102 (2008).

²⁰ New York Petition at 9.

²¹ Id. at 9-13.

²² Id. at 13.

²³ Id.

As with NYS-12-A, Entergy responds by asserting that New York has not met the requirements of 10 C.F.R. § 2.309(f)(2) for the admission of an amended contention in that it does not allege that the Draft SEIS contains data or conclusions that are significantly different from those in the ER.²⁴ Entergy suggests that there is no need to “re-designate” the contention “to reflect its status as an admitted challenge” to the Draft SEIS.²⁵ In addition, however, Entergy asserts that the issues raised by New York in footnote 5 – that Entergy’s use of ATMOS may result in deficient predictions that will provide false information to the public and emergency responders and as a result the NRC Staff will not be able to meet its NEPA obligations – are inadmissible and outside the scope of NYS-16 as previously admitted by this Board.²⁶

The NRC Staff argues that the amended contention impermissibly raises issues that New York failed to raise earlier and which exceed the scope of the issues admitted in NYS-16.²⁷ The NRC Staff also argues that NYS-16-A raises an additional issue regarding the Entergy’s radiological source term which it asserts was excluded initially by the Board in its language admitting NYS-16.²⁸ Finally, the NRC Staff maintains that New York has asserted for the first time that only an EPA-approved air dispersion model is acceptable.²⁹ This is an issue that the NRC Staff argues could have and should have been asserted earlier, and is not legally supported.

New York responded to Entergy’s assertions regarding footnote 5 by arguing that Entergy should have challenged this claim when the “almost identical” language was used by New York in footnote 38 of its original petition.³⁰ Entergy is barred, according to New York, from raising this issue now. In addition, New York asserts that footnote 5 does not challenge

²⁴ Entergy Answer at 13.

²⁵ Id.

²⁶ Id. at 14.

²⁷ NRC Staff Answer at 12.

²⁸ Id. at 13.

²⁹ Id. at 13-14.

³⁰ New York Reply at 13-14.

Entergy's compliance "but simply describes one of the possible consequences of Entergy's continued reliance on what is known to be a deficient and outdated air dispersion model."³¹

New York also maintains that the NRC Staff is wrong in claiming that New York raised the EPA approval issue for the first time in the amended contention.³² New York points to its original petition wherein the same assertion regarding the accuracy of Entergy's SAMA analysis was raised and argues that NYS-16-A "simply now assigns that failure to the NRC Staff, as the reviewer of Entergy's ER."³³

The Board admits NYS-16-A. In the Board's initial decision on July 31, 2008, we admitted NYS-16 to the extent it challenges (1) "whether the population projections used by Entergy are underestimated," (2) "whether the ATMOS module in MACCS2 is being used beyond its range of validity, " and (3) "whether use of MACCS2 with the ATMOS module leads to nonconservative geographical distribution of radioactive dose within a 50-mile radius" of Indian Point.³⁴ In admitting this amended contention, the Board notes that New York will not be allowed to address arguments from the original NYS-16 that went beyond the limiting language of the admitted contention. Thus, the issue of whether an "EPA-approved" air dispersion model must be used in the NRC Staff's analysis – which contrary to the NRC Staff's assertion was included in the original petition³⁵ – is outside the scope of NYS-16 and is also outside the scope of NYS-16-A. However, the Board does find that, to the degree that the Draft SEIS fails to address the issues raised by New York in NYS-16 as admitted by the Board, NYS-16-A is within the scope of the proceeding and is admitted as such. New York has satisfied the contention

³¹ Id. at 14.

³² Id. at 12.

³³ Id. at 12-13.

³⁴ Indian Point, LBP-08-13, 68 NRC at 112.

³⁵ New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) at 166.

admissibility requirements of 10 C.F.R. § 2.309(f)(1) as we discussed in our original order.³⁶

NYS-16-A is admitted and consolidated with NYS-16 for the purpose of this proceeding.

- C. NYS-17-A – The [Draft SEIS] fails to address the impact of the continued operation of IP2 and IP3 for another 20 years on off-site land use, including real estate values in the surrounding area in violation of 10 C.F.R. §§ 51.71(a), 51.71(d), 51.95(c)(1), and 51.95(c)(4).³⁷

New York asserts in this amended contention that the NRC Staff failed to address – in its evaluation of offsite land use in its Draft SEIS – the positive impact on land use and land value from the denial of the license extension.³⁸ The amended contention is similar to the original, though it focuses on the Draft SEIS instead of on the ER.

Entergy asserts that the amended contention is inadmissible and argues that the Draft SEIS mooted the original NYS-17 which should now be dismissed.³⁹ Entergy argues that beyond rehashing its original arguments from NYS-17, New York also makes, for the first time, allegations about the impacts of spent fuel storage on property values “after the period of extended operation.”⁴⁰ Entergy asserts that this is not a new issue but one that could have been raised earlier and no justification is provided by New York as to why it was not raised in the original petition.⁴¹ Entergy also maintains that NYS-17-A raises issues that are not within the scope of the proceeding, and are not material to the findings that the NRC Staff must make.⁴² Finally, Entergy argues that New York does not provide adequate support for the contention and fails to controvert the discussion of socioeconomic impacts in the Draft SEIS.⁴³

³⁶ Indian Point, LBP-08-13, 68 NRC at 112-13.

³⁷ New York Petition at 14.

³⁸ Id. at 15.

³⁹ Entergy Answer at 16-18.

⁴⁰ Id. at 16.

⁴¹ Id. at 17.

⁴² Id.

⁴³ Id.

The NRC Staff asserts that New York raises issues in NYS-17-A that could have been raised earlier.⁴⁴ The NRC Staff points to footnote 6 in New York's petition wherein New York discusses two proposed rulemaking actions from the Commission that were published in October 2008. New York fails, according the NRC Staff, to explain why these assertions were not raised in a timely fashion, which the Staff suggests is within thirty days of their initial publication.⁴⁵ Like Entergy, the NRC Staff also objects to New York's allegations regarding impacts after the period of extended operation.⁴⁶

New York asserts, in its reply, that one of the bases for NYS-17 noted the adverse impact of continued storage at the site after shutdown but that New York could not allege such storage could extend past the period of extended operation without challenging 10 C.F.R. § 51.23.⁴⁷ Therefore, according the New York, it could not raise this argument until after new documents were released in October 2008 – well past the date that initial petition to intervene were due.⁴⁸ New York further asserts that Entergy's arguments challenging New York's expert's opinions "merely confirms that there is [a] material dispute between the parties on this issue."⁴⁹

As discussed in our accompanying order, the mootness issue is not properly before us as Entergy has not submitted a motion for summary disposition and we have not addressed the issue sua sponte at this time.⁵⁰ Thus, we disregard Entergy's mootness argument regarding NYS-17. Like NYS-12-A and 16-A, this amended contention updates the original to reflect that New York contends that the NRC Staff erred in a similar manner to Entergy and that the original contention is now relevant to the Draft SEIS, as well as to the ER. We admit the amended contention as such and consolidate it into NYS-17.

⁴⁴ NRC Staff Answer at 14.

⁴⁵ Id. at 15.

⁴⁶ Id. at 15-16.

⁴⁷ New York Reply at 14.

⁴⁸ Id. at 14-15.

⁴⁹ Id. at 16.

⁵⁰ Licensing Board Order (Denying New York State's Motion to Strike) (June 15, 2009).

III. New York's New Contentions

- A. NYS-33 – The [Draft SEIS] discussion of energy alternatives (Chapter 8) violates NEPA because it ignores significant new information and fails to provide a rigorous analysis of the costs, benefits, and feasibility of energy conservation and other measures under the “no-action” alternative in violation of 10 C.F.R. §§ 51.53(c)(3)(iv), 51.71(a) and (d), and 51.95, 10 C.F.R. Part 51, Subpart A, Appendix B; and 40 C.F.R. §§ 1502.14 and 1502.9.⁵¹

In this new contention, New York asserts that the Draft SEIS does not contain an analysis of “significant problems and objections” as required by 10 C.F.R. § 51.71(b).⁵² New York maintains that, for the “no-action” alternative, the Draft SEIS failed to adequately consider inter alia energy conservation and efficiency, the viability of renewable energy resources, energy transmission capacity, and possible combinations of different energy sources.⁵³

In response, Entergy asserts that only a few of the allegations in NYS-33 are new, what is not new is not materially different from what was presented with the original petition, and none of the allegations are timely, as they could have been asserted in the original petition.⁵⁴ According to Entergy, the new contention is “little more than a repackaging of the same issues” raised by New York in NYS-9-11 which, Entergy argues, is “a thinly-veiled attempt by [New York] to litigate” issues that have already been rejected by the Board.⁵⁵ Furthermore, Entergy maintains that NYS-33 is not a challenge to the “no-action” alternative in the Draft SEIS but rather alleges “that energy conservation must be included as proxy or alternative” to displace the demand for power from Indian Point which is contrary to NRC precedent, and this Board’s July 2008 ruling that energy conservation does not need to be considered in the alternatives analysis.⁵⁶ Entergy also asserts that the contention is an impermissible attack on NRC

⁵¹ New York Petition at 20.

⁵² Id. at 20-21.

⁵³ Id. at 23-34.

⁵⁴ Entergy Answer at 31, 44.

⁵⁵ Id.

⁵⁶ Id. at 31-32.

regulations⁵⁷ and does not meet the admissibility requirements for new contentions found in 10 C.F.R. § 2.309(f)(2) or even the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).⁵⁸

The NRC Staff makes similar arguments regarding what it views as New York's repackaging of previously rejected arguments from NYS-9-11.⁵⁹ The NRC Staff asserts that New York has failed to show why these arguments could not have been presented as challenges to the original petition.⁶⁰ Further, the NRC Staff maintains that New York failed to show that the Draft SEIS would have reached a materially different conclusion if New York's additional information had been considered.⁶¹

In its reply, New York includes both a general response on the legal requirements for the admissibility of contentions based on the Draft SEIS and a specific response to each answer. New York maintains that NEPA obligates the NRC Staff, as opposed to the Applicant, to prepare a thorough Draft SEIS that identifies and analyzes environmental impacts and alternatives.⁶² New York then asserts that it has identified new and significant information that has not been evaluated by the NRC in conducting the Generic EIS, the ER, or the Draft SEIS – i.e., in any environmental review related to Indian Point – and the NRC Staff is compelled by NEPA to address these issues “to the extent required for a full, fair environmental review.”⁶³

In its specific response, New York asserts that the NRC Staff and Entergy fail “to understand the difference between, and function of, the discussion of energy alternatives to the proposed action and the discussion of the no-action alternative.”⁶⁴ The “no-action” alternative, according to New York, focuses on a “comparison of the likely environmental impacts that flow

⁵⁷ Id. at 32.

⁵⁸ Id. at 39-55.

⁵⁹ NRC Staff Answer at 16.

⁶⁰ Id.

⁶¹ Id. at 16-17.

⁶² New York Reply at 6-7.

⁶³ Id. at 8-11.

⁶⁴ Id. at 17.

from the approval of the proposed action against the likely environmental impacts that flow from a rejection of the proposed action.”⁶⁵ New York argues that the Draft SEIS is deficient in that respect.

New York asserts that NYS-33 satisfies the requirements of 10 C.F.R. § 2.309(f)(2) because the data and conclusions in the Draft SEIS differ from those in the ER in that the Draft SEIS, unlike the ER, includes an analysis of a combined group of renewable energy options and considers energy conservation as an alternative to the relicensing of Indian Point.⁶⁶ Thus, the fact that much of New York’s argument comes from its original bases for NYS-9-11 is “irrelevant” according to New York because they are directed toward the analysis of the “no-action” alternative in the Draft SEIS and the specific data that was not analyzed in the ER.⁶⁷

New York also claims that arguments about timing do not take into account the regulatory requirements for a Draft SEIS. Specifically, unlike the ER which is subject to challenges based on NRC regulations, the Draft SEIS is also subject to challenges based on NEPA and Council of Environmental Quality (“CEQ”) regulations.⁶⁸ Finally, New York maintains that contrary to the argument put forward by the NRC Staff, the allegations in NYS-33 demonstrate that if Indian Point was not granted a renewal license, “the considerable adverse impacts associated with continued operation of Indian Point would be avoided.”⁶⁹

The Board finds that NYS-33 satisfies the new contentions requirements of 10 C.F.R. § 2.309(f)(2) and the general admissibility requirements of 10 C.F.R. § 2.309(f)(1) and is therefore admitted. As discussed supra, in order for a new environmental contention to be admitted, under 10 C.F.R. § 2.309(f)(2) a party must show that there are data or conclusions in the Draft SEIS that differ significantly from those in the ER. Any new environmental contention

⁶⁵ Id.

⁶⁶ Id. at 18 (citing Draft SEIS at 8-58 to 8-59 and 8-65 to 8-78).

⁶⁷ Id. at 19.

⁶⁸ Id.

⁶⁹ Id. at 20.

must also be based on the differing data or conclusions.⁷⁰ If there is a material difference between the two documents, a party need not address the additional requirements in 10 C.F.R. § 2.309(f)(2)(i)-(iii).

In NYS-33, New York contends that the Draft SEIS materially differs from the ER in the data and conclusions associated with each document's "no-action" alternative section. The NRC Staff in the "No-Action Alternative" section of the Draft SEIS states that the power not generated by Indian Power under the "no-action" scenario would likely be replaced by "(1) power supplied by other producers . . . , (2) demand-side management and energy conservation, or (3) some combination of these options."⁷¹ The environmental impacts of these options, the NRC Staff explains, are discussed in the alternatives section of the Draft SEIS.⁷² Thus, the Draft SEIS addresses two issues that are dismissed in the ER – energy conservation and combinations of alternatives. The "Combination of Alternatives" section in the Draft SEIS is significantly more detailed than that in the ER, and actually analyzes the impacts of two distinct combination alternatives.⁷³ The ER, on the other hand, did not evaluate any mixing of generation sources, instead adhering to the GEIS which limited alternative analysis to "single discrete electrical generating sources" that are "technically feasible and commercially viable."⁷⁴ New York, in NYS-33, challenges the NRC Staff's analysis of those issues in the "no-action" alternative section that are associated with significantly different data and conclusions and therefore, has demonstrated that it meets the requirements for new contentions in 10 C.F.R. § 2.309(f)(2).

In order for a new contention to be admissible it must also satisfy the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). The Board finds that NYS-33 meets these requirements. New York lays out several areas in which it asserts that the Draft SEIS ignores

⁷⁰ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

⁷¹ Draft SEIS at 8-27.

⁷² Id.

⁷³ Id. at 8-65 to 8-75.

⁷⁴ ER at 8-56.

information related to energy conservation and incorrectly assumed that “energy conservation would only result in a savings of 800 MW.”⁷⁵ New York also directly challenges the NRC Staff findings in the Draft SEIS, including inter alia, the assertion that wind power or other renewable energy sources could only provide 200 to 400 MW of energy to replace either or both Indian Point units, and whether the two combination alternatives analyzed in the Draft SEIS were “artificially narrow and arbitrary.”⁷⁶ The contention is within the scope of the proceeding and demonstrates a genuine dispute on a material issue, namely, whether the “no-action” alternative in the Draft SEIS is adequate.

The Board finds that NYS-33 meets the requirements of 10 C.F.R. § 2.309(f)(1) and (2). Accordingly, NYS-33 is admitted and, based on the similarities of issues dealing with the “no-action” alternative, the Board consolidates it with NYS-9.

- B. NYS-34 – The [Draft SEIS] did not take into account significant new information regarding the potential impacts to off-site land use from long term or indefinite storage of high level nuclear waste on the Indian Point site in violation of NEPA and 10 C.F.R. §§ 51.53(c)(3)(iv), 51.71(a) and (d), and 51.95, 10 C.F.R. Part 51, Subpart A, Appendix B; and 40 C.F.R. § 1502.9.⁷⁷

In this new contention, New York asserts that the Draft SEIS fails to account for new and significant information that pertains to the potential environmental impacts to off-site land use resulting from the onsite storage of high level nuclear waste.⁷⁸ The new and significant information, according to New York, comes from two related documents. First, the “Waste Confidence Decision Update,” published in the Federal Register on October 9, 2008, in which New York asserts the Commission removed its expectation that a spent fuel repository would be available by 2025, and admitted to no longer being confident that there would be “sufficient high

⁷⁵ New York Petition at 25.

⁷⁶ Id. at 27, 33.

⁷⁷ Id. at 37.

⁷⁸ Id.

level waste repositories available within 30 years after cessation of operation of nuclear power plants for the wastes generated during license renewal.”⁷⁹

The second piece of new and significant information relied on by New York is the “Temporary Storage Rule,” published on the same date, wherein the Commission, according to New York, proposed amending 10 C.F.R. § 51.23 to reflect the revised policies outlined in the Waste Confidence Decision Update, *i.e.*, stating that spent fuel can be stored safely and without significant environmental impacts onsite or offsite at independent spent fuel storage installations (“ISFSI”s) until a repository is available.⁸⁰ Taken together, New York suggests that the Commissions pronouncements “mean that the NRC expects that spent fuel will remain at power reactor sites or [ISFSIs] for decades longer than anticipated, if not indefinitely.”⁸¹

New York argues that while licensing boards in the past have continuously rejected contentions based on the storage of spent fuel, the boards in those cases did not have the October 9, 2008 statements by the Commission, which, New York maintains, “removed the basis that existed for the findings contained in § 51.23 and the GEIS but has yet to legally replace them with any new findings.”⁸² This new information, New York asserts, obligated the NRC Staff to address any environmental impacts in the Draft SEIS that may be caused by the indefinite storage of spent fuel onsite. New York provides an expert’s opinion stating that there will be substantial socioeconomic environmental impacts that will be more severe if the storage of spent fuel at Indian Point lasts indefinitely.⁸³

Entergy opposes the admission of NYS-34 arguing that the contention does not meet the admissibility requirements for late-filed or new contentions under 10 C.F.R. § 2.309(c) or (f)(2), because New York did not submit the contention in a timely fashion and waited over five months

⁷⁹ *Id.* at 38 (citing Waste Confidence Decision Update, 73 Fed. Reg. 59,551 at 59,557, 59,561 (Oct. 9, 2008)).

⁸⁰ *Id.* at 39 (quoting Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008)).

⁸¹ *Id.* at 39.

⁸² *Id.* at 42.

⁸³ *Id.*; Supplemental Declaration of Stephen C. Sheppard (Feb. 26, 2009).

from the triggering event of the date of publication,⁸⁴ and argues that the information in the October 9, 2008 publications is not materially different from information previously available.⁸⁵ Finally, Entergy asserts that NYS-34 does not meet the general admissibility requirements of 10 C.F.R. § 2.309(f)(1).⁸⁶

The NRC Staff also opposes NYS-34, asserting that notwithstanding the proposed amendment of the waste confidence rule, the current rule “remains in effect and may not be challenged in this proceeding absent the grant of a petition for rule waiver under 10 C.F.R. § 2.335 – which the State has not filed.”⁸⁷ Additionally, the NRC Staff argues that the issue in question “is (or is about to become) the subject of general rulemaking by the Commission – which further bars its litigation in this proceeding.”⁸⁸

In its reply, New York asserts that Entergy’s argument regarding there being no material differences between the ER and the Draft SEIS is “factually inaccurate” because the new and significant information regarding the waste confidence rule was published after the ER and before the Draft SEIS, and thus the Draft SEIS should have discussed it pursuant to 10 C.F.R. § 51.95(c)(4).⁸⁹

New York also rejects the argument that NYS-34 is inadmissible because it is a direct challenge to NRC regulations, specifically 10 C.F.R. § 51.23.⁹⁰ New York argues that the prohibition on considering environmental impacts from spent fuel storage contained in that regulation, is explicitly premised on certain findings that the Commission says in the October 9, 2008 publications are no longer valid.⁹¹ According to New York, “[i]f a rule, on its face, is based on a finding that the Commission has rejected, the rule can no longer bar consideration of a

⁸⁴ New York Petition at 57-58.

⁸⁵ Id. at 58.

⁸⁶ Id. at 59-66.

⁸⁷ NRC Staff Answer at 25.

⁸⁸ Id.

⁸⁹ New York Reply at 25.

⁹⁰ Id. at 26-27.

⁹¹ Id. at 27.

critical issue such as land use impacts,” especially since this issue must be considered in a license renewal proceeding as it is a Category 2 issue.⁹² This contention, New York asserts, does not interfere with an ongoing rulemaking either because the Commission has already concluded that spent fuel will remain onsite indefinitely. New York points out that neither Entergy nor the NRC Staff have shown where the socioeconomic impacts of long-term storage on off-site land have been addressed as required by 10 C.F.R. § 51.95(c)(4).⁹³

The Board denies this contention. New York does not point to any significantly different data or conclusions in the Draft SEIS as compared to the ER, and thus has to show that the contention meets the requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii). New York points to two proposals published by the Commission regarding the waste confidence rule. This information was not previously available and is materially different than information previously available. The new contention has been submitted in a timely fashion – contrary to the arguments put forward by Entergy and the NRC Staff – because the issuance of Draft SEIS was the triggering point for New York to submit a new contention based on the waste confidence publications.

As discussed supra, however, in order for a new contention to be admissible, it must also meet our general rules of admissibility. This is where NYS-34 fails. Both of the publications that New York cites as new and significant information are proposed revisions. At this point, the Commission has not made a final determination vis-à-vis the waste confidence rule. Therefore, it is premature to use these publications as the bases for a new contention, as the regulations now in force, specifically 10 C.F.R. § 51.23(b), do not permit “discussion of any environmental impact of spent fuel storage” at nuclear reactor sites. Accordingly, NYS-34 is an impermissible challenge to NRC regulations⁹⁴ and must be denied.

⁹² Id.

⁹³ Id. at 28.

⁹⁴ See 10 C.F.R. § 2.335(a).

IV. Conclusion

For the foregoing reasons, the Board admits the three amended contentions submitted by New York. The three initial contentions NYS-12, NYS-16 and NYS-17 are hereby amended to reflect the rulings in this Order. The Board admits New York's new contention NYS-33 and consolidates it with NYS-9. The Board denies admission to New York's new contention NYS-34.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁹⁵

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 16, 2009

⁹⁵ Copies of this Order were sent this date by Internet e-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, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (RULING ON NEW YORK STATE'S NEW AND AMENDED CONTENTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Brian Harris, Esq.
Andrea Z. Jones, Esq.
Karl Farrar, Esq.
Brian Newell, Paralegal

Administrative Judge
Lawrence G. McDade, Chair

Administrative Judge
Richard E. Wardwell

Administrative Judge
Kaye D. Lathrop
190 Cedar Lane E.
Ridgway, CO 81432

Zachary S. Kahn, Law Clerk

Docket Nos. 50-247-LR and 50-286-LR
 ORDER ((RULING ON NEW YORK STATE'S NEW AND AMENDED CONTENTIONS))

William C. Dennis, Esq.
 Assistant General Counsel
 Entergy Nuclear Operations, Inc.
 440 Hamilton Avenue
 White Plains, NY 10601

Andrew M. Cuomo, Attorney General
 John J. Sipos, Assistant Attorney General
 Mylan L. Denerstein
 Deputy Assistant Attorney General
 Division of Social Justice
 Janice A. Dean
 Assistant Attorney General
 Office of the Attorney General
 of the State of New York
 The Capitol
 State Street
 Albany, New York 12224

Kathryn M. Sutton, Esq.
 Paul M. Bessette, Esq.
 Martin J. O'Neill, Esq.
 Mauri T. Lemoncelli, Esq.
 Counsel for Entergy Nuclear Operation, Inc.
 Morgan, Lewis & Bockius, LLP
 1111 Pennsylvania Avenue, NW
 Washington, DC 20004

Joan Leary Matthews, Esq.
 Senior Attorney for Special Projects
 New York State Department
 of Environmental Conservation
 625 Broadway, 14th Floor
 Albany, New York 12233-5500

Michael J. Delaney
 Vice President, Energy Department
 New York City Economic Development
 Corporation (NYCEDC)
 110 William Street
 New York, NY 10038

Robert D. Snook, Esq.
 Office of The Attorney General
 State of Connecticut
 55 Elm Street
 P.O. Box 120
 Hartford, CT 06141-0120

Arthur J. Kremer, Chairman
 New York Affordable Reliable Electricity
 Alliance (AREA)
 347 Fifth Avenue, Suite 508
 New York, NY 10016

Stephen C. Filler, Board Member
 Hudson River Sloop Clearwater, Inc.
 303 South Broadway, Suite 222
 Tarrytown, NY 10591

Docket Nos. 50-247-LR and 50-286-LR
 ORDER ((RULING ON NEW YORK STATE'S NEW AND AMENDED CONTENTIONS))

Daniel E O'Neill, Mayor
 James Siermarco, M.S.
 Liaison to Indian Point
 Village of Buchanan
 Municipal Building
 236 Tate Avenue
 Buchanan, NY 10511-1298

Manna Jo Greene, Environmental Director
 Hudson River Sloop Clearwater
 112 Little Markey Street
 Poughkeepsie, NY 12601

Thomas F. Wood, Esq.
 Town of Cortlandt
 Daniel Riesel, Esq.
 Jessica Steinberg, J.D.
 Counsel for the Town of Cortlandt
 Sive, Paget & Riesel, P.C.
 460 Park Avenue
 New York, NY 10022

Nancy Burton, Esq.
 Connecticut Residents Opposed
 to Relicensing of Indian Point (CRORIP)
 147 Cross Highway
 Redding Ridge, CT 06876

Elise N. Zoli, Esq.
 Goodwin Proctor, LLP
 Exchange Place
 53 State Street
 Boston, MA 02109

Justin D. Pruyne
 Assistant County Attorney, Litigation Bureau
 Of Counsel to Charlene M. Indelicato, Esq.
 Westchester County Attorney
 148 Martine Avenue, 6th Floor
 White Plains, NY 10601

FUSE USA
 John LeKay
 Heather Ellsworth Burns-DeMelo
 Remy Chevalier
 Bill Thomas
 Belinda J. Jaques
 351 Dyckman Street
 Peekskill, New York 10566

Westchester Citizens' Awareness Network
 (WestCan), Citizens Awareness Network,
 (CAN), et al
 Susan H. Shapiro, Esq.
 21 Pearlman Drive
 Spring Valley, NY 10977

Victor M. Tafur, Senior Attorney
 Philip Musegaas, Esq.
 Deborah Brancato, Esq.
 Riverkeeper, Inc.
 828 South Broadway
 Tarrytown, NY 10591

Richard L. Brodsky
 Assemblyman
 5 West Main Street
 Suite 205
 Elmsford, NY 10523

Docket Nos. 50-247-LR and 50-286-LR
ORDER ((RULING ON NEW YORK STATE'S NEW AND AMENDED CONTENTIONS))

Diane Curran, Esq.
Counsel for Riverkeeper, Inc.
Harmon, Curran, Spielberg,
& Eisenberg, LLP
1726 M. Street NW, Suite 600
Washington, DC 20036

Sarah L. Wagner, Esq.
Legislative Office Building, Room 422
Albany, NY 12248

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of June 2009