

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
ENERGY 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
(Denying New York State's Motion to Strike)

On February 27, 2009, the State of New York ("New York" or "State") filed new and amended contentions concerning the NRC Staff's Draft Supplemental Environmental Impact Statement ("Draft SEIS") regarding the license renewal application of Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") for Indian Point Nuclear Generating Units 2 and 3.¹ In its answer thereto, Entergy asserted inter alia that NYS-9 and 17 – environmental contentions of omission – have been rendered moot by the issuance of the Draft SEIS and should therefore be dismissed by the Board.² In response, New York filed a motion to strike Entergy's mootness argument from Entergy's answer, arguing inter alia that Entergy should have filed a separate motion to dismiss NYS-9 and 17 as moot.³ Entergy responded to New York's motion, asserting that New York's arguments were without "merit" and that Entergy was not required to submit a separate motion to argue that a mooted contention of omission must either be modified by the

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

² Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State (Mar. 24, 2009) at 17-19, 37-39.

³ Motion to Strike Entergy's Mootness Argument From Its March 24, 2009 Answer to the State of New York's DEIS Contentions (Mar. 31, 2009) at 1-2.

sponsoring intervenor or disposed of by the Board.⁴ The NRC Staff also responded to New York's motion, asserting that the motion should be denied though the Board should "disregard" Entergy's assertions of mootness unless the Board decides to rule sua sponte on the potential mootness of NYS-9 and 17 in light of the Draft SEIS or Entergy files a motion to dismiss those contentions as moot.⁵ For the reasons stated below, the Board agrees with the NRC Staff and denies New York's motion and disregards Entergy's mootness assertions.

NRC regulations and case law provide two different mechanisms for dismissing contentions that have been admitted to a proceeding – either by a motion for summary disposition submitted by a party or if a board decides to do so sua sponte. The regulations clearly set out the requirements of a motion for summary disposition and the schedule for submitting answers thereto.⁶ These motions are to be filed when a party believes that there "is no genuine issue to be heard" on any matter in a proceeding.⁷ Licensing boards also have the authority to dismiss admitted contentions sua sponte. These are the only two options available to dismiss admitted contentions.

The Board does not agree with Entergy's reading of applicable case law that an admitted contention of omission must be dismissed as a matter of law if the Draft SEIS has cured the alleged omission.⁸ The case law simply stands for the proposition that a board should dismiss a contention of omission, if it has been cured in subsequent documentation and not amended by the petitioner, assuming that issue has been properly brought before the board in the form of a motion for summary disposition or if the board chooses to do so sua sponte. This Board believes that if an admitted contention has been cured by a subsequent filing it would not be

⁴ Answer of Entergy Nuclear Operations, Inc. to New York State's Motion to Strike Entergy's Contention Mootness Arguments (Apr. 13, 2009) at 1-2 [hereinafter Entergy Answer].

⁵ 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 DEIS Contentions" (Apr. 13, 2009) at 1.

⁶ See 10 C.F.R. § 2.710, 2.1205.

⁷ Id. § 2.710(a).

⁸ See Entergy Answer at 2-5.

proper to ignore this new information and allow the contention to go forward to a hearing on the merits. In that situation, the Board could act sua sponte and ask for briefing on the issue so that each party would have the full opportunity to address the issue before the Board, or the opposing party could file a motion for summary disposition under the regulations and the Board would consider the motion and the responses thereto.

If Entergy believes an admitted contention is now moot and should be dismissed it should say so in a motion before the Board. However, we deny New York's motion to strike the mootness argument because it is unnecessary to do so. Allowing the mootness argument to remain in Entergy's pleading does not properly put the dismissal of NYS-9 and 17 before the Board. The Board reads Entergy's pleading only for its arguments regarding the admission of New York's new and amended contentions.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁹

/RAI

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 16, 2009

⁹ 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 (DENYING NEW YORK STATE'S MOTION TO STRIKE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-247-LR and 50-286-LR
 ORDER (DENYING NEW YORK STATE'S MOTION TO STRIKE)

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Docket Nos. 50-247-LR and 50-286-LR
ORDER (DENYING NEW YORK STATE'S MOTION TO STRIKE)

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ORDER (DENYING NEW YORK STATE'S MOTION TO STRIKE)

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[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

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