

March 7, 2011

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 THE STATE OF NEW YORK'S
MOTION FOR LEAVE TO FILE A NEW CONTENTION, AND
NEW CONTENTION 37, CONCERNING THE FINAL
SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its answer to Contention 37 submitted by the State of New York ("New York" or "State") on February 3, 2011,¹ concerning the Staff's December 2010 Final Supplement 38 ("Final SEIS" or "FSEIS") to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996). As explained below, Contention 37 is untimely and is not based upon information that is significantly different from the Applicant's Environmental Report and the Staff's Draft SEIS² or Final SEIS.³ Therefore New York's Motion and Contention should be denied.

¹ See (1) "State Of New York's Motion For Leave To File New And Amended Contentions Concerning Chapter 8 Of The December 3, 2010 Final Supplemental Environmental Impact Statement" dated February 3, 2011 ("Motion"); and (2) "State Of New York Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement" dated February 3, 2011 ("Contention").

² "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, (continued. . .)

BACKGROUND

On April 23, 2007, Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") filed an application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3"), for an additional period of 20 years; as part of its license renewal application ("LRA"), the Applicant submitted an ER, as required by 10 C.F.R. §§ 51.53(c) and 54.23. On May 11, 2007, the NRC published a notice of receipt of the Indian Point LRA,⁴ and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.⁵ On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York, which filed 32 contentions including, *inter alia*, Contention 9, wherein New York alleged that the Applicant's Environmental Report failed to evaluate energy conservation as an alternative that could displace the energy production of one or both of the Indian Point reactors and thus failed to carry out its obligations under 10 C.F.R. § 51.53(c)(2).⁶ On July 31, 2008, the Board issued its Memorandum and Order ruling on the

(...continued)

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 There are, of course, different data and conclusions in the FSEIS. However, as discussed *infra* at 8-10, with respect to the contention admissibility standards, New York has not shown what these differences are or that Contention 37 is based upon information contained in the FSEIS that is different from the information contained in the ER or DSEIS. See 10 C.F.R. § 2.309(f)(2).

⁴ "Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 26,850 (May 11, 2007).

⁵ "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).

⁶ See "New York State Notice of Intention to Participate and Petition to Intervene" ("2007 New York Petition" or "2007 Petition"), filed November 30, 2007 at 106.

petitioners' standing to intervene and the admissibility of their contentions.⁷ The Board found, *inter alia*, that the portion of New York-9 related to the alternatives analysis was inadmissible, but the portion relating to the "no-action" alternative was admissible.⁸

On December 22, 2008, the NRC Staff issued its Draft SEIS concerning the Indian Point LRA. On February 27, 2009, New York filed various new and amended Contentions, including new Contention 33, in which the State presented numerous arguments concerning the adequacy of the analysis of alternative energy sources and energy conservation in the "no action alternative" discussion in Chapter 8 of the Draft SEIS.⁹ On June 16, 2009, the Board issued its Order ruling on the new and amended contentions.¹⁰ The Board found, *inter alia*, that Contention 33 satisfied the requirements of 10 C.F.R. § 2.309(f)(2) because the data and conclusions in the Draft SEIS differed from those in the ER in that the Draft SEIS included an analysis of a combined group of renewable energy options and considered energy conservation as an alternative to the relicensing of Indian Point.¹¹ The Board consolidated Contentions 9 and 33 based upon the similarities dealing with the "no-action" alternative.¹²

On December 3, 2010, the Staff issued the FSEIS for the Indian Point LRA. On February 3, 2011, the State filed its Motion and new Contention 37, which the State characterized as updating Contentions 9 and 33, while raising the new issue that Chapter 8 of

⁷ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

⁸ LBP-08-13, slip op. at 45-51.

⁹ See (1) "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," dated February 27, 2009 ("New York's DSEIS Contentions").

¹⁰ Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) (unpublished).

¹¹ *Id.* at 11.

¹² *Id.* at 13.

the FSEIS does not provide a "rational basis" for the NRC's Record of Decision.¹³ Although New York stated that Contention 37 "updates" Contention 9/33, New York did not formally amend Contention 9/33.¹⁴

DISCUSSION

I. Legal Standards Governing the Admission of Late-Filed NEPA Contentions

The admissibility of late-filed contentions in NRC adjudicatory proceedings is governed by three regulations. These are: (a) 10 C.F.R. § 2.309(f)(2), concerning new and timely contentions, (b) 10 C.F.R. § 2.309(c), concerning non-timely contentions, and (c) 10 C.F.R. § 2.309(f)(1), establishing the general admissibility requirements for contentions. See *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

First, a late-filed contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave, if it meets the following requirements:

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the

¹³ Contention at 1.

¹⁴ *Id.*

initial filing only with leave of the presiding officer upon a showing that –

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id., emphasis added. The "Commission also requires petitioners to raise their NEPA contentions in response to the ER, rather than awaiting publication of the EIS." *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP 09-16, 70 NRC 227, 263 (2009). "If Petitioner were to delay and submit contentions on NEPA topics addressed in the ER after issuance of the EIS, they would likely be characterized as ["late-filed contentions."] subject to much more stringent admissibility standards." *Northern States Power Co.* (Formerly Nuclear Management Company, LLC), LBP-08-26, 68 NRC 905,931-932 (2008), adjudication terminated, CLI-10-27, 72 NRC __ (Sept. 30, 2010). An intervenor must file contentions raising environmental issues based on the environmental report or promptly after the information supporting the contentions becomes available, rather than waiting for the Draft or Final SFEIS to be published, pursuant to 10 C.F.R. § 2.309(f)(2). The Commission explained this requirement in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998):

Although the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered, intervenors must file their environmental contentions as soon as possible, even before issuance of the draft EIS, if the contested issue is addressed in the applicant's ER. See 10 C.F.R. § 2.714(b)(2)(iii) [now § 2.309(f)(2)]. To the extent that the FEIS may differ from the ER, an intervenor is provided a second opportunity to file contentions on environmental issues.

Id. Thus, where a Final EIS contains information or conclusions that differ from the applicant's ER, a new or amended contention should be filed to address the new material; alternatively,

where the information has not changed and the draft or final EIS "is essentially *in para materia* with the ER analysis or discussion," a contention based upon the ER may be considered to be a challenge to the EIS. See, e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 63-64 (2008); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001) (the contention is viewed as "migrating" from the ER to the draft EIS). Further, in its December 27, 2010 Order,¹⁵ this Board recognized that, to be proper and timely, new contentions must be based upon "significantly new data or conclusions in the FSEIS."¹⁶ The Board's admonition here is consistent with established case law.¹⁷

Second, a contention that does not qualify for admission as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the factors governing nontimely contentions, set forth in 10 C.F.R. § 2.309(c)(1). See, e.g., *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006). Pursuant to 10 C.F.R. § 2.309(c)(2), the requestor must address each factor in their nontimely filing.¹⁸

¹⁵ "Order (Granting Intervenor's Unopposed Joint Motion for an Extension of Time)," ("FSEIS Contention Order") (Dec. 27, 2010) (unpublished order).

¹⁶ The Board's ruling is similar to the guidance previously provided by the Board. In its February 4, 2009 Memorandum and Order, this Board made it clear that any new contentions concerning the Draft SEIS "may only deal with new environmental issues raised by the Draft SEIS," and that "contentions based on environmental issues that could have been raised when the original contentions were filed" would not be allowed. Pre-Hearing Conference Order at 3; see Tr. 768.

¹⁷ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 532 (2005); *Vermont Yankee*, LBP-06-14, 63 NRC at 572-74; *Duke Energy Corp.* (McGuire Nuclear Station Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), 56 NRC 373, 385-386 (2002).

¹⁸ The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. See, e.g., *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

The publication of a Staff document that summarizes or collects existing information is not by itself automatically sufficient to justify a new contention. The Commission recently summarized its "longstanding policy" on this matter:

[A] petitioner has an "iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention." As we recently held in [*AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009)]:

[O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

By permitting [petitioners] to wait for the Staff to compile all relevant information in a single document, the Board improperly ignored [petitioner's] obligation to conduct its own due diligence.

Prairie Island, CLI-10-27, slip op. at 17-18 (footnotes omitted).

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). The requirements of this regulation were addressed at length by the Board in *Indian Point*, LBP-08-13, 68 NRC at 60-64. Thus, for each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the

contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position, including references to specific sources and documents that support the contention; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute, or identification of each failure to include necessary information in the application, and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi); *Indian Point*, LBP-08-13, 68 NRC at 60-61. The purpose for the contention filing requirements set forth in § 2.309(f)(1) have been summarized by the Board, as focusing litigation on concrete issues, which results in a clearer and more focused record for decision. *Indian Point*, LBP-08-13, at 61.

II. New York's Motion Should Be Denied

Although New York's Motion was filed within the time frame specified by the Board, the Motion should be denied for failing to show that Contention 37 was timely filed.

A. New York does not show Contention 37 is based upon information which is "significantly different" from the Applicant's documents.

As a threshold matter, New York fails to satisfy 10 C.F.R. § 2.309(f)(2) because its discussions of differences between the DSEIS and FSEIS fail to show that the FSEIS has "data or conclusions . . . that differ significantly from the data or conclusions in the applicant's documents." Therefore, New York has not shown how it meets 10 C.F.R. § 2.309(f)(2) and the requirements of the Board's FSEIS Contention Order. Thus, New York states that the discussion of alternatives in the FSEIS differs significantly from the discussion in the DSEIS in four specific aspects: (1) inclusion of an energy conservation alternative in FSEIS § 8.3.3 (Conservation), (2) inclusion of a purchased power alternative in FSEIS § 8.3.2 (Purchased Electrical Power), (3) removal of a coal generation alternative in FSEIS § 8.3.4.13 (Supercritical

Coal-Fired Generation), and (4) addition of 200 MW to the renewable alternative in FSEIS § 8.3.5.1 (Impacts of Combination Alternative 1) and FSEIS § 8.3.5.2 (Impacts of Combination Alternative 2). See Motion at 3-4. However, New York fails to indicate any manner in which the FSEIS differs from the ER. In addition, New York quotes part of the FSEIS conclusion, but does not explain how the conclusion significantly differs from the Applicant's ER, or from the DSEIS. See *id.* at 4. For example, New York shows no significant differences in the Staff's discussions in DSEIS²¹ § 8.3.3 (Purchased Electrical Power) and FSEIS § 8.3.2 (Purchased Electrical Power).

Further, it is not clear how the information presented by New York amounts to significantly different data or conclusions relative to the ER (10 C.F.R. § 2.309(f)(2)), or new information material relative to the DSEIS. First, for example, the State notes that the Staff found that the impacts of purchased power are difficult to determine (Motion at 4). That statement, however, is taken out of context; the Staff explained that the impacts are fact-specific and cannot be further determined without specific facts (see FSEIS § 8.3.2). The State does not indicate any error in this statement, or that it constitutes a significant difference. See Motion at 4. Second, regarding discussions in FSEIS § 8.3.4.13 (Supercritical Coal-Fired Generation) the State claims the difference somehow involves the Staff's incorporation of the discussion from the DSEIS into the FSEIS. See Motion at 4. Where the FSEIS incorporates the DSEIS, however, there simply is no "significant difference;" indeed, the FSEIS states that the "discussion of the supercritical coal-fired alternative in [FSEIS § 8.3.4.13] has not been updated from the draft SEIS." Thus, there is no difference to justify a new contention. Third,

²¹ The Board has previously directed that, with limited exceptions, documents must be attached if a party seeks to have the Board rely upon the document. Scheduling Order (July 1, 2010) at 17-18. The DSEIS was not a listed exception. Accordingly, the relevant portions of the Chapter 8 and Chapter 9 of DSEIS are provided in Attachment A.

while the State notes that the while the DSEIS § 8.5.3 (Combination of Alternatives) considered up to 400 MW(e) from renewable energy, the FSEIS § 8.3.5 (Combination of Alternatives) assumes 600 MW(e) of renewable energy. See Motion at 4. As before, the State does not explain why it contends this 200 MW(e) increase in the assumed availability of renewable energy is significant, by, for example, relating the increase in renewable energy to a change in the impacts of combination alternatives. See *id.* Nor has New York indicated that there is any error in this statement as required to show a material issue in dispute.

In sum, New York has not supported its Motion with respect to the "differ significantly" element of § 2.309(f)(2), and accordingly it has not shown that the proffered contention should be treated as timely under § 2.309(f)(2) or the Board's FSEIS Contention Order.

Instead of meeting the significance test of § 2.309(f)(2) by showing significantly different data or conclusions between the Applicant's ER and the Staff's FSEIS, New York relies on the remaining three elements of § 2.309(f)(2) by alleging that (i) the information upon which new contention is based was not previously available; (ii) the information upon which the new contention is based is materially different than information previously available; and (iii) the new contention has been submitted in a timely fashion based on the availability of the subsequent information. See Motion at 4-6. However, New York presents only conclusory arguments with regard to this standard -- and its assertions, in any event, miss the mark.²²

Further, New York does not specifically address when the information upon which it relies became available. See Motion at 5. Instead, New York frames Parts A and B of Contention 37 as continuations of existing defects in the Staff's evaluation (Motion at 1),

²² It is true, of course, that the Staff's FSEIS was not previously available, but it is the availability of new information, not the publication of the Staff's document, that constitutes the controlling factor for timely new contentions. See 10 C.F.R. § 2.309(f)(2); see also *Prairie Island*, CLI-10-27 slip op. at 14.

thereby acknowledging that the issues are not new. Further, New York states that Parts C and D of the Contention are based upon the NRC's use of outdated information. Motion at 2.

However, because it does not show that the DSEIS data and conclusions differed significantly from the FSEIS in the use of this "obsolete" information, New York has not shown that its new contention is timely. See 10 C.F.R. § 2.309(f)(2).

In support of its Motion and Contention, New York provided six attachments.²³ The dates for the first three²⁴ show they are not new and do not constitute new information. Similarly, while Attachment 4, ("January 31, 2011 Declaration of David A. Schlissel") has a recent date, it does not contain new information; it is, instead, a compilation of existing old information and the newest references therein is from September 2010 (see *id* at 3 n.9). Likewise, Attachment 5 ("February 1, 2011 Declaration and Curriculum Vitae of Peter J. Lanzalotta") relies on old information. See, e.g., *id.* at 3 n.2 (referring to a September 8, 2010 press release). In the same vein, Attachment 6 ("February 2, 2011 Declaration of Peter A. Bradford") is also based upon old information, except for two immaterial, and thus non-supportive, exceptions.²⁵ Thus, New York's Motion fails to demonstrate that Contention 37 is based upon material new information as required under 10 C.F.R. § 2.309(f)(2).

²³ While New York did attach six documents with its Motion and Contention, New York improperly attempts to have the Board rely upon "references to documents that are contained therein," as well as numerous other unattached documents found on websites and elsewhere. See Contention at 43-44. Such references fail to comply with the Board's Scheduling order. In any event, even if the Board were to rely upon the unattached documents, none of the documents constitutes newly-available, and materially-different information under 10 C.F.R. § 2.309(f)(2)(i)-(ii).

²⁴ See Attachment 1 ("November 28, 2007 Declaration, Curriculum Vitae, and Report on the Availability of Replacement Capacity and Energy for Indian Point Units 2 & 3 of David A. Schlissel") Attachment 2 ("November 28, 2007 Declaration and Resume of Peter A. Bradford") and Attachment 3, ("February 27, 2009 Declaration of David A. Schlissel").

²⁵ The two recent documents are: (1) a December 16, 2010 "Annual Energy Outlook Early Release Overview" which provides a higher price of natural gas (Decl. of Bradford at 4 n.6), and (2) a reference to the "NYISO 2010 Comprehensive Reliability Plan, December 2010" noting an increase in (continued. . .)

B. The Motion does not meet the non-timely standards of 10 C.F.R. § 2.309(c).

In its Motion, New York included an argument that Contention 37 should be admitted under the non-timely standards of 10 C.F.R. § 2.309(c). Motion at 7-9. New York claims good cause exists for its late filing because the State could be affected by the NRC's decision, and that its contention is supported. Motion at 8. However, arguing that the State could be affected is not responsive to showing "good cause" for why it did not file sooner. "Good cause has long been interpreted to mean that the information on which the proposed new contention is based was not previously available." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 125-126 (2009). The State fails to address this factor in accordance with the Commission's requirements, and thus fails to show "good cause" for its untimely contention.

The other seven factors of 10 C.F.R. § 2.309(c) also weigh against the admission of this untimely contention. If Contention 37 is rejected, New York will still be a participating party, and will be able to litigate its previously-admitted and similar Contention 9/33. Thus, New York will have had an opportunity to address these issues prior to the entry of any order in the proceeding that could substantially impact the State (Motion at 9). Regarding § 2.309(c)(vii) (delay or broaden the proceeding), New York asserts that litigating the contention will "avoid any dispute," (Motion at 9), but this argument is a *non sequitur*: a contention is a dispute, and any new elements to a previously-admitted contention broaden that dispute. Regarding the last factor, § 2.309(c)(viii) (participation will assist in developing a sound record), the Staff notes that

(. . .continued)

projected cumulative savings from energy efficiency programs (*id.* at 5 n. 12). Neither of these documents was attached to the State's filings, thus, pursuant to the Board's order, the Board may not rely upon those documents.

New York provided extensive comments on the DSEIS, including many comments on the topics of energy alternatives, conservation, efficiency, transmission and connection enhancements. See FSEIS at A-1006 - A-1022. Thus, the Staff's NEPA document already records and addresses New York's concerns, and New York does not explain why the information in the FSEIS, in combination with the information New York might provide to support Contention 9/33, will not result in a "sound record" in the absence of Contention 37.

III. New York Contention 37 Is Inadmissible

Contention 37 states as follows:

The FSEIS Discussion Of Energy Alternatives (Chapter 8) Fails To Provide A Meaningful Analysis Of Energy Alternatives Or Responses To Criticism Of The DSEIS, In Violation Of The Requirements Of 42 U.S.C. §§ 4331 And 4332; 10 C.F.R. §§ 51.91(A)(1), And (C), 51.92(2), 51.95(C)(4), And Part 51, Subpart A, Appendix A And Appendix B; 40 C.F.R. §§ 1052.1, 1052.2(G), 1502.9, AND 1502.14; AND 5 U.S.C. § 551 *et seq.*

Contention at 2. Significantly, Contention 37 does not state that it concerns the "no action" alternative, and some of its bases appear to challenge the "alternative scenarios" rather than "the no action alternative." See, *e.g.*, Contention at 36. This framing of the contention appears to disregard the Board's prior rulings in this proceeding. Thus, the Board previously found "that the reasonable alternatives for license renewal proceedings are limited to discrete electric generation sources that are feasible technically and available commercially." *Indian Point*, LBP-08-13, 68 NRC at 92. Further, NEPA does not demand an analysis of energy efficiency, and conservation measures are "outside the scope required by a NEPA analysis of reasonable alternatives." *Id.* at 93. Accordingly, the Board found that there no need to address energy conservation measures except in the "no-action" alternative. *Id.* Contention 37 appears to disregard these rulings.

The State presents the four separate Bases for Contention 37. Part A asserts that the FSEIS failed to address previously-identified deficiencies in the ER and the DSEIS (Contention at 1); Part B asserts that the FSEIS failed to respond meaningfully to criticisms of the ER and DSEIS (*id.*); Part C, which is further subdivided into four subsections, is described by New York as providing new bases and evidence that the NRC Staff's analysis of energy alternatives is deficient, arbitrary, and biased (*id.* at 2); and Part D alleges that the FSEIS cannot be used because it lacks a meaningful alternatives analysis (*id.*).

As described below, Contention 37 is deficient for various reasons. First, the State has not shown the contention is based upon data or conclusions in the FSEIS that differ significantly from those in the ER, nor that Contention 37 is timely filed based upon new materially different information. See 10 C.F.R. 2.309(f)(2). Second, portions of the support for Contention 37 are based upon an incorrect understanding of the EIS comment process. Finally, New York fails to show that the FSEIS would contain a materially-different evaluation if all the issues presented in this contention were accepted and incorporated into the FSEIS.

A. New York's Claim Regarding "Obsolete" Information Is Untimely.

New York describes Part A of its Bases as asserting that the FSEIS failed to address previously-identified deficiencies in the ER and the DSEIS (Contention at 1), but otherwise does not discuss the contents of the ER. In Part A, the State asserts:

The FSEIS Fails To Take A "Hard Look" At Alternatives To License Renewal Because In Preparing It NRC Staff Relied On Obsolete Information, In Violation Of 10 C.F.R. §§ 51.72 and 51.91 and 40 C.F.R. § 1502.24.

Contention at 8. New York states that the FSEIS fails to provide a comprehensive no-action alternative that represents "the status quo" at the time of the FSEIS. Contention at 8. New York further alleges that the FSEIS "No-Action Alternative" discussion is unchanged from the

DSEIS. *Id.* at 9. New York then relies upon various *unattached* reports and documents, all of which pre-date its filing of Contention 37 by months or years.²⁸

Part A of New York's submission fails to support the admission of Contention 37. First, New York shows that its new contention is not based on new information contained in the FSEIS, inasmuch as New York acknowledges the FSEIS is unchanged from the DSEIS. See Contention at 9. The State does not discuss the contents of the ER, nor describe how the new contention is based upon data and conclusions that differ significantly from the ER. Thus, Part A does not show that Contention 37 is timely under 10 C.F.R. § 2.309(f)(2).

Moreover, New York has not shown that re-performing the FSEIS "no action" analyses using the updated power demand information provided by New York would make a significant difference in the FSEIS's evaluations or conclusions. New York cites a 4.1% drop in demand, but does not elaborate if this information "differ[s] significantly" from Entergy's predictions, or is "materially different" from previous estimates (*i.e.*, it does not discuss whether the alleged demand change was within the bounds of the predictions and analyses used in the FSEIS); thus, New York's citation of this information does not support the contention's admission under 10 C.F.R. § 2.309(f)(2). The FSEIS (and the DSEIS before it) concluded that the environmental impacts of the "no action" alternative were "SMALL" for most categories.²⁹ While arguing that "fundamental changes in New York's energy markets and infrastructure" are not discussed in

²⁸ See e.g. Contention at 10 n.18 (relying on "New York Independent System Operator 2010 Summer Outlook" (May 2010); *id.* at 12 n.21 (relying on "NYISO 2009 Comprehensive Review of Resource Adequacy," (March 10, 2010)). New York disputes reliance on a 2006 Department of Energy study. See, e.g., *id.* at 13. Neither of these documents was attached to the State's filing.

²⁹ The SMALL impact was found for land use, ecology, water use and quality, air quality, waste, human health, socioeconomics (transportation), aesthetics, historic and archeological resources, and environmental justice; the socioeconomics impact was "SMALL to MODERATE" (revenue impact based upon jurisdiction). FSEIS at 8-21, Table 8-2, "Summary of Environmental Impacts of the No-Action Alternative," and 8-25.

the FSEIS (Contention at 14), New York has not shown that inclusion of these alleged market and infrastructure changes would make the FSEIS § 8.2 "No-Action Alternative" impacts to be "MODERATE," "LARGE," or any different from the current FSEIS. In other words, New York has not shown the information to be material to the outcome of this proceeding.

B. The State did not submit the documents cited in Part B of Contention 37 as comments on the DSEIS.

The State describes Part B as asserting that the FSEIS failed to respond meaningfully to criticisms of the ER and DSEIS. Contention at 1. In Part B, the State claims:

The FSEIS Fails To Take A "Hard Look" At Alternatives To License Renewal Because In Preparing It NRC Staff Ignored And Failed To Respond To Extensive Timely And Relevant Comments, In Violation Of 10 C.F.R. §§ 51.90 and 51.91.

Contention at 15. New York believes that the FSEIS did not respond to three specific documents. The first two of these documents³¹ were attached to the New York's original petition to intervene in this proceeding,³² and the third document³³ was attached to New York's submission of additional contentions concerning the DSEIS.³⁴ Contention at 15-17. However, while the State submitted comments on the DSEIS, the three documents at issue in Part B were only *referenced* in the State's comments, and were not actually submitted as comments, as was requested in the Federal Register notice to assure their consideration in the FSEIS.³⁵ Further,

³¹ Schlissel, D., "Report on the Availability of Replacement Capacity and Energy for Indian Point Units 2 & 3" (Nov. 28, 2007) and "Declaration of Peter A Bradford" (Nov. 28, 2007).

³² "New York State Notice of Intention to Participate and Petition to Intervene and Supporting Declarations and Exhibits" Vol. I of II, (Nov. 30, 2007)

³³ "Declaration of David A. Schlissel" (Feb. 27, 2009).

³⁴ "State of New York Contentions Concerning the Staff's Draft Supplemental Environmental Impact Statement" (Feb. 27, 2009).

³⁵ 73 Fed. Reg. 80,440 (Dec. 31, 2008) ("To be considered, comments must be provided either at the transcribed public meeting or in writing."). See Attachment B.

as required by 10 C.F.R. § 51.73, the Staff's Federal Register notice requesting comments clearly stated where comments were to be submitted; the notice did not state that pleadings filed with the Board would be screened or searched to find additional comments, nor did it state that references listed in comments would be treated as separate comments.³⁶ The comments that the State actually submitted were addressed in the FSEIS (at A-984 - A-1043).³⁷

In sum, Part B does not demonstrate that Contention 37 should be admitted because it fails to show that the FSEIS failed to consider any comments submitted on the DSEIS.

C. New York's claim regarding non-fossil fuel alternatives is untimely raised.

New York describes Part C of its Bases as providing new bases and evidence that the NRC Staff's analysis of energy alternatives is deficient, arbitrary, and biased. Contention at 2. Part C states:

The FSEIS Fails To Take A "Hard Look" At Non-Fossil Fuel Alternatives

Id. at 17. Part C is further sub-divided into four subsections (1) Renewable Sector Generation, (2) Energy Efficiency/Energy Conservation, (3) Purchased Electrical Power, and (4) Combined Heat and Power. *Id.* at 18-23, 23-28, 28-30, and 30-31 respectively. New York states that the FSEIS is "facially responsive" to the State's comments, but did not provide a sufficient "hard look" at conservation, purchased power, and combined alternatives. *Id.* at 17-18.

In particular, New York claims that the FSEIS was not updated to reflect the State's implementation of the "Renewable Portfolio Standard" adopted in 2004, and its "45 x 15" policy as described in a 2009 speech (*id.* at 19). Further, the State complains that the FSEIS fails to

³⁶ *See id.*

³⁷ The State fails to show any error in the FSEIS's treatment of its actual comments, or show how the FSEIS did not meet 10 C.F.R. §§ 51.91(a) and 51.95(b).

provide "critical analysis" of the State's programs and is self-contradictory with respect to how much wind power is available, *id.* at 21; is arbitrarily insists that wind power be supported with backup power generation, *id.* at 22; and ignores developments in wind power, *id.* at 23.

In the area of energy efficiency and energy conservation, New York complains the FSEIS does not clearly state if conservation could replace all of IP2 and IP3. *Id.* at 24. New York also objects to the incorporation of evaluations presented in the Final SEIS prepared for other reactor sites, and New York asserts that the NRC ignored the fact that that energy conservation is associated with job creation. *Id.* at 24-26. In addition, New York repeats its claim that the DSEIS ignored the 2007 Schlissel report discussed in Basis B above, *id.* at 26, and that the FSEIS did not analyze a demand-response program. *Id.* at 28. With respect to purchased power, New York objects to the FSEIS conclusion that specific route information is needed to analyze transmission line projects, and wants to the FSEIS to analyze two projects specified by New York. Contention at 29-30. For combined heat and power, New York objects to the FSEIS conclusion that IP2 and IP3 do not currently provide heat to offsite users, and thus producing heat is not a purpose of IP2 and IP3. *Id.* at 30-31.

The State's claims fail to establish a material issue in dispute that is appropriate for litigation, as required by 10 C.F.R. § 2.309(f)(1)(vi) and (vi). As a threshold matter, nowhere in Part C does New York dispute, or even refer to, FSEIS § 8.2 (No-Action Alternative), nor does it claim that Part C is applicable to the "no-action alternative." Inasmuch as Part C disputes the "Non-Fossil Fuel Analysis" without any challenge to the "No-Action Alternative," this portion of the contention should be rejected. As the Board previously held, admissible contentions must be limited to reasonable alternatives, which are discrete electric generation sources, feasible, and commercially available. *Indian Point*, LBP-08-13, 68 NRC at 92. As this Board further

held, energy efficiency and conservation are beyond the control of the Applicant and the scope required by a NEPA analysis of energy alternatives. *Id.* at 93.

Further, Part C, like the other parts of Contention 37, is untimely because it is based upon old information. For example, with respect to the Renewable Sector Generation topic, the State claims that the FSEIS failed to include the 2004 State's Renewable Portfolio Standard (Contention at 19), however this standard was known to the State several years before the start of the license renewal proceeding, and the State was therefore obliged to raise this issue in contentions challenging the ER. See 10 C.F.R. § 2.309(f)(2). The State has not shown that there is significant new information to justify a new contention on this matter, and a NEPA issue based upon seven-year-old information cannot be considered timely raised. See, e.g., *Crow Butte*, CLI-09-09, 69 NRC at 351.

Regarding the topic of energy efficiency/energy conservation, the State objects to incorporating other analyses into the FSEIS (Contention at 24-26). The incorporation of information or discussions contained in a previous EIS is permissible under the NRC's regulations in Appendix A to Subpart A of 10 C.F.R Part 51. Indeed, the FSEIS repeatedly cites and incorporates by reference the discussions presented in the GEIS, without complaint by New York. Further, the FSEIS found almost all the impacts from conservation to be SMALL. See FSEIS 8-41 - 8-43. The State does not allege the FSEIS is incorrect. In addition, the claim of a failure to analyze a demand-response program (Contention at 28), a claim of omission, could have been raised much sooner, for example based on the discussion in the DSEIS (at 8-59). New York is not timely in now raising this claim of omission against the FSEIS.

Regarding the topics of purchased power and transmission corridors, New York is again late. The subject of transmission projects was discussed in the DSEIS (see, e.g., DSEIS at 8-57), and New York has not shown any newly-available information to justify a new contention

at this time.⁴⁰ Moreover, New York admits that: "The State provided NRC Staff information on these transmission projects, and other currently pending transmission projects as early as *November 2007*." Contention at 30 (emphasis added). If New York believed the ER or DSEIS was deficient without discussion of those projects, New York should have filed this contention as a challenge to the ER or DSEIS. Finally, regarding the topic of combined heat and power, the specified heat project is beyond the scope of any required alternatives analysis. See *Indian Point*, LBP-08-13, 68 NRC at 93.

D The FSEIS is sufficient to satisfy NEPA.

New York describes Part D as showing that the FSEIS cannot be used because it lacks a meaningful alternatives analysis. See Contention at 2. New York writes as Part D:

The FSEIS Discussion Of Energy Alternatives (Chapter 8) Does Not Permit A Rational Decision Maker To Determine Whether The Adverse Environmental Impacts Of License Renewal Are So Great That Preserving The Option Of License Renewal For Energy Planning Decision Makers Would Be Unreasonable.

Contention at 31. New York faults the FSEIS for not including a cost-comparison among energy alternatives, and not indicating which energy alternative would "deployed" if the no-action alternative was adopted.⁴¹ *Id.* at 32. Citing FSEIS Chapter 9, "Summary and Conclusions," New York says the FSEIS is "conclusory" regarding resource commitments and long-term productivity. *Id.* New York further states its view that the Staff's conclusion that the

⁴⁰ To the contrary, the information New York cites is from April 2009, December 2009, and September 2010. Contention at 29-30.

⁴¹ Although New York faults the FSEIS for not having included this comparison, elsewhere in the Contention New York agrees with the FSEIS on the controlling factors for alternative energy choices. Thus, the Contention states that the "FSEIS does acknowledge that NYS energy conservation programs (8-42, 43) and renewable generation (8-28, 8-61) are growing rapidly and that the choice of generation in NYS will be driven increasingly by carbon and other environmental considerations (8-28)." Contention at 36. Thus, this "energy deployment" claim lacks basis.

"no-action alternative has the smallest effect" is meaningless unless updated data are used.⁴²

Id. Relying on information from October 2010 or earlier, which the State could have cited as the basis for a new contention previously, New York alleges that the FSEIS did not address, or avoided, contradicting evidence⁴³ *see id.* at 33-35; the use of incorrect information biased the FSEIS toward renewal, *id.* at 35-36; the FSEIS did not correctly consider energy conservation and/or renewable energy options, skipped an entirely non-fossil fuel alternative, and thus assigned higher impacts to the "no-action alternative" and alternative energy scenarios.⁴⁴ *Id.* at 36-37. Further, New York objects to the FSEIS's discussions of grid stability and reliability, which New York alleges amount to advocating license renewal, *id.* at 37-38; and it objects to discussions of synchronous condensers in the alternatives analysis, *id.* at 37-39.⁴⁵ New York also repeats its objections to using FSEIS discussions from other sites, alleging that this practice is inconsistent with NEPA. *Id.* at 39-41.

⁴² Notably, New York does not disagree with the finding that "no-action" has the least environmental impact. *See* Contention at 32. Thus, it appears the New York does not have a material dispute with the FSEIS conclusion.

⁴³ Again, New York does not discuss if the DSEIS failed to address this information, and fails to show the contention was timely filed.

⁴⁴ Although New York alleged that "the FSEIS overstates the environmental impacts of the alternative scenarios as well as the no action alternative" (Contention at 36), the State's subsequent discussions did not distinguish between the two separate standards applicable to the scope of alternatives and the scope of "no-action alternatives" which the Board addressed in *Indian Point*, LBP-08-13, 68 NRC at 92-93.

⁴⁵ The issue of "synchronous condensers" was discussed in the DSEIS, and that discussion is unchanged in the FSEIS to the DSEIS. Both say in § 8.2, "No-Action Alternative":

As "synchronous condensers," the generators could add reactive power (but not real power) to the transmission system (National Research Council 2006). Because it is assumed that the generators would be operated as synchronous condensers only until the reactive power could be supported by new, real replacement power generation, their operation is not considered as a significant contributor to the impacts described below.

See DSEIS at 8-27, FSEIS at 8-22. New York's attempt to raise it here is untimely.

Part D of the Contention contains generalized conclusions that are not relevant to contention admissibility, and repeats arguments from the Contention. See Contention at 41-43. For example, the State argues that because the FSEIS does not discuss the State's energy conservation measures, the State's own energy planning decision makers and the public will not know what the State is doing, and therefore the FSEIS preempts the State's responsibility to decide on the appropriate mix of energy alternatives.⁴⁶ *Id.* Finally, the State claims that the FSEIS did not provide a "good faith" discussion of energy alternatives and did not address the DSEIS comments. *Id.* at 42.

Part D fails to provide support the admission of this contention. Part D neither describes nor argues that Contention 37 is justified based upon "data or conclusions in the NRC . . . [FSEIS] . . . that differ significantly from the data or conclusions in the applicant's documents," and it thus fails to show Contention 37 is timely filed. See 10 C.F.R. § 2.309(f)(2). Further,

⁴⁶ No comparison to the DSEIS or Applicants document's is proffered; the State fails to show any new information that provides support in Part D for Contention 37. In addition, New York's preemption argument is misplaced and lacking merit. The NRC has recognized the role of states, like New York:

After the NRC makes its decision based on the safety and environmental considerations, the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers. This final decision will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction. The NRC has no authority or regulatory control over the ultimate selection of future energy alternatives. Likewise, the NRC has no regulatory power to ensure that environmentally superior energy alternatives are used in the future. Given the absence of the NRC's authority in the general area of energy planning, the NRC's rejection of a license renewal application based on the existence of a single superior alternative does not guarantee that such an alternative will be used. In fact, it is conceivable that the rejection of a license renewal application by the NRC in favor of an individual alternative may lead to the implementation of another alternative that has even greater environmental impacts than the proposed action, license renewal.

throughout Part D, New York fails to contrast the DSEIS with the FSEIS and therefore does not show that Contention 37 was timely submitted based upon the availability of new, material information under 10 C.F.R. §§ 2.309(f)(2)(i)-(iii).⁴⁷ Moreover, the information cited in Part D was available long before the State's February 3, 2011 filing, thus demonstrating the contention is untimely. See, e.g., Contention at 34 n.58 (using data from Oct. 31, 2006); *id.* at 35 n.61 (using a 2007 document and a 1979 document).

Careful inspection of the claimed errors in Part D shows that Contention 37 should have been raised based upon the DSEIS, inasmuch as (a) the FSEIS is not significantly different from the DSEIS, (b) the information held up as providing support for Contention 37 is not new, and (c) review of the information provided by New York fails to show an error in the FSEIS. For example, New York disputes the FSEIS (at 8-27) regarding the reason why electric rates are high (Contention at 33 ¶ 60.a), but the FSEIS discussion of this matter is unchanged from the DSEIS.⁴⁸ DSEIS at 8-32. Similarly, the power demand and supply information from the FSEIS (at 8-39) disputed in Contention at 33 ¶ 60.b was first stated in the DSEIS (at 8-56). While New York Contention at ¶ 60.c identifies an error in the FSEIS (at 8-40), that issue could have been raised regarding the DSEIS in 2009, and, in any event, the identified error is immaterial.⁴⁹

⁴⁷ For example, New York objects to FSEIS § 9.1.3, "Short-Term Use Versus Long Term Productivity" (Contention at 32), but the discussion in the FSEIS is *unchanged* from the discussion in DSEIS § 9.1.3, "Short-Term Use Versus Long-Term Productivity."

⁴⁸ The Staff's discussion states, "Because of the area's current dependence on local power generation from natural gas and oil fuels, the area has high electricity rates (DOE 2006)." DSEIS at 8-32, FSEIS at 8-27.

⁴⁹ New York is correct that NYRI had submitted an application to the New York Public Service Commission for the construction of a new high-voltage transmission line, then withdrew that application on April 9, 2009, and has no active application for a transmission project in the New York ISO. See *New York Reg'l Interconnect, Inc. v. Fed. Energy Regulatory Comm'n*, No. 09-1309, 2011 WL 476621, 4-5 (D.C. Cir. Feb. 11, 2011) (holding that without an active application, NYRI lacked standing to challenge certain FERC orders). That project was never a choate plan; accordingly the FSEIS used the NYRI project as an example, illustrative of a potential project (FSEIS at 8-40). The environmental impacts of the (continued. . .)

Likewise immaterial is Contention at 33 ¶ 60.d, where New York says that its energy efficiency ranking improved without explaining how this invalidates the FSEIS; further, the State could have raised the issue in October 2010. Similarly, Contention at 33-34 ¶ 60.e relies upon old information: a 2009 jobs program and a 2006 study. Contention at 34 ¶ 60.f of the contention seeks analysis of a combined heat and power project, an issue which could have been raised long ago, and, moreover, is beyond the scope of discrete generating alternatives. Contention at 34 ¶ 60.g is based upon a 2009 energy plan, and inaccurately states what is in the FSEIS.⁵⁰ Contention at 34 ¶ 60.h mischaracterizes the land disturbance information, as shown by an examination of the underlying document and thus lacks basis.⁵¹ Contention at 35 ¶ 60.i likewise takes the cited information out of context regarding repowered facilities and therefore lacks basis.⁵² Also late is New York's assertion that the FSEIS failed to consider an entirely non-fossil-fuel alternative, and as a consequence overstated the adverse impacts of the renewable sector alternative. Contention at 36-37. This claim of omission is untimely, in that New York

(...continued)

project described in the DSEIS and FSEIS are the same whether or not there is an active application for the project.

⁵⁰ In fact, the FSEIS goes on to state, "Those potentials do not indicate an upper bound of the possible resources in the state, but are indicative of the resources most likely to be added based on NYSDPS supply curve projections." FSEIS at 8-61. More significantly, the statement cited by New York, that 7000 MW of additional windpower is proposed, with no statement about *when* such power might be sited, designed, built, and operated, does not contradict the FSEIS statement that the New York State Department of Public Service *anticipates* 1076 MW of *additional* windpower in the defined four-year period of 2011 to 2015.

⁵¹ See National Renewable Energy Laboratory, *Land-Use Requirements of Modern Wind Power Plants in the United States*, Paul Denholm, Maureen Hand, Maddalena Jackson, and Sean Ong, August, 2009, p. 22. Attachment C.

⁵² The cited passage, continued: "Impacts would be essentially the same for a repowered facility as for a facility constructed at Indian Point, though available site infrastructure could result in slightly lower or higher impacts at the repowering project." FSEIS at 8-29. Further, within the same section, the Staff agreed with New York that the impacts are dependent on the site selected. See *id.*

could have raised the absence of such analysis as a claim of omission against the ER. See 10 C.F.R. § 2.309(f)(2).

CONCLUSION

New York Contention 37 was untimely filed without good cause, and fails to identify material new information which would support its admission. Further, the State's claims regarding alternative energy sources raise issues that are inappropriate for consideration in a license renewal proceeding. For these reasons, as more fully discussed above, New York Contention 37 should be rejected.

Respectfully submitted,



David E. Roth
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 7th day of March 2011

Answer Certification

Pursuant to the Board's Order of July 1, 2010, I certify that I made a sincere effort to make myself available to listen and respond to the moving parties, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.



David Roth
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of March 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S MOTION FOR LEAVE TO FILE A NEW CONTENTION, AND NEW CONTENTION 37, CONCERNING THE FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT," dated March 7, 2011, 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 7th day of March, 2011:

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