

RAS E-467

DOCKETED

February 23, 2011 (3:28 p.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 February 23, 2011
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NEW YORK STATE MOTION FOR APPROVAL OF
EXTENSION OF PAGE LIMITATIONS FOR PROPOSED
CONTENTION 37, *NUNC PRO TUNC*, JANUARY 31, 2011

On February 3, 2011, the State of New York filed Proposed Contention 37 which focuses on the shortcomings in the FSEIS analysis of energy alternatives and the no action alternative. Contention 37 essentially consolidates and then expands upon the bases for previously admitted Contentions 9 and 33. Proposed Contention 37 is 46 pages.

On July 1, 2010 the Board issued a Scheduling Order that included the following:

A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously.

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3) Scheduling Order (July 1, 2010) at 5. The same Order also included a page limitation applicable to motions:

Motions and answers to motions shall not exceed twenty-five (25) pages in length (including signature page but excluding attachments, see paragraph M.5, *infra*), absent preapproval of the Board. A motion for preapproval to exceed this page limitation shall be submitted in writing no less than three (3) business days prior to the time the motion or answer is due to be filed.

TEMPLATE=SECY-041

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Id. at 6. On February 17, 2011 the Board issued an order with regard to page limitations for responses to new contentions. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Order (Extending Page Limitations for Pleadings as They Apply to Answers to Clearwater's and Riverkeeper's January 24, 2011, Joint Motion, and New York State's Motion to Amend Contention 17A and Waiver Petition, Filed January 24, 2011) February 17, 2011. In the February 17th Order the Board clarified its earlier Scheduling Order and stated:

when we issued the Scheduling Order, we anticipated that such motions [for leave to file a new contention] and their proposed contentions would be filed as separate documents, each separately subject to the 25-page limit set at Paragraph G.1 of that Order.

Id. at 2. Until the latter Order was issued, the State believed that the page limitation only applied to motions and did not apply to new proposed contentions. For that reason, Proposed Contention 37 exceeds the 25 page limit and no request to exceed that page limit was filed prior to the filing of the proposed contention. Thus, the need for this *nunc pro tunc* motion.

The State believes good cause exists for granting this motion. First, some of the length of Contention 37 is attributable to the repetition of the already accepted bases from admitted Contentions 9 and 33. As set forth in the contention itself, these bases were repeated out of an exercise of caution, or, in some cases, were necessarily repeated in order to demonstrate a persistent failure of consideration, or a persistent pattern of analytical error.

Secondly, the length of Contention 37 reflects the complexity of the alternatives analysis and that the State has taken seriously the admonition that “[a]ll parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of

the party.” 10 C.F.R. § 2.323(d); *see* 69 Fed. Reg. 2182, 2183, Statement of Considerations, Changes to Adjudicatory Process (Jan. 14, 2004) referring to “existing requirements . . . to proffer specific, adequately supported contentions in order to be admitted as a party to the proceeding.” Thus, the State of New York has provided the Board with substantial evidence in the form of expert reports and declarations, and publicly available studies which support the State’s assertions of numerous inaccuracies in the FSEIS, and of unexamined alternatives to license renewal that are feasible and not speculative.

Third, the State’s confusion on this matter was not unreasonable since, as the Board noted in its February 17th Order (*id.* at 2), the State has filed its motions for leave as a separate document from its proposed contentions, thus isolating the motion, to which the State believed the page limitation applied, from the proposed contention, as to which the State believed no page limitation applied. No such page limitation on contentions is contained in 10 C.F.R. § 2.309, which is understandable given the heightened scrutiny the Commission has declared should be given to its requirements for proposed contentions which requirements are to be considered “strict by design.” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Memorandum and Order (Denying the Village of Buchanan’s Hearing Request and Petition to Intervene) (Dec. 5, 2007) at 4.

Under these circumstances, and for the good cause shown, the State of New York requests that this Motion to exceed the page limitation for Proposed Contention 37 be allowed and be deemed filed on January 31, 2011.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Board grant the State's motion *nunc pro tunc* to exceed the page limitation for Proposed Contention 37 concerning energy alternatives.

Respectfully submitted,

s/ 

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February 23, 2011

Certification pursuant to 10 C.F.R. § 2.323 and ASLB Scheduling Order

Pursuant to 10 C.F.R. § 2.323(b) and this Atomic Safety and Licensing Board's July 1, 2010 Scheduling Order ¶ G.6, I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Is Janice Dean P.R.
Janice Dean

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and February 23, 2011
Entergy Nuclear Operations, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2011, copies of the State of New York's New York State Motion For Approval Of Extension Of Page Limitations For Proposed Contention 37, *Nunc Pro Tunc*, January 31, 2011 were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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Dated at New York, New York
this 23rd day of February 2011

February 23, 2011 (3:28 p.m.)

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

DPR-26, DPR-64

February 23, 2010
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NOTICE OF WITHDRAWAL OF COUNSEL

Notice is hereby given of the withdrawal of Mylan Denerstein, Esq., as counsel for the State of New York in this proceeding. The State requests that all service lists in this proceeding be amended accordingly.

Respectfully submitted,

 AJO

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Dated: February 23, 2011

**UNITED STATES OF AMERICA
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I hereby certify that on February 23, 2011, copies of the Notice of Withdrawal of Mylan Denerstein were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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Dated at New York, New York
this 23rd day of February 2011