

July 28, 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/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER TO "APPLICANT'S MOTION FOR
CLARIFICATION OF LICENSING BOARD ADMISSIBILITY
RULINGS ON CONTENTIONS NYS-17B AND NYS-37"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby submits its answer to "Applicant's Motion For Clarification of Licensing Board Admissibility Rulings on Contentions NYS-17B and NYS-37" ("Motion"), filed by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on July 18, 2011. As more fully set forth below, the Staff believes that the limited clarifications sought by the Applicant will serve to assist all parties in preparing for hearings on these contentions.¹ For this reason, as more fully set forth below, the Staff supports the Applicant's Motion and recommends that it be granted.

¹ The State of New York ("New York" or "State") filed an answer opposing Entergy's Motion, asserting (a) that the Motion seeks reconsideration of the Board's ruling on Contention NYS-17B, (b) the State is prepared to file its testimony on both contentions without "further guidance" by the Board, and (c) Entergy does not need clarification now, since it can later file a motion *in limine* to exclude any testimony which it believes is outside the scope of the Board's Order. See "State of New York's Response to Applicant's Motion for Clarification of Licensing Board's Admissibility Rulings on Contentions NYS-17B and NYS-37" (July 26, 2011), at 1 and 2. As discussed below, the Staff believes that New York's views are without merit – and that all parties – including Entergy, the Staff, and New York – would benefit from clarification of the Board's Order.

BACKGROUND

On January 24, 2011, New York filed a motion seeking leave to file amended bases to its previously admitted Contention NYS-17A, to be designated Contention NYS-17B, concerning the impact of long-term on-site storage of spent fuel on property values in the vicinity of Indian Point Nuclear Generating Units 2 and 3 ("IP2/IP3").² Responses to that motion were filed by the Staff and Applicant on February 18, 2011, to which the State replied on March 4, 2011.³

On February 3, 2011, New York filed a motion seeking leave to file new Contention 37,⁴ concerning the Staff's consideration of non-fossil energy alternatives as part of the "no action" alternative, in Final Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996).⁵ Responses to the State's

² "State of New York Motion for Leave to File Timely Amended Bases to Contention 17A (Now To Be Designated Contention 17B)" (Jan. 24, 2011) ("17B Motion"). Along with that motion, New York filed "State of New York Contention 17B," and a request for exemption or waiver of 10 C.F.R. § 51.23(b). See "State of New York's Request for A Determination That the Proposed Amended Bases for Contention 17A Are Not Barred by 10 C.F.R. § 51.23(b), or That [An] Exemption From the Requirements of 10 C.F.R. § 51.23(b) Should Be Granted, or That the State Has made A Prima Facie Case That § 51.23(b) Should Be Waived as Applied to Contention 17B" ("Waiver Petition").

³ See (1) "NRC Staff's Answer to the State of New York's Motion for Leave to File Amended Bases to Contention 17A (To Be Designated 17B) and Request for an Exemption or Waiver" (Feb. 18, 2011) ("Staff's 17B Response"); and (2) "Applicant's Answer to Proposed Amended Contention New York State 17B and the Associated Request for Exemption and/or Waiver of 10 C.F.R. § 51.23(b)" (Feb. 18, 2011) ("Entergy's 17B Response"). See also "State of New York's Combined Reply to the Answers of Entergy and NRC Staff to the State's Proposed Amended Contention NYS-17B" (Mar. 4, 2011).

⁴ See (1) "State of New York Motion for Leave to File New and Amended Contentions Concerning Chapter 8 of the December 3, 2010 Final Supplemental Environmental Impact Statement" (Feb. 3, 2011) and (2) "State of New York Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement" (Feb. 3, 2011).

⁵ "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3," NUREG-1437, Supp. 38 (Dec. 2010) ("Final SEIS" or "FSEIS").

motion were filed by the Staff and Applicant on March 7, 2011, to which the State replied on March 18, 2011.⁶

On July 6, 2011, the Atomic Safety and Licensing Board ("Board") issued its decision on the admissibility of 11 new and amended contentions, including Contentions NYS-17B and NYS-37.⁷ As pertinent here, the Board granted the State's request to admit Contention 17B, thereby modifying admitted contention NYS-17/17A, concerning the Final SEIS discussion of the impacts of license renewal on off-site property values, in light of the Commission's recent update to the Waste Confidence Rule.⁸ Order at 9-19. Further, the Board admitted Contention NYS-37, expanding the bases for admitted Contention NYS 9/33 to include a challenge to the Final SEIS discussion of non-fossil energy alternatives within the "no-action" alternative for license renewal. *Id.* at 29-35. On July 18, 2011, Entergy filed the instant Motion, seeking clarification of two limited aspects of the Board's ruling on Contentions NYS-17B and NYS-37.

DISCUSSION

The Board's Order of July 6, 2011, ruled on the admissibility of 11 new and amended contentions. Entergy seeks clarification of two narrowly-confined portions of the Board's ruling.

⁶ See (1) "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" ("Staff Answer to Contention 37") (Mar. 7, 2011); and (2) "Applicant's Answer to New York State's Contention 37 Concerning the NRC Staff's Evaluation of Energy Alternatives" ("Entergy's Answer to Contention 37") (Mar. 7, 2011). See also "State of New York's Combined Reply to Entergy and NRC Staff's Answers to the State's Proposed Contention 37 Concerning NRC Staff's December 2010 [FSEIS] and Its Deficient Analysis of Energy Alternatives" (Mar. 18, 2011).

⁷ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions)" (July 6, 2011).

⁸ See (1) "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010); (2) "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032 (Dec. 23, 2010).

The Staff shares Entergy's view that clarification of these matters would provide needed guidance to the parties as to the issues to be litigated within the scope of these contentions, which is necessary for the parties to be able to confront the issues admitted in this proceeding.

Contention NYS-17B

With respect to Contention NYS-17B, Entergy points out that two statements in the Board's Order appear to be inconsistent, leaving it unclear which issues the parties are to litigate within the scope of this contention. In order "to avoid any potential confusion," Entergy seeks "confirmation that the Board's reference to 'occupation of the site by *components* of IPEC . . . if license renewal is granted" on page 18 of the July 6, 2011 Board Order does not include consideration of environmental impacts of long-term on-site spent fuel storage." Motion at 2-3 (emphasis in original).

The Staff believes that clarification of this matter is needed. In this regard, the Board's Order stated as follows:

. . . New York also argues that the no-action alternative would substantially increase the beneficial uses for land adjacent (within 2 miles) to the IPEC site and increase the value of that land, whereas extended operation of IP2 and IP3, and the presence of the additional waste they generate, will deprive adjacent lands of the economic recovery that they would otherwise enjoy. Further, New York argues that its new bases should be allowed because the impacts on property values of spent fuel are site-specific and are exempt from the provisions of 10 C.F.R. § 51.23(b).

We disagree. The presence of spent fuel is generic to all reactor sites under both the Generic Environmental Impact Statement (GEIS) for License Renewals and the Waste Confidence Rule. To argue that the presence of spent fuel itself on the site affects property values is to assert that there is an environmental impact from the presence of spent fuel that must be assessed on a site-specific basis, contradicting the language of the Waste Confidence Rule, 10 C.F.R. § 51.23(b), which states that there is no such requirement. . . .

Because the Commission has specifically barred consideration of the environmental impacts of long-term storage of spent fuel in adjudicatory proceedings, this aspect of NYS-17B is inadmissible as beyond the scope of this proceeding pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Nevertheless, the negative effect on property values predicted by Dr. Sheppard that would result from the longer-term presence of spent fuel anticipated by the updated Waste Confidence Rule is not an environmental impact barred by the Waste Confidence Rule. The potential for spent fuel to indefinitely stay on-site is not an environmental impact associated with the spent fuel itself; rather, it is the occupation of the site by components of IPEC that has the potential to bring down property values if license renewal is granted. It is the value and uses of adjacent property that are site-specific environmental impacts. A challenge based on the impact of IPEC components' long-term on-site existence upon surrounding property values is not barred by the Waste Confidence Rule.

Because the admission of NYS-17B as limited permits an analysis of the putative positive property value impact of the no-action alternative compared to the property value impact of the proposed action, we find it unnecessary to rule on New York's request for an exemption to or a waiver from the provisions of Section 51.23(b). . . .

Order at 16-19 (footnotes omitted; emphasis added).

The Staff respectfully submits that the Board's ruling is unclear. While the Board observed that the Commission "has specifically barred consideration of the environmental impacts of long-term storage of spent fuel in adjudicatory proceedings," it nonetheless admitted the issue of the impact to offsite property values that would be caused by longer-term presence of spent fuel at the site, on the grounds that "the longer-term presence of spent fuel anticipated by the updated Waste Confidence Rule is not an environmental impact barred by the Waste Confidence Rule." *Id.* at 18; emphasis added. The Staff finds these statements render it

unclear as to which issues are within, or beyond, the scope of the contention as admitted.⁹ The Staff respectfully submits that clarification by the Board would serve to assist all parties to understand what it is that they must address in their testimony, which is crucial to enable them to confront the issues the Board will address in its decision on license renewal.

Contention NYS-37

With respect to Contention NYS-37, Entergy recognizes that while the Board admitted New York's challenge to the FSEIS discussion of non-fossil energy alternatives as part of the "no action" alternative, the Board also ruled out a "broad-ranging inquiry into alternative scenarios and the need for power." Motion at 3. Nonetheless, Entergy states that footnote 156 of the Board's Order renders the Board's ruling unclear, insofar as the Board stated that "New York's *concerns* about the FSEIS's analysis of *certain non-fossil alternatives* untimely, given that these issues go beyond those raised by New York in its contentions on the DSEIS and New York could have raised them earlier." *Id.* at 4; emphasis by Entergy.

The Staff shares Entergy's view that footnote 156 of the Board's ruling renders it unclear which aspects of Contention NYS-37 the Board intended to admit within the scope of this contention. In this regard, New York's proposed contention raised multiple concerns about the FSEIS discussion of alternative energy sources and energy conservation, as part of the "no-action" alternative, many (if not all) of which it could have raised earlier with respect to the Draft

⁹ For example, it is unclear whether the Board meant (a) to admit the issue of impacts resulting from on-site storage of spent fuel for the additional 20-year period of license renewal, and to exclude longer-term storage of spent fuel beyond the license renewal period; (b) to admit the issue of impacts resulting from the on-site presence of storage casks (*i.e.*, "components" of the plant), but not of "the spent fuel itself" that would be stored in those casks – as Entergy interprets the Order (see Motion at 3); or (c) to allow the litigation of offsite property value impacts resulting from license renewal and longer-term storage of spent fuel on the site, on the grounds that such impacts were not within the scope of the environmental impacts addressed by the Commission's Waste Confidence Rule.

SEIS; those issues, both in whole and in part, were opposed by the Staff as untimely.¹⁰ See Order at 31-32. For example, the Staff opposed the admission of the entire contention as untimely, on the grounds that the contention could have been filed upon publication of the Draft SEIS.¹¹ Further, the Staff opposed the admission of Parts A, C and D of the contention, in particular, as untimely.¹²

While the Board admitted Contention NYS-37, the Board found that “New York’s concerns about the FSEIS’s analysis of certain non-fossil alternatives [were] untimely, given that these issues go beyond those raised by New York in its contentions on the DSEIS and New York could have raised them earlier.” Order at 35 n.156; emphasis added. The Staff, which had opposed the entire contention (as well as distinct parts thereof) as untimely, agrees that the contention was untimely, at least in part – but the Staff is unsure which aspects of the contention were ruled to be within, or outside, the Board’s timeliness determination. The Board’s Order leaves this issue unclear, in stating only that “certain” non-fossil alternatives were excluded as untimely. Clarification of the Board’s ruling would help to assure that all parties properly address the admitted issues in their testimony.

Finally, the Staff notes that New York had argued that this entire contention was timely (see Order at 33), and New York may well have its own view as to which issues the Board meant to exclude as untimely. New York’s suggestion that the Board should remain silent and leave it to the parties to frame their testimony based on each party’s unilateral view of the

¹⁰ In contrast, Entergy stated that it did “not oppose NYS-37 on timeliness grounds.” Entergy’s Answer to Contention 37 (Mar. 7, 2011) at 7; *cf. id.* at 2.

¹¹ Staff Answer to Contention 37 (Mar. 7, 2011) at 8-13.

¹² Staff Answer to Contention 37 (Mar. 7, 2011) at 14-15, 17-20, and 22-25.

Board's intent, subject to later clarification by the Board in ruling on a motion *in limine* after testimony has been filed (New York's Answer at 2), is neither practical nor likely to promote an orderly, fair, and efficient hearing process.¹³ Rather, clarification of the Board's statement in footnote 156 would assist all parties in understanding the scope of the issues admitted in this contention, as necessary for them to properly frame their testimony on this contention.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that clarification of the Board's Order of July 6, 2011, in the limited respects requested by Entergy, would afford vital guidance to the parties for the litigation of Contentions NYS-17B and NYS-37 in this proceeding. For this reason, as more fully set forth above, the Staff supports Entergy's Motion and recommends that it be granted.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of July 2011

¹³ For example, a party may decide to exclude an issue from its testimony, believing the issue to be outside the scope of the contention, only to find later, when it is too late to address the issue, that the Board accepted another party's testimony on that issue – this leaving a gap in the record. Similarly, a party may devote substantial time, effort and resources in addressing a particular subject, only to find later, upon the Board's ruling on a motion in limine, that its efforts were entirely wasted. Such an outcome would defeat the Commission's objective of efficient case management and the conduct of orderly, fair and efficient litigation. See, e.g., *GE-Hitachi Global Laser Enrichment LLC* (GLE Commercial Facility), CLI-10-4, 71 NRC 56, 66-67 (Jan. 7, 2010); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18-19 (1998); *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981) (“[R]ulings should be issued on crucial or potentially dispositive issues at the earliest practical juncture in the proceeding. Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question.”)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'APPLICANT'S MOTION FOR CLARIFICATION OF LICENSING BOARD ADMISSIBILITY RULINGS ON CONTENTIONS NYS-17B AND NYS-37,'" dated July 28, 2011, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or by deposit in the U.S. Postal Service, as indicated by an asterisk, with copies by electronic mail, this 28th day of July, 2011:

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