

RAS E-584

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ON APPLICATION BY ENTERGY
FOR INTERLOCUTORY APPEAL FROM LBP-11-17

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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, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and August 16, 2011
Entergy Nuclear Operations, Inc.
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**THE STATE OF NEW YORK AND THE STATE OF CONNECTICUT'S
COMBINED MOTION FOR LEAVE TO FILE A BRIEF REPLY
TO NRC STAFF'S ANSWER TO APPLICANT'S PETITION FOR
REVIEW OF LBP-11-17**

Pursuant to 10 C.F.R. § 2.323(a), Petitioner-Intervenor State of New York and Interested Governmental Entity State of Connecticut (the "States") request leave to file the attached reply to NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 ("Staff Answer"). NRC Staff raises several points not included in Entergy's Petition. Most notably, NRC Staff announces for the first time in its Answer how it intends to address the matters resolved by the Licensing Board in LBP-11-17 and then, based on that newly-announced plan, argues that interlocutory review is warranted.

This is the first time Staff has indicated how it will respond to the Board's order, and this information goes beyond the four corners of Entergy's Petition. The intervenors have been held to a rigorous standard regarding Commission procedures in this proceeding, and those same requirements must be applied to Staff and Entergy as well. Because Staff's Answer is the functional equivalent of an untimely petition for review, fair play and due process require that the States be allowed to reply on the merits with sufficient time to adequately respond to these

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new arguments. Should the Commission grant leave for a merits review, the States respectfully request that Staff and Entergy go first and disclose their arguments concurrently, so that the States and other intervenors have a meaningful opportunity to analyze, prepare, and respond to them following the page limits for Answers in 10 C.F.R. § 2.341(b)(3). Additionally, the States request that the Commissioners grant leave to file the appended submission.

I. Staff Did Not File Its Own Petition for Review and Raises New Arguments In Its Answer to the Applicant's Petition

Significantly, NRC Staff did not file its own petition for interlocutory review, thus essentially abandoning any arguments it had made in its prior pleadings on this issue¹ that were not also included in the Applicant's prior pleadings on this issue.² However, contrary to the spirit of the Commission Regulations, NRC Staff did not merely support the arguments advanced by Entergy for interlocutory review, but used its "Answer" as an opportunity to make new arguments for interlocutory review based substantially on its newly-announced intention to not comply with the holding of the Board in LBP-11-17 regarding the SAMA analysis in the FSEIS. Staff then used that statement to argue that because it would not comply with the Board's Order, interlocutory review was required to address the profound impact that its intransigent position will have on the ongoing hearing. Staff offers no justification for its failure to timely file its own petition for interlocutory review, merely citing to 10 C.F.R. § 2.341(f)(2). This regulatory provision allows for answers to petitions, but does not allow use of the answer as a device to avoid timely filing a petition for review.

¹ Including NRC Staff's (1) Cross-Motion for Summary Disposition, and (2) Response to New York State's Motion for Summary Disposition, of Contention NYS-35/36 (Severe Accident Mitigation Alternatives) (Feb. 7, 2011).

² Including the Applicant's Consolidated Memorandum in Opposition to New York State's Motion for Summary Disposition of Contention NYS-35/36 and in Support of Its Cross-Motion for Summary Disposition (Feb. 3, 2011).

In its Petition, Entergy could not, and did not, argue that NRC Staff's refusal to follow the Board's guidance in LBP-11-17 was a basis for interlocutory review and thus the States could not respond to that argument in their opposition to Entergy's Petition.

Staff also argues — contrary to its earlier-stated position and to that of the Applicant (expressed in the Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36) — that Staff *does* have the legal authority to require implementation of any cost-effective SAMAs as a condition of a renewed license. Staff Answer at 14, n.45. Staff now asserts that it is the GEIS, which found that “the probability-weighted radiological consequences of severe accidents” was “SMALL,” that excuses Staff's failure to impose any severe accident mitigation measure in any license renewal proceeding because the SAMA “is not required for environmental protection purposes” (*id.*).

Although NRC Staff has previously referred to the GEIS's generic finding, it has not used that finding as a blanket rationale for not implementing any SAMA, regardless of its cost-effectiveness. This new line of argument should be contrasted to Staff's statements in the FSEIS regarding Staff's “rational basis” for refusing to consider implementation contained of clearly cost-effective SAMAs. FSEIS at 5-11 – 5-12 (stating that “there is no regulatory basis to impose any of the potentially cost-beneficial SAMAs as a condition for license renewal” and making only passing reference to the GEIS). Until this Answer, NRC Staff had acknowledged that clearly cost-effective SAMAs that *are related* to age-degradation would be required to be implemented. NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 5, 2010) at 28-29 (“The Commission has explicitly recognized that a potentially cost-beneficial SAMA will not be imposed as a condition of license renewal *unless it relates to adequate*

management of the effects of aging during the period of extended operation” (emphasis added)).

Staff’s new view that the GEIS’s generic finding makes all SAMAs too small to warrant implementation directly contradicts the Commission’s position that aging-management related SAMAs can be implemented. *Id.*

II. Principles of Fairness Support the States’ Right to Reply to Staff’s Newly-Raised Arguments

Allowing the States to respond to arguments raised for the first time in the Staff Answer to Entergy’s Petition is also consistent with the practice instituted by the Board in this proceeding regarding matters before it. *See* Scheduling Order (July 1, 2010) at 7 (“if any party files an answer that supports a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a reply to any new facts or arguments presented in that answer”). While the Commission is not bound by that Scheduling Order, the fairness of the approach adopted by the Licensing Board is a sound precedent for allowing the attached reply.

CONCLUSION

In keeping with the provisions of 10 C.F.R. § 2.341(b)(3) the attached reply is filed within 5 days of the Staff Answer and is limited to 5 pages. The States respectfully request that their request for leave to file the attached reply be granted.

Respectfully submitted,

August 16, 2011

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Consultation with Parties Pursuant to 10 C.F.R. § 2.323

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. Entergy and NRC Staff oppose this request on the ground that the reply sought is not authorized by the NRC's Rules of Practice in 10 C.F.R. Part 2.

_____/s
Janice A. Dean

UNITED STATES
NUCLEAR REGULATORY COMMISSION

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GEORGE APOSTOLKIS, AND WILLIAM C. OSTENDORFF AND
CHAIRMAN GREGORY B. JACZKO

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FOR INTERLOCUTORY APPEAL FROM LBP-11-17

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COMBINED REPLY TO NRC STAFF'S ANSWER IN SUPPORT OF
ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-11-17**

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INTRODUCTION

Although the Commission's duly appointed Atomic Safety and Licensing Board has decided that NRC Staff's FSEIS is legally deficient, Staff asserts it will ignore this decision, will never prepare a legally sufficient FSEIS, and that therefore interlocutory review is appropriate. Staff's arguments in support of interlocutory review, a review it did not seek following the Board's rejection of its own summary disposition motion, are as objectionable as its contemptuous disregard of the Board's direction.

POINT I

COMMISSION REVIEW IS NOT WARRANTED

A. 10 C.F.R. § 2.341(f)(2) Standards Are Not Met

Staff asserts that interlocutory review is necessary because either (1) compliance with the Board's Order to prepare a legally sufficient FSEIS would entail a substantial expenditure of resources which could be avoided if the Commission were to grant interlocutory review and reverse the Board's decision, or (2) because Staff's refusal to comply with the Board's direction renders a hearing on the remaining contentions unnecessary. Staff made a similar argument regarding resources when it sought interlocutory review of admission of New York's Contentions 35/36 and is now disregarding the Commission's rejection of that argument.¹ *Energy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-10-30, 72 N.R.C. __ (Nov. 30, 2010) ("CLI-10-30") at 6-7 (footnotes omitted).

Moreover, Staff's argument that preparing a legally sufficient FSEIS "affects this

¹ See CLI-10-30 ("To the extent that the contention may call for further "explanation" of the SAMA analysis conclusions, we see no unusual or pervasive impact on the proceeding."). Staff is also willfully disobeying the Commission's admonition, issued *twice* in this case, that "parties should not seek interlocutory review by invoking the grounds under which the

proceeding in a pervasive or unusual manner” (Staff Answer at 8-9) is specious. First, Entergy has already agreed it will complete the cost estimates for all “potentially” cost-effective SAMAs. Entergy’s Answer to New York State’s New and Amended Contentions Concerning Entergy’s December 2009 Revised SAMA Analysis (Apr. 5, 2010) at 10 (ML101450328). Once it does, Staff will have to determine whether implementation of any SAMA is warranted. See 10 C.F.R. §§ 51.103 and 54.33;² LIC-202, Rev. 2, *Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests* (May 12, 2010) at 3-4; see also NUREG-1409 *Backfitting Guidelines* (1990) at 7-9.³ Thus, Staff will eventually have to do the work it now complains is too burdensome, including providing a rational basis for why cost-effective SAMAs should or should not be implemented. *Id.* Second, making implementation of cost-effective SAMAs a condition of any renewed operating license does not affect the proceeding any more than the proposed imposition of *any* condition and a possible challenge to that proposal by an intervenor or applicant. Thus, the issues are not whether SAMA cost analyses will be complete or clearly cost-effective SAMAs will be implemented, or a rational explanation given for no implementation, but whether those decisions will be subject to review in this hearing, or decided after the hearing, without public participation and Board review.⁴

Staff argues that since it will never prepare a legally sufficient FSEIS, then it is apparent the Board has affected the “basic structure of the proceeding in a pervasive or unusual manner”

Commission might exercise its supervisory authority” (CLI-09-30 at 7, n.32). See NRC Staff Answer at 9, n.36. Also, 10 C.F.R. § 2.341(b)(4) is not applicable to interlocutory reviews.

² Staff’s Answer, like Entergy’s Petition, ignores 10 C.F.R. § 51.103’s obligations.

³ As the result of the operation of 10 C.F.R. §§ 51.103(a)(4) and 54.33(c), which authorize implementation of clearly cost-effective SAMAs, there is no need to resort to 10 C.F.R. § 50.109 in a license renewal proceeding.

⁴ Staff’s argument that no other licensing board has ever required this of Staff is irrelevant; the vast majority of license renewals Staff referenced were unopposed or involved no contentions based on the need to complete SAMA analyses or implement SAMAs.

because license renewal will be denied and the hearing on current issues will be superfluous.⁵ Of course, that “dilemma” is of Staff’s own making.⁶ By complying with the Board’s Order and appealing when “the final decision” (CLI-10-30 at 7) is issued, Staff could avoid the alleged pervasive or unusual impact on the proceeding, and the hearing would take place as scheduled.⁷

B. 10 C.F.R. § 2.341(b)(1) Standards Are Not Met

In CLI-10-30, the Commission directed Staff to wait for “the final decision” if it is dissatisfied with the Board’s ruling. CLI-10-30 at 7. The Board’s summary disposition order is not “the final decision” to which the Commission makes reference.

The rule making partial initial decisions immediately appealable codified the Commission’s longstanding practice of considering a Board order appealable where it “disposes of a major segment of the case or terminates a party’s right to participate.”

The provision expressly permitting immediate review of a “partial initial decision” is an exception to the Commission’s established policy of disfavoring interlocutory appeals. A grant of summary disposition does not fall within this codified exception.

Energy Nuclear Generation Co. (Pilgrim Nuclear Power Station), 67 N.R.C. 31, 34-35 and n.14 (Jan. 15, 2008)(citations omitted). Contention 35/36 is only one of several SAMA based contentions and its resolution does not dispose of a major segment of this case. *See* NYS

⁵ Since an order that grants or denies summary disposition could impact the hearing if the party against whom the order is issued refuses to comply with it, granting review of the current order based on Staff’s refusal to comply with it would provide precedent for review of all summary disposition orders where a party asserts it will not comply. It is not the Board’s order, but the Staff’s refusal to follow the Board’s direction, that impacts this hearing.

⁶ Although Staff feigns concern about its ability to provide the Board with a rational basis (Staff Petition at 10-12), the States are confident that Staff could do so if it were willing. Staff has made only legal arguments concerning its rationale for not implementing cost-effective SAMAs, and has not, to date, offered any technical analysis concerning implementation.

⁷ Since the current schedule calls for prefiled direct and rebuttal testimony to be filed in 2011, most of the work on admitted contentions will be completed before an interlocutory review would be complete, so, even if review were granted and the relief sought were granted, it would result in little savings in hearing resources, a savings the Commission has repeatedly said is no

Contentions 12C (challenging the calculation of clean-up costs in the SAMA analysis) and 16B (challenging the methodology for meteorology and population density calculations in the SAMA analysis). Resolution of those contentions in New York's favor would likely increase the number of cost-effective SAMAs. The interlocutory nature of the Board's Order is not transformed by Staff's refusal to comply with it.

Staff also asserts that the proceeding is over, the record is closed, and can only be reopened by meeting the stringent requirements in 10 C.F.R. § 2.326(a). Staff Answer at 10. Yet Staff plans to issue a revised SER on August 19. *See* Staff Answer at 3, n.11. Staff's argument, like its dire predictions regarding resource use, is at best inconsistent. It is Staff, and not the Board, which has placed this proceeding "in limbo." Staff Answer at 12.

POINT II

NRC STAFF IS AUTHORIZED TO ORDER IMPLEMENTATION OF COST-EFFECTIVE SAMAS

Staff's Answer finally admits it has the authority to comply with the Board's order. *See* Staff Answer at 14, n.45 (objecting to Entergy's position that Staff lacks the authority to implement non-aging management-related SAMAs). However, in the FSEIS Staff took a different position, declaring that "there is no regulatory basis to impose any of the potentially cost-beneficial SAMAs as a condition for license renewal." FSEIS at 5-12. Now, after Board action, Staff shifts its position and seeks to defend its FSEIS by relying on the argument that the GEIS found the "the probability-weighted radiological consequences of severe accidents" is "SMALL." Staff Answer at 14, n.45. This new focus ignores the fact that the GEIS made the SAMA analysis a Category 2 issue because of site-specific differences, and the fact that the SAMA analyses for these plants at this site demonstrate that benefits of some mitigation

basis for granting interlocutory review. *See* CLI-10-30 at 6-7.

measures are in the millions of dollars while the costs of mitigation are only a few hundred thousand dollars. LBP-11-17 at 7-8. Moreover, the States never argued that cost-beneficial SAMAs must be implemented as Part 54 safety measures. Staff appears unable to differentiate the purpose of SAMAs, which is to assess the environmental impacts of a severe accident, as separate from Staff's Part 54 safety review. The only argument Staff raises other than its irrelevant Part 54 argument, is to state, in conclusory fashion, that the Board misreads the Commission's decisions in *McGuire/Catawba*. Staff offers no basis for its assertion or indication of which specific *McGuire/Catawba* decision the Board allegedly misreads. The Board's reference to three different *McGuire/Catawba* decisions reflects a clear understanding of their holdings. CLI-11-17 at 10, 11.

Respectfully submitted,

August 16, 2011

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2011, copies of The State of New York and the State of Connecticut's Combined Motion for Leave to File a Brief Reply To NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 and The State of New York and the State of Connecticut's Combined Reply to NRC Staff's Answer In Support of Entergy's Petition For Interlocutory Review of LBP-11-17, were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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