UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	May 29, 2012

ENTERGY'S ANSWER IN OPPOSITION TO STATE OF NEW YORK MOTION TO SUPPLEMENT THE RECORD BASED ON MAY 8, 2012 SITE VISIT

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") files this answer opposing the New York State ("NYS") Motion to Supplement the Record Based on the May 8, 2012 Atomic Safety and Licensing Board ("Board") site visit ("Motion"). NYS requests that the evidentiary record be supplemented to include certain information obtained during the May 8th site tour. In particular, NYS seeks to augment the record with "statements" from unidentified Entergy personnel regarding the status of IP3 spent fuel storage, Entergy's plans to construct additional dry cask storage, and the anticipated "capacity" of the IP2 and IP3 spent fuel pools and independent spent fuel storage installation ("ISFSI") "at the end of operation under any 20-year extension of the current operating licenses."[1]

As an initial matter, the Motion should be rejected because NYS did not satisfy 10 C.F.R. § 2.323(b) prior to filing it. For this reason, it is procedurally deficient. In addition, the Motion should be denied because it fails to demonstrate why, or even for which contentions, such statements are relevant. Rather, an examination of the statements offered by NYS reveals that

[1] Motion at 1.

they are, in fact, not relevant to *any* admitted contention, as the Board has repeatedly held that issues related to onsite spent fuel storage are outside the scope of this proceeding.[2] Finally, Entergy objects, in particular, to NYS's third proffered statement concerning the anticipated "capacity" of the IP2 and IP3 spent fuel pools and the ISFSI "at the end of operation under any 20-year extension of the current operating licenses,"[3]—it is ambiguous and lacks appropriate explanatory context. Thus, the Board should deny NYS's request to supplement the record in its entirety.

II. ARGUMENT

A. NYS's Motion Should be Denied for Failing to Comply with 10 C.F.R. § 2.323(b)

As a threshold, procedural matter, the Motion should be denied because NYS failed to properly consult with Entergy in accordance with 10 C.F.R. § 2.323(b). That regulation states that "[a] motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a *sincere effort* to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."[4] This requirement demands more than a last minute, unilateral announcement—via email—that a party will be filing a motion.[5] As such, the Board has previously "voiced its displeasure with the minimal efforts" by NYS to comply

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2 *See, e.g.*, Licensing Board Memorandum and Order (Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A) at 13 (Apr. 22, 2010) (unpublished) ("contentions relating to on-site spent fuel storage are outside the scope of this proceeding due to the Waste Confidence Rule (codified as 10 C.F.R. § 51.23)"); Licensing Board Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 17 (July 6, 2011) (unpublished) (finding NYS argument that the presence of spent fuel itself on the site affects property values is the same as asserting "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 . . . which states that there is no such requirement").

3 *See* Motion at 1.

4 10 C.F.R. § 2.323(b) (emphasis added).

5 *See Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 129-30 (2006) (stating that a phone call on the day a motion was filed should not be viewed as a sincere effort to resolve the issue).

with this requirement and has put the parties on notice that "the Board expects a real effort . . . to resolve the issues presented before the motion is filed, not just simply a notice at the last minute that the motion is going to be filed."[6]

Here, NYS made no "real effort" to resolve, or even discuss, the issues presented in the Motion. Rather, NYS sent an e-mail initiating consultation at 2:40 p.m. on Friday, May 18, 2012[7]—the same date any motion to supplement the record was due.[8] NYS's last minute notice failed to allow for appropriate consultation before filing, contrary to the Board's prior direction in this proceeding. In particular, NYS's notice did not provide sufficient time for counsel for Entergy to contact appropriate representatives from Entergy involved in the site tour to discuss the statements proposed by NYS to be included in the record. Accordingly, the Motion should be rejected because of NYS's disregard for the Commission's consultation requirement.

B. NYS's Motion Provides No Basis to Supplement the Record

The purpose of the site visit was to allow the Board to view areas of the site that might be relevant to the admitted contentions.[9] In establishing protocols for the site visit, the Board established a deadline for "appropriate" motions to supplement the evidentiary record to include information from the site visit.[10] The Board order establishing such a deadline did not, however,

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6 Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished) (citations and quotations omitted).

7 E-mail from J. Sipos, NYS, to P. Bessette, Morgan Lewis, et al., "Site Visit – Supplement to Record," (May 18, 2012) (Attachment 1 to this Answer).

8 Licensing Board Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) at 6 (Apr. 18, 2012) (unpublished) ("April 18 Order").

9 Licensing Board Notice (Scheduling Site Visit and Pre-Hearing Conference Call) at 1 (Apr. 5, 2012) (unpublished) ("The purpose of the visit is to allow the Board to view areas of the site that it believes might be relevant to the admitted contentions in this proceeding."); *see also id.* at 2 ("The purpose of this site visit is to gain an appreciation for the physical configuration of the key plant components and to focus on specific elements discussed in the contentions that are external to the reactors at Indian Point.").

10 April 18 Order at 6.

expand the scope of this proceeding or set aside the Commission regulations requiring that evidence offered in this proceeding be relevant to an admitted contention.[11]

Despite the requirements of Section 2.337(a), NYS fails to demonstrate why the statements it seeks to include in the record are relevant to any of its admitted contentions. In fact, NYS provides the Board and other parties with no indication why such information is relevant or appropriate for inclusion in the record. Instead, NYS includes only a conclusory request that the record be supplemented. Accordingly, the Motion should be denied because NYS, in contravention of the requirement in 10 C.F.R. § 2.323(b), fails to "state with particularity the grounds" for the motion.[12]

C. <u>The Statements Cited in the Motion Are Irrelevant to NYS's Contentions</u>

Even if NYS had provided some basis for its request to supplement the record (which it did not), the Board has already established that issues related to onsite spent fuel storage are not relevant to this proceeding.[13] For example, in the context of NYS-17B, the Board emphasized that "any impact of spent fuel alone need not be given any role in assessment of property values" and "whatever hypothesized impact IPEC has on property values during the period of extended operations is not affected to a measurable degree by any one component (including the presence or absence of spent fuel) . . . ."[14] Because spent fuel storage impacts—including where or how it is stored—are not relevant to any of NYS's contention, there is no reason to include the

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11 *See, e.g.*, 10 C.F.R. § 2.337(a).

12 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-08-29, 68 NRC 899, 902 n.12 (2008) (rejecting motion to strike that failed to "state with particularity the grounds"); *Feldberg v. Quechee Lakes Corp.*, 463 F.3d 195, 197 (2d Cir. 2006) (denying motion that did not state any grounds because it did not apprise the court or the opposing party of grounds for motion).

13 *See* footnote 2, *supra*.

14 Licensing Board Order (Granting Entergy's Request for Clarification) at 4 (Aug. 10, 2011) (unpublished).

statements offered by NYS in the record of this proceeding. Accordingly, for this additional reason, the Board should deny the Motion.[15]

D. The Statement About the IP2 and IP3 Spent Fuel Pools Being "Filled to Capacity" at the "End of Operation" Is Ambiguous and Lacks Necessary Context

Although NYS's Motion is procedurally-defective and the statements therein are not relevant to any admitted contentions, to the extent the Board finds otherwise, Entergy objects to NYS's third proffered statement concerning the anticipated "capacity" of the IP2 and IP3 spent fuel pools and the ISFSI "at the end of operation under any 20-year extension of the current operating licenses"[16] as being ambiguous and lacking necessary explanatory context.

In particular, it is unclear what NYS means when it refers to "*any* 20-year extension of the current operating licenses."[17] Further, the phrase "filled to capacity" can only be appropriately considered in the context of other facts and assumptions—both of which are missing and undefined in the Motion. Such supporting context must include predicted operating parameters, assumed compliance with Technical Specifications and other NRC requirements, and that this statement assumes continued breach of the federal government's contractual obligation to remove spent fuel from nuclear plant sites pursuant to the Nuclear Waste Policy Act. As such context is entirely absent, Statement 3 should not be admitted into the record of this proceeding.

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[15] With regard to the other statements offered by NYS, Entergy notes that while it has no current plans to construct an additional dry cask storage area, that does not preclude it from developing such plans in the future, as appropriate.

[16] Motion at 1.

[17] *Id*. (emphasis added).

III. CONCLUSION

For the foregoing reasons, the Board should deny NYS's Motion.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 29th day of May 2012

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ANSWER CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Executed in accord with 10 C.F.R. § 2.304(d)

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ENTERGY'S ANSWER IN OPPOSITION TO STATE OF NEW YORK MOTION TO SUPPLEMENT THE RECORD BASED ON MAY 8, 2012 SITE VISIT

ATTACHMENT 1

E-mail from J. Sipos, NYS, to P. Bessette, Morgan Lewis, et al.,

"Site Visit – Supplement to Record," (May 18, 2012)

Kuyler, Raphael Philip

Subject: FW: Site Visit - Supplement to Record

From: John J. Sipos [mailto:John.Sipos@ag.ny.gov]
Sent: Friday, May 18, 2012 2:40 PM
To: Bessette, Paul M.; 'Sherwin Turk'; 'Beth Mizuno'; 'Deborah Brancato'; Phillip Musegaas; Rotini, Melissa-Jean; 'astolorow@sprlaw.com'; Mannajo@clearwater.org
Cc: Kathryn Liberatore; Janice Dean
Subject: Site Visit - Supplement to Record

Dear Counsel & Ms. Greene:

The State of New York suggests that the evidentiary record of this proceeding should include Entergy's statements during the March 8, 2012 site visit that:

1. all of the spent fuel generated during since the start of commercial operation of Indian Point Unit 3 remains in the Indian Point Unit 3 spent fuel pool (as of the date of the site visit);

2. Entergy has no current plans to construct an additional dry cask storage area (in addition to the existing dry cask storage area); and

3. that at the end of operation under any 20-year extension of the current operating licenses, Entergy estimates that the existing dry cask storage area would be filled to capacity and that the Indian Point Unit 2 spent fuel pool and Indian Point Unit 3 spent fuel pool would be filled to capacity as well.

In addition, it seems appropriate for the record to include the power point presentation.

Please let me know if your clients object to, consent to, or take no position regarding this proposal.

John Sipos
Assistant Attorney General
tel. 518 - 402 - 2251

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2012, a copy of the "Entergy's Answer in Opposition to State of New York Motion to Supplement the Record Based on May 8, 2012 Site Visit" was served electronically via the Electronic Information Exchange on the following recipients:

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