

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

June 7, 2012

ORDER

(Denying New York State's Motion to Supplement)

On May 8, 2012, the Board conducted a site visit to Entergy Nuclear Operations, Inc.'s (Entergy's) Indian Point Energy Center in Buchanan, New York.¹ In an April 18, 2012 Order outlining logistics for the site visit, the Board stated, inter alia, "[t]he site visit will not be recorded or transcribed. [However, i]f any site visit participants believe that any information or communication that occurs during the site visit should be included in the written evidentiary record of this proceeding, they may file an appropriate motion to supplement the record."²

On May 18, 2012, New York timely filed a Motion to Supplement requesting the evidentiary record include three statements that it alleges were made by Entergy officials during the site visit:

¹ In addition to representatives from Entergy, representatives from the State of New York (New York), the NRC Staff, Riverkeeper, Inc. (Riverkeeper), Hudson River Sloop Clearwater (Clearwater), Westchester County and the Town of Cortlandt were in attendance.

² Licensing Board Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) (Apr. 18, 2012) at 6 (unpublished).

1. all of the spent fuel generated during since [sic] 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 the Indian Point Unit 3 spent fuel pool would be filled to capacity as well.³

New York also stated that Entergy provided New York “with a copy of the Power Point presentation provided at the start of the visit; the State understands that Entergy will include the presentation in its next monthly disclosure; and the State reserves the right to include the presentation as an exhibit in future submissions.”⁴

On May 29, 2012, Entergy filed an answer to New York’s Motion to Supplement citing several grounds for opposition.⁵ Procedurally, Entergy argues that the Motion to Supplement should be denied because New York did not satisfy its 10 C.F.R. § 2.323(b) consultation requirements prior to filing the motion. Additionally, Entergy argues the Motion to Supplement should be denied “because it fails to demonstrate why, or even for which contentions, such statements are relevant.”⁶ Entergy argues these statements are “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.”⁷ Finally, Entergy objects specifically to New York’s third

³ State of New York Motion to Supplement the Record Based on the May 8, 2012 Site Visit (May 18, 2012) at 1 [hereinafter Motion to Supplement].

⁴ Id. We do not comment on the “Power Point presentation” here or New York’s “reservation of right.” If filed as an exhibit by any party and timely objected to by another, we will address any objection at that time.

⁵ Entergy’s Answer in Opposition to State of New York Motion to Supplement the Record Based on May 8, 2012 Site Visit (May 29, 2012) [hereinafter Entergy’s Answer].

⁶ Id. at 1.

⁷ Id. at 2 (emphasis omitted).

proffered statement as “ambiguous and lack[ing in] appropriate explanatory context.”⁸ Entergy does not contest the accuracy of the statements or whether they were made during the May 8, 2012 site visit.

The Board is loath to reject a motion on procedural grounds; however, we have repeatedly advised all participants in this proceeding about the importance of meeting their obligations under 10 C.F.R. § 2.323(b) and are surprised to be addressing this issue again.⁹ While the 10 C.F.R. § 2.323(b) consultation requirement has no bright rule about how consultation must be conducted and how much advance notice must be given, it does require an attorney or representative to certify that a sincere effort has been made to contact the other parties and resolve the issue(s) to be raised in the motion.¹⁰ The Board previously stated that consultation is “not merely a notice requirement” or “simply a notice at the last minute that the motion is going to be filed.”¹¹

At 2:40 P.M. on the day the Motion to Supplement was due [May 18, 2012], New York sent an e-mail to the counsel and/or representatives for the relevant parties initiating consultation. Less than four hours later, the Motion to Supplement was filed. As New York’s 10 C.F.R. § 2.323(b) Certification indicates “NRC Staff and County of Westchester did not respond by the time this motion was finalized.”¹² While drawing a bright line rule is not our intent, we can say that less than four hours e-mail notice to consent or object to a motion is not the sincere

⁸ Id.

⁹ Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished) [hereinafter February 4, 2009 Order]; Licensing Board Order (Denying New York’s Motion in Limine and Holding Riverkeeper’s Motion in Limine in Abeyance) at 5-6 (June 1, 2012).

¹⁰ 10 C.F.R. § 2.323(b).

¹¹ February 4, 2009 Order at 3.

¹² Motion to Supplement at 2.

consultation effort required by 10 C.F.R. § 2.323(b). We also agree with Entergy that New York'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 [New York]."¹³ Entergy could not effectively engage with New York without speaking to those alleged to have made the statements – and this task could not reasonably have been completed on New York's timeline.

We also emphasized on various occasions that the site visit was off-the-record with the purpose of orienting the Board with the site for the purposes of testimony review and oral hearing.¹⁴ While the Board took suggestions from the parties of the locations that the Board should consider viewing while on the site,¹⁵ those suggestions were not entertained and incorporated for the purposes of generating further discovery for any party. We only wanted to be assured that we were thoroughly oriented with the physical features of the site at issue in this proceeding, and are confident the May 8, 2012 site visit achieved that goal.

We need not decide whether the facts and issues New York highlights in its Motion to Supplement are relevant to any admitted contentions. Should New York (or any other party) think the Board should pursue a line of questioning relating to one or more of these issues at the evidentiary hearing, our scheduling order provides opportunity to propose questions to the Board and file motions for cross examination.¹⁶

¹³ Entergy's Answer at 3.

¹⁴ Tr. at 1121; April 18, 2012 Order at 6.

¹⁵ Tr. at 1128-31, 1136-37.

¹⁶ Licensing Board Scheduling Order (July 1, 2010) at 15, 16 (unpublished).

For the foregoing reasons, New York's Motion to Supplement is DENIED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 7, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR
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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying New York State's Motion to Supplement)** have been served upon the following persons by Electronic Information Exchange.

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ORDER (Denying New York State's Motion to Supplement)

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 7th day of June 2012