

**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))	
)	July 30, 2012

**ENTERGY’S RESPONSE TO THE STATEMENT OF POSITION OF THE
ATTORNEY GENERAL OF CONNECTICUT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1207(a)(2) and the Atomic Safety and Licensing Board (“Board”) July 1, 2010 Scheduling Order, Entergy Nuclear Operations, Inc. (“Entergy”) submits this Response to the Attorney General of Connecticut (“Connecticut”) Statement of Position, filed on June 28, 2012.¹ Connecticut proffers no evidence and identifies no admitted contention on which it wishes to participate, but states that it supports New York State’s positions in this proceeding, and asks that the Board deny relicensing of Indian Point Nuclear Generating Units 2 and 3 (respectively, “IP2” and “IP3,” and collectively, “Indian Point”), until the NRC performs a National Environmental Policy Act (“NEPA”) review of evacuation-related environmental impacts resulting from an accident or attack at Indian Point, and various spent fuel storage risks.²

As discussed below, contrary to controlling Commission precedent and this Board’s explicit direction, Connecticut fails to identify any admitted contention on which it wishes to participate. Connecticut also fails to discuss, let alone provide a legal interpretation of, the

¹ Statement of Position of the Attorney General of Connecticut (June 28, 2012) (“Connecticut Position Statement”), *available at* ADAMS Accession No. ML12180A511.

² *See id.* at 1-2.

evidence proffered on the admitted contentions. Instead, in many respects, Connecticut simply reargues issues that the Board rejected in 2008. Specifically, Connecticut focuses on environmental impacts of emergency plan population evacuations and spent fuel storage issues that are not only outside the scope of the admitted contentions, but also outside the scope of license renewal. Accordingly, the Board should accord no weight to the Position Statement nor need it address claims raised in that Statement. Entergy does not, however, object to the Board treating the Connecticut filing as a limited appearance statement pursuant to 10 C.F.R.

§ 2.315(a).³

II. PROCEDURAL BACKGROUND

On April 23, 2007, Entergy applied to renew the IP2 and IP3 operating licenses for 20 years beyond their current expiration dates of September 28, 2013, and December 12, 2015, respectively. After the NRC published a Federal Register notice of opportunity for hearing,⁴ Connecticut filed a Petition to Intervene, proposing two contentions.⁵

Proposed Contention Connecticut EC-1 alleged that a fire or attack involving Indian Point's spent fuel pools could result in radioactive releases leading to human fatalities and large-scale land contamination, and that such issues must be considered as part of the license renewal

³ See Licensing Board Notice of Hearing (Application for License Renewal) at 6 (June 8, 2012); Atomic Safety and Licensing Board; Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3); Notice of Hearing (Application for License Renewal), 77 Fed. Reg. 36,015, 36,016 (June 15, 2012) ("As provided in 10 CFR 2.315(a), any person not a party to the proceeding may submit a written limited appearance statement setting forth his or her position on the issues in this proceeding. These statements do not constitute evidence but may assist the Board and/or parties in defining the issues being considered.").

⁴ Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁵ Petition for Leave to Intervene, Request for Hearing and Contentions of Richard Blumenthal, Attorney General of Connecticut, for the License Renewal Proceeding for Indian Point Nuclear Generating Unit Nos. 2 and 3, DPR-26 and DPR 64 (Nov. 30, 2007) ("Petition to Intervene"), *available at* ADAMS Accession No. ML073370334.

process.⁶ Proposed Contention Connecticut EC-2 challenged emergency evacuation plans for the area around Indian Plant and claimed that NRC's NEPA evaluation must evaluate evacuation protocols as part of the license renewal process.⁷

The Board found both of Connecticut's proposed contentions inadmissible and denied Connecticut's Petition to Intervene.⁸ In rejecting Connecticut EC-1, the Board emphasized that Connecticut's terrorism-based claim was outside the scope of license renewal proceedings, and that spent fuel storage environmental impacts during operations are SMALL for all plants pursuant to the 10 C.F.R. Part 51, Appendix B, Table B-1 and the Generic Environmental Impact Statement ("GEIS").⁹ In rejecting Connecticut EC-2, the Board ruled that evacuation and emergency planning issues are also outside the scope of license renewal proceedings.¹⁰

Although Connecticut was denied party status, the Board indicated that Connecticut could participate in the proceeding as an interested State pursuant to 10 C.F.R. § 2.315(c).¹¹ In response, Connecticut requested an opportunity to participate as an interested State pursuant to Section 2.315(c).¹² Although it noted that the Board had admitted "eleven discrete contentions,"¹³ Connecticut listed six admitted contentions on which it wished to participate.¹⁴

⁶ See Petition to Intervene at 13-16.

⁷ See *id.* at 16-20.

⁸ See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 161-166 (2008).

⁹ See *id.* at 163.

¹⁰ See *id.* at 165-66.

¹¹ See *id.* at 162.

¹² Request of the State of Connecticut for an Opportunity to Participate as an Interested Government Body in Proceeding and Hearing on Relicensing of Indian Point Units 2 and 3 (Sept. 25, 2008) ("Request to Participate"), available at ADAMS Accession No. ML082750012.

¹³ *Id.* at 2.

¹⁴ *Id.* at 2-3. Connecticut identified contentions NYS-12 (Severe Accident Mitigation Alternatives ("SAMA") cleanup costs), NYS-16 (SAMA population estimates), NYS-24 (containment concrete), NYS-26 (metal fatigue), RK-EC-3 (spent fuel pool leaks), and CW-EC-3 (environmental justice). NYS-24 has since been settled. See Licensing Board Order (Approving Settlement of Contention NYS-24) at 2 (Jan. 26, 2012).

With regard to those contentions, Connecticut also identified other “concerns” it sought to address at any Board hearing.¹⁵

Because several of Connecticut’s “concerns” were outside the scope of the admitted contentions, Entergy responded to Connecticut’s Request and asked that the Board limit Connecticut’s participation accordingly.¹⁶ For example, Entergy highlighted that, notwithstanding the Board’s earlier ruling, Connecticut sought to address “attacks” on the Indian Point facility as part of the NYS-12 adjudication.¹⁷ As Entergy emphasized, interested States are subject to the same procedural requirements and constraints that apply to admitted parties and thus “may not freely ‘change the focus of an admitted contention at will as litigation progresses.’”¹⁸

Without expanding the scope of any admitted contention, the Board granted Connecticut’s Request to Participate pursuant to Section 2.315(c).¹⁹ Connecticut has since occasionally participated in briefings on admitted Contention NYS-35/36²⁰ and rejected Clearwater Proposed Contentions CW-EC-7 and CW-SC-1.²¹

Following the intervenors’ evidentiary submissions in December 2011, Entergy and the

¹⁵ See Request to Participate at 4-6.

¹⁶ Entergy’s Response to the State of Connecticut’s Request to Participate as an Interested Governmental Body at 4 (Oct. 2, 2008) (“Entergy Response to Request to Participate”), *available at* ADAMS Accession No. ML082840110.

¹⁷ Entergy Response to Request to Participate at 3; Request to Participate at 4.

¹⁸ Entergy Response to Request to Participate at 2-3.

¹⁹ See Licensing Board Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) at 2 (Dec. 18, 2008) (unpublished).

²⁰ See Answer of the Attorney General of the State of Connecticut to State of New York’s Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Apr. 1, 2010), *available at* ADAMS Accession No. ML101100473; Response of Attorney General of Connecticut in Support of New York’s Motion for Summary Disposition of Consolidated Contention NYS-35/36 (Feb. 3, 2011), *available at* ADAMS Accession No. ML110400479.

²¹ See Answer of Richard Blumenthal, Attorney General of Connecticut to Hudson River Sloop Clearwater, Inc.’s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-level Radioactive Waste at Indian Point (Nov. 20, 2009), *available at* ADAMS Accession No. ML100570240.

NRC Staff filed testimony and position statements on eleven admitted contentions in March 2012. Pursuant to the Board’s Scheduling Order and May 16, 2012 Order,²² Connecticut, as a Section 2.315(c) interested State, was then authorized to file statements of position, testimony, and supporting exhibits, “on a contention-by-contention basis,” on or before June 29, 2012.²³

Contrary to the Board’s Order, Connecticut does not address the admitted contentions or the parties’ pre-filed testimony. Nor does Connecticut proffer its own evidence. Instead, Connecticut asks the Board to deny license renewal until the NRC considers the environmental impacts of population relocations resulting from emergency plan evacuations and additional accumulation of spent fuel at IPEC during the 20-year license renewal period.²⁴

III. LEGAL STANDARDS

Pursuant to 10 C.F.R. § 2.315(c), an interested State’s participation is limited in scope to those matters already placed in controversy by the admitted parties—*i.e.*, the admitted contentions.²⁵ Thus, an interested State must comply with the strict 10 C.F.R. § 2.309 timeliness and contention admissibility requirements if it wishes to litigate new issues not covered by admitted contentions.²⁶

²² Licensing Board Order (Granting Unopposed Extension of Time) at 1 (May 16, 2012) (unpublished).

²³ Licensing Board Scheduling Order at 15 (July 1, 2010).

²⁴ *See id.*

²⁵ *See* 10 C.F.R. § 2.315(c) (“The [interested State] representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 *with respect to the admitted contentions.*”) (emphasis added); *see also La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 627 (2004) (“Designated governmental representatives who have not been admitted as a party, but who choose to participate [under Section 2.315(c)] also may participate on *any admitted contentions.*”) (emphasis added); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2200 (Jan. 14, 2004) (indicating that interested State “participation is dependent on the existence of a hearing independent of the interested State, local governmental body or Indian Tribe participation, and such participation ends when the hearing is terminated”).

²⁶ *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 456 (2002).

Allowing an interested State to “interject ‘informal’ issues for litigation would not only undermine the purposes of [the contention requirement], but would remove any incentive for governmental entities to participate in proceedings as full intervenor parties.”²⁷ Thus, the Commission’s regulations prevent “parties from having to expend resources on litigating unsubstantiated issues, while at the same time affording interested governmental entities a full opportunity to be heard on the issues being litigated.”²⁸

This Board has confirmed Section 2.315(c)’s proper scope. During the March 11, 2008 contention admissibility oral argument, in discussing whether Connecticut would participate as a party or an interested State, Chairman McDade stated to Connecticut’s counsel that, if Connecticut participated under Section 2.315(c), it would be doing so “with regard to contentions offered by any party.”²⁹ Likewise, as discussed above, the Board’s July 1, 2010 Scheduling Order clearly contemplates that Connecticut would be limited to admitted contentions, as the Order requires interested State submissions to be made on a “contention-by-contention basis.”³⁰

IV. ARGUMENT

Contrary to controlling Commission precedent and this Board’s orders, the Connecticut Position Statement fails to identify any admitted contention on which it wishes to participate. Nor does Connecticut proffer any evidence or seek to apply controlling legal principles to any party’s evidence. Instead, Connecticut attempts to again raise issues similar to those rejected by

²⁷ *Id.*

²⁸ *Id.*

²⁹ Official Transcript of Proceedings, Entergy Nuclear Indian Point Units 2 & 3, at 523:23-25 to 524:1 (Mar. 11, 2008), *available at* ADAMS Accession No. ML080740257.

³⁰ Licensing Board Scheduling Order, at 15 (July 1, 2010).

the Board in 2008.³¹ And, whether thinly-veiled reargument of previously-rejected contentions or simply new argument on new points never properly admitted pursuant to 10 C.F.R. § 2.309, as discussed below, those issues are both outside the scope of the admitted contentions and also outside the scope of license renewal. Accordingly, the Board should accord no weight to Connecticut's Position Statement.

A. Connecticut Raises Emergency Planning Issues That Are Outside the Scope of the Admitted Contentions and License Renewal Proceedings

Connecticut argues that the NRC's NEPA review failed to consider the environmental impacts of a major population relocation in the event of an evacuation resulting from an Indian Point severe accident.³² Connecticut, however, makes no attempt to link its evacuation-related arguments to any admitted contention. Nor does it provide any discussion of any proffered evidence in this proceeding. Clearwater Contention CW-EC-3A is the only contention that alleges emergency planning deficiencies³³ and even then, in only a limited way, in the context of environmental justice, an issue which Connecticut does not address. Therefore, the Board should accord no weight to Connecticut's Position Statement in deciding CW-EC-3A.

Furthermore, this Board previously rejected several contentions challenging emergency preparedness and evacuation planning, including Connecticut Contention EC-2.³⁴ In doing so, the Board made clear that "the NRC Regulation dealing with emergency plans, 10 C.F.R. § 50.47(a)(1)(i), provides that no finding relating to emergency planning is necessary for

³¹ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 161-166 (2008).

³² See Connecticut Position Statement at 2, 5-8.

³³ But see Entergy's Motion in Limine to Exclude Portions of Clearwater's Rebuttal Filings on Contention CW-EC-3A (Environmental Justice) at 4-6, 7-8, 10-11, 13-14 (July 30, 2012); Entergy's Motion in Limine to Exclude Portions of Clearwater's Pre-Filed Testimony and Exhibits for Contention CW-EC-3A (Environmental Justice) at 8-10, 16-18, 20-23 (Jan. 30, 2012), *available at* ADAMS Accession No. ML12030A200.

³⁴ *Indian Point*, LBP-08-13, 68 NRC at 165-166 (rejecting proposed contention Connecticut EC-2).

issuance of a renewed nuclear power reactor operating license” and thus, “[t]his language places consideration of emergency plans outside the scope of this proceeding.”³⁵ Since then, the Commission has confirmed that a NEPA-based contention may not be used to challenge the adequacy of emergency planning in a license renewal proceeding.³⁶ Accordingly, having failed to comply with the Commission’s 10 C.F.R. § 2.309 contention admissibility requirements, Connecticut may not now use its participation under Section 2.315(c) to inject an issue that both this Board and the Commission have rejected as outside the scope of license renewal proceedings.

B. Connecticut Raises Spent Fuel Storage Issues That Are Outside the Scope of the Admitted Contentions and License Renewal Proceedings

Connecticut also raises several issues related to spent fuel storage environmental impacts.³⁷ According to Connecticut, the NRC’s NEPA review failed to consider the environmental impacts of an attack on the spent fuel pool, spent fuel pool fires, and long-term and potentially indefinite spent fuel storage.³⁸ Connecticut claims that those issues could adversely affect Connecticut’s natural resources and water supplies.³⁹

As an initial matter, Connecticut again makes no attempt to link its spent fuel storage-related arguments to any admitted contention. Nor does it provide any discussion of any proffered evidence in this proceeding. Although Riverkeeper and Clearwater Consolidated Contention RK-EC-3/CW-EC-1 addresses onsite spent fuel storage, it does so in the context of

³⁵ *Id.* at 149 (rejecting proposed contention NYS-29).

³⁶ *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 302 (2010) (ruling that witness statements on “the issue of emergency planning—the need to provide accurate, ‘real time’ projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated” are beyond the scope of a license renewal severe accident mitigation alternative review—a NEPA-based review).

³⁷ *See Connecticut Position Statement* at 8-13.

³⁸ *See id.*

³⁹ *See id.*

spent fuel pool leaks, an issue which Connecticut does not address. Therefore, the Board should accord no weight to Connecticut's Position Statement in deciding RK-EC-3/CW-EC-1.

Furthermore, the Board has previously rejected several contentions similarly raising allegations concerning an attack or fire involving spent fuel pools. The Commission—and this Board—have consistently held that the NRC does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants.⁴⁰ In fact, in rejecting the spent fuel pool attack argument in Connecticut EC-1, the Board held that such issues are outside the scope of this proceeding.⁴¹

In addition, as both the Board and the Commission have held, onsite spent fuel storage during operations is a Category 1 issue addressed in the GEIS that is beyond the scope of a license renewal proceeding.⁴² More specifically, as the Board appropriately recognized, this generic determination plainly covers spent fuel pool fires.⁴³ Consequently, Connecticut's attempt to reargue onsite spent fuel storage issues during operations impermissibly challenges this Board's previous rulings and the generic findings codified in 10 C.F.R. Part 51.

Citing the recent *State of New York v. NRC* decision,⁴⁴ Connecticut also seeks an analysis of long-term spent fuel storage impacts after operations cease.⁴⁵ The D.C. Circuit, however, has

⁴⁰ See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007) (holding that impacts associated with terrorist attacks are “simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.”); *Indian Point*, LBP-08-13, 68 NRC at 143 (“[W]e are nonetheless bound by the Commission's ruling in *Oyster Creek* ‘that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.’”).

⁴¹ *Indian Point*, LBP-08-13, 68 NRC at 163.

⁴² See *Vermont Yankee/Pilgrim*, CLI-07-3, 65 NRC at 16; *Turkey Point*, CLI-01-17, 54 NRC at 21; *Indian Point*, LBP-08-13, 68 NRC at 162-63, 185-86.

⁴³ See *Indian Point*, LBP-08-13, 68 NRC at 162-63, 185-86.

⁴⁴ *State of New York v. NRC*, No. 11-1045, 2012 U.S. App. LEXIS 11603 (D.C. Cir. June 8, 2012).

⁴⁵ See Connecticut Position Statement at 9-10.

not yet issued its mandate returning the proceeding to the Commission.⁴⁶ Because it is the mandate that makes the decision legally effective, that decision cannot yet have legal significance for actions that the Board or the NRC should take. And for this same reason, the Temporary Storage Rule, 10 C.F.R. § 51.23, remains effective unless and until the mandate issues, excluding consideration of long-term spent fuel storage issues.

Moreover, even if the mandate were to issue, Commission precedent clearly dictates that an issue that is, or is about to become, the subject of a rulemaking cannot be considered in an individual licensing proceeding.⁴⁷ As the Commission made clear in this very proceeding, its longstanding practice has been to address long-term waste storage issues generically through rulemaking rather than litigating issues case-by-case in individual adjudicatory proceedings.⁴⁸ Thus, if the mandate issues, consideration of long-term spent fuel storage impacts would still be inappropriate in this proceeding because it may reasonably be expected that the Commission will continue this practice and institute a rulemaking addressing the issues on remand.

Finally, Entergy recognizes that long-term spent fuel storage environmental issues are the subject of a *proposed* contention pending before this Board.⁴⁹ Entergy will respond separately to that contention in accordance with 10 C.F.R. § 2.309. Although Entergy opposes the proposed contention's admission, if the Board admits that contention and it proceeds to hearing,

⁴⁶ See Fed. R. App. P. 41(b) (indicating that a mandate will not issue until the later of seven days after the time to file a petition for rehearing expires or seven days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate); Clerk's Order, *New York v. NRC*, No. 11-1045 (D.C. Cir. July 6, 2012) (unpublished) (extending until August 22, 2012 the time to file petition for rehearing or rehearing en banc). In addition, upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. See Fed. R. App. P. 41(d)(2).

⁴⁷ See *Indian Point*, CLI-10-19, slip op. at 2; *Oconee*, CLI-99-11, 49 NRC at 345.

⁴⁸ See *Indian Point*, CLI-10-19, slip op. at 2 (citing *Oconee*, CLI-99-11, 49 NRC at 343).

⁴⁹ See State of New York, Riverkeeper, Inc., and Hudson River Sloop Clearwater's Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the On-Site Storage of Nuclear Waste at Indian Point (July 8, 2012), available at ADAMS No. ML12190A002. Connecticut has not sought to participate on that proposed contention.

Connecticut will have the opportunity to participate in accordance with Section 2.315(c). Such issues, however, are clearly outside the scope of the upcoming hearing. Indeed, the fact that there is an appropriate mechanism by which to advance a proposed new contention merely serves to emphasize the improper route Connecticut has sought to pursue here, effectively attempting an end-run around long-standing contention requirements designed to insure orderly and appropriately focused proceedings.

V. CONCLUSION

For the foregoing reasons, the Board should accord no weight to Connecticut's Position Statement. Entergy does not, however, object to the Board treating the Connecticut filing as a limited appearance statement pursuant to 10 C.F.R. § 2.315(a).

Respectfully submitted,

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Dated in Washington, D.C.
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CERTIFICATE OF SERVICE

I certify that on July 30, 2012, a copy of the “Entergy’s Response to the Statement of Position of the Attorney General of Connecticut” was served electronically via the Electronic Information Exchange on the following recipients:

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