UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 6, 2012

DECLARATION OF JANICE A. DEAN IN SUPPORT OF THE STATE OF NEW YORK'S MOTION FOR EXTENSION OF TIME TO RESPOND TO ENTERGY'S MOTION FOR DECLARATORY ORDER

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

JANICE A. DEAN, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the Office of the New York State Attorney General and I make this Declaration pursuant to 28 U.S.C. § 1746 in support of the State of New York's motion for extension of time to respond to Entergy's motion for declaratory order regarding its Coastal Zone Management Act ("CZMA") obligations. Specifically, I make this Declaration to support the State's argument that Entergy's new counsel inappropriately concluded consultation communications and prematurely filed its motion without giving the State an opportunity to confirm and evaluate the factual bases for Entergy's motion.

2. On Tuesday, July 24, counsel for Entergy (at Morgan Lewis & Bockius) and NRC Staff consulted with me on a number of motions in limine Entergy and NRC Staff intended to file. Shortly after concluding the consultation call, I received a telephone call from Entergy's

counsel at Morgan Lewis giving me a "heads-up" that Entergy had filed a document with the NRC and that another consultation request would be forthcoming. At 3:07 p.m., Entergy's counsel at Morgan Lewis emailed Entergy's License Renewal Application "Supplement", designated as NL-12-107 (Exhibit 1 to Entergy's Motion), to me and other parties. A copy of this email is annexed to this Declaration as Exhibit 1. This was the first time I was made aware of Entergy's change in position regarding its CZMA obligations.

3. In this email, counsel at Morgan Lewis informed me that consultation concerning a "Motion for Declaratory Order" Entergy planned to file with the Board later that week regarding the NL-12-107 would take place on Wednesday, July 25 at 10 a.m. Counsel at Morgan Lewis also explained that a lawyer who previously had not filed a notice of appearance, Mr. Bobby Burchfield of McDermott Will & Emery LLP, would join the consultation call. I was advised Mr. Burchfield represented Entergy on "this effort."

4. NL-12-107 references six documents, including two New York State Department of Environmental Conservation documents, a New York State Power Authority document, and a New York State Public Service Commission document. A fourth state agency, the New York State Department of State ("NYSDOS"), is responsible for administering the CZMA in New York State.

5. At 3:53 p.m. on July 24, I replied to Entergy's email and explained that "this raises complex and significant issues involving other State agencies that we need to talk with before I will be able to address this appropriately." A copy of this email is attached to this Declaration as Exhibit 2. I requested that we move the next morning's consultation to Thursday

afternoon, following a previously scheduled follow-up consultation call on the motions in limine. Morgan Lewis declined to reschedule.

6. Entergy's counsel from both Morgan Lewis and McDermott, counsel for other parties and I commenced consultation communications on Wednesday, July 25, via a teleconference. During consultation, Entergy stated its new position that, contrary to statements Entergy had made in its Environmental Report and statements NRC Staff had made in its Final Supplemental Environmental Impact Statement, no CZMA determination was necessary from the State. Mr. Burchfield explained Entergy's position that no further CZMA review is necessary because IP2 and IP3were subject to previous consistency reviews. Mr. Burchfield argued that previous consistency reviews were carried out in 2000 and 2001 for the sale and license transfers of IP2 and IP3 and in 2000 for a State Pollutant Discharge Permit. He did not circulate the actual determinations he alleged NYSDOS had issued. On the consultation call, I reiterated my concern that because of the various state agencies involved, we required more time to confer internally and I could not take a position on Entergy's proposed motion until I conferred with those state agencies.

7. Following the July 25 call, I began consulting with the relevant State agencies whose actions Entergy asserted form the basis for its motion. Entergy had scheduled another consultation call for Thursday, July 26 at 2:30 p.m. I continued these efforts on Thursday, July 26. At 1:39 p.m., I sent Mr. Burchfield and others an email stating that

> I am in the process of consulting with state agencies but as I indicated, I will not have any response to share today. I am regretfully out of the office at a funeral tomorrow afternoon so I believe Monday may be a better day to continue our discussion. However, from my initial review it appears that you have failed to address a critical document, the attached New York Department of State's 2006

> Routine Program Change which is controlling as to this issue. Please advise on how your proposed motion squares with this document.[1]

A copy of this email is annexed to this Declaration as Exhibit 3. I proposed a follow-up consultation call on Monday, July 30. I received no response to my email and, thus, joined the 2:30 p.m. teleconference Mr. Burchfield had arranged.

8. During that teleconference with Entergy, I clarified that certain references Entergy cited in support of prior federal CZMA consistency determinations were in fact State determinations, and thus irrelevant, rendering subsequent legal arguments flowing from them legally baseless. I explained my understanding that NYSDOS is the only agency authorized to make federal consistency determinations. Mr. Burchfield stated his belief that in certain situations agencies other than the NYSDOS are authorized to make federal consistency determinations. Mr. Burchfield asked me to clarify whether federal determinations were performed in 2000 and 2001, and if so, to identify which agencies performed them. I agreed to do so.

9. Additionally, in reference to the 2006 document I had emailed earlier, Mr. Burchfield responded that he was aware of this document and that it did not change Entergy's position. He did not elaborate. At some point during these communications, counsel for NRC Staff, Mr. Turk, stated that since Monday was a significant filing deadline for motions in limine, and that as such, Tuesday would be preferable. I stated that Tuesday would be better for my own intra-state consultation as well. Entergy stated that it wanted to file its motion very soon

[1] The State will explain the significance of this document should it answer Entergy's motion on the merits. For these purposes, it is sufficient to note that the 2006 document I referenced states that all NRC licensing decisions are subject to mandatory CZMA review by the New York State Department of State.

and stated its belief that the filing of NL-12-107 on July 24, 2012 triggered a 10-day window for the filing of its motion. I stated that even if that were true, the State would not object to an extension of the 10 days to complete consultation. Counsel for NRC Staff, Mr. Turk, also indicated that he would not oppose such an extension and that more time would also benefit the Staff.

10. On Friday morning, July 27, I again sent an email to Mr. Burchfield and others reiterating some of the points I raised during the July 26 consultation call:

> These factual and legal questions/misunderstandings about New York's program cause me to again question Entergy's need for expediting submission of this motion. Entergy has had five years to raise this issue, which is a novel approach …, and yet has chosen a particularly busy pre-hearing period in which to raise this. …. I do not believe Entergy has substantiated its need for expedited treatment of this motion. The two reasons Entergy provides, a manufactured 10-day window from a letter Entergy itself decided to send (which parties have agreed to extend), and alternately a need to file a CZMA application which Entergy has not filed in the five years since submitting its application, do not provide sufficient cause for expedited treatment of this issue.
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> That said, I am diligently working to formulate a position on Entergy's motion and provide responses to questions Entergy raised in yesterday's call. I have been in touch with two state agencies and staff there are reviewing records on the 2000 and 2001 transfers of the Indian Point facilities as to the CZMA. As I will be regretfully out of the office this afternoon, I do not anticipate having an answer to these questions by Monday's call.

A copy of this email is annexed to this Declaration as Exhibit 4.

11. Mr. Burchfield scheduled a consultation telephone conference for 10:00 a.m. on Monday morning, July 30. *See* email annexed hereto as Exhibit 5. Notwithstanding my clear statement that I would not have a position on the motion by Monday, Mr. Burchfield stated that he "looked forward to learning [the State's position]" then. *Id*.

12. On Monday morning, July 30, I sent an email to Mr. Burchfield and other parties reiterating that "I have not yet been able to obtain the answers to Entergy's questions from those agencies. Consultation is very much still ongoing here. I anticipate having further answers to Entergy's questions later this week. … State agencies are researching the files on the PSC [Public Service Commission] and NYPA [New York Power Authority] approvals Entergy asked about and that may shed the needed light on this issue." A copy of this email is annexed hereto as Exhibit 6.

13. Having received no response to my email, at 10:00 a.m. on July 30 I joined the teleconference set up by Mr. Burchfield. I stated my opinion that Entergy had not yet identified a good faith basis for filing this motion, given that it had not yet provided any federal consistency determinations, and that Entergy had offered no information substantiating its self-identified deadline by which it believed it had to file this motion. I also explained that it seemed as if Entergy was fundamentally misunderstanding the way New York's Coastal Management Program has been laid out. I again reminded Entergy's counsel that parties had agreed to extend Entergy's purported deadline for filing its motion since consultation was still ongoing, but that even if there was a basis for the 10-day requirement, Monday was only day 6 and thus parties had until the end of the week to finish obtaining the necessary information from State agencies which would indicate if Entergy had a basis for its motion or not. During either this or a previous call, I stated to Mr. Burchfield that although he may be new to this proceeding and may not be aware, the Board had instructed parties on numerous occasions to follow section 2.323's mandates, and reminded him that Entergy had recently obtained a ruling against the State on faulty consultation grounds and that as a result we take our consultation obligations very seriously.

14. Disregarding my statements, Entergy's new counsel stated that it sounded to him like I was objecting to the motion, unilaterally declared the consultations concluded, and filed the instant motion, four days in advance of Entergy's purported deadline of Friday, August 3.

15. Entergy acknowledges in footnote 7 of its motion that "New York has requested continuation of consultations" but states that "Ms. Janice Dean of the New York Attorney General's Office has raised numerous objections to Entergy's legal interpretation of the State's CMP. In particular, she has stated that only NYSDOS is authorized to issue a federal consistency certification, that the CMP does not allow state consistency certifications to suffice for federal licensing actions, and that Entergy's legal position is based on erroneous interpretations of the State's regulatory program…. Thus, it appears highly unlikely that the Parties will be able to resolve the issues raised in this motion. Accordingly, Entergy believes it has in good faith satisfied its consultation obligations pursuant to 10 C.F.R. § 2.323(b)."

16. I do not share Entergy's view that it has satisfied its consultation obligations pursuant to 10 C.F.R. § 2.323(b) for the following reasons:

(A) When it filed its motion, Entergy's counsel was aware that I was in the process of determining whether federal coastal zone consistency reviews had in fact been completed for the sale and/or transfer of the licenses for IP2 and IP3 in 2000 and 2001. By filing its motion before I completed this determination, Entergy's counsel exhibited no regard for the truth of the matter, i.e., whether such a certification had in fact been done, and exhibited no intentions of completing consultation here.

(B) Entergy's counsel mischaracterized my position on numerous occasions, asserting that I, on behalf of the State, was objecting to Entergy's motion, notwithstanding clear

statements I made and attach here explaining where I was in the process of ascertaining the answers to questions Entergy's counsel asked.

(C) I believe the consultation process can serve to minimize litigation over matters that could be resolved without using Board and party resources needlessly. Indeed, in May of this year, the State proposed to file a motion concerning the possibility that the FSEIS supplement would not be issued on its scheduled date, potentially impacting Track One hearing issues. After consulting with counsel for Staff and Entergy, the State was satisfied that no motion would be necessary. Entergy's filing of this motion before I could obtain the answers to its questions, and confirm or deny the existence of the documents it relies upon as the basis for its motion, frustrates important functions of consultation. As such, should my review of State agency records, once completed, indicate that Entergy's assumptions regarding the existence of a federal consistency determination for the 2000 and 2001 license transfers were incorrect, parties and the Board would have wasted significant resources on a matter which could and should have been resolved through proper consultation.

Dated: August 6, 2012
New York, New York

Signed (electronically) by
Janice A. Dean
Assistant Attorney General