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

STATE OF NEW YORK MOTION FOR EXTENSION OF TIME TO RESPOND TO ENTERGY'S MOTION FOR DECLARATORY ORDER REGARDING THE COASTAL ZONE MANAGEMENT ACT

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

TABLE OF CONTENTS

Page

INTRODUCTION

On Monday, July 30, 2012, Entergy Nuclear Operations, Inc. ("Entergy"), represented by new counsel, filed what it styled a "Motion for Declaratory Order That It Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point Units 2 And 3 for Renewal of the Operating Licenses." As the basis for this motion, Entergy alleges that (1) two New York State agencies and a New York State public authority were involved with 2000 and 2001 proceedings involving a transfer of ownership of Indian Point facilities and applicable licenses to Entergy and, therefore, the New York State Department of State must have issued coastal zone consistency determinations for those actions, notwithstanding that Entergy has not located or provided such determinations, and (2) those alleged determinations obviate the need for Coastal Zone Management Act ("CZMA") federal consistency review by the Department of State during relicensing.

The State respectfully requests an extension of time until November 8, 2012[1] in which to respond to this complex and novel procedural device[2] and theory. The State believes this extension is appropriate because (1) Intervenors have numerous existing pre-hearing deadlines and ongoing pre-hearing preparation work, of which Entergy was well aware when it filed this motion, (2) Entergy's motion is based on critical documents it has not identified or provided (the supposed consistency determinations it alleges the New York State Department of State issued in 2000 and 2001), and (3) Entergy's new counsel inappropriately terminated consultations even

[1] The State requests 91 days instead of 90 to accommodate Veteran's Day, a federal holiday.

[2] Entergy's motion does not make clear whether the Atomic Safety and Licensing Board has the jurisdiction over Coastal Zone Management Act issues. Without delving too far into the merits of the motion in this request for extension of time, the regulatory provision Entergy cites in favor of NRC's jurisdiction , 15 C.F.R. § 930.51(e), does not apply if no CZMA consistency review has been done. *See* 15 C.F.R. § 930.51(e), cross-referencing § 930.51(b)(1) and (c). As explained below, Entergy has not established that previous reviews have been done, and curtailed consultation before State counsel could consult with the appropriate State agencies to confirm or deny.

though counsel for the State articulated clear reasons why such an action was unwarranted and prejudicial, and (4) Entergy has articulated no reason why this motion should be heard prior to the long-scheduled Track One contentions, given that Entergy could have filed this motion (or its application for a Coastal Zone consistency determination) at any point since it filed its License Renewal Application in 2007.[3]

ARGUMENT

Entergy's motion states that the Board should resolve this issue now because Entergy faces "grave 'uncertainty as to its legal obligations'" (Motion for Declaratory Order at 5), but any uncertainty existing here appears to be of Entergy's own making. The State had no notice prior to Entergy's first consultation call of its belated change in position regarding its CZMA obligations and had no reason to believe CZMA issues would be raised in this proceeding based on statements in Entergy's License Renewal Application ("LRA"), Staff's Draft and Final Supplemental Environmental Impact Statement ("DSEIS" and "FSEIS"), and statements Entergy management has made to Entergy's shareholders.

As Entergy explains in its License Renewal Supplement, the LRA Entergy submitted in 2007 at Appendix E ("Applicant's Environmental Report Operating License Renewal Stage Indian Point Energy Center") states that Entergy "would submit a Coastal Management Program Consistency Certification to the New York State Department of State (NYSDOS)." Motion for Declaratory Order, Ex. 1; *see also* LRA at Appendix E. In addition, Entergy acknowledges that

[3] The State reserves its right to assert timeliness as grounds for dismissal of this motion in its entirety. As discussed in more detail below, the State is in the process of verifying the factual basis for Entergy's motion, but it appears that, even if Entergy's factual assertions are correct, Entergy's motion is based on actions taken more than twelve years ago, long before the regulations' required 10-day window for motions. 10 C.F.R. § 2.323(a). The Board may wish to require briefing from Entergy as to why this motion is timely as a threshold matter, prior to the expenditure of significant resources by multiple parties, on the merits.

"the NRC Staff, in the IP2 and IP3 Final Supplemental Environmental Impact Statement (FSEIS), issued in December 2010 (Reference 2), noted that '[b]ased on IP2 and IP3's location within the State's Coastal Zone, license renewal of IP2 and IP3 will require a State coastal consistency certification.' FSEIS at 2142." *Id.*; *see also* DSEIS at 2-137 ("Based on IP2 and IP3's location within the State's Coastal Zone, license renewal of IP2 and IP3 will require a State coastal consistency certification."). Entergy's Chief Executive Officer advised its shareholders in 2011 that "Indian Point expects to file its consistency determination application with the New York Department of State in 2012" (Entergy 2011 10K filing, at 230, *available at* http://www.sec.gov/Archives/edgar/data/7323/000006598412000067/a10-k.htm) and on another occasion that "[t]he NRC process also requires that Indian Point obtains a consistency determination in the New York Department of State under the Federal Coastal Zone Management Act. Indian Point will file this application in due course, and we believe the factual case supports, obtaining the CZM consistency determination." Transcript, Entergy 1st Quarter 2012 Analysts' Briefing (Apr. 26, 2012) at 4, a*vailable at* http://seekingalpha.com/article/533641-entergy-s-ceo-discusses-q1-2012-results-earnings-call-transcript.

Thus, Entergy and Staff's own core documents and communications indicate no "uncertainty" as to Entergy's obligations under the CZMA. There is no reason why Entergy should have waited until ten weeks prior to the hearing to raise this new issue and apprise Intervenors and Staff of its change in position. Similarly, there is no reason why the State, other Intervenors, Staff, and the Board should prejudice their hearing preparations to address arguments based on an incomplete set of facts regarding actions that occurred in 2000 and 2001. It is evident from Entergy's retention of two additional, large law firms and its submission of a

motion and exhibits that total 2,084 pages that it has likely been working on this issue for quite some time. Entergy has long been aware of its obligations under the Coastal Zone Management Act, but it has nevertheless chosen to hire additional resources so that it could raise this novel argument and motion ten weeks prior to the hearing. For these reasons, the State's request that the Board grant it an extension to respond until after the first phase of the Track One hearing is reasonable.

POINT I

NUMEROUS LONGSTANDING, PRE-HEARING DEADLINES NECESSITATE AN EXTENSION OF TIME TO RESPOND TO ENTERGY'S NEW MOTION

As Entergy is aware, the State and other parties, as well as the Board, are in the final ten weeks of preparation for the first phase of the Track One hearing. As of the date Entergy filed this motion, the State was in the midst of drafting:

(1) Responses to the five motions in limine Entergy and Staff filed on Monday, July 30 on Contentions NYS-5, 12C, 16B, and 26B;

(2) Revised testimony and statements of position negotiated on two contentions between the State and Entergy to obviate the need for further motion practice;[4]

(3) Replies to Entergy and Staff Answers on Contention 39; and

(4) Direct examination plans and proposed cross-examination questions for Contentions NYS-5, 6, 7, 8, 12C, 16B, 17B, 25, and 26B, addressing a total of 40 witnesses between Entergy and NRC Staff.

[4] The State and Entergy reached a resolution of Entergy's proposed motions in limine regarding Contentions 5 and 8. The State submitted revisions to Contention 8 earlier today and is in the process of revising Contention NYS-5's testimony and statement of position and will submit for the Board's consideration shortly.

In addition to these which are already in the works, the following deadlines are approaching in upcoming weeks:

(1) The deadline for revised testimony and statement of position on Contention NYS-38,

(2) The conclusion of the 45-day public comment period on the Staff's July 6, 2012 Federal Register publication of a draft supplement to the FSEIS (August 20, 2012),

(3) The deadline for all motions in limine and motions to strike rebuttal testimony by any party to interested governmental entity statements of position and testimony on Track 1 contentions (August 29, 2012), and

(4) The deadline for requesting party cross-examination Subpart G procedures (August 29, 2012).

In addition, in upcoming weeks, State counsel will be preparing its nine experts for the hearing, arranging travel and lodging for numerous State lawyers and experts, and will be preparing paper sets of exhibits for the more than 400 documents the State filed pursuant to the Board's October 7, 2011 Order in preparation for the hearing. *See* Order (Procedures for Evidentiary Filing) (Oct. 7, 2011) at 4, section B.3.

In contrast to genuinely time-sensitive issues that must be addressed during these critical pre-hearing weeks, Entergy has not substantiated a reason for requiring expeditious treatment of its recent change in position on the Coastal Zone Management Act. Under 10 C.F.R. § 2.323(a), "[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." As will be explained in more detail below, during consultation, Entergy stated its belief that its filing of a License Renewal Supplement on July 24, 2012 triggered a 10-day window for the filing of its motion for declaratory order. Declaration of

Janice A. Dean (Aug. 6, 2012)("Dean Decl.") ¶¶ 9, 13. Entergy's supplement and its motion, however, are based on actions taken more than a decade ago in 2000 and 2001. Entergy should not be permitted to manufacture a deadline by filing a License Renewal Supplement based on old information and then claiming the date of the supplement filing—a date entirely within Entergy's control—is the appropriate date for calculating its motion deadline. For this reason and the others articulated below, the State respectfully requests a roughly 90-day extension of time such that this motion can be briefed after the first phase of the Track One hearing.

POINT II

ENTERGY HAS NOT PROVIDED THE FEDERAL CONSISTENCY DETERMINATIONS ON WHICH ITS MOTION IS BASED AND DID NOT PROVIDE THE STATE WITH SUFFICIENT TIME DURING CONSULTATION TO VERIFY OR DENY THEIR EXISTENCE

Entergy's motion is based upon alleged prior federal consistency determinations for Indian Point Units 2 and 3, but Entergy has not provided the determinations themselves. Rather, Entergy merely supposes they exist, alleging as to the 2001 license transfer of Indian Point Units 1 and 2 that "although the available records do not reflect whether ConEd or NYSPSC submitted a federal consistency certification, the NRC's approval of the transfer demonstrates that New York confirmed consistency with the CMP" (Motion for Declaratory Order at 18) and alleging as to the 2000 license transfer of Indian Point Unit 3 that "the available records do not reflect that NYSDOS explicitly concurred with NYPA's certification" (Motion for Declaratory Order at 17).

Since Entergy has not produced these consistency determinations, counsel for the State has endeavored to work with multiple State agencies to ascertain whether such determinations exist. Dean Decl. at ¶¶ 5, 6, 7, 10. In the four working days between the first consultation and

Entergy's filing of its motion, the State advised Entergy numerous times that it was in the process of conferring with State agencies in an attempt to locate prior federal consistency determinations, if any. *Id.* The State informed Entergy that it needed to verify the basis for Entergy's motion so that the State could form an opinion for the purposes of consultation. *Id*. at ¶¶ 12-13. From the day the State was consulted on Entergy's proposed motion to the present, counsel for the State has been working with counsel and program staff at multiple state agencies to locate and review twelve-year old files in an attempt to ascertain their contents, and verify, if possible, the existence or lack of federal determinations which would allow the State to then assess Entergy's motion on its merits. *Id.* ¶¶ 7, 10, 12. Despite the State's repeated requests to allow time for these agencies to finish their investigation and determine whether prior federal consistency determinations exist, Entergy's counsel improperly and unreasonably terminated consultation. *Id*. at ¶ 14. Therefore, instead of ensuring that the motion had a proper factual basis under 10 C.F.R. § 2.323(d), Entergy filed this motion prematurely.[5] *Id*. at ¶¶ 12-14.

To date, the State has not been able to locate any prior federal consistency determinations. *Id.* at ¶¶ 12, 15. This is significant, as the lack of such a determination would be fatal to Entergy's motion even if it were properly based in law, which it does not appear, at first blush, to be.[6] Thus, in order to be able to assess the merits of Entergy's legal arguments, the State must first confirm the factual underpinnings. A roughly 90-day extension will allow the

[5] Pending the outcome of its investigation into the factual bases of Entergy's motion, the State hereby reserves the right to seek sanctions under 10 C.F.R. § 2.323(d).

[6] Indian Point's original operating license was granted prior to the enactment of the Coastal Zone Management Act and as such, was not reviewed on a plant-wide basis for Coastal Zone consistency at that time. Therefore, Indian Point's license renewal would appear to be a "Renewal … of federal license … not previously reviewed by the State agency [here, the New York State Department of State]") under 15 C.F.R. § 930.51(b)(1). Entergy has argued that this provision does not apply because of the alleged prior federal consistency determinations. Thus, its argument turns on these determinations, and it has not produced them. Therefore it is imperative for the State, working in conjunction with state agencies and public authorities, to understand what happened in 2000 and 2001 as a factual matter before it can address Entergy's legal arguments.

State to complete its investigation of the factual bases of Entergy's motion while meeting its other pre-hearing obligations.

A. Entergy's New Counsel Inappropriately Concluded Consultations Prior to the State Taking a Position on the Motion, Needlessly Burdening the Board with Potentially Unnecessary Litigation

On Tuesday, July 24, Entergy's counsel at Morgan Lewis circulated Entergy's LRA Supplement —the first time State counsel became aware of Entergy's change in position regarding the Coastal Zone Management Act. Dean Decl. at ¶ 2. Entergy's counsel scheduled a teleconference for the following day. At 3:53 p.m. on July 24, Assistant Attorney General Janice Dean 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." *See* Dean Decl. ¶ 5, Exhibit 1. She requested that parties move the next morning's consultation to Thursday afternoon, following a previously scheduled follow-up consultation call on the motions in limine. *Id*. Morgan Lewis declined to reschedule. *Id.*

On Wednesday, July 25, Entergy's counsel from both Morgan Lewis and a new law firm, McDermott Will & Emery, commenced consultation communications with counsel for the State and other parties. Dean Decl. ¶ 6. During the teleconference, Entergy informed the State of its new position—contrary to statements Entergy had made in its Environmental Report and to shareholders, and statements NRC Staff had made in its DSEIS and FSEIS—that no CZMA determination was necessary from the State. *Id*. at ¶ 6. Mr. Burchfield from McDermott explained Entergy's position that the New York State Department of State issued consistency determinations for the license transfers of IP1, IP2, and IP3 in 2000 and 2001 as applicable and that those federal consistency determinations supplanted the need for any CZMA-related review during relicensing. *Id*. Mr. Burchfield did not circulate the actual determinations. *Id*.

On the consultation call, AAG Dean reiterated her concern that because of the various state agencies involved, the State required more time to confer internally and that the State could not take a position on Entergy's proposed motion until she conferred with those state agencies. Dean Decl. at ¶ 6. Following this call the State made efforts to consult relevant State agencies whose actions Entergy asserted form the basis for its motion. *Id*. at ¶ 6. These efforts continued on Thursday, July 26. *Id*. Entergy had scheduled another consultation call for Thursday, July 26 at 2:30 p.m. *Id*. At 1:39 p.m., AAG Dean sent Mr. Burchfield and parties 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.[7]

AAG Dean proposed a follow-up consultation call on Monday, July 30. *Id*. at ¶ 6; Ex. 3. AAG Dean received no response to her email and, thus, joined the 2:30 p.m. teleconference Mr. Burchfield had arranged. *Id*. at ¶ 6.

During that teleconference with Entergy, AAG Dean 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. *Id*. at ¶ 8. She explained her understanding that NYSDOS is the only agency authorized to make federal consistency determinations. *Id*. Mr. Burchfield stated his belief that in certain situations agencies other than the NYSDOS are authorized to make federal consistency determinations. *Id*. Mr. Burchfield asked AAG Dean to clarify whether federal determinations

[7] 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 AAG Dean referenced states that all NRC licensing decisions are subject to mandatory CZMA review by the New York State Department of State.

were performed in 2000 and 2001, and if so, to identify which agencies performed them. *Id*. AAG Dean agreed to do so. *Id*.

Additionally, in reference to the 2006 document AAG Dean had emailed about earlier, Mr. Burchfield responded that he was aware of this document and that it did not change Entergy's position. *Id*. at ¶ 9. He did not elaborate. *Id*. 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. *Id*. AAG Dean stated that Tuesday would be better for the State's own intra-state consultation as well. *Id*. Entergy stated that it wanted to file its motion very soon 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. *Id*. AAG Dean stated that even if that were true, the State would not object to an extension of the 10 days to complete consultation. *Id*. 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. *Id*.

On Friday morning, July 27, AAG Dean again sent an email to Mr. Burchfield and parties reiterating some of the points she 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.
>
> 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.

Dean Decl. at ¶ 10; Ex. 4. Mr. Burchfield scheduled a consultation telephone conference for 10:00 a.m. on Monday morning, July 30. *Id*. at ¶ 10. Notwithstanding the State's unambiguous email stating that the State 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*.; Ex. 5.

On Monday morning, July 30, AAG Dean 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." Dean Decl., ¶ 12; Ex. 6.

Having received no response to her email, at 10:00 a.m. on July 30 AAG Dean joined the teleconference set up by Mr. Burchfield. Dean Decl., ¶ 13. She reiterated her 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. *Id*. She also explained that it seemed as if Entergy was fundamentally misunderstanding the way New York's Coastal Management Program has been laid out, and 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. *Id*.

Disregarding State counsel's concerns and requests to continue consultation in an attempt to resolve the factual and legal matters at issue without litigation, Entergy's counsel filed the instant motion later that same day.

B. Consultation Serves Numerous Purposes, One of Which Is To Discourage Baseless Filings

Entergy states in its motion that "it appears highly unlikely that the Parties will be able to resolve the issues raised in this motion" and that as such, "Entergy believes it has in good faith satisfied its consultation obligations pursuant to 10 C.F.R. 2.323(b)." Entergy Motion at 2, n.7. As demonstrated by the State's emails, consultations were still very active when Entergy filed its motion. In addition, Entergy misstates the purpose of § 2.323's consultation requirement. By its plain language, 2.323's intent is not merely for the movant to engage in discussions for the sole purpose of having all parties agree on the movant's position. Consultation is "a meeting for deliberation, discussion, or decision."[8] Inherent in that idea is that a movant may be dissuaded from filing a frivolous motion or otherwise burdening the proceeding with an improper, untimely, erroneous, or otherwise ill-advised filing. It is this possibility that Entergy disregarded in unilaterally abandoning consultation efforts here.[9] Counsel for the State, in consultation with multiple state agencies and authorities, attempted, during the very short timeframe Entergy's new counsel provided, to (a) understand the basis for Entergy's motion, including locating critical

[8] *See* http://dictionary.reference.com/browse/consultation.

[9] It is regrettable that the State is compelled to bring this to the Board's attention, given the Board's recent admonishment to all parties (and directed mainly at the State) that the Board has "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." Order (Denying New York State's Motion to Supplement) (June 7, 2012) at 4. Counsel for the State reminded Mr. Burchfield of these obligations and the Board's recent statements. Dean Decl. at ¶ 13.

documents Entergy had failed to provide, (b) understand the factual and legal underpinnings of Entergy's motion, and (c) formulate a position on the motion. *See generally* Dean Decl. It was not possible to complete this process during the artificially short timeframe Entergy's new counsel provided. *Id.* Entergy acknowledges in footnote 7 of its motion that "New York has requested continuation of consultations" (Motion for Declaratory Order at 3, n.7) but filed its motion regardless. As such, should the State's 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.

CONCLUSION

For the above-stated reasons and to further judicial economy, the State respectfully requests that the Board grant its request for a 91-day extension to respond to Entergy's motion.

Respectfully submitted,

Signed (electronically) by

Janice A. Dean
Assistant Attorney General
Office of the Attorney General
for the State of New York
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8459

Dated: August 6, 2012

Certificate Pursuant to 10 C.F.R. § 2.323

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 scheduling order, 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.

Signed (electronically) by
John Sipos
Assistant Attorney General
August 6, 2012