August 20, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO STATE OF NEW YORK'S "MOTION TO IMPLEMENT STATUTORILY-GRANTED CROSS-EXAMINATION RIGHTS UNDER ATOMIC ENERGY ACT § 274(l)"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its answer to the State of New York's ("New York") "Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(*l*)" ("Motion").[1] New York's Motion requests – for the third time[2] – that the Atomic Safety and Licensing Board ("Board") issue an order allowing New York to exercise its purported statutory right under Atomic Energy Act ("AEA") Section 274(*l*) to cross-examine witnesses at the evidentiary hearings scheduled for October 15-24, 2012, with respect to seven of the ten

[1] State of New York's Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(*l*) (Aug. 8, 2012).

[2] New York made substantially similar requests in its November 30, 2007 petition to intervene, and in its August 21, 2008 pleading concerning the hearing procedures to be used in this proceeding. *See* discussion *infra* at 14-17.

"Track 1" admitted contentions: *viz.*, Contentions NYS-12C, NYS-16B, NYS-17B, NYS-37, NYS-5, NYS-8, and NYS 6/7.[3]

As more fully discussed below, the NRC Staff opposes New York's Motion, on the grounds that it lacks legal merit. In this regard, New York is incorrect in its assertion that it has an "inviolate right" under § 274(*l*) to cross-examine witnesses at the upcoming evidentiary hearings.[4] Contrary to New York's assertion, as a party in this proceeding, New York does not have rights that are superior to those of other parties; rather, its rights are defined in the Commission's regulations in 10 C.F.R. Part 2 and, in particular, by the regulations governing cross-examination.[5] Further, New York's expansive reading of AEA § 274(*l*) has been rejected by other licensing boards in the past, and conflicts with the NRC's regulatory interpretation of the statutory provision. Finally, New York's request that it be provided a right to cross-examination independent of the rights afforded to other parties in the Indian Point license renewal proceeding is entirely unsupported by any NRC or judicial precedent or by the legislative history of § 274(*l*). New York's request should therefore be denied.

BACKGROUND

This proceeding concerns the license renewal application ("LRA") filed by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on April 23, 2007, in which Entergy requested that the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point" or "IP2 and IP3") be renewed for an additional period of 20 years.[6] On May 11, 2007, the NRC

[3] Motion at 1. In addition, New York "reserve[d] the right to seek cross-examination" on three Track 2 contentions NYS-26B/RK-TC-1B, NYS-38/RK-TC-5, and NYS-25. *Id.*

[4] Motion at 10.

[5] *See* Motion at 5; 14; 18-19.

[6] Letter from Fred Dacimo, Site Vice President (Entergy) to NRC Document Control Desk (April 23, 2007) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML071210108), as supplemented by letters dated May 3 and June 21, 2007 (ADAMS Accession Nos. ML071280700 and ML071800318).

published a notice of receipt of the Indian Point license renewal application ("LRA"),[7] and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.[8]

On November 30, 2007, New York filed a petition for leave to intervene as a party in this proceeding, along with 32 (initial) contentions that it sought to litigate, under 10 C.F.R. § 2.309. In particular, New York's Petition stated:

> New York State requests, and is entitled to a full adjudicatory hearing with all the rights of discovery and cross-examination provided by 10 C.F.R. Subpart G. At a later date, to be set by the [Board], New York State will demonstrate that it meets the requirements of 10 C.F.R. § 2.310(d) in making this request.
>
> IP2 and IP3 are located within the boundaries of the State of New York. The State of New York submits this Petition. Therefore, pursuant to 10 C.F.R. § 2.309(d)(2), New York State is deemed to have standing for purposes of this proceeding . . . .[9]

On January 22, 2008, the Applicant and Staff filed answers to New York's Petition, in which they did not oppose New York's standing to participate as a party in the proceeding. On July 31, 2008, the Board issued its decision in LBP-08-13, in which it, *inter alia*, granted New York's petition to intervene and admitted it as a party under 10 C.F.R. § 2.309(d)(2).[10]

This proceeding has progressed substantially in the four-year period since the Board issued its decision in LBP-08-13. During this period, numerous new and amended contentions

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[7] "Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 26,850 (May 11, 2007).

[8] "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; 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).

[9] "New York State Notice of Intention to Participate and Petition to Intervene" ("New York Petition") (Nov. 30, 2007), at 18-19 (footnote omitted).

[10] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 60, n.19 (2008).

were filed by New York and other intervenors, many of which were admitted for litigation. On July 1, 2010, the Board issued its initial "Scheduling Order," delineating a series of milestones leading to the commencement of evidentiary hearings, which are now scheduled to commence on October 15, 2012 on ten "Track 1" contentions.[11]

On August 8, 2012 (ten weeks before the start of evidentiary hearings), New York filed the instant request seeking to exercise its purported "right" to conduct cross-examination pursuant to § 274(*l*) of the Atomic Energy Act, with respect to seven of the ten Track 1 contentions that have been scheduled for hearing.

DISCUSSION

I. A State's Participation in NRC Licensing Proceedings is Governed by the Commission's Rules of Practice in 10 CFR Part 2

The Commission's Rules of Practice in 10 C.F.R. Part 2 provide a State with two means of participating in adjudicatory proceedings. A State that wishes to raise specific concerns can file a contention and be admitted as a party to the proceeding, with all the rights afforded to other parties, assuming it meets the standing and contention admissibility standards in 10 C.F.R. § 2.309(f)(1). In the event that a State avails itself of that opportunity – as New York has done in this proceeding – the State's right to cross-examine witnesses is the same as that of other parties to the proceeding. Thus, pursuant to 10 C.F.R. § 2.711(a), in any Subpart G proceeding, the parties would be permitted to conduct "any cross-examination required for full and true disclosure of the facts" in accordance with "an approved cross-examination plan" that contains the information required by 10 C.F.R. § 2.711(c). In contrast, in a Subpart L proceeding – which applies to license renewal and all other nuclear reactor licensing

[11] Hearings on other contentions are to be scheduled later. *See generally* (1) "Notice of Hearing (Application for License Renewal" (June 8, 2012), slip op. at 4-5; (2) "Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference)" (Apr. 18, 2012), slip op. at 4; and (3) "Amended Scheduling Order" (June 7, 2011).

proceedings – the State's (and other parties') right to conduct cross-examination is governed by 10 C.F.R. § 2.1204(b)(3), which states: "[t]he presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision." *Id.* (emphasis added).

Alternatively, under 10 C.F.R. § 2.315(c), a State can participate in either a Subpart L or a Subpart G proceeding as an "interested State," and it then "shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without the need to take a position on the subject at issue, file proposed findings . . ., and petition for review by the Commission . . . with respect to the admitted contentions." *Id.* (emphasis added). Thus, by the express terms of the rule, an "interested State" is afforded a right to cross-examine only if cross-examination is otherwise permitted in the proceeding. Also, a State cannot claim "interested State" participation if it has already been admitted as a party.[12]

New York has intervened as a party in this proceeding under 10 C.F.R. § 2.309(f)(1);[13] accordingly, as a party to this Subpart L proceeding, under the regulatory framework set out above, New York may cross-examine witnesses at hearing "only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision."[14] No such determination has been rendered by the Board to date, and no grounds therefore exist to support New York's request to conduct cross-examination. In these circumstances, New York has renewed its claim that it has a separate

[12] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626-27 (2004).

[13] New York Petition at 19-22.

[14] 10 C.F.R. § 2.1204(b)(3) (emphasis added).

statutory right to cross-examination preserved by § 274(*l*) of the AEA.[15] As demonstrated below, this claim lacks any statutory or other legal basis and should be rejected.

II. Section 274(*l*) of the Atomic Energy Act Applies Only to Interested States, Not Those Admitted to the Proceeding Under 10 C.F.R. § 2.309(f)(1)

Section 274(*l*) of the AEA, passed as part of the 1959 amendments to the AEA, affords States the right to interrogate witnesses, stating:

> With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection c., the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.[16]

New York claims that the "text of the statute makes plain" that not only "interested States" under 10 C.F.R. § 2.315(c) are entitled to cross-examination, but that parties to the proceeding (such as New York) may also cross-examine.[17] However, the statute does not clearly define or identify the situation to which it applies. A "plain" reading of the statute (certainly "plainer" than New York's reading) is that it speaks only to situations in which a State seeks to participate without becoming a full party to a proceeding, and, lacking standing, would not be able to offer evidence, interrogate witnesses, or advise the Commission, without the Congressional authority provided in Section 274(*l*). Congress recognized that in such a situation – and in that situation alone – a State should be afforded the right to contribute to the licensing process without formally seeking party status and committing itself to a particular position as to whether the license should be granted or denied.

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[15] Motion at 1.

[16] 42 U.S.C. § 2021(*l*).

[17] Motion at 4.

While the Staff believes the text of the statute is clear, under established statutory construction principles, any ambiguity may be resolved by an examination of the legislative history and the regulatory interpretation provided by the implementing agency.[18] Here, the NRC's regulatory interpretation gives guidance. Specifically, 10 C.F.R. § 2.315(c) provides:

> The presiding officer will afford an interested State . . . which has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing. . . . The [State] 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.[19]

[18] The legislative history of § 274(*l*) does not clearly indicate the scope of the provision. Nevertheless, its purpose was certainly to afford States an opportunity that they otherwise would not have had. One report recommends legislation that would, "*Authorize* the Commission to invite any interested State or State agency to designate a State official to participate in any hearing held pursuant to section 189 of the act and to give that State official an opportunity to examine witnesses and to comment, formally or informally, upon a preliminary decision on the matter in which the State official participated." Joint Committee on Atomic Energy, Selected Materials on Federal-State Cooperation in the Atomic Energy Field, at 451 (Mar. 1959) (emphasis added) (hereinafter "Selected Materials"). States already had the right to intervene in a proceeding and examine witnesses within that context, as a party to the proceeding. There was no need to "authorize" the Commission to allow States to exercise a pre-existing right. Rather, Congress needed to authorize States to examine witnesses where a State was not a party to the proceeding; that Congressionally-afforded right is now embodied in 10 C.F.R. § 2.315(c).

[19] Prior to January 2004, these provisions were embodied in (former) § 2.715(c), which stated, in part, "[t]he presiding officer will afford representatives of an interested State . . . and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue." 10 C.F.R. § 2.715(c) (2003) (emphasis added). As the Commission explained in adopting the 2004 amendments:

> {T]he Commission intended to maintain the distinction between a State, local governmental body, or Indian Tribe participating as parties under § 2.309, versus their participation in a hearing as an "interested" State, local governmental body or Indian Tribe under § 2.315(c) (formerly § 2.715(c)). A State, local governmental body or Indian Tribe admitted as a party is entitled to the rights and bears the responsibilities of a full party, including the ability to engage in discovery, initiate motions, and take positions on the merits. By contrast, an "interested" State, local governmental body or Indian Tribe may participate in a hearing by filing testimony, briefs, and interrogating witnesses if parties are permitted by the rules to cross-examine witnesses, as provided in § 2.315(c). However, such 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.

(footnote continued)

The Appeal Board recognized that the predecessor of this regulation (former § 2.715(c)) interprets AEA § 274(*l*): it called "Section 274 of the Atomic Energy Act" the "statutory source" of the regulation now designated as 10 C.F.R. § 2.315(c), and stated that "[t]he design of both provisions [Sections 274 and former § 2.715(c)] is to accord to States the privilege of fully participating in licensing proceedings and advising the Commission on the resolution of issues considered therein without being obliged in advance to set forth any affirmative contentions of its own[.]"[20] The NRC has always understood the scope of § 274(*l*) as limited to addressing the rights of "interested States." If § 274(*l*) had also provided a separate cross-examination right to States when they are parties to proceedings, it is reasonable to expect that the NRC would have codified those additional rights in its regulations – particularly upon adopting clarifying revisions to these regulations in 2004.

In sum, 10 C.F.R. § 2.315(c) interprets a State's right under § 274(*l*) to provide evidence, cross-examine witnesses, and advise the Commission to be limited to situations in which the state "has not been admitted as a party."[21] Even in that circumstance, however, the State would be permitted to interrogate witnesses only "where cross-examination by the parties is permitted" –*i.e.*, the State is afforded no right to cross-examination greater than the rights afforded to parties in the proceeding, in either a Subpart L or a Subpart G proceeding.

The Commission's interpretation of Section 274(*l*) should be followed by this Board, as it is entitled to deference under the Supreme Court's *Mead* framework: "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it

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Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2200-01 (Jan. 14, 2004) (emphasis added).

[20] *Project Management Corp.* (Clinch River Breeder Reactor), ALAB-354, 4 NRC 383, 393 (1976) (emphasis added).

[21] 10 C.F.R. § 2.315(c).

appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[22] Therefore, New York, having elected to become a party to the proceeding, cannot take advantage of the opportunities afforded to non-parties by Section 274(*l*).[23] Like every other party in the proceeding, New York can cross-examine witnesses "only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision."[24] Moreover, even if New York had elected to participate in this proceeding as an interested State, it would be bound by 10 C.F.R. § 2.315(c), which circumscribes its right to conduct cross-examination to situations in which the parties are permitted to conduct cross-examination.

III. The Commission's Part 2 Regulations Afford Parties a "Reasonable Opportunity" for Cross-Examination as Required by Section 274(*l*)

Even if the Board rejects the Staff's view that § 274(*l*) applies only to governmental entities participating as "interested States," New York's argument is still unavailing. Not once has the Commission or an Atomic Safety and Licensing Board adopted New York's strained interpretation of § 274(*l*). To the contrary, two separate licensing boards have found that

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[22] *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

[23] The Staff recognizes that one licensing board has rejected this approach, holding that "nothing in the statute makes the State's right to a 'reasonable opportunity … to interrogate witnesses' dependent on its status under 10 C.F.R. § 2.315(c) as an interested State or a party." *Entergy Nuclear Vermont Yankee & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 707-08 (2004). However, the Staff submits that this is not the most reasonable interpretation of § 274(l), given that the only regulation addressing § 274(l) exclusively discusses "interested States" and not States who participate as parties. In the Staff's view, the *Vermont Yankee* board's decision was incorrect on this point. and should not be followed. *See Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) ("unreviewed Board rulings do not constitute precedent or binding law at this agency.").

[24] 10 C.F.R. § 2.1204(b)(3).

Section 274(*l*) does not grant a State a fundamental right to conduct cross-examination.[25] Rather, those boards have clearly held that under the statute, a State need only be afforded "reasonable opportunity" for cross-examination.[26] That "reasonable opportunity" is satisfied by the Commission's rules that authorize the presiding officer to allow cross-examination by the parties where necessary to ensure the development of an adequate record for decision (§ 2.1204(b)(3)).[27] Thus, in the *Vermont Yankee* license renewal proceeding, the board held:

> Accordingly, we find that section 274(*l*) of the AEA does not give a State an absolute [r]ight of cross-examination, but states only that "the Commission … shall afford reasonable opportunity for State representatives to … interrogate witnesses." 42 U.S.C. § 2021(*l*) (emphasis added). The Subpart L grant of cross-examination to situations where it "is necessary to ensure the development of an adequate record for decision," 10 C.F.R. § 2.1204 (b)(3), is consistent with the AEA requirement that State representatives be given a "reasonable opportunity … to … interrogate witnesses." 42 U.S.C. § 2021(*l*).[28]

Similarly, the board in the previous *Vermont Yankee* power uprate proceeding held that "the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is . . . consistent with the State's 'reasonable opportunity … to interrogate witnesses' under 42 U.S.C. § 2021(l).").[29]

New York argues that these board rulings are incorrect because they fail to consider whether a State has a "sovereign prerogative" under § 274(*l*) which allows them to conduct cross-examination irrespective of whether such cross-examination is "necessary" to develop an adequate record.[30] Yet, in the *Vermont Yankee* license renewal proceeding quoted above, the

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[25] *Vermont Yankee*, LBP-04-31, 60 NRC at 708-10; *Entergy Nuclear Vermont Yankee & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 203-04 (2006).

[26] *Vermont Yankee*, LBP-04-31, 60 NRC at 710; *Vermont Yankee*, LBP-06-20, 64 NRC at 203-04.

[27] *Vermont Yankee*, LBP-04-31, 60 NRC at 710; *Vermont Yankee*, LBP-06-20. 64 NRC at 203-04

[28] *Vermont Yankee*, LBP-06-20, 64 NRC at 203-04.

[29] *Vermont Yankee*, LBP-04-31, 60 NRC at 710.

[30] Motion at 16.

board stated in no uncertain terms that "section 274(*l*) of the AEA does not give a State an absolute [r]ight of cross-examination."[31] Moreover, nothing in the statutory text or legislative history provides any evidence of this "sovereign prerogative" which New York seeks to grant itself. Indeed, in the course of its lengthy discussion (Motion at 6-14), New York does little more than cite the obvious: it states that the 1959 amendments to the AEA were concerned with providing States a right to take part in the Commission's licensing process, that cross-examination is a means by which a party to legal proceedings can protect its interests and was an oft-used tool in Atomic Energy Commission licensing proceedings, and that States have constitutional rights which cannot be usurped by the federal government. Aside from being self-evident, New York's assertions do not establish any Congressional intent in § 274(l) to afford a State the automatic right to conduct cross-examination should it desire to do so. At best, New York has provided the Board with a drawn-out policy argument, which cannot trump the text of the statute, the Commission's regulatory interpretation in 10 C.F.R. § 2.315(c), and the licensing boards' uniform interpretation of the statute in all prior proceedings that addressed the issue.

New York also asserts that the 2004 changes to 10 C.F.R. Part 2, which limited the use of cross-examination in Subpart L proceedings as set forth in 10 C.F.R. § 2.1204(b)(3), were only upheld by the courts under the minimum due process standards of the Administrative Procedure Act ("APA").[32] On the other hand, New York, contends, AEA § 274(*l*)'s alleged grant of a right to cross-examination is independent of and stricter than the APA standard.[33] In this manner, New York attempts to construct an irreconcilable conflict between (a) the AEA, which it contends affords a bulletproof right to cross-examination, and (b) the regulation in 10 C.F.R.

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[31] *Vermont Yankee*, LBP-06-20, 64 NRC at 203.

[32] Motion at 14.

[33] *Id.*

§ 2.1204(b)(3), which it contends improperly dilutes this statutory right.[34] Further, New York argues, the fundamental right to cross-examination provided by the AEA cannot be eviscerated at whim by mere regulation.[35]

New York's arguments offer an incorrect and needlessly complex vision of the interplay between AEA § 274(*l*) and 10 C.F.R. § 2.1204(b)(3). Contrary to New York's assertions, the statute and the Commission's regulations do not conflict; rather, the agency's regulations present a reasonable interpretation of the statute. As the licensing boards in two *Vermont Yankee* licensing proceedings have held, Section 274(*l*) does not afford States a fundamental right to cross-examination, but only requires that a "reasonable opportunity" be provided. Further, in 10 C.F.R. § 2.1204(b)(3), the Commission decided that in Subpart L proceedings, a "reasonable opportunity" to interrogate witnesses is still afforded as required by the AEA, because cross-examination is available where necessary to develop an adequate record for decision. This interpretation is reasonable and is entitled to deference by the Board.[36]

IV. As a Matter of Policy, Section 274(*l*) Cannot Provide New York with a Special Right to Cross-Examination That Is Not Granted to Other Parties in the Proceeding

A further holding of the *Vermont Yankee* license renewal board stressed that § 274(*l*) provides a limited opportunity for State participation in NRC adjudicatory proceedings; it is not a blank check allowing a State to disregard the rules of the proceeding. Although the language of § 274(*l*) only requires that the State's desire to participate must concern an application for an NRC license, the board held that a State has no automatic statutory right to a hearing under

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[34] Motion at 18-19.

[35] *Id.*

[36] *See Mead*, 533 U.S. at 226-27.

§ 274(l) when no hearing is otherwise being held and no contentions have been submitted.[37] As a matter of policy, § 274(l) cannot provide a State with any right that goes beyond the confines of the proceeding. For example, if there was no existing proceeding with admitted contentions, the agency's consideration and action on the license renewal application would be conducted without a hearing, and New York could not rely on § 274(l) to circumvent NRC regulations and begin one. So too, § 274(l) cannot sanction cross-examination where the Board has not otherwise authorized it. The Appeal Board has held that "an 'interested state' must observe the procedural requirements applicable to other participants."[38] Surely this is no less the case for an admitted party such as New York. It cannot rely on its own *ipse dixit* construction of statutory authority to award itself super-party authority and thereby overreach the established rules of the proceeding in which it takes part.

The legislative history of § 274(l) indicates that Congress desired to ensure that States have their say in Commission matters that affect them,[39] and allow a State to participate in a manner similar to that afforded other parties without being required to take sides.[40] In a sense, affected States were allowed to be the equal of other parties; there is no indication that Congress ever intended the self-serving result sought by New York, in which a State would gain procedural rights not afforded to other parties in the proceeding. Originally, reactor licensing proceedings were conducted as formal proceedings under 10 C.F.R. Subpart G, in which cross-

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[37] *Vermont Yankee*, LBP-06-20, 64 NRC at 205. This requirement is reiterated in the Commission's statement of consideration accompanying the 2004 rule changes and adoption of 10 C.F.R.§ 2.315(c). *See* n. 19 *supra.*

[38] *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 60 NRC 760, 768 (1977).

[39] *See* Sen. Rep. No. 870, at 12 (1959) ("Subsection l. provides appropriate recognition of the interest of the States in activities which are continued under Commission authority.").

[40] *See* Selected Materials at 451 (recommending that the 1959 amendments should "[a]uthorize the Commission to invite any interested State or State agency to designate a State official to participate in any hearing held pursuant to section 189 of the act and to give that State official an opportunity to examine witnesses and to comment, formally or informally, upon a preliminary decision on the matter in which the State official participated.").

examination was permitted.[41] Congress determined that such a right should be afforded to interested States as well, even those not admitted to the proceeding. The Commission has since determined that "cross-examination conducted by the parties often is not the most effective means for ensuring that all relevant and material information with respect to a contested issue is efficiently developed for the record of the proceeding."[42] Because "there is no fundamental right to cross-examination" in NRC proceedings, and the APA and due process do not require it, the Commission determined that its use should be curtailed.[43] If the Board were to accept New York's argument that despite these regulatory changes, § 274(*l*) provides a State with an automatic recourse to cross-examination, it would enshrine, by fiat, a procedural device no longer central to NRC hearings and no longer afforded to other parties as a matter of right. Such an outcome would ignore the Commission's clearly evident intent in adopting and amending the agency's Rules of Practice.

V. New York's Repeated Efforts to Rely on AEA § 274(*l*) to Support Its Desire to Conduct Cross-Examination Should Be Rejected

On two prior occasions, New York has urged this Board to recognize its purported automatic right to conduct cross-examination, without regard to whether other parties are permitted to do so, and even if an adjudicatory proceeding would not otherwise be held on the application. Thus, in its initial petition to intervene, New York argued that it is entitled to conduct

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[41] 69 Fed. Reg. at 2183 ("It was thought [in the 1950s] that the panoply of features attending a trial—parties, sworn testimony, and cross-examination—would lead to a more satisfactory resolution of the complex issues affecting the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC."); *see also Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-75-1, 1 NRC 1-2 (1975) (affirming the Appeal Board's holding that "in both operating license and construction permit proceedings, an intervenor can and should be afforded the opportunity to cross-examine on those portions of a witness' testimony which relate to matters which have been placed into controversy by at least one of the parties to the proceeding—so long as the intervenor has a discernible interest in the resolution of the particular matter.") (citation and internal quotation marks omitted).

[42] 69 Fed. Reg. at 2195.

[43] *Id.* at 2195-96, *citing Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 120 (1995).

cross-examination under § 274(*l*) of the AEA, even if no proceeding would otherwise be held. Citing § 274(*l*), New York asserted:

> 10 C.F.R. § 2.315(c) acknowledges these rights of a state ["to offer evidence, interrogate witnesses, and advise the Commission as to the application"] in those cases where a hearing is held. However, the statute extends the right to offer evidence and interrogate witnesses to all applications, even if pursuant to 10 C.F.R. § 2.309 no hearing will otherwise be held. Thus, in the case of a State and/or its designated representative, NRC must provide these rights of participation regardless of the existence of any "admissible contention" and include the right to present evidence and interrogate witnesses as to matters relevant to the application. . . .[44]

In LBP-08-13, upon granting New York's petition to intervene, the Board admitted New York as a party to this license renewal proceeding, without explicitly addressing New York's assertions regarding its purported rights to conduct cross-examination under § 274(*l*) of the AEA.[45]

Similarly, in its August 22, 2008 request that the Board adopt Subpart G procedures,

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[44] New York Petition at 20; *cf*. New York Petition at 307 (denial of a request for hearing would violate § 2239(a) of the AEA, "and also denies the State of New York additional rights secured under 42 U.S.C. § 2021(*l*).").

[45] *See Indian Point*, LBP-08-13, 68 NRC at 133-35. In its answer to New York's Petition, the Staff had contested New York's interpretation of § 274(*l*) of the AEA. *See* "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) The State of New York, (5) Riverkeeper, Inc. (6) The Town of Cortlandt, and (7) Westchester County" (Jan. 22, 2008) ("Staff Answer"), at 133-35. As the Staff observed:

> New York . . . asserts that states have an inherent right to interrogate witnesses. . . . The basis for this claim appears to be rooted in New York's suggestion that the Atomic Energy Act grants states an automatic right to interrogate witnesses . . . .
>
> New York contends that the statutory "right" to interrogate witnesses applies "to all applications." [New York] Petition at 20. In fact, no such absolute right exists. The AEA provides that NRC "shall afford reasonable opportunity for [States] to offer evidence, interrogate witnesses, and advise the Commission as to the application." 42 U.S.C. § 2021(l) (emphasis added). This opportunity is inherent in proceedings using Subpart G procedures, and, in Subpart L proceedings is governed by the provisions of 10 C.F.R. § 2.1204(b), which allows the presiding officer to permit cross-examination as needed "to develop an adequate record." 10 C.F.R. § 2.1204(b)(3). *See also Vermont Yankee*, LBP-04-31, 60 NRC at 708-09.

New York claimed that it has an automatic right to interrogate witnesses under § 274(l) of the AEA.[46] New York asserted:

> [T]the Atomic Energy Act itself grants the states, but not other entities, a right to present evidence, interrogate witness, and advise the Commission about federally licensed atomic energy activities that take place within a state . . . . 42 U.S.C. § 2021(l) compels the NRC to "afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application" for any licensing amendment authorizing operation of a nuclear reactor whether or not a hearing is to be held. . . . In the interest of efficiency, the State of New York will not press this right at this time, but reserves the right to do so if, and when, it becomes necessary to assure a "full and true disclosure of the facts."[47]

Both the Applicant and the Staff opposed New York's interpretation of § 274(*l*) of the AEA,[48] but the issue was left unresolved at that time.[49]

New York's filing of the instant Motion and its renewed assertion of its purported automatic right to conduct cross-examination – even if cross-examination is not conducted by other parties – requires that the issue now be resolved. Tellingly, New York has dropped its prior claim that Section 274(l) entitles it to conduct cross-examination even in the absence of a contested proceeding – *i.e.*, in New York's view, Section 274(l) of the AEA afforded New York the right to present evidence and interrogate witnesses, via cross-examination on the

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[46] "The State Of New York's Response To The Board's Question Concerning Hearing Procedures and Motion That the Board Apply Subpart 'G' Discovery Procedures to Certain Admitted Contentions" (Aug. 21, 2008) ("New York Response"), at 30-31.

[47] *Id.* at 30-31.

[48] See (1) "NRC Staff's Response to 'The State of New York's Response to the Board's Question Concerning Hearing Procedures and Motion That the Board Apply Subpart 'G' Discovery Procedures to Certain Admitted Contentions'" (Sept. 15, 2008), at 28-29 and n.33; and (2) "Applicant's Answer to Intervenors' Requests for the Application of Subpart G Procedures to Certain Admitted Contentions" (Sept. 16, 2008), at 18 n.71.

[49] *See* "Memorandum and Order (Addressing Requests that the Proceeding Be Conducted Pursuant to Subpart G)" (Dec. 18, 2008), at 4; *see id*. at 13-14. It is unclear why (and most unfair that) New York waited until now, shortly before the commencement of evidentiary hearings, to renew this claim; certainly, it could have raised this issue sooner, such as by seeking reconsideration of the Board's rulings on New York's pleadings in which it had raised the issue, or by filing its Motion more promptly.

application, "regardless of the existence of any 'admissible contention.'"[50] Indeed, if New York were correct that the AEA affords a State these purportedly "inviolate" rights, New York should be permitted to conduct "unfettered" cross-examination on any issues it chooses, wholly apart from the issues raised in its contentions. New York's omission of this argument in its Motion demonstrates the fallacy and untenability of its reading of the statute.

CONCLUSION

New York's Motion is wholly without merit. For this reason, as more fully discussed above, New York's request to conduct cross-examination of other parties' witnesses in this proceeding, pursuant to Section 274(*l*) of the Atomic Energy Act, should be denied.

Respectfully submitted,

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Dated at Rockville, Maryland
this 20th day of August 2012

[50] New York Petition at 20.

CERTIFICATION OF COUNSEL

Counsel for the Staff 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.

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Dated at Rockville, Maryland
this 20th day of August 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO STATE OF NEW YORK'S 'MOTION TO IMPLEMENT STATUTORILY-GRANTED CROSS-EXAMINATION RIGHTS UNDER ATOMIC ENERGY ACT § 274(l),'" dated August 20, 2012, in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 20th day of August, 2012.

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