

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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))	
)	September 28, 2012

**ENTERGY'S APPLICATION TO STAY BOARD ORDER GRANTING CROSS-
EXAMINATION TO NEW YORK STATE OR, IN THE ALTERNATIVE, TO GRANT A
PARTIAL STAY OF THE HEARING PENDING THE COMMISSION'S DECISION ON
ENTERGY'S EMERGENCY PETITION FOR INTERLOCUTORY REVIEW**

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I. INTRODUCTION

On September 28, 2012, Entergy Nuclear Operations, Inc. (“Entergy”) separately filed with the U.S. Nuclear Regulatory Commission (“Commission” or “NRC”) an Emergency Petition for Interlocutory Review of the Atomic Safety and Licensing Board’s (“Board”) September 21, 2012 Order granting, in part, New York’s Motion for Cross Examination (“Order”).¹ In that Petition, Entergy seeks reversal of the Board Order prior to commencement of the hearing in this proceeding, which is scheduled to begin on October 15, 2012.² In the interim, Entergy respectfully requests, pursuant to 10 C.F.R. § 2.342, an immediate stay of the Board’s Order, or, in the alternative, a stay of the hearing on New York’s contentions, until the Commission rules on the Emergency Petition.³

¹ See Entergy’s Emergency Petition for Interlocutory Review of Board Order Granting Cross-Examination to New York State and Request for Expedited Briefing (Sept. 28, 2012) (“Emergency Petition”).

² See Licensing Board Notice of Hearing (Application for License Renewal) at 5 (June 8, 2012) (unpublished) (“Notice of Hearing”).

³ Entergy seeks only to stay the hearings on contentions proffered by New York State and does not seek to stay the hearings on the contentions of other Intervenors.

Entergy further requests that the Commission order expedited briefing of this application for stay so that hearings can proceed on schedule.⁴ To this end, Entergy proposes that any responses to this application be due within five calendar days after it is filed.

II. SUMMARY OF THE DECISION BELOW

On August 8, 2012, the State of New York (“New York”) filed a sweeping request for cross-examination of witnesses on all of its contentions under Section 274(l) of the Atomic Energy Act of 1954 (“AEA”), as amended, 42 U.S.C. § 2021(l), asserting that this statute granted it an “absolute,” “inviolable,” and “unfettered” right to cross-examination because of its status as a sovereign state.⁵ New York explicitly stated that the standards set forth in 10 C.F.R. § 2.1204(b)(3), which governs this Subpart L proceeding, were “*inapplicable to [its] motion.*”⁶

Entergy and the NRC Staff filed timely answers to New York’s Motion.⁷ Citing two other Board determinations as support,⁸ Entergy and the Staff argued that Section 274(l) of the AEA confers the same opportunity to cross-examine witnesses as that set forth in Section 2.2104(b)(3)—and not the “absolute right” asserted by New York.⁹ Of particular relevance, Entergy and the NRC Staff explained that New York did not meet the governing

⁴ See, e.g., *Wis. Elec. Power Co.* (Point Beach Nuclear Plant Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982) (“As a general matter when expedition is necessary, the Rules of Practice are sufficiently flexible to permit it by ordering such steps as shortening—even drastically in some circumstances—the various time limits for the party’s filings . . .”).

⁵ State of New York Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(l) at 1, 4, 7, 10 (Aug. 8, 2012) (“Motion”).

⁶ *Id.* at 15 (emphasis added).

⁷ Entergy’s Answer Opposing New York State’s Motion to Cross-Examine (Aug. 20, 2012) (“Entergy’s Answer”); NRC Staff’s Answer to State of New York’s “Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(l)” (Aug. 20, 2012) (“NRC Staff’s Answer”).

⁸ See Entergy’s Answer at 5-7 (citing *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 698 (2004); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 203-04 (2006), *rev’d on other grounds*, *Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371 (2007)).

⁹ See generally Entergy’s Answer.

standard for cross-examination in 10 C.F.R. § 2.1204(b)(3) because the state did not even attempt to carry its burden of showing that cross-examination is “necessary.”¹⁰ Entergy also highlighted the patent unfairness of New York’s request, and requested an equal opportunity for cross-examination if the Board granted New York’s Motion.¹¹

On September 21, 2012, one month after the briefing on New York’s Motion was complete, and approximately three weeks before the hearing in this proceeding is scheduled to begin, the Board issued an Order granting New York’s request for cross-examination. It did so, however, on a basis that New York explicitly disavowed in its Motion. The Board ruled *sua sponte* that under Section 2.1204(b)(3), cross-examination by New York (and New York alone) is “necessary” to ensure an adequate record because the pre-filed testimony and exhibits in this proceeding are “voluminous and technical.”¹² The Board has stated that it will allow New York alone to “examine witnesses” after the Board has done so, as long as its questions are “relevant, reasonable, and non-repetitive.”¹³ The Board thus granted New York’s wide-ranging request for cross-examination on all of its contentions, while ignoring Entergy’s alternative request for an equal opportunity.

III. THE COMMISSION SHOULD STAY THE BOARD’S DECISION, OR IN THE ALTERNATIVE ANY HEARINGS TO BE HELD UNDER IT, UNTIL THE COMMISSION RESOLVES THIS INTERLOCUTORY APPEAL

The Commission may grant a request for a stay after considering a balance of the four equitable factors set out in 10 C.F.R. § 2.342(e): (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether that party will be irreparably injured

¹⁰ See *id.* at 12-13 (*quoting* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2195-96 (Jan. 14, 2004)).

¹¹ See *id.* at 10-11 & n.10.

¹² Order at 6.

¹³ *Id.* at 7. Thus, the Board’s Order is not necessarily limited to the cross-examination of witnesses.

unless a stay is granted; (3) whether the granting of a stay would harm the other parties; and (4) where the public interest lies.¹⁴ As the Commission recently explained, irreparable injury is the most important of the four factors, followed by the likelihood of success on the merits.¹⁵ In this case, all four factors weigh in favor of a stay of the Board's Order, or, in the alternative, a stay of the hearing on New York's contentions, until the Commission can review and rule on Entergy's Emergency Petition for interlocutory review.

1. Entergy Will Be Irreparably Injured By the Unequal Hearing Process Specified in the Board's Decision.

Entergy's request satisfies the most important factor for a stay because Entergy will be irreparably injured if New York is afforded broad and unilateral cross-examination rights on all of its contentions. This harm is both "certain and great,"¹⁶ because the unequal hearing procedure is inimical to basic notions of fundamental fairness.¹⁷ The Board's Order would subject Entergy's witnesses to wide-ranging cross-examination by New York with no reciprocal equal opportunity for Entergy to cross-examine the State's witnesses.¹⁸

¹⁴ See *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant Units 3 and 4), CLI-12-11, 75 NRC __, slip op. at 6-7 (Apr. 16, 2012) (citing 10 C.F.R. § 2.342(e)). Section 2.342(b) also requires a stay application to provide a concise summary of the decision which is requested to be stayed. That summary appears in Section II, above. It also requires references to the record or affidavits for any facts relied upon that are subject to dispute. This application does not rely on any facts subject to dispute, but it does provide references to the record throughout.

¹⁵ *Vogtle*, CLI-12-11, slip op. at 7.

¹⁶ See *id.*

¹⁷ See *Hous. Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

¹⁸ On September 24, 2012, the Board discussed its Order in a pre-hearing conference call in response to questions from the NRC Staff and Entergy. During that conference, the Board Chair confirmed that New York will have the opportunity to examine witnesses on "areas that the Board missed" in its own witness examinations. Official Transcript of Proceedings, Indian Point Nuclear Generating Units 1 & 2 [sic—2 & 3] at 1238 (Sept. 24, 2012). Although the Chair suggested that it might limit New York's questioning if it becomes repetitive, *id.*, and stated that other parties will have the opportunity for cross-examination on discrete issues through oral motions at the hearing if they make a "sufficiently compelling request," *id.* at 1239, only New York can "examine witnesses" without any demonstration—compelling or otherwise. Further, although Entergy reiterated its previous, conditional request for cross-examination rights, the Chair responded by stating that "[n]o other party requested cross-examination." *Id.* at 1241.

The one-sided and potentially wide-ranging adversarial inquiry to be conducted by New York against Entergy (and NRC Staff) witnesses is an injury that cannot be remedied on appeal after the hearing. For example, the Commission has found irreparable injury in another proceeding when an Atomic Safety and Licensing Board admitted a contention that would require an inquiry into the internal finances and governance of a federally recognized Indian Tribe.¹⁹ The Commission granted a stay of the Board's decision pending interlocutory review because, "[a]s a practical matter, review of the Licensing Board's ruling after a hearing on the internal tribal matters would provide no relief from the type of harm that conceivably could be suffered as a result of such an inquiry."²⁰ A similar harm to Entergy will arise unless a stay is granted.

Further, the unbalanced record that will be created by New York's cross-examination on all of its contentions will be difficult to "unscrambl[e] and remedy[]" in the future, particularly in a "lengthy, complex, and contentious proceeding, which spans years of litigation and has generated a massive record,"²¹ such as this one.²²

2. Entergy Has Made a Strong Showing that It Is Likely to Prevail on the Merits.

Entergy's Emergency Petition demonstrates that it is substantially likely to prevail on the merits because the Board's decision is unprecedented, contrary to governing law, and highly prejudicial.²³ Under the Commission's precedents, the strength of Entergy's showing on the

¹⁹ See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224 (2002).

²⁰ *Id.*

²¹ *Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 & 2), CLI-95-15, 42 NRC 181, 184 (1995).

²² See Order at 6 (referring to the "voluminous and technical" record of this proceeding).

²³ See Emergency Petition § III.C.

success-on-the-merits prong justifies a stay even in the absence of any finding of irreparable injury.²⁴

As set forth more fully in the Emergency Petition filed concurrently with this stay application, Entergy is likely to prevail on the merits. First, cross examination in Subpart L proceedings is warranted only in rare circumstances because the Board’s witness examinations are sufficient to develop adequate hearing records. In promulgating the relevant rules, the Commission has explicitly rejected the idea that Subpart G procedures (*i.e.*, formal hearings with cross-examination) should be used for hearings in proceedings involving “numerous/complex issues.”²⁵

The “voluminous and technical” record standard on which the Board relied upon for its Order is unprecedented and subject to reversal under 10 C.F.R. § 2.341(b)(4)(ii). The Commission’s “better approach” for resolving complex technical issues in license renewal proceedings is through a “controlled and deliberate” examination of witnesses by the Board under the procedures in 10 C.F.R. Subpart L, not through adversarial interrogation.²⁶ The “voluminous and technical” record standard articulated by the Board is indistinguishable from “numerous/complex” that has been rejected by the Commission. In short, the Board’s Order is directly contrary to the Rules of Practice and the Commission’s decades-long effort to develop more efficient hearing processes.²⁷ Accordingly, the Board’s Order is reversible on this ground.

The Order granting cross-examination to New York is also prejudicial procedural error and therefore subject to reversal under 10 C.F.R. § 2.341(b)(4)(iv). Common sense and fairness

²⁴ See *Vogtle*, CLI-12-11, slip op. at 7.

²⁵ Changes to Adjudicatory Process, 69 Fed. Reg. at 2204-05.

²⁶ *Id.* at 2195-96.

²⁷ See *id.* at 2182-90.

dictate that each side in an adjudicatory proceeding should have an equal opportunity to be heard.²⁸ Contrary to that fundamental principle, the Board granted New York (and New York alone) a virtually unfettered opportunity to examine witnesses and provided no reciprocal cross-examination opportunities to Entergy or the NRC Staff. The Board cites no precedent for such an unequal hearing, and there is none. The Board's decision was also made *sua sponte*, without the benefit of briefing from the parties on the rule it applied. This patently unfair hearing procedure is textbook prejudicial procedural error.²⁹

Finally, the Board's Order should be reversed under 10 C.F.R. § 2.341(b)(4)(iii) because the Board's unprecedented decision raises issues that could affect a broad spectrum of licensing proceedings.³⁰ The adoption of the Board's novel "voluminous and technical" record standard would undermine the Commission's decades-long efforts to develop more efficient hearing processes.³¹

3. A Stay Would Not Harm New York or Any Other Party.

No other party will be harmed by the short stay contemplated by this application. Having repeatedly (and successfully) sought delays in these proceedings—many over the objections of Entergy and the NRC Staff—New York has no standing to complain about a brief stay to resolve

²⁸ See *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979).

²⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (holding that a review of administrative hearing procedures against due process requirements requires consideration of the private interest that may be affected by the action, the risk of erroneous deprivation of that interest through the proposed procedures, and the probable value of the additional procedures, including the fiscal and administrative burdens the additional procedure might entail); see also *City of W. Chicago v. NRC*, 701 F.2d 632, 646 (7th Cir. 1983) (reviewing NRC proceedings under this standard).

³⁰ See *Hydro Res. Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-7, 63 NRC 165, 166 (2006); *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-10-17, 70 NRC ___, slip op. at 13 (2010).

³¹ See *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2182-90.

the important issues raised on this interlocutory appeal.³² The other Intervenor will not be harmed either, as the hearings on their contentions will not be affected by the stay. Nor will the NRC Staff be harmed by a delay while the Commission considers whether its witnesses will be subject to one-sided cross-examination by New York.

4. The Public Interest Supports Granting a Stay.

The public interest is served by a full, fair, efficient, and impartial adjudication of Entergy's license renewal application. This factor, therefore, also weighs in favor of granting a stay while the Commission weighs the merits of the Board's proposed hearing process.

³² See, e.g., Licensing Board Order (Granting, in Part, Joint Motion to Extend the Scheduling Order and Setting Out New Deadlines) at 2 (Aug. 28, 2012) (unpublished) (granting nearly the entire extension requested by Intervenor, more than quadrupling the allotted time for rebuttal filings); Licensing Board Order (Granting, in Part, the NRC Staff's and New York's Motions for Extension of Time) at 2 (Aug. 8, 2012) (unpublished) (granting an extension of time of over 150 days in response to New York's request for an extension of 91 days). In addition, New York's decision to file its Motion asserting unlimited statutory cross-examination rights five years into this proceeding is a key reason why this stay application is necessary.

IV. CONCLUSION

For the foregoing reasons, the Commission should order expedited briefing of this application, and grant a stay of the Board's Order, or, in the alternative, a stay of the hearing on New York's contentions, pending the disposition of Entergy's Emergency Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the “Entergy’s Application to Stay Board Order Granting Cross-Examination to New York State or, in the Alternative, to Grant a Partial Stay of the Hearing Pending the Commission’s Decision on Entergy’s Emergency Petition for Interlocutory Review” was served electronically via the Electronic Information Exchange on the following recipients.

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