UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 ENTERGY'S EMERGENCY PETITION FOR INTERLOCUTORY REVIEW, AND APPLICATION FOR STAY, OF THE BOARD'S ORDER OF SEPTEMBER 21, 2012

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INTRODUCTION

On September 28, 2012, Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") filed (1) an emergency petition, under 10 C.F.R. § 2.341(f), seeking interlocutory review[1] of the Atomic Safety and Licensing Board's ("Board") Order of September 21, 2012, in which the Board afforded cross-examination rights to the State of New York ("New York"),[2] and (2) an application, under 10 C.F.R. § 2.342(a), to stay the Board's Order or, in the alternative, to stay evidentiary hearings on seven contentions that are currently scheduled to commence on October 15, 2012 (just 10 days from now).[3] Pursuant to 10 C.F.R. §§ 2.341(f) and 2.342(d), and the Commission's Order of October 2, 2012 (granting Entergy's request for expedited briefing)

[1] "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) ("Petition for Review").

[2] "Order (Order Granting, in part, New York's Motion for Cross Examination)" (Sept. 21, 2012) ("Order"), *as corrected,* "Errata (Regarding Order Granting, in part, New York's Motion for Cross Examination)" (Sept. 25, 2012). *See also*, Transcript of Teleconference (Sept. 24, 2012), at Tr. 1,224, Tr. 1,235-43 and Tr. 1,247 (ADAMS Accession No. ML12269A439).

[3] "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" (Sept. 28, 2012) ("Stay Request").

the NRC Staff ("Staff") hereby files this Answer to Entergy's Petition for Review and Stay Request.[4]

In its Order, the Board granted New York – and only New York – the right to cross-examine witnesses in the upcoming evidentiary hearings, presumably on New York's seven contentions. The Staff respectfully submits that immediate interlocutory review of the Board's Order is warranted, and that the Board's Order should be stayed and/or vacated.

First, with respect to the Petition for Review, the Staff submits that the Board's Order, as amplified in a prehearing teleconference on September 24, 2012, (a) is inconsistent with the Commission's Rules of Practice, as revised in 2004, in which the Commission determined that Subpart L proceedings should be conducted without cross-examination, except in rare instances not applicable here; (b) constitutes a *sua sponte* action by the Board that lacks any apparent basis, (c) violates the fundamental right of the Applicant (as well as the Staff and other parties) to a fair and impartial hearing, as set out in 10 C.F.R. § 2.319 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 556; and (d) warrants interlocutory review, under 10 C.F.R. § 2.341(f), in that the Board's Order threatens to have an immediate and irreparable impact that cannot be remedied later, and affects the basic structure of the proceeding in a pervasive and unusual manner. Accordingly, interlocutory review of the Board's Order is warranted.

Second, with respect to the Stay Request, the Staff submits that (a) the Applicant has made a strong showing that it is likely to prevail on the merits of its Petition for Review, (b) the Applicant (as well as the Staff and other parties) will be irreparably injured unless a stay is granted, (c) the grant of a stay will not harm other parties, and (d) the public interest strongly favors the issuance of a stay. The Staff therefore supports Entergy's application for a stay.

[4] An answer to Entergy's Petition for Review and Stay Request has been filed by New York. *See* "State of New York Combined Answer to Entergy's Requests for Emergency Stay and Interlocutory Review of the Board Order Granting Limited Cross-Examination" (Oct. 1, 2012) ("NYS Answer").

BACKGROUND

A. Procedural History

This proceeding concerns Entergy's license renewal application ("LRA"), submitted on April 23, 2007, in which it requested that the operating licenses for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3" or "Indian Point") be renewed for an additional period of 20 years.[5] On May 11, 2007, the NRC published a notice of receipt of the LRA,[6] and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.[7]

In late 2007, petitions for leave to intervene were filed in this proceeding by a number of individuals and entities, including New York, Riverkeeper, Inc. ("Riverkeeper"), and Hudson River Sloop Clearwater, Inc. ("Clearwater").[8] Answers to the petitions and the petitioners' contentions were filed by the Applicant and the Staff on January 22, 2008.[9] On July 31, 2008, the Board issued a Memorandum and Order (LBP-08-13), in which it, *inter alia*, granted these

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

[6] "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).

[7] "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).

[8] "New York State Notice of Intention to Participate and Petition to Intervene" (Nov. 30, 2007) ("NYS Petition to Intervene"); (2) "Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant" (Nov. 30, 2007); and (3) "Hudson River Sloop Clearwater, Inc.'s Petition to Intervene and Request for Hearing" (Dec. 10, 2007).

[9] *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 to NYS Petition"); "Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene" (Jan. 22, 2008).

three petitions to intervene and admitted many of their contentions for litigation.[10] Soon thereafter, the Board admitted five governmental bodies as "interested governmental entities" in the proceeding, under 10 C.F.R. § 2.315(c).[11]

On several occasions following the issuance of LBP-08-13, the Board admitted various new and amended contentions that were filed by the Intervenors. In addition, the Board denied several motions for summary disposition that were filed by the Applicant and/or Staff, and granted one motion for summary disposition that was filed by New York. As a result of those rulings, 14 consolidated contentions are currently pending before the Board.

As the Commission is aware, this proceeding has involved extensive litigation on numerous issues. On July 1, 2010, the Board issued its initial "Scheduling Order," delineating a series of milestones leading to the commencement of evidentiary hearings; the Board has since issued other rulings and revisions to the schedule, such that hearings are now scheduled to be held on October 15-18, October 22-24, and December 10-14, 2012, on ten "Track 1" contentions;[12] hearings on four other ("Track 2") contentions have not yet been scheduled.[13]

During the past five years the Staff has completed comprehensive environmental and safety reviews of the Indian Point LRA, culminating in publication of (1) a Final Supplemental

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

[11] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Memorandum and Order (Authorizing Interested Governmental Entities to Participate in This Proceeding) . . ." (unpublished) (Dec. 18, 2008), slip op. at 2.

[12] The ten "Track 1" contentions are as follows: (1) NYS-5 (buried piping and tanks), (2) NYS-6/7 (inaccessible low and medium voltage cables), (3) NYS-8 (transformers), (4) NYS-12 (Severe Accident Mitigation Alternatives ("SAMA") decontamination costs), (5) NYS-16 (SAMA population estimates), (6) NYS-17 (impact on property values), (7) NYS-37 (no action alternative), (8) RK-TC-2 (flow accelerated corrosion), (9) RK-EC3/CW-EC1 (spent fuel pool leaks), and (10) CW-EC8 (environmental justice).

[13] The four "Track 2" contentions are NYS-25 (reactor vessel internals), NYS-26B (metal fatigue), NYS-38 (licensee commitments), and RK-EC8 (endangered species).

Environmental Impact Statement ("FSEIS"),[14] (2) a Safety Evaluation Report ("SER"),[15] (3) Supplement 1 to the SER,[16] and (4) a Draft Supplement to the FSEIS.[17] The Staff is currently reviewing public comments on the Draft FSEIS Supplement and new information on certain limited safety issues, and expects to issue a Final FSEIS Supplement and SER Supplement 2 within the next several months. None of the matters that are currently under Staff review involve any of the Track 1 contentions.[18]

B. New York's Motion for Cross-Examination

On August 8, 2012 (ten weeks before the start of evidentiary hearings),[19] New York filed a motion before the Board, seeking to exercise its purported right to conduct cross-examination in this proceeding under Section 274(*l*) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(*l*) (the "Act").[20] New York's Motion asserted that Section 274(*l*) of the Act

[14] NUREG-1437, Supp. 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report" (Dec. 2010).

[15] NUREG-1930, "Safety Evaluation Report Related to License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3" (Nov. 2009).

[16] NUREG-1930, Supp. 1, "Safety Evaluation Report Related to License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3" (Oct. 2011).

[17] NUREG-1437, Supp. 38, Vol. 4, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment" (June 2012).

[18] *See* "NRC Staff's Eighth Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012" (Oct. 1, 2012), at 2-3. A summary of all pending matters is provided in that report. *See id*., at 3 - 4.

[19] New York had made similar requests in two prior pleadings. *See* (1) "NYS Petition to Intervene (Nov. 30, 2007), at 20; and (2) "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), at 30-31. The Board did not rule on those requests. *See* LBP-08-13, 68 NRC at 133-35; "Memorandum and Order (Addressing Requests that the Proceeding be conducted Pursuant to Subpart G)" (Dec. 18, 2008) at 4, 13-14.

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

afforded it, as a "sovereign" State government, the right to cross-examine witnesses in any adjudicatory proceeding in which it participates; and it requested that it be granted the right to conduct such cross-examination on seven of the ten "Track 1" contentions scheduled for hearing later this month (*i.e.,* Contentions NYS-5, NYS 6/7, NYS-8, NYS-12C, NYS-16B, NYS-17B, and NYS-37).[21]

More specifically, New York asserted that as a State government, Section 274(*l*) of the Act afforded it an "absolute," "guaranteed," "sovereign," "unfettered," "statutory," "ensured," "special," "inviolate" right to cross-examine witnesses in NRC adjudicatory proceedings,[22] "without the restrictions imposed by [10 C.F.R.] § 2.1204(b)(3);"[23] in addition, New York asserted that as a sovereign State, it is not bound by the Commission's rules governing participation by other parties to this proceeding.[24] According to New York, the Commission and Board are powerless to interfere with its purported right to cross-examine witnesses as it sees fit, since "Section 274(l) . . . intends that the States, not a federal agency, will decide how and when to ask questions of witnesses";[25] and "it was the State's sovereign prerogative to decide what it believed needed to be asked to assure a complete record," which right cannot be "restricted by allowing the Commissioners or a hearing board to decide whether cross-examination is 'necessary' as is now provided in 10 C.F.R. § 2.1204(b)(3)."[26]

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

[22] *See* NYS Motion at 1, 2, 3, 4, 7, 9, 10, 11, 14, 15, 16, 18, and 19. The sole exception to this purported sovereign right, New York (inconsistently) conceded, was that the Board has the authority to "prevent argumentative, repetitious or cumulative cross-examination (10 C.F.R. § 2.333(e))." *Id.* at 11.

[23] *Id.* at 19.

[24] *Id.* at 14-19.

[25] *Id.* at 15. Further, New York opined, under Section 274(*l*), States are "guarantee[d]" the "opportunity to ensure that all relevant questions are asked and answered." *Id.* at 11.

[26] *Id.* at 16.

On August 20, 2012, answers in opposition to New York's Motion were filed by Entergy and the Staff.[27] In their Answers, both Entergy and the Staff contested, in detail, New York's arguments concerning its purported right to conduct cross-examination under Section 274(*l*) of the Act.[28] In this regard, both Entergy and the Staff asserted that, as a party in this proceeding, New York is bound by the same rules of procedure that apply to the other parties; that New York's assertions conflict with the NRC's regulatory interpretation of Section 274(*l)*, currently set out in 10 C.F.R. § 2.315(c);[29] and that any request to conduct cross-examination in a Subpart L proceeding such as this, is governed by 10 C.F.R. § 2.1204(b)(3) – which New York had expressly disavowed as "inapplicable" to its Motion.[30]

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[27] *See* (1) "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) ("Staff Answer to NYS Motion"); (2) "Entergy's Answer Opposing New York State's Motion to Cross-Examine" (Aug. 20, 2012) ("Entergy Answer to NYS Motion").

[28] *See* Staff Answer to NYS Motion, at 4-17; Entergy Answer to NYS Motion at 1-2, 3-11.

[29] Staff Answer to NYS Motion, *passim*; Entergy Answer to NYS Motion, *passim.* New York had also asserted, previously, that Section 274(*l*) afforded it the right to conduct cross-examination in any proceeding for a facility within its boundaries, "regardless of the existence of any 'admissible contention.'" NYS Petition to intervene, at 20. This seemingly illogical conclusion – although consistent with New York's interpretation of the statute – was notably missing in New York's Motion of August 8, 2012. *See* Staff Answer to NYS Motion, at 16-17.

[30] New York argued:

> Based on consultations with Entergy and NRC Staff, it is likely they will claim that a State's statutory right to cross-examination is governed either by the provisions of two regulations, 10 C.F.R. §§ 2.315(c) or 2.1204(b)(3). Those provisions are inapplicable to this motion and, moreover, cannot trump the statutory provisions of Atomic Energy Act Section 274(l). The provisions of § 2.1204(b)(3) are based on the APA and contain limitations on the right to use cross-examination that vest the Board with the power to determine when such cross-examination is "necessary" to assure the development of the record. That restriction, if applied to States, would eviscerate the right of cross-examination guaranteed to the States by Section 274(l), which intends that the States, not a federal agency, will decide how and when to ask questions of witnesses.

NYS Motion at 15 (emphasis added). New York further argued that Board decisions in two other proceedings, which had rejected similar claims, failed to confront the "central question" in its Motion:

(continued . . .)

On September 21, 2012, the Board issued its Order, ruling on New York's Motion. Significantly, the Board declined to rule upon New York's fundamental argument that Section 274(*l*) of the Act afforded it an unfettered right to conduct cross-examination that was different from the limited rights conferred by § 2.1204(b)(3).[31] Instead, the Board granted New York (and only New York) the right to conduct cross-examination, for the purpose of ensuring the "development of an adequate record" in accordance with § 2.1204(b)(3). In other words, the Board granted New York the very right that New York had disavowed as "inapplicable" to its Motion. The Board cited a single reason in support of this ruling:

> [T]he pre-filed testimony and exhibits in this proceeding are voluminous and technical. Thus, the Board has determined that granting New York's request for cross-examination is necessary to ensure development of an adequate record for this proceeding. Accordingly, the Board grants New York's request for cross-examination under 10 C.F.R. § 2.1204(b)(3).

Order at 6-7 (emphasis added).

On September 24, 2012, in a previously scheduled prehearing teleconference, the Board amplified its ruling, explaining that it gave cross-examination rights to New York, alone, because (in its view) no other party had requested cross-examination[32] -- and the Board ruled that if any

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> That question is not whether the cross-examination must be conducted for the purpose of assuring that the record is complete, but rather whether Section 274(l) recognized that it was the State's sovereign prerogative to decide what it believed needed to be asked to assure a complete record or whether the right of cross-examination could be restricted by allowing the Commissioners or a hearing board to decide whether cross-examination is "necessary" as is now provided in 10 C.F.R. § 2.1204(b)(3).

Id. at 16 (emphasis added).

[31] *See* Order at 5-6 (finding it was "not necessary" to rule upon New York's claims that Section 274(*l*) of the Act afforded it cross-examination rights "different from those provided to parties under 10 C.F.R. Part 2"). Inasmuch as the Board's Order did not rely on Section 274 of the Act, the Commission need not address New York's arguments on that issue, here.

[32] *See* Tr. 1,237, 1,241-42; *but see* Tr. 1,241 (Bessette).

other party seeks to cross-examine (or to present redirect testimony), it would have to make a "sufficiently compelling" or otherwise adequate case to support its request.[33] On September 28, 2012, Entergy filed its emergency petition for review and request to stay the Board's Order.

ARGUMENT

I. Interlocutory Review of the Board's Order Is Warranted.

The Staff respectfully submits that the Commission should undertake immediate interlocutory review, pursuant to 10 C.F.R. § 2.341(f), of the Board's Order of September 21 (as amplified by the Board's oral ruling on September 24, 2012), in that the Board's Order: (a) effectively eviscerates the Commission's well-considered regulatory scheme, which establishes that cross-examination should not be permitted in Subpart L proceedings such as this except in rare circumstances, not applicable here; (b) constitutes a *sua sponte* action by the Board that lacks any discernible basis, (c) violates the fundamental right of the Applicant (as well as the Staff and other parties) to a fair and impartial hearing; and (d) affects the basic structure of the proceeding in a pervasive and unusual manner, and threatens to have an immediate and irreparable impact that cannot be remedied later.

A. The Board's Order Effectively Eviscerates the Regulatory Scheme Established in 10 C.F.R. Part 2, Subpart L.

In January 2004, the Commission adopted a comprehensive set of procedures for use in its adjudicatory proceedings, substantially revising the regulatory scheme set out in 10 C.F.R. Part 2. Prior to 2004, most NRC adjudications were conducted using the formal procedures in 10 C.F.R. Part 2, Subpart G. In its 2004 rulemaking, the Commission substantially altered this

[33] *See* Tr. 1,239-40, 1,250-51. At times, the Board appeared to suggest that it might allow other parties to conduct cross-examination or to present redirect testimony without requiring a "compelling" showing of need. *See* Tr. 1,236-37, 1,240-41, 1,242-43, and 1,251. These statements leave it altogether unclear what the Board will do, or what standard it will apply, if the Applicant, Staff, or other parties decide to request an opportunity to cross-examine or present re-direct or rebuttal testimony, during the hearings.

practice, stating that "the greater use of more informal procedures is desirable."[34] As the Commission further explained, it was "the Commission's intent to expand the use of more informal procedures to improve the effectiveness and efficiency of the NRC's hearing processes," and to "better focus and use limited resources of all involved."[35] Accordingly, the Commission instructed that henceforth, "most adjudications would be conducted under the [informal] hearing procedures in Subpart L, unless one of the more specialized hearing tracks in Subparts G, K, M, or N, apply."[36]

In accordance with the Commission's revised Rules of Practice, this reactor license renewal proceeding is being conducted as an informal proceeding under 10 C.F.R. Part 2, Subpart L.[37] In a Subpart L reactor licensing proceeding like this, the Commission's rules contemplate that the Boards are to question the witnesses, as they deem necessary to ensure the development of an adequate record for their decisions[38] -- and cross-examination is to be permitted only if one of two limited exceptions applies:

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[34] Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,206 (Jan. 14, 2004). Among the primary differences between Subparts G and L are the types of discovery allowed, and the means of presenting evidence at hearing. As pertinent here, Subpart G allows cross-examination as of right, upon presentation of a cross-examination plan (*see* 10 C.F.R. § 2.711(a)-(c); in contrast, in a Subpart L proceeding, the Board is to question the witnesses and cross-examination is only to be "permitted, on motion, if the Board deems it necessary for the development of an adequate record." *See* 10 C.F.R. §§ 2.1207 & 1208; *Entergy Nuclear Vermont Yankee L.L.C. & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 693 (2004).

[35] 69 Fed. Reg. at 2,190, 2,191. The Commission's rulemaking was upheld in *Citizen's Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004) ("*CAN v. NRC*"). As the court observed, the NRC had determined its "existing rules of practice lead to hearings that are cumbersome, unnecessarily protracted, and wasteful of the resources of the parties and the Commission." *Id.* at 352.

[36] 69 Fed. Reg. at 2,193.

[37] *See* 10 C.F.R. § 2.310(a); Tr. 1,236.

[38] 10 C.F.R. § 2.1207(b)(6) provides, in pertinent part, as follows:

> Participants and witnesses will be questioned orally or in writing and only by the presiding officer or the presiding officer's designee . . . . using questions prepared by the presiding officer or the presiding officer's designee, questions submitted by the participants at the discretion of the presiding officer, or a combination of both. . . .

(a) Where resolution of a contention "necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of a contested factual matter";[39] or

(b) Where a party submits a request for cross-examination and cross-examination plan, in conformance with the requirements of 10 C.F.R. § 2.1204(b) – but "only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision." 10 C.F.R. § 2.1204(b)(3) (emphasis added).[40]

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[39] 10 C.F.R. § 2.310(d); 69 Fed. Reg. at 2,191. *See Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201-02 (2006).

[40] In adopting its revised Rules of Practice in 2004, the Commission stated:

> . . . . Under the APA, cross-examination is authorized only if necessary for a "full and true disclosure of the facts." 5 U.S.C. 556(d). Since neither due process principles nor the APA require cross-examination, the Commission's determination whether to permit cross-examination turns on whether cross-examination is necessary to elucidate relevant and material factual evidence, or whether the hearing process affords other mechanisms of assuring that the decisionmaker is privy to such evidence in a manner that conserves the decisionmaker's and the parties' time and resources. While cross-examination can be an effective mechanism for ensuring a complete and accurate hearing record, especially in circumstances involving disputes over the occurrence of an activity or the credibility of a material witness, it does not appear to be either necessary or useful in circumstances where, for example, the dispute falls on the interpretation of or inferences arising from otherwise undisputed facts. In such cases, questioning of witnesses by the presiding officer, after consideration of questions for witnesses propounded by the parties, has the potential to be the better approach for assuring the expeditious, controlled and deliberate development of an adequate record for decision. The presiding officer is ultimately responsible for the preparation of an initial decision on the contention/contested matter; it would follow that the presiding officer is best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer's (future) decision. If there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize cross-examination by the parties.

69 Fed. Reg. at 2195-96 (emphasis added).

Here, in two brief sentences, the Board ruled that cross-examination by one party (New York), and that party alone, is "necessary" to assure the development of an adequate record; the Board, however, offered little basis for this finding, stating only that:

> [T]he pre-filed testimony and exhibits in this proceeding are voluminous and technical. Thus, the Board has determined that granting New York's request for cross-examination is necessary to ensure development of an adequate record for this proceeding. Accordingly, the Board grants New York's request for cross-examination under 10 C.F.R. § 2.1204(b)(3).

Order at 6-7. In these few words, the Board effectively set aside the Commission's carefully-crafted regulatory scheme and clearly-stated principle that proceedings such as this are to be conducted as informal proceedings without cross-examination, except in rare circumstances[41] – solely on the grounds that the "testimony and exhibits in this proceeding are voluminous and technical."

The Staff recognizes that the testimony and exhibits in this proceeding are "voluminous and technical." The Staff understands, as well, that the Board faces a considerable task in assimilating the evidence and properly resolving the contested issues. But, that is why the Commission's regulations allow the parties to submit proposed questions for the Board's use, should it choose to do so, in questioning witnesses.[42] Indeed, the Board directed the parties to submit such questions for its consideration here, and the parties have done so.[43]

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[41] *See, e.g., Amergen Energy Co, LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 278-80 (2009) (noting that the Subpart G provisions for cross-examination apply to "*eyewitnesses,* not *expert witnesses*"; the Board in a Subpart L proceeding is not required to ask a party's proposed questions; and the Board conducted its own questioning, inquired in areas of interest to the intervenor, and "asked the questions pertinent to clarifying its understanding of the relevant, material issues in the proceeding").

[42] 10 C.F.R. Section 2.1207(a)(3) provides: "Unless otherwise limited by this subpart or by the presiding officer, participants in an oral hearing may submit . . . (i) Proposed questions for the presiding officer to consider for propounding to the persons sponsoring the testimony[, and] (ii) Proposed questions directed to rebuttal testimony for the presiding officer to consider for propounding to persons sponsoring the testimony. . . . "

[43] *See* "Order (Memorializing Items Discussed During the July 9, 2012, Status Conference)" (July 12, 2012), at 2; "Scheduling Order" (July 1, 2010), at 15-16, ¶ 5. The Board instructed that the

(continued . . .)

Moreover, the Commission expressly countenanced this scenario when it adopted Subpart L – and explicitly rejected the use of Subpart G procedures (*e.g.,* cross-examination) in a proceeding merely because the issues are numerous or complex. Thus, in responding to comments on its *proposed* rule (which had contemplated the use of Subpart G procedures in cases involving numerous or complex issues), the Commission concluded:

> *Complex Issues in Reactor Licensing.* Section 2.310(c) of the proposed rule included a criterion that would call for the use of the hearing procedures of Subpart G in those reactor licensing proceedings that involve a large number of complex issues which the presiding officer determines can best be resolved through the application of formal hearing procedures. The Commission requested public comments on the appropriateness of this proposed "numerous/complex issues" criterion . . . .
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> Upon reconsideration, the Commission agrees that the proposed "numerous/complex issues" criterion may not be well-suited for determining whether the procedures of Subpart G should be used in a given proceeding. Rather, the Commission agrees with the thrust of the commenters opposing this criterion that, inasmuch as neither the AEA nor the APA require the use of the procedures provided in Subpart G, they should be utilized only where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters. In the Commission's view, the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination which challenges their recollection or perception of factual occurrences. . . . Hence, the Commission focused on criteria to identify those contested matters for which an oral hearing with right of cross-examination would appear to be necessary for a fair and expeditious resolution of the contested matters. Common sense, as well as case law, lead the Commission to conclude that oral hearings with right of cross-examination are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event." . . .[44]

"examination plans should contain a brief description of the issue or issues that the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective." *Id*. The parties submitted proposed questions to the Board on August 29, 2012, in accordance with the Board's orders.

[44] 69 Fed. Reg. at 2,204-05 (emphasis added, footnotes omitted). The Commission concluded:

(continued . . .)

The Board's view that the "voluminous and technical" nature of the evidence provides justification for its ruling contravenes the Commission's determination, set forth above, that the informal procedures in Subpart L provide the most appropriate way to consider such issues.[45] Further, the Board's ruling is inconsistent with the Commission's ruling in *Crow Butte, supra,* and the rulings of every Board that has considered the use of cross-examination in a Subpart L proceeding.;[46] indeed, to the Staff's knowledge, cross-examination by the parties has never

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> . . .[T]he Commission believes that the complexity and number of issues in nuclear power plant licensing proceedings may not, per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters. Rather, it is the nature of the disputed matters themselves that most directly and significantly bears on whether the techniques of formal hearings such as cross-examination are appropriate. Accordingly, the Commission has decided to modify the proposed rule by providing for the use of Subpart G procedures (including . . . cross-examination at hearing) in nuclear power plant licensing only where the presiding officer by order finds that the resolution of particular contentions necessitates resolution of material issues of fact which are best determined through the use of the procedures in Subpart G. As discussed earlier, these are issues relating to the occurrence of a past event material to the issue in controversy, where the credibility of an eyewitness (not an expert witness without first-hand knowledge) may reasonably be expected to be at issue, as well as issues of motive or intent of the party or eyewitness. In these circumstances, formal trial-like procedures, with formal discovery before the hearing and cross-examination at the hearing, are useful and should result in development of an adequate record for decision on these particular types of issues.

Id. at 2196 (emphasis added).

[45] The Commission applied this approach in its decision in *Crow Butte Resources, Inc*. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 572-73 (2009), where it declined to authorize cross-examination in a Subpart L proceeding despite the Board's stated view, *inter alia*, that cross-examination "would be helpful in resolving complex technical issues.".

[46] *See, e.g., Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201-02 (2006); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), "Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures)" (June 5, 2006) (unpublished) (slip op. at 2); *Entergy Nuclear Vermont Yankee L.L.C. & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 690, 692-95 & n.7 (2004). In *Vermont Yankee*, the Board explicitly rejected arguments that the "complexity" and "breadth" of the issues warranted the adoption of Subpart G procedures, as 10 C.F.R. § 2.310(d) contained no language to support that view. *Id.,* 60 NRC at 696.

been conducted, until now, in a license renewal or other Subpart L proceeding, since the revised Rules of Practice were adopted in January 2004.[47]

In sum, the Board's Order would eviscerate the Commission's well-considered determination to prohibit the use of cross-examination in Subpart L proceedings except in certain limited circumstances, even where the evidence is voluminous and technical. If the Board's ruling is allowed to stand, any Board, in any proceeding, could hereafter readily set aside the Commission's regulatory scheme, based only upon a finding that the evidence is "voluminous and technical." Commission review of the Board's Order is therefore appropriate.

B. The Order Constitutes a S*ua Sponte* Action that Lacks Any Apparent Basis.

As discussed *supra* at 5-7, New York's Motion was based exclusively upon its assertion that Section 274(*l*) of the Atomic Energy Act affords it, as a "sovereign" State, an "absolute," "guaranteed," "sovereign," "unfettered," "statutory," "ensured," "special," "inviolate" right to cross-examine witnesses in NRC adjudicatory proceedings -- "without the restrictions imposed by § 2.1204(b)(3);"[48] in addition, New York asserted that as a sovereign State, it is not bound by the Commission's rules governing the participation of other parties to this proceeding.[49] Further New York asserted that "Section 274(l) . . . intends that the States, not a federal agency, will decide how and when to ask questions of witnesses";[50] and that New York's purported right to

[47] *See Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 652 n.27 (2009) ("[t]o date, no party has ever been granted the opportunity to conduct cross-examination in a Subpart L proceeding."). The Staff notes that one Board has allowed the parties to ask questions (which did not amount to cross-examination) directly of their own and other parties' witnesses, in a one-day hearing on a limited issue, after the Board had concluded its own questioning. *See Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), Transcript of Hearing (April 10, 2008) (ADAMS Accession No. ML081070329), at Tr. 767-76 and 838-41.

[48] NYS Motion at 1, 2, 3, 4, 7, 9, 10, 11, 14, 15, 16, 18, and 19.

[49] *Id.* at 14-19. As noted above, the sole exception New York allowed to this asserted unrestricted right was that a Board has the authority to "prevent argumentative, repetitious or cumulative cross-examination (10 C.F.R. § 2.333(e))." *Id*. at 11.

[50] *Id.* at 15.

decide what "needed to be asked to assure a complete record" cannot be "restricted by allowing the Commissioners or a hearing board to decide whether cross-examination is 'necessary' as is now provided in 10 C.F.R. § 2.1204(b)(3)."[51]

Moreover, New York flatly and explicitly stated that "the provisions of . . . 10 C.F.R. §§ 2.315(c) or 2.1204(b)(3). . . are inapplicable to this motion."[52] According to New York, while § 2.1204(b)(3) is based on the Administrative Procedure Act and contains "limitations on the right to use cross-examination that vest the Board with the power to determine when such cross-examination is 'necessary' to assure the development of the record," no such restriction applies to a State's "guaranteed" rights under Section 274(*l*) of the Act, "which intends that the States, not a federal agency, will decide how and when to ask questions of witnesses."[53] Thus, New York's Motion, in terms, is absolutely clear: New York eschewed any interest in obtaining the right to cross-examine witnesses under 10 C.F.R. § 2.1204(b)(3), and it did not seek the Board's permission to do so.

Inexplicably, the Board's Order conferred upon New York the very right that New York had explicitly rejected: the right to conduct limited cross-examination, under the Board's control, pursuant to 10 C.F.R. § 2.1204(b)(3). Nothing in New York's Motion supports that decision by the Board, nor had its Motion requested the right bestowed upon it by the Board.[54]

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[51] *Id.* at 16.

[52] *Id*. at 15 (emphasis added).

[53] *Id.*

[54] Moreover, as Entergy observes (Petition for Review, at nn. 14 & 53), New York had never asserted, during consultations with Entergy and the Staff prior to filing its Motion, that cross-examination was needed to develop the record. *See also,* Motion at 21 (certifying under 10 C.F.R. § 2.323 that Counsel for New York had "made a sincere effort to contact counsel for NRC Staff and Entergy in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues . . ."); Tr. 1,238-39 (Turk); Tr. 1,241 (Bessette). If New York wanted to cross-examine witnesses under § 2.1204(b)(3) in order to ensure the development of an adequate record, it was obliged to raise this issue during its consultations with the Staff and Applicant prior to filing its motion, in accordance with 10 C.F.R. § 2.323(b). Its failure to do so required the Board to reject this (unstated) argument as a basis for the Motion.

Nor did New York satisfy the requirements set forth in 10 C.F.R. § 2.1204(b), which the Commission has determined must be satisfied before a party in a Subpart L proceeding will be allowed to conduct cross-examination. First, 10 C.F.R. § 2.1204(b)(1) provides that a party may request that it be allowed to conduct cross-examination "on particular admitted contentions or issues."[55] Here, New York broadly asked for cross-examination on all of its contentions, without bothering to indicate which contentions or which witnesses' testimony, in particular, truly need cross-examination, and which do not. Second, § 2.1204(b)(1) requires that "[t]he motion must be accompanied by a cross-examination plan" that contains certain specified information.[56] Here, no such cross-examination plan was filed by New York. Instead, the Board ruled, *sua sponte,* that it would treat New York's proposed Board questions as if they had been filed as a cross-examination plan, thereby finding that New York had satisfied the procedural requirements of the regulation – without ever having been asked by New York to do so.

Finally, nowhere did New York provide any demonstration that its cross-examination of witnesses is needed to ensure the development of an adequate record for the Board's decision – as is required under the regulation. Thus, 10 C.F.R. § 2.1204(b)(3) provides authority for the presiding officer to 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."[57] Here, New York failed to provide any explanation in support of its conclusory claim that cross-examination was necessary to assure the development of an

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[55] 10 C.F.R. § 2.1204(b)(1) (emphasis added). *See Crow Butte,* CLI-09-12, 69 NRC at 572 ("Should a discrete issue be identified at or before the oral hearing that warrants cross-examination by the parties, Subpart L allows any party to request it," *citing* 10 C.F.R. § 2.1204(b)(3)) (emphasis added).

[56] Under § 2.1204(b)(1), cross-examination plans must contain: (i) A brief description of the issue or issues on which cross-examination will be conducted; (ii) The objective to be achieved by cross-examination; and (iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

[57] 10 C.F.R. § 2.1204(b)(3) (emphasis added).

adequate record,[58] nor did New York point to the testimony of any party, or any witness, which it claimed needed cross-examination. Indeed, New York explicitly distanced itself from any claim that cross-examination was truly necessary to develop the record, stating as follows:

> [The] "question is not whether the cross-examination must be conducted for the purpose of assuring that the record is complete, but rather whether Section 274(l) recognized that it was the State's sovereign prerogative to decide what it believed needed to be asked to assure a complete record or whether the right of cross-examination could be restricted by allowing the Commissioners or a hearing board to decide whether cross-examination is "necessary" as is now provided in 10 C.F.R. § 2.1204(b)(3).[59]

Accordingly, Entergy and the Staff never had an opportunity to confront any showing by New York that cross-examination is required to ensure development of an adequate record – and no such showing was ever made to the Board, to support its ruling.

In sum, like New York's Motion, the Board's ruling that cross-examination by New York is needed "to ensure the development of an adequate record" lacks any discernible basis, apart from the Board's finding that the evidence in this proceeding is "voluminous and technical." That determination fails to satisfy the Commission's requirements in 10 C.F.R. § 2.1204(b)(3).

C. The Order Violates the Right of Other Parties to a Fair and Impartial Hearing.

The Commission's regulations in 10 C.F.R. § 2.319 recite a fundamental principle of law, embodied in the NRC's adjudications: "A presiding officer has the duty to conduct a fair and impartial hearing according to law."[60] The Staff respectfully submits that the Board's Order appears, on its face at least, to be inconsistent with this requirement, such that interlocutory

[58] See Motion at 10 and 18.

[59] Motion at 16 (emphasis added).

[60] This principle is embodied in § 556(b) of the APA, which states, "[t]he functions of the presiding employees and of employees participating in decisions . . . shall be conducted in an impartial manner."

review is warranted.[61] Significantly, if the Board has concluded that cross-examination is required to assure the development of an adequate record, why has it awarded this prerogative to one party alone? Why has it told other parties that they will not be allowed to conduct cross-examination unless they make a "compelling" case to support their requests?[62] Surely, parties other than New York may be able to assist the Board in developing an adequate record, and may well seek to question witnesses (including New York's witnesses) on testimony that is not cross-examined by New York. Also, why does the Board need New York to conduct cross-examination of witnesses, when it already has New York's proposed questions in hand and can ask whichever of those questions it deems appropriate, without assistance by New York? Moreover, why has the Board declined to place any limits on New York's cross-examination, either as to the issues on which it may inquire or the time allotted for its cross-examination?[63]

Finally, the Board's determination that only New York had filed a motion requesting cross-examination does not support its decision. To be sure, only New York filed a "motion requesting the right to conduct cross-examination. However, as stated in Entergy's Petition for Review, Entergy's answer to New York's Motion did request the right to conduct cross-

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[61] *Cf. Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008) (declining to undertake review of the Board's decision not to re-schedule oral argument on contention admissibility, stating that "[i]t is the Board's responsibility to 'conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, and to maintain order.' [citing 10 C.F.R. § 2.319] As a general matter, we decline to interfere with the Board's day-to-day case management decisions, unless there has been an abuse of power.").

[62] Certainly, no such "compelling" case was demonstrated by New York – in fact, New York made no case in support of its request to conduct cross-examination, having deemed that to be unnecessary under Section 274(l) of the Act.

[63] During the prehearing teleconference, the Board declined to set a time limit on New York's cross-examination, on the grounds that the imposition of such a limit might lead to stalling by the witnesses. *See* Tr. 1,237-38. There was no basis (and no record) to support that view. Moreover, as the Appeal Board observed long ago, (a) the imposition of time limits on cross-examination is permissible and in accord with the NRC's Rules of Practice, as long as there is no prejudice to the rights of any party, and (b) such limits have been approved by the federal courts in complex, lengthy litigation. *Philadelphia Electric Co*. (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 501 (1986).

examination if the Board allows New York to do so.[64] Moreover, New York's Motion (upon which the Board's Order rests), eschewed any request that it be allowed to conduct cross-examination under 10 C.F.R. § 2.1204(b)(3) and was based solely on the language in Section 274(*l*) of the Act. Thus, although the Board had provided an opportunity to all parties to request cross-examination under § 2.1204(b)(3),[65] no party – including New York – ever did so. Accordingly, the Board's reliance on New York's Motion and its view that no other party had requested cross-examination, fail to support its grant of cross-examination rights to New York (and New York alone) under § 2.1204(b)(3).

D. Interlocutory Review Is Warranted Under 10 C.F.R. § 2.341(f).

As the Commission previously observed in this proceeding, the Commission "may, in its discretion, grant interlocutory review at the request of a party."[66] Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission will grant a petition for interlocutory review of a Board ruling only if the party demonstrates that the issue for which interlocutory review is sought:

> (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

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[64] Petition for Review at 16 n.70; *see* Entergy's Answer to NYS Motion, at 11 n.10 ("If this Board . . . determines that New York does possess an absolute right to cross-examine – which it does not – Entergy respectfully requests that it be granted the same right, especially considering that Entergy carries the ultimate burden of proof.") For its part, the Staff asserted that New York has no greater or different right to conduct cross-examination than the other parties. *See* Staff Answer to NYS Motion at 8-9.

[65] *See, e.g.,* "Order (Memorializing Items Discussed during the July 9, 2012, Status Conference)" (July 12, 2012), at 2 ¶ C; "Scheduling Order" (July 1, 2010), at 16, ¶ 6.

[66] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC __, __ (Dec. 22, 2011), slip op. at 14; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-06, 69 NRC 128, 132 (2009); 10 C.F.R. § 2.341(f)(2).

Further, the Commission "grant[s] such petitions only under 'extraordinary circumstances.'"[67] The Staff respectfully submits that the Board's Order warrants interlocutory review under both of these standards.[68]

1. Effect on the "Basic Structure of the Proceeding"

Evidentiary hearings are scheduled to commence just ten days from now on ten complex safety and environmental contentions, for which Entergy and all other parties have been preparing for the past five years. To date, the parties have proffered approximately 1,360 evidentiary exhibits[69] for admission in the record, including extensive pre-filed written testimony on each contention. Considerable effort has been expended by the Staff, Entergy and intervenors in reviewing each others' testimony and exhibits, and preparing for the upcoming hearings.[70] The Board's Order establishes an imbalanced procedural framework for the presentation of evidence that could render nugatory all of this effort and render invalid any decision on the evidence that the Board may eventually issue, in that it would establish an inequitable, uneven and uncertain evidentiary foundation for the Board's decision. The Board's oral ruling that parties other than New York will have to make a "compelling" or sufficient showing to be granted cross-examination rights,[71] only compounds this effect.

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[67] *Indian Point*, CLI-09-06, 69 NRC at 133.

[68] *Cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-864, 25 NRC 417, 428 (1987) (granting directed certification and requiring revisions to a hearing schedule that had effectively precluded intervenors from filing written testimony, stating, "If anything more than lip service is to be accorded the principle that every litigant is entitled to a fair hearing -- in the context of the matter before us, a fair opportunity to present its case -- that result cannot be tolerated.")

[69] These are listed in the parties' lists of hearing exhibits. *See* Ex. ENTR40001 (572 Entergy exhibits); Ex. NRCR20001 (163 Staff exhibits); Ex. NYSR15001 (442 New York exhibits); Ex. RIV70001 (126 Riverkeeper exhibits); and Ex. CLER40001 (60 Clearwater Exhibits)

[70] The Staff estimates that as of September 27, 2012, it has expended 14,079 hours on safety issues, 10,664 hours on environmental issues, and 6,235 hours on hearing support in this proceeding, for a total of 30,978 hours. These estimates do not include the many thousands of hours expended by Staff Counsel and others in the NRC's Office of the General Counsel.

[71] Tr. 1,239-40, 1,251.

In sum, the Staff respectfully submits that the Board's *sua sponte* award of cross-examination rights to one party (and one party alone) in the upcoming hearings affects the basic structure of this proceeding in a pervasive and unusual manner.

2. "Immediate and Serious Irreparable Impact"

In its Petition, Entergy points out that as the applicant for license renewal, it bears the ultimate burden of proof in this proceeding.[72] At the same time, with respect to contentions challenging the adequacy of the Staff's FSEIS, the Staff bears its own burden, since "the Staff, not the applicant, bears the responsibility for complying with NEPA."[73] Entergy or the Staff may therefore find it necessary to pose questions to the witnesses (or ask the Board to do so), in order to elucidate matters not pursued by the Board or to redress any confusion or inaccuracies that may have resulted during the Board's or New York's examination of the witnesses.

The Board's award of cross-examination rights solely to New York, and its requirement that Entergy, the Staff, and any party other than New York will have demonstrate why they should be allowed to conduct any questioning of their own, threatens to have an immediate and serious irreparable impact on the proceeding. Both Entergy and the Staff have prepared proposed questions for the Board to propound to other parties' witnesses. There is no way of knowing whether or to what extent the Board will pursue those questions, or how the Board will view a party's request to cross-examine a witness by asking the very questions that the Board decided not to ask.[74] Further, there is no way of knowing how a witness will answer the Board's or New York's questions, making it impossible to predict, at this time, whether the Staff or Entergy will find it necessary to pose additional cross-examination questions to the witness. The

[72] Petition at 16,

[73] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC __, __ (Dec. 22, 2011), slip op. at 9.

[74] It does not seem unreasonable to expect the Board to reject such a request by the Applicant, Staff, or other party, having already decided not to ask those questions, itself – thus increasing the likelihood that these parties' impromptu request to cross-examine at the hearings will be denied.

Board's establishment of these imbalanced evidentiary procedures threatens serious and irreparable impact to the Applicant, Staff and other participants in the proceeding, other than New York.

Evidentiary hearings will commence shortly. Dozens of witnesses have prepared written testimony, and are now finalizing their preparations to testify. Once these hearings conclude and an Initial Decision is rendered, the Commission will be asked to consider the Board's conclusions based upon the record presented. In order to avert any claim that the evidentiary record does not and cannot support the Board's decision, due to the Board's use of unfair and imbalanced evidentiary procedures, resulting in prejudicial impact to the Applicant or other party in the proceeding, the Board's decision to allow New York (and only New York) to cross-examine witnesses under § 2.1204(b)(3) threatens to have serious and irreparable impacts that cannot be undone later. Immediate interlocutory review is therefore warranted.

II. The Commission Should Stay the Board's Order, Pending Review.

The Staff respectfully submits that a stay of the Board's Order is required, as set forth in 10 C.F.R. § 2.342(e), in that (a) the Applicant has made a strong showing that it is likely to prevail on the merits of its Petition for Review, (b) the Applicant will be irreparably injured unless a stay is granted, (c) the grant of a stay will not harm other parties, and (d) the public interest favors the issuance of a stay. [75]

A. Likelihood of Prevailing on the Merits

As discussed above, the Board's Order effectively eviscerates the Commission's well-considered regulatory scheme, which precludes cross-examination in a Subpart L proceeding except in certain narrow circumstances not present here. Further, the Board's Order lacks any discernible basis, as New York had not requested that it be allowed to cross-examine witnesses

[75] *Cf. Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 223 (2002) (granting a stay of hearings on an issue under former § 2.788, pending the Commission's interlocutory review of the Board's ruling on that issue).

under § 2.1204(b)(3) – and, indeed, it had expressly rejected the opportunity to do so – and had not demonstrated any reason why its cross-examination is required to ensure development of an adequate record. Moreover, the Board's Order violates the rights of the Applicant, Staff and other parties to a fair and impartial hearing, and has a pervasive and unusual effect on the basic structure of the proceeding. For these reasons, as discussed in detail above, the Staff submits that the Applicant is likely to prevail in its petition for Commission review of the Board's Order.

B. Irreparable Injury Unless a Stay Is Granted

In the foregoing discussion, the Staff stated its view that the Board's Order establishes an imbalanced framework for the presentation of evidence that threatens to undermine any Initial Decision that the Board may eventually issue, in that it creates an inequitable, uneven and uncertain evidentiary foundation for the Board's decision. The Board's subsequent ruling that parties other than New York will be required to make a "compelling" (or otherwise sufficient) argument before they will be allowed to conduct cross-examination further compounds this effect. The Board's Order threatens to deprive the parties of the ability to present evidence in a fair and balanced manner, jeopardizing their rights to a fair and impartial hearing. The Order thus has an immediate and serious irreparable impact that cannot be alleviated by later appeal.

C. Absence of Harm to Other Parties

No party is entitled to conduct cross-examination in a Subpart L proceeding, except in narrow circumstances not applicable here. A stay of the Board's Order will only result in restoring balance to this proceeding, such that evidentiary hearings can proceed this month, as planned. No party – including New York – will be harmed if the Board's Order is stayed.[76]

[76] While New York would lose its recently-awarded (and unsupported) "right" to cross-examine witnesses, New York (like all other parties) would still be free to propose additional questions for the Board to ask, during the course of the evidentiary hearings. New York's assertion that its witnesses would be inconvenienced if the hearings are postponed (NYS Answer at 9) fails to warrant denial of the Applicant's stay request, in that there is no apparent need to stay the hearings. Moreover, all parties would incur the same or greater inconvenience if hearings on New York's contentions are deferred.

Moreover, all parties would benefit from a stay, in that a stay could avert an imbalance in the evidentiary foundation for the Board's Initial Decision, thus providing greater confidence in the soundness and reliability of that decision.

D. The Public Interest Favors Issuance of a Stay

Five years have passed since this proceeding was initiated. Given the extraordinary time, resources, and efforts that have been expended until now by the parties and the Board, any imbalance in the rights of the parties would cast a shadow on the proceeding and the evidentiary record for the Board's decision. The public interest favors the re-establishment of evidentiary procedures that ensure a fair and impartial hearing, as contemplated in 10 C.F.R. § 2.319, to provide a proper foundation for the Commission's resolution of this proceeding.

CONCLUSION

The Board's unprecedented Order effectively eviscerates the Commission's regulations governing this Subpart L proceeding, and creates a striking imbalance in the procedural framework for the upcoming evidentiary hearings. The Staff respectfully submits that the Applicant's Petition for Review and Stay Request should be granted.

Respectfully submitted,

Signed Electronically by

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Dated at Rockville, Maryland
this 5th day of October 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO ENTERGY'S EMERGENCY PETITION FOR INTERLOCUTORY REVIEW, AND APPLICATION FOR STAY, OF THE BOARD'S ORDER OF SEPTEMBER 21, 2012," dated October 5, 2012, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above- captioned proceeding, this 5th day of October, 2012.

/Signed (electronically) by/

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