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)	)	October 8, 2012

ENTERGY'S REPLY TO NEW YORK STATE'S OPPOSITION TO ENTERGY'S EMERGENCY PETITION FOR INTERLOCUTORY REVIEW

William B. Glew, Jr., Esq.
William C. Dennis, Esq.
ENTERGY NUCLEAR OPERATIONS, INC.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3202
Fax: (914) 272-3205
E-mail: wglew@entergy.com
E-mail: wdennis@entergy.com

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Raphael P. Kuyler, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Phone: (202) 739-3000
Fax: (202) 739-3001
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: rkuyler@morganlewis.com

COUNSEL FOR ENTERGY NUCLEAR OPERATIONS, INC.

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)	)	
	)	October 8, 2012

ENTERGY'S REPLY TO NEW YORK STATE'S OPPOSITION TO ENTERGY'S EMERGENCY PETITION FOR INTERLOCUTORY REVIEW

Pursuant to 10 C.F.R. § 2.341(b)(3) and the October 2, 2012 Order of the Secretary, Entergy Nuclear Operations, Inc. ("Entergy") replies to the State of New York's Combined Opposition to Entergy's Requests for Emergency Stay and Interlocutory Review of the Board Order Granting Limited Cross-Examination (Oct. 1, 2012) ("Opposition").[1]

New York's Opposition makes clear why expedited review and reversal of the Board's Order[2] is necessary. The Opposition does not dispute that, in granting New York unprecedented (and undefined) cross-examination rights, the Board applied a novel legal standard that the Commission itself has already rejected. Nor does the Opposition dispute that, with hearings scheduled to begin in one week, review must come "now or not at all" to be meaningful.

So Entergy's original conclusions stand: (1) expedited, immediate review is necessary because the Order threatens Entergy with immediate, serious, and irreparable harm and affects the basic structure of this proceeding in a pervasive and unusual manner; and (2) the Board's unprecedented Order should be reviewed and reversed because it is legally erroneous, highly prejudicial, and at the very least raises substantial questions of law, policy, and discretion.

---

1 This reply does not address New York's responses to Entergy's Application to Stay Board Order Granting Cross-Examination to New York State and Stay the Hearing Pending the Commission's Decision on Entergy's Emergency Petition for Interlocutory Review (Sept. 28, 2012) ("Stay Application"), because no reply is permitted under 10 C.F.R. § 2.342. The NRC Staff filed an answer on October 5, 2012. *See* 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 (Oct. 5, 2012). Entergy agrees with the Staff's position in its Answer and does not intend to file a reply to the Staff.

2 (Order Granting, in part, New York's Motion for Cross Examination) (Sept. 21, 2012) (unpublished) ("Order").

New York's primary argument against review is that Entergy did not ask the Board for cross-examination rights.[3] That argument is both wrong and beside the point. It is wrong because Entergy *did* ask the Board—in the alternative to denying New York's request outright—to grant Entergy the same cross-examination rights as New York for fundamental fairness's sake.[4] It is beside the point because it ignores the fundamental problems with the Order—*i.e.*, that it applies an erroneous legal standard to pervasively alter the hearing process, and grants procedural rights to a single party while withholding them from all others. It also sidesteps the related problem that the Board granted these rights to New York *sua sponte*, so Entergy never had the opportunity to respond to any argument that cross-examination was warranted under 10 C.F.R. § 2.1204.

New York's primary argument against reversal is that at a subsequent pre-hearing teleconference, Entergy "gained" the right to request cross-examination, in the normal course of the hearing, if need be.[5] This reads far too much into comments by the Board Chair during that conference—comments that were explicitly subject to further discussion with the other Board members.[6] New York does not explain, because it cannot, why Entergy and the other parties should be held to a stricter standard than New York and are required to comply with the governing regulations for seeking cross-examination at the hearing. Interlocutory review and reversal is necessary to correct the fundamental error in granting New York unprecedented and unmerited rights, to avoid the resulting prejudice to Entergy (and the other parties), and to ensure that the hearing goes forward in the fair, orderly manner envisioned by the Commission.

---

3 *See* Opposition at 1.

4 *See* Entergy's Emergency Petition for Interlocutory Review of Board Order Granting Cross-Examination to New York State and Request for Expedited Briefing at 16 (Sept. 28, 2012) ("Emergency Petition").

5 *See* Opposition at 2 (*citing* Official Transcript of Proceedings, Indian Point Nuclear Generating Units 1 & 2 [sic—2 & 3] at 1236-43 (Sept. 24, 2012) ("Tr.")).

6 *See* Tr. at 1242 ("what I envision and will discuss this further with my colleagues"). Statements in a prehearing conference—particularly when subject to such caveats—are not equivalent to a Board Order, and in any event granted nothing to Entergy that is not already granted under 10 C.F.R. § 2.1204. *See Crowe Butte Res., Inc.* (North Trend Expansion Project), CLI-09-1269 NRC 535, 577 (2009) ("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.") (emphasis added).

I. THE BOARD'S DECISION WARRANTS IMMEDIATE REVIEW

Immediate review of the Board's decision is warranted because of the effect and irreparable impact of the wide-ranging, one-sided cross-examination authorized by the Order.[7] New York's primary argument against that conclusion is that Entergy did not formally move for cross-examination, and so is "belated[ly]" seeking relief it did not request from the Board.[8] That is not so.

For one thing, Entergy *did* seek cross-examination, in its response to New York's own request, as an alternative to denying that request outright.[9] To the extent New York argues that Entergy's conditional request was somehow technically deficient or unsupported under 10 C.F.R. § 2.1204, New York has no standing to make that argument (which fails in any event) because New York did not move for cross-examination pursuant to Section 2.1204. Indeed, it *explicitly disavowed* any application of that Section in its own motion.[10] New York certainly made no "proper showing" under the regulations—a standard it now inconsistently seeks to impose on Entergy as a prerequisite to its review request.[11] And to the extent the Order deems New York's submission of proposed questions to satisfy the procedural requirement of a cross-examination plan, Entergy must also be deemed to have satisfied that requirement because it submitted proposed questions as well.[12]

More fundamentally, whether or not Entergy properly moved for cross-examination before the Board (and it did) is wholly irrelevant to the primary arguments advanced in Entergy's Emergency Petition: the Board's Order rests on an incorrect and indefensible legal standard; works a pervasive and

---

7 *See* Emergency Petition at 8-10.

8 Opposition at 1.

9 *See* Emergency Petition at 6 (*citing* Entergy's Answer Opposing New York State's Motion to Cross-Examine at 10-11 & n. 10 (Aug. 20, 2012)).

10 *See* State of New York Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(*l*) at 15 (Aug. 8, 2012) ("Motion").

11 Opposition at 7; *see also id*. at 2, 5. In any event, nothing in the regulations allows across-the-board cross examination of witnesses without a showing of necessity. Thus, Entergy's request for the alternative relief of an opportunity equal to New York's could only have been made in response to the state's Motion.

12 *See* Emergency Petition at 16. Although New York claims that Entergy has not cited any case for the proposition that "when one party moves for relief, the Board should formally grant all non-moving parties identical relief," that is not Entergy's argument and, in any case, is incorrect. Opposition at 4. Entergy's argument is that all parties must be granted a fair opportunity to be heard. *See* Emergency Petition at 9 (*citing Hous. Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979)).

fundamental change in the hearing procedures; and causes substantial and irrevocable prejudice to Entergy by ignoring the cardinal principle that all parties must be granted equivalent procedural rights. Neither the Order nor New York's attempt to defend it can explain why only one party should be awarded an unequal right to examine witnesses on a novel and erroneous basis that the parties did not have the opportunity to brief and oppose under Section 2.1204. Nor does the Opposition explain why another party's conditional request for an equal opportunity can simply be ignored—both in the Order and at the subsequent teleconference.[13] That silence is telling, and only underscores why the Board's ruling is fundamentally unfair and should be immediately reviewed and reversed.

New York also tries to minimize the sweep of the examination rights granted by the Order by repeatedly characterizing those rights as "limited."[14] But saying does not make it so. The only arguable "limit" on the rights conferred on New York (and New York alone) by the Order is that its questions must be "relevant, reasonable, and non-repetitive."[15] That is an exceedingly low bar, to say the least. It is no wonder, then, that New York relies so heavily on later comments by the Board's Chair during the teleconference to insist that its cross-examination rights are "not unfettered" because they must be "focused."[16] On the contrary, the Order allows New York alone the *general* opportunity to examine witnesses on all of its contentions, so long as its questions are "relevant, reasonable, and non-repetitive."[17]

It is no answer to this prejudice and unfairness to say, as New York does, that the Chair later suggested that the other parties (including Entergy) may seek cross-examination during the hearing itself.[18] Neither New York's Opposition nor the Order explains why all other parties must make a "sufficiently compelling request"[19] to engage in piecemeal cross-examination of particular witnesses on

---

13 *See generally* Order; *see also* Tr. at 1241.

14 *See* Opposition at 1, 3, 5, 6, 8, 10.

15 Order at 7.

16 Opposition at 3, 5. *But see* Motion at 7 (claiming an "unfettered" right to cross-examination).

17 Order at 7; *see also* Tr. at 1240 (suggesting that New York's *may voluntarily choose to limit its own cross-examination* because "*they're* satisfied that the Board covered everything") (emphasis added).

18 Opposition at 8; *see also id*. at 2-5, 6-7 (citing the teleconference transcript).

19 Tr. at 1239.

particular issues while New York—and New York alone—will be excused from that showing due to the Board's *sua sponte* grant of an across-the board exemption from the governing standards on all of its contentions.

II. THE COMMISSION SHOULD REVERSE THE BOARD'S DECISION

New York's only response on the merits of Entergy's arguments for reversal is that the Board generally has wide discretion and authority to conduct a fair and impartial hearing.[20] That is true, but beside the point. None of the fundamental errors identified by Entergy come within that discretion.[21]

New York speculates that "it is possible" that it will not "see fit to ask additional questions at the conclusion of the Board's examination."[22] That speculation cannot be reconciled with New York's intent to exercise its "sovereign prerogative" to decide what questions must be asked.[23] And it cannot be reconciled with the Order, which erroneously authorizes the State to do just that.

III. CONCLUSION

For the foregoing reasons and those set forth in Entergy's Emergency Petition, the Commission should immediately review the Order and reverse it. In the alternative, the Commission should grant Entergy an equal right to examine witnesses at the hearing.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

William B. Glew, Jr., Esq.
William C. Dennis, Esq.
ENTERGY NUCLEAR OPERATIONS, INC.

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Raphael P. Kuyler, Esq.
MORGAN, LEWIS & BOCKIUS LLP

---

20 *See* Opposition at 6-7.

21 *See* Emergency Petition at 10-16. New York selectively quotes language from *Citizens Awareness Network v. United States*, cited in Entergy's Emergency Petition, but fails to mention that the court there *upheld* the validity of the Commission's regulations allowing cross-examination in Subpart L proceedings *when a party carries its burden to show that cross-examination is necessary*. *See* 391 F.3d 338, 351 (1st Cir. 2004). New York has failed to carry that burden here.

22 Opposition at 6.

23 *See* Motion at 16.

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)	)	
	)	October 8, 2012

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that, on this date, copies of the "Entergy's Reply to New York State's Opposition to Entergy's Emergency Petition for Interlocutory Review" was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Lance A. Escher

Lance A. Escher, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
Phone: (202) 739-5080
Fax: (202) 739-3001
E-mail: lescher@morganlewis.com

DB1/ 71254218