

May 13, 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S OPPOSITION TO  
MOTION BY THE STATE OF NEW YORK FOR LEAVE TO FILE  
TWO ADDITIONAL EXHIBITS CONCERNING CONSOLIDATED CONTENTION NYS-37

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("Staff") files its opposition to the motion filed by the State of New York ("New York")<sup>1</sup> for leave to file two additional documents as exhibits in this matter in support of New York's Contention NYS-37 regarding the Staff's analysis of the no-action alternative. As set forth more fully below, the Staff opposes the motion on the grounds that the proposed exhibits are immaterial and cumulative and that the request is late.

The regulation in 10 C.F.R. § 2.337 provides that "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted." Thus, the powers of a presiding officer include the power to preclude the introduction of evidence that is "irrelevant, immaterial, unreliable, duplicative or cumulative." 10 C.F.R. § 2.319(d) and (e).

Here, New York proposes to introduce two documents: Proposed Exhibit NYS000474, State of New York Public Service Commission, Case 10-T-0139, Order Granting Certificate of Environmental Compatibility and Public Need, Application of Champlain Hudson Power

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<sup>1</sup> Motion by the State of New York for Leave to File Two Additional Exhibits Concerning Consolidated Contention NYS-37, dated May 3, 2013 ("Motion").

Express, Inc. (April 18, 2013) (“CHPE Certificate”) and Proposed Exhibit NYS000475, State of New York Public Service Commission, Case 11-E-0593, Order Granting Certificate of Public Convenience and Necessity, Petition of Cricket Valley Energy Center, LLC (Feb. 14, 2013) (“Cricket Valley Certificate”). New York asserts that these proposed exhibits are relevant to the issues addressed in Contention NYS-37 (No-Action Alternative). In making the case for relevance, however, New York also demonstrates that the documents are immaterial and cumulative.

The proposed exhibits are immaterial because the facts they establish have never been at issue in this proceeding and will have no effect on the disposition of the question whether the Staff’s analysis of alternatives to license renewal is legally sufficient. The proposed exhibits establish that the State of New York has approved the CHPE transmission lines and the Cricket Valley power plant. There has never been any dispute between the parties regarding whether the transmission lines or the power plant would be approved.

With respect to proposed Exhibit NYS000475 regarding the CHPE transmission lines, New York states that the Staff used CHPE “as an example of new transmission capacity that could deliver power to the New York City metropolitan area if Indian Point were not relicensed”<sup>2</sup> and that New York’s “experts also discussed the CHPE project for the same purpose[.]”<sup>3</sup> The question was not whether CHPE would be built or approved, or not; indeed, there was no question regarding CHPE at all. CHPE was cited for illustrative purposes only – and by both parties for “the same purpose.”<sup>4</sup> Accordingly, it would not change the Staff’s analysis if CHPE was approved or disapproved. The fact that CHPE has received a certificate of environmental

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<sup>2</sup> Motion at 2. In its motion, in footnote 3 on page 2, New York cited a Staff exhibit “NRC000133 at 54-55 A.8.” for the proposition that CHPE is an example of new transmission capacity to deliver power to New York City if Indian Point is not relicensed. There is no A.8. at pages 54-55 of the exhibit. The Staff discusses CHPE, however, in Exhibit NRC000133 at pages 53-54, A.68.

<sup>3</sup> Motion at 2.

<sup>4</sup> *Id.*

compatibility and public need is thus immaterial. It works no change to the Staff's analysis and has no effect on the Board's resolution of Contention NYS-27.

Similarly, the approval of the Cricket Valley power plant will not affect the Staff's analysis or the Board's resolution of this contention. New York describes Cricket Valley as a project "that will provide replacement energy to the New York metropolitan area if Indian Point is not relicensed."<sup>5</sup> But the Staff has never asserted that there was a lack of replacement power in the event that Indian Point is not relicensed. Instead, the Staff determined that a natural gas combined cycle plant ("NGCC"), such as Cricket Valley, could serve as a viable alternative to Indian Point.<sup>6</sup>

New York's stated purpose for putting the new exhibits forward also demonstrates the exhibits' immateriality. New York states that these exhibits "demonstrate[] that new coal generation will not be considered as an option in New York."<sup>7</sup> The Staff does not consider new coal generation to be a viable option in New York and said so in the FSEIS.<sup>8</sup> Accordingly, the Staff dismissed new coal-fired generation from consideration as an alternative to Indian Point, explaining:

The NRC Staff has moved the supercritical coal-fired alternative to this section [Alternatives Dismissed from Individual Consideration] based on comments, a staff review of likely generating alternatives in New York State, and policies like the Regional Greenhouse Gas Initiative that make coal-fired generation unlikely in New York State.<sup>9</sup>

The two proposed exhibits, which total over 650 pages, are also cumulative in light of the

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<sup>5</sup>*Id.*

<sup>6</sup> Final Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 ("FSEIS") at 8-28 through 39.

<sup>7</sup> State of New York's Reply to Entergy's and NRC Staff's Proposed Findings of Fact and Conclusions of Law for Consolidated Contention NYS-37, dated May 3, 2013, at 6.

<sup>8</sup> FSEIS at 8-43.

<sup>9</sup> *Id.*

6 exhibits already admitted with respect to the two projects. As New York put it, “[e]xhibits relating to [CHPE] have already been admitted into evidence in this proceeding. . . . [and] both the State and NRC Staff have introduced exhibits relating to the Cricket Valley Energy Center in this proceeding.”<sup>10</sup>

Finally, proposed Exhibit NYS000475 is late. Boards generally apply the eight factor test in 10 C.F.R. 2.309(c)(1) “to determine whether we can consider [the petitioner’s] late-filed exhibits. Good cause for the failure to file on time is the most important factor.”<sup>11</sup> According to New York, proposed Exhibit NYS000475 was issued on February 14, 2013.<sup>12</sup> New York has provided no explanation for its submission of this proposed exhibit over 11 weeks after its issuance and thus has not established good cause for its failure to raise the introduction of this exhibit in a timely fashion.

Hearings on Contention NYS-37 concluded on November 27, 2012, and the parties have filed their proposed findings of fact and conclusions of law, as well as their reply findings of fact and conclusions of law. New York’s late filing of this proposed exhibit at this time is untimely in the extreme and comes too late for the parties to address in any meaningful way. It should therefore be excluded from evidence.

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<sup>10</sup> Motion at 2.

<sup>11</sup> FirstEnergy Nuclear Operating Co. (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC 534, 543 (2011).

<sup>12</sup> Motion at 1. New York states, in its discussion, that the two orders were issued in January and February 2013. However, its descriptions of the documents give the dates of issuance as February 14 and April 18, 2013.

For the foregoing reasons, the Staff submits that the Motion by the State of New York for Leave to File Two Additional Exhibits Concerning Consolidated Contention NYS-37 should be denied.

Respectfully submitted

**/Signed Electronically by/**

Beth N. Mizuno  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
Telephone: (301) 415-3122  
E-mail: [Beth.Mizuno@NRC.gov](mailto:Beth.Mizuno@NRC.gov)

Dated at Rockville, Maryland  
this 13<sup>th</sup> day of May 2013

CERTIFICATION OF COUNSEL

Counsel for the Staff certifies that she has made a sincere effort to make herself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that her efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

**/Signed (electronically) by/**

Beth N. Mizuno  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop – O-15D21  
Washington, DC 20555  
Telephone: (301) 415-3122  
E-mail: [Beth.Mizuno@nrc.gov](mailto:Beth.Mizuno@nrc.gov)

Dated at Rockville, Maryland  
this 13<sup>th</sup> day of May 2013

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing “NRC STAFF’S OPPOSITION TO MOTION BY THE STATE OF NEW YORK FOR LEAVE TO FILE TWO ADDITIONAL EXHIBITS CONCERNING CONSOLIDATED CONTENTION NYS-37” dated May 13, 2013, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding, this 13th day of May, 2013.

**/Signed (electronically) by/**  
Beth N. Mizuno  
Counsel for NRC Staff  
U. S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop – O-15D21  
Washington, DC 20555  
Telephone: (301) 415-3122  
Email: [Beth.Mizuno@nrc.gov](mailto:Beth.Mizuno@nrc.gov)