

June 21, 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 MOTION FOR PARTIAL RECONSIDERATION OF THE
BOARD'S ORDER OF JUNE 12, 2013 (GRANTING NEW YORK'S MOTIONS
TO SUPPLEMENT THE RECORD ON CONTENTIONS NYS-5 AND NYS-16B)

INTRODUCTON

Pursuant to 10 C.F.R. § 2.323(a), the Staff of the Nuclear Regulatory Commission ("Staff") hereby requests that the Atomic Safety and Licensing Board ("Board") reconsider, in two limited respects, its "Order (Granting New York's Motions, Denying Clearwater's Motion, and Denying CZMA Motions)" ("Order"), issued June 12, 2013.¹

Specifically, the Staff seeks partial reconsideration of the Board's Order insofar as the Board (a) granted the State of New York's ("New York") motion to supplement the record on Contention NYS-5,² prior to the filing (and without consideration) of any answer thereto by the Staff or other parties,³ and (b) granted New York's motion to supplement the record and to file supplemental proposed findings of fact on Contention NYS-16B (regarding the Applicant's

¹ The Staff previously informed the Board and parties of its intent to file this motion. See Letter from Sherwin E. Turk to the Board (June 12, 2013), at 1.

² "State of New York Motion for Leave to Submit Recently Disclosed Entergy Documents as Additional Exhibits Concerning Contention NYS-16B" ("NYS-5 Motion") (June 10, 2013).

³ The Staff notes that Entergy Nuclear Operations, Inc. ("Applicant") has also filed a motion for reconsideration of this portion of the Board's Order. See "Applicant's Motion for Reconsideration of the Board's Decision to Admit Additional New York Exhibits Concerning Contention NYS-5" ("Applicant's Motion for Reconsideration") (June 14, 2013).

recent submission of its completed engineering project cost estimates),⁴ without ruling on the Staff's request that it be permitted to file responsive supplemental proposed findings of fact and conclusions of law regarding that evidence, in the event that New York's motion were to be granted.⁵

In accordance with 10 C.F.R. § 2.323(b), the Staff has consulted with the other parties regarding the instant motion. In this regard, (a) the Applicant stated that it does not oppose the Staff's motion; (b) Hudson River Sloop Clearwater, Inc. stated that it takes no position on the motion; (c) Riverkeeper, Inc. stated that it does not oppose the motion concerning Contention NYS-5, and that it takes no position on the motion concerning Contention NYS-16B; and (d) New York stated that it does not oppose the motion concerning NYS-5 and NYS-16, and does not oppose Staff's request to file supplemental proposed findings of fact/conclusions of law on Contention NYS-16B within 10 days of a Board ruling permitting the Staff to do so.⁶

DISCUSSION

A. New York's Motion to Supplement the Record on Contention NYS-5

New York filed its motion for leave to supplement the record on Contention NYS-5 on June 10, 2013. Two days later, on June 12, 2013, the Board granted that motion, before any answer had been filed by the Staff or other parties. In accordance with 10 C.F.R. §§ 2.323(b) and 2.306(a), the Staff was permitted (and had intended) to file an answer to that motion on or

⁴ "State of New York Motion Seeking Leave to File an Additional Exhibit and Supplemental Proposed Findings of Fact and Conclusions of Law on Contention NYS-16B" ("NYS-16B Motion") (May 17, 2013).

⁵ "NRC Staff's Opposition to State of New York Motion Seeking Leave to File an Additional Exhibit and Supplemental Proposed Findings of Fact and Conclusions of Law on Contention NYS-16B" (May 23, 2013), at 1. n.2 ("If the Board grants New York's Motion, the Staff requests the opportunity to respond to New York's supplemental proposed findings and conclusions of law. Denying the Staff and other parties an opportunity to respond to New York's proposed supplemental filing, if granted, would be inequitable.").

⁶ New York further stated that it "reserves the right to review the substance" of the Staff's motion and to "respond to material, documents, and arguments contained therein."

before June 24, 2013. The Board's issuance of its Order prior to the Staff's filing of its answer precluded any consideration by the Board of the Staff's views regarding the merits of New York's motion. While it is likely that the Board did not intend to preclude the Staff or other parties from responding to New York's motion, that outcome is the effect of its ruling. The Staff respectfully submits that this outcome is manifestly unfair, and that reconsideration of the Board's ruling on New York's motion is appropriate, to afford the Board an opportunity to consider the Staff's (and other parties') views regarding the merits of New York's motion.⁷

Finally, the Staff submits that in the event that the Board grants the instant motion for reconsideration and affords the Staff an opportunity to respond to New York's motion to supplement the record on Contention NYS-5, the Staff would be prepared to file that answer one week from today, *i.e.*, on or about June 28, 2013.⁸

B. New York's Motion to Supplement the Record on Contention NYS-16B

In its motion concerning Contention NYS-16B, filed on May 17, 2013, New York requested leave (a) to supplement the record and (b) to file supplemental proposed findings of fact and conclusions of law, to address the new material it had proffered; further, New York filed, in Attachment 1 to its motion, its supplemental proposed findings of fact and conclusions of law for the Board's consideration.⁹ Included in New York's supplement were nine detailed paragraphs containing its supplemental proposed findings of fact (PFF ¶¶ 206 – 214), and three paragraphs containing its supplemental proposed conclusions of law (PFF ¶¶ 215 – 217).

⁷ See 10 C.F.R. § 2.323(e) ("Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.").

⁸ The Staff notes that the undersigned Counsel is expected to be unavailable until June 26, 2013, due to his need to attend a funeral in Chicago during the coming week.

⁹ NYS-16B Motion, "Attachment 1" ("State of New York's Supplemental Proposed Findings of Fact and Conclusions of Law for Contention NYS-16/16A/16B ('NYS-16B')").

On May 23, 2013, the Staff filed its answer to New York's motion to supplement the record on Contention NYS-16B. Therein, the Staff set forth its view that the motion should be denied; further, the Staff requested that if the Board were to grant New York's motion, that the Staff be allowed to file responsive proposed findings of fact and conclusions of law to address New York's supplemental filing.¹⁰ Likewise, the Applicant requested leave to file a response to New York's supplemental proposed findings and conclusions – which it attached to its answer.¹¹

In the Board's Order of June 12, 2013, the Board granted New York's motion for leave to supplement the record and to file supplemental proposed findings of fact and conclusions of law on Contention NYS-16B, and it granted Entergy's request for leave to file responsive proposed findings of fact and conclusions of law. See Order at 2. The Board did not, however, address the Staff's similar request that it be permitted to respond to New York's supplemental proposed findings of fact and conclusions of law.

The Staff submits that, in the interest of fairness and to help assure the issuance of a proper decision on the merits of Contention NYS-16B, the Staff should be afforded an opportunity to respond to New York's supplemental proposed findings of fact and conclusions of law. Further, the Staff submits that the filing of responsive proposed findings of fact and conclusions of law by the Staff is proper under 10 C.F.R. § 2.1209 and the Board's previous orders regarding the filing of such responsive pleadings. Finally, the Staff notes that while the Board likely did not intend to preclude the Staff from responding to New York's supplemental findings and conclusions, that will be the effect of the Board's ruling unless it grants reconsideration of its Order and permits the Staff to file responsive proposed findings of fact and

¹⁰ See n.4, *supra*.

¹¹ See "Entergy's Answer Opposing State of New York Motion Seeking Leave to File an Additional Exhibit and Supplemental Findings of Fact and Conclusions of Law on Contention NYS-16B" (May 28, 2013) at 5 n.21, and "Attachment 1" thereto ("Entergy's Reply to New York State's Supplemental Proposed Findings of Fact and Conclusions of Law for Contention NYS-16B").

conclusions of law to address New York's supplemental findings of fact and conclusions of law on Contention NYS-16B.

In the event that the Board grants the instant motion for reconsideration and affords the Staff an opportunity to respond to New York's supplemental proposed findings of fact and conclusions of law on Contention NYS-16B, the Staff would be prepared to file that supplement within 10 days from today, *i.e.*, on or about July 1, 2013.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Board grant partial reconsideration of its Order of June 12, 2013, with regard to its rulings on New York's motions concerning Contentions NYS-5 and NYS-16B, (a) to allow the Staff to file an answer to New York's motion to supplement the record on Contention NYS-5, and to consider that answer in ruling on New York's motion, and (b) to allow the Staff to file responsive supplemental proposed findings of fact and conclusions of law on Contention NYS-16B.

Respectfully submitted

/Signed Electronically by/

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Dated at Rockville, Maryland
this 21st day of June 2013

CERTIFICATION OF COUNSEL

In accordance with 10 C.F.R. § 2.323(b) Counsel for the Staff certifies that he has made a sincere effort to contact other parties in the proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and further certifies that his efforts to resolve the issues have been successful as stated above.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of |) | |
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| ENTERGY NUCLEAR OPERATIONS, INC. |) | Docket Nos. 50-247-LR/ 50-286-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 MOTION FOR PARTIAL RECONSIDERATION OF THE BOARD'S ORDER OF JUNE 12, 2013 (GRANTING NEW YORK'S MOTIONS TO SUPPLEMENT THE RECORD ON CONTENTIONS NYS-5 AND NYS-16B)," dated June 21, 2013, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 21st day of June, 2013.

/Signed (electronically) by/

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