

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, NUCLEAR
INFORMATION AND RESOURCE
SERVICE, and HUDSON RIVER
SLOOP CLEARWATER,

Petitioners,

v.

U.S. NUCLEAR REGULATORY
COMMISSION,

Respondent.

No. 16-1189

MOTION OF ENTERGY NUCLEAR INDIAN POINT 2, LLC, AND ENTERGY
NUCLEAR OPERATIONS, INC. FOR LEAVE TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. (together, “Entergy”), respectfully move for leave to intervene as party-respondents in the above-captioned matter. Petitioners Friends of the Earth, Nuclear Information and Resource Service, and Hudson River Sloop Clearwater (together, “FOE”), by their counsel Richard Ayres, Esq., and Respondent Nuclear Regulatory Commission (“NRC”), by its Solicitor Andrew Averbach, Esq., have indicated that they consent to Entergy’s intervention.

In support of its motion, Entergy states as follows:

1. Entergy Nuclear Indian Point 2, LLC owns, and Entergy Nuclear Operations, Inc. operates, Indian Point Unit 2, a nuclear power plant located in Buchanan, New York. Together with Indian Point Unit 3, Indian Point Unit 2 generates approximately 2,000 megawatts of electricity and supplies approximately 25 percent of power used in New York City and Westchester County. *See* New York Independent System Operator, 2015 Load & Capacity Data 22 (columns H, I, J), 41 (April 2015) (“Gold Book”), http://www.nyiso.com/public/webdocs/markets_operations/services/planning/Documents_and_Resources/Planning_Data_and_Reference_Docs/Data_and_Reference_Docs/2015%20Load%20and%20Capacity%20Data%20Report.pdf.

2. As a nuclear power plant located in the United States, Indian Point Units 2 is subject to extensive regulation by the NRC.

3. On June 16, 2016, FOE filed an “Emergency Petition For Writ Of Mandamus” requesting that this Court order the NRC to prevent Indian Point Unit 2 from restarting operations, and alternatively that this Court order NRC to require a shutdown of Indian Point Unit 2 if the unit had already restarted before the Court could rule on the petition.

4. This Court and other courts have permitted intervention by the owners and operators of nuclear power plants in cases where petitioners seek to compel the NRC to take action against a nuclear power plant. *See, e.g., Safe Energy Coalition*

of *Mich. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989).

Entergy respectfully requests that it be allowed to intervene here.

Background

5. In 1973, the NRC's predecessor issued a 40-year license for Indian Point 2, which began operating in 1974. While NRC regulations limit the term of an initial license to 40 years, the regulations permit operators to apply for a 20-year renewed operating license. In April 2007, Entergy filed with the NRC an application for 20-year renewal of the licenses for Indian Point 2 and 3, which remains pending at NRC.

6. As part of routine operation, Indian Point 2 must shut down periodically to refuel. Such outages typically take place every 18 to 24 months. On March 7, 2016, Indian Point 2 shut down for its refueling outage. During the refueling outage, Entergy undertook numerous inspections in accordance with its Aging Management Program, which had been reviewed and approved by the NRC. Indian Point Energy Center, *Hundreds of Inspections Completed on Indian Point Unit 2, Replacement of Reactor Liner Bolts Planned* (Mar. 29, 2016), <http://www.safesecurevital.com/hundreds-of-inspections-completed-on-indian-point-unit-2-replacement-of-reactor-liner-bolts-planned/>.

7. One such inspection involved visual and volumetric examinations of baffle-former assembly bolts, among other reactor vessel internal ("RVI")

components. The inspection was conducted consistent with industry-wide standards developed by the Electric Power Research Institute (“EPRI”) in MRP-227-A, “Pressurized Water Reactor Internals Inspection and Evaluation Guidelines.” It included visual and, where feasible, ultrasonic testing (“UT”) examinations of approximately 2000 baffle-former assembly bolts (which include baffle-former and baffle-edge bolts) as part of the RVI aging management program. No failures of the baffle-edge bolts were identified during the inspections. However, as to the baffle-former bolts (hereinafter, “bolts”), the visual and preliminary UT examination results showed indications (*e.g.*, missing bolt heads, and bars meant to hold them in place, and other degradation requiring replacement of the bolts) on approximately 227 of 832 bolts. No bolts were missing entirely. This number included 14 bolts that were inaccessible and could not be inspected and, therefore, were conservatively assumed to be degraded. On March 29, 2016, Entergy reported the preliminary results to the NRC.¹

8. Entergy replaced the 227 defective bolts, as well as 49 additional bolts that did not have apparent problems but were replaced in an abundance of caution to avoid the possibility of a clustering of failures in the future. Entergy

¹ See Event Notification, Event Number 51829, “Baffle Bolt Indications Identified During Inservice Inspection” (Mar. 29, 2016), <http://www.nrc.gov/reading-rm/doc-collections/event-status/event/2016/20160330en.html#en51829>.

also replaced an additional 2 bolts that were found to be defective during the process of replacing the other bolts. *See* Entergy Nuclear Operations Inc., Licensee Event Report #2016-004-00, “Unanalyzed Condition due to Degraded Reactor Baffle-Former Bolts,” Indian Point Unit No. 2, Docket No. 50-247, DPR-46, at 5 (May 31, 2016).

9. Throughout April, May, and June 2016, the NRC Staff actively oversaw Entergy’s response to this issue. Entergy employees had regular contact with NRC Region I Staff and the NRC resident inspectors at Indian Point, and conducted regular status calls with NRC regional and headquarters subject matter experts regarding the status of bolt inspection, repair, and analysis activities. The Staff further oversaw and reviewed Entergy’s actions related to assessment of the root cause of the bolt degradation at Unit 2. The NRC dispatched a three-person inspection team to conduct an on-site inspection at Indian Point beginning on May 23, 2016. The Staff closely monitored closely Entergy’s baffle-former bolt repair efforts at Unit 2. And NRC Resident Inspectors are onsite at Unit 2 to assess any possible changing conditions.

10. In May 24, 2016—nearly two months after Entergy announced it had determined the bolts needed replacement and began to accomplish that task—FOE filed a petition with the NRC charging that the NRC had failed to exercise its regulatory responsibility. FOE alleged that “[n]o analysis ha[d] been conducted by

the NRC regarding the cause of the bolt degradation, how or why some bolts went missing, and how long Unit 2 has been operating with over one-quarter of its baffle-former bolts degraded or missing entirely.” FOE’s Petition to this Court, Attachment A (page 41 of 128). FOE asked the NRC to “prohibit the restart of Unit 2 until the Commission is satisfied that the unit can be safely restarted.” *Id.* at 40.

11. On June 3, 2016, Rich Guzman, Senior Project Manager, Division of Operating Reactor Licensing, in NRC’s Office of Nuclear Reactor Regulation, notified FOE and Entergy of his assignment as the “Petition Manager” for the petition that FOE had submitted. In that notification, Mr. Guzman informed FOE and Entergy that FOE’s petition to NRC would be treated as a “10 CFR 2.206 petition.” FOE’s Petition to this Court, Attachment B (page 64-65 of 128). The notification further informed FOE and Entergy that the Section 2.206 petition process “permits anyone to petition NRC to take enforcement-type action related to NRC licensees or licensed activities,” and that “[d]epending on the results of its evaluation, NRC could modify, suspend or revoke an NRC-issued license or take any other appropriate enforcement action to resolve a problem.” *Id.* at page 64 of 128.

12. The notification also specifically informed FOE that its request to prevent restart of Indian Point Unit 2 had been denied:

You specifically requested in your letter for the NRC to immediately issue an order preventing restart of Indian Point, Unit 2 until the Commission concludes, based on its own investigation, that the unit can be safely operated, and order the immediate shutdown and inspection of Indian Point, Unit 3 until the petition is adjudicated. On June 3, 2016, your request for immediate action was reviewed by members of the Petition Review Board (PRB), which includes staff from the NRC's Office of Nuclear Reactor Regulation (NRR) and Region I. After thorough review and discussion, the PRB determined that there were no immediate safety significant concerns which would adversely impact the public's health and safety; therefore, the PRB denied your request for immediate action.

Id.

13. Also on June 3, 2016, NRC Chairman Stephen G. Burns sent a letter to The Honorable Kirsten Gillibrand, U.S. Senator from New York, explaining, among other things, that:

Based on our independent assessment of this issue, the NRC does not have an immediate safety concern at this time that would warrant regulatory action to prevent the restart of Indian Point Unit 2. The licensee has provided its root cause analysis to the NRC for its review. In light of the licensee's corrective actions described below and our understanding of the degradation phenomenon and its potential consequences, completion of our review of root-cause analysis is not a pre-condition to restart of Indian Point Unit 2. Baffle assemblies are constructed with a significant amount of structural margin and integrity of the baffle plates can be maintained even with the failure of a substantial number of bolts. Damage to fuel created by loose baffle-former bolt parts would be detected by routine monitoring of reactor coolant radioactivity.

<http://www.nrc.gov/docs/ML1614/ML16146A233.pdf>.

14. FOE thereafter filed its Petition in this Court on June 16, 2016.

Grounds for Intervention

15. Rule 15(d) states that a motion to intervene “must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). To satisfy this rule, a prospective intervenor must “simply ... file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991).

16. Since Rule 15(d) does not provide any standards for intervention, “appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24.” *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004). Under that rule, this Court has held that “qualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant ‘claims an interest relating to the property or transaction which is the subject of the action’; (3) whether ‘the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest’; and (4) whether ‘the applicant’s interest is adequately represented by existing parties.’” *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ.

P. 24(a)(2)); *see also* *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003). Entergy satisfies these requirements, as explained below.

The Motion Is Timely

17. This motion is timely because it has been filed within “30 days after the petition for review [was] filed.” Fed. R. App. P. 15(d); *see also* *Alabama Power Co. v. I.C.C.*, 852 F.2d 1361, 1367 (D.C. Cir. 1988).

Entergy Has A Significant Interest In The Property That Is The Subject Of The Petition

18. Entergy is the owner and operator of Indian Point 2. As its ownership and operation activities are comprehensively regulated by the NRC, Entergy has a significant interest in complying with those regulations and safely operating the plant. Consistent with its safety obligations, Entergy also has an economic interest in operating the plant and earning revenues from the sale of the electricity generated by the plant.

Disposition Of The Petition May As A Practical Matter Impair Or Impede Entergy’s Ability To Protect Its Interest

19. FOE’s Petition specifically requests that this Court order NRC to prevent Indian Point 2 from operating (either by preventing it from restarting, or by shutting it down if it has already restarted). Such an order would have direct operational consequences for Entergy. It would also have direct economic consequences in depriving Entergy of revenues from the operation of the plant.

Entergy therefore has a direct, immediate, and substantial interest in this case that would be harmed if FOE's Petition were granted. Absent Entergy's involvement as an intervenor in this case, Entergy would not be able to protect these interests.

The Federal Agency Respondent May Be Unable To Represent The Entergy's Unique Interests Adequately

20. A prospective intervenor's burden of showing inadequate representation "is not onerous," as it "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

21. The NRC and Entergy share the goal of operating Indian Point 2 safely. NRC comprehensively regulates Entergy generally, and has done so specifically regarding the defective bolts and their replacement. Thus, NRC's and Entergy's interests and positions are aligned when it comes to safety.

22. Operation (or, conversely, prohibiting the operation) of a nuclear power plant has additional consequences, including impact on the electricity grid, especially during the summer months when demand is high. As noted, *supra*, at 2, the output of Indian Point 2 and 3 is approximately 25% of the electricity used in New York City and Westchester County. Entergy may be better situated than the NRC to explain the impact of FOE's Petition on grid reliability, among other non-safety issues.

23. Entergy will endeavor to coordinate with the NRC to avoid duplicative briefing and to ensure that Entergy's participation as intervenor is of assistance to the Court. Entergy is aware that this Court has set a deadline of Tuesday, June 21, at noon for NRC's brief in opposition to FOE's Petition, and Entergy is prepared to file its own brief by that deadline so that this Court's disposition of the Petition is not delayed by Entergy's intervention.

WHEREFORE, Entergy respectfully requests that the Court grant Entergy leave to intervene as a party-respondent.

Dated: June 16, 2016

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By: /s/ Sanford I. Weisburst

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ADDENDUM--CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appeal Procedure 26.1 and D.C. Circuit Rule 26.1, counsel for Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. certifies as follows:

Plaintiff Entergy Nuclear Indian Point 2, LLC, is a wholly owned subsidiary of Entergy Nuclear Holding Company #3, LLC, which is a wholly owned subsidiary of Entergy Nuclear Holding Company, LLC. Entergy Nuclear Holding Company, LLC, is a wholly owned subsidiary of Entergy Corporation. The general nature and purpose of Entergy Nuclear Indian Point 2, LLC is to own the nuclear power plant known as Indian Point 2 or Indian Point Unit 2, located in Buchanan, New York.

Plaintiff Entergy Nuclear Operations, Inc. is a wholly owned subsidiary of Entergy Nuclear Holding Company #2, which is a wholly owned subsidiary of Entergy Corporation. The general nature and purpose of Entergy Nuclear Operations, Inc. is to operate nuclear power plants, including Indian Point 2.

Entergy Corporation is a publicly traded company. It has no parent corporation, and no publicly traded company owns more than 10% of its stock.

CERTIFICATE OF SERVICE

I, Sanford I. Weisburst, a member of the Bar of this Court, hereby certify that on June 16, 2016, I electronically filed the foregoing “Motion Of Entergy Nuclear Indian Point 2, LLC, And Entergy Nuclear Operations, Inc. For Leave To Intervene” with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ Sanford I. Weisburst
Sanford I. Weisburst

Dated: June 16, 2016