

January 6, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| 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 RESPONSE TO THE ATOMIC SAFETY AND
LICENSING BOARD'S ORDER OF DECEMBER 8, 2016

INTRODUCTION

On December 8, 2016, the Atomic Safety and Licensing Board ("Board") directed Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") to provide information by December 21, 2016, regarding (a) whether the Commission could issue renewed licenses for Indian Point Units 2 and 3 ("IP2" and "IP3") without a favorable ruling on Entergy's Coastal Zone Management Act ("CZMA")¹ consistency certification by the U.S. Secretary of Commerce and other CZMA-related questions, and (b) the status of other permits, approvals or licenses that could potentially affect license renewal for IP2/IP3.² Further, the Board directed the NRC Staff ("Staff") and Intervenors to provide any objections or additions to Entergy's report by January 6

¹ Coastal Zone Management Act, 16 U.S.C.S. §§ 1451 *et seq.*

² *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Requesting Updated Information on Pending Litigation and Other Matters)" (Dec. 8, 2016), at 2-3 ("Order").

and January 19, 2017, respectively.³ Entergy filed its required response on December 21, 2016.⁴

The Staff hereby provides its response to the Board's Order. In brief, the Staff has no basis upon which to confirm, object to, or supplement the information provided by Entergy in its December 21, 2016 Response to the Board's Order; nonetheless, the Staff submits that none of those matters have any effect on the issues presently pending before the Board.

DISCUSSION

The Board's Order seeks information concerning various matters that are currently the subject of litigation between Entergy and the State of New York ("New York") or other parties in various tribunals outside the jurisdiction of the NRC, and the potential for those matters to affect IP2/IP3 license renewal. As summarized by the Board, these include:

- (a) Entergy's certification of consistency with the New York Coastal Management Program, required under the Coastal Zone Management Act ("CZMA"), and various related legal proceedings;⁵ and
- (b) "[a]ny and all other permits, approvals, or licenses (e.g., water permits) that could potentially affect relicensing, lead to additional contentions, or delay resolution of this proceeding."⁶

Entergy provided detailed information concerning these matters in its December 21 response to the Board's Order, including information concerning possible challenges it may raise to New York's objection to its CZMA consistency certification,⁷ and its ongoing efforts to obtain a Clean Water Act water quality certification and other water-related approvals.⁸

³ *Id.* at 3.

⁴ "Entergy Nuclear Operations, Inc.'s Response to the Licensing Board's Order Requesting Updated Information on Pending Litigation and Other Matters" (Dec. 21, 2016) ("Entergy's Response").

⁵ Order at 1-3.

⁶ *Id.* at 3.

⁷ See Entergy's Response at 2-9.

⁸ See *id.* at 9-11.

The NRC Staff is not a party to any of the litigation cited in Entergy's Response, and it has no independent knowledge or basis upon which to confirm, object to, or supplement the statements contained in that Response. The Staff is, however, generally aware of that litigation and of the pertinent federal statutes,⁹ and would take the latest available information concerning those matters into account, as appropriate, in making a recommendation to the Commission as to whether the licenses for IP2 and IP3 should be renewed. At this time, however, inasmuch as litigation of those matters is ongoing and further (possibly significant) developments may occur, it would be premature for the Staff to state a position on whether those matters will affect its recommendation or the Commission's license renewal decision. Further, any opinion regarding the effect of those matters would necessarily rest upon hypothetical assumptions as to what may or may not transpire in the future, and the formulation of such an opinion is presently "unnecessary" and would constitute a "mere academic exercise" at this time.¹⁰ Moreover, inasmuch as the Commission, not the Staff, will ultimately be called upon to decide whether to renew the licenses for IP2 and IP3, the Staff is unable to state what the Commission will consider in deciding whether to renew those licenses, or whether the matters addressed in Entergy's Response will affect the Commission's decision.

⁹ The Staff notes that the CZMA provides, in part, that "[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds . . . that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). In turn, the Clean Water Act provides, in part, that "No license or permit shall be granted until the certification required by this section has been obtained or has been waived No license or permit shall be granted if certification has been denied by the State . . . or the Administrator, as the case may be." 33 U.S.C. § 1341(a)(1). The Staff offers no opinion as to whether these or any other statutory provisions, or any possible limitations or exceptions thereto, may affect IP2/IP3 license renewal.

¹⁰ *U.S. Department of Energy* (High Level Waste Repository), CLI-08-21, 68 NRC 351, 353 (2008). *See also Exelon Generation Co., LLC* (Dresden Nuclear Power Station), CLI-16-06, 83 NRC 147, 157 (2016) ("We disfavor the issuance of advisory opinions and prefer instead to address issues in the context of a concrete dispute"), *citing Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-13-10, 78 NRC 563, 568-69 (2013) *and Department of Energy, supra*, 68 NRC at 353.

Finally, the Staff notes that the matters referred to by the Board pertain to environmental matters, which are not the subject of any contentions pending before the Board.¹¹ As such, the matters referred to by the Board have no impact upon the resolution of any pending contention in this proceeding.¹² While the Board also requested the parties' views on "how [the other proceedings] may result in potential new contentions,"¹³ the Staff has no basis to state whether other parties will elect to file new contentions based upon developments in other proceedings concerning other permits and approvals. If such late-filed contentions are filed, however, they must comply with the Commission's regulations governing contention admissibility, including timeliness, to be admitted.¹⁴

¹¹ As the Board is aware, the sole remaining contentions in this proceeding are three safety contentions (Contentions NYS-25, NYS-26B/RK-TC-1B, and NYS 38/RK TC 5), which were addressed in evidentiary hearings in November 2015 and are now awaiting the filing of further testimony and proposed findings of fact and conclusions of law.

¹² *See Id.*

¹³ *Id.*

¹⁴ *See* 10 C.F.R. §§ 2.309(c) and (f)(1). Pursuant to 10 C.F.R. § 2.309(c)(1), contentions filed after the initial deadline for filing contentions "will not be entertained absent a determination by the presiding officer" that the proponent has demonstrated "good cause" by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

This Board has ruled that contentions are generally to be filed within 30 days after the event that gave rise to the filing thereof. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Scheduling Order" (July 1, 2010), at 6 ("A motion and proposed new contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. . . ."). *See also Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Establishing Deadline for New and Amended Contentions)," at 2 (July 9, 2013) (new contentions are to be filed within 60 days after publication of Staff's first FSEIS Supplement).

CONCLUSION

For the foregoing reasons, the Staff has no basis upon which to confirm, object to, or supplement the information provided by Entergy in its December 21, 2016 Response to the Board's Order. The Staff submits, however, that the matters referred to by the Board do not affect any of the contested issues in this proceeding.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Rockville, Maryland
this 6th day of January 2017

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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 RESPONSE TO THE ATOMIC SAFETY AND LICENSING BOARD’S ORDER OF DECEMBER 8, 2016,” dated January 6, 2017, have been served via the NRC’s Electronic Information Exchange (the NRC’s E-Filing system), in the above captioned proceeding, this 6th day of January 2017.

/Signed (electronically) by/

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