

DOCKETED
USNRC

December 20, 2000

00 DEC 28 P12:31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBefore the Presiding OfficerOFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
POWER AUTHORITY OF THE)	
STATE OF NEW YORK and ENTERGY)	
NUCLEAR FITZPATRICK, LLC,)	Docket Nos. 50-333-LT
ENTERGY NUCLEAR INDIAN)	and 50-286-LT
POINT 3, LLC, and ENTERGY)	(consolidated)
NUCLEAR OPERATIONS, INC.)	
)	
(James A. FitzPatrick Nuclear Power)	
Plant and Indian Point Nuclear)	
Generating Unit No. 3))	

**NYPA/ENTERGY COMPANIES' REPLY TO "CITIZENS
AWARENESS NETWORK, INC. RESPONSE" . . . TO
SUBSEQUENT REQUEST BY APPLICANTS TO DISMISS
ISSUES #1 ACCEPTED BY COMMISSION ORDER CLI-00-22"**

On December 15, 2000, the Town of Cortlandt, New York, and the Hendrick Hudson School District (collectively "Cortlandt") filed with the Presiding Officer a Notice of Withdrawal announcing that Cortlandt voluntarily and with prejudice withdrew from this proceeding. By the Notice, Cortlandt also withdrew its Request for Hearing and Petition for Leave to Intervene and withdrew the issues that it raised in this proceeding, including Issue #1 admitted by the Commission's November 27, 2000, Memorandum and Order, CLI-00-22.

Relying on settled NRC case law, the Power Authority of the State of New York, Entergy FitzPatrick, LLC, Entergy Indian Point 3, LLC, and Entergy Operations, Inc. (collectively "NYPA/Entergy Companies") in a pleading filed on December 18, 2000, requested that the

Presiding Officer dismiss Issue #1. Subsequently the same day, Citizens Awareness Network, Inc. ("CAN") responded in opposition to the NYPA/Entergy Companies' filing.

The primary argument asserted in the CAN filing is that the Commission's Memorandum and Order "clearly directed all parties to make presentation on both the issues admitted". CAN interprets CLI-00-22 to mean that an admitted issue must remain to be litigated even though the intervenor that raised the issue withdraws from the proceeding. There is simply nothing in the language of the Commission's Memorandum and Order quoted by CAN – or elsewhere in that decision – that suggests such a result.

The language of CLI-00-22 relied upon by CAN merely instructs the parties to "organize their presentations around the following two issues" and requires that "[t]he parties' filings and arguments must be confined to the contours of these two issues." Whether or not these quotations contemplate Cortlandt (had it remained a party) filing testimony on CAN's issue or CAN filing testimony on Cortlandt's issue, it simply cannot be stretched to the conclusion that Cortlandt's Issue #1 remains alive once Cortlandt withdraws from the proceeding. Nowhere in CAN's quoted language or elsewhere in CLI-00-22 does the Commission deal with the impact of an intervenor's withdrawal on the admitted issues. Nor would such a discussion have been expected, especially in view of the well-established NRC caselaw on the subject. Had the Commission intended to change its established caselaw on the disposition of a withdrawing party's issue (as discussed in NYPA/Entergy Companies' December 15 pleading), one would certainly have expected the Commission to announce such a change.

There is nothing in CAN's July 31, 2000 Request for Hearing and Petition to Intervene that could be read as a basis for CAN's adopting Cortlandt's Issue #1. There is no mention of

Entergy Indian Point 3 liability for financial obligations of Entergy FitzPatrick financially jeopardizing Indian Point 3 in the event of an accident there or at FitzPatrick. Nor does CAN make mention of the joint and several liability which Cortlandt had alleged was imposed by the Facilities Payment Note and the Fuel Payment Note, which in the Commission's words is the "precise contour" of Issue #1. See CLI-00-22, at 18-20, 50. Finally, CAN has made no attempt to justify its adoption of Issue #1 as a late-filed contention.

The South Texas Appeal Board's rationale for dismissing the contentions of a withdrawing intervenor -- despite the desire of other, non-sponsoring intervenors to litigate them -- provides a compelling reason for the Presiding Officer to dismiss Issue #1. As the Appeal Board stated:

This approach is neither unfair to remaining intervenors nor inconsistent with the public interest. Intervenors, after all, choose the issues they wish to advance. To be sure, . . . an intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. But that does not elevate the intervenor's status to that of a co-sponsor of the contentions. Because contentions can be withdrawn or (as in the instant case) settled through negotiation, a non-sponsoring party assumes at least some risk that the pursuit of it interests may not be wholly within its control. Indeed, an approach that accorded a remaining intervenor more or less an equal right to pursue contentions earlier put forth by another party would frustrate the Commission's policy of encouraging legitimate efforts by applicants and intervenors to reach good faith, mutually satisfactory resolution of issues without the need for litigation.

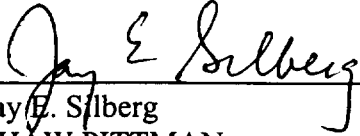
Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 (1985) (emphasis added; footnotes omitted).

Here, the other intervenors chose the issues they wished to advance when they filed their petitions to intervene. Thus they should be left to litigate only those issues now. Moreover, allowing CAN to litigate Cortlandt's issues would directly frustrate the Commission's policy of

encouraging settlement. Therefore, the issues sponsored by Cortlandt, including Issue #1, must be dismissed.

December 20, 2000

Respectfully submitted,



Jay E. Silberg
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128
phone: (202) 663-8000
fax: (202) 663-8007
e-mail: jay.silberg@shawpittman.com

Counsel for the Power Authority of the State of
New York, Entergy Nuclear FitzPatrick, LLC,
Entergy Nuclear Indian Point, LLC and
Entergy Nuclear Operations, Inc.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Presiding Officer

In the Matter of)	
)	
POWER AUTHORITY OF THE)	
STATE OF NEW YORK and ENTERGY)	
NUCLEAR FITZPATRICK, LLC,)	Docket Nos. 50-333-LT
ENTERGY NUCLEAR INDIAN)	and 50-286-LT
POINT 3, LLC, and ENTERGY)	(consolidated)
NUCLEAR OPERATIONS, INC.)	
)	
(James A. FitzPatrick Nuclear Power)	
Plant and Indian Point Nuclear)	
Generating Unit No. 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NYPA/Entergy Companies' Reply To "Citizens Awareness Network, Inc. Response . . . To Subsequent Request By Applicants To Dismiss Issues #1 Accepted By Commission Order CLI-00-22" were served on the persons listed below by electronic mail, with conforming copies by U.S. mail, first class, postage prepaid, this 20th day of December, 2000.

Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
e-mail: cxb2@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemakings & Adjudications Branch
Washington, DC 20555
e-mail: SECY@NRC.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
e-mail: OGCLT@NRC.gov

Steven R. Hom, Esq.
Office of General Counsel, O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555
e-mail: srh@NRC.gov

Timothy L. Judson
Citizens Awareness Network, Inc.
140 Bassett Street
Syracuse, NY 13210
e-mail: cnycan@rootmedia.org

Deborah Katz, Executive Director
Citizens Awareness Network
P.O. Box 83
Shelburne Falls, MA 01370
e-mail: can@shaysnet.com

Paul V. Nolan, Esq.
5515 N. 17th Street
Arlington, VA 22205-2207
e-mail: pvnpvn@aol.com

Nancy T. Bocassi
Assistant Superintendent for Business
Hendrick Hudson School District
61 Trolley Road
Montrose, NY 10548
e-mail: nbocassi@henhud.lhric.org

Alan D. Scheinkman, Esq.
County Attorney
Westchester County
Department of Law, Room 600
148 Martine Avenue
White Plains, NY 10601
e-mail: ads2@westchestergov.com

Stewart M. Glass, Esq.
Senior Assistant County Attorney
County of Westchester
Department of Law, Room 600
148 Martine Avenue
White Plains, NY 10601
e-mail: smg4@westchestergov.com

Joseph R. Egan, Esq.
Egan & Associates, P.C.
1500 K Street, N.W., Suite 200
Washington, DC 20005
e-mail: eganpc@aol.com

John Valentino, Esq.
Green & Seifter
One Lincoln Center, 9th Floor
Syracuse, NY 13202
e-mail: jvalentino@greenseifter.com

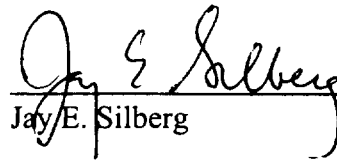
Douglas E. Levanway, Esq.
Wise, Carter, Child and Caraway
401 E. Capital Street, Suite 600
P.O. Box 651
Jackson, MS 39205-0651
e-mail: del@wisecarter.com

Gerald C. Goldstein, Esq.
Arthur T. Cambouris, Esq.
David E. Blabey, Esq.
Power Authority of the State of New York
123 Main Street
White Plains, NY 10601
e-mail: goldstein.g@nypa.gov

Thomas F. Wood, Esq.
Town of Cortlandt
153 Albany Post Road
Buchanan, NY 10511
e-mail: tfwesq@aol.com

George F. Sansoucy, P.E.
260 Ten Rod Road
Rochester, NH 03867
e-mail: sansoucy@nhultranet.com

John M. Fulton, Esq.
Entergy
600 Rocky Hill Road
Plymouth, MA 02360
e-mail: jfulto1@entergy.com


Jay E. Silberg

1055312 v1