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UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
CONSOLIDATED EDISON COMPANY	)	
OF NEW YORK and	)	
ENTERGY NUCLEAR INDIAN POINT 2, LLC,	)	Docket Nos. 50-003-LT
and ENTERGY NUCLEAR OPERATIONS, INC.	)	and 50-247-LT
	)	(consolidated)
(Indian Point Nuclear Generating	)	License Nos. DPR-5
Units Nos. 1 and 2)	)	And DPR-26
	)	

TOWN OF CORTLANDT AND HENDRICK HUDSON SCHOOL DISTRICT'S REPLY TO APPLICANTS' ANSWER TO SUBMISSION OF ISSUES

The Town of Cortlandt, New York and the Hendrick Hudson School District ("Petitioners") requested leave to intervene in the above referenced proceeding by Petition dated February 20, 2001. After the submission of an Answer to the Petition by Consolidated Edison Company of New York, Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. ("Applicants"), and a reply by Petitioners, the Commission directed that Petitioners would be permitted to submit a statement of issues after the execution of a

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confidentiality agreement. Pursuant to this direction, the parties executed a confidentiality agreement on March 23, 2001, and Petitioners submitted an additional statement of issues on April 12, 2001.

In response, the Applicants submitted on April 23, 2001 an answer to this statement of issues. This answer includes additional responses to issues identified in Petitioners' February 20, 2001 petition, which should properly have been addressed in the Applicants' original answer on March 2, 2001. The Applicants have also utilized the opportunity to submit an answer to the statement of issues as to respond to Petitioners's request for a waiver of regulatory requirements pursuant to 10 CFR 2.1329, which was contained in Petitioners' March 7, 2001 answer.

In this Reply, Petitioners respond to the issues raised in the Applicants' April 23 answer. Furthermore, in the supplemental propriety reply, which is submitted in the form of an attachment, Petitioners respond to the issues raised in the "proprietary annexed to Applicants' answer", which was also submitted on April 23, 2001.

ADEQUACY OF DECOMMISSIONING FUNDING AND REQUEST FOR WAIVER OF REGULATORY REQUIREMENTS PURSUANT TO 10 CFR 2.1329

Petitioners, in their initial filing, raised the issue of whether the Applicants had complied with the requirements of section 50.33(k)(1) pertaining to the adequacy of the funding of the decommissioning of Indian Point 1 and 2. Applicants maintain that they have provided adequate funding for the decommissioning of the facilities because they claim to have prepaid the minimum funding level specified in 10 CFR 50.75(c)(1)(i). Nevertheless, Petitioners maintain that, even if the funding level is adequate to comply with this regulatory criteria, the

Applicants have failed to establish that they have sufficient resources to fund the decommissioning of the facility because of the existence of studies, which were identified in the April 12 filing of Petitioners, funded by the current operator, Con Edison demonstrating a shortfall of $67 million at the expiration of the licenses in 2013.

Petitioners have requested a waiver of the regulatory criteria which would otherwise state that compliance with the minimum funding amount is sufficient to demonstrate regulatory compliance. Petitioners maintain that a special circumstance exists, inasmuch as a site-specific study, done by the present operator of the plant, has confirmed that the amount specified as adequate prepayment will not be sufficient.

In response, at the Applicants state that Petitioners' requested waiver is procedurally deficient because of the failure to support it by "affidavits". Under the circumstances of this case, affidavits would be superfluous. Petitioners' argument is based upon the existence of documents, prepared by one of the Applicants, that demonstrate the factual contentions that Petitioners seek to raise. In any event, the regulation does not require affidavits per se, but only requires affidavits "to the extent applicable" (2.1329(c)). Since no affidavits would be applicable in this case, there is no need to file them.

The cases cited by the Applicants with respect to the showing of "special circumstances" are inapplicable. For example, Applicants cite North Atlantic Energy Service Corp.(Seabrook), CLI-99-06(footnote 8) for the proposition that "no one would be free to argue in a license transfer case that site-specific conditions at a particular nuclear power reactor render unusable generic project projected costs calculated under our rules cost formula." In Seabrook, the Commission held that a promise to pay more than the minimum amount currently prescribed left a co-owner without any "plausible decommissioning funding grievance."

However, the issue in this case is whether it is adequate for a proposed licensee to fund

decommissioning by providing the bare minimum set forth in the regulation, in spite of the fact that a decommissioning study shown that this amount will be inadequate. Petitioners maintain the existence of the decommissioning study is a "special circumstance" within the meaning of 2.1329, warranting the waiver of the regulatory criteria. This issue has never been considered by the Commission and it should be noted that the Footnote No. 8 in Seabrook, upon which the Applicants rely, specifically contemplates that, in an appropriate situation, the appropriateness of the prepayment requirements can be the subject of a waiver petition. Petitioners respectfully maintain that the instant case is precisely the type of situation where a waiver request should be granted.

It appears to be the position of the Applicants that it is appropriate to delay the requirements with respect to funding until close to the decommissioning and then to "fine-tune" requirements. Petitioners respectively maintain that the Commission should, instead, take adequate precautions to ensure that money is available for decommissioning as soon as it is conclusively is determined, as it has been in this case,
that such resources will be needed.

Furthermore, it should be noted that Applicants have assured the local host communities that decommissioning will be done so as to achieve Greenfield Status, which is more stringent, so the host communities have been informed, than achieving a particular level of ambient radiation level. As this stringent requirement has direct impacts upon the level of decommissioning funds, the funding level must be sufficient to meet that standard that the Petitioners have agreed to regardless of the more lax standard and "safe refuge" offered by the Commission's minimum requirements.

THE INADEQUACY OF THE 85 PERCENT CAPACITY FACTOR

Petitioners challenge the estimated 85 percent average annual capacity factor assumed by the Applicants as unrealistic. In response, the Applicants argue that: 1) Petitioners' critique is not supported by any factual evidence, and 2) Petitioners have failed to credit Entergy's allegedly superior history of nuclear operations, which Applicants claim will ensure that they will be able to meet this 85 percent standard. It is respectfully submitted that the mere statements of Applicants and the data submitted in response to Staff's information request are too cursory and speculative to shift upon the Petitioners any burden of proof or persuasion. Indeed, the information is similar to that being "litigated" in the IP3/FitzPatrick dispute.

Petitioners respectfully maintain that Applicants have it backwards. If Entergy wishes to argue that it will be able to achieve a standard of operations which have never been achieved before at the Indian Point facility, then it is Entergy's burden to establish, as part of its application, how it intends to meet this standard. It should be noted that no evidence is submitted in the application as to how Entergy has been able to achieve its allegedly high plant performance standards at other facilities that it owns, or any basis for Entergy's conclusion that it will be able to do better than Con Edison has done at the same facility.

Entergy assumes that "there is no reason why IP2 should not operate as well as Indian Point 3 (IP3) once Entergy practices are established at the site." (Response to request for additional information, dated April 16, 2001, redacted version, Attachment 3). If Entergy wishes to have the issue of its alleged high-performance litigated, then it must introduce evidence of such performance. Until such evidence is actually put forward, and utilized as the basis for Entergy's alleged ability to achieve an 85 percent performance standard, it would be grossly unfair to require Cortlandt to introduce factual evidence demonstrating that Entergy is not

capable of achieving this standard, and that Entergy is not capable of remedying the long-standing problems that have plagued Indian Point 2.

Furthermore, there will be years when Entergy's capacity factors are lower than 85 percent, and, during those years, its revenue will be less than the projections. In those years, with the decreased revenues, it will have to rely on other sources to fund its operations. Entergy has failed to establish how it will be able to do so, and its vague reference to retained earnings and lines of credit are inadequate.

THE RELEVANCE OF THE PURCHASE POWER AGREEMENT

It may be true, as the Applicants claim, that the Commission does not have the authority to order the Applicants to revise the Purchase Power Agreement. However, the Commission obviously has the authority to ensure that Entergy has adequate financial resources to operate the facility. Inasmuch as the Purchase Power Agreement limits the revenues that Entergy will be receiving, and, inasmuch as the revenues are inadequate to fund operating expenses, the Commission has the authority to take appropriate corrective or preventative action to ensure that the Applicants, if they are to proceed with their proposed license transfer, take appropriate measures to ensure that the proposed transferee has adequate financial resources.

The Purchase Power Agreement represents the upward limit of Entergy's revenues. The Commission should not approve a transfer if it finds, as Petitioners respectfully urge, that those revenues are inadequate to cover operating costs.

STORAGE OF SPENT NUCLEAR FUEL

The Applicants argue that the issue of storage of spent nuclear fuel is outside the scope of this proceeding. The Applicants falsely accuse Petitioners of attempting to "allow this license transfer proceeding to become another forum for ventilating objections to the Skull Valley project" (for storing spent nuclear fuel at an Indian Reservation in Utah).

Regardless of who owns the Indian Point facility, measures will have to be taken to handle spent nuclear fuel when the present on-site capacity of Indian Point is exhausted in 2004. Although this issue was not discussed anywhere in the Applicants' filing, Petitioners are aware of it as a result of documents obtained in proceedings before the New York State Public Service Commission, and, in particular, are aware of a decommissioning study, performed at the behest of Con Edison, that addressed this issue. This study, as discussed at length in Petitioners' April 12 filing, identifies various options, including on-site storage and off-site storage at the Skull Valley Indian Reservation, as methods that may be utilized to handle spent nuclear fuel. The costs are estimated in the hundreds of millions of dollars, with the cheaper options involving the use of the Indian Reservation for off-site storage.

If Entergy wishes to rely upon estimates that it will be able to utilize the option of off-site storage, then it must demonstrate that such an option is, in fact, viable. Petitioners' reference to the problems of utilization of the Skull Valley Indian Reservation were set forth to demonstrate that it is by no means a done deal that such an option will be available, and that the ultimate approval of the Indian Reservation is by no means certain. Therefore, it appears likely that Entergy will be required to fund on-site storage, and must demonstrate the financial resources to do so.

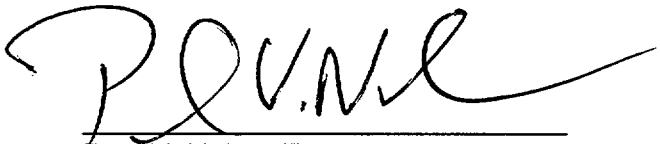
It is true, of course, that the funding of a storage facility for on-site nuclear fuel will occur

regardless of whether the transfer is consummated. However, if a transfer is not consummated, then Con Edison, a regulated utility, which has other assets, will be responsible for this cost. In contrast, if the transfer is permitted to proceed, the solution to the problem will be in the hands of a shell corporation, with questionable resources.

CONCLUSION

For the reasons set forth in the original Petition, dated February 20, 2001, the Reply, dated March 7, 2001, the additional Submission of Issues dated April 12, 2001, as well as in the instant Reply, the Town of Cortlandt and the Hendrick Hudson School District should be permitted to intervene in this proceeding, and the issues described in these filings should be admitted for a hearing.

Respectfully submitted this 30th day of April 2001.



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CERTIFICATE OF SERVICE

I, Paul V. Nolan, Esq., Counsel to the Town of Cortlandt, New York and the Hendrick Hudson School District, hereby certifies that on the 30th day of April 2001, service of the foregoing filing; was made by first class mail and e-mail (before 4:30 PM) to the Secretary the parties noted in January 29, 2001 public notice and the March 6, 2001 Order. See attached service list. Courtesy copies have also been provided as noted on the Service List.

Dated this 30th day of April 2001.

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