

August 17, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 ANSWER TO "THE STATE OF NEW YORK AND
THE STATE OF CONNECTICUT'S COMBINED MOTION FOR
LEAVE TO FILE A BRIEF REPLY TO NRC STAFF'S ANSWER
TO APPLICANT'S PETITION FOR REVIEW OF LBP-11-17"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith files its answer to the State of New York and State of Connecticut's (hereinafter referred to collectively as "New York") motion for leave to file a reply to the "NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36,"¹ filed on August 11, 2011.

DISCUSSION

In its Motion, New York provided a certification of Counsel, as required under 10 C.F.R. § 2.323(b), in which it stated that "Entergy and NRC Staff oppose this request on the ground that the reply sought is not authorized by the NRC's Rules of Practice in 10 C.F.R. Part 2." That certification does not accurately reflect the position expressed by Staff Counsel during

¹ "The State of New York and the State of Connecticut's Combined Motion For Leave To File A Brief Reply to NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17" (Aug. 16, 2011) ("Motion"). New York attached its Reply to its Motion. See "The State of New York and the State of Connecticut's Combined Reply to NRC Staff's Answer in Support of Entergy's Petition for Interlocutory Review of LBP-11-17" (Aug. 16, 2011) ("Reply").

consultations on New York's Motion. In fact, the Staff had expressed the following position -- which the Staff reiterates here for the Commission's consideration:

The Staff opposes the State's request, on the grounds that the reply is not authorized by the rules (which also bar the Staff from filing a reply to the State's Answer), and the Staff's Answer does not differ substantially from the position expressed in its cross-motion for summary disposition or its petition for review of the Board's previous decision.

Please include the above statement in your motion, in describing the Staff's position.

See Attachment 1; emphasis added. Although Counsel for New York (Janice A. Dean) committed to include this statement in New York's Motion (see Attachment 1), the Motion presents only a portion of the Staff's position. The Staff therefore presents its complete position on New York's Motion.

In this regard, the Staff submits that its Answer to the Applicant's Petition² presents substantially the same arguments that the Staff had made in its prior filings concerning Contention NYS-35/36, before both the Atomic Safety and Licensing Board ("Board")³ and the Commission.⁴ New York's assertions to the contrary are incorrect.⁵ Thus, the Staff's Answer presented its views that (a) New York's motion for summary disposition should have been

² "Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36" (July 29, 2011) ("Petition").

³ See (1) "NRC Staff's (1) Cross-Motion for Summary Disposition, and (2) Response to New York State's Motion for Summary Disposition, of Contention NYS-35/36 (Severe Accident Mitigation Alternatives)" (Feb. 7, 2011) ("Staff Cross-Motion"); (2) "NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis" (Apr. 5, 2010), at 13-35.

⁴ See "NRC Staff's Petition For Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13)" (July 15, 2010) ("Staff Petition").

⁵ The Staff's Answer does address, for the first time, the Board's recent decision in LBP-11-17, and the impact that decision may have on this proceeding. See Answer at 8-12; *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-11-17, 74 NRC ____ (July 14, 2011). The Board's decision in LBP-11-17, however, could not have been addressed prior to the issuance of that decision.

denied and the Staff's and Applicant's cross-motions for summary disposition should have been granted,⁶ (b) there is no regulatory basis to require engineering project cost-benefit analyses as a condition for license renewal,⁷ (c) the Board's decision is inconsistent with NEPA, Commission precedent, and NRC regulations,⁸ and (d) the FSEIS provides an adequate evaluation and "rational basis" for the Staff's license renewal recommendation, as required by NEPA and the APA.⁹ There is nothing substantially new in the Staff's presentation of these arguments.

Further, there is no factual basis for New York's assertion that the Staff's Answer (a) "announces" or "indicates" for "the first time" how it will respond to the Board's decision in LBP-11-17, *Id.* at 1, (b) that the Staff's answer demonstrates its "intention to not comply" with that decision, *Id.* at 2, or (c) that the Staff's Answer "argues . . . that Staff does have the legal authority to require implementation of any cost-effective SAMAs as a condition of a renewed license. Staff Answer at 14 n.45." *Id.* at 2-3. In fact, the Staff's Answer indicated (a) that the Staff had already complied with the Board's requirements, first announced by the Board in LBP-10-30,¹⁰ by providing an augmented explanation of its SAMA conclusions in the Final SEIS¹¹ – which the Board failed to address in LBP-11-17;¹² (b) that the Staff would review any further cost information that might be submitted by Entergy in an amendment to its application, or as otherwise directed by the Commission;¹³ and (c) that the issue of the Commission's legal

⁶ See, e.g., Staff Answer at 13-15.

⁷ Staff Answer at 15-19.

⁸ Staff Answer at 19-21.

⁹ Staff Answer at 21-25.

¹⁰ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, CLI-10-30, 72 NRC __, __ (Nov. 30, 2010) (slip op. at 2 and 6-7).

¹¹ "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report," NUREG-1437, Supplement 38 (Dec. 2010) ("Final SEIS" or "FSEIS").

¹² Staff Answer at 21-22.

¹³ Staff Answer at 12 n.41.

authority to impose SAMA-related conditions for license renewal need not be addressed to resolve the pending appeal – and, indeed, the Staff expressed no position on that issue.¹⁴

Finally, although the Commission could grant New York's Motion as a matter of discretion, the Staff notes that the Motion rests upon certain incorrect legal assertions, insofar as New York suggests (a) that a party's answer to a petition for review must not "go[] beyond the four corners of [the] Petition," Motion, at 1; and (b) that if a party elects to file an answer to a petition for review, rather than file its own petition, it "essentially abandon[s] any arguments it had made in its prior pleadings . . . that were not also included in the [petitioner's] prior pleadings on this issue", *Id.* at 2. There is no legal basis for New York's belief that a party's answer to a petition for review is restricted to the matters stated in the petition. Rather, 10 C.F.R. § 2.341(b)(3) states that any party other than the petitioner for review "may . . . file an answer supporting or opposing Commission review." No limitation is placed upon the matters that may be raised in such an answer in § 2.341(b)(3).¹⁵ Indeed, if answers to petitions for review were restricted to the "four corners" of the claims made by a petitioner, the parties' answers would effectively be allowed to state only that they "agree" or "disagree" with statements and supporting rationale presented in the petition. That result is inconsistent with the principle set forth in 10 C.F.R. § 2.341(b)(3), that parties are permitted to file an answer in support of, or in opposition to, a petition for review. New York's attempt to limit the permitted scope of such an answer would render that principle meaningless. Moreover, under New York's suggested approach, parties would be barred from presenting important and relevant factors for Commission consideration, beyond those stated in the petition – and the Commission would be prevented from being able to consider such matters in ruling on a petition for review. That suggested approach should be rejected.

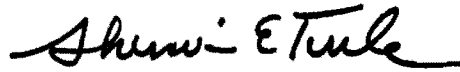
¹⁴ See Staff Answer at 14 n.45.

¹⁵ New York does not cite any Commission case law that restricts the scope of an answer in the manner New York suggests, and the Staff is aware of no such decision.

CONCLUSION

New York's request for leave to reply to the Staff's Answer is not authorized by 10 C.F.R. § 2.341(b)(3), and lacks factual basis. Whether the Commission decides to grant New York's Motion and to consider its Reply to the Staff's Answer is a matter that rests within the Commission's discretion; the Staff respectfully submits, however, that New York's Motion does not provide a sound basis for its request, for the reasons discussed above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of August 2011

Turk, Sherwin

From: Janice Dean [Janice.Dean@ag.ny.gov]
Sent: Tuesday, August 16, 2011 10:42 AM
To: Turk, Sherwin
Cc: Martin J. O'Neill; Paul Bessette; Robert Snook
Subject: RE: Indian Point - consultation regarding motion for leave to filereply to Staff's Answer

Will do. Thank you.

Janice

>>> "Turk, Sherwin" <Sherwin.Turk@nrc.gov> 8/16/2011 10:04 AM >>>
Janice -

The Staff opposes the State's request, on the grounds that the reply is not authorized by the rules (which also bar the Staff from filing a reply to the State's Answer), and the Staff's Answer does not differ substantially from the position expressed in its cross-motion for summary disposition or its petition for review of the Board's previous decision.

Please include the above statement in your motion, in describing the Staff's position.
Thank you.
Sherwin

-----Original Message-----

From: Janice Dean [<mailto:Janice.Dean@ag.ny.gov>]
Sent: Monday, August 15, 2011 3:39 PM
To: Paul Bessette; Turk, Sherwin
Cc: Robert Snook
Subject: RE: Indian Point - consultation regarding motion for leave to filereply to Staff's Answer

Primarily, this is the first notice parties have gotten of what Staff's intended response to the Board's order is. Until Staff's Answer, parties did not know how Staff would be complying with the order since the order offered Staff multiple options. It's now clear that Staff has chosen none of those options.

Janice

>>> "Turk, Sherwin" <Sherwin.Turk@nrc.gov> 8/15/2011 3:07 PM >>>
Janice -

What is it that you want to respond to, that you believe is not embraced by "any point Entergy made in its Petition"?
Sherwin

-----Original Message-----

From: Janice Dean [<mailto:Janice.Dean@ag.ny.gov>]
Sent: Monday, August 15, 2011 2:26 PM
To: Paul Bessette; Turk, Sherwin
Cc: Robert Snook
Subject: Indian Point - consultation regarding motion for leave to file reply to Staff's Answer

Paul and Sherwin,

This email seeks consultation under 2.323(b) regarding the State's intention to file a motion for leave to file a 5-page reply to Staff's Answer to Entergy's Petition for Interlocutory Review. The motion and affiliated reply would be filed tomorrow, within the regulatory timeframe for replies, and will address narrow points Staff made which the States of New York and Connecticut do not believe respond directly to Entergy's petition but which we view as newly raised issues. As you are aware, the States would have been entitled to a significantly longer reply should Staff have filed its lengthy Answer as a Petition. Since Staff did not, and to facilitate a decision on this Petition as quickly as possible, at this time the States seek only to submit this limited reply. The reply will not address any point Entergy made in its Petition.

Please advise if you would like to discuss further or if Entergy or Staff support, oppose, or take no position on this motion. Regretfully as I am writing both now, I do not have drafts yet to share.

I am available today but for a 3pm meeting if you would like to discuss.

Thank you,
Janice

Janice A. Dean
Assistant Attorney General
Office of the NYS Attorney General
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8459 voice
(212) 416-6007 fax
janice.dean@ag.ny.gov

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	Docket Nos. 50-247-LR/286-LR
)	
(Indian Point Nuclear Generating)	
Units 2 and 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO "THE STATE OF NEW YORK AND THE STATE OF CONNECTICUT'S COMBINED MOTION FOR LEAVE TO FILE A BRIEF REPLY TO NRC STAFF'S ANSWER TO APPLICANT'S PETITION FOR REVIEW OF LBP-11-17," dated August 17, 2011, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or by deposit in the U.S. Postal Service, as indicated by an asterisk, with copies by electronic mail, this 17th day of August, 2011:

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Lawrence.McDade@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Richard.Wardwell@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Dr. Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
190 Cedar Lane E.
Ridgway, CO 81432
E-mail: Kaye.Lathrop@nrc.gov

Josh Kirstein, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: Josh.Kirstein@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
(Via Internal Mail Only)

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of Robert F. Meehan, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
E-Mail: MJR1@westchestergov.com

Kathryn M. Sutton, Esq.*
Paul M. Bessette, Esq.
Jonathan Rund, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: jrund@morganlewis.com

John J. Sipos, Esq.*
Charlie Donaldson, Esq.
Assistants Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224
E-mail: John.Sipos@ag.ny.gov

Martin J. O'Neill, Esq.*
Morgan, Lewis & Bockius, LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
E-mail: martin.o'neill@morganlewis.com

Janice A. Dean, Esq.*
Assistant Attorney General,
Office of the Attorney General
of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
E-mail: Janice.Dean@ag.ny.gov

Elise N. Zoli, Esq.*
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: ezoli@goodwinprocter.com

Joan Leary Matthews, Esq.*
Senior Attorney for Special Projects
New York State Department of
Environmental Conservation
Office of the General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-1500
E-mail: jlmatthe@gw.dec.state.ny.us

William C. Dennis, Esq.*
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
E-mail: wdennis@entergy.com

John Louis Parker, Esq.*
Office of General Counsel, Region 3
New York State Department of
Environmental conservation
21 South Putt Corners Road
New Paltz, NY 12561-1620
E-mail: [jlparker@gw.dec.state.ny.us](mailto:jlpark@gw.dec.state.ny.us)

Daniel E. O'Neill, Mayor*
James Seirmarco, M.S.
Village of Buchanan
Municipal Building
Buchanan, NY 10511-1298
E-mail: yob@bestweb.net
E-mail: smurray@villageofbuchanan.com

Robert Snook, Esq.*
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
E-mail: robert.snook@ct.gov

Phillip Musegaas, Esq.*
Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
E-mail: phillip@riverkeeper.org
dbrancato@riverkeeper.org

Michael J. Delaney, Esq.*
Director, Energy Regulatory Affairs
New York City Department of Environmental
Protection
59-17 Junction Boulevard
Flushing, NY 11373
E-mail: mdelaney@dep.nyc.gov

Manna Jo Greene*
Stephen Filler
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
E-mail: mannajo@clearwater.org
E-mail: stephenfiller@gmail.com

Daniel Riesel, Esq.*
Thomas F. Wood, Esq.
Victoria Shiah, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
E-mail: driesel@sprlaw.com
vshiah@sprlaw.com



Sherwin E. Turk
Counsel for NRC Staff