

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	August 7, 2012

**ENTERGY’S OPPOSITION TO NEW YORK STATE’S
MOTION FOR EXTENSION OF TIME**

New York State’s Motion for Extension of Time filed on August 6, 2012 fails to “demonstrate appropriate cause”¹ for an unprecedented 91-day extension of its time to answer Entergy’s Motion for Declaratory Order. Entergy’s motion concerns the federal Coastal Zone Management Act (“CZMA”) and federal regulations implementing it, and, to a lesser extent, New York’s *own* Coastal Management Program (“CMP”). The State makes minimal effort to show cause for this extraordinary extension, arguing in essence that it is too busy with other deadlines in this proceeding to address Entergy’s motion.² Yet, the NRC Staff, which confronts the same deadlines with far fewer resources, has requested—and Entergy has agreed to—an extension of 53 days, and Staff Counsel *opposes* New York’s request for nearly twice as much time.³

¹ Scheduling Order, at 7 (July 1, 2010).

² See New York State’s Motion for Extension of Time, at 4-6 (Aug. 6, 2012).

³ See NRC Staff’s Motion for Extension of Time, at 1 & n.1 (Aug. 6, 2012).

Much of New York’s motion addresses its collateral and erroneous assertion that the consultation process pursuant to 10 C.F.R. § 2.323(b) on Entergy’s motion ended prematurely. Yet New York’s motion and attached declaration disclose its vigorous disagreement with Entergy on the law and facts governing Entergy’s Motion for Declaratory Order. Staff Counsel observed during the last of three consultation conference calls that, at the least, Entergy and New York plainly disagree about the meaning of certain CZMA regulations. In any event, whether Entergy’s Motion has merit (which New York obviously disputes) and whether Entergy complied with the consultation requirement of 10 C.F.R. § 2.323(b) are issues having no bearing on the State’s request for a 91-day extension.

BACKGROUND

On July 24, 2012, Entergy supplemented the Environmental Report appended to the License Renewal Application (“LRA”) to state that the application is not subject to further CMP consistency review by New York State because renewal will not result in coastal effects that are “substantially different” than the effects previously reviewed by the State.⁴ *See* 15 C.F.R. § 930.51(b)(3). Entergy convened conference calls on July 25th, 26th, and 30th among the parties to this proceeding, during which Entergy explained in detail the basis for its LRA supplement and the issues that would be presented in its then-forthcoming Motion for Declaratory Order.⁵ In addition, counsel for Entergy responded to several email inquiries from New York’s counsel and other parties, and provided numerous supporting documents.⁶ In the

⁴ *See* Letter from F. Dacimo, Entergy, to NRC Document Control Desk, Supplement to License Renewal Application – Compliance with Coastal Zone Management Act (July 24, 2012) (NL-12-107) (Att. 1).

⁵ *See* Motion Certification appended to Entergy’s Motion for Declaratory Order (July 30, 2012) (hereafter “Certification”).

⁶ *See id.*

third and final conference call on July 30, New York's counsel requested additional time to consult with State agencies, but throughout insisted, contrary to Entergy's position, that:

- (a) 15 C.F.R. § 930.6(c) is inapplicable to New York;⁷
- (b) only the New York State Department of State ("NYSDOS"), and no other State agency, is authorized to issue federal "consistency certifications"; and
- (c) any filing by Entergy inconsistent with these two assertions would be frivolous.

Counsel for both Entergy and the Staff stated that further consultation was not likely to produce agreement on the issues presented.

On July 30, 2012, Entergy filed its Motion for Declaratory Order seeking a determination by the Board on the position asserted in Entergy's LRA supplement. New York stated its intention to seek a 91-day extension of time (in addition to the 10 days set forth in the Scheduling Order) to respond to Entergy's motion on August 2 and convened a conference call among the parties to discuss the issue on August 3. Entergy and NRC Staff both oppose the State's requested 91-day extension as excessive and unnecessary.⁸ Entergy has agreed, however, to the NRC Staff's request for a 53-day extension.⁹

⁷ 15 C.F.R. § 930.6(c) states:

If described in a State's management program, the issuance or denial of relevant State permits can constitute the State agency's consistency concurrence or objection if the State agency ensures that the State permitting agencies or the State agency review individual projects to ensure consistency with all applicable State management program policies and that applicable public participation requirements are met.

⁸ See NRC Staff's Motion for Extension of Time (Aug. 6, 2012), at 1 n.1.

⁹ See *id.*

ARGUMENT

I. NEW YORK'S REQUEST FOR A 91-DAY EXTENSION IS EXCESSIVE.

New York State has failed to “demonstrate appropriate cause” supporting the unprecedented 91-day extension, as required by the Scheduling Order of July 1, 2010.¹⁰

First, New York asserts that it is simply too busy with its other obligations in this proceeding to respond to Entergy's motion before November 8. New York is the nation's third most populous state, and its gross state product of \$1.157 trillion in 2011 exceeded the gross domestic products of all but thirteen of the world's *nations*.¹¹ Even without taking account of legal and expert resources in other pertinent State agencies such as NYSDOS or the Department of Environmental Conservation, New York's Office of the Attorney General alone claims “[o]ver 650 Assistant Attorneys General and over 1,700 employees, including forensic accountants, legal assistants, scientists, investigators and support staff.”¹² New York's complaint of excessive workload is, of course, ironic in view of the 39 contentions it alone has interpled, most recently on July 8, 2012, into this proceeding. New York has never before shown evidence of constrained resources in this proceeding as it pursues its own contentions and agenda; its claimed need for 101 days (10 days in the Scheduling Order plus the requested 91) to respond to Entergy's motion strains credulity.

¹⁰ Scheduling Order, at 7 (July 1, 2010). “Appropriate cause” is especially lacking in light of the State's apparent expectation that it might not file an answer to Entergy's motion on the merits at all. *See* Decl. of Janice A. Dean ¶ 7 n.1 (stating that “[t]he State will explain the significance of [a certain] document *should it answer* Entergy's motion on the merits” (emphasis added)).

¹¹ *See* U.S. Dep't of Commerce Bureau of Economic Analysis, Gross Domestic Product by State, <http://www.bea.gov/iTable/iTable.cfm?ReqID=70&step=1&isuri=1&acrdn=1> (listing New York's gross state product in 2011 as \$1.157 trillion); The World Bank, Gross domestic product 2011 (July 9, 2012), *available at* <http://databank.worldbank.org/databank/download/GDP.pdf> (ranking the 2011 gross domestic products of 192 nations).

¹² New York State Office of the Attorney General, Our Office, <http://www.ag.ny.gov/our-office>.

Second, the issues raised by Entergy's motion are not burdensome to New York. Entergy's motion focuses on whether New York has previously reviewed IP2 and IP3 for consistency with the CMP, and if so, whether license renewal will cause substantially different coastal effects than those previously reviewed. *See* 15 C.F.R. § 930.51(b)(3). Entergy has provided substantial documentation in support of its motion. An argument by New York that it has conducted no previous consistency review of the Indian Point facilities would fly in the face of this evidence.¹³ If New York contends that renewal of the licenses "will" produce "substantially different" coastal zone effects, it can state what those effects are. Moreover, New York already disputes Entergy's legal position that, as a matter of law, consistency reviews by state agencies other than NYSDOS may satisfy CZMA consistency requirements for a federal license.¹⁴ *See* 15 C.F.R. § 930.6(c) (quoted in note 7 above). The State cannot reasonably contend that it needs three extra months to formulate and articulate its legal position.

Third, with an equally full docket, the NRC Staff has determined that it can adequately respond to Entergy's motion with only a 53-day extension. New York has failed to show cause why it cannot do likewise.

II. THE PARTIES FAILED TO REACH AGREEMENT ON ENTERGY'S MOTION.

New York's motion and supporting declaration set forth New York's recollection of the § 2.323(b) consultations that preceded Entergy's filing of its Motion for Declaratory Order. Entergy does not agree with New York's recitation, but will not engage in a point by point rebuttal because the discussion is so tangential to the request for an extension.

¹³ *See* New York State's Motion for Extension of Time, at 6-7 (Aug. 6, 2012).

¹⁴ *See, e.g.,* Mot. 7, 9; Dean Decl. ¶ 8.

It is worth noting, however, that New York’s motion confirms the existence of a material legal and factual dispute between Entergy and New York regarding the meaning and applicability of federal CZMA regulations and whether license renewal “will” cause substantially different coastal effects. 10 C.F.R. § 2.323(b) provides that a motion must be accompanied by a certification by the moving party’s counsel that there has been “a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” Entergy’s certification recites that, from July 24, 2012 through July 30, 2012, the Parties held three conference calls on Entergy’s LRA supplement and its potential Motion for a Declaratory Order.¹⁵ As New York’s motion confirms, New York expressed its view that Entergy: (1) “failed to address . . . a critical document;¹⁶ (2) raised “factual and legal questions/misunderstandings about New York’s program” that caused New York to challenge Entergy’s position;¹⁷ and (3) “was fundamentally misunderstanding the way New York’s Coastal Management Program has been laid out.”¹⁸ Moreover, New York asserts that “all NRC licensing decisions are subject to mandatory CZMA review by the New York Department of State,” which is directly contrary to Entergy’s position in its motion for a declaratory order.¹⁹

Although New York contends that consultations were “very much still ongoing” when Entergy filed its motion,²⁰ New York vigorously *disagreed*—and continues to disagree—with

¹⁵ See Certification 1.

¹⁶ Mot. 9.

¹⁷ *Id.* 10.

¹⁸ *Id.* 11.

¹⁹ *Id.* 9 n.7.

²⁰ *Id.* at 11.

Entergy's legal position.²¹ During the consultation on Monday, July 30, 2012, NRC counsel observed that New York and Entergy disagreed about the law governing Entergy's LRA supplement and motion. Indeed, Entergy's good faith belief that further consultation was highly unlikely to yield agreement is confirmed by the content and tone of New York's motion.²²

CONCLUSION

For all of the foregoing reasons, the Board should deny New York State's Motion for Extension of Time to the extent it seeks more than the generous 53-day extension agreed to by Entergy and the NRC Staff.

Dated: August 7, 2012

Respectfully submitted,

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²¹ See Certification 1-2.

²² See *id.*

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ANSWER CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Executed in accord with 10 C.F.R. § 2.304(d)

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CERTIFICATE OF SERVICE

I certify that on August 7, 2012, copies of the foregoing Motion for Declaratory Order were served electronically via the Electronic Information Exchange on the following recipients:

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