UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 8, 2012

STATE OF NEW YORK
MOTION TO IMPLEMENT STATUTORILY-GRANTED CROSS-EXAMINATION RIGHTS UNDER ATOMIC ENERGY ACT § 274(*l*)

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Court Decisions

Federal Statutes

Administrative Procedure Act (APA)

TABLE OF AUTHORITIES

Page(s)

Federal Administrative Agency Regulations

Federal Register Notices

Nuclear Regulatory Commission Decisions

TABLE OF AUTHORITIES

Page(s)

Legislative Materials

TABLE OF AUTHORITIES

Page(s)

Miscellaneous

INTRODUCTION

The State of New York respectfully requests that the Atomic Safety and Licensing Board issue an order allowing the State to exercise its statutory right to cross-examine witnesses presented by Entergy and NRC Staff at the evidentiary hearings scheduled for October 15-24, 2012 on the following "Track 1" admitted contentions: Contentions NYS-12C, NYS-16B, NYS-17B, NYS-37, NYS-5, NYS-8, and NYS-6/7.[1] Cross-examination rights in these proceedings are granted to the State via the Atomic Energy Act § 274(*l*), 42 U.S.C. § 2021(*l*), which provides, in pertinent part, that in all licensing proceedings "the Commission . . . shall afford reasonable opportunity for State representatives to . . . interrogate witnesses." The statute and its legislative history make clear that a State in which the federal government has been asked to authorize the operation of a nuclear reactor has an absolute right to conduct cross-examination of witnesses in NRC licensing proceedings regarding that reactor.

In order to assure that New York's cross-examination of witnesses will help to develop the full record needed to enable the Board and the Commissioners to reach a decision and to avoid any unnecessary delay in the hearing, New York proposes that the Board adopt the following plan for New York's cross-examination:

1. The State of New York will submit to the Board on August 29 the State's proposed areas of cross-examination of witnesses as contemplated by the Board's July 1, 2012 Scheduling Order;
2. Following the Board's cross-examination of a witness during the evidentiary hearing, attorneys for the State of New York will be entitled to ask additional, relevant, and non-redundant questions of the witness based on the responses elicited by the Board

[1] The contentions are listed here in the order that the Atomic Safety and Licensing Board has indicated that it will take up the State's contentions. The State reserves the right to seek cross-examination on Contentions NYS-26B/RK-TC-1B, NYS-38/RK-TC-5, and NYS-25.

in its questioning or on the areas of cross-examination identified in New York's proposed areas of cross-examination filed on August 29, 2012.

This process will assure that questioning by New York will be limited to seeking information that will provide the complete record needed for the Board to decide the underlying issues and will assure the Board retains the oversight responsibility for examination of witnesses and the orderly progression of the hearing.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The State of New York and two citizen groups previously presented various contentions challenging the issuance of the proposed renewed operating licenses for the Indian Point Unit 2 and Unit 3 atomic power reactors located in Westchester County within New York State. In its 2007 Notice of Intention to Participate and Petition to Intervene, the State of New York specifically identified its statutory right to cross-examination under AEA § 274(*l*) and its intent to exercise that right at the time of evidentiary hearings. New York State Notice of Intention to Participate and Petition to Intervene (November 30, 2007) ML073400187, at 19-22, 307; *see also* New York State Reply in Support of Petition to Intervene (Feb. 22, 2008) ML080600444, at 184-189. In those pleadings, New York set forth the basic arguments it advances here regarding its statutorily guaranteed right of cross-examination. The Board did not have occasion to address this issue in ruling on the Petitions to Intervene. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), 68 N.R.C. 43, LBP-08-13 (July 31, 2008) ("Intervention Order").

In its Intervention Order, the Board directed the intervening parties to file, by August 21, 2008 their proposal, on a contention-by-contention basis, for the type of hearing (Subpart G or Subpart L) that should be held. Intervention Order, 68 N.R.C. at 219. New York timely filed its

response which addressed the Subpart G issue, indicated that, regardless of whether Subpart G or Subpart L procedures were chosen, New York was entitled to cross-examination of witnesses pursuant to Section 274(*l*) and that New York would present its request to exercise such right after witnesses had been identified and testimony had been filed. The State of New York's Response to the Board's Question Concerning Hearing Procedures and Motion that the Board Apply Subpart "G" Discovery Procedures to Certain Admitted Contentions, at 30-31 (Aug. 21, 2008) (ML082400524). In ruling on the issue of the Subpart under which the hearings would be conducted, the Board held that parties would be allowed to seek the use of Subpart G discovery procedures when, and if, their use was deemed necessary and that following completion of all discovery the Board "will entertain argument on the procedures to be used during the evidentiary hearing." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G), at 14 (Dec. 18, 2008) (unpublished) (ML083530743).

Following voluntary discovery and submission of pre-filed evidence, the contentions will be reviewed by the Board at evidentiary hearings conducted pursuant to Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a). In June 2012, the Board issued an order that identified which of the admitted "Track 1" Contentions would be reviewed during the October 15-24 evidentiary hearings and in what order they would be heard. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Notice of Hearing (Application for License Renewal), at 5 (Jun. 8, 2012) (unpublished) (ML12160A093) ("Notice of Hearing"). In its subsequent July 12, 2012 Order "the Board directed the parties to file motions for cross-examination, requests for a Subpart G proceeding, and proposed questions for the Board to ask at the evidentiary hearing for all Track 1 Contentions no later than Wednesday, August 29, 2012."

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Order (Memorializing Items Discussed During the July 9, 2012 Status Conference), at 2 (Jul. 12, 2012) (unpublished) (ML12194A538). New York is submitting this request for cross-examination in advance of that deadline to facilitate early resolution of the request.

ARGUMENT

ATOMIC ENERGY ACT SECTION 274(*l*) PERMITS A STATE TO CROSS-EXAMINE WITNESSES IN NRC LICENSING PROCEEDINGS FOR POWER REACTORS LOCATED WITHIN THAT STATE

Section 274(*l*) of the Atomic Energy Act (AEA) guarantees States the right to interrogate witnesses in nuclear relicensing proceedings. The provision states in full:

> (*l*) Commission regulated activities; notice of filing; hearing
>
> With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

AEA, § 274(*l*); 42 U.S.C. § 2021(*l*). The text of this statute makes plain that States are entitled to these rights no matter their posture in a licensing proceeding (as intervenor States that take positions on specific issues, as New York is in the instant case, or as interested States that may or may not take a position on an issue in the case). If the federal government locates or authorizes the operation of a nuclear reactor within a State, the Atomic Energy Act authorizes that State to interrogate witnesses in the federal licensing proceeding. Section 274(*l*) authorizes such a State to exercise its sovereign right to chart its own course, develop its own position, marshal its own case, and ask its own questions of the witnesses in the federal licensing proceeding.

No current Commission regulation addresses the Atomic Energy Act's statutorily-created rights of a State that is a party to a proceeding to conduct cross-examination pursuant to Section 274(*l*) or purports to circumscribe such a State's statutory rights to conduct such cross-examination. The Part 2 regulations governing the conduct of hearings represent the Commission's position on the requirements imposed on it by the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 and 557, *see* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182 (Jan. 14, 2004) and *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm.*, 391 F.3d 338, 349 (1st Cir. 2004) ("*CAN v. NRC*"), and therefore they do not apply to this motion.

The following discussion demonstrates that when Congress enacted Section 274(*l*) it was addressing a concern raised by a number of States, including New York, that the nuclear reactor licensing process was, if not modified, essentially depriving the States of their traditional role in evaluating the wisdom of, and granting approval to or denying applications for, major industrial developments within their State. Part of the bargain reached with the States was to assure them, whether they were formal parties or not, that they could play an active role in the licensing process including being able to cross-examine all witnesses. Also, at the time Congress enacted Section 274(*l*), the right of cross-examination was guaranteed to all participants in nuclear reactor licensing proceedings by Atomic Energy Agency regulations. *See* 10 C.F.R. § 2.747 (1956). It was that right Congress preserved via statute for all States where nuclear reactors were to be located, a right that has not been subsequently diminished either by Congress or NRC regulations.

A. The Legislative History of AEA Section 274 Shows That Cross-Examination Is a Right Guaranteed to the States by the Atomic Energy Act

The enactment of AEA § 274(*l*) in 1959 was part of a general statute titled "Cooperation With States," and its purpose was to "recognize the interests of the States in the peaceful uses of atomic energy," and to lay the groundwork for what Congress saw as the future regulation of various aspects of the nuclear energy industry. 42 U.S.C. § 2021(a)(1-6), AEA § 274(a)(1-6). Before 1959, the AEA did not provide a specific role for the States in federal reactor licensing proceedings. However, protecting the States' role with respect to the construction and operation of a nuclear power reactor within the state was a "subject of concern" for the Joint Committee on Atomic Energy since the initial passage of the Atomic Energy Act in 1954. *Amendments to the Atomic Energy Act of 1954, as Amended, With Respect to Cooperation with States*, Sen. Rep. No. 870, 86th Cong., 1st Sess. (Sept. 1, 1959), *reprinted in* 1959 U.S. Code Cong. & Admin. News 2872, 2875. Accordingly, shortly after enacting the Atomic Energy Act in 1954, the Committee began looking into the issue, *id.*, and prior to the enactment of § 274 published a 520-page report that examined issues of Federal-State cooperation in the context of nuclear energy. *Selected Materials on Federal-State Cooperation in the Atomic Energy Field*, Joint Committee on Atomic Energy, 86th Cong., 1st Sess. (Joint Comm. Print, March 1959) (hereinafter, "*Selected Materials*"). The report included a number of recommendations to foster increased State involvement in the nuclear licensing process, including authorizing the Commission to "invite any interested State . . . to participate in any hearing held pursuant to section 189 of the act and to give that State . . . an opportunity to examine witnesses . . ." *Selected Materials* at 451. By specifying not only that a State would have a role to play in the licensing process but identifying the type of participatory rights that a State would have, these recommendations sought to assure States that certain traditional procedural rights would be available to them in the licensing

process and that those rights could not be curtailed by administrative action of the federal government.

It is clear that when it enacted Section 274(*l*) Congress had a clear understanding that essentially unfettered cross-examination was a vital component of the process of deciding whether to license a nuclear reactor. As the NRC itself has recognized:

> It was thought [in the 1950s] that the panoply of features attending a trial—parties, sworn testimony, *and cross-examination*—would lead to a more satisfactory resolution of the complex issues affecting the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC.

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2183 (Jan. 14, 2004) (emphasis added). Thus, not only does the text of Section 274(*l*) plainly permit States to cross-examine witnesses, but when Section 274(*l*) was enacted it was recognized that cross-examination would produce a "more satisfactory resolution of the complex issues affecting the public health and safety."

Section 274, the language for which was proposed by AEC staff, Sen. Rep. No. 870, 1959 U.S.C.C.A.N., at 2873, was the result of the bargain reached between the Commission, Congress, and States that had begun to seek a seat at the table regarding federal regulation of nuclear activities located within the various states. In exchange for not having the right to regulate certain aspects of nuclear safety of nuclear power plants within their borders, States were promised the statutory right to a full and meaningful participation in the AEC's process for addressing those issues in public licensing proceedings and the right of cross-examination was explicitly provided by the Statute. In § 274(*l*), Congress authorized States – in which the federal government decided to locate nuclear reactors – to exercise the States' right as sovereigns to chart their own course, develop their own position, marshal their own case, and ask their own questions of the witnesses in the licensing proceedings.

Evidence of this bargain is contained throughout the transcript of the Joint Committee's hearings on the bill, *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. (1959) ("1959 Hearings"). For example, Governor Robert E. Smylie, Governor of Idaho, chairman of the Governors' Conference Special Committee on Federal-State Relations and co-chairman of the Joint Federal-State Action Committee stated that the provision, which would ultimately become § 274(*l*), was "meant to acknowledge the interest of the States in the areas . . . [that] . . . remain under Federal jurisdiction," such as reactor licensing. 1959 Hearings at 118.[2] These statements were echoed by members of the Committee including Rep. Chet Holifield, who emphasized the importance of the States having control over their participation in the licensing process:

> [T]his committee has admonished the AEC on this very subject. I think they have changed their procedures considerably on this very point…I am strongly of the opinion that the State has a very vital interest in this problem as well as the AEC. *I am very doubtful if the AEC should be the determining factor in the location of industrial type reactors*…certainly, in the whole field of industrial application, it seems to me that the States should have a pretty *strong say as to where that site should be*. They have problems which the Federal Government cannot comprehend.

1959 Hearings at 399 (emphasis added). Confirming the compromise, AEC itself stated that it was "appropriate to give this kind of statutory recognition to the interests of the States in these reserved areas." 1959 Hearings at 312. In summarizing the legislation, the Senate Report confirmed that Section 274(*l*) "provides appropriate recognition of the interest of the States in activities which are continued under Commission authority" and that "the Commission is required to … afford reasonable opportunity for State representatives to …interrogate witnesses…" Sen. Rep. No. 870, 1959 U.S.C.C.A.N. at 2883.

[2] At the time that Governor Smylie testified on May 22, 1959, the provision that ultimately became § 274(*l*) was in subsection "k" of the draft legislation. *See* May 13, 1959 letter from A.R. Luedecke (AEC) to Sen. Anderson, *printed in* 1959 Hearings at 293, 296.

As the following discussion demonstrates, the right of cross-examination of witnesses is widely recognized as a fundamental means by which a party to a proceeding can protect its interests by ensuring that the questioning of witnesses is done in a manner and at a time which is most likely to fully elicit all the relevant facts regarding that witness's testimony. It was a right that AEC had assured all participants in nuclear licensing proceedings. By enactment of § 274 Congress assured the States that although the federal government would regulate certain aspects of the radiological safety at nuclear power plants, the States could fully participate in the process of examining witnesses in the hearing and assuring that a full and accurate factual record was developed before AEC decided whether or not to approve the construction or operation of a nuclear reactor within the State. By including the right to "interrogate witnesses" in the language of Section 274(*l*) Congress ensured that it was the States that would decide how and when to cross-examination witnesses and that the federal government was not authorized to curtail that right.

B. Enactment of AEA Section 274(*l*) Reflects the Long-Standing Recognition that States Occupy a Special Role in the Federal System Including in Licensing of Nuclear Facilities

The federal government has long recognized that States hold a special place in the federal system. *See e.g.*, *Massachusetts v. U.S. Envt'l Protection Agency*, 549 U.S. 497, 520 (2007) (Commonwealth of Massachusetts and other States "entitled to special solicitude" in standing analysis); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty."); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237

(1907) (a State has "an interest independent of and behind the titles of its citizens"). In *New York v. United States*, the Supreme Court invalidated a provision of the Low-Level Radioactive Waste Policy Act and reasoned in part that the Constitution leaves to the States a "residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992).

These principles of state's rights underscore the importance of NRC fully complying with the mandate of Section 274(*l*) and allowing New York to exercise its statutorily established right to cross-examination of witnesses in this proceeding. Exercising these rights in this proceeding is particularly important not only because of the profound actual and potential impact of Indian Point on the residents of New York State, but because of the full and active role that New York has played in this proceeding. Without in any way diminishing the role the Board plays in conducting cross-examination of witnesses, it is vital to the sovereign interests of the State of New York that the State be allowed the opportunity to ensure that the record is fully developed and the facts are fully disclosed regarding the vital issues at stake in this proceeding. Section 274(*l*) mandates that the decision about whether to use cross-examination as a mechanism to assure a fully developed record is a decision to be made by the States.

The inviolate right established by Section 274(*l*) provides New York with the right to be able to ask the questions it believes need to be asked and to obtain the answers it believes need to be obtained to allow this Board to make a final decision on whether to allow Indian Point to be allowed to operate for an additional 20 years. Section 274(*l*) is New York's, and every State's, guarantee that a nuclear facility will not operate within its borders until and unless the State has been given the opportunity to ensure that all relevant questions are asked and answered. That right is not, and cannot be, delegated to federal authorities and cannot be circumscribed by

federal regulations that grant to federal authorities the determination of whether cross-examination by a State is warranted. Unless those determinations are made by the State, subject only to the authority of the Board to "prevent argumentative, repetitious or cumulative cross-examination" (10 C.F.R. § 2.333(e)), the rights guaranteed to the States by Section 274(*l*) will be meaningless and the bargain made with the States with the passage of Section 274(*l*) will be abrogated. The Commissioners and the Staff do not have the authority to change Congressional statutes.

C. Subsequent Regulatory & Practical Application of AEA Section 274 Confirm that Cross-Examination is a Right Granted to the States by the AEA and Is Essential for Meaningful Participation by States in the Licensing Proceeding

The specific provision at issue here, § 274(*l*), provided states with specific rights in federal licensing proceedings for civilian atomic power reactors. These rights include receiving adequate notice of a licensing proceeding, and, as a result of the notice, a reasonable opportunity to present evidence and interrogate witnesses without requiring, but also not limiting their ability to be, adversary parties to the proceedings. Beginning in 1956 and continuing on to 2004, the AEC and NRC, used a formal hearing procedure that allowed cross-examination to be used in all licensing proceedings. Promulgated originally as 10 C.F.R. § 2.747 (1956), AEC regulations stated "[e]very party to the hearing shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts." This same provision was in place in 1959 when Congress enacted Section 274(*l*). This provision, according to the NRC itself was interpreted by the Commission as allowing for broad ranging cross-examination.

> [T]he AEC saw benefits in a highly formal process, resembling a judicial trial, for deciding applications to construct and operate nuclear power plants. It was thought that the panoply of features attending a trial—parties, sworn testimony, *and cross-examination*—would lead to a more satisfactory resolution of the

> complex issues affecting the public health and safety and would build public confidence in the AEC's decisions and thus in the safety of nuclear power plants licensed by the AEC.

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2183 (Jan. 14, 2004) (emphasis added). The State has located only one published federal court decision citing or construing § 2.747, *Hannah v. Larche*, 363 U.S. 420 (1960). There, the Supreme Court, in comparing the due process measures in place at various federal agencies, said that § 2.747 provided for a "right to cross-examine witnesses." *Id.* at Appendix 1. Thus, at the time it enacted Section 274(*l*), Congress was aware that nuclear reactor licensing proceedings included a broad right to cross-examination, and it was that right it was preserving for States in Section 274(*l*) of the Atomic Energy Act.

Commentators also recognized the role that cross-examination played in AEC hearings. A review of the earliest AEC case, *Power Reactor Development Company*, (Fermi Atomic Energy Plant Unit 1), 1 A.E.C. 1 (1956), noted both that AEC allowed cross-examination in licensing proceedings and that the right was provided so that the cross-examining party could protect its interests and assure itself that the record was complete. Dean C. Dunleavy, *Federal Licensing and Atomic Energy*, 46 Cal. L. Rev. 69, 81 (1958) (the procedure of the time included a "requirement that the witness[es] be made available for such cross-examination as may be required for a full and true disclosure of the facts, so that the interest of any party will not be prejudiced."). A subsequent article recognized that cross-examination was a common tool used in AEC licensing proceedings and described the cross-examination procedures then being used as "vigorous and broadranging." Joseph F. Hennessey, *Licensing of Nuclear Power Plants by the Atomic Energy Commission*, 15 Wm. & Mary L. Rev. 487-501 (1974). In hearings before the Joint Committee in 1962, Raoul Berger, Chairman of the Section of Administrative Law, American Bar Association said of the cross-examination allowed by AEC regulations in

contested license cases, "[a]s a general rule, it is a good thing to have scientific evidence spread on the record subject to cross-examination. Everyone, time and again, has seen a battle of experts and seen experts fold up on cross-examination. Cross-examination is valuable for evaluation of expert testimony." *AEC Regulatory Problems: Hearing Before the Joint Comm. on Atomic Energy*, 87th Cong. at 69 (1962).

This understanding of cross-examination rights continued after NRC was created in 1974 to carry out the regulatory responsibilities of the AEC. In its first published opinion, *Northern States Power Company* (Prairie Island Nuclear Generating Plant, Units 1 and 2), 1 N.R.C. 1, CLI-75-1 (1975), the Nuclear Regulatory Commission recognized the vital role that cross-examination plays in providing a party with meaningful participation in the hearing process:

> In order to assure meaningful public participation in the adjudicatory process, in both operating license and construction permit proceedings, *an intervenor must be afforded the opportunity to cross-examine a witness* on matters which have been placed into controversy by any of the parties to the proceeding—so long as that intervenor has a discernible interest in the resolution of the particular matter."

Northern States Power Company, at 1-2 (emphasis added). Under this standard, States, just as any other intervenor party, were afforded cross-examination privileges.

Cross-examination rights have been generally recognized as a vital part of the right of participants in legal proceedings. *Perry v. Leeke*, 488 U.S. 272, 283, n.7 (1989). Citing respected treatises, the Supreme Court's *Perry* decision including the following commentary on cross-examination:

> "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law." . . . . 5 J. Wigmore, Evidence § 1367 (J. Chadbourn rev. 1974) (calling cross-examination "the greatest legal engine ever invented for the discovery of truth"); 4 J. Weinstein, Evidence ¶ 800[01] (1988) (cross-examination, a "'vital feature' of the Anglo-American system," "'sheds light on the witness' perception, memory and narration,'" and "can expose inconsistencies, incompletenesses, and inaccuracies in his testimony").

488 U.S. at 283, n.7. It is also important that the party have control of the cross-examination to assure that the right questions are asked, at the right time and in the right manner. "Cross-examination often depends for its effectiveness on the ability of counsel to punch holes in a witness' testimony at just the right time, in just the right way." *Perry*, 488 U.S. at 282. It is that right which was preserved for each State in Section 274(*l*) and that right was granted to the States as part of the 1959 legislative bargain.

D. The State's Cross-Examination Rights Under Atomic Energy Act Section 274(*l*) Exist Independently of the Administrative Procedure Act

Atomic Energy Act Section 274(*l*) guarantees States, in which power reactors are located, with certain rights in nuclear licensing proceedings, independent of the Administrative Procedure Act (APA). The State's request here is not based on the APA and is unaffected by NRC's decision to reduce the rights of parties in licensing proceedings pursuant to NRC's revised view of its obligations under the APA. The right to cross-examination for States in licensing proceedings exists independent of the minimum standards established by APA and flows directly from the AEA. When, in 2004, NRC chose to modify the APA procedures for other parties to NRC licensing proceedings and placed restrictions on the use of cross-examination, it did not purport to address the rights preserved to the States in Section 274(*l*). In fact,

> the Commission never discussed the issue of the State's rights under 42 U.S.C. [§] 2021(*l*) in the Statements of Considerations (totaling 70+ pages) to the proposed or final revisions to 10 C.F.R. Part 2. *See* 66 Fed. Reg. 19,610-71 and 69 Fed. Reg. 2182-2282.

Entergy Nuclear Vermont Yankee and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), 60 N.R.C. 686, 708, LBP-04-31 (2004). For these reasons, the 2004 regulatory revisions and subsequent decision upholding them, *CAN v. NRC,* 391 F.3d 338, are inapplicable to the State's rights guaranteed under the Atomic Energy Act.

E. Entergy and Staff's Likely Contrary Arguments Should Be Rejected

Based on consultations with Entergy and NRC Staff, it is likely they will claim that a State's statutory right to cross-examination is governed either by the provisions of two regulations, 10 C.F.R. §§ 2.315(c) or 2.1204(b)(3). Those provisions are inapplicable to this motion and, moreover, cannot trump the statutory provisions of Atomic Energy Act Section 274(*l*). The provisions of § 2.1204(b)(3) are based on the APA and contain limitations on the right to use cross-examination that vest the Board with the power to determine when such cross-examination is "necessary" to assure the development of the record. That restriction, if applied to States, would eviscerate the right of cross-examination guaranteed to the States by Section 274(*l*), which intends that the States, not a federal agency, will decide how and when to ask questions of witnesses. The provisions of § 2.315(c) have no application to New York in this proceeding since they only apply to a State that "has not been admitted as a party."

Thus, the real issue in dispute between New York and Entergy and Staff is not whether Section 274(*l*) assures the state the right of cross-examination, which it clearly does, but whether that right is already provided to New York as a party to this proceeding pursuant to 10 C.F.R. § 2.1204(b)(3). Since, as noted above, that provision was adopted by NRC to implement its revised view of the APA and was not addressed to Section 274(*l*) and the rights guaranteed to States by that provision, there is no statement by the Commission that would support the view likely to be advanced by Entergy and Staff.

The State also recognizes that two ASLB decisions concerning Vermont Yankee concluded – incorrectly in the State's view – that Section 274*(l)*'s requirements are met through the application of 10 C.F.R. § 2.1204(b)(3). *Entergy Nuclear Vermont Yankee and Energy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 60 N.R.C. 686, 710-11,

LBP-04-31 (2004)[3] and *Entergy Nuclear Vermont Yankee and Energy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 64 N.R.C. 131, 203-204, LBP-06-20 (Sept. 22, 2006). The State respectfully submits that those conclusions are in error, primarily because they do not address the central question, which was not raised by the parties in the *Vermont Yankee* that proceedings. That question is not whether the cross-examination must be conducted for the purpose of assuring that the record is complete, but rather whether Section 274(*l*) recognized that it was the State's sovereign prerogative to decide what it believed needed to be asked to assure a complete record or whether the right of cross-examination could be restricted by allowing the Commissioners or a hearing board to decide whether cross-examination is "necessary" as is now provided in 10 C.F.R. § 2.1204(b)(3).

In LBP-04-31, the *Vermont Yankee* ASLB acknowledged that:

> The recent decision in *CAN v. United States*, No. 04-1145, 2004 WL 2827697 (1st Cir. Dec. 10, 2004), supports the view that a reasonable opportunity for cross examination, in appropriate circumstances, must be afforded to any party under 10 C.F.R. § 1204(b)(3). In that case, the Commission represented to the court that the availability of cross examination under 10 C.F.R. § 2.1204(b)(3) "is *equivalent* to the APA's provision for such cross examination 'as may be required for a full and true disclosure of the facts,' for on-the-record adjudicatory hearings under 5 U.S.C. § 556(d)." Federal Brief in *CAN v. United States* at 19, State Reply, Exh. 37 (emphasis added). The Commission went on to state that "Subpart L, though using somewhat different language, provides as much access to cross-examination as the APA." *Id.* at 46.

60 N.R.C. at 709, LBP-04-31 (footnote omitted). It also held that:

[3] Entergy or Staff may argue that the Commission's decision in *Louisiana Energy Services, L.P.* (National Enrichment Facility (New Mexico)), 60 N.R.C. 619, CLI-04-35 (2004), forecloses a claim by New York, which is a party to this proceeding, to exercise the rights provided to New York by Section 274(*l*) because, having elected to participate as a party it cannot claim to be an "interested state." The *Vermont Yankee* Board correctly resolved that question when it held that:

> Neither the Commission or the Board addressed the impact of section 2021(*1*) in *Louisiana Energy Services* because the issue never arose. And nothing in the statute makes the State's right to a "reasonable opportunity . . . to interrogate witnesses" dependent on its status under 10 C.F.R. § 2.315 (c) as an interested State or a party. Thus, *Louisiana Energy Services*, provides no answer to the State's arguments under 42 U.S.C. § 2021(*l*).

60 N.R.C. at 707-708, LBP-04-31 (footnote omitted).

> With regard to the discretion of the presiding officer/Board to determine whether cross-examination is needed, the [*CAN v. NRC*] court stated:
>
> > [W]e cannot say that it is arbitrary and capricious for the Commission to leave the determination of whether cross-examination will further the truth-seeking process in a particular proceeding to the discretion of the individual hearing officer.
> >
> > We do, however, *add a caveat. The APA does require that cross-examination be available when "required for a full and true disclosure of the facts."* [5 U.S.C. § 556(d)]. If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. *Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against further challenges.*

60 N.R.C. at 710, LBP-04-31 (quoting *CAN v. NRC*, 391 F.3d at 354 (emphasis in original)). The subsequent ASLB decision in LBP-06-20 conformed with the earlier decision in LBP-04-31. 64 N.R.C. at 203-04 (2006).

Although the 2004 *Vermont Yankee* ASLB ultimately concluded – erroneously in the State's view – that the rights afforded to parties under § 2.1204(b)(3) are the equivalent to the rights given to the States under Section 274(*l*), it did so with a recognition of the liberality with which an ASLB is to determine whether to allow cross-examination by any party:

> Although the Board includes technical experts, we are not experts in all disciplines nor as well versed in the nuances of some issues as some of the litigants. Therefore, supplemental cross-examination by the parties is clearly allowed under 10 C.F.R. § 2.1204(b)(3) and 5 U.S.C. § 556(d) when it is required for a full and fair disclosure and adequate record of competing technical and scientific evidence and testimony. It is on this basis that we conclude that using Subpart L rules for this proceeding is consistent with State's statutory right under 42 U.S.C. § 2021(1).

60 N.R.C. at 711, LBP-04-31.

In this proceeding New York has offered extremely well-qualified experts in support of its admitted contentions, all of whom have specific, in depth, knowledge of the particular subject

they are addressing. The ability of the State of New York, with the assistance of its experts, to pose questions and to follow up answers with additional questions, in order to ensure that the record with regard to each contention is fully developed, will be substantial. It is certainly possible that, even if the Board agreed with the legal conclusion in the *Vermont Yankee* decisions, at each instance in which New York sought to conduct additional cross-examination, following cross-examination by the Board, the cross-examination would be allowed. However, that would still place the statutory rights guaranteed to the State of New York under Section 274(*l*) under the restrictions imposed by § 2.1204(b)(3) – restrictions that did not exist when the statute was passed.

Under § 2.1204(b)(3) cross-examination is allowed "only if the [ASLB] determines that cross-examination . . . is necessary to ensure the development of an adequate record for decision." The regulation in place when Section 274(*l*) was enacted provided every party "shall have the right to . . . such cross-examination as may be required for a full and true disclosure of the facts." 10 C.F.R. § 2.747 (1956). As noted above, Congress would have believed, as did the AEC at that time, that "the panoply of features attending a trial—parties, sworn testimony, *and cross-examination*—would lead to a more satisfactory resolution of the complex issues affecting the public health and safety." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2183 (Jan. 14, 2004) (emphasis added). If the Commission now believes, as it indicated in the 2004 Part 2 Amendments, that cross-examination is no longer essential for a "satisfactory resolution of the complex issues affecting the public health and safety" it may be free to restrict that right in Part 2 for all other parties who are not States, but it is not free to restrict that right as guaranteed to the States by Section 274(*l*). Only Congress can make that change. *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("A

regulation's age is no antidote to clear inconsistency with a statute, and the fact, again, that [the regulations at issue] flies against the plain language of the statutory text exempts courts from any obligation to defer to it."); *U.S. v. Larionoff*, 431 U.S. 864, 873 & n.12 (1977) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . (only) the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.").

Finally, the V*ermont Yankee* ASLB decisions do not discuss the fact that although Section 2.1204(b)(3) may provide the same cross-examination rights as those allowed under the APA, it does not provide the same cross-examination as those guaranteed to the States under 274(*l*). When the Commission adopted the 2004 Amendments to Part 2 it intended to restrict the previously existing right of cross-examination. "The final rule does place limitations on cross-examination for the less formal procedures." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2187. Thus, the cross-examination rights that were created by Section 274(*l*) and which looked to the then existing Commission regulations on the conduct of hearings, provided a less restrictive right of cross-examination than now exists in § 2.1204(b)(3). New York is entitled to a broader right of cross-examination guaranteed to it by Section 274(*l*), without the restrictions imposed by § 2.1204(b)(3). To find otherwise would be to eviscerate New York's Section 274(*l*) rights and essentially eliminate a key component of the bargain reached by New York and all other states when Section 274(*l*) was enacted.

CONCLUSION

For the foregoing reasons, the State of New York respectfully requests the Board adopt New York's proposal to implement the State's right, pursuant to Atomic Energy Act Section 274(*l*), to conduct cross-examination of witnesses following the Board's cross-examination of those witnesses.

Respectfully submitted,

Signed (electronically) by

_____

John J. Sipos
Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224
(518) 402-2251

Dated: August 8, 2012

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for NRC Staff and Entergy in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

_____

John J. Sipos
Assistant Attorney General
State of New York

Dated: August 8, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 8, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2012, copies of the State of New York Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(*l*) were served electronically via the Electronic Information Exchange on the following recipients:

Lawrence G. McDade, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Lawrence.McDade@nrc.gov

Michael F. Kennedy
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Michael.Kennedy@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Richard.Wardwell@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Shelbie Lewman, Esq. Law Clerk
Anne Siarnacki, Esq., Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Shelbie.Lewman@nrc.gov
Anne.Siarnacki@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
ocaamail@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
hearingdocket@nrc.gov

Sherwin E. Turk, Esq.
David E. Roth, Esq.
Beth N. Mizuno, Esq.
Brian G. Harris, Esq.
Anita Ghosh, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mailstop 15 D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
sherwin.turk@nrc.gov
david.roth@nrc.gov
beth.mizuno@nrc.gov
brian.harris@nrc.gov
anita.ghosh@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Jonathan Rund, Esq.
Raphael Kuyler, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ksutton@morganlewis.com
pbessette@morganlewis.com
jrund@morganlewis.com
rkuyler@morganlewis.com

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

Bobby R. Burchfield, Esq.
Matthew M. Leland, Esq.
Clint A. Carpenter, Esq.
McDermott Will & Emery LLC
600 13th Street, NW
Washington, DC 20005-3096
bburchfield@mwe.com
mleland@mwe.com
ccarpenter@mwe.com

Richard A. Meserve, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
rmeserve@cov.com

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

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

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

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
MJR1@westchestergov.com

Daniel E. O'Neill, Mayor
James Seirmarco, M.S.
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298
vob@bestweb.net

Daniel Riesel, Esq.
Thomas F. Wood, Esq.
Victoria S. Treanor, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driesel@sprlaw.com
vtreanor@sprlaw.com

Michael J. Delaney, Esq.
Director
Energy Regulatory Affairs
NYC Department of Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11373
(718) 595-3982
mdelaney@dep.nyc.gov

Manna Jo Greene, Director
Karla Raimundi, Environmental Justice Associate
Stephen Filler, Esq., Board Member
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
Mannajo@clearwater.org
karla@clearwater.org
stephenfiller@gmail.com

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

Signed (electronically) by

_____

John J. Sipos
Assistant Attorney General
State of New York
(518) 402-2251

Dated at Albany, New York
this 8th day of August 2012