

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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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,	DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and	
Entergy Nuclear Operations, Inc.	March 25, 2016
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**STATE OF NEW YORK
REPLY IN SUPPORT OF CONTENTION NYS-40**

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for the State of New York
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The State of New York submits this reply in support of Contention NYS-40 and in response to NRC Staff and Entergy's answers. Contention NYS-40 addresses modifications to mitigate the environmental effects to the New York metropolitan area caused by a severe reactor accident. With the publication of the December 2015 Draft Supplemental EIS ("DSEIS"), NRC Staff and Entergy now agree for the first time that the engineering cost calculations are complete. NRC Staff and Entergy also agree that the probabilistically-discounted cost-benefit analysis reveals that twelve modifications are cost-beneficial – that is, that the benefits provided to the citizens and communities surrounding the Indian Point site are greater than the cost to Entergy of making the modifications.

Despite its acknowledgment that the engineering cost calculations are now final, NRC Staff has refused to include those cost-beneficial modifications as a condition to the requested operating licenses. Staff bases this refusal on its claim that the modifications do not relate to the aging management of non-moving parts, which Staff asserts is the only issue at play in this proceeding. Staff's position is both wrong and arbitrary. First, Entergy has applied for an operating license to continue to operate each power plant beyond the term of its initial license. Should NRC grant Entergy's application, the resulting operating license will permit Entergy to do more than inspect irradiated baffle bolts inside the pressure vessel, buried pipes, or similar components; it will authorize Entergy to operate the entire facility, including the power reactor, spent fuel pool, and related systems. The proceeding could result in the issuance of an operating license, which NRC defines as a "major federal action." Second, in PRM 51-7, the Commissioners rejected the position now advanced by Staff and Entergy. Third, this Board previously ruled in favor of the State on two related contentions – first, admitting those

contentions and later granting the State's motion for summary disposition. Those rulings, which reflect the current law of the case, further support the admission of NYS-40.

Nothing in Staff and Entergy's answers precludes the admission of Contention NYS-40. Many of their arguments were presented previously to the Board – and rejected. And the new arguments likewise lack merit.

1. The December 2015 Draft Supplemental EIS Contains New Information Concerning NRC Staff and Entergy's Cost Calculations for the Site-Specific Indian Point SAMA Modifications.

Staff and Entergy try to argue that the DSEIS breaks no new ground concerning the severe accident cost benefit analysis. *See* Staff Answer at 11; Entergy Answer at 10-12. But that is not correct. During the earlier litigation on Contentions NYS-35/36, Staff and Entergy each sought to hedge their position by characterizing the cost estimates as preliminary estimates that produced potential results, and suggested that Entergy might chose to develop further estimates at some future date. For thirty months between May 2013 and December 2015, Entergy and Staff engaged in an ongoing discussion about the subsequent engineering cost calculations and adjustments to those calculations. The December 2015 DSEIS serves as the book end to that lengthy discussion. The DSEIS fixed Staff's position and established that the engineering cost calculations are completed. In turn, Contention NYS-40 expressly noted Staff's acceptance of the refined cost calculations as complete. NYS-40 at ¶ 22. The State timely presented Contention NYS-40 to address this change in position by Staff and in accordance with the Board's July 9, 2013 Order.

2. The Commission's Current Review of Similar Issues Should Not Prevent the State from Filing the Contention.

In presenting Contention NYS-40, the State explained that it sought to protect the State's interest in this proceeding given the Board's previous rulings, the December 2015 DSEIS, and

the fact that both Indian Point facilities had entered the period of extended operation. *See, e.g.*, NYS-40 at ¶¶ 1, 6, 15. If it did not present the contention, the State anticipated that Staff would oppose later efforts to do so.

All parties recognize that the Commission is reviewing the Board's earlier rulings concerning Contentions NYS-35 and NYS-36.¹ As of today, the Board's rulings – LBP-10-13 and LBP-11-17 – reflect the current application of the law to the facts here in this adjudicatory proceeding concerning cost-beneficial severe accident mitigation alternatives.² Those Board rulings support the rejection of Staff and Entergy's arguments opposing the admission of Contention NYS-40.

3. Contention NYS-40 is Timely.

The State served the Staff, Entergy, and the Board with the contention on February 22, 2016 and the contention was therefore timely.³ NRC Staff recognizes that the filing was timely. Staff Answer at 9, n. 35. Entergy faults the State for omitting a discussion of the factors identified in 10 C.F.R. § 2.309(f)(1) in the February 22 motion for leave. Entergy Answer at 12-13. As counsel for the State previously acknowledged, as a result of an oversight by counsel, the motion for leave omitted discussion of those factors. However, the State's counsel self-identified this omission to the Board and parties and promptly submitted a supplemental discussion of those factors on February 29. Entergy did not seek an extension to prepare its

¹ *See, e.g.*, Contention NYS-40 at ¶ 1, n. 1; NRC Answer at 7, n. 29; Entergy Answer at 6.

² *Duke Energy Corp.*, (Catawba Nuclear Station, Units 1 and 2), 59 N.R.C. 388, 390 (June 10, 2004); *see also Louisiana Energy Services, L.P.*, (Claiborne Enrichment Center), 45 N.R.C. 99, 109 (March 7, 1997); *Ohio Edison Company* (Perry Nuclear Power Plant, Unit 1), 36 N.R.C. 269 (November 18, 1992). ("Our ruling there thus became the 'law of the case' and, having been provided with no reason that would cause us to change our views here, we adhere to it now.").

³ An unknown systems problem in the NRC Electronic Information Exchange prevented the State from uploading the contention to the EIE server on February 22. After attempting to use the EIE, the State e-mailed the contention and motion for leave to representatives of NRC Staff, Entergy, and the Board on February 22. The State was able upload the February 22 filings to the EIE on February 23.

answer, assert any prejudice to its ability to prepare its answer, or take other action. Moreover, the contention itself contained the necessary information regarding the § 2.309(f)(1) factors.

4. Staff and Entergy's Answers Seek to Re-litigate Old Issues.

The answers repeat arguments similar to those presented by Staff and Entergy back in 2010-2011. The Board previously considered such arguments and rejected them in LBP-10-13 and LBP-11-17. It should do so again here.

The December 2015 DSEIS set out Staff's rationale for not including the cost-beneficial site-specific SAMA modifications as a condition to the requested Indian Point operating licenses or their operation in the period of extended operation, namely that the SAMA modifications did not "relate to adequately managing the effects of aging during the period of extended operation." *See, e.g.*, 2015 DSEIS at 21:34-37. Staff opposes the admission of NYS-40 because it asserts that implementation of a SAMA is not required and the State did not assert that Staff's rationale is inadequate. Staff Answer at 15-29. It also asserts that the resolution of cost-effective site-specific modifications for the Indian Point facilities are beyond the scope of this licensing proceeding. Staff Answer at 25-29. These arguments revisit earlier disputes among the parties.⁴ In short, the Commissioners' resolution of the NEI petition for rulemaking (supported by Entergy and others) in PRM 51-7 defeats Staff's arguments. The Commissioners recognized that renewed operating licenses authorize the operation of the entire facility. PRM 51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001). Other NRC and NEI documents, which emphasize the delineation of cost-effective site-specific severe accident mitigation alternatives, further counter Staff's

⁴ The State previously addressed these points in its March and April 2010 submissions in support of Contentions NYS-35 and NYS-36 and during the oral argument concerning their admission. *See, e.g.*, State of New York Motion for Leave to File New and Amended Contentions (March 11, 2010) (ML100780366) and State of New York's Combined Reply to Entergy and NRC Staff Answers (April 12, 2010) (ML101160415). The State also addressed these points during the summary disposition briefing in early 2011. *See, e.g.*, State of New York's Motion for Summary Disposition (January 14, 2011) (ML110270252).

arguments while also supporting the State's position.⁵ Moreover, NRC regulations require compliance with NEPA and Part 51 and require Staff and the Commission to take steps to avoid and minimize environmental harm from the proposed action or provide a valid explanation why it did not. *See, e.g.*, 10 C.F.R. § 51.103(a)(4).

Conclusion

The State prepared and submitted Contention NYS-40 to protect and preserve its rights concerning cost-effective site-specific SAMA modifications and the Board's previous rulings in favor of the State. After hedging as to whether previous engineering cost calculations were sufficiently final, the 2015 DSEIS indicates that Staff and Entergy now agree that the refined calculations are complete. Entergy and Staff's own cost calculations confirm that there are at least twelve *cost-effective* and *site-specific* modifications for the Indian Point facilities that would benefit surrounding communities. Staff and Entergy's answers reflect their wish to avoid the specific modifications to the Indian Point facilities that will minimize the impacts of a severe accident to nearby citizens and communities. Contention NYS-40 sufficiently asserts that Staff's rationale for refusing to require Entergy to implement those modifications is arbitrary.

⁵ *See* NYS-40 at ¶17 *citing* Severe Accident Mitigation Alternatives (SAMA) Guidance Document ("NEI 05-01(Rev. A)") at 28; NRC Reg. Guide 4.2, Supplement 1 (September 2000) at 4.2-S-50; NRC Standard Review Plan for Environmental Reviews for Nuclear Power Plants - Supplement 1: Operating License Renewal (Oct. 1999) ("Standard Review Plan") at 5.1.1-8 to 5.1.1-9; and NRC Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission NUREG/BR-0058, Revision 4 (September 2004) at 4.

For the above reasons, the State of New York respectfully requests that the Atomic Safety and Licensing Board admit Contention NYS-40.

Respectfully submitted,

Signed (electronically) by

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