

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

September 21, 2012

ORDER

(Order Granting, in part, New York's Motion for Cross Examination)

INTRODUCTION

On August 8, 2012, the State of New York (New York) filed a motion seeking to invoke what it claims to be its statutorily-granted cross-examination rights under Section 274(l) of the Atomic Energy Act (AEA).¹ New York claims that the expansive cross-examination rights conferred upon it as a host state by Section 274(l) of the AEA, 42 U.S.C § 2021(l) (Section 2021(l)) take precedence over the restrictive cross-examination rights allowed pursuant to 10 C.F.R. §§ 2.135(c) and 2.1204(b)(3).² More specifically, New York argues that the 2004 modifications to the NRC's Administrative Procedure Act compliant regulations, which it contends generally restrict the use of cross-examination by most parties, do "not purport to

¹ See State of New York Motion to Implement Statutorily-Granted Cross-Examination Rights Under Atomic Energy Act § 274(l) (Aug. 8, 2012) [hereinafter New York Motion].

² See id. at 14–15, 19.

address the rights preserved to the States in [Section 2021(l)].”³ Thus, New York argues that 10 C.F.R. §§ 2.135(c) and 2.1204(b)(3) do not apply to it as a host state and do not restrict its right to interrogate witnesses.⁴

New York further argues that the language of Section 2021(l), and its legislative history, make it 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 the reactor.”⁵ According to New York, this right to interrogate witnesses at Commission licensing proceedings was conferred to the states by the United States Congress “[i]n exchange for [states] not having the right to regulate certain aspects of nuclear safety of nuclear power plants within their borders”⁶ and guarantees every state “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.”⁷ Moreover, New York contends this cross-examination right—specifically granted by the AEA to states that house nuclear reactors—“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.”⁸ In addition, according to New York, this right “has not been subsequently diminished either by Congress or NRC regulations.”⁹

³ Id. at 14.

⁴ Id. at 15.

⁵ Id. at 1.

⁶ Id. at 7.

⁷ Id. at 10.

⁸ Id. at 10–11.

⁹ Id. at 5.

New York emphasizes that in this proceeding its rights to cross-examination are “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.”¹⁰ New York contends that “[w]ithout in any way diminishing the role the Board plays in conducting cross-examination of witnesses, it is vital to the sovereign interests . . . 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 the proceeding.”¹¹

Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff (Staff) oppose this motion.¹² Entergy argues that “[n]othing in the relevant statutes, regulations, and case law supports—let alone requires—[New York’s] unprecedented and unfair” request for cross examination.¹³ Entergy further argues that Section 2021(l) “does not provide an ‘absolute right [to cross examination],’ as New York insists, but only a ‘reasonable opportunity,’ . . . to cross-examine that is ‘equivalent’ to that set forth in [10 C.F.R. § 2.2104(b)(3)].”¹⁴ According to Entergy, to find otherwise would mean that New York, not the Board, is the “arbiter of whether its own request [for cross examination] is reasonable.”¹⁵ It would also mean that states that

¹⁰ Id. at 10.

¹¹ Id.

¹² See Entergy’s Answer Opposing New York State’s Motion to Cross-Examine (Aug. 20, 2012) [hereinafter Entergy’s Answer]; NRC Staff’s Answer to State of New York’s “Motion to Implement Statutorily-Granted Cross-Examination Rights under Atomic Energy Act § 274(l)” (Aug. 20, 2012) [hereinafter Staff’s Answer].

¹³ Entergy’s Answer at 2.

¹⁴ Id. at 3.

¹⁵ Id. at 5.

house nuclear facilities, like New York, “can cross-examine witnesses indefinitely (and even badger those witnesses) with impunity.”¹⁶

Moreover, Entergy states that New York did not show that “cross-examination is necessary under [10 C.F.R. § 2.2104(b)(3)],” the regulation, according to Entergy, that governs cross examination in this proceeding.¹⁷ At most, Entergy asserts, “New York speculates it is ‘possible’ that it’s ‘cross-examination would be allowed’ under [10 C.F.R. § 2.2104(b)(3)].”¹⁸ This speculation, according to Entergy, does not establish a necessity for New York’s requested cross-examination.¹⁹

Finally, Entergy argues that New York’s motion should be denied as untimely.²⁰ Entergy asserts that “[u]nder 10 C.F.R. § 2.323(a), [a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”²¹ Entergy states that there was no occurrence in the ten days between July 29th and August 8th (the date New York filed its motion seeking cross examination) that triggered the timely filing of this motion.²² Thus, Entergy contends that this motion is untimely.²³

¹⁶ Id. at 8.

¹⁷ Id. at 12.

¹⁸ Id.

¹⁹ See id.

²⁰ Id. at 13.

²¹ Id.

²² Id.

²³ Id. Entergy does acknowledge that the July 12, 2012 Order directs the parties to file motions for cross-examination by August 29, 2012. Id. But Entergy asserts that the July 12, 2012 Order was a clarification of the July 1, 2010 Scheduling Order, and the Scheduling Order, according to Entergy, only sets a deadline for cross-examination motions under 10 C.F.R. § 2.1204(b). Id. at 13 & n.12. Thus, according to Entergy, New York’s present motion for cross examination was not timely filed under the Scheduling Order or the July 12, 2012 Order because it seeks cross examination under Section 2021(l), not 10 C.F.R. § 2.1204(b). Id. at 13.

The Staff argues that in this proceeding New York is not just the State housing Indian Point, but it is also a party to this proceeding.²⁴ Thus, the Staff argues that New York's cross-examination rights are governed by 10 C.F.R. § 2.1204(b)(3), the same regulation that governs the cross-examination rights of all of the parties to this proceeding.²⁵ In support of this argument, the Staff asserts that if Section 2021(l) had "provided a separate cross-examination right to States when they are parties to the proceeding, it is reasonable to expect that the NRC would have codified those additional rights in its regulations—particularly upon adopting clarifying revisions of these regulations in 2004."²⁶ The Commission, however, did not codify such additional rights, and therefore, according to the Staff, "New York, having elected to become a party to the proceeding, cannot take advantage of the opportunities afforded to non-parties by [Section 2021(l)]."²⁷

BOARD DECISION

Whether participating in this proceeding as a host state, an admitted party intervenor, or both, New York must observe the procedural requirements imposed by regulation on all participants to this proceeding,²⁸ and the Board must follow all applicable Commission Regulations. Accordingly, in this proceeding, New York's opportunity to cross-examine witnesses is bound by the same 10 C.F.R. Part 2 regulations that govern all parties to this proceeding. However, that opportunity, as it will be applied in this proceeding, will comply with the Commission's Regulations and provide New York with the reasonable opportunity to interrogate witness which it argues it is guaranteed by Section 2021(l). Thus, it is not necessary

²⁴ See Staff's Answer at 4.

²⁵ Id. at 4–5.

²⁶ Id. at 8.

²⁷ Id. at 9.

²⁸ See Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977).

for the board, in this Order, to address whether and if so to what extent, in some theoretical sense, the right to cross-examination granted to host states by the AEA may be different from those provided to parties under 10 C.F.R. Part 2.

Pursuant to 10 C.F.R. § 2.315(c) representatives of states and other interested governmental bodies shall be afforded the right to interrogate witnesses when, and to the extent that, admitted intervenor parties are permitted to interrogate witnesses. Commission regulations do not recognize a greater right of governmental entities to cross-examine witnesses than that of intervenor parties. Likewise, governmental entities' cross-examination rights are in no way diminished when they are admitted as a party to the proceeding.

Under 10 C.F.R. § 2.1204(b)(1), "[i]n any oral hearing under [Subpart 2], a party may file a motion with the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues. The motion must be accompanied by a cross-examination plan" And pursuant to 10 C.F.R. § 2.1204(b)(3), "[t]he presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision."

In this case, New York did file a motion for cross-examination before the August 29, 2012, deadline for cross-examination motions.²⁹ It also filed proposed examination questions on August 29, 2012,³⁰ which, in the Board's judgment, constituted a reasonable cross-examination plan. Thus, the Board finds that New York complied with 10 C.F.R. § 2.1204(b).

Moreover, the pre-filed testimony and exhibits in this proceeding are voluminous and technical. Thus, the Board has determined that granting New York's request for cross-examination is necessary to ensure development of an adequate record for this proceeding. Accordingly, the Board grants New York's request for cross-examination under 10 C.F.R. §

²⁹ See New York Motion at 20; Licensing Board Order (Memorializing Items Discussed During the July 9, 2012, Status Conference) (July 12, 2012) at 2 (unpublished).

³⁰ The State of New York's Proposed Examination Questions to Entergy and NRC Staff Witnesses on Contentions NYS 5, 6/7, 8, 12C, 16B, 17B, and 37 (Aug 29, 2012).

2.1204(b)(3). During the evidentiary hearing New York may examine witnesses after the Board's examination, so long as New York's questions are relevant, reasonable, and non-repetitive.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 21, 2012

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Order Granting, in part, New York's Motion for Cross Examination)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland
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[Original signed by Nancy Greathead]
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