

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
ENTERGY NUCLEAR INDIAN POINT 2,)	Docket No. 50-247-OLA
LLC, and ENTERGY NUCLEAR)	
OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Unit No. 2;)	
Facility Operating License DPR-26))	

NRC STAFF'S RESPONSE TO RIVERKEEPER, INC.'S AMENDED PETITION
FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARINGINTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to "Amended Petition For Leave To Intervene And Request A Hearing," (Amended Petition) submitted by Riverkeeper, Inc., (Riverkeeper or Petitioner) dated April 30, 2002. For the reasons set forth below, Riverkeeper's petition for intervention and request for a hearing should be denied.

BACKGROUND

On July 13, 2001, Consolidated Edison Company of New York (ConEd)¹, the holder of the operating license for Indian Point Nuclear Generating Unit No. 2 (IP2) applied for a license amendment to make a one-time change to Technical Specification Surveillance Requirement 4.4.A.3 to revise the frequency of the containment integrated leak rate test (ILRT, Type A test) from

¹ The transfer of the IP2 operating license from ConEd to Entergy Nuclear Indian Point 2, LLC/ Entergy Nuclear Operations, Inc. (Entergy), was approved on August 27, 2001. See "In the Matter of Consolidated Edison Company of New York, Inc. (Indian Point Nuclear Generating Unit Nos. 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments," 66 Fed. Reg. 46,034 (2001). The IP2 license was amended to reflect the transfer on September 6, 2001. See "Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations," 66 Fed. Reg. 55,007 (2001).

at least once per 10 years to once per 15 years. The Commission published a notice of proposed no significant hazards consideration determination and opportunity for a hearing on ConEd's license amendment request on August 22, 2001. The notice set September 21, 2001, as the deadline for filing petitions for intervention. See "Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations," 66 Fed. Reg. 44,161 (2001). Neither Petitioner, nor any other member of the public, either filed a request for a hearing or submitted comments on the Staff's proposed no significant hazards determination.

In late March 2002, approximately 6 months after the deadline for filing petitions for intervention, Riverkeeper filed its original petition for leave to intervene.² Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. (Licensee) filed an answer to the petition on April 4, 2002.³ The Staff filed a response on April 16, 2002, objecting to the petition as petitioners had not met the standards for late-filed petitions and had not demonstrated standing.⁴ Riverkeeper served an amended petition on April 30, 2002.⁵

² See "Section 2.714 Petition For Leave To Intervene And Request For A Hearing," dated March 18, 2001 (Petition).

³ See "Entergy Nuclear Indian Point 2, LLC, And Entergy Nuclear Operations, Inc. Answer To Riverkeeper, Inc. Petition For Leave To Intervene And Request For Hearing," dated April 4, 2002.

⁴ See "NRC Staff's Response To Riverkeeper, Inc.'s Petition For Leave To Intervene And Request For A Hearing, dated April 16, 2002 (Staff Response).

⁵ See "Amended Petition For Leave To Intervene And Request A Hearing," dated April 30, 2002 (Amended Petition). The Certificate of Service indicates that the Licensing Board was served via Federal Express and that the Staff, Licensee, and Office of the Secretary were served via U.S. Mail. The Staff actually received this petition on May 7, 2002. The Staff objects to serving the Licensing Board in a different manner than the Staff and Licensee. The Staff further notes that 10 C.F.R. § 2.712 requires that service be made on the Secretary in the same or similar manner as is made on the rest of the parties so that the Secretary will receive the papers at approximately the same time.

DISCUSSION

In its amended petition Riverkeeper continues to allege that it has met the standards for late filed petitions. The factors to be considered when determining whether a late-filed petition should be granted are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). The five factors are:

- (i) Good cause, if any, for failure to file on time;
- (ii) The availability of other means whereby the petitioner's interest will be protected;
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) The extent to which the petitioner's interest will be represented by existing parties;
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). The burden of proof is on the petitioner, and the petitioner is obliged to affirmatively address the five lateness factors in its petition, and to demonstrate that a balancing of the five factors warrants overlooking the petition's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). Further, the Commission can summarily reject a petition which fails to address the five factors or the standing requirements set forth in 10 C.F.R. § 2.714(d)(1). *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Unit 2), CLI-93-11, 37 NRC 251, 255 (1993). As Riverkeeper only amended its response to factors 1 (good cause) and 3 (ability to contribute to the record), only those factors will be addressed in this response⁶.

⁶ The Amended Petition does address all five factors, however three of the factors are (continued...)

A. Riverkeeper Has Not Demonstrated Good Cause For Failure To File On Time.

An intervenor in an NRC licensing proceeding has an affirmative obligation to uncover information in publicly available documentary material. *In the Matter of Duke Power Company, et al.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). The test is not when the Petitioners became aware of the material they seek to introduce. Instead, the test is when the information became available, and when petitioners reasonably should have become aware of the information. "In essence, not only must the petitioner have acted promptly after learning of the new information, but the information itself must be new information, not information already in the public domain." *In the Matter of Texas Utilities Electric Company, et al* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164 (1993).

Riverkeeper claims that the information pertaining to degradation in the containment dome was not publicly available prior to February 2002. Amended Petition at 3. As was demonstrated in the Staff's initial filing, this is simply not true. Staff Response at 4-5. The degradation in the IP2 containment liner was discussed in the NRC Inspection Report in the Spring of 2000. See NRC Integrated Inspection Report 05000247/2000-003 at 9.⁷ An April 2, 2001, letter from Con Edison to the NRC giving the results of the 2000 refueling outage inservice inspection discussed the corrosion in the containment liner.⁸ This letter was specifically cited as a reference to Con Ed's

⁶(...continued)
unchanged from the initial Petition and are therefore not addressed by the Staff in this response.

⁷ The portion of the Inspection Report that discusses the degradation of the containment liner was attached to the Staff's initial response as Exhibit 1. The ADAMS Accession number for the inspection report is ML003715736.

⁸ Letter from Alan Blind, Vice President, ConED to NRC, Subject: *2000 Refueling Outage Inservice Inspection (ISI) Program Summary Report - Second Outage, Second Period, Third Interval*, April 2, 2001. The letter and relevant attachment were attached to the Staff's initial filing as Exhibit 2.

application for a one time extension of the type A ILRT test.⁹ The application was noticed in the *Federal Register* on August 22, 2001. 66 Fed. Reg. 44,161 (2001). In addition, the Staff sent an initial Request for Additional Information (RAI) to the licensee on October 4, 2001, asking how the degraded containment areas have been addressed in the risk assessment.¹⁰ The October 2001 RAI was served on a large number of people who had requested to be on the service list.¹¹

Petitioner claims that ConEd did not even discuss the rust in the dome in its application published in the *Federal Register*. Amended Petition at 4. The *Federal Register* notice is not a verbatim copy of the application. Rather, the notice serves to alert the public to the fact that an application has been submitted, gives the public notice of an opportunity for a hearing on the proposed amendment, gives the public direction as to where to find the application, provides a summary description of the proposed amendment, and sets forth the Staff's proposed no significant hazards determination. It is possible that Petitioner misconstrued the purpose of the *Federal Register* notice. In the instant case, the application specifically referenced an April 2, 2001 letter, which discussed the containment liner degradation. Any interested member of the public could have read the application and its references and known that there was degradation in the containment liner.

⁹ See Letter from James S. Baumstark, Vice President, ConEd, to NRC, Subject: *Indian Point 2 License Amendment Request: Containment Integrated Leakage Rate Testing Frequency*, July 13, 2001 (Application). The ADAMS accession number is ML011980205.

¹⁰ Letter from Patrick Milano, Senior Project Manager, NRC, to Michael Kansler, Vice President Entergy, Subject: *Indian Point Nuclear Generating Unit No. 2 - Request For Additional Information Regarding One-Time Extension Of Containment Integrated Leakage Rate Test Frequency* (TAC No. MB2414), October 4, 2001. The ADAMS accession No. is ML012730014.

¹¹ At least some of the people on the October 2001, RAI service list have some connection to Petitioner. For example, Kyle Rabin was listed on the October 2001 service list as working for Environmental Advocates. At some point prior to February, Mr. Rabin started working for Riverkeeper. The October 2001 RAI was also served on Edward Smeloff of Pace Law School Energy Project. Recently the Energy Project and Riverkeeper released a joint study on Indian Point. See <http://www.riverkeeper.org/new/indianpoint/Resources.html>.

In its amended petition, Riverkeeper argues that without ADAMS accession numbers the information is “virtually hidden, especially to a lay person not familiar with the ADAMS database.” Amended Petition at 3-4. Petitioner attached its ADAMS searches in an attempt to demonstrate that Petitioner had in fact looked for documents and had been unable to find them. Petitioner implies that because it did not easily find the documents in ADAMS, they were somehow not in the public domain. The information regarding the containment liner degradation was, however, in the public domain.

The duty to find publicly available information in a timely manner predates the establishment of the ADAMS database. See *Catawba*, CLI-83-19, 17 NRC at 1048 (1983). The ADAMS database is intended as an aide to the public in obtaining information. Through the ADAMS database, a member of the public can find NRC documents with a computer and internet access making a trip to the public document room unnecessary. Thus a member of the public who is interested in a particular plant can type in the docket number for the plant and access all documents concerning the docket from the convenience of his or her home. Members of the public can also contact the reference librarian at the public document room for help in locating information, or for assistance in using ADAMS. See <http://www.nrc.gov/reading-rm/adams/help-reference.html>.

Information regarding the degradation of the containment liner has been in the public domain since Spring of 2000. The possible connection between the containment liner degradation and the application to delay the Type A test has been available since the time the application was noticed in August, 2001. Petitioners delayed until late March, 2002, to file a petition to intervene. Petitioner’s tardiness in obtaining information that has been in the public domain for 7 months does not constitute “good cause” for late intervention. See *Comanche Peak*, CLI-93-4, 37 NRC 156 at 165 (holding that information that has been in the public domain for 6 months will not constitute good cause for late intervention).

B. Riverkeeper's Participation Will Not Assist In Developing A Sound Record.

When a petitioner addresses its ability to contribute to the record, it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. *In the matter of Washington Public Power Supply System, et al.* (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1177 (1983). This factor assumes even more importance in a case such as this one where the grant or denial of the petition will determine whether there is an adjudicatory hearing. *Id.* at 1180.

The Amended Petition states that Dr. Christian Meyer will testify that corrosion damage may create stress concentrations in the surrounding steel, and has the potential to cause embrittlement in the surrounding steel. Amended Petition at 5. To support this claim Petitioner attaches a letter from Dr. Christian Meyer to Petitioner's counsel. Letter from Christian Meyer, Professor of Civil Engineering, Columbia University, to Karl S. Coplan, Pace Environmental Litigation Clinic, Inc., April 29, 2002, Attachment C to Amended Petition. This letter states, "corrosion damage has also the potential of causing embrittlement of the surrounding sound steel, depending on the specific metallurgical makeup of the steel and corrosion products. *Since I am not a metallurgist, I cannot further characterize the potential consequences of such embrittlement.*" Attachment C to Amended Petition (emphasis added). It is difficult to see how Dr. Meyer will testify to the embrittlement of the sound steel considering that he himself said that he is not a metallurgist and could not characterize this potential embrittlement. Petitioner has failed to demonstrate how the testimony of Dr. Meyer will assist in developing this record and as such this factor weighs strongly against granting Petitioner's inexcusably late petition to intervene.

C. Riverkeeper's Standing to Intervene.

Riverkeeper attempted to cure its standing in its amended petition. In its initial answer the Staff argued that if Riverkeeper was seeking representational standing, it had failed to identify any group member by name and address or to demonstrate that any member had authorized it to

represent that member's interest. Staff Response at 12. Riverkeeper attempted to cure this deficiency by giving the addresses for three members and stating that it is authorized to represent their interests. Amended Petition at 7. The amended petition states that one of its members, Ms. Mechaley, is concerned about the health and safety consequences of a potential release of radiation from IP2. Amended Petition at 7. Mr. and Mrs. Puente, also Riverkeeper members, are concerned about any offsite release. Amended Petition at 7. The amended petition also states that Petitioner can provide affidavits of individual members that have significant concerns. Amended Petition at 7. Riverkeeper, however, should provide affidavits of individual members authorizing Riverkeeper to represent them and stating their particularized injury. See *Power Authority of the State of New York and Entergy Nuclear Fitzpatrick, LLC, Entergy Nuclear Indian Point LLC, and Entergy Nuclear Operations, Inc.* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

CONCLUSION

Petitioner has failed to demonstrate good cause for not timely filing. Moreover Petitioner has failed to demonstrate that the balance of the factors for late-filed petitions has been satisfied. For these reasons the Petition to Intervene should be denied.¹²

Respectfully submitted,

/RA/

Sara E. Brock
Counsel for NRC Staff

Dated at Rockville, Maryland
This 20th day of May, 2002

¹² If the Board determines that the Petition is timely, and that Petitioner has established standing, Petitioner must still propose an admissible contention in order for the Petition to be granted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO RIVERKEEPER, INC.'S AMENDED PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING" in the above-captioned proceeding have been served on the following by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by an asterisk, by deposit in the United States mail, first class, with copies by electronic mail, this 20th day of May, 2002:

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