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

DOCKETED 07/17/02

SERVED 07/17/02

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

ENERGY NUCLEAR INDIAN POINT 2, LLC,
and
ENERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Unit No. 2)

Docket No. 50-247-OLA

ASLBP No. 02-798-01-OLA

July 17, 2002

MEMORANDUM AND ORDER
(Setting Date for Prehearing Conference
and Schedule for Amending Petition and Filing Contentions)

Introduction and Summary. We have before us in this license amendment proceeding the issue of whether to admit a late-filed intervention petition. The petition, submitted by Riverkeeper, Inc., would challenge the pending application of the new operators of Indian Point Nuclear Generating Unit No. 2 (IP2) for a license change that would, in effect, give them a one-time five-year extension of the period within which to conduct the “containment integrated leak rate” test otherwise required every ten years.

Riverkeeper’s petition pointed to the then-recent disclosure in the press of the discovery of rusted areas in the reactor containment building as providing justification both for the petition’s late filing and for the concomitant request for a hearing on the proposed license amendment. In light of the licensee’s and the NRC Staff’s opposition, we hereby set the matter for a prehearing conference in White Plains on Tuesday, August 27, 2002, and direct the parties to take in advance thereof the steps set out herein.

Background. The new owner-operators of Indian Point 2 -- Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. (Entergy) -- inherited an application for a license amendment filed on July 13, 2001, by the previous licensee, Consolidated Edison Company of New York (ConEd).¹ That application sought to revise, on a one-time only basis, the frequency of a mandated test of the reactor containment's leak integrity from once every 10 years to 15 years.² (The most recent test was conducted in June, 1991; NRC rules allow up to a 15-month grace period to conduct each of the series of 10-year tests.)

After conducting its review of the application, the NRC Staff issued a Federal Register notice (66 Fed. Reg. 44161, 44165, August 22, 2001) seeking public comment on its proposal to make a "no significant hazards" determination as to the amendment request. The notice also provided the opportunity for anyone opposed to the amendment "whose interest may be affected" thereby to file within 30 days -- i.e., by September 21, 2001-- a petition to intervene in the proceeding and a request for a hearing.

On March 18, 2002, nearly six months after the deadline for intervening, Riverkeeper filed a "Section 2.714 Petition for Leave to Intervene and Request for a Hearing".³ In due course, the matter was referred to this Board for resolution.⁴

¹ The transfer of the IP2 operating license from ConEd to Entergy was approved on August 27, 2001. See 66 Fed. Reg. 46034. The IP2 license was duly amended on September 6, 2001 to reflect that transfer. 66 Fed. Reg. 55007.

² The so-called "ILRT, Type A Test" was embodied in Technical Specification Surveillance Requirement 4.4.A.3.

³ Although the Notice indicated that the Staff reserved the right to issue the proposed amendment even in advance of the expiration of the 30 days, no such amendment had been issued prior to (or since) the filing of Riverkeeper's Petition. According to its pleadings, the Staff has during this period apparently been investigating the very matters which are the subject of the Petition. See Staff April 16, 2002 Response, p. 5.

⁴ See April 8, 2002, letter from the Commission's Secretary to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, and the April 12, 2002, establishment of this Board. 67 Fed. Reg. 20175 (April 24, 2002)

Both Entergy⁵ and the NRC Staff⁶ filed pleadings arguing the Petition should be denied. In response, and taking advantage of the provision in our Rules allowing petition amendments at any time up to 15 days before the first prehearing conference, Riverkeeper amended its petition on April 30. Notwithstanding the efforts Riverkeeper made therein to bolster its position, the licensee and the NRC Staff continued -- in filings dated May 15 and May 20, respectively -- to oppose the petition.

Next Steps. At this juncture, the issues before us include those related to Riverkeeper's standing and the belatedness of its petition. On both of these, oral argument would be helpful to the Board.

On a related matter, under 10 C.F.R. §2.714(b)(1), intervention cannot be allowed unless a petitioner presents at least one valid contention. Although Riverkeeper's prior pleadings provide some indication of the likely nature of its contention(s), It is now timely under that Rule for that organization to supplement its petition by filing any such contention(s) formally, and we are allowing it until 5:00 PM Monday, August 12, to do so.⁷ Responses from the other parties will be due ten days later, at 5:00 PM Thursday, August 22.⁸

In order to hear oral argument on the legal issues involved and to consider the admissibility of any contention(s) Riverkeeper files, we will hold a prehearing conference on Tuesday, August 27 in the White Plains area. Information as to precise location, time of day

⁵ Entergy's "Answer to Riverkeeper, Inc. Petition for Leave to Intervene and Request for Hearing" was filed on April 4, 2002.

⁶ The Staff's "Response to Riverkeeper, Inc.'s Petition for Leave to Intervene and Request for a Hearing" was filed on April 16, 2002.

⁷ Riverkeeper is to assure that, by whatever means it chooses, its pleadings are in the hands of the other parties by that same time (compare the procedures set out in the Appendix).

⁸ Those parties shall, likewise (see footnote 7), assure that Riverkeeper and the Board have their pleadings in hand by that same time.

and agenda will be available shortly; in any event, the parties should plan to devote at least a half day to the proceeding.

Guidance. Pursuant to 10 C.F.R. § 2.714(a)(3), the petitioner may yet further amend its petition; if it chooses to do so, the amendment shall also be provided to the Board and the other participants no later than 5:00 PM on Monday, August 12. Entergy and Staff responses to the amended petition shall be provided to the Board and the other participants no later than 5:00 PM on Thursday, August 22.

In such an amended petition, Riverkeeper may wish to respond further to the arguments set forth by Entergy and Staff regarding its standing⁹ and the admissibility of its petition under the Section 2.714(a)(1) late-filing criteria. With specific respect to the "good cause" criterion for late-filing, see 10 C.F.R. § 2.714(a)(1)(i), petitioner may respond further as to why the existence of each of the documents cited by Staff and Entergy as having been publicly available well before the petition's March 18, 2002 filing date, was insufficient to inform them of conditions at IP2. By the same token, in their responses the other parties should address why an interested observer would be expected to look behind the indication on page 7 of Attachment 1 to the licensee's July 13, 2001 application that "only minor discrepancies not affecting containment integrity were found" during the outage examinations conducted in 2000.

In presenting its contention(s) and their accompanying bases in its supplemental petition (see p. 3, above), Riverkeeper should pay close attention both to the requirements of Section 2.714(b)(2)(i)-(iii) and to a Licensing Board decision elaborating on the purpose and application of those requirements. See Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 505-08 (2001). In that regard, the manner in which any proposed

⁹ Having previously had the proverbial "second bite at the apple," Petitioner should not expect to receive any further opportunities (beyond that offered herein) to plead and/or to present its asserted standing properly.

contention is presented will be doubly significant in these circumstances, for it will also have a bearing on the Board's determination regarding the late-filing factor dealing with the extent to which petitioner "may reasonably be expected to assist in developing a sound record." See 10 C.F.R. § 2.714(a)(1)(iii); see also the self-expressed limitations contained in the April 29 letter from petitioner's expert, Dr. Christian Meyer.

Format and Service of Pleadings. The parties are referred to the Appendix to this Order for information on these subjects. They are advised to adhere to the requirements set out therein unless ordered otherwise (see footnotes 7 and 8, above).

To recap: a prehearing conference will be held in the vicinity of White Plains, New York, on Tuesday, August 27, 2002, at a time of day and precise location to be announced later. Matters to be considered include (1) the standing of petitioner Riverkeeper; (2) the admissibility of its petition under the Section 2.714(a)(1) standards governing late-filed intervention requests; and (3) the admissibility of any proposed contention(s). Prior to that time, the parties shall submit the additional pleadings called for herein.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Rockville, Maryland
July 17, 2002

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

APPENDIX

Each pleading in this proceeding shall have its filing/service date printed on the top right-hand side of the first page of the submission.

With respect to filing/service of pleadings and other documents, paper copies are currently required by NRC rules (see 10 C.F.R. §§ 2.708, 2.712). The Licensing Board requests the participants additionally to send electronic copies of their filings by e-mail to the other participants, to the Office of the Secretary (Internet address: hearingdocket@nrc.gov), and to the Licensing Board.

To complete service on members of the Licensing Board, then, a party should do both of the following (and accord the other parties similar treatment):

(a) send the filing (which should include the certificate of service) as a file attached to an e-mail message directed to each of the Licensing Board members (Internet addresses: mcf@nrc.gov; rfc1@nrc.gov; and cnk@nrc.gov); and

(b) send paper conforming copies that same date by regular mail, with copies addressed to each Licensing Board member at: Atomic Safety and Licensing Board Panel (ASLBP), U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001. For regular mail service to Board members, the Staff may use the NRC internal mail system (Mail Stop T-3 F23) in lieu of first class mail.

If a party has a pleading it wishes to send by e-mail that includes attachments it is unable to convert to electronic form, it should do one of the following:

(a) if the attachments the party is unable to convert to electronic form are fifteen (15) pages or less, contemporaneous with the transmission of the pleading by e-mail one copy of the attachments should be sent by a separate facsimile transmission (to (301) 415-5599 for all Board members (verification (301) 415-7550)). The e-mail and facsimile transmissions, as well

as the certificate of service, should note that separate transmission modes are being used. The paper conforming copies of the pleading and attachments should be sent to each of the Licensing Board members by regular mail at the address listed above; OR

(b) if the attachments the party is unable to convert to electronic form are more than fifteen (15) pages, the pleading should be sent by e-mail and the paper conforming copy of the pleading with the attachments should be sent to each of the Licensing Board members by express mail or other means that will ensure delivery on the next business day. The e-mail should note that there will be next-day service of the pleading with the attachments.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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ENTERGY NUCLEAR INDIAN POINT 2, LLC) Docket No. 50-247-OLA
AND ENTERGY NUCLEAR OPERATIONS, INC.)
)
(Indian Point Nuclear Generating Station,)
Unit No. 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SETTING DATE FOR PREHEARING CONFERENCE AND SCHEDULE FOR AMENDING PETITION AND FILING CONTENTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-247-OLA
LB MEMORANDUM AND ORDER
(SETTING DATE FOR PREHEARING CONFERENCE
AND SCHEDULE FOR AMENDING PETITION AND
FILING CONTENTIONS)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of July 2002