

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE 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 MOTION TO TERMINATE THE PROCEEDING  
AND REQUEST FOR EXPEDITED CONSIDERATION

INTRODUCTION

In light of Riverkeeper's failure to file any contentions, the Staff of the Nuclear Regulatory Commission (Staff) moves the Atomic Safety and Licensing Board (Board) for an order terminating the proceeding and canceling the prehearing conference currently scheduled for August 27, 2002.

BACKGROUND

On July 13, 2001, Consolidated Edison Company of New York(ConEd)<sup>1</sup>, 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 at least once per 10 years to once per 15 years.<sup>2</sup> The Commission published a notice of proposed no significant hazards consideration determination and opportunity for hearing on ConEd's license

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<sup>1</sup>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. 66 FR 46034. The IP2 license was amended to reflect the transfer on September 6, 2001. 66 FR 55007.

<sup>2</sup>The Staff granted the amendment on August 5<sup>th</sup>, 2002. See Letter from NRC Staff Counsel to Administrative Judges, dated August 5, 2002.

amendment request on August 22, 2001. The notice set September 21, 2001, as the deadline for filing petitions for intervention. See 66 Fed. Reg. 44,161 (2001). Neither Riverkeeper Inc. (Riverkeeper) 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.

On March 18, 2002, approximately 6 months after the deadline for filing petitions for intervention, Riverkeeper filed its original petition.<sup>3</sup> Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Operations, Inc. (Licensee) filed an answer to the petition on April 4, 2002.<sup>4</sup> 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.<sup>5</sup>

Riverkeeper served an amended petition on April 30, 2002.<sup>6</sup> The amended petition did not include contentions. The Licensee responded to the amended petition on May 15, 2002.<sup>7</sup> The Staff responded on May 20, 2002.<sup>8</sup> On July 17, 2002 the Licensing Board issued a memorandum and order setting a date for a prehearing conference and setting a schedule for amending the

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<sup>3</sup>See "Section 2.714 Petition For Leave To Intervene And Request For A Hearing" dated March 18, 2001.

<sup>4</sup>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.

<sup>5</sup>See "NRC Staff's Response To Riverkeeper, Inc.'s Petition For Leave To Intervene And Request For A Hearing," dated April 16, 2002.

<sup>6</sup>See "Amended Petition For Leave To Intervene And Request A Hearing," dated April 30, 2002. (Amended Petition).

<sup>7</sup>See "Entergy Nuclear Indian Point 2, LLC And Entergy Nuclear Operations, Inc. Answer To Riverkeeper, Inc. Amended Petition For Leave To Intervene And Request For A Hearing," dated May 15, 2002. (Entergy's Second Answer).

<sup>8</sup>See "NRC Staff's Response To Riverkeeper, Inc.'s Amended Petition For Leave To Intervene And Request For A Hearing," dated May 20, 2002. (Staff's Second Response).

petition and filing contentions.<sup>9</sup> The Board Order stated that Riverkeeper needed to file contentions and gave it until 5:00 PM Monday, August 12 to do so. See Board Order at 3. On August 13, 2002, one day after the deadline for filing contentions, Riverkeeper submitted a letter to the Licensing Board Chairman stating that it was not filing a supplemental petition to intervene, and stating that it believed it had already set forth contentions in its Amended Petition to Intervene.<sup>10</sup>

#### DISCUSSION

Not later than fifteen days prior to the holding of the prehearing conference, a petitioner must file a supplement to the petition to intervene that includes a list of the contentions which the petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that contains an admissible contention will not be permitted to participate as a party.

10 C.F.R. § 2.714(b)(1). The Board Order specifically acknowledged this requirement, stating:

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."

Board Order at 3.

In its letter of August 13, 2002, Riverkeeper stated its belief that the Amended Petition to Intervene adequately set forth Riverkeeper's proposed contentions despite the fact that the Board Order specifically instructed Riverkeeper to file proposed contentions. Although the Board Order noted that Riverkeeper's prior pleadings had indicated the likely nature of its contentions, it required Riverkeeper to file contentions formally. Not only did the Board Order direct Riverkeeper to file contentions, it also told them to "pay close attention both to the requirements of

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<sup>9</sup>See "Memorandum And Order (Setting Date for Prehearing Conference and Schedule for Amending Petition and Filing Contentions)," (Board Order) dated July 17, 2002.

<sup>10</sup>See "August 13, 2002 Letter Karl S. Coplan to Judge Farrar," dated August 13, 2002.

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, 505-508 (2001).” Board Order at 4. Riverkeeper’s blatant disregard of the Board Order and failure to file contentions should cause the Board to terminate this proceeding. Moreover, Riverkeeper has failed to present any contentions, either in its letter or its Amended Petition. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, each contention must include a brief explanation of the bases of the contention; a concise statement of the alleged facts or expert opinion which support the contention and sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2). The burden of coming forward with admissible contentions is on the proponent. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998). A contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions. *Id.* It is not sufficient to show up on the Commission’s doorstep with generalized complaints about a proposed facility or action. Instead complaints must be stated with great specificity, a basis for them must be put forward, and one who wishes to participate in the proceeding must go so far as to describe in general terms the nature of the evidence that will be put forward. See *PFS*, LBP-01-39, 54 NRC 497 at 507. The requirement for detailed pleadings puts other parties on notice of the Petitioner’s specific grievances and thus gives them a good idea of the claims they will either be supporting or opposing. *Id.* at 506. While the pleading requirements set out in 10 C.F.R. § 2.714 do not preclude a party from filing contentions in the original petition, when a pleading does not label contentions and the pleading is not organized in such a way that it is obvious that it includes contentions the

Board need not consider such a petition as setting forth contentions. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993).<sup>11</sup>

Riverkeeper's letter states that it will rely on the contentions outlined in its amended petition and quotes its amended petition stating in part.... "Dr. Meyer opines that the significance of the corrosion damage, even if only of a limited extent, can impair the integrity of the liner..... It may create stress concentrations in the surrounding steel, and has the potential to cause the embrittlement of the surrounding steel."<sup>12</sup> Coplan August 13 letter at 1. This statement cannot possibly be considered a contention. It does not give a specific statement of the issue of law or fact Riverkeeper wishes to litigate. It does not give a bases for the statement. It does not give a concise statement of the expert opinion which supports the contention and sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. As an additional matter, it was not filed by the 5:00 PM Monday deadline for filing contentions.

There were no contentions identified in the amended petition, or anything that remotely resembled an attempt to proffer a contention. In accordance with *Rancho Seco* the Board need not consider the Amended Petition as containing contentions. *Rancho Seco*, CLI-93-3, 37 NRC 135 at 142.

The purpose of the prehearing conference is to determine the standing of Riverkeeper, the admissibility of the petition under the Section 2.714(a)(1) standards governing late-filed intervention

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<sup>11</sup>It is worth noting that the Commission stated in the *Rancho Seco* case, "To the extent that we have decided this appeal without resolving the petitioner's standing as a matter of law, we rest our decision on our discretionary authority to hold hearings and to permit participation in our proceedings. We do so in view of the unusual circumstances presented by this case. Our decision should not be viewed as precedent for any other matter that may come before the Commission." *Rancho Seco*, CLI-93-3, 37 NRC 135 at 142. The Staff takes the statement on precedent to refer only to the standing portion of the opinion, a matter not at issue here.

<sup>12</sup>As previously noted by the Board, the Staff, and the Licensee, Dr. Meyer has already stated that he is not a metallurgist and cannot characterize the consequences of embrittlement. See Attachment C to Amended Petition; Board Order at 5; Entergy's Second Answer at 6-7; Staff's Second Response at 7.

requests, and the admissibility of any proposed contention(s). Board Order at 5. As a petitioner cannot be a party without filing contentions there is no reason to proceed to the prehearing conference when Riverkeeper has failed to file any contentions.

The Staff respectfully requests that the Board consider this motion under expedited procedures so as to save the parties' resources by avoiding an unnecessary prehearing conference.

CONCLUSION

In light of Riverkeeper's failure to file any contentions, the Staff moves the Board for an order terminating the proceeding and canceling the prehearing conference currently scheduled for August 27, 2002.

Respectfully Submitted

***/RA/***  
Sara E. Brock  
Counsel for NRC Staff

Dated at Rockville, MD  
this 14<sup>th</sup> day of August, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO TERMINATE THE PROCEEDING AND REQUEST FOR EXPEDITED CONSIDERATION" 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 14<sup>th</sup> day of August, 2002:

Michael C. Farrar, Chair  
Atomic Safety and Licensing Board  
Mail Stop: T 3F-23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail copy to [mcf@nrc.gov](mailto:mcf@nrc.gov))

Office of the Secretary  
ATTN: Rulemaking and Adjudications Staff  
Mail Stop: O 16C-1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail copy to  
[HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov).)

Dr. Richard F. Cole  
Atomic Safety and Licensing Board  
Mail Stop: T 3F-23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail copy to [rfc1@nrc.gov](mailto:rfc1@nrc.gov))

Office of the Commission Appellate  
Adjudication  
Mail Stop: O 16C-1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Dr. Charles N. Kelber  
Atomic Safety and Licensing Board  
Mail Stop: T 3F-23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
(E-mail copy to [cnk@nrc.gov](mailto:cnk@nrc.gov))

John M. Fulton, Esq.\*  
Assistant General Counsel  
Entergy Nuclear Operations, Inc.  
440 Hamilton Avenue  
White Plains, NY 10601  
(E-mail copy to [jfulton@entergy.com](mailto:jfulton@entergy.com))

Adjudicatory File  
Atomic Safety and Licensing Board Panel  
Mail Stop: T 3F-23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Karl S. Coplan, Esq.\*  
Michelle B. Moore, Legal Intern  
Pace Environmental Litigation Clinic, Inc.  
Counsel for Riverkeeper, Inc.  
Pace University School of Law  
78 North Broadway  
White Plains, N.Y. 10603  
(E-mail copy to [kcoplan@law.pace.edu](mailto:kcoplan@law.pace.edu);  
[mmoore1@law.pace.edu](mailto:mmoore1@law.pace.edu))

J. Michael McGarry III, Esq.\*  
Kathryn M. Sutton, Esq.  
Brooke D. Poole  
Counsel for Entergy Nuclear Indian Point 2,  
LLC and Entergy Nuclear Operations, Inc.  
Winston & Strawn  
1400 L Street, N.W.  
Washington, DC 20005  
(E-mail copy to [jmcgarry@winston.com](mailto:jmcgarry@winston.com);  
[ksutton@winston.com](mailto:ksutton@winston.com);  
[bpooles@winston.com](mailto:bpooles@winston.com))

***/RA/***

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Sara E. Brock  
Counsel for NRC Staff