

November 28, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC) Docket Nos. 50-247/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S RESPONSE TO THE SECOND REQUEST
OF WCAN, CAN, RCCA, PHASE, AND THE SIERRA CLUB,
FOR AN EXTENSION OF TIME IN WHICH TO FILE
PETITIONS FOR LEAVE TO INTERVENE IN THIS PROCEEDING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission Staff ("NRC Staff") hereby files its response to the second request for an extension of time in which to file petitions for leave to intervene in this proceeding, filed by Westchester Citizen's Awareness Network ("WCAN"), Citizen's Awareness Network ("CAN"), Rockland County Conservation Association ("RCCA"), Public Health and Sustainable Energy ("PHASE"), and the Sierra Club – Atlantic Chapter ("Sierra Club"), on November 27, 2007 ("Second Request").¹ For the reasons set forth below, the NRC Staff does not oppose this request, limited to a 10-day extension of time solely for the requesting entities. In all other respects, the Staff opposes the Second Request and recommends that such other aspects of the Second Request be denied.

DISCUSSION

By letter dated April 23, 2007, Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") submitted an application for the renewal of the operating licenses for Indian Point Nuclear

¹ See Letter from Susan Shapiro, Esq. to NRC Chairman [Dale] Klein and [Licensing Board] Chairman Lawrence G. McDade, dated November 27, 2007.

Generating Unit Nos. 2 and 3 ("LRA" or "Application").² On May 11, 2007, the NRC published a notice of receipt of the Indian Point LRA,³ and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity to request a hearing on the LRA.⁴

Consistent with 10 C.F.R. § 2.309(b)(3)(i), the *Federal Register* Notice provided a 60-day period for the filing of hearing requests and petitions for leave to intervene, so that any such requests or petitions were initially due to be filed on or before October 1, 2007. By Order dated September 25, 2007, the Commission extended the period for filing hearing requests and petitions to intervene in the Indian Point LRA proceeding, so that requests for hearing or petitions for leave to intervene on the LRA are due to be filed by November 30, 2007.⁵

On November 7, 2007, Friends United for Sustainable Energy ("FUSE") filed a request for extension of time in which to file a petition for leave to intervene, based on various assertions, including the fact that the NRC's Agencywide Documents Access and Management System ("ADAMS") was inaccessible to FUSE on many occasions for a period of several weeks, and it had not yet been able to obtain certain documents which it had requested from the NRC

² Letter from Fred Dacimo, Site Vice President (Entergy) to NRC Document Control Desk, dated April 23, 2007.

³ Entergy Nuclear Operations, Inc., "Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 26,850 (May 11, 2007).

⁴ Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁵ Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; "Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period; Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding," 72 Fed. Reg. 55,834 (Oct. 1, 2007).

and the U.S. Department of Energy (“DOE”) through the Freedom of Information Act (“FOIA”) and otherwise.

By Order dated November 16, 2007, the Commission granted FUSE a 10-day extension of time, permitting FUSE to file a petition for leave to intervene in this proceeding on or before December 10, 2007. In doing so, the Commission granted FUSE’s request to the extent that it was based on the unavailability of ADAMS; but it denied FUSE’s request to the extent that it was based on other reasons, and it denied FUSE’s request for an extension of time greater than 10 days.⁶ Further, the Commission directed the Secretary to refer any future requests for extensions of time in this proceeding to the Licensing Board (November 16 Order, at 1).

On November 21, 2007, Susan Shapiro -- the attorney who had previously filed FUSE’s extension request⁷ -- filed two requests for an extension of time in which to file petitions for leave to intervene, this time on behalf of (a) WCAN, CAN, RCCA and PHASE,⁸ and (b) the Sierra Club.⁹ On November 23, 2007, a separate request for an extension of time was filed by Manna Jo Greene on behalf of Hudson River Sloop Clearwater, Inc. (“Clearwater”).¹⁰

⁶ FUSE had requested an extension of time until 60 days after it receives all of the documents it had requested. In denying FUSE’s request for an extension of time until 60 days after it has received all of the documents it requested, the Commission explained, “the Commission has procedures in place that allow for late-filed contentions based on new information, if the appropriate standards are met. See 10 C.F.R. § 2.309(c).” November 16 Order, at 1.

⁷ On November 21, 2007, the same day she filed her initial requests for an extension of time on behalf of WCAN, CAN, RCCA, PHASE, and the Sierra Club, Ms. Shapiro filed a letter informing the Commission that she has terminated her representation of FUSE.

⁸ See Letter from Susan Shapiro, Esq. to NRC Chairman [Dale] Klein and [Licensing Board] Chairman Lawrence G. McDade, dated November 21, 2007 (“PHASE Request”).

⁹ See Letter from Susan Shapiro, Esq. to NRC Chairman [Dale] Klein and [Licensing Board] Chairman Lawrence G. McDade, dated November 21, 2007 (“Sierra Club Request”).

¹⁰ See Letter from Manna Jo Greene to the Atomic Safety and Licensing Board, dated November 23, 2007 (“Clearwater Request”).

On November 27, 2007, the Licensing Board issued two Orders: In the first Order, it granted Clearwater's request for an extension of time;¹¹ in the second, it denied the extension requests which Ms. Shapiro had filed on behalf of WCAN, CAN, RCCA, PHASE, and the Sierra Club,¹² due to Ms. Shapiro's failure to follow the Commission's rules governing the filing and service of documents. Shapiro Extension Order at 2-4. Nonetheless, the Licensing Board issued its denial "without prejudice," affording WCAN, CAN, RCCA, PHASE and the Sierra Club an opportunity to file "a new motion which complies with 10 C.F.R. §§ 2.302 and 2.323 as well as other applicable regulations." *Id.* at 4.

On November 27, 2007, approximately one hour after the Licensing Board's Law Clerk transmitted the Shapiro Extension Order by E-mail to Ms. Shapiro and other persons on the Board's service list,¹³ Ms. Shapiro transmitted a second request for extension of time on behalf of WCAN, CAN, RCCA, PHASE, and the Sierra Club, to the Licensing Board, Counsel for the Staff, Counsel for the Applicant, and other representatives in this proceeding.¹⁴

Staff Position on the Extension Request

In light of the Commission's Order of November 16, affording FUSE a 10-day extension of time for the filing of a petition for leave to intervene due to the unavailability of ADAMS, it would appear equitable to afford other organizations who request an extension of time based on

¹¹ "Order (Granting an Extension of Time to Clearwater Within Which to File Requests for Hearing," dated November 27, 2007.

¹² "Order (Denying an Extension of Time Within Which to File Requests for Hearing)," dated November 27, 2007 ("Shapiro Extension Order").

¹³ The Licensing Board's Law Clerk transmitted the Shapiro Order to Ms. Shapiro, Counsel for the Applicant, Counsel for the Staff, and other representatives, by E-mail at 2:48 PM. Ms. Shapiro then sent an E-mail message attaching her Second Request, at 3:52 PM; at 4:03 PM, she sent a further E-mail message, transmitting what may (or may not) be a re-transmission of the same request.

¹⁴ See Letter from Susan Shapiro, Esq. to NRC Chairman [Dale] Klein and [Licensing Board] Chairman Lawrence G. McDade, dated November 27, 2007 ("Second Request").

the unavailability of ADAMS the same 10-day extension of time that the Commission granted to FUSE. Accordingly, the Staff does not oppose the grant of a 10-day extension of time for the filing of petitions by WCAN, CAN, RCCA, PHASE, and the Sierra Club, insofar as they allege that they have been hindered in their preparation of petitions for leave to intervene due to the inaccessibility of ADAMS. However, the Staff opposes the pending request for an extension to the extent that it (a) seeks a greater extension of time than the Commission had afforded to FUSE, (b) is based upon circumstances other than the unavailability of ADAMS, and (c) seeks a blanket extension of time for all potential intervenors.

Specifically, the Staff opposes these organizations' second request for an extension of time, insofar as their Second Request is based on the requestors' inability to obtain documents through FOIA requests or otherwise¹⁵ – *i.e.*, the same circumstances which the Commission deemed to be insufficient to support FUSE's request, in its Order of November 16, 2007. In addition, the Staff opposes the Second Request to the extent that the requestors seek an extension of time beyond the 10-day extension which was afforded to FUSE in the Commission's Order of November 16, 2007.¹⁶ In this regard, the Commission has already denied FUSE's request for an extension of more than 10 days, based on the same considerations as are presented by Ms. Shapiro on behalf of her new clients; and she has failed to demonstrate any reason to believe that the grant of a longer extension of time would now be warranted.

Finally, the Staff opposes the Second Request to the extent that the requestors seek an extension of time for any persons other than the five organizations named as requestors

¹⁵ See Sierra Club and PHASE Requests, at [unnumbered] 1-4, 7-9.

¹⁶ See Sierra Club Request at [unnumbered] 8-9; PHASE Request at [unnumbered] 9.

therein.¹⁷ In this regard, WCAN, CAN, RCCA, PHASE, and the Sierra Club have not shown that they are authorized to represent any person¹⁸ other than themselves, nor has Ms. Shapiro alleged or shown that she has been retained to represent any persons other than the named organizations in this proceeding. Further, any other persons who may find that they need an extension of time to file a petition for leave to intervene due to the unavailability of ADAMS may file their own requests for an extension, if they choose to do so. Moreover, the Commission could have, but did not, issue a blanket extension of time for all potential intervenors – notwithstanding the fact that FUSE had also included such other persons in its request¹⁹ -- nor has the Commission authorized the Licensing Board to issue a blanket extension of time for the filing of petitions to intervene in this proceeding.

Other Procedural Matters

Although, as a matter of equity, the Staff does not oppose the granting of the Second Request filed by Ms. Shapiro on behalf of WCAN, CAN, RCCA, PHASE, and the Sierra Club, we note that the Second Request does not comply fully with the Licensing Board's Order of November 27, 2007. In this regard, while Ms. Shapiro's Second Request satisfies the Licensing

¹⁷ See Second Request at [unnumbered] 1 ("the undersigned stakeholders, citizen Stakeholders and other interested parties").

¹⁸ In accordance with the Commission's Rules of Practice, "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated in the hearing." 10 C.F.R. § 2.309(a). A "person" is defined as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission . . . ; any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity, and (2) any legal successor, representative, agent, or agency of the foregoing." 10 C.F.R. § 2.4

¹⁹ See (1) Letter from Susan Shapiro, *et al.*, to NRC Chairman [Dale] Klein and Licensing Board] Chairman Lawrence G. McDade, dated November 7, 2007 at [unnumbered] 1 ("citizen Stakeholders and other interested parties"), and 10 ("all Intervenors"); and (2) Letter from Sherwood Martinelli to NRC Chairman [Dale] Klein, dated November 7, 2007, at [unnumbered] 1 ("citizen Stakeholders and other interested parties"), and 7 ("all Intervenors").

Board's instruction that "all pleadings must be accompanied by a Proof of Service" (Shapiro Extension Order at 2), her service list is incomplete;²⁰ and she has disregarded the Board's further specific instruction that a movant must comply with the requirements of 10 C.F.R. § 2.323(b). *Id.*, at 3. As the Board observed, under that rule, "a motion must be rejected if it does not include a certification by the attorney . . . of the moving party that the movant has made a sincere effort to contact other parties to the proceeding and resolve the issue(s) raised in the motion." *Id.* at 3, n.9; emphasis added. The Second Request fails to include any certification that Ms. Shapiro contacted the other parties before filing the Second Request as required, nor, to our knowledge, has she done so.²¹

Further, the Staff notes that Ms. Shapiro's Second Request restates many (if not all) of the arguments that she made in her request for an extension of time filed on behalf of FUSE, entirely disregarding the fact that the Commission has already considered and rejected those arguments. This apparent disregard of previous rulings in the proceeding imposes an improper burden on other parties and the Licensing Board, who must then review the adjudicatory record in order properly to address the matters raised in her filings. Such disregard of prior rulings is altogether improper and, if continued, could result in incomplete or incorrect responses by other parties and incorrect rulings by the Licensing Board, leading to confusion and disarray, and causing potential problems on appeal.

²⁰ The certificate of service filed by Ms. Shapiro fails to indicate that service was made as required upon the Office of the Secretary and members of the Licensing Board; and it states an incomplete address for Staff Counsel (omitting the city, state and zipcode). Of course, even if the certificate was complete and correct, filing a certificate or proof of service is no substitute for making the service alleged therein. It remains to be seen whether the filing and service required by 10 C.F.R. §§ 2.304(f) and 2.305(c) has been made as stated in the certificate.

²¹ At approximately 10:15 this morning – having filed the Second Request the day before -- Ms. Shapiro contacted the undersigned attorney and inquired whether the Staff would oppose a 10-day extension for her clients. Staff Counsel indicated that the Staff would not oppose that extension, in principle.

Finally, Ms. Shapiro has improperly filed, by E-mail, what appear to be (but in fact, may not be) duplicate copies of the same pleading: Thus, she transmitted the Second Request in an E-mail message at 3:52 PM; and then transmitted that request (or some version of it) again, at 4:03 PM. Such repeated filings of the same (or similar) pleadings places an unfair burden on other parties and the Board, who can only guess at whether their efforts to address one pleading will fully and correctly address the second version thereof. If continued, Ms. Shapiro's practice could result in incomplete or incorrect responses by other parties and incorrect rulings in the proceeding, causing additional confusion, disarray, and complications on appeal. This practice must end.²²

CONCLUSION

For the reasons set forth above, the NRC Staff does not oppose the second request for an extension of time filed by WCAN, CAN, RCCA, PHASE, and the Sierra Club, for the filing of petitions to intervene in this proceeding, if limited to a 10-day period. The Staff respectfully submits, however, that the Second Request should be denied to the extent that it seeks an

²² Ms. Shapiro filed at least two versions of a petition for leave to intervene on behalf of FUSE, on or about September 21 and October 3, 2007, and FUSE then filed a further (similar but not identical) version of that petition on or about November 14, 2007. On November 21, 2007, the Applicant filed a motion to strike those pleadings, without prejudice, suggesting that FUSE be permitted to file a single, final, petition for leave to intervene by December 10, 2007. The Staff plans to file a response in support of that motion shortly.

extension of time for anyone other than the five organizations named therein or for a period beyond the 10-day extension which was afforded to FUSE.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of November 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF'S RESPONSE TO THE SECOND REQUEST OF WCAN, CAN, RCCA, PHASE, AND THE SIERRA CLUB, FOR AN EXTENSION OF TIME IN WHICH TO FILE PETITIONS FOR LEAVE TO INTERVENE IN THIS PROCEEDING, dated November 28, 2007, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 28th day of November, 2007:

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