

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

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Kaye D. Lathrop  
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

December 18, 2008

**MEMORANDUM AND ORDER**

(Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G)

**A. Parties' Positions**

On August 21, 2008, the State of New York ("New York"), Riverkeeper, Inc. ("Riverkeeper"), and Hudson River Sloop Clearwater ("Clearwater"), submitted responses to an Order<sup>1</sup> which directed that they articulate preferences for the hearing procedures to be used in this proceeding.<sup>2</sup> Those parties were also asked to explain why the requested hearing procedure would be appropriate for each admitted contention. Entergy and the NRC Staff submitted answers to the parties' responses on September 15, 2008.<sup>3</sup>

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<sup>1</sup> Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 67 NRC \_\_, \_\_ (slip op. at 227) (July 31, 2008).

<sup>2</sup> The State of New York's Response to the Board's Question Concerning Hearing Procedures and Motion that the Board Apply Subpart "G" Discovery Procedures to Certain Admitted Contentions (Aug. 21, 2008) [hereinafter NYS Response]; Riverkeeper, Inc.'s Request to the Atomic Safety and Licensing Board Regarding the Use of Subpart G and L Hearing Procedures for Admitted Contentions (Aug. 21, 2008) [hereinafter Riverkeeper Response]; Hudson River Sloop Clearwater, Inc.'s Response to the Board's Request Concerning Discovery (Aug. 21, 2008) [Clearwater Response].

<sup>3</sup> Applicant's Answer to Intervenors' Requests for the Application of Subpart G Procedures to Certain Admitted Contentions (Sept. 15, 2008) [hereinafter Entergy Answer];

The parties describe fundamentally different schemes governing the choice of hearing procedures under NRC Regulations. New York, supported by Riverkeeper,<sup>4</sup> argues that the regulations create a two-step process (10 C.F.R. § 2.309(g)), in which a party must initially “demonstrate that it is reasonable to anticipate that the use of one or more Subpart G procedures will be required for certain contentions.”<sup>5</sup> Then, after the Board accepts that analysis, the party seeking to use a particular Subpart G procedure would be required to justify the use of specific procedures on a contention by contention basis.<sup>6</sup> New York asserts that this functional test is drawn from the Administrative Procedure Act.

New York also suggests that 10 C.F.R. § 2.310(d) provides an alternative method for a party to justify the use of Subpart G procedures relevant to the use of cross-examination but not relevant to whether the Board would approve requests for admissions, interrogatories, depositions, or document production.<sup>7</sup> New York asserts that under 10 C.F.R. § 2.310(a), a Board is not required to use Subpart L in any relicensing proceedings but may do so unless the Board finds that the standard in Section 2.310(d) has been met. However, according to New York, if a party meets the provisions of Section 2.309(g) for use of Subpart G procedures, then the Board would have no authority to proceed under Subpart L (10 C.F.R. § 2.310(a)).<sup>8</sup>

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NRC Staff’s Response to “The State of New York’s Response to the Board’s Question Concerning Hearing Procedures and Motion that the Board Apply Subpart ‘G’ Discovery Procedures to Certain Admitted Contentions” (Sept. 15, 2008) [hereinafter NRC Staff NYS Answer]; NRC Staff’s Response to Riverkeeper’s Request for Subpart G Hearing Process (Sept. 15, 2008) [hereinafter NRC Staff Riverkeeper Answer].

<sup>4</sup> Riverkeeper Response at 2.

<sup>5</sup> NYS Response at 5.

<sup>6</sup> Id.

<sup>7</sup> NYS Response at 7.

<sup>8</sup> Id. at 8.

New York asserts that the proper reading of 10 C.F.R. § 2.310(d) establishes three separate standards that can be read disjunctively or conjunctively. Thus, in its reading, a Subpart G proceeding will be granted if the Board finds that resolution of the contention, “[1] necessitated resolution of issues of material fact relating to the occurrence of a past activity, [2] where the credibility of an eyewitness may reasonably be expected to be at issues, and/or [3] issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.”<sup>9</sup> New York asserts that the language of the regulation is clear and that, under the rules of statutory construction, “when a statute’s language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.”<sup>10</sup> New York adds that the Commission has emphasized “that the provisions of Part 2 are ‘strict by design’ and are to be strictly construed, there is no authority to tinker with the words of the regulations.”<sup>11</sup>

In addition, New York argues that Subpart G procedures will “shorten the hearing by discovering and clarifying facts and pinning down the position of the parties” thereby making the process more efficient.<sup>12</sup> New York believes that such discovery procedures will help “ascertain precisely what actions Entergy is committed to taking to meet its obligations under Part 54.”<sup>13</sup> It asserts that pre-trial practices, such as depositions, allow for the discovery to occur before the

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<sup>9</sup> Id. (brackets added by New York).

<sup>10</sup> Id. at 9 (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 1530 U.S. 1 (2000); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)).

<sup>11</sup> Id. at 10.

<sup>12</sup> Id. at 13.

<sup>13</sup> Id. at 19.

hearing, and the hearing can then focus on “cross-examining the witnesses based upon the already established facts, not uncovering the facts.”<sup>14</sup>

New York further submits that it is too early in the proceeding – before witness lists have been produced – to request authorization for cross-examination but seeks to reserve the right to return to the Board at a later point to request authorization for specific discovery procedures or cross-examination. New York also notes that the Atomic Energy Act “grants the states, but not other entities, a right to present evidence, interrogate witness, and advise the Commission about federally licensed atomic energy activities that take place within a state.”<sup>15</sup>

Entergy and the NRC Staff take a fundamentally different approach to the regulatory framework underlying the choice of hearing procedures. Focusing on the regulatory history behind the substantial amendments to 10 C.F.R. Part 2 by the NRC in January, 2004, both the NRC Staff and Entergy argue separately that Subpart G hearings for power reactor licensing proceedings are only warranted under the two circumstances mentioned in 10 C.F.R. § 2.310(d): (1) where the contention involves an issue of material fact concerning a past activity and the credibility of an eyewitness may reasonably be expected to be at issue, or (2) the motive or intent of a party or eyewitness is material to the resolution of the contested matter.<sup>16</sup> According to Entergy and the NRC Staff, the regulatory history supporting this claim is clear and conclusive.<sup>17</sup> The NRC Staff and Entergy assert that New York has failed to show that any of their contentions fit into either of the circumstances laid out in 10 C.F.R. § 2.310(d).<sup>18</sup> Both

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<sup>14</sup> Id.

<sup>15</sup> Id. at 31 (citations omitted).

<sup>16</sup> Entergy Answer at 5; NRC Staff NYS Answer at 7.

<sup>17</sup> See Entergy Answer at 6-7; See NRC Staff NYS Answer at 8.

<sup>18</sup> Entergy Answer at 7; NRC Staff NYS Answer at 10.

Entergy and the NRC Staff disagree with New York's assertion that 10 C.F.R. § 2.310 merely addresses the use of cross-examination at the hearing; instead, they argue that it deals with both discovery and hearing procedures.<sup>19</sup> Additionally, both argue that contrary to the argument made by New York, the use of the Subpart G procedures would fail to make the proceedings more efficient.<sup>20</sup>

In addition to the above, the parties discuss Subpart G procedures in the context of specific contentions. New York contends that eight of its eleven contentions involve "a complexity and breadth of issues [that] warrant application of Subpart G at least for discovery procedures."<sup>21</sup> Riverkeeper, whose Contention TC-1/TC-1A has been consolidated with NYS Contention 26/26A, supports and incorporates by reference New York's response on that contention.<sup>22</sup> Riverkeeper also asserts that Subpart G procedures should be used for all of its contentions.<sup>23</sup> Clearwater, whose Contention EC-1 has been consolidated with Riverkeeper's Contention EC-3, authorizes Riverkeeper to serve as the lead party for this contention.<sup>24</sup> For Clearwater Contention EC-3, Clearwater states that Subpart L is appropriate, but seeks to reserve the right to move for Subpart G procedures at a later point.<sup>25</sup> Entergy and the NRC

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<sup>19</sup> See Entergy Answer at 11-13; See NRC Staff NYS Answer at 16-17.

<sup>20</sup> See Entergy Answer at 22-26; See NRC Staff NYS Answer at 16-17.

<sup>21</sup> NYS Response at 2.

<sup>22</sup> Riverkeeper Response at 2.

<sup>23</sup> Id. at 3.

<sup>24</sup> Clearwater Response at 1.

<sup>25</sup> Id. at 1-2.

Staff each argue that the Intervenors have not justified the use of Subpart G procedures.<sup>26</sup>

Below is a short summary of parties' reasoning behind each of the Subpart G contentions.

**1. NYS Contentions 5, 6, and 7 (AMPs for Buried Pipes and Cables)**

According to New York, these contentions require “a full identification, by location, design, function and accessibility of all the buried pipes, tanks, and transfer canals that contain radioactive fluid and relevant inaccessible electrical cables which meet 10 C.F.R. § 54.4(a) criteria.”<sup>27</sup> New York argues that it must receive extensive information on each component in order to determine whether Entergy’s plan will be effective. New York asserts that if there was an ascertainable Current Licensing Basis (CLB), the document production under 10 C.F.R. § 2.336 could suffice, but it doubts that the CLB is in fact easily ascertainable.<sup>28</sup> In light of this, New York argues that depositions may be “essential to either ascertain where the relevant documentation is, whether it is up to date . . . or whether the relevant documentation cannot be located.”<sup>29</sup> New York also posits that Entergy’s “full disclosure of all relevant documents may not occur, at least not in a timely manner.”<sup>30</sup>

Entergy maintains that New York’s efforts to “challenge the completeness of the LRA or impugn Entergy’s credibility do not establish the need for Subpart G procedures . . . .”<sup>31</sup> Entergy asserts that New York does not provide any indication why Subpart G discovery procedures are necessary to provide for discovery of the technical data that New York believes is necessary.

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<sup>26</sup> Entergy Answer at 26, 34-37; NRC Staff NYS Answer at 21; NRC Staff Riverkeeper Answer at 5.

<sup>27</sup> NYS Response at 21.

<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id. at 22.

<sup>31</sup> Entergy Answer at 27.

The NRC Staff asserts that it is improper for New York to use the Subpart G discovery procedures to compel the NRC Staff and Entergy to compile or identify the CLB.<sup>32</sup> The NRC Staff also asserts that there “is no legal basis which would warrant the adoption of Subpart G procedures merely because a petitioner or party asserts there is a possibility a party may not comply with disclosure requirements in the future.”<sup>33</sup>

## **2. NYS Contention 8 (LRA fails to include an AMP for each electrical transformer)**

New York asserts that it “has reason to believe that initial disclosures related to Contention 8 may not be complete.”<sup>34</sup> In support, New York notes that, after completion of oral arguments, the NRC Staff published an Interim Staff Guidance that supports this contention.<sup>35</sup> New York then questions whether the NRC Staff will make sufficient disclosures under 10 C.F.R. § 2.336, because during the consideration of Contention 8 the NRC Staff did not acknowledge that this Staff Guidance document was being prepared and argued that there was no merit to the contention whose subject it addresses.<sup>36</sup>

Entergy argues that New York has not shown that formal Subpart G procedures are necessary for this contention.<sup>37</sup> It asserts that New York does not explain why the guidance document is relevant to this contention, why the NRC Staff was obligated to disclose the existence of the document before oral arguments, and why it believes that the document would

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<sup>32</sup> NRC Staff NYS Answer at 23.

<sup>33</sup> Id. (emphasis in original).

<sup>34</sup> NYS Response at 24.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Entergy Answer at 28.

not be provided during mandatory disclosure.<sup>38</sup> Entergy also maintains that New York has not shown that NRC witnesses would not be credible and that “generalized and unsupported criticisms concerning the tactics or motives of the parties do not satisfy” the requirements of 10 C.F.R. § 2.310(d).<sup>39</sup> The NRC Staff adds, regarding NYS Contentions 8, 12, and 16, that New York has failed “to establish that Subpart G discovery (and/or cross-examination) procedures are required for [New York] to litigate its contentions or for the Board to properly resolve the issues presented in [the] contentions.”<sup>40</sup>

### **3. NYS Contention 12 (Entergy’s SAMA analyses do not reflect decontamination costs)**

New York states that there are several documents that must be included with discovery regarding this contention, including inter alia, the SAND 96-0957 Report and NRC documents analyzing the underpinnings of the Report.<sup>41</sup> If these documents are not included in the NRC Staff’s disclosure, New York asserts that it will return to the Board and request the application of Subpart G procedures to further discovery.<sup>42</sup>

Entergy argues that New York does not explain why Subpart G procedures are necessary to resolve this contention and does not provide adequate reasons as to why it believes that the information its seeks will not be provided under the mandatory disclosure procedures provided by Subpart L.<sup>43</sup>

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<sup>38</sup> Id.

<sup>39</sup> Id. at 28-29.

<sup>40</sup> NRC Staff NYS Answer at 24.

<sup>41</sup> NYS Response at 26.

<sup>42</sup> Id.

<sup>43</sup> Entergy Answer at 30.

**4. NYS Contention 16 (Entergy 's SAMA analyses are based on inaccurate population dose estimates)**

New York asserts that both the NRC Staff and Entergy opposed the admissibility of Contention 16 without disclosing or referencing a governmental study that raised the same concerns as the contention. New York also asserts that without the benefit of discovery and interrogatories, there may not be a full and complete disclosure of all the relevant information.<sup>44</sup>

Entergy asserts that the New York does not provide a reason to believe that Entergy or the NRC Staff will not fulfill their obligations under the Subpart L mandatory disclosure requirements.<sup>45</sup> According the Entergy, this argument is premature and hypothetical and should be dealt with if there is an actual derogation of discovery obligations by the NRC Staff or Entergy in the future.<sup>46</sup>

**5. NYS Contention 25 (LRA lacks an adequate AMP for managing the effects of embrittlement of the reactor pressure vessels and associated internals)**

New York asserts that this is first time that this issue has been raised in a relicensing proceeding and therefore there is no way to know whether mandatory disclosures will be adequate to provide the information for New York to prepare for the evidentiary hearing.<sup>47</sup> New York also asserts that this contention raised complex technical issues that it believes have been reviewed by third parties and, in consequence, relevant documents may be claimed to be outside the control of Entergy or the NRC Staff and may not be provided as part of the mandatory disclosure.<sup>48</sup>

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<sup>44</sup> NYS Response at 27.

<sup>45</sup> Entergy Answer at 31.

<sup>46</sup> Id.

<sup>47</sup> NYS Response at 28.

<sup>48</sup> Id.

Entergy asserts that New York's support for Subpart G procedures in this contention is "nothing more than a hypothetical discovery dispute that might arise in the future."<sup>49</sup> Entergy also argues that the adequacy of the LRA does not have any bearing on the selection of hearing procedures but is a matter for adjudication.<sup>50</sup> The NRC Staff also maintains that the assertions offered by New York do not establish that Subpart G procedures should be adopted.<sup>51</sup>

**6. Consolidated NYS Contention 26/26A & Riverkeeper Contention TC-1/TC-1A  
(LRA does not have an adequate AMP for metal fatigue)**

New York asserts that this contention is similar to one raised in the Vermont Yankee relicensing proceeding and argues that in that proceeding the general disclosures did not explain the motives of the Applicant in approaching metal fatigue in the LRA and LRA Amendments.<sup>52</sup> New York maintains that the general disclosure procedures are not adequate to explore the issues involved in this contention.<sup>53</sup>

Entergy asserts that New York's argument regarding Entergy's submission of LRA Amendment 2 does not explain how this contention will "involve issues relating to credibility, motive, or intent of an eyewitness."<sup>54</sup> Also, Entergy asserts that New York's concerns regarding the calculations made by Entergy can be resolved through Subpart L procedures, such as the written testimony of expert witnesses that are subject to cross-examination by the Board.<sup>55</sup> Entergy notes that since this contention is similar to one in the Vermont Yankee license renewal

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<sup>49</sup> Entergy Answer at 32 (emphasis in original).

<sup>50</sup> Id. at 33.

<sup>51</sup> NRC Staff NYS Answer at 25-26.

<sup>52</sup> NYS Response at 29.

<sup>53</sup> Id. at 30.

<sup>54</sup> Entergy Answer at 33 (emphasis in original).

<sup>55</sup> Id.

proceeding, the Board should apply the same Subpart L procedures that were used in Vermont Yankee.<sup>56</sup> The NRC Staff suggests that the assertions made by New York are without merit and speculative.<sup>57</sup> It points out that Entergy's approach to metal fatigue in Vermont Yankee is beyond the scope of the issues raised in this proceeding.<sup>58</sup> The NRC Staff asserts that New York has failed to meet the burdens required for applying Subpart G procedures.<sup>59</sup>

**7. Riverkeeper Contention TC-2 (AMP for flow-accelerated corrosion is inadequate)**

Riverkeeper asserts that since Entergy has refused to publicly disclose the benchmarking of CHECWORKS or explain its technical analysis, Riverkeeper is concerned that the mandatory discovery requirements of Subpart L would not be sufficient "to ensure that Entergy cooperates fully . . . on this issue."<sup>60</sup> Riverkeeper insists that only the Subpart G procedures "can fully develop the necessary evidentiary basis to attack such a tactic by ascertaining the full extent of Entergy's reliance on such an external program," and can obtain the necessary documents.<sup>61</sup> Riverkeeper believes that the Subpart G procedures will help develop an adequate record for decision.<sup>62</sup>

Entergy asserts that Riverkeeper has not met its burden under 10 C.F.R. § 2.310(d) to show that it will need to examine the motive, intent, or credibility of an eyewitness in adjudicating this contention. Entergy argues that this is a technical contention, very similar to a

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<sup>56</sup> Id.

<sup>57</sup> NRC Staff NYS Answer at 27.

<sup>58</sup> Id.

<sup>59</sup> Id. at 27-28.

<sup>60</sup> Riverkeeper Response at 4.

<sup>61</sup> Id.

<sup>62</sup> Id.

contention in the Vermont Yankee license renewal proceeding, and the Board should apply the same Subpart L procedures that were applied in Vermont Yankee.<sup>63</sup> The NRC Staff adds that Riverkeeper's concerns are purely speculative and without merit.<sup>64</sup> Citing the board in the Vermont Yankee license amendment proceeding, the NRC Staff asserts that a board "cannot presume that a party will not comply with its regulatory duty to disclose documents."<sup>65</sup>

**8. Consolidated Riverkeeper Contention EC-3 & Clearwater Contention EC-1 (Challenges Entergy's assessment of the significance of the environmental impacts from radioactive leaks from Indian Point Spent Fuel Pools)**

Riverkeeper asserts that Entergy cited fish sampling reports in its initial Answer that had not been publicly disclosed and were not made available to Riverkeeper or the Board.<sup>66</sup> Riverkeeper also asserts that Entergy has failed to provide any information in its ER or its pleadings regarding any additional measures that it has taken to ensure that additional leaks do not exist in the Indian Point 2 spent fuel pool in any unexamined areas.<sup>67</sup> Based on these assertions, Riverkeeper urges that it would be necessary to use Subpart G procedures to develop an adequate record for decision.

Entergy, as it did for Riverkeeper Contention TC-2, asserts that Riverkeeper is merely postulating a hypothetical discovery dispute in the future and provides "no nexus between its claims and any issue involving the credibility of eyewitnesses with respect to either the

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<sup>63</sup> Entergy Answer at 35-36.

<sup>64</sup> NRC Staff Riverkeeper Answer at 7.

<sup>65</sup> Id. (citing Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 698 (2004)).

<sup>66</sup> Riverkeeper Response at 5.

<sup>67</sup> Id.

occurrence of a material past event, or their motive or intent of a party or eyewitness, as required by 10 C.F.R. § 2.310(d).<sup>68</sup>

### **B. Board Decision**

Entergy and the NRC Staff assert that the Intervenor's motions rest on the presumption that Entergy and the NRC Staff will not fully meet their discovery obligations under 10 C.F.R. § 2.336. We do not read the Intervenor's position in that manner, and we would reject it if we did. To the contrary, we presume that all Parties in this proceeding will fully and efficiently honor their discovery obligations.

However, we agree with the Intervenor that the matters to be litigated in this proceeding are complex and that focused discovery may be necessary in order to insure a fully developed record and the most efficient use of time during the evidentiary hearing in this matter. Accordingly, we defer our ruling on whether to proceed under subpart G or L, and direct the parties to immediately begin mandatory discovery as outlined in Section 2.336.<sup>69</sup> Subsequently, if any party believes that additional discovery pursuant to Section 2.704 is necessary, they may so request. We will hold regular status conferences in order to insure that

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<sup>68</sup> Entergy Answer at 37.

<sup>69</sup> Because the mandatory discovery requirements under Sections 2.336 and 2.704 are substantially similar, we envision no delay if, based on future developments, we determine that it is appropriate to alter course during discovery.



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(Indian Point Nuclear Generating Station, )  
Units 2 and 3) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (ADDRESSING REQUESTS THAT THE PROCEEDING BE CONDUCTED PURSUANT TO SUBPART G) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-247-LR and 50-286-LR  
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[Original signed by Christine M. Pierpoint]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 18<sup>th</sup> day of December, 2008