

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

February 4, 2009

MEMORANDUM AND ORDER
(Summarizing Pre-Hearing Conference)

On January 14, 2009, this Board convened a pre-hearing conference to discuss various issues pending in the Indian Point License Renewal Proceeding. The following is a summary of the matters discussed during the conference including specific Board rulings.

1. Electronic Information Exchange

The Board asked the parties to consider whether this proceeding should be transferred into the NRC's electronic filing system – the Electronic Information Exchange ("EIE"). More specifically, the Board directed the participants to review the information describing the EIE which can be found on the NRC's website and to decide whether they want to adopt the EIE's procedures. The Board then directed the NRC Staff to coordinate this effort and inform the Board within seven days whether the participants in the proceeding wanted to switch to the EIE format.¹ Tr. at 757-58. To date, the Board has not been informed of the participants' decision and we direct the NRC Staff to respond to the Board no later than February 9, 2009.

¹ In order to transfer into the EIE system all of the participants in the proceeding must agree to switch. 72 Fed. Reg. 49,139.

2. Clarifying the Participants in the Proceeding

The Board clarified that the participants in this proceeding, and the only entities that need to be on the service list, are the following: the Board (including its law clerk(s)), the Office of the Secretary, Entergy Nuclear Operations, Inc. ("Entergy"), the NRC Staff, the State of New York ("New York"), Riverkeeper, Inc. ("Riverkeeper"), Hudson River Sloop Clearwater ("Clearwater"), the State of Connecticut ("Connecticut"), Westchester County, the Town of Cortlandt, the Village of Buchanan, and the New York City Economic Development Corporation. Tr. at 758-61.

3. Motion for Extension of Time to File Contentions

On January 9, 2009, New York and Riverkeeper jointly filed a motion for an extension of time within which to file contentions related to the Draft Supplemental Environmental Impact Statement ("Draft SEIS")² that had been submitted by the NRC Staff on December 22, 2008.³ The motion asked for a 37-day extension of time to file. Entergy filed an answer to the motion and asked the Board to deny the extension request.⁴ The NRC Staff was allowed to address the motion orally during the pre-hearing conference.

The Board granted the Extension Motion. Tr. at 768. The Board found that the Motion was timely because it was reasonable for the intervenors to carefully review the Draft SEIS in an effort to file within an appropriate amount of time, and only to ask for an extension when it became clear that they would not be able to file contentions within the required time frame.

² Motion by New York State and Riverkeeper for Extension of Time to File Timely Contentions Related to Draft Supplemental Environmental Impact Statement (Jan. 9, 2009) [hereinafter Extension Motion].

³ Clearwater and Connecticut asked to join the Extension Motion during the pre-hearing conference. Tr. at 764-65.

⁴ Entergy's Answer to New York State and Riverkeeper Motion for Extension of Time to File Contentions Related to Draft SEIS (Jan. 12, 2009).

Tr. at 765-66. The Board noted that the Extension Motion was filed sufficiently before the contentions were due and that it is in the best interests of the Board and the public for the participants to have time to provide well-thought out and well-written contentions. Tr. at 766. Additionally, the Board reminded the parties that any new contentions may only deal with new environmental issues raised by the Draft SEIS. Tr. at 767-68. The Board will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed.

The Board voiced its displeasure with the minimal efforts of New York and Riverkeeper to comply with the consultation requirements of 10 C.F.R. § 2.323(b). The parties were reminded that this is not merely a notice requirement but there must be “a reasonable attempt to resolve the issue.” Tr. at 767. The Board put all the parties on notice that if a motion is to be filed in the future, the Board expects “a real effort on the part of the parties to resolve the issues presented before the motion is filed, not just simply a notice at the last minute that the motion is going to be filed.” Tr. at 767.

4. Mandatory Disclosures

The Board stated that it had no objections to the provisions of the Letter Agreement filed by the parties memorializing mandatory disclosure protocols agreed to by all parties.⁵ Based on a suggestion by the NRC Staff, the Board agreed to set January 30, 2009, as the due date for submission of the initial mandatory disclosures. Tr. at 830-31.

5. Scheduling

The NRC Staff indicated that the Audit Report and the Safety Evaluation Report (“SER”) with Open Items would be filed shortly after the pre-hearing conference. Tr. at 773. The Audit

⁵ Agreement of the Parties Regarding Mandatory Discovery Disclosures (Jan. 13, 2009). The Board also noted that no objection to the provisions of the agreement of the parties was made by any interested governmental entity and that all mandatory disclosures will be served on all the governmental bodies that have been admitted to this proceeding.

Report was filed on January 13, 2009,⁶ and the SER with Open Items was filed on January 15, 2009.⁷

6. Bifurcation of the Evidentiary Hearing

During the pre-hearing conference the parties discussed the idea of bifurcating the evidentiary hearing to allow the safety contentions to be heard earlier than the environmental contentions. The Board deferred any ruling on the subject finding it premature until the Final SER is issued. Tr. at 777.

7. Limits on Pleading Length

A question was raised regarding a page limitation on pleadings. The Board noted that all of the participants who are currently involved in this proceeding have consistently submitted pleadings that are of an appropriate length. Therefore, relying on the assumption that all participants would continue to file such focused pleadings, the Board stated that it would not set a page limitation on pleadings at this time but indicated that it could reconsider that ruling in the event that this leeway was abused in the future. Tr. at 786.

8. Disclosure of Various Codes

New York asserted that it had not reached an agreement with the NRC Staff with respect to the State's ability to have access to the MACCS2 code. Tr. at 787. New York also stated that it desired access to the MELCOR code. Tr. at 790. The NRC Staff responded that New York, or any other participant, can secure access to the MACCS2 code by paying a user fee. Tr. at 789. The Board directed New York, acting on behalf of the intervenors, to discuss this issue in greater detail with the NRC Staff and Entergy to try to work out an agreement that would make available needed information. If they can not reach a satisfactory agreement, New

⁶ Letter from Sherwin Turk (NRC Staff) to the Licensing Board (Jan. 15, 2009).

⁷ Letter from Sherwin Turk (NRC Staff) to the Licensing Board (Jan. 22, 2009).

York was instructed to notify the Board. Tr. at 790-91.

In terms of the CHECWORKS code, Riverkeeper indicated that it would engage in discussions with Entergy regarding the possibility of entering into a protective agreement that would allow for the release of information about the code. Tr. at 797.

New York and Riverkeeper shall provide the Board with a status report on the negotiations regarding the disclosure of codes by March 1, 2009.

9. Schedule for Filing New or Amended Contentions and Adopting Contentions

The Board declined to set a schedule for the filing of new or amended contentions and stated that it would follow the requirements of 10 C.F.R. § 2.309(f)(2) and case law. Tr. at 797-98. In addition, the Board stated that it considered the presumption of 25 days to respond to new or amended contentions, expressed in 10 C.F.R. § 2.309(h), to be appropriate but would consider motions to lengthen or shorten the time for responding based on specific, relevant facts. Tr. at 798. In addition, the Board stated that parties would have 30 days to adopt any new or amended contentions that are accepted by the Board. Tr. at 798-99.

10. Discovery of Documents Reviewed but Not Taken into Possession by the NRC Staff

The NRC Staff pointed to the Commission's decision in CLI-08-23 wherein the Commission indicated that documents created by individual reviewers, not shared with other members of the NRC Staff, and that do not contain unique information, need not be retained. Tr. at 800. Furthermore, the NRC Staff pointed out that the Audit Report would list the documents reviewed on site but not taken into possession. Tr. at 801. The Board noted that if there are documents on this list that Entergy does not disclose as part of its mandatory disclosures, and another participant believes they should be disclosed, that participant may come to the Board and represent why the documents should be disclosed. Tr. at 801-02.

11. Schedule for Summary Disposition

The Board expressed its strong feeling that there not be late-filed motions for summary

disposition. Tr. at 803. However, the Board declined to set a specific date for when summary disposition motions may no longer be filed. The Board advised the parties that it would set a date for submission of motions for summary disposition that would be significantly in advance of the hearing. Tr. at 804.

12. Communications Between the NRC Staff and Entergy

The NRC Staff described the different forms of communication between the NRC Staff and Entergy: telephone communications, meetings, e-mail communications, and written communications. Tr. at 805. The NRC Staff stated that documents submitted by Entergy to the NRC Staff are not necessarily sent to all parties on the adjudicatory service list, but they do become part of the Hearing File and are available on ADAMS. The documents sent by the NRC Staff to Entergy are copied to every party on the Technical Staff Service List, placed in the Hearing File, and are available on ADAMS. Tr. at 805-06. Email communications are collected and placed in the Hearing File. Tr. at 819. The NRC Staff stated that it tries to provide advanced notice to the parties on the Technical Staff Service List of any meetings or telephone calls between the NRC Staff and Entergy, and the summaries of the meetings or calls will be put into ADAMS and the Hearing File. Tr. at 819-20.

The Board pointed out that in its view, placing documents on ADAMS does not necessarily mean that the participants in this litigation are on notice of the documents' existence but that placing a document into the Hearing File does put the participants on notice. The Board anticipates that all documents subject to disclosure will be put into the Hearing File within 30 days after they become available.

13. Searchability of Discovery Documents

There was a lengthy discussion during the conference regarding the searchability of documents provided during the disclosure process. Tr. at 780-85, 823-24, 831-32. The participants in the litigation had come to an agreement regarding the searchability requirements

of the initial mandatory disclosures, however some parties expressed displeasure about the agreement. The Board did not make any rulings on the issue but encouraged the parties to engage in discussions to reach an agreement about the searchability of all future documents after the initial mandatory disclosures.

The Board is of the view that in the interest of expediting this proceeding, wherever possible, document production should be made in an electronic format that is efficiently and economically searchable and that the failure to do so may well result in the necessity of the Board granting extensions of time to participants who are required to inefficiently review disclosed documents.

Any participant to this proceeding may request that this Board conduct a pre-hearing conference to resolve matters that may arise. Absent a request from one or more participant, the Board anticipates convening another pre-hearing conference in approximately 90 days and, after consultation regarding conflicts, will issue the appropriate Scheduling Order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁸

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
February 4, 2009

⁸ Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (SUMMARIZING PRE-HEARING CONFERENCE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Administrative Judge
Lawrence G. McDade, Chair

Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Jessica A. Bielecki, Esq.

Administrative Judge
Richard E. Wardwell

Marcia J. Simon, Esq.
Karl Farrar, Esq.

Administrative Judge
Kaye D. Lathrop
190 Cedar Lane E.
Ridgway, CO 81432

Brian Harris, Esq.
Brian Newell, Paralegal

Zachary S. Kahn, Law Clerk

Docket Nos. 50-247-LR and 50-286-LR

LB MEMORANDUM AND ORDER (SUMMARIZING PRE-HEARING CONFERENCE)

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601

Andrew M. Cuomo, Attorney General
John J. Sipos, Assistant Attorney General
Mylan L. Denerstein
Deputy Assistant Attorney General
Division of Social Justice
Janice A. Dean
Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
State Street
Albany, New York 12224

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
Mauri T. Lemoncelli, Esq.
Counsel for Entergy Nuclear Operation, Inc.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

Joan Leary Matthews, Esq.
Senior Attorney for Special Projects
New York State Department
of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-5500

Michael J. Delaney
Vice President, Energy Department
New York City Economic Development
Corporation (NYCEDC)
110 William Street
New York, NY 10038

Robert D. Snook, Esq.
Office of The Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Arthur J. Kremer, Chairman
New York Affordable Reliable Electricity
Alliance (AREA)
347 Fifth Avenue, Suite 508
New York, NY 10016

Stephen C. Filler, Board Member
Hudson River Sloop Clearwater, Inc.
303 South Broadway, Suite 222
Tarrytown, NY 10591

Docket Nos. 50-247-LR and 50-286-LR

LB MEMORANDUM AND ORDER (SUMMARIZING PRE-HEARING CONFERENCE)

Daniel E O'Neill, Mayor
James Siermarco, M.S.
Liaison to Indian Point
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298

Manna Jo Greene, Environmental Director
Hudson River Sloop Clearwater
112 Little Markey Street
Poughkeepsie, NY 12601

Thomas F. Wood, Esq.
Town of Cortlandt
Daniel Riesel, Esq.
Jessica Steinberg, J.D.
Counsel for the Town of Cortlandt
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022

Nancy Burton, Esq.
Connecticut Residents Opposed
to Relicensing of Indian Point (CRORIP)
147 Cross Highway
Redding Ridge, CT 06876

Elise N. Zoli, Esq.
Goodwin Proctor, LLP
Exchange Place
53 State Street
Boston, MA 02109

Justin D. Pruyne
Assistant County Attorney, Litigation Bureau
Of Counsel to Charlene M. Indelicato, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601

FUSE USA
John LeKay
Heather Ellsworth Burns-DeMelo
Remy Chevalier
Bill Thomas
Belinda J. Jaques
351 Dyckman Street
Peekskill, New York 10566

Westchester Citizens' Awareness Network
(WestCan), Citizens Awareness Network, (CAN),
etc.

Susan H. Shapiro, Esq.
21 Pearlman Drive
Spring Valley, NY 10977

Docket Nos. 50-247-LR and 50-286-LR
LB MEMORANDUM AND ORDER (SUMMARIZING PRE-HEARING CONFERENCE)

Victor M. Tafur, Senior Attorney
Philip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591

Richard L. Brodsky
Assemblyman
5 West Main Street
Suite 205
Elmsford, NY 10523

Diane Curran, Esq.
Counsel for Riverkeeper, Inc.
Harmon, Curran, Spielberg,
& Eisenberg, LLP
1726 M. Street NW, Suite 600
Washington, DC 20036

Sarah L. Wagner, Esq.
Legislative Office Building, Room 422
Albany, NY 12248

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of February 2009