

March 30, 2009

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 ANSWER TO "RIVERKEEPER, INC.'S
PRESERVATION OF RIGHT TO AMEND CONTENTION TC-2 –
FLOW ACCELERATED CORROSION BASED UPON NRC
STAFF'S SAFETY EVALUATION REPORT WITH OPEN ITEMS"

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to "Riverkeeper, Inc.'s Preservation of Right to Amend Contention TC-2 – Flow Accelerated Corrosion Based upon NRC Staff's Safety Evaluation Report with Open Items" ("Preservation Request"), filed by Riverkeeper, Inc. ("Riverkeeper") on March 18, 2009. For the reasons set forth below, the Staff respectfully submits that Riverkeeper's Preservation Request should be denied.

In its Preservation Request, Riverkeeper observes that the Atomic Safety and Licensing Board ("Board") has admitted Riverkeeper Contention TC-2 (Flow Accelerated Corrosion) for litigation.¹ Further, Riverkeeper observes that in January 2009, the Staff issued its "Safety

¹ Preservation Request at 1-2 and n.4, *citing Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC __, __ (July 31, 2008), slip op. at 167-68.

Evaluation Report with Open Items” (“SER”) ² and its Audit Report concerning the Indian Point Units 2 and 3 aging management programs and aging management reviews.³ Riverkeeper notes that the Board subsequently granted the intervenors’ request that a “date certain” be established for the filing of contentions challenging the Staff’s SER – requiring that such contentions be filed by March 18, 2009.⁴ Riverkeeper then states that “[b]ased on [its] review of the SER and Audit report alone, there is no ‘new’ or ‘materially different’ information warranting an amendment to Riverkeeper’s existing contention at this time,” but -- noting that it has asked Entergy Nuclear Operations, Inc. (“Applicant”) to provide certain documents for it to review -- “in an abundance of caution, Riverkeeper respectfully requests that the ASLB recognize Riverkeeper’s right to amend Contention TC-2 once it has had a chance to review” the Applicant’s documents. Preservation Request at 3; emphasis added.

The Staff respectfully submits that Riverkeeper’s Preservation Request is improper and should be denied. First, although Riverkeeper did not style its Preservation Request as a motion, in fact it seeks affirmative action by the Board – thus effectively rendering its “Preservation of Right” into a motion. Riverkeeper’s failure to properly describe the nature of its filing effectively failed to provide proper notice to other parties that a response to its filing might be required.

² “Safety Evaluation Report with Open Items Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3” (“SER with Open Items”), issued January 15, 2009; see letter from Sherwin E. Turk to the Board, dated January 22, 2009.

³ “Audit Report for Plant Aging Management Programs and Reviews, Indian Point Nuclear Generating Unit Nos. 2 and 3” (“Audit Report”), issued January 13, 2009; see letter from Sherwin E. Turk to the Board, dated January 15, 2009.

⁴ Preservation Request at 2 n.7, *citing Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), “Order (Granting Petitioners’ Joint Motion for an Extension of Time)” (February 12, 2009).

Second, Riverkeeper waited until the last moment to file its Preservation Request – serving its Request by E-mail at 11:58 PM on March 18, 2009 – but it did not consult with the Staff prior to filing its Preservation Request, and it fails to certify that it “has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion,” as required by 10 C.F.R. § 2.323(b).⁵

Third, Riverkeeper’s Preservation Request is without merit. The Board has previously indicated that it would not establish a schedule for the filing of new or amended contentions, but would “follow the requirements of 10 C.F.R. § 2.309(f)(2) and [NRC] case law” in ruling on the timeliness of such contentions.⁶ In the event that Riverkeeper’s review of documents leads it to discover new information which was not available to it previously, it may seek to file a motion seeking the admission of a new or amended contention. The timeliness of any such new or amended contention would properly be determined at that time, based upon the facts presented by the motion and any responses thereto; it would be improper for the Board to rule now, before any such contention is filed, on the timeliness of such a motion.

Finally, Riverkeeper explicitly states in its Preservation Request that the Staff’s SER and Audit Report do not contain any “‘new’ or ‘materially different’ information warranting an amendment to Riverkeeper’s existing contention at this time.” Preservation Request at 3. Further, Riverkeeper indicates that any new or amended contention which it might later file would not be based upon the SER or Audit Report, but upon some other document that it has requested from the Applicant. *Id.* Accordingly, it is apparent that Riverkeeper’s Preservation

⁵ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), “Memorandum and Order (Summarizing Pre-Hearing Conference)” (February 4, 2009), at 3 (¶ 3).

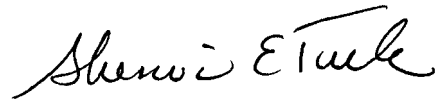
⁶ *Id.* at 5 (¶ 9).

Request was not triggered by its reading of the SER or Audit Report, but rather, constitutes an attempt to secure, in advance, a ruling on the timeliness of any contention it might seek to file based upon its reading of the other documents it has requested. Such a request is premature and lacks any showing that such a contention would, in fact, be timely.

CONCLUSION

For the reasons stated above, Riverkeeper's request that the Board "recognize Riverkeeper's right to amend Contention TC-2 once it has had a chance to review various documents is improper and should be denied.

Respectfully submitted,

A handwritten signature in black ink, reading "Sherwin E. Turk". The signature is written in a cursive, flowing style.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of March 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'RIVERKEEPER, INC.'S PRESERVATION OF RIGHT TO AMEND CONTENTION TC-2 – FLOW ACCELERATED CORROSION BASED UPON NRC STAFF'S SAFETY EVALUATION REPORT WITH OPEN ITEMS," dated March 30, 2009, 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 30th day of March, 2009:

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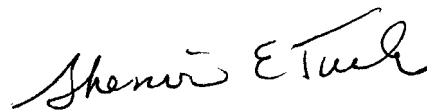
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