

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. 50-0247-LR and
50-286-LR
ASLBP No. 07-858-03-LR-BD01
May 28, 2009

Order

(Denying Clearwater's Petition to File a New Contention)

On February 4, 2009, this Licensing Board issued a Memorandum and Order which inter alia extended the deadline to submit new or amended contentions based on issues arising from the Draft Supplemental Environmental Impact Statement ("Draft SEIS") until February 27, 2009.¹ Thereafter, on March 19, 2009, Hudson River Sloop Clearwater, Inc. ("Clearwater") submitted a proposed new contention. The "new information" which Clearwater identified as the trigger for this contention was a letter issued by the New York State Department of Conservation ("DEC") which stated that it would assume responsibility as the lead agency on an application to build a desalination plant to extract water from the Hudson River to be used as drinking water.² Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant")³ and the Nuclear Regulatory

¹ Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) (Feb. 4, 2009) at 2-3 (unpublished) [hereinafter Pre-Hearing Conference Order].

² Hudson River Sloop Clearwater, Inc.'s Petition to File a New Contention Based Upon New Information (Mar. 19, 2009) [hereinafter Clearwater Petition].

³ Applicant's Answer Opposing Clearwater's Motion for Leave and New Contention Concerning the Alleged Impacts of Indian Point License Renewal on the Hudson River as a Drinking Water Source (Apr. 13, 2009).

Commission (“NRC”) Staff⁴ submitted answers opposing the new contention, and Clearwater submitted a combined reply thereto.⁵ As discussed in greater detail below, the Board does not admit Clearwater’s new contention for failing to comply with NRC regulations for contention admissibility.

Pursuant to 10 C.F.R. § 2.309(f)(2), a late-filed contention dealing with an issue arising under the National Environmental Policy Act (“NEPA”) is admissible if there “are data or conclusions” in the Draft SEIS that differ “significantly” from the applicant’s environmental documents.⁶ Otherwise, a new contention can only be filed with leave of the Board, upon a showing that the information upon which it is based was not previously available, is materially different than information previously available, and has been submitted in a timely fashion.⁷ A new contention may also be admissible under 10 C.F.R. § 2.309(c), governing nontimely filings, which bases admission on a balancing of eight different factors.⁸ However, as the Commission recently stated, “failure to address the requirements [of 10 C.F.R. § 2.309(c) is] reason enough to reject the proposed new contentions.”⁹ In addition to the above regulations, any new contention must meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).¹⁰

Clearwater’s new contention states:

The Environmental Report submitted by Entergy and Supplement
38 to Generic Environmental Impact Statement for License
Renewal for Nuclear Plants, Regarding Indian Point Generating

⁴ NRC Staff’s Answer to Hudson River Sloop Clearwater’s Petition to File New Contention Based Upon New Information Regarding Environmental and Public Health Impacts of Using the Hudson River as a Drinking Water Supply (Apr. 7, 2009).

⁵ Reply to NRC Staff’s Opposition to Petition to Add a New Contention Preliminary Statement (Apr. 20, 2009).

⁶ 10 C.F.R. § 2.309(f)(2).

⁷ Id. § 2.309(f)(2)(i)-(iii).

⁸ See id. § 2.309(c).

⁹ Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC ___, ___ (slip op. at 14) (Mar. 5, 2009).

¹⁰ These requirements were discussed in detail in our Order ruling on petitions to intervene. See Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 60-64 (2008).

Units 2 and 3 (hereinafter referred to as “DSEIS”) issued by the NRC Staff on December 22, 2008 fail to satisfy the requirements of NEPA, 42 U.S.C. §4332 et seq., and NRC regulations implementing NEPA, because the ER and DSEIS do not assess the impacts of the license renewal on drinking water quality and drinking water degradation as it relates to the use of the Hudson River as a source of drinking water.¹¹

In its petition, Clearwater contends that its new contention is admissible as a late-filed contention pursuant to 10 C.F.R. § 2.309(f)(2) because it rests on the discovery of a letter from the DEC which stated that it would be the lead agency on an application by United Water New York Inc. to build a desalination plant that will take water out of the Hudson River to supply the residents of Rockland County with drinking water.¹² This letter, however, is not new, relevant information.

According to Clearwater, the proposed water desalination plant will use reverse osmosis to filter the water, which is not an “effective process for removing tritium, cesium-137 and strontium-90.”¹³ Clearwater states that both Entergy, in its Environmental Report (“ER”), and the NRC Staff, in its Draft SEIS, deny that there is a drinking water pathway associated with the groundwater below Indian Point or with the Hudson River.¹⁴ Accordingly, Clearwater argues that the Applicant and the NRC Staff must “assess the impacts upon the Hudson River as a source of drinking water in making their environmental assessments.”¹⁵ Clearwater, however, does not adequately address how the DEC letter constitutes new information in the context of our consideration of the admissibility of its new contention.

The new contention does not meet the 10 C.F.R. § 2.309(f)(2) requirements. Per the first part of the regulation, if Clearwater intended to directly challenge the Draft SEIS, the new contention should have been filed by February 27, 2009, as required by the Pre-Hearing Conference Order issued on February 4, 2009. Per the second part of the regulation,

¹¹ Clearwater Petition at 8.

¹² Id. at 1-2.

¹³ Id. at 3.

¹⁴ Id. at 6-7.

¹⁵ Id. at 4.

Clearwater could have sought leave from the Board to file the new contention, however, the new contention would need to meet the “previously unavailable information” requirement of 10 C.F.R. § 2.309(f)(2)(i)-(iii).

Clearwater’s new contention, however, patently is not based on previously unavailable, relevant information. In fact, Clearwater itself discussed the proposed desalination plant in its initial reply on Contention EC-1, filed on February 8, 2008,¹⁶ and the Board specifically referenced Clearwater’s discussion of the proposed desalination plant both in our initial order admitting that contention¹⁷ and in an order denying reconsideration thereof.¹⁸ Since the subject matter of the DEC letter – the proposed desalination plant – was previously available and Clearwater was aware of it, it cannot be considered previously unavailable information. Accordingly, Clearwater has failed to convince the Board that the DEC’s letter stating that it will be the lead agency in dealing with the desalination plant’s application is newly discovered information capable of supporting the admissibility of a new contention.

Furthermore, Clearwater did not attempt to offer support for the admission of the new contention under the regulations for nontimely filings. Clearwater has chosen to not deal with the factors that must be balanced under 10 C.F.R. § 2.309(c), and the Board can not do so on their behalf. While Clearwater does offer support for admission of the new contention based on the general admissibility requirements of 10 C.F.R. § 2.309(f)(1), as discussed above, this must be done in conjunction with satisfying the requirements of either 10 C.F.R. § 2.309(c) or 10 C.F.R. § 2.309(f)(2). Having failed to satisfy the requirements of either, the Board can not evaluate Clearwater’s support for admissibility under 10 C.F.R. § 2.309(f)(1).

¹⁶ Hudson River Sloop Clearwater, Inc.’s Reply to Entergy and the Nuclear Regulatory Commission Responses to Clearwater Petition to Intervene and Request for Hearing (Feb. 8, 2008) at 4-5.

¹⁷ Indian Point, LBP-08-13, 68 NRC at 193.

¹⁸ Licensing Board Memorandum and Order (Denying Entergy’s Motion for Reconsideration of the Board’s Decision to Admit Riverkeeper Contention EC-3 and Clearwater Contention EC-1) (Dec. 18, 2008) at 14 (unpublished) [hereinafter Reconsideration Order].

Beyond the arguments put forth by Entergy and the NRC Staff, the Board finds that the new contention is duplicative of the issue that we admitted in Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 ("Consolidated Contention"). As mentioned above, the Board, in admitting that contention, explicitly noted that Clearwater had used the plan to develop a water intake facility on the Hudson River as support for its contention.¹⁹ We reiterated that support in denying Entergy's motion to reconsider that contention.²⁰

In our view, the Consolidated Contention questions Entergy's conclusions regarding groundwater contamination from leaks at Indian Point, including the impact on drinking water as it relates to the use of the Hudson River as a source of drinking water.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²¹

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 28, 2009

¹⁹ Indian Point, LBP-08-13, 68 NRC at 193.

²⁰ Reconsideration Order at 14.

²¹ 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 ORDER (DENYING CLEARWATER'S PETITION TO FILE A NEW CONTENTION) 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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Docket Nos. 50-247-LR and 50-286-LR
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ORDER (DENYING CLEARWATER'S PETITION TO FILE A NEW CONTENTION)

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[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 28th day of May 2009