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May 4, 2010

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Dr. Kaye D. Lathrop
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Re: Pre-Hearing Litigation Milestone Events and Proposed Dates,
License Renewal Application for Indian Point Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Judges McDade, Wardwell, and Lathrop:

The State of New York, State of Connecticut, Town of Cortlandt, Riverkeeper, Inc., and the Hudson River Sloop Clearwater, Inc., respectfully submit this joint letter concerning pre-hearing litigation milestones and the proposed schedule for such events.

The proposed hearing schedule filed today reflects the combined efforts of the undersigned States, interested governmental entities, and private parties working with Entergy and NRC Staff. We are pleased to report that, as a result of these efforts, the proposal represents substantial agreement and we are grateful for the time and flexibility exhibited by Entergy and NRC Staff in fashioning this proposal. In the proposed schedule, parties and interested governmental entities agree to many milestone events and their order. Separate columns reflect the proposed dates for those milestone events and, where the dates differ, a brief statement of the basis for the disagreement. There are a few points on which the participants were unable to reach agreement, and the purpose of this letter is to briefly describe those points and our position on them. To assist with the identification of these points, they appear in green text in the accompanying schedule.

First, at several places in the schedule proposed by Entergy and NRC Staff, the deadline for an intervenor to respond to an action taken by Entergy or NRC Staff is insufficient. In each instance Entergy or NRC Staff has had months or even years to prepare the pleading which triggers the intervenor response.

For example, as discussed disclosed during the April 19, 2010 conference, Entergy will be filing totally new information in mid-June and the end of July 2010 related to the State of New York's

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Contentions 25 and 26/26A and Riverkeeper Contention TC 1/1A., These filings could have been made months, if not years, earlier. Yet Entergy and NRC Staff propose that any new contentions based on these filings be submitted within 30 days of the newly received information. At the same time, Entergy will be filing motions for summary disposition regarding all other safety contentions the answers to which are proposed to be due within 30 days. At a later date, Entergy and NRC Staff will be filing summary disposition motions with regard to several remaining safety contentions and all environmental contentions. Here again, the time for response by intervenors to all these summary disposition motions is a mere 30 days. There is simply not enough time for intervenors to properly evaluate all of this data and provide adequate responses, and, therefore, we have proposed longer deadlines for these events.

Similarly, when Entergy and NRC Staff file their proposed direct testimony, particularly as to safety contentions, it will be the first time that intervenors will know the full extent of Entergy and NRC Staff positions on those issues. Allowing 30 days to file rebuttal testimony as to that direct testimony will not be sufficient; as reflected in the chart, intervenors respectfully request 60 days to prepare rebuttal testimony

Second and as an alternative, the time needed to respond to Entergy and NRC Staff direct testimony could remain as proposed by Entergy and NRC Staff (at 30 days) if the Board accepted intervenors' proposal that Entergy and NRC Staff be required to provide a detailed statement of their position on the merits of all contentions long before direct testimony is required to be filed. In short, the State proposes that Entergy and NRC Staff provide a type of answer to the intervenors' admitted contentions. While not rejecting this proposal outright, Entergy and NRC Staff have expressed reluctance to do so, fearing that it will trigger a new round of proposed contentions. As an initial matter, that was not the intent of the suggestion. If, as Entergy and Staff believe, their disclosure of positions will reveal significant new information and new contentions could be filed, that same risk will arise when they file their direct testimony, except that such an event would occur later in the schedule and could result in a delay the hearing. Moreover, the State respectfully submits that the filing of a document wherein Entergy and Staff each detail their substantive positions concerning each admitted contention and "join issue" with the bases and supporting evidence contained in a contention would have substantial benefits for all the participants, the public, and the Board. An early detailed presentation of Entergy and Staff's positions on all bases and supporting evidence for each remaining contention will reduce the risk of delay and help make the direct testimony and the hearing more efficient and focused.

As Entergy notes in today's letter (p.3), on safety issues the ultimate burden of proof remains with the applicant throughout the proceeding. *See, e.g,, Duke Power Co.* (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1048 (1983), *citing, Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-283, 2 N.R.C. 11, 17 (1975); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 N.R.C. 235, 263 (2009) (the applicant must demonstrate that it satisfies the "reasonable assurance standard" by a preponderance of the evidence); *Virginia Electric & Power Company* (North Anna Power station, Units 1, 2, 3 & 4), ALAB-256, 1 N.R.C. 10, 17, n.18 (1975). With respect to environmental issues, NEPA places the responsibility and ultimate burden of proof on NRC Staff and the Commission. *See, e.g., Limerick Ecology Action, Inc., v. NRC,* 869 F.2d 719, (3d Cir. 1989); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Ctr.), CLI-98-03, 47 N.R.C. 77, 89 (1998) ("NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately addressed"). In this proceeding, the State of New York and other intervenor parties have satisfied the standards contained in 10 C.F.R. § 2.309 governing contention admissibility – standards that NRC and Entergy have described as "strict by design." Having satisfied the strict admissibility requirements with various contentions and supporting sworn declarations, the State maintains its position that it would be efficient, fair, and appropriate for this proceeding if Entergy and Staff disclosed their substantive positions

concerning the admitted contentions before the State prepares pre-filed testimony and exhibits. The proposal would provide substantial benefits to the proceeding and the public with no harm.

Third, intervenors propose, consistent with the requirements of 10 C.F.R. §§ 2.336(d) and 1204 (c) and the ruling by the ASLB in the Initial Scheduling Order issued in *Entergy Nuclear Vermont Yankee, LLC*, (Vermont Yankee Nuclear Power Station) on November 17, 2006, (slip op. at 4) ML063210212, that mandatory disclosures continue at least until the start of the hearings and not stop, as Entergy and NRC Staff seem to propose, several months before hearings begin. If no new information is being generated or located, the filings will not be burdensome. If new information is generated or located, the parties and the Board should have the benefit of a full record before deciding this important proceeding.

Because in the intervenors' proposed schedule we do not specify the dates by which the Board shall take various actions, it is not possible to directly compare the date by which hearings will begin under the two different proposals. However, because some of the extensions we propose do not affect the critical path items, we do not believe the additional time we propose will be substantial. We appreciate the Board's consideration of our views on these issues.

Finally, the parties and the interested governmental entities have considered a two-track schedule and the initial draft of that schedule was circulated by NRC Staff on April 28. After seeing the two-track schedule, no party or interested governmental entity expressed support for that approach. On a separate matter, Clearwater also notes that it has a pending petition to add contentions concerning waste issues.

Following the April 19, 2010 hearing, the parties devoted considerable time discussing the issues – both before the circulation of the initial drafts on April 28 and over the last several days. By submitting a chart reflecting the respective positions of the parties, the undersigned parties and governmental entities hope to facilitate the Board's review of the milestones and proposed schedule. The undersigned are available to answer any questions that the Board may have.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 May 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2010, copies of a Joint Letter Submission Concerning a Proposed Hearing Schedule on All Safety and Environmental Contentions were served by the State of New York on behalf of itself, the State of Connecticut, the Town of Cortlandt, Riverkeeper, and Clearwater upon the following persons via U.S. Mail and e-mail at the following addresses:

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John Sipos

Dated at Albany, New York
this 4th day of May 2010