RAS E-365

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 June 16, 2010

THE STATE OF NEW YORK, THE STATE OF CONNECTICUT, RIVERKEEPER, INC., AND THE HUDSON RIVER SLOOP CLEARWATER'S JOINT COMMENTS AND PROPOSED MODIFICATIONS TO ATOMIC SAFETY AND LICENSING BOARD DRAFT SCHEDULING ORDER

The State of New York, the State of Connecticut, Riverkeeper, Inc., and the Hudson River Sloop Clearwater, Inc. (collectively "Intervenors") respectfully submit the following comments to the Atomic Safety and Licensing Board's ("ASLB" or "Board") Draft Scheduling Order dated June 2, 2010 ("Draft Scheduling Order"). Intervenors support the intent of the ASLB's proposed schedule to move as expeditiously as reasonably possible to the evidentiary hearing stage of this AEA § 189 proceeding. However, Intervenors have several concerns with the ASLB's Draft Scheduling Order that may ultimately impact the ability of the parties to adhere to the currently proposed timeline. Intervenors raise these issues now, request certain modifications now and reserve the right to seek extensions of time if the below-described circumstances come to pass.

As an initial matter, Intervenors note that they have worked to comply with the various deadlines provided by NRC regulations and this Board. Having reviewed the Draft Scheduling Order, Intervenors can see the possibility that the Order may result in scheduling conflicts or

"bottlenecks" that will adversely affect the ability of the Intervenors to effectively participate in this § 189 proceeding. These potential bottlenecks result not from dilatory conduct by Intervenors, but from various actions by NRC Staff and the applicant including, but not limited to, Staff's August 2007 acceptance of an incomplete application and the applicant's slow response to the Board's July 31, 2008 ruling that admitted various contentions such as metal fatigue and embrittlement require additional submissions. In short, these bottlenecks arise from decisions that were or are within the control of Staff and the applicant; those decisions by Staff and applicant, however, should not prejudice Intervenors' rights to effectively participate in this proceeding.

I. Timing of Responses to Dispositive Motions

The Draft Scheduling Order currently requires the submission of all motions for summary disposition by July 30, 2010 (Draft Scheduling Order at H.4), but does not extend the time for parties to respond (*id.* at H.3). Currently, the contentions on which no motion has yet been filed include NYS-5, 6, 7, 9/33, 12/12A, 24, 25, NYS-26/26A/RK-TC1/TC1A, RK-TC-2, RK-EC3/CW-EC1, and CW-EC-3. Thus, it is possible that the State may receive eight motions for summary disposition by July 30, and that Riverkeeper may receive up to three, with only 20 days to respond to all. This may present a problem for State and Riverkeeper counsel who would have to coordinate with several experts. Despite this potential bottleneck, given that it is not yet known how many summary disposition motions will be filed, Intervenors do not seek an amendment of the Draft Scheduling Order but instead reserve their right to seek additional time pursuant to the Draft Scheduling Order's provisions at section G.4.

II. Timing of Dispositive Motions Related to Contentions NYS-25 and NYS-26/26A/RK-TC-1/TC-1A

Along those same lines, the applicant in this proceeding, Entergy Nuclear Operations, Inc. ("Entergy") has represented to the ASLB and all parties that it intends to submit supplemental information that will bear upon Contentions NYS-25 (embrittlement) and NYS-26/26A/RK-TC-1/TC-1A (metal fatigue) at the end of June 2010 and at the end of July 2010, respectively.[1] The Draft Scheduling Order urges Entergy to "file any motions that may arise from those supplements with all deliberate speed" so that "intervenors will have a fair opportunity to respond to those motions before publication of the FEIS,"[2] which, as of now, NRC Staff has estimated will occur at the end of August 2010.[3] At maximum, the Draft Scheduling Order would require any such motions to be filed within 30 days of the submissions.[4]

Intervenors have several concerns about this proposed course as it relates to Entergy's forthcoming submission relevant to NYS-25 and Consolidated Contention NYS-26/26A/RK-TC-1/TC-1A. Foremost, Intervenors are concerned that allowing for immediate dispositive motions after Entergy's supplemental submission would deny Intervenors an appropriate amount of time to digest the long-awaited and ostensibly complex supplemental information, determine how this new information impacts the currently admitted contentions, and, if appropriate, prepare supplemental contentions that comply with NRC's "strict" contention pleading regulations. This will require careful review of Entergy's submissions as well as any supplemental disclosures

---

[1] Transcript of Entergy Nuclear Operations Indian Point, Units 2 & 3, Pre-Hearing Conference, April 19, 2010, ADAMS Accession No. ML101160416 ("Pre-Hearing Conference Transcript"), at 807.
[2] Draft Scheduling Order at 11, Footnote 28.
[3] Pre-Hearing Conference Transcript at 802-03, 807-08.
[4] Draft Scheduling Order at 11.

resulting therefrom, further discovery if necessary, coordination between two intervenors, and consultation with more than one expert.

Notably, it is apparent that Entergy has had the luxury of an unfettered opportunity to work on a supplemental submission relevant to Consolidated Contention NYS-26/26A/RK-TC-1/TC-1A as well as NYS-25 for months on end. The ASLB's Ruling on Petitions to Intervene and Requests for Hearing, dated July 31, 2008, almost two years ago, recognized that Entergy's License Renewal Application was incomplete without further metal fatigue calculations.[5] Moreover, Entergy could have anticipated the need for a refined metal fatigue analysis as early as 2006, given a parallel ruling on this same issue in the Vermont Yankee nuclear plant license renewal proceeding.[6] The State of New York raised concerns to NRC and this Board over the Entergy corporate family's approach to the metal fatigue issue as early as the State's November 2007 petition to intervene.[7] The State's concerns have been well founded: more than three years after it submitted its initial license application, Entergy effectively will submit a new license application with respect to embrittlement and metal fatigue issues. The timing of Entergy's forthcoming submission so late in the ongoing process should not prejudice the Intervenors, who should have a full and fair opportunity to assess new information on a critical safety issue prior

---

[5] *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, Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing (July 31, 2008), ADAMS Accession No. ML082130436, at 116 ("[T]his Board admits NYS-26/26A to the limited extent that it asserts that *the LRA is incomplete without the calculations of the CUFs* as threshold values necessary to assess the need for an AMP, that *Entergy's AMP is inadequate for lack of the final values*, and that the LRA must specify actions to be carried out by the Applicant during extended operations to manage the aging of key reactor components susceptible to metal fatigue. In doing so, *the Board recognizes the requirement for inclusion of the actual CUF calculations in the LRA* to meet the TLAA regulations, 10 C.F.R. § 54.21(a)(3), and to provide the specificity needed to achieve the demonstration required of an AMP, 10 C.F.R. § 54.21(c)(1)(iii).") (emphasis added).

[6] *See* July 31, 2008 Board Ruling at 116 ("[C]onsistent with a recent ruling in Vermont Yankee, this Board recognizes that an AMP that merely summarizes options for future plans does not meet the specific requirement for demonstrating that the effects of aging will be adequately managed for the period of extended operations as required by Part 54."). *See also Entergy Nuclear Vermont Yankee, LLC*, (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 186 (2006).

[7] *See, e.g.*, State of New York Notice of Hearing and Petition to Intervene (Nov. 30, 2007) at 227-33.

to addressing a motion for summary disposition. The Intervenors propose that the Draft Scheduling Order be revised to require Entergy to file motions on these contentions no sooner than 60 days from the submission of new data, which would give Intervenors time to evaluate the new information with their experts. When Congress amended the AEA to provide the opportunity for a proceeding to explore license applications under §189, it did not intend that right to be so limited as to be an opportunity in name only. Given that Entergy has had an unfettered opportunity to consult with its experts and review and revise its April 2007 license application, and given the fact that the State and others have identified the problematic aspects of Entergy's approach for some time now, Intervenors and their experts should not be forced to undertake substantial review and filing efforts under a unduly and unnecessarily compressed schedule with conflicting litigation demands.

III. Timing of Intervenor Submission of Initial Hearing Filings/"Trigger Date" Issue

Another area of concern is the "trigger date" and subsequent submissions of initial position and testimony. As an initial matter, as to the trigger date itself, it should be the date on which the notice of the availability of the FEIS appears in the Federal Register. However, should parties file motions for summary disposition on NEPA-based contentions in response to the issuance of the Final Supplemental Environmental Impact Statement ("FSEIS"), respondents would be focused on answering such motions during the same period of time which the ASLB contemplates for the preparation of initial hearing filings (Statements of Position, testimony, etc). Similarly, should a party receive a high number of summary disposition motions simultaneously in July, necessitating an extension of time in which to respond as discussed above, parties would likewise be engaged in responding to such motions through the end of September 2010, already halfway into the time allotted for Intervenors to prepare initial hearing documents.

Of more significant concern to Intervenors is the possibility that, should any extension of time for response to summary disposition motions that must be filed before July 30 become necessary, or should a party find cause to file summary disposition motions following the FSEIS, Intervenors would find themselves in the position of utilizing limited resources to draft and submit statements of position and initial testimony on contentions which may be disposed of prior to hearing. Intervenors' initial testimony for environmental contentions cannot be prepared entirely in advance, because they must consider information in the FEIS, which will not be available until the end of August at the earliest. Moreover, corralling resources, which is difficult particularly for non-governmental intervenors, becomes much more difficult when it is unclear whether the resources being expended on testimony preparation could be rendered valueless by a subsequent summary disposition ruling. For these reasons, Intervenors request that the Board allow Intervenors at least 45 days from the date of resolution of any motions for summary disposition based upon the FSEIS to file testimony regarding the challenged contentions.

IV. Timeframe for Motions in Limine/Motions to Strike

Intervenors understand proposed paragraph K.4 to allow for the submission of in limine filings directed at the initial testimony 21 days after the service of the initial testimony and for the submission of another set of in limine motions directed at the rebuttal testimony 21 days after the service of the rebuttal testimony (that is, two rounds of motions -- one directed at the initial testimony and one directed at the rebuttal testimony). Draft Scheduling Order at K.4. As such, Intervenors respectfully submit that footnote 39 appears redundant in that it offers an "extension" of time which is not necessary, since applicant and Staff are already granted the right to submit

in limine filings on K.3 rebuttal testimony in paragraph K.4. Intervenors seek clarification from the Board as to the significance of footnote 39 if Intervenors' understanding is not correct.

CONCLUSION

The Intervenors respectfully submit the above comments for the Board's consideration.

Respectfully submitted,

/s

Janice A. Dean
John J. Sipos
Assistant Attorneys General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 402-2251
john.sipos@ag.ny.gov

/s

Robert D. Snook
Assistant Attorney General
Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Tel: (860) 808-5020
Fax: (860) 808-5347
Robert.Snook@ct.gov

/s

Deborah Brancato, Esq.
Phillip Musegaas, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
(914) 478-4501
dbrancato@riverkeeper.org
phillip@riverkeeper.org

/s

Manna Jo Greene
Ross Gould
Hudson River Sloop Clearwater, Inc.
112 Little Market Street
Poughkeepsie, NY 12601
mannajo@clearwater.org
rgould@gmail.com

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 June 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2010, copies of Joint Comments and Proposed Modifications to Atomic Safety And Licensing Board Draft Scheduling Order on behalf of the State of New York, the State of Connecticut, Riverkeeper, Inc., and the Hudson River Sloop Clearwater were served upon the following persons via U.S. Mail and e-mail at the following addresses:

Lawrence G. McDade, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Lawrence.McDade@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Richard.Wardwell@nrc.gov

Kaye D. Lathrop
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
190 Cedar Lane E.
Ridgway, CO 81432
Kaye.Lathrop@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Zachary S. Kahn, Esq. &
Josh Kirstein, Esq. Law Clerks
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Zachary.Kahn@nrc.gov
Josh.Kirstein@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
ocaamail@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
hearingdocket@nrc.gov

Sherwin E. Turk, Esq.
David E. Roth, Esq.
Andrea Z. Jones, Esq.
Beth N. Mizuno, Esq.
Brian G. Harris, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mailstop 15.D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
sherwin.turk@nrc.gov
andrea.jones@nrc.gov
david.roth@nrc.gov
beth.mizuno@nrc.gov
brian.harris@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ksutton@morganlewis.com
pbessette@morganlewis.com
cadams@morganlewis.com

Martin J. O'Neill, Esq.
Morgan, Lewis & Bockius LLP
Suite 4000
1000 Louisiana Street
Houston, TX 77002
martin.o'neill@morganlewis.com

Elise N. Zoli, Esq.
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
ezoli@goodwinprocter.com

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

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
robert.snook@po.state.ct.us

Gregory Spicer, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
gss1@westchestergov.com

Daniel E. O'Neill, Mayor
James Seirmarco, M.S.
Village of Buchanan
Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298

vob@bestweb.net

Daniel Riesel, Esq.
Thomas F. Wood, Esq.
Jessica Steinberg, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driesel@sprlaw.com
jsteinberg@sprlaw.com

Michael J. Delaney, Esq.
Vice President - Energy Department
New York City Economic Development
Corporation (NYCEDC)
110 William Street
New York, NY 10038
mdelaney@nycedc.com

Manna Jo Greene, Director
Hudson River Sloop Clearwater, Inc.
112 Little Market St.
Poughkeepsie, NY 12601
Mannajo@clearwater.org

Stephen Filler, Esq.
Board Member
Hudson River Sloop Clearwater, Inc.
Suite 222
303 South Broadway
Tarrytown, NY 10591
sfiller@nylawline.com

Ross H. Gould
Member
Hudson River Sloop Clearwater, Inc.
10 Park Ave, #5L
New York, NY 10016
rgouldesq@gmail.com

Phillip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
phillip@riverkeeper.org
dbrancato@riverkeeper.org

Janice A. Dean
Janice A. Dean
Assistant Attorney General
State of New York
(212) 416-8459

Dated at New York, New York
this 16th day of June, 2010