

March 14, 2011

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-LR/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO STRIKE
HUDSON RIVER SLOOP CLEARWATER, INC. AND RIVERKEEPER, INC.'S
PETITION FOR WAIVER AND PORTIONS OF THEIR COMBINED REPLY
TO ANSWERS TO THEIR NEW WASTE CONFIDENCE CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the "Motion to Strike" ("Motion") filed by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on March 4, 2011. Therein, the Applicant moved to strike the petition for waiver, the Declarations of Manna Jo Greene and Arnold Gundersen, and certain portions of the "combined reply" filed by Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc. (hereafter, "Joint Intervenors") on February 25, 2011, in response to the Applicant's and Staff's answers to their new "waste confidence" contentions.¹

¹ The Motion seeks to strike the following documents filed by the Joint Intervenors: (a) their "Petition for Exemption from or Waiver of Restrictions Contained in 10 C.F.R. § 51.23(b)" ("Waiver Petition"); (b) the "Declaration of Manna Jo Green[e]"; (c) the "Expert Witness Declaration of Arnold Gundersen Regarding Aging Management of Nuclear Fuel Racks"; and (d) specified portions of their "Combined Reply to NRC Staff and Entergy's Answers in Opposition to Clearwater and Riverkeeper's Joint Motion for Leave and Petition to Add New Contentions" ("Combined Reply").

For the reasons stated in the Applicant's Motion and the reasons set forth below, the Staff supports the Applicant's Motion and recommends that it be granted.²

BACKGROUND

On December 23, 2010, the Commission published an update to its "Waste Confidence Rule" contained in 10 C.F.R. § 51.23(b), along with a rule providing its generic consideration of the environmental impacts of the temporary storage of spent fuel.³ In accordance with this Board's Scheduling Order of July 1, 2010, any new contention based upon these developments was due to be filed within 30 days thereafter, *i.e.*, on or before January 24, 2011.

On January 24, 2011, the Joint Intervenors filed a 48-page motion, proffering four new contentions concerning the on-site storage of spent fuel or nuclear waste at Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3").⁴ In filing their new contentions, the Joint Intervenors stated that two of these contentions (Clearwater EC-8 (Riverkeeper EC-6) and Clearwater SC-2 (Riverkeeper TC-3)) were based on the assumption that the Commission's Waste Confidence Rule, as recently updated and amended, is invalid (*i.e.*, "the rule invalid scenario"; the other two contentions (Clearwater EC-9 (Riverkeeper EC-7) and Clearwater SC-3 (Riverkeeper TC-4)) were filed "[i]n the alternative, if the Board decides that Petitioners cannot challenge duly adopted NRC rules in these proceedings."⁵ The Joint Intervenors' new

² The Applicant's Motion correctly noted that the Staff supports the Motion. See Motion at 11. The instant response is provided to explain the bases for the Staff's position.

³ See (1) Final Rule, "Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation," 75 Fed. Reg. 81,032 (Dec. 23, 2010); (2) "Waste Confidence Decision Update," 75 Fed. Reg. 81,037 (Dec. 23, 2010).

⁴ "Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s Joint Motion For Leave To Add New Contentions Based Upon New Information And Petition To Add New Contentions" (Jan. 24, 2011) ("New Contentions").

⁵ New Contentions at 17, 18.

contentions contained extensive arguments challenging the validity of the Commission's Waste Confidence Rule, but were unaccompanied by a petition seeking a waiver of that rule under 10 C.F.R. § 2.335; further, the contentions relied upon previously-filed declarations rather than material new information or declarations.

On February 18, 2011, the Applicant and Staff filed their Answers to the Joint Intervenors' new contentions.⁶ The Applicant's and Staff's Answers, totaling 26 and 36 pages, respectively, opposed the admission of the new contentions on numerous grounds, including the facts that (a) the new contentions posed an impermissible challenge to the Commission's waste confidence rule and the Joint Intervenors had failed to request a waiver of the Commission's rules to permit them to litigate these issues;⁷ and (b) the new contentions relied upon previously-filed declarations and were not supported by material new information, as required under 10 C.F.R. § 2.309(f)(2).⁸

On February 25, 2011, the Joint Intervenors filed their "Combined Reply" to the Applicant's and Staff's Answers, along with the Waiver Petition and the Declarations of Manna Jo Greene and Arnold Gundersen. In these filings, the Joint Intervenors sought to remedy the defects of their previous filings; thus, their Combined Reply relied, in part, upon the newly-filed Declaration of Mr. Gundersen (in contrast to the New Contentions' reliance on his prior declaration), while their Waiver Petition requested a waiver of the Waste Confidence Rule, in response to the Applicant's and Staff's arguments that their New Contentions constitute an

⁶ See "NRC Staff's Answer to Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s Joint Motion and Petition To Add New Contentions" (Feb. 18, 2011) ("Staff Answer"); "Applicant's Answer to Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s New Contentions Concerning the Waste Confidence Rule" (Feb. 18, 2011) ("Applicant's Answer").

⁷ See, e.g., Staff Answer at 19, 22-26, 28; Applicant's Answer at 2-3, 12-14.

⁸ See, e.g., Staff Answer at 33-35; Applicant's Answer at 8, 16-19.

impermissible challenge to the Commission's regulations.⁹ On February 25, 2011, the Applicant filed its motion to strike.

DISCUSSION

The Applicant's Motion discusses the legal standards governing the filing of replies to answers to contentions; the Staff concurs in that discussion. As stated therein, replies may not be used to introduce new arguments in support of a previously filed contention, without satisfying the Commission's rules governing the late filing of such material. See Motion at 4-5 and cases cited therein. Moreover, to permit an intervenor to file new arguments in its reply to other parties' answers to its contentions would create an unworkable process, whereby new arguments could potentially be filed whenever a party develops a new theory or finds additional support for its previously filed contention, thereby depriving other parties of an opportunity to respond to the new arguments. See *id.* at 5-6 and cases cited therein.

Further, the Staff notes that if a party were permitted to file new arguments in its reply to other parties' answers (whether in response to contentions or answers to any other motion or brief), new arguments could potentially be filed whenever a party develops a new theory or finds additional support for its previously filed pleading, thereby expanding the issues and causing delay in the proceeding. That result would be unfair and inconsistent with the Commission's interest in promoting an efficient adjudicatory process.

In sum, the Joint Intervenors' new contentions concerning the Commission's waste confidence update were required to be filed, along with all necessary supporting documents, within 30 days after the updated Waste Confidence Rule was published. As set forth in

⁹ See Waiver Petition at 1-2.

10 C.F.R. § 2.309(f)(2), “[c]ontentions must be based on documents or other information available at the time the petition is to be filed” This requirement placed an “ironclad obligation” on the Joint Intervenors to examine available information with sufficient care to enable them to uncover any information that could serve as the foundation for their contention.¹⁰ Indeed, the Joint Intervenors appear to have recognized that their new contentions were required to be filed by that date, since they filed their new contentions within the required 30-day period. In the same vein, any supporting information or petitions for waiver should have been submitted at that time, to comply with 10 C.F.R. § 2.309(f)(2).

Moreover, the Staff’s and Applicant’s Answers to the Joint Intervenors’ New Contentions demonstrate that they each devoted substantial time and resources to address the contentions, as originally filed. It would be highly wasteful and unfair to the Staff and Applicant if their previously-filed answers were now to be set aside, and new or modified answers are needed, to address the Joint Intervenors’ newly-filed Waiver Petition and the newly submitted information and arguments contained in their Combined Reply.

Finally, as noted by the Applicant, this Board has previously “advise[d] the parties to file . . . petitions [for waiver] as soon as practicable with the understanding that a failure to [do] so may well result in the rejection of an otherwise meritorious petition.”¹¹ Indeed, this Board has previously rejected a contention challenging the waste confidence rule as an impermissible challenge to the regulations, where no petition for waiver of the rule had been filed.¹² Moreover,

¹⁰ “Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

¹¹ See Motion at 2, *citing* “Order (Scheduling Prehearing Conference and Ruling on New York State’s Motion Requesting Consideration of Additional Matters)” (Dec. 18, 2008), at 4.

¹² See “Order (Ruling on New York State’s New and Amended Contentions)” (June 16, 2009), slip op. at 16 (rejecting Contention 34 as an impermissible attack on the Commission’s regulations).

in addressing a prior waste confidence contention filed by Clearwater, the Board observed that “numerous Boards, including this Board, have uniformly and correctly rejected . . . challenges [to the Waste Confidence Rule] as attacks on Commission regulations that the Boards were not authorized to entertain.”¹³ Indeed, the Commission subsequently instructed the parties in this proceeding that challenges to the waste confidence rule should be made “through the rulemaking process – that is, the Waste Confidence Rule, codified at 10 C.F.R. § 51.23 – instead of litigating issues case-by-case in adjudicatory proceedings.”¹⁴

Thus, the Joint Intervenors have had ample reason to know that contentions challenging the waste confidence rule are impermissible unless a waiver of the rule has been obtained.¹⁵ Their belated filing of a petition for waiver on February 25, 2011 – 64 days after the Commission’s waste confidence update was published, and 32 days after the petition and any supporting information were due to be filed – should be rejected.

¹³ “Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater’s Motion for Leave to Admit New Contention)” (Feb. 12, 2010), at 22.

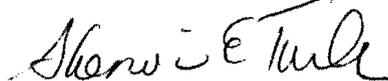
¹⁴ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-19, 72 NRC __ (July 8, 2010), slip op. at 2.

¹⁵ Other parties to this proceeding have adhered to this requirement. For example, the State of New York filed its new contention challenging the Waste Confidence Rule, together with a petition for waiver. See (1) “State of New York Motion for Leave to File Timely Amended Bases to Contention 17A (Now to Be Designated Contention 17B)” (Jan. 24, 2011); (2) “State of New York Contention 17B” (Jan. 24, 2011); and (3) “State of New York’s Request for a Determination That the Proposed Amended Bases for Contention 17A Are Not Barred by 10 C.F.R. § 51.23(b), or That Exemption From the Requirements of 10 C.F.R. § 51.23(b) Should Be Granted, or That the State Has Made a Prima Facie Case That § 51.23(b) Should Be Waived as Applied to Contention 17B” (Jan. 24, 2011).

CONCLUSION

For the reasons stated above and in the Applicant's Motion, the Staff supports the Applicant's motion to strike and recommends that the Motion be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is written in a cursive style with a large, stylized initial 'S'.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, MD
this 14th day of March 2011

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO STRIKE HUDSON RIVER SLOOP CLEARWATER, INC. AND RIVERKEEPER, INC.'S PETITION FOR WAIVER AND PORTIONS OF THEIR COMBINED REPLY TO ANSWERS TO THEIR NEW WASTE CONFIDENCE CONTENTIONS," dated March 14, 2011, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 14th day of March, 2011:

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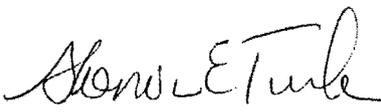
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