

September 28, 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 THE STATE OF NEW YORK'S
MOTION FOR AN EXTENSION OF TIME FOR AT LEAST 90 DAYS
TO FILE ITS DIRECT TESTIMONY AND STATEMENTS OF POSITION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith files its answer to the State of New York's ("New York," "NYS" or "State") motion for an extension of time of "at least 90 days" to submit its direct testimony, exhibits and statements of position in this proceeding, filed on September 27, 2011.¹

As more fully set forth below, the Staff respectfully submits that New York's Motion – which effectively seeks a 90-day or longer (i.e., an indefinite) suspension of adjudicatory proceedings on all safety and environmental contentions in this proceeding – is unsupported by any showing of good cause sufficient to warrant such an extraordinary delay in the Atomic Safety and Licensing Board's ("Board") established schedule for this proceeding. Further, by styling its request for a 90-day suspension of proceedings as a simple "motion for extension of time," New York unfairly constricted the time available for the Staff and Applicant to answer its Motion, requiring any answers to be filed within one day rather than the 10 day period normally

¹ "State of New York Motion For an Extension of Time So That Outstanding Issues Affecting the Content of Prefiled Direct Testimony and Statements of Position May Be Resolved" (Sept. 27, 2011) ("Motion"), at 9.

allowed for such answers; New York's use of this litigation device, by itself, warrants that New York's Motion be rejected. For these reasons, as more fully set forth below, the Motion should be denied.²

PROCEDURAL BACKGROUND

This proceeding concerns the license renewal application ("LRA") for Indian Point Units 2 and 3 ("IP2 and IP3" or "Indian Point"), submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on April 23, 2007. The NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA, on August 1, 2007.³ Petitions for leave to intervene were then timely filed by various petitioners, including New York. On July 31, 2008, the Board granted New York's petition and admitted a number of its contentions.⁴ Numerous late-filed contentions were subsequently filed by New York and other Intervenors, many of which the Board admitted.

On July 1, 2010, the Board issued its initial Scheduling Order in this proceeding, in which it, *inter alia*, established mandatory deadlines for the parties' submission of written testimony, statements of position, and evidentiary exhibits. In accordance with that Order, New York was required to file its written testimony and related materials within 90 days after the later of (a) the Staff's publication of its Final Supplemental Environmental Impact Statement ("FSEIS"), or (b) the last date that replies are filed by Intervenors in response to the Staff's or Applicant's

² As discussed *infra* at 14, the Staff would not object to a limited, three (3) day extension of time, for good cause shown, to accommodate New York's scheduled computer maintenance,

³ "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period," 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁴ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 100-02, 110-13 (2008)..

answers to new or amended FSEIS contentions;⁵ the Applicant and Staff were required to file their direct and rebuttal testimony and related documents within 60 days thereafter.⁶ The Staff published its FSEIS on December 3, 2010;⁷ various FSEIS-related contentions, answers to contentions, and replies to those answers were then filed, on or before March 21, 2011.⁸ New York's testimony was then due to be filed on or before June 20, 2011.

Separately, the Staff issued its Safety Evaluation Report ("SER") on August 11, 2009, in which it recommended approval of the LRA;⁹ the Advisory Committee on Reactor Safeguards ("ACRS") issued a letter on September 23, 2009, recommending approval of the LRA;¹⁰ and the Staff published its SER in November 2009, recommending approval of the LRA. On May 26, 2011, the Staff informed the Board and parties that it intended to issue a Supplement to its SER, to provide "its evaluation of the additional information it has received (or will soon receive) from the Applicant" in response to its recent or planned requests for additional information ("RAIs").¹¹

⁵ Scheduling Order of July 1, 2010, at 13 (¶¶ K, K.1).

⁶ *Id.* at 14 (¶ K.2).

⁷ See Letter from Sherwin E. Turk to the Board (Dec. 3, 2010), transmitting a copy of "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report," NUREG-1437, Supplement 38 (Dec. 2010).

⁸ The last such filing appears to have been made by Hudson River Sloop Clearwater, Inc. ("Clearwater") on March 21, 2011. See "Combined Reply to NRC Staff and Entergy's answers in Opposition to Clearwater's Motion for Leave and Petition to Amend Contention EC-3" (Mar. 21, 2011).

⁹ See NUREG-1930, "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3" (Nov. 2009) ("SER").

¹⁰ See Letter from Mario V. Bonaca, Chairman, ACRS, to Gregory B. Jaczko, Chairman, NRC (Sept. 23, 2009), reproduced in SER Vol. 2, at 5-2.

¹¹ Letter from Sherwin E. Turk to the Board (May 26, 2011), at 1. The Staff noted that Entergy's final responses to the RAIs were expected on or about the end of June 2011, and the SER Supplement was expected to be issued by early August 2011. Further, the Staff advised the Board and parties that (a) the SER Supplement was expected to address a number of issues that are the subject of admitted contentions in this proceeding, including: buried piping (New York Contention 5); low and medium voltage cables (New York Contention 6/7); containment structure integrity (New York Contention 24); and metal fatigue (New York Contention 26/Riverkeeper TC-2); and (b) the Staff "is currently unable to state what impact the SER Supplement may have upon the parties' testimony, [but] the Staff does expect that its testimony would address some of the information to be discussed in the SER Supplement." *Id.* at 1, 2.

On June 6, 2011, the Board convened a prehearing conference to discuss the Staff's planned issuance of an SER Supplement and the potential impact that the Applicant's RAI responses and the SER Supplement might have on the schedule for the proceeding.¹² On June 7, 2011, the Board issued an Amended Scheduling Order, in which it, *inter alia*, revised the schedule for the submission of testimony, statements of position, and related documents to afford the intervenors time to consider and address the new information and SER Supplement in their submittals. In accordance with the Board's Amended Scheduling Order, the Intervenors are required to file their written testimony, statements of position and related documents either (a) 40 days after the Staff issues its SER Supplement, or (b) 30 days after the last Intervenor reply is filed in response to answers to new or amended contentions based on the SSER.¹³

On August 31, 2011, the Staff published its SER Supplement. As a result, New York is required to file its written testimony, statements of position and related documents either (a) by October 11, 2011, or (b) if any new or amended contentions are filed based on the SSER, within 30 days after the last timely reply is filed in response to answers to such new or amended contentions. The Staff and Applicant are required to file their testimony and other documents within 60 days thereafter;¹⁴ evidentiary hearings on all safety and environmental contentions are then expected to commence in mid-2012, following the submittal of rebuttal testimony, interested government testimony and positions, and various other documents and motions.¹⁵

¹² See E-mail communication from Joshua A. Kirstein, Esq. to the parties (May 26, 2011); "Amended Scheduling Order" (June 7, 2011).

¹³ See "Amended Scheduling Order, at 3.

¹⁴ Scheduling Order of July 1, 2010, at 14 (¶¶ K.2).

¹⁵ See Amended Scheduling Order at 3; Scheduling Order at 17 (¶ 8).

DISCUSSION

A. Legal Standards

In accordance with 10 C.F.R. § 2.319(k), the Presiding Officer or Board is authorized to “[s]et reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules.” Further, pursuant to 10 C.F.R. § 2.307(a) and (b), the Commission or Presiding Officer is authorized to extend or shorten the times provided for taking any action in the proceeding, upon a showing of “good cause.”¹⁶ The Commission, however, discourages the extension of deadlines, recognizing that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case.¹⁷ Thus, the Commission has indicated that it “expects licensing boards to set and adhere to reasonable schedules for proceedings,” and “advised” the boards “to satisfy themselves that the [former section] 2.711 ‘good cause’ standard for adjusting times fixed by the Board or prescribed by Part 2 has actually been met before granting an extension of time.”¹⁸ More recently, the Commission indicated that “ordinarily only ‘unavoidable and extreme circumstances’ provide sufficient cause to extend filing deadlines.”¹⁹

¹⁶ See, e.g., *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 260-61 (1994).

¹⁷ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998) (recognizing that “the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.”).

¹⁸ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

¹⁹ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 3 n.2 (1999), citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 21; accord, *La. Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 20 (2004). As one Board has noted, the Commission did not explicitly cite the “unavoidable and extreme circumstances” standard upon adopting its revised rules of practice in 2004, leaving that Board to question whether that standard continues in effect. See *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), Order (Granting Extension Request)” (June 3, 2004), at 1 n.2 (unpublished) (finding, in any event, that the standard was satisfied in the circumstances of that case). In this regard, the Staff notes that the Commission has not rescinded its policy statements; moreover, in adopting its revised rules of practice, the Commission reiterated its interest in the “efficient and effective conduct of hearings,” and the need for “strong case management and control by the ASLBP and its presiding officers – using the tools and reflecting the policies in the Commission’s Policy Statement on the Conduct of Adjudicatory

More specifically, the Commission has stated that a showing of good cause requires more than showing the normal difficulties of participating in a hearing or even multiple hearings; there must be a showing of special circumstances unique to the requestor amounting to good cause.²⁰ Moreover, the Commission has made clear that a party is not relieved of its hearing obligations because it may possess fewer resources than others to devote to a proceeding.²¹ Similarly, a party is not excused from compliance with a Board's discovery schedule simply because of the need to prepare for a related state court trial.²² Further, in denying requests for substantial filing extensions related to petitions to intervene, the Commission has held that petitioners did not show good cause when citing the following: (a) difficulties in coordinating multiple organizations and insufficient resources to meet the burden of drafting pleadings while balancing other obligations;²³ (b) insufficient staff and resources necessary to review the license renewal application and inability to identify and retain experts to assist with the review within the 60-day review period;²⁴ and (c) arguments that an extension would not delay issuing the license.²⁵

Proceedings and in the rules of practice." Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2197 (Jan. 14, 2004).

²⁰ *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant Unit 3), CLI-09-4, 69 NRC 80, 82 (2009).

²¹ See *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). See also *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 n.29 (1982); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-85-46, 22 NRC 830, 832 (1985).

²² *Kerr-McGee*, LBP-85-46, 22 NRC at 832.

²³ *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant Unit 3), CLI-09-4, 69 NRC 80, 82 (2009). (denying a 90-day extension request and stating that an extension was not warranted because the license renewal application had been available to petitioners for five months).

²⁴ See, e.g., *PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 & 2, Hope Creek Generating Station, Unit 1), Order (Nov. 13, 2009) (denying 60-day extension request and granting a modest 16-day extension) (unpublished) (ADAMS Accession Nos. ML0931707322 & ML0931707720).

²⁵ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), Order (Aug. 5, 2009) (unpublished) (ADAMS Accession No. ML082180832).

Finally, it should be noted that the Commission's construction of "good cause" has been held to constitute a reasonable means of avoiding undue delay in a license renewal proceeding, and for assuring that the proceeding is adjudicated promptly, consistent with the goals set forth in the Commission's Policy Statements and the Administrative Procedure Act.²⁶

B. New York Has Not Shown Good Cause for the Requested Extension.

In its Motion, New York asserts a panoply of reasons why this Board should suspend the date for filing of testimony on all contentions, by "at least 90 days with an understanding that . . . New York may [later] seek additional time." Motion at 9. As discussed with respect to each of New York's assertions, none of the reasons stated by New York in support of its Motion establish good cause for such an extraordinary request.

1. The Pending Appeal from LBP-11-17.

New York asserts, first, that the Applicant's pending appeal from the Board's decision in LBP-11-17,²⁷ which the Staff has supported, warrants a suspension of the proceeding until the appeal has been decided by the Commission. Motion at 5. New York provides no explanation of its own for this view; rather, it asserts that this is the Staff's view, in support of which it recites (sometimes incorrectly) various statements presented in the Staff's Answer to the Applicant's petition for review.²⁸ New York misstates or misinterprets the Staff's views.

In its brief on appeal, the Staff expressed its view that the Board had erred in granting New York's motion for summary disposition of NYS Contention 35/36, concerning the implementation of cost-beneficial SAMAs (or providing a valid reasons for not requiring such implementation) as a condition for license renewal. The views stated by the Staff in its brief on

²⁶ *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998).

²⁷ "Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36" (July 29, 2011) ("Petition").

²⁸ "NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 (Aug. 11, 2011) ("Staff Br.").

appeal were consistent with the views it had expressed before the Board, in opposing New York's motion for summary disposition and in support of its own cross-motion for summary disposition of that contention. In addition, the Staff explained its view that interlocutory review of LBP-11-17 was appropriate under 10 C.F.R. § 2.341(f), in that the decision threatened to have an unusual or pervasive effect on the structure of the proceeding. Staff Br. at 8-12.

In this regard, the Staff explained, *inter alia*, that the Board's decision in LBP-11-17 effectively terminated all litigation on NYS Contention 35/36 and, in the present circumstances, would result in the denial of Entergy's LRA regardless of the outcome of the evidentiary hearings on all of the 14 other admitted contentions. *Id.* at 9-10. Contrary to New York's representation, the Staff did not state that "this proceeding [is] in limbo" (Motion at 5, misquoting Staff Br. at 12); did not "essentially argue[] that further proceedings in this proceeding are pointless unless and until the Commission reverses the Board" (*Id.*); and did not suggest that "from the Staff's perspective[,] the necessity of advancing to hearing on any issue is in question" (*Id.*).²⁹ To the contrary, while the Staff supports the Applicant's appeal from LBP-11-17, it is the Staff's view that proceedings can continue on the 14 contentions currently slated to go to evidentiary hearing pending the outcome of that appeal.

2. Potential Future Changes to Entergy's LRA.

New York contends that "Entergy's application remain[s] in flux" (Motion at 5), in support of which it cites various portions of the Staff's SSER pertaining to pressure vessel internals

²⁹ Also contrary to New York's representations, the Staff did not state that it "will not conduct any further review of the 20 severe accident mitigation alternatives that are potentially cost-beneficial" (Motion at 5, misstating Staff Br. at 11 n.40), or that "it will not comply with the ASLB ruling" (*Id.*). In fact, the Staff explained that it had already complied with the Board's requirement that it provide a "valid" explanation for its SAMA determinations, by providing an augmented explanation of its SAMA conclusions in the Final SEIS, Staff Br. at 10-11; further, the Staff stated that, "unless otherwise directed by the Commission, the Staff is not inclined to expend agency resources on actions which the Staff firmly believes are not required by NRC regulations." *Id.* at 11 n.39. Further, the Staff observed that "if the Applicant submits an amendment to its ER, containing a revised SAMA analysis that incorporates an engineering project cost analysis, the Staff would determine whether that submittal constitutes "new and significant" information that requires a supplement to the FSEIS," and "the Staff would also implement any Commission determination that such analyses should be submitted." *Id.* at 12 n.41. .

embrittlement, steam generator primary stress corrosion cracking, and metal fatigue (*Id.* at 5-7). New York then asserts, without any basis, that the “[c]ontemplated changes may directly impact the substance of the State’s contentions, as well as the State’s decision to file new contentions.”³⁰ Essentially, New York asks the Board to delay this proceeding because something may happen in the future, which may cause New York to want to change its testimony or file additional contentions.

New York’s reliance on the possible occurrence of events in the future does not support its request for an extension of time. It is axiomatic that a license application is not static. If the Applicant submits new information in the future that warrants a revision to the parties’ testimony, an appropriate motion could be filed for such relief at the proper time. Moreover, if the Board were to grant this unwarranted delay, New York could raise the same complaint and seek further delay every time the LRA might change in the future. Indeed, under New York’s suggested approach, this proceeding could be delayed repeatedly, without even knowing if any expected changes to the LRA are significant enough to warrant a change in the parties’ positions or testimony. This type of unending litigation would preclude the efficient and effective resolution of this proceeding.³¹

In paragraph 2 of its Motion, the State alleges three issues that it claims have impeded its ability to prepare its testimony or file new contentions including: (1) the Staff’s review of a generic Ageing Management Plan (“AMP”) for pressurized water reactors vessel internals (“Vessel Internals Program”), (2) a missing AMP for steam generators (“SG”), and (3) Entergy and Staff’s “open-ended dialogue” regarding metal fatigue.

³⁰ Motion at 5 (emphasis added).

³¹ Further, if Entergy were to make changes to its LRA, the State could seek leave to file new or amended contentions based on any significant new information, which (if admitted) the parties would be able to address in their testimony. Alternatively, New York could request leave to file supplemental testimony addressing the new issues to the extent that any future submission might significantly affect currently admitted issues. However, New York’s generalized concern that Entergy might supplement its LRA does not provide good cause for a total suspension of the proceeding to await a determination as to the content and significance of the amendments.

More particularly, the State complains that the Staff has not produced documents necessary for testimony and that they have been unable to locate a document "denominated MRP-227-A."³² It is well established, however, that the adequacy of the application, not the adequacy of the Staff's review or evaluation, e.g., its SER, is the proper focus for a safety contention.³³ While New York assumes that Entergy's "anticipated LRA supplement impacts the State's consideration of filing new contentions,"³⁴ the anticipated LRA supplement is not expected to present a substantial change to LRA; rather, the anticipated September 28, 2011, LRA supplement is expected to comprise an inspection plan submitted as part of Entergy's fulfillment of its commitment related to the Vessel Internals Program. This "supplement" has been scheduled for this time frame for essentially the life of this proceeding,³⁵ in that Commitment 30 required that Entergy submit an inspection plan two years prior to the period of extended operation. Thus, it could not have come as any surprise to NYS that Entergy is now complying with that commitment. Moreover, Entergy's compliance with the commitment is outside of scope of this license renewal proceeding and has no legal effect on whether the proposed AMP is adequate.

³² Although the State cites to a generic safety evaluation related to MRP-227, it seems to complain that the document was missing from the hearing file update that released on the same day as the SSER. The next update to the hearing file is due to be filed on September 30, 2011. Further, New York failed to consult with the Staff regarding this document in any way, or to mention this issue in its "consultation" regarding the filing of its Motion. As such, New York's complaint regarding a document that they have attempted to pursue in any meaningful way and which could not have been identified and provided in the previous hearing file update fails to establish good cause for New York's motion.

³³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-3, 53 NRC 84, 97 (2001). The adequacy of the manner in which the Staff conducts its review of a technical/safety matter is outside the scope of Commission proceedings. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 476-77, 481-82 (2008); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003).

³⁴ Motion at 6. It is apparent that NYS' concern regarding potential new contentions cannot serve as good cause for extending the time to file testimony based on the existing application.

³⁵ SER at 21 (Commitment 30) ("For aging management of the reactor vessel internals, [Entergy] will ... (3) upon the completion of these programs, but not less than 24 months before entering the period of extended operation, submit an inspection plan for reactor internals to the NRC for review and approval.")

In paragraph 2(b), the State again complains that it has been precluded from filing a new contention because information is missing from the LRA. Here, the State concentrates on an AMP related to the primary to secondary boundary in the SG. The State made no assertions as to how this impacted its ability to prepare testimony related to its contentions. As such, it cannot be basis for a showing of good cause for a 90-day extension. Repeatedly, the State confuses its desire file new contentions with its obligation to submit testimony.

In paragraph 2(c), NYS complains of two separate issues related to metal fatigue. NYS asserts that there is no timeline or deadline for the completing Entergy's confirmation of the limiting location for metal fatigue in Indian Point Units 2 and 3 (Motion at 6). However, NYS' selected quote from the SSER definitively sets out a date certain for the completion, i.e. "prior to entering the period of extended operation." *Id.* Thus, NYS apparent misunderstanding of clear language in the SSER cannot provide a basis for good cause for a 90-day extension.

NYS also takes issue with WESTEMSTM, the computer code used by Entergy to perform calculations related to metal fatigue. New York, however, does not assert that its testimony may be affected by this matter, nor does it provide any explanation as to how its testimony was affected by WESTEMSTM.³⁶ NYS thus seems to leave it to the Board to construct the reason for good cause. Moreover, its complaints seem to center on New York's contemplation of potential new contentions rather than indicating any basis for not filing its testimony on current issues.

3. Potential Changes to the AMP for Buried Piping.

In paragraph 3, NYS asserts that it cannot submit testimony or its testimony would be premature, because Entergy has not yet submitted CEP-UPT-0100 (containing detailed information related to risk ranking criteria, reasonable assurance guidance, and recommendations for inspection, monitoring and mitigation). NYS also states that Entergy's counsel "indicated that CEP-UPT-0100 is still undergoing internal ... review and ... cannot be

³⁶ WESTEMS appears to have been part of Entergy's LRA from its initial submission. As such, any issue NYS raises regarding WESTEMS is late.

disclosed until ... completed.”³⁷ If as NYS argues, the critical documentation regarding the AMP for underground tanks and buried pipes is simply missing, the Staff cannot see how NYS was precluded from completing its testimony regarding the inadequacy of this AMP – i.e., its testimony may simply point to the absence of information which New York contends is needed to resolve this issue.³⁸

4. Resources Diverted by the Filing of Entergy's Appeal from LBP-11-17.

New York asserts that Entergy's filing of its appeal from LBP-11-17 “diverted State resources” from the preparation of testimony. This complaint is without merit. Entergy's appeal, filed on July 29, 2011, necessitated that all interested parties devote some amount of their resources to that appeal; the Applicant and the Staff, both of whom filed appellate briefs, have asserted that the appeal interfered with their other obligations in the proceeding. Further, New York filed its answer to the appeal on August 11, 2011, fully two months before the deadline for filing testimony in the proceeding – thus allowing more than enough time for the State to meet its filing obligations. Finally, Commission precedent establishes that a party's limited resources or its need to meet other litigation obligations generally does not establish good cause for a substantial extension of time. See cases cited *supra*, at 6.

5. The Need to Conclude a New Contract for Expert Assistance.

New York asserts that its contract for expert assistance on Contention 12-C (regarding SAMAs) has “ended,” and it “is actively working to locate and finalize arrangements for additional expert services.” Motion at 8. Further, New York states that it requires time to hire a new expert and “prepare [the new expert's] statement of position and written testimony for that Contention.”³⁹

³⁷ The Staff notes that it has no knowledge regarding that alleged conversation.

³⁸ The Staff would expect that, if true, the testimony regarding an AMP missing critical information would be the easiest testimony to produce.

³⁹ NYS' Motion at 8.

New York's assertions regarding this matter do not establish good cause for a 90-day delay in the proceeding. The scheduled expiration of its expert's contract was something that New York knew of and could have acted upon more promptly, either to extend the previous contract or to hire a new expert in a timely manner. Extending a contract for an expert or seeking another expert is a normal difficulty associated with participating in a hearing, and is not a special circumstance unique to the State.⁴⁰ Moreover, the need to identify and retain experts is generally found not to constitute good cause for a substantial extension of time.⁴¹ Thus, the State has not shown that its need to identify a new expert for Contention 12-C is good cause for a 90-day extension.

6. Public Release of Sandia Documents That Were Produced to the State.

New York asserts that the filing of its testimony will require prior confirmation by the Staff that certain documents which the Staff has produced to the State (in response to its April 2011 motion to compel) may be disclosed to the public. Motion at 8. This is a non-issue. The State concedes that the documents were produced to the State (*id.*), and the State has had full use of the documents in preparing its testimony. Moreover, Staff Counsel (Sherwin Turk) has informed Counsel for the State that the Staff will provide a formal confirmation that the documents may be publicly disclosed; the Staff intends to do so in the next several days, as soon as Staff Counsel is able to coordinate the necessary authorization with the Staff. This matter will be fully resolved well before the State is required to file its testimony, and there is no reason to believe that this issue will impact the State's ability to file its testimony and other documents on time.

7. Westinghouse Documents.

New York asserts that another Intervenor (Riverkeeper) has been seeking access for

⁴⁰ See *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant Unit 3), CLI-09-4, 69 NRC 80, 82 (2009) (requiring a showing of special circumstances unique to the requestor to establish good cause).

⁴¹ See, e.g., *PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 & 2, Hope Creek Generating Station, Unit 1), Order (Nov. 13, 2009) (unpublished) (ADAMS Accession Nos. ML0931707322 & ML0931707720) ("Salem & Hope Creek Order") (denying a requested 60-day extension and granting only a 16-day extension).

“some time” to “certain Westinghouse proprietary documents in connection with contention NYS-26/RK-TC-1.” Motion at 8. New York does not identify those documents, nor does it indicate that they are relevant to the contention; rather, it asserts only that Entergy has produced “some of those documents” to Riverkeeper, and it understands “Entergy is working to determine whether additional Westinghouse documents may be responsive and produced.” *Id.*⁴² Moreover, New York does not assert how access to these documents impacts its ability to prepare testimony, its need for the documents, or any attempt it has made to obtain the documents.⁴³ These assertions thus fail to establish good cause for New York’s request for an extension of time.⁴⁴

8. Scheduled Maintenance of the State’s Computer System.

As part of its good cause argument for a 90-day extension, the State asserts that the State’s computer system will be undergoing maintenance during the Columbus Day holiday weekend, from the afternoon of Friday, October 7, until the morning of Tuesday, October 11, 2011. Motion at 8. The Staff believes that this aspect of New York’s Motion establishes sufficient cause to warrant a three-day extension of time, but does not provide good cause for a 90-day extension. Accordingly, the Staff does not object to an extension of time for the Intervenor’s filing deadline, from October 11, 2011 to October 14, 2011.

9. Unexplained Limitations on Dr. Lahey’s Availability

The State asserts that there is good cause for a 90-day extension because its expert on embrittlement and fatigue issues “has limitations on his availability during October to review new submissions and documents from Entergy, NRC, Westinghouse, EPRI, or other entities.” Motion

⁴² NYS’ Motion at 8 (emphasis added). There is no indication that the documents in question are even responsive, much less why access to the documents is essential for the State to make its submissions by October 11, 2011.

⁴³ While New York states that Riverkeeper has been seeking access to the documents (Motion at 8), it does not allege that either it or Riverkeeper has filed a motion to compel, as envisioned by the Board’s Scheduling Order of July 1, 2010, at 4-5 (¶ D).

⁴⁴ See 10 C.F.R. § 2.307(a).

at 8.⁴⁵ Nowhere, however, does New York explain what those limitations are, or why the Board should agree to extend the schedule by 90 days or more to allow Dr. Lahey to free himself from his unexplained and unsupported limitations. Further, Commission precedent establishes that a party's need to identify and retain experts does not generally constitute good cause for a substantial extension of time.⁴⁶ Moreover, given that the State's submissions are due on October 11th, at most this expert would be unavailable for eleven days. New York, moreover, fails to indicate that this expert is needed to "review new submissions and documents" that may be submitted before October 11 on any "embrittlement and fatigue issues." *See id.* This issue therefore fails to establish good cause for New York's requested 90+ day extension.

10. Briefing Dates Set by the District of Columbia Court of Appeals.

New York asserts that in a pending appeal challenging the Commission's recent waste confidence determinations, the District of Columbia Court of Appeals has "modified the parties' agreed-upon schedule and shifted the petitioners' filing date from August 15 to September 16." Motion at 9. New York asserts that "[t]his unanticipated change necessarily diverted State resources from the ongoing preparation of the prefiled testimony, exhibits, and statements of position." *Id.*

New York's claims fail to establish good cause for its requested extension. First, New York incorrectly suggests that the D.C Court of Appeals somehow modified an existing schedule in that proceeding. In fact, the parties in that proceeding had merely proposed a briefing schedule, pursuant to which New York's brief would be due on August 15; on August 12, 2011; on August 12, however, the Court issued its initial briefing order, which afforded the parties an additional month for the filing of initial briefs, such that New York would be allowed to file its brief

⁴⁵ NYS' Motion at 8.

⁴⁶ *See, e.g., PSEG Nuclear LLC (Salem Nuclear Generating Station, Units 1 & 2, Hope Creek Generating Station, Unit 1) Dkt. Nos. 50-272-LR, 50-311-LR, & 50-354-LR, Order (Nov. 13, 2009) (unpublished) (ADAMS Accession Nos. ML0931707322 & ML0931707720) ("Salem & Hope Creek Order") (denying 60-day extension and granting more modest 16-day extension).*

on or before September 15, 2011.⁴⁷ Thus, the Court's Order did not deprive New York of time to file its brief or to work on other matters (such as pleadings due to be filed in this proceeding). This issue simply provides no support for New York's request for an extension of time in the instant proceeding.

11. The Fukushima Events.

New York asserts that two other Intervenors (Riverkeeper and Clearwater) have filed a new contention addressing the Commission's "Near-Term Task Force Review of Insights From the Fukushima Dai-Ichi Accident, Recommendations for Enhancing Reactor Safety in the 21st Century." Motion at 9. New York further notes that "briefing was recently completed" on the admissibility of that contention. *Id.* New York fails to explain, however, how that matter affects its own ability to file its testimony on time – and it nowhere asserts or explains how that matter affects Riverkeeper's or Clearwater's ability to file their testimony on time. This claim fails to establish good cause for New York's requested 90+ day extension of time.

C. Procedural Grounds for Denial of New York's Motion.

Pursuant to 10 C.F.R. § 2.323(c), answers to written motions are required to be filed within 10 days after filing of the motion. The Board has provided a limited exception to this commonly accepted regulatory requirement, providing that answers to a motion for extension of time are to be filed within one day after filing of the motion. Scheduling Order of July 1, 2010, at 7 (¶ 6). As noted above, New York's motion seeks a suspension of the filing deadline for all testimony and evidentiary materials for "at least 90 days." This request, founded upon a wide array of assertions, differs substantially from the typical motion for an extension of time – which the Staff (and likely the Board, as well) had envisioned, which are normally grounded upon the occurrence of some specific incident which necessitated a brief extension (on the order of a few

⁴⁷ Attached as Attachments 1 and 2 hereto, are copies of (1) "Joint Proposed Briefing Format and Schedule" (partial excerpt) (June 13, 2011), and (2) "Order" filed in *New York v. NRC*, Docket No. 11-1045 (D.C. Cir., Aug. 12, 2011) (unpublished).

days or weeks) for the filing of a specific pleading or document. New York's Motion, which easily could (and should) have been styled as a motion for suspension of all filing deadlines, violates the spirit of this Board's requirement that motions for an extension of time be filed no later than three days before the filing deadline, and that responses thereto be filed within a single day. Further, New York's use of this litigation tactic has placed an altogether inordinate, unnecessary, and onerous demand on the Staff's and Applicant's time and resources. If for no other reason, New York's election to style its Motion as a request for extension of time warrants that its Motion be denied. See 10 C.F.R. §§ 2.314(a); 10 C.F.R. § 2.319(g).

CONCLUSION

New York's Motion, seeking a 90-day suspension of evidentiary hearings on all issues in this proceeding, is not supported by any showing of good cause sufficient to warrant the imposition of such an inordinate delay in the conduct of this proceeding. The Motion should be denied.

Respectfully submitted,



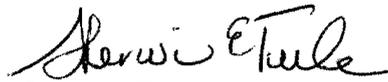
Sherwin E. Turk
Brian G. Harris
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of September 2011

ANSWER CERTIFICATION

The undersigned Counsel hereby certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sherwin E. Turk".

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of September 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ATTACHMENT 1
(PARTIAL
EXCERPT)

THE STATE OF NEW YORK, *et al.*

Petitioners,

-against-

Nos. 11-1045, 11-1051,
11-1056, 11-1057

NUCLEAR REGULATORY COMMISSION,
and UNITED STATES OF AMERICA,

Respondents.

JOINT PROPOSED BRIEFING FORMAT AND SCHEDULE

On May 13, 2011, the Court issued an order requiring the parties in these consolidated actions to submit proposed briefing formats no later than June 13, 2011. The parties submit this joint briefing format proposal, as well as a proposed briefing schedule, in response to that order.

Background

1. The consolidated petitions for review challenge two determinations issued by the United States Nuclear Regulatory Commission (“NRC”) on December 23, 2010. The first determination amends NRC’s “waste confidence findings” to

provide, *inter alia*, that (1) spent nuclear fuel can be stored in spent-fuel pools and dry storage facilities safely and without significant environmental impacts for at least sixty years beyond the licensed life of any nuclear reactor; and (2) when necessary, sufficient mined geologic repository capacity will be available to dispose of high-level radioactive waste and spent fuel (“the waste confidence findings”). 75 Fed. Reg. 80,137 (Dec. 23, 2010) The second determination amends 10 C.F.R. § 51.23(a) to provide that spent nuclear fuel can be stored in spent-fuel pools and dry storage facilities safely and without any significant environmental impacts for sixty years beyond the licensed life of any nuclear reactor (“the temporary storage rule”). 75 Fed. Reg. 80,132 (Dec. 23, 2010).

2. Petitions for review of the waste confidence findings and temporary storage rule were filed by (1) New York, Vermont, and Connecticut jointly on February 15, 2011, Docket No. 11-1045; (2) the Natural Resources Defense Council on February 17, 2011, Docket No. 11-1051; (3) Blue Ridge Environmental Defense League, Riverkeeper, Inc., and Southern Alliance for Clean

Energy jointly on February 18, 2011, Docket No. 11-1056; and (4) the Prairie Island Indian Community on February 22, 2011, Docket No. 11-1057. The petitions claim that NRC's determinations violate the requirements of the National Environmental Policy Act ("NEPA"), the Atomic Energy Act, the Administrative Procedure Act, and related regulations.

3. On March 10, 2011, the Court consolidated the four petitions. On May 9, 2011, the Court granted the motion made by New Jersey to intervene on the side of petitioners and the motions made by Nuclear Energy Institute, Inc. and Entergy Nuclear Operations, Inc. to intervene on the side of NRC and the United States.

The Parties' Proposal

4. For the reason stated below, the parties propose the following briefing schedule and format, with a deferred joint appendix:

- a. Briefs of petitioners and intervenor on side of petitioners filed by August 15, 2011;

- i. Joint brief filed by petitioners New York, Vermont, and Connecticut, and intervenor New Jersey of no more than 15,000 words;
 - ii. Joint brief filed by petitioners Natural Resources Defense Council, Blue Ridge Environmental Defense League, Riverkeeper, Inc., and Southern Alliance for Clean Energy of no more than 12,000 words;
 - iii. Brief filed by Prairie Island Indian Community of no more than 3,000 words;
- b. Brief of respondents NRC and the United States filed by October 14, 2011 of no more than 18,000 words;
 - c. Briefs of intervenors on side of NRC and the United States filed by October 21, 2011;
 - i. Brief of intervenor Nuclear Energy Institute, Inc. of no more than 8,000 words;
 - ii. Brief of Entergy Nuclear Operations, Inc. of no more than 4,000 words;
 - d. Reply briefs of petitioners and intervenor on side of petitioners filed by December 5, 2011;
 - i. Joint reply brief filed by petitioners New York, Vermont, and Connecticut, and intervenor New Jersey of no more than 7,500 words;
 - ii. Joint reply brief filed by petitioners Natural Resources Defense Council, Blue Ridge Environmental Defense League,

Riverkeeper, Inc., and Southern Alliance for Clean Energy of no more than 6,000 words;

iii. Reply brief filed by Prairie Island Indian Community of no more than 1,500 words;

e. Joint appendix due December 22, 2011;

f. Final briefs due January 11, 2011.

5. Opening Briefs. Under the proposed schedule and format, three opening briefs would be filed by August 15, 2011, one by the state petitioners and intervenor of no more than 15,000 words, one by the environmental group petitioners of no more than 12,000 words, and one by the Prairie Island Indian Community of no more than 3,000 words.

Petitioners and New Jersey submit that that schedule and format are justified for the following reasons:

a. As is customary in many cases involving environmental issues, the States, in their role as governments, should be permitted to file a brief separate from the brief filed by the environmental groups. The States filed their petition to protect both their quasi-sovereign interests in the well-being of their citizens, as well as their sovereign interests and their

Indian Community of no more than 1,500 words. Petitioners and intervenor New Jersey believe that that format is justified for the reasons stated in connection with their opening briefs. They seek forty-five days for reply briefs because New York, the principal drafter of the States' brief, is short-staffed due to an ongoing budget crisis and involved in time-intensive proceedings regarding the relicensing of the Indian Point nuclear power plant.

CONCLUSION

The undersigned parties believe that their proposed briefing schedule and format is reasonable and respectfully request that the Court adopt this schedule and format.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1045

September Term 2010

NRC-75FR81032

Filed On: August 12, 2011

State of New York, et al.,

Petitioners

v.

Nuclear Regulatory Commission and United
States of America,

Respondents

State of New Jersey, et al.,
Intervenors

Consolidated with 11-1051, 11-1056, 11-1057

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the joint briefing proposal, it is

ORDERED that the following briefing schedule and format apply in these consolidated cases:

Brief(s) for Petitioners and Intervenor for Petitioners (not to exceed 14,000 words, to be divided as petitioners see fit)	September 15, 2011
Brief for Respondents (not to exceed 14,000 words)	November 14, 2011

ATTACHMENT
2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1045

September Term 2010

Joint Brief for Intervenors for Respondents (not to exceed 8,750 words)	November 21, 2011
Reply Brief(s) for Petitioners and Intervenor for Petitioners (not to exceed 7,000 words, to be divided as petitioners see fit)	January 3, 2012
Deferred Joint Appendix	January 17, 2012
Final Briefs	January 24, 2012

The parties will be notified by separate order of the oral argument date and composition of the merits panel. The court reminds the parties that

In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

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))

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S MOTION FOR AN EXTENSION OF TIME FOR AT LEAST 90 DAYS TO FILE ITS DIRECT TESTIMONY AND STATEMENTS OF POSITION" in the above-captioned proceeding has been filed and served by Electronic Information Exchange (EIE), with copies to be served by the EIE system on the following persons, this 28th day of September, 2011.

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