

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. September 30, 2010
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**STATE OF NEW YORK AND RIVERKEEPER'S
JOINT MOTION FOR LEAVE TO FILE A NEW CONTENTION CONCERNING
ENERGY'S FAILURE TO DEMONSTRATE THAT IT HAS ALL PROGRAMS THAT
ARE REQUIRED TO EFFECTIVELY MANAGE THE EFFECTS OF
AGING OF CRITICAL COMPONENTS OR SYSTEMS**

A. Introduction

Pursuant to 10 C.F.R. § 2.309(f)(2) the State of New York and Riverkeeper seek leave to file the attached Consolidated Contention NYS-38/RK-TC-5. The Contention is based on the August 2011 Supplemental Safety Evaluation Report, NUREG-1930, Supplement 1 (“SSER”) (ML11243A109), and Entergy’s recent proposals, as discussed in the SSER, for addressing concerns raised by NRC Staff with Entergy’s previous AMPs for critical safety components and systems.

This proposed consolidated contention is based on a series of communications between NRC Staff and Entergy that culminated in an agreement between Entergy and Staff that is reflected in the SSER. Accordingly, under the Board’s June 7, 2011 Amended Scheduling Order, the proposed contention is timely for the purposes of 10 C.F.R. § 2.309(f)(2)(iii) because the contention is being submitted within 30 days of Staff serving the SSER. That order provided:

[T]o further promote judicial economy and pursuant to the objectives of 10 C.F.R. § 2.332(c)(3)-(4), we direct that new or amended contentions arising from new information contained in the responses to RAIs referenced in the NRC Staff's May 26, 2011 letter (i.e., those submitted on March 28, 2011 or to be submitted by Entergy prior to the publication of the NRC Staff's SER Supplement) or which arise from new information contained in the SER Supplement, shall be filed no later than thirty (30) days after the SER Supplement is issued.

We direct this unified filing of new or amended contentions in order to avoid repeated filings, or modifications to those filings, as new information emerges within a very limited time period during which the parties are also preparing their initial written statements of position, written testimony with supporting affidavits, and exhibits. Accordingly, if such new or amended contentions are filed in accordance with this Amended Scheduling Order, they will be viewed as timely pursuant to 10 C.F.R. § 2.309(f)(2)(iii).

June 7, 2011 Amended Scheduling Order at 2-3 (footnote omitted).

The accompanying proposed consolidated contention is timely, having been filed within 30 days of the date on which NRC Staff served the Board and the parties with the SSER. *See* Amended Scheduling Order at 2-3; August 31, 2011 letter from NRC Counsel Sherwin Turk to ASLB and parties enclosing SSER (ML11243A109). Thus, the remainder of this pleading addresses the other factors in 10 C.F.R. § 2.309(f)(2) as well as the requirements of 10 C.F.R. § 2.309(f)(1) as required by the Board's July 1, 2010 Scheduling Order. *Id.*

B. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(2)

The contention fully meets 10 C.F.R. § 2.309(f)(2) which requires for admissibility, in pertinent part, a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Id.

1. The Information Was Not Previously Available and Is Materially Different Than Previously Available Information

Since this contention is based upon a document served on August 31, 2011 and information contained in that document (1) reflected an agreement between Entergy and NRC Staff regarding Entergy's proposed procedure for dealing with various aging management issues at the Indian Point reactors by essentially deferring the development of aging management programs and the disclosure of their details in this proceeding, (2) summarized communications since March 2011 between NRC Staff and Entergy regarding Entergy's proposed procedure for dealing with such aging management issues, and (3) at the same time revealed NRC Staff's evolving concerns regarding aspects of Entergy's proposals in the context of the Indian Point license renewal application (*e.g.*, concerning steam generator degradation and issues with the WESTEMS computer code), the contention relies on information not previously available and thus meets the first prong of the test set forth in 10 C.F.R. § 2.309(f)(2)(i).

Until the SSER was published it was not evident that Entergy's plan to deal with problems found in its then existing AMPs would be addressed by filing the AMP – *i.e.* detailing the elements of the proposed inspection programs for addressing aging management concerns related to various safety-related components and systems – after the license renewal proceeding was completed. For example, when Entergy's plan to rely on the details contained in MRP-227, the EPRI guidance document for addressing reactor vessel internals, was rejected by NRC Staff and Entergy was required to demonstrate that it would comply with the yet to be developed modified MRP-227 that Staff has required as a condition of approving the EPRI guidance, Entergy did not seek to postpone resolution of the hearing until the revised version of MRP-227 was issued and approved by NRC Staff but merely committed to comply with the revised version without being able to disclose to the parties or the Board what the revised MRP-227

would require. Thus, in its September 28, 2011 NL-11-107 filing¹ related to Commitment 30, Entergy relies on MRP-227, portions of which guidance document NRC Staff has expressly rejected. While the delay in completing the inspection program for reactor vessel internals may not be directly caused by Entergy, that is no excuse for allowing Entergy to obtain a renewed license without meeting its regulatory and statutory obligations.

Similarly, when Entergy originally proposed an AMP for steam generator tubes, it proposed to follow GALL guidance regarding water chemistry control programs which was approved by Staff in the SER. SER at 3.1-36, 3.1-38 and 3.1-39. However, as now disclosed in the SSER, Staff has determined there are problems with the effectiveness of such water chemistry programs for aging management of steam generator tube dividers and that an alternative program will be required. SSER at 3-18 to 3-19. Entergy has no new AMP to address this concern and proposes to wait until industry analyses are completed, sometime in 2013, before it offers an AMP. *Id.* In the interim Entergy proposes to use its own inspection program but fails to provide any details of that program including what inspection techniques it will use, how often it will conduct inspections and the criteria for making that decision, what criteria will be used to determine where the inspections will be made and, most importantly, what will be the criteria for determining what corrective actions will be taken. This major departure from the original AMP and the plans to address the newly disclosed problems with the AMP were revealed in the SSER.

It was not until the Indian Point SSER wherein NRC Staff both (1) made clear that Staff had concerns about various aspects of Entergy's proposal and (2) disclosed that it accepted Entergy's proposal to defer completion and disclosure of various details of its aging management

¹ A copy of Entergy's NL-11-107 communication was sent to counsel for the State on the afternoon of September 29, 2011.

program for various safety-related systems (such as steam generators and reactor piping and parts) to address those concerns that the State of New York and Riverkeeper were able to determine with certainty that Entergy was intending to obtain a renewed license based on several promises to develop AMPs for certain safety-related systems and components rather than presenting those completed AMPs. In order to deal with the obvious problems these new developments are causing to Entergy's plan to obtain a the requested operating licenses, its opposition to New York's Motion for Extension of Time attempts to create an artificial distinction between making a commitment to adopt a specific AMP, what Entergy calls a program, and the actual creation of the program, what Entergy calls implementation. Of course, implementation in the context of NRC practice refers to the use of the program, such as running the actual CUF_{en} calculations once the program for how those calculations should be run has been determined, not to the process of turning a promise to create an AMP into an actual AMP. *See e.g. Entergy Vt. Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), CLI-10-17, slip op. at 45-46, -- NRC --, 2010 WL 2753783 (July 8, 2010).*

Thus, the proposed contention meets all the requirements of 10 C.F.R. § 2.309(f)(2).

C. The Contention Meets All the Requirements of 10 C.F.R. § 2.309(f)(1)

1. The Contention Is Within the Scope of License Renewal

The accompanying proposed contention focuses on Entergy's proposals (and NRC Staff's acceptance of those proposals) to essentially defer or delay development of an aging management program for various safety related systems including the steam generator divider plates, the metal fatigue of critical components and effects of aging on reactor vessel internals all of which are discussed in the SSER and are therefore within the scope of Staff's licensing renewal review and Part 54. The adequacy of any AMP to deal with aging of safety-related reactor systems or components is inherently within the scope of this proceeding. As the

Commission concluded in *Vermont Yankee* “[a]nd of course, any AMP is subject to challenge before a board in a license renewal proceeding.” CLI-10-17, Slip Op. at 47. In addition, there is no question that the three AMPs that are the subject of proposed Contention NYS-38 are within the scope of the license renewal proceeding. For example, the Board has already ruled that the issue of whether an applicant has an adequate AMP to deal appropriately with metal fatigue of plant systems is within the scope of license renewal. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) LBP-08-13 at 112-117, 161-162, -- N.R.C. -- (July 31, 2008) (Ruling on Petitions to Intervene and Requests for Hearing). Thus, the accompanying proposed contention, which challenges the entire process now being proposed by Entergy, to address problems identified with existing AMPs by promising to provide a better AMP at some future time without identifying the essential details of that future AMP, is within the scope of the license renewal hearing.

2. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issue of details and timing of the development of a substantive aging management program is material to this relicensing proceeding because, as evidenced by the SSER, NRC must make certain findings in accordance with the Atomic Energy Act as to whether or not Entergy’s proposed AMPs protect the public health and safety, and the environment, and either deny the license renewal, or impose significant modifications on the applicant’s operations. *Power Reactor Development Co. v. International Union of Elec., Radio and Mach. Workers, AFL-CIO*, 367 U.S. 396, 397 (1961)(“It is clear from this provision that before licensing the operation of PRDC’s reactor, the AEC will have to make a positive finding that operation of the facility will ‘provide adequate protection to the health and safety of the public.’”). The petitioners have demonstrated in the attached contention, particularly through the Declarations of

Dr. Lahey and Dr. Hopenfeld, that the AMPs at issue here involve significant safety and public health issues. The fact that each of these AMPs is included in the SSER is evidence enough that their adequacy is a material issue whose resolution is essential to the Board's decision-making.

3. Adequate Bases Have Been Provided For the Contention

The bases for this contention are detailed and exceed the regulatory requirement for a "brief explanation." The bases describe the deficiencies in the existing AMPs that have been identified by Staff and accepted by Entergy and note that in lieu of providing a corrected AMP, Entergy is proposing to do no more than to promise to produce a corrected AMP at some future date, outside the hearing process timeline. Since Entergy is not now providing the AMP details regarding assumptions to be used, criteria to be applied, the specific inspection methodologies proposed and the criteria for corrective actions as well as the corrective actions to be taken Entergy cannot "demonstrate" that it has an AMP that will meet the requirements of NRC regulations or the Atomic Energy Act. The bases for proposed Contention 38, are not that the AMP proposed by Entergy is flawed (it may turn out to be flawed once it is disclosed), but that Entergy has not presented an AMP and thus cannot meet its burden to prove that the undefined and unspecified AMPs are adequate to meet the requirements of 10 C.F.R. §§ 54.21(a)(3) and (c)(1)(iii) nor to demonstrate that the yet to be defined AMP will be consistent with the 10 specific components of each AMP identified in GALL to which Entergy has committed compliance.

4. A Concise Statement of Facts and Expert Opinion Support the Contention

Dr. Richard Lahey and Dr. Joram Hopenfeld have offered their expert opinions that Entergy's revised proposal for addressing aging management issues and NRC Staff's acceptance of that proposal is deficient because critical information necessary to assess the adequacy of the AMP to demonstrate consistency with the GALL provisions have not been provided. In addition

substantial legal precedent and regulatory history confirm that license renewal cannot be granted on the basis of promises to create AMPs that comply with GALL but that an actual “demonstration” must be made by showing how the elements of a complete AMP are consistent with the ten steps identified in GALL. As the Commission has succinctly stated “[w]e do not simply take the applicant at its word.” *Vermont Yankee*, CLI-10-17 Slip Op. at 45.

5. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact

The essence of Entergy’s position, which NRC Staff accepts in the SSER, is that as long as Entergy provides a commitment to develop – in the future – plans and programs for an AMP that will be consistent with GALL or will meet regulatory requirements it has done all that is required for license renewal approval. However, as noted above, the State of New York and Riverkeeper contend that Entergy and Staff’s collective position conflicts with well-established precedents, both by courts and NRC, that a definitive finding of safety must be made prior to approval of any operating license and that an adequate factual record must be developed to support that definitive finding. That finding depends upon knowing the details of an AMP in order to be able to assess whether it will be consistent with GALL or regulatory requirements; a mere promise to provide the details cannot meet the standard imposed by 10 C.F.R. §§ 54.21(a)(3) and (c)(1)(iii), the Atomic Energy Act, 42 U.S.C. §§ 2232(a), 2133, and the Administrative Procedure Act. Accordingly, the State of New York and Riverkeeper have provided sufficient information that a genuine dispute exists with Entergy regarding several material issues of fact and law.

D. Conclusion

For the reasons stated, the State of New York and Riverkeeper respectfully request that the Atomic Safety and Licensing Board grant leave to file the accompanying contention.

Respectfully submitted,

Signed (electronically) by

John J. Sipos
Assistant Attorney General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12227
(518) 402-2251

Signed (electronically) by

Deborah Brancato, Esq.
Phillip Musegaas, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, New York 10562
(914) 478-4501

dated: September 30, 2011

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 scheduling order, I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

John J. Sipos
Assistant Attorney General
State of New York