

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of

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

October 7, 2011

ORDER

(Denying New York's Motion for an Extension of Time)

The State of New York (New York) has filed a Motion for an Extension of Time¹ that is supported by Riverkeeper, Inc. (Riverkeeper)² and is opposed by Entergy Nuclear Operations, Inc. (Entergy)³ and the NRC Staff.⁴ New York represents that its purpose in filing the Motion is to allow sufficient time to resolve outstanding issues affecting the content of statements of position and pre-filed direct testimony before the submission deadline that, at the time the Motion was filed, would have been October 11, 2011.⁵

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) [hereinafter New York's Extension Motion].

² Riverkeeper, Inc. Response in Support of State of New York Motion for Extension of Time (Sept. 28, 2011) [hereinafter Riverkeeper's Response].

³ Applicant's Opposition to the State of New York's Motion for an Extension of Time (Sept. 28, 2011).

⁴ 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 (Sept. 28, 2011) [hereinafter NRC Staff's Answer].

⁵ See New York's Extension Motion at 9-10; Licensing Board Amended Scheduling Order (June 7, 2011) at 3 (unpublished) [hereinafter Amended Scheduling Order] ("[I]f no new or amended

In its Motion, New York advances several arguments supporting its request that the time for submission of its statement of position and direct testimony be delayed by at least 90 days.⁶ However, after New York's Extension Motion was filed, New York and Riverkeeper filed a Joint Motion for Leave to File a New Contention, NYS-38/RK-TC-5,⁷ which allegedly arises from the Supplemental Safety Evaluation Report published by the NRC Staff on August 31, 2011.⁸ This action, pursuant to the Board's June 7, 2011 Amended Scheduling Order, automatically moved the deadline for the submission of intervenors' statements of position and direct testimony to 30 days after the submission of final pleadings related to the Joint Motion.⁹

The Board's July 1, 2010 Scheduling Order provides that all non-moving parties have 25 days within which to answer New York's and Riverkeeper's Joint Motion and that the movants

contentions or motions for summary disposition are filed as a result of the SER [Safety Evaluation Report] Supplement [published on August 31, 2011], then intervenors' initial written statements of position [and] written testimony . . . shall be submitted no later than forty (40) days after the SER Supplement is issued").

⁶ New York's Extension Motion at 5-9.

⁷ State of New York and Riverkeeper's Joint Motion for Leave to File a New Contention Concerning Entergy's Failure to Demonstrate that it has all Programs that are Required to Effectively Manage the Effects of Aging of Critical Components or Systems (Sept. 30, 2011) [hereinafter NYS-38/RK-TC-5 Motion].

⁸ U.S. Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, Safety Evaluation Report Relating to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3, Supplement 1, NUREG-1930, Supplement 1 (Aug. 31, 2011) (ADAMS Accession No. ML11201A031).

⁹ Amended Scheduling Order at 3 ("If new or amended contentions [based on the SER Supplement] are filed, then intervenors' initial written statements of position [and] written testimony . . . shall be submitted no later than thirty (30) days after the last timely reply or answer to [those] new . . . contentions . . . is filed.").

then have 7 days to file a reply.¹⁰ Accordingly, the current presumptive date for the submission of Intervenor's statements of position and direct testimony is December 1, 2011.¹¹

By operation of the existing Scheduling Orders, the filing of the Joint Motion has de facto granted New York an extension of 51 days from October 11, 2011, until December 1, 2011, for filing its statement of position and direct testimony. This extension, giving generous credit for the issues addressed in New York's Extension Motion, in the judgment of the Board allows adequate additional time within which New York may prepare its statement of position and direct testimony. Taking into consideration that most of the contentions to be litigated were admitted by this Board more than 3 years ago¹² and that the parties have been dealing with these issues for over 4 years,¹³ any further extension at this time would be excessive. Therefore, we deny New York's Extension Motion.

Three additional matters need to be addressed by the Board at this time. First, Riverkeeper's Response states that on September 26, 2011, it requested from Entergy clarification regarding the existence of documents pertaining to metal fatigue.¹⁴ We had assumed that, this late in the proceeding, all issues regarding the disclosure of documents relevant to admitted contentions had been resolved; these issues should have been resolved long ago. Accordingly, we urge Entergy and Riverkeeper to attempt to resolve this issue with all

¹⁰ Licensing Board Scheduling Order (July 1, 2010) at 5 (unpublished) [hereinafter July 1, 2010 Scheduling Order].

¹¹ Because the Joint Motion was filed on September 30, 2011, answers to the Joint Motion will be due October 25, 2011, and any replies thereto would be due no later than November 1, 2011. If any replies are filed, then the thirtieth day after November 1, 2011 is December 1, 2011.

¹² See LBP-08-13, 68 NRC 43 (2008).

¹³ See 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).

¹⁴ Riverkeeper's Response at 2.

deliberate speed and direct them to report their progress to the Board no later than October 21, 2011. If it will be necessary for the Board to resolve this matter, we propose to do so without disturbing the schedule outlined above.

Second, the NRC Staff states that it and the Applicant were placed in an inappropriately disadvantaged position by operation of our July 1, 2010 Scheduling Order, which allowed them only one day within which to respond to New York's Extension Motion.¹⁵ When we drafted that provision, we anticipated that it would apply to the typical request for an extension, which is usually of short duration and for which an extended briefing schedule would render the process meaningless. In the situation presented here, however, where New York's Motion requests an extension of at least 90 days and offers multiple reasons why the extension would be appropriate, any meaningful opposition would necessarily be lengthy and the 1-day response time contemplated by the Board was inappropriate. Accordingly, we agree with the NRC Staff's suggestion that this Extension Motion would have been more properly handled as a motion for the postponement of filing deadlines, with a presumptive 10-day response window. Therefore, as part of the pre-filing consultation process for all motions, we direct the parties to discuss whether the presumptive deadlines specified in our Scheduling Orders are appropriate given the pending circumstances and, in the consultation certification section of any proffered motion, to notify us of any disagreements regarding or proposed modifications to the presumptive response date.

Third, we note that there are two contentions pending admission: NYS-38/RK-TC-5 and the contention addressing the implications of the NRC Near-Term Task Force's Report on the events at Fukushima, Japan, filed by Riverkeeper and Hudson River Sloop Clearwater, Inc.

¹⁵ NRC Staff's Answer at 16-17; see also July 1, 2010 Scheduling Order at 8.

(Clearwater).¹⁶ In addition, the Board's Memorandum and Order granting summary disposition of NYS-35/36 has been appealed to the Commission.

The admissibility of NYS-38/RK-TC-5, which has triggered the de facto extension of time noted in this Order, remains to be resolved. As noted above, the briefing on that Motion will not be completed until the end of October, at the earliest. For the purposes of scheduling, and for the parties' preparation of their statements of position and direct testimony, they should not assume that, if admitted, this new contention will be heard with the other pending contentions or that the December 1, 2011 filing deadline for the submission of Intervenors' statements of position and direct testimony will be extended.¹⁷

The same holds for Riverkeeper's and Clearwater's new contention that addresses the implications of the NRC Near-Term Task Force's Report on Fukushima.

The contentions that were the subject of a successful summary disposition motion will not be considered at the evidentiary hearing in this proceeding unless and until the Commission

¹⁶ See NYS-38/RK-TC-5 Motion; Motion to Admit Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc. New Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the NRC Fukushima Task Force Report (Aug. 11, 2011).

¹⁷ If, however, after considering all the pleadings to be filed regarding this new contention, the Board determines that it is admissible and that it should be consolidated with existing contentions or, if not consolidated, that it should be presented at the same hearing as the pending contentions, we will convene a status conference to discuss with the parties whether a further adjustment in the submission date for the statements of position and direct testimony would be appropriate.

reverses the Board's decision. Accordingly, any testimony addressing such contentions will be stricken.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹⁸

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 7, 2011

¹⁸ Copies of this Order were sent this date by the agency's E-Filing system to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Sean Murray, the Representative for the Village of Buchanan; and (10) Michael J. Delaney, counsel for the City of New York.

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NUCLEAR REGULATORY COMMISSION

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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR
) and 50-286-LR
(Indian Point Nuclear Generating Station,)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Denying New York's Motion for an Extension of Time), have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Linda D. Lewis] _____
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Dated at Rockville, Maryland
this 7th day of October, 2011