

**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. December 1, 2011  
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**STATE OF NEW YORK AND RIVERKEEPER'S JOINT RESPONSE TO  
ENTERGY'S MOTION FOR CLARIFICATION  
ABOUT CONTENTION NYS-38/RK-TC-5**

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## **PROCEDURAL BACKGROUND**

Following publication of the Supplemental Safety Evaluation Report (“SSER”), the State of New York and Riverkeeper filed proposed Contention NYS-38/RK-TC-5 that challenged a strategy proposed by Entergy, and accepted by NRC Staff, to allow Entergy to postpone providing, until after the conclusion of these hearings, the details of Aging Management Programs. State of New York and Riverkeeper’s New Joint Contention NYS-38/RK-TC-5 (September 30, 2011) ML11273A196. The proposed Contention, while challenging the practice in general as violating 10 C.F.R. §§ 54.21(a)(3) and (c)(1)(iii) and the requirements of 42 U.S.C. §§ 2133(b) and (d) and 2232(a), identified in its bases several examples of the Entergy strategy. The supporting evidence provided by New York and Riverkeeper experts discussed the specific examples and explained how current plans, without the planned future details, were inadequate and how important the future details were to determining whether the proposed AMP met the regulatory and statutory requirements. Entergy and NRC Staff submitted separate answers, both of which opposed the admission of the proposed Contention. The State and Riverkeeper submitted a joint reply in further support of the Contention.

After reviewing the parties' submissions, the Board admitted the proposed Contention NYS-38/RK-TC-5. *Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5), November 10, 2011 ML11314A211. The Board found that “Intervenors have broadly contended, relying on multiple bases, that Entergy’s new commitments do not meet NRC regulations for having a program that will adequately manage the effects of aging during the period of extended operations.” *Id.* at 10 (footnote omitted). It held that:

the broader legal question of how much information Entergy must provide to show it can manage the effects of aging before entering the period of extended operations, and whether Entergy has met its regulatory burden to show enough of that information, are material to the NRC's decision whether to grant Entergy's license renewal application, and thus satisfy 10 C.F.R. § 2.309(f)(1)(iv).

*Id.* at 11.

Having unsuccessfully argued against admission of Contention NYS-38/RK-TC-5, Entergy now has filed a motion ostensibly seeking clarification of the Board's Order. Its Motion seeks, in effect, to substantially restrict the scope of the admitted Contention and truncate discovery and preparation time with regard to that Contention, which was admitted only 20 days ago. The Board should reject this effort by Entergy.

### **ARGUMENT**

#### **I. CONTENTION NYS-38/RK-TC-5 IS NOT THE NARROW CONTENTION ENTERGY BELATEDLY SEEKS TO MAKE IT**

Although Entergy purports to need "clarification" of this Board's November 10, 2011 Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5), it is actually seeking to obtain relief that it failed to request in its opposition to the proposed Contention. The Contention raised a generic issue: Does Entergy "demonstrate" compliance with the requirements for an aging management program ("AMP") when all it does, and all NRC Staff requires, is a promise to develop a detailed program at some future date? Examples of this problem, taken from the Supplemental Safety Evaluation Report ("SSER"), were used to illustrate the fundamental problem. *See* State of New York and Riverkeeper's New Joint Contention NYS-38/RK-TC-5 (September 30, 2011), Bases 2 ("The AMPs for which Entergy is proposing to taking future action, after completion of these hearings, *include at least the following*") at 1 (emphasis added).

Entergy's Answer, which opposed the admission of the proposed Contention, recognized the Contention's relevance to all of Entergy's AMPs:

The New Contention erroneously alleges that Entergy relies on commitments to define, in the future, the aging management programs ("AMPs") and activities required by Part 54. That is not so. Entergy already has defined the requisite AMPs and aging management activities, which the Staff has reviewed and found to be acceptable. Entergy's commitments to implement certain aspects of its AMPs in the future (as opposed to define their content in the first instance) are fully authorized by NRC regulations and Commission precedent.

Applicant's Opposition to New York State's and Riverkeeper's Joint Motion to Admit New Contention NYS-38/RK-TC-5 (Oct. 25, 2011) at 2 ML11298A380. NRC Staff was similarly aware of the broad scope of the proposed Contention:

The focus of the proffered contention is, according to New York and Riverkeeper, a "fundamental legal deficiency of the AMP record." Contention at 16. The essence of the Intervenor's position is that Entergy's application for license renewal is insufficient and incomplete where the LRA provides a commitment to develop – in the future – plans and programs for an AMP which the Applicant has already stated will be consistent with GALL.

NRC Staff's Answer to State of New York and Riverkeeper's Joint Motion to File a New Contention, and New Joint Contention NYS-38/RK-TC-5 (Oct. 25, 2011) at 18 ML11298A379.

The Board, in ruling on the proposed Contention, also recognized that the issues raised in the Contention had broad application holding that "contrary to the position taken by Entergy and the NRC Staff, a commitment by the Applicant to modify AMPs in the future does not constitute implementation of the plan; rather, it is the future development of the plan itself." *See Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5), November 10, 2011, slip op. at 12, n.51 (references omitted); *see also id.* at 7-9.

Entergy now seeks to narrow the scope of the Contention to the examples used as bases

to support the Contention's admissibility. However, Commission regulations do not require that an admissible contention contain all the possible bases for the contention. "[A] petitioner must provide *some sort of minimal basis* indicating the potential validity of the contention." Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (emphasis added). This minimal basis need not be "an exhaustive list of possible bases, but simply enough to provide the alleged factual or legal bases in support of the contention." *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee), LBP-06-20, 64 N.R.C. 131, 147 (2006)(quoting *Louisiana Energy Serv., LP* (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 623 (2004)). If Entergy believed that the scope of the Contention should be limited to the examples cited in the bases, it should have presented that argument in its Answer in opposition to the proposed Contention, not after its other attempt to defeat the Contention had been rejected by the Board. In short, it is too late to raise this argument. Moreover, the State notes that with respect to primary water stress corrosion cracking, Dr. Lahey's supporting declaration expressed concern over the SG plates *and* welds. Sept. 30, 2011, Declaration of Richard T. Lahey, Jr., ¶¶ 5-6 ML11273A192.

Not only is it too late for Entergy to raise its argument that the Contention should be limited to the examples used to support the bases, but it is also too early. New York and Riverkeeper have not sought, at this time, to identify additional AMPs that may, like the examples given in the Contention, involve mere plans to develop programs, although several admitted New York Contentions do challenge the lack of an adequate AMP (*e.g.*, NYS 5-7). Several of those challenges note that in lieu of an actual detailed plan, Entergy has merely offered a sketchy outline of a plan without even promising to provide more detail in the future.

In light of the changing nature of the Indian Point license renewal application, it is reasonable to expect that new “plans” to address concerns raised in Intervenors’ Contentions or by NRC Staff, could be forthcoming. When, and if, that happens, New York and Riverkeeper could use those changes as supporting evidence for the already admitted Contention NYS-38/RK-TC-5. No new bases would be required since the bases provided are already sufficient to support the admission of the Contention and there is no restriction on additions to supporting evidence provided timely notice is given of the existence of the relevant evidentiary documents.<sup>1</sup>

At this time Entergy is merely speculating about a possible disagreement among the parties regarding the scope of the admitted Contention. That possible disagreement could exist as to any admitted contention and, if allowed as the basis for a “clarification,” would bog the Board down in a myriad of “clarification” motions, each of which might itself result in a new ruling that could require more clarification. Entergy’s abstract concern about possible future disagreements cannot, and should not, be resolved in a vacuum. Only when New York and Riverkeeper file prefiled testimony will there be a firm evidentiary basis to assess whether proposed testimony is within the scope of the Contention, keeping in mind that the Contention’s scope is defined by what is admitted by the Board, not by the applicant’s attempt to narrow the Contention to examples used to illustrate the bases for the Contention. In upholding an ASLB

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<sup>1</sup> Recent disclosures by Entergy reflect a flexibility towards the obligations imposed by 10 C.F.R. § 2.336(a) for timely disclosures. First, its October 2011 disclosures were served on November 7, 2011. *See* Entergy-Indian Point License Renewal Proceeding Thirty-Third Supplemental Disclosure Log (Nov. 7, 2011). Second, that disclosure included 113 documents, many of which were several years old. *Id.* In addition, while New York and Riverkeeper timely requested a number of those documents, some of which relate to Contentions NYS-25B, NYS-26A/RK-TC-1A, and RK-TC-2, the document themselves were not provided until November 17, 2011, thereby limiting the ability of New York’s expert to fully evaluate the information and integrate it into his report sufficiently in advance of the filing deadline.

refusal to “clarify” an earlier order in the Pilgrim relicensing proceeding, the Commission noted that the clarification motion “prematurely raise[s] evidentiary matters that will be resolved by the Board at the appropriate point in the proceeding.” *Entergy Nuclear Generation Co.*, (Pilgrim Nuclear Power Station), CLI-10-28, slip op. at 1, – N.R.C. –, 2010 NRC LEXIS 42 (Nov. 5, 2010). That principle also applies to Entergy’s clarification motion in this proceeding.

In addition, the relief Entergy seeks, if granted, would unwarrantedly exacerbate the lack of symmetry in Part 2 requirements. If, as Entergy argues, Contention NYS-38/RK-TC-5, is limited to the examples given in the bases and Entergy subsequently comes up with another proposal to belatedly provide the details of an AMP, New York and Riverkeeper would have to go through the laborious procedures of 10 C.F.R. § 2.309(f)(2) and respond once again to the arguments from Entergy and Staff on issues of timeliness and other procedural hurdles. Entergy, on the other hand, has no limitations to restrict its ability to change its LRA or its Commitments and to continue the iterative license application process which has necessitated numerous amendments to contentions and bases. One of the goals of Contention NYS-38/RK-TC-5 is to provide a challenge to the deferred approach that Entergy has begun to rely on. As seen in the RAIs that led up to the SSER, Entergy seeks to avoid challenges to its LRA that are based on the absence of a detailed plan for its AMP by, at the last minute, promising to provide a more detailed plan for an AMP but to do so after these hearings are concluded. New York and Riverkeeper should not have to seek to amend this newly-admitted Contention every time Entergy avails itself of this unlimited ability to change its LRA tactics and, should that occur, New York and Riverkeeper should be free to use the new information as further evidence of the fundamental problem that lies at the root of Contention NYS-38/RK-TC-5 - *i.e.* Entergy’s

attempt, with Staff concurrence, to avoid allowing the parties and the Board to assess the adequacy of the actual plan it intends to use to meet its AMP obligations.

**II. ENTERGY MISREADS THE BOARD'S ORDERS REGARDING THE TIMING OF TESTIMONY FOR CONTENTION NYS-38/RK-TC-5**

Contention NYS-38/RK-TC-5 was admitted on November 10, 2011 and is 20-days old today. Contrary to the relief Entergy now seeks, the Board did not direct that testimony related to Contention NYS-38/RK-TC-5 must be filed at the same time as testimony for other contentions that had been admitted previously. Contrary to Entergy's understanding (Mtn. at 3-4), when the Board denied New York's request for a 90-day extension of time for filing its Prefiled Direct Testimony, the Board stated, "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 . . ."  
*Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Order (Denying New York's Motion for an Extension of Time) at 5 (October 7, 2011) ML11280A228.

The Board further stated :

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.

*Id.*, at 5, n.17. The new Contention was admitted but not consolidated with existing contentions, no pre-hearing conference has been convened and the Board has not considered, nor has any party asked it to consider, whether an adjustment in the schedule is warranted.



When the Board granted New York and Riverkeeper's unopposed motion to extend the deadline for Prefiled Direct Testimony to December 22, 2011 and to make other adjustments in the schedule to accommodate Entergy and NRC Staff, it also held that "Except as otherwise ordered previously, all other provisions of our scheduling orders remain in effect". *Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Order (Granting Unopposed Motion by the State of New York and Riverkeeper, Inc. to Amend the Scheduling Order) at 2 (November 17, 2011) ML11321A261. Among the previous Orders specifically referenced by the Board as remaining in effect was its October 7, 2011 Order Denying New York's Motion for an Extension of Time. *Id.* n.3. Thus, the December 22, 2011 date was explicitly not applied to Contention NYS-38/RK-TC-5.

In addition, Entergy and NRC Staff have yet to make the mandatory disclosure of a single document related to Contention NYS-38/RK-TC-5 and will not do so any sooner than November 30, 2011.<sup>2</sup> Until those disclosures are made and the documents identified are provided to New York and Riverkeeper, it will not be possible to determine how much time will be needed to prepare Prefiled Direct Testimony with regard to this new Contention. The State respectfully submits that meaningful disclosures should take place on, among other things, SG primary water stress corrosion cracking, and user interventions, assumptions, and judgments that have been or will be made for Westems. Once the mandatory disclosures are made and the relevant documents are actually produced, New York and Riverkeeper will be in a position to address the

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<sup>2</sup> On November 30, 2011, NRC Staff served their first discovery disclosure following the admission of Contention NYS-38/RK-TC-5; that filing added two documents to the Hearing File Index. Letter from NRC Staff Counsel to ASLB (Nov. 30, 2011) (Attachment 1). Staff's filing did not disclose any documents concerning NYS-38/RK-TC-5. The same day, the State disclosed, among other documents, four documents related to NYS-38/RK-TC-5.

issue regarding the timing of prefiled testimony related to the new Contention and will consult with Entergy and NRC Staff to see if the four parties can agree on a schedule to submit to the Board for approval. If those consultation efforts fail, a pre-hearing conference might then be warranted.

Moreover, since there is no current schedule for prefiled testimony related to Contention NYS-38/RK-TC-5, Entergy's proposal that New York and Riverkeeper consolidate portions of the testimony for that contention with testimony for Contentions NYS-25B and NYS-26A/RK-TC-1A, should also be rejected, particularly since Contention NYS-38/RK-TC-5 is a consolidated contention but Contention NYS-25B is not, making for unnecessary complexities for filing. Entergy has not provided a valid reason to truncate discovery, compress expert preparation, and accelerate the collection, organization, and drafting of trial testimony and submissions on Contention NYS-38/RK-TC-5.

### **CONCLUSION**

For all the reasons stated, the State of New York and Riverkeeper respectfully request that the Board deny Entergy's Motion for Clarification .

Respectfully submitted,

***Signed (electronically) by*** \_\_\_\_\_

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December 1, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

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Entergy Nuclear Indian Point 3, LLC, and  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2011, copies of the State of New York and Riverkeeper's Joint Response to Entergy's Motion for Clarification About Contention NYS-38/RK-TC-5 was served electronically via the Electronic Information Exchange on the following recipients:

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Dated at Albany, New York  
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