

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

March 30, 2012

MEMORANDUM AND ORDER

(Denying Riverkeeper's and Clearwater's Motion for Leave to File New Environmental  
Contention Regarding NRC's Near-Term Task Force on Fukushima)

On August 11, 2011, Intervenor Riverkeeper, Inc. (Riverkeeper) and Hudson River Sloop Clearwater, Inc. (Clearwater) (collectively, the Intervenor) moved for leave to file a new contention, which alleges that the NRC Staff's Final Supplemental Environmental Impact Statement (FSEIS) for the license renewal of Indian Point Units 2 and 3 "fails to address the extraordinary environmental implications of the findings and recommendations raised" in the July 2011 report by the NRC's Near-Term Task Force on Fukushima.<sup>1</sup> For the reasons described below, we deny admission of the Intervenor's proposed new contention.

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<sup>1</sup> 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) at 1 [hereinafter Motion]; see also 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) at 4 [hereinafter New Contention]. Intervenor's Motion was accompanied by a rulemaking petition and a request to suspend the licensing decision in this proceeding pending that rulemaking. Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc. Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011). The Commission, however, has denied the Intervenor's suspension request pending the agency's consideration of topics raised in the Intervenor's rulemaking petition. See Union Elec.

I. BACKGROUND

On July 12, 2011, the NRC's Near-Term Task Force on Fukushima issued a report entitled "Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident."<sup>2</sup> On August 11, 2011, the Intervenor moved for leave to file a new contention.<sup>3</sup> On September 6, 2011, Applicant Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff filed Answers opposing the new contention's admission.<sup>4</sup> On September 13, 2011, the Intervenor filed a Reply<sup>5</sup> and, pursuant to permission granted by the Board,<sup>6</sup> on September 21, 2011, Entergy filed a Surreply.<sup>7</sup>

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Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2) et al., CLI-11-05, 74 NRC \_\_, \_\_ (slip op. at 38-41) (Sept. 9, 2011).

<sup>2</sup> U.S. Nuclear Regulatory Commission, Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (ADAMS Accession No. ML11861807) [hereinafter Task Force Report].

<sup>3</sup> See Motion.

<sup>4</sup> See Applicant's Answer to Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc.'s Motion to Admit New Contention Regarding the Fukushima Task Force Report (Sept. 6, 2011) [hereinafter Entergy Answer]; NRC Staff's Answer in Opposition to Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) [hereinafter NRC Staff Answer].

<sup>5</sup> Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc.'s Combined Reply to NRC Staff and Entergy's Answers in Opposition to Motion to Admit New Contention Regarding the Fukushima Task Force Report (Sept. 13, 2011) [hereinafter Intervenor Reply]; Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011).

<sup>6</sup> See Licensing Board Order (Granting Entergy's Motion to File Surreply) (Sept. 20, 2011) at 1 (unpublished).

<sup>7</sup> Applicant's Surreply to the Combined Reply of Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc. (Sept. 21, 2011) [hereinafter Entergy Surreply].

## II. PARTIES' POSITIONS

The Intervenor's new contention calls for "significant re-evaluation and revision [of the NRC's current regulatory framework] in order to expand or upgrade the design basis for reactor safety as recommended by the Task Force Report."<sup>8</sup> Intervenor's assert that the new contention is timely pursuant to 10 C.F.R. § 2.309(f)(2) because it arose from information in the Task Force Report, which was released in July 2011 and contains information that was not publicly available prior to its issuance.<sup>9</sup>

As to the contention itself, Intervenor's argue that the "FSEIS must be supplemented in light of the Task Force findings that certain accidents formerly classified as severe should be incorporated into the design basis" and that "the values assigned to the cost-benefit analysis for Indian Point SAMAs [severe accident mitigation alternatives], as described in Section 5.2 of the FSEIS, must be re-evaluated in light of the Task Force's conclusion that the value of SAMAs is so high that they should be elected as a matter of course."<sup>10</sup> Intervenor's represent that revising the Indian Point SAMA analysis to include future mitigation measures suggested by the Task Force Report would yield a larger number of SAMAs required to be implemented, as well as an impact to the overall cost-benefit analysis for Entergy's License Renewal Application.<sup>11</sup> Intervenor's also maintain that the FSEIS should address the Task Force Report's analysis of impacts from flooding and earthquakes and the Task Force's suggested measures to mitigate environmental impacts.<sup>12</sup> Intervenor's concede "that some issues raised by the Task Force Report may be appropriate for generic rather than case-specific resolution," but state that any

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<sup>8</sup> New Contention at 8.

<sup>9</sup> Motion at 3-5. In the alternative, Intervenor's claim that their Motion and contention meet the nontimely filing requirements of 10 C.F.R. § 2.309(c). Id. at 5-8.

<sup>10</sup> New Contention at 12-13 (capitalizations omitted).

<sup>11</sup> Id. at 13.

<sup>12</sup> Id. at 14-16.

generic resolution of these issues as they pertain to the relicensing of Indian Point must be completed before that renewal is granted.<sup>13</sup>

Entergy insists that the proposed new contention should be rejected because it is untimely, does not meet the requirements for nontimely filings, and does not satisfy the requirements for contention admissibility set out in 10 C.F.R. § 2.309(f)(1). Entergy argues that the Task Force Report is not a source of new information sufficient to support a timely new contention because there have been no new regulatory changes since the issuance of the NRC Staff's FSEIS in December 2010.<sup>14</sup> According to Entergy, Intervenor's lack good cause to propose the contention and the proposed contention does not meet the remaining balancing factors in the Section 2.309(c)(1) test.<sup>15</sup> Entergy states that the proposed contention misinterprets the Task Force Report's description of the suitability of the NRC's current regulatory approach and that the contention challenges existing regulations or raises issues that are about to become the subject of rulemaking.<sup>16</sup> Entergy maintains that the proposed contention's concerns are insufficient to trigger a new FSEIS and that the contention does not raise any specific challenges to the sufficiency of the FSEIS as issued.<sup>17</sup>

The NRC Staff also urges rejection of the proposed contention. The NRC Staff argues the proposed contention is outside the scope of this proceeding for two reasons: (1) the Commission will generically address the subject matter of the contention, and (2) the contention implicates emergency planning issues, which are not properly part of license renewal review.<sup>18</sup> In addition, the NRC Staff argues that the proposed contention does not challenge any specific

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<sup>13</sup> Id. at 18-19.

<sup>14</sup> Entergy Answer at 11-12.

<sup>15</sup> Id. at 12-15.

<sup>16</sup> Id. at 15-21.

<sup>17</sup> Id. at 21-28.

<sup>18</sup> NRC Staff Answer at 4-5, 8.

portions of the FSEIS and that the contention's arguments relating to severe accidents, SAMAs, and need for power fail for two reasons: (1) they are not material to the agency's licensing decision in this proceeding and (2) they do not raise genuine disputes with the FSEIS itself.<sup>19</sup> Finally, the NRC Staff asserts that the contention lacks an adequate factual basis and was not timely raised.<sup>20</sup>

The Intervenor's respond that their proposed contention challenges the adequacy of the FSEIS for Indian Point Units 2 and 3, asserting that the FSEIS does not "address the significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report."<sup>21</sup> The Intervenor's further claim that their proposed contention specifically challenges the juxtaposition of the Task Force Report's findings with the NRC's determination in 10 C.F.R. Part 51, Subpart A, Appendix B that the environmental impacts of severe accidents would be "small," in addition to challenging the NRC Staff's SAMA analysis in the FSEIS, which fails to consider the conclusions of the Task Force Report.<sup>22</sup>

Entergy's Surreply states that the Intervenor's ignore the Commission's ruling in CLI-11-05 that the Task Force Report does not provide new information related to any generic or site-specific environmental analyses required under the National Environmental Policy Act (NEPA) and 10 C.F.R. Part 51.<sup>23</sup> Likewise, Entergy depicts CLI-11-05 as holding that any request to undertake supplemental NEPA review at this time is premature until the full facts are gleaned from the accident at Fukushima.<sup>24</sup>

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<sup>19</sup> Id. at 14-24.

<sup>20</sup> Id. at 24-35.

<sup>21</sup> Intervenor's Reply at 2.

<sup>22</sup> Id. at 2-3.

<sup>23</sup> Entergy Surreply at 3.

<sup>24</sup> Id.

### III. ANALYSIS

#### A. Legal Standards

##### 1. Contention Admissibility

Except where a contention challenges “data or conclusions” in the NRC’s environmental review documents that “differ significantly from the data or conclusions in the applicant’s documents,” a timely new contention must meet the new contention requirements of 10 C.F.R. § 2.309(f)(2)(i)-(iii). Section 2.309(f)(2)(i)-(iii) permits new contentions to be admitted only with leave of the Board “upon 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.<sup>25</sup>

Our July 1, 2010 Scheduling Order states that, pursuant to 10 C.F.R. § 2.309(f)(2)(iii), we will deem timely filed any proffered new contention submitted “within thirty (30) days of the date when the new and material information on which it is based first becomes available.”<sup>26</sup>

Otherwise, if a contention is not timely filed, it must meet the multi-factor balancing test in 10 C.F.R. § 2.309(c). To be admissible, all contentions, timely or nontimely, must also satisfy the six criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi).<sup>27</sup>

##### 2. NRC’s NEPA Duties, CLI-11-05, and CLI-12-07

In its review of a nuclear power reactor license renewal application, the NRC must prepare an environmental impact statement (EIS) that is supplemental to the Generic

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<sup>25</sup> Id. § 2.309(f)(2)(i)-(iii).

<sup>26</sup> Licensing Board Scheduling Order (July 1, 2010) at 6 (unpublished).

<sup>27</sup> We have outlined these six criteria in prior memoranda and orders. See LBP-10-13, 71 NRC 673, 677 n.6 (2010); LBP-08-13, 68 NRC 43, 60-64 (2008).

Environmental Impact Statement (GEIS) for License Renewal, NUREG-1437.<sup>28</sup> The NRC's implementation of NEPA into agency regulations, 10 C.F.R. Part 51, contemplates two tiers of environmental impacts resulting from power reactor license renewal: (1) those impacts incident to all license renewals (which have been addressed generically by the GEIS and are labeled Category 1 issues) and (2) those impacts incident to the specific facility in question (which must be addressed on a site-specific basis by the supplemental EIS and are labeled Category 2 issues).<sup>29</sup> NRC regulations define severe accidents as Category 2 issues and provide that "[i]f the staff has not previously considered [SAMAs] for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided."<sup>30</sup>

Where an FSEIS has been issued, the NRC Staff must prepare a supplement to the FSEIS before taking the proposed action if there are "substantial changes in the proposed action that are relevant to environmental concerns" or "new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."<sup>31</sup> The Commission has defined "new and significant information" as "present[ing] a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."<sup>32</sup>

In CLI-11-05, the Commission declared that

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<sup>28</sup> 10 C.F.R. § 51.95(c). The findings of the GEIS are codified at 10 C.F.R. Part 51, Appendix B.

<sup>29</sup> See LBP-08-13, 68 NRC at 67 (citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-12 (2001)).

<sup>30</sup> 10 C.F.R. § 51.53(c)(3)(ii)(L); see also id. Part 51, subpart A, app. B.

<sup>31</sup> Id. § 51.92(a)(1)-(2).

<sup>32</sup> Hydro Res., Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (internal quotation marks and citations omitted).

Although the Task Force completed its review and provided its recommendations . . . , the agency continues to evaluate the [Fukushima] accident and its implications for U.S. facilities . . . . [W]e do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.<sup>33</sup>

The Commission established that “[i]f . . . new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate.”<sup>34</sup> The Commission stated, however, that “given the current state of information available to us,” such information does not “present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned” such that it would trigger at least a generic NEPA review.<sup>35</sup> Moreover, because the Commission directed the NRC Staff to institute a longer-term review of the implications of events at Fukushima on U.S. facilities and “the NRC may implement changes to its regulations and regulatory processes,” the Commission regarded any requests for added safety review to have, “in essence, been granted.”<sup>36</sup>

In CLI-12-07, the Commission denied a petition for review of a licensing board memorandum and order that declined to admit a common contention filed in several reactor licensing proceedings that, in all important respects, is identical to the one proffered in this proceeding.<sup>37</sup> The Commission explained that “reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics of the sites or reactors that are the subject of the petitions, does not

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<sup>33</sup> Callaway, CLI-11-05, 74 NRC at \_\_ (slip op. at 30).

<sup>34</sup> Id. at \_\_-\_\_ (slip op. at 30-31).

<sup>35</sup> Id. at \_\_ (slip op. at 31) (citing Hydro Res., CLI-99-22, 50 NRC at 14 (internal quotation marks and citations omitted)).

<sup>36</sup> Id. at \_\_-\_\_ (slip op. at 31-32).

<sup>37</sup> See Luminant Generation Co. LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-12-07, 75 NRC \_\_ (slip op.) (Mar. 16, 2012).



provide sufficient support for the common contention.”<sup>38</sup> Accordingly, because the petitioners in those proceedings “did not relate their contention[s] to any unique characteristics of the particular site[s] at issue,” the Commission agreed with the licensing board that the contention was not adequately supported by alleged facts or expert opinions and did not raise issues material to the NRC’s reviews of the pending license applications.<sup>39</sup> The Commission did not say that no contention based on the Fukushima accident could be admissible: “[a]s tangible Fukushima lessons emerge—whether from inside or outside the NRC—Fukushima-related contentions in individual adjudications may become more plausible, except insofar as the NRC is taking generic steps to address them.”<sup>40</sup>

B. Board Decision

The Commission’s ruling in CLI-12-07 controls this case. The Intervenor’s proposed contention raises the same issue as the common contention that was rejected by the Commission—the alleged failure to comply with NEPA in the wake of the Task Force recommendations. Like the petitioners in those proceedings, the Intervenor has not offered any information in support of their contention that ties the recommendations of the Task Force Report to any site-specific circumstances at the Indian Point facility. Although the Intervenor demands reconsideration of “any conclusions in the Indian Point FSEIS based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable,”<sup>41</sup> they do not identify any such conclusions in the FSEIS or explain how they are flawed. Further, the supporting declaration of their expert, Dr. Arjun Makhijani, makes no mention of Indian Point. Although the Intervenor claims that their contention

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<sup>38</sup> Id. at \_\_ (slip op. at 13).

<sup>39</sup> Id. at \_\_ (slip op. at 9); see also id. at \_\_, \_\_ (slip op. at 11, 13).

<sup>40</sup> Id. at \_\_ (slip op. at 11) (emphasis added).

<sup>41</sup> New Contention at 11-12.

“specifically challenge[s] the failure of the FSEIS to address the significant environmental implications” of the Task Force Report’s findings,<sup>42</sup> this charge is not specific at all, but rather seeks “the generic type of NEPA review that [the Commission] declared premature in CLI-11-5.”<sup>43</sup>

Because the Intervenorors have not connected the Task Force recommendations to the Indian Point facility, they have not put forward “new and significant circumstances or information” that are relevant to the NRC’s site-specific NEPA review of Entergy’s License Renewal Application. As a result, the contention fails to present sufficient information to show that it has raised a genuine dispute of material fact or law with the Application.<sup>44</sup>

We note that, since the filing of the Intervenorors’ contention, the agency has begun to take steps to implement the lessons learned from Fukushima. On October 18, 2011, the Commission issued a Staff Requirements Memorandum directing the NRC Staff to implement recommendations from the Task Force Report.<sup>45</sup> On March 12, 2012, in light of recommendations made by the Task Force Report, the NRC imposed a series of orders on all power reactor licensees to strengthen these licensees’ spent fuel pool instrumentation as well as their abilities to withstand beyond design basis events.<sup>46</sup> That same day, the NRC published

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<sup>42</sup> Intervenorors Reply at 2.

<sup>43</sup> Comanche Peak, CLI-12-07, 75 NRC at \_\_\_ (slip op. at 9).

<sup>44</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>45</sup> Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report at 1 (Oct. 18, 2011) (unanimous approval).

<sup>46</sup> See, e.g., In the Matter of All Power Reactor Licensees and Holders of Construction Permits in Active Or Deferred Status: Order Modifying Licensees With Regard To Reliable Spent Fuel Pool Instrumentation (Effective Immediately), 77 Fed. Reg. 16,082, 16,082 (Mar. 19, 2012); Order Modifying Licenses With Regard To Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately), 77 Fed. Reg. 16,091, 16,091 (Mar. 19, 2012).

an Advanced Notice of Proposed Rulemaking to revise its station blackout rule.<sup>47</sup> To the extent that these actions impose (or will eventually impose) requirements on licensees, they are examples of the generic steps the NRC is taking to respond to Fukushima and which the Commission has now ruled cannot be the basis for a contention in an individual licensing proceeding.<sup>48</sup> Consequently, they do not remove the prematurity that is fatal to the proposed contention.<sup>49</sup>

#### IV. CONCLUSION

For the foregoing reasons, we deny the Intervenor's Motion to admit a new contention.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Kaye D. Lathrop  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard E. Wardwell  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 30, 2012

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<sup>47</sup> Station Blackout, 77 Fed. Reg. 16,175, 16,175 (Mar. 20, 2012).

<sup>48</sup> See Comanche Peak, CLI-12-07, 75 NRC at \_\_ (slip op. at 11).

<sup>49</sup> See Florida Power & Light Co. (Turkey Point Units 6 and 7), LBP-11-33, 74 NRC \_\_, \_\_-\_\_ (slip op. at 9-10) (Nov. 21, 2011).

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Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (Denying Riverkeeper's and Clearwater's Motion for Leave to File New Environmental Contention Regarding NRC's Near-Term Task Force on Fukushima) have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM AND ORDER (Denying Riverkeeper's and Clearwater's Motion for Leave to File New Environmental Contention Regarding NRC's Near-Term Task Force on Fukushima)

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[Original signed by Christine M. Pierpoint]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 30<sup>th</sup> day of March 2012