

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	May 23, 2012
))	

ENTERGY’S REPLY TO RIVERKEEPER, INC. RESPONSE IN SUPPORT OF STATE OF NEW YORK MOTION TO STRIKE PORTIONS OF ENTERGY TESTIMONY

I. INTRODUCTION

In accordance with the Atomic Safety and Licensing Board (“Board”) July 1, 2010 Scheduling Order (“Scheduling Order”),¹ Entergy Nuclear Operations, Inc. (“Entergy”) files this timely Reply to Riverkeeper, Inc.’s Response in Support of the New York State (“NYS”) Motion to Strike Portions of Entergy and NRC Staff Witness Testimony (“Riverkeeper Response”).² While NYS’s Motion addresses Entergy’s testimony on Contentions NYS-17B and NYS-37 concerning property values and energy alternatives, Riverkeeper has filed a Response thereto that inappropriately turns away from the contentions that are the subject of the NYS Motion to Strike and instead attempts to challenge Entergy’s testimony on Consolidated Contention RK-EC-3/CW-EC-1. Specifically, Riverkeeper has asked the Board to disregard portions of Entergy’s testimony on that contention related to spent fuel pool (“SFP”) leaks.

¹ Licensing Board Scheduling Order § G.2, at 7 (July 1, 2010) (unpublished) (“Scheduling Order”) (“[I]f any party files an answer that *supports* a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a reply to any new facts or arguments presented in that answer.”).

² Riverkeeper, Inc. Response in Support of State of New York Motion to Strike Portions of Energy and NRC Staff Testimony (May 14, 2012) (“Riverkeeper Response”), *available at* ADAMS Accession No. ML12135A716; *see also* State of New York Motion to Strike Portions of Entergy and NRC Staff Witness Testimony As Impermissible Under NRC Regulations (Apr. 30, 2012) (“NYS Motion to Strike”), *available at* ADAMS Accession No. ML12121A702.

As an initial matter, Riverkeeper's Response should be summarily rejected because Riverkeeper is not a party to NYS-17B or NYS-37, and as such has no right to file pleadings concerning those contentions. In addition, Riverkeeper's Response exceeds the scope of a permissible answer as it raises totally new grounds for relief. Moreover, to the extent Riverkeeper seeks to exclude testimony regarding RK-EC-3/CW-EC-1, to which it is a party, the Response should be rejected as an out-of-time *de facto* motion in limine in violation of the Board's Scheduling Order.

Aside from these procedural flaws, Riverkeeper's arguments also are meritless. Riverkeeper introduced expert testimony broadly challenging the adequacy of the evaluation by Entergy and the NRC Staff of the environmental significance of Indian Point SFP leaks.³ In response, Entergy has properly presented qualified experts who demonstrate that the human health, groundwater quality, and aquatic ecology impacts from SFP leaks have been and will continue to be SMALL and, thus, are environmentally insignificant.⁴ Just because environmental "significance" is a concept addressed by the National Environmental Policy Act ("NEPA") does not render such testimony legally impermissible, as Riverkeeper mistakenly claims. The Board should therefore deny Riverkeeper's requested relief in its entirety.

II. ARGUMENT

A. Riverkeeper Is Prohibited From Filing Pleadings on NYS-17B and NYS-37

Having failed to adopt NYS-17B and NYS-37, Riverkeeper is not a party to those contentions and therefore is not permitted to file a pleading responding to the NYS Motion to

³ See, e.g., Prefiled Direct Testimony of Arnold Gundersen Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) at 4 (Dec. 21, 2011) ("Gundersen Testimony") (RIV000060) (challenging the adequacy of the evaluation by Entergy and the NRC Staff of SFP leaks and groundwater contamination).

⁴ See, e.g., Testimony of Entergy Witnesses Donald M. Mayer, Alan B. Cox, Thomas C. Esselman, Matthew J. Barvenik, Carl J. Paperiello, and F. Owen Hoffman Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) at 17-21 (Mar. 29, 2012) (ENT000301) ("Entergy RK-EC-3/CW-EC-1 Testimony").

Strike.⁵ Permitting Riverkeeper to file this Response contravenes the Commission’s contention adoption regulation, 10 C.F.R. § 2.309(f)(3), an important requirement necessary to avoid unnecessary pleadings and to provide for orderly, efficient proceedings. That regulation provides a petitioner seeking intervention the option of adopting another petitioner’s contentions. The petitioner requesting to adopt a contention, however, must agree that the party proposing the contention will act as “the representative with respect to that contention” (or otherwise reach agreement with the other petitioner about who will act as the lead petitioner on that contention).⁶ Early in this proceeding, several petitioners took advantage of this procedure and adopted certain admitted contentions.⁷ But Riverkeeper did not adopt any other petitioner’s proffered contentions. Accordingly, Riverkeeper is not a party to NYS-17B and NYS-37, and has no right to file pleadings concerning those contentions.

As the Commission held in the *Louisiana Energy Services* proceeding, to allow an intervenor the right to participate “on all other parties’ contentions, regardless of whether the contentions were ever adopted,” would defeat the purpose of the contention adoption requirement.⁸ Approving the presiding officer’s reasoning, the Commission further stated:

With contention adoption explicitly recognized as the method by which an intervenor can gain a role relative to another petitioner’s proffered contentions, to permit any party to the proceeding to take an active role regarding any contention without regard to whether

⁵ See 10 C.F.R. § 2.323(c) (“[A] party may file an answer in support of or in opposition to the motion. . . .”) (emphasis added).

⁶ 10 C.F.R. § 2.309(f)(3); see also *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 455 (1981) (“[S]ingle, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument.”) (emphasis added).

⁷ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 202-203, 206 (2008) (authorizing Clearwater’s adoption of NYS-9 and NYS-12).

⁸ *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 627 (2004).

that party made any attempt to adopt that contention would seriously undermine the efficacy of that provision.⁹

Moreover, adoption is not a mere formality, but is necessary to ensure the orderly conduct of this proceeding. This is particularly true in a complex case such as this one, with three intervenors, five interested governmental entities, and over a dozen admitted contentions. Were intervenors permitted to ignore the adoption requirement and file pleadings concerning another intervenor's contentions at will, the number of filings could increase dramatically, making conduct of an orderly, efficient proceeding exceedingly difficult.

Thus, if Riverkeeper wished to participate on NYS-17B and NYS-37, the proper avenue would have been to adopt those contentions earlier in the proceeding.¹⁰ Having failed to take advantage of these procedures, the Board should disregard Riverkeeper's Response.

B. Riverkeeper Exceeds the Proper Scope of an Answer by Raising New Arguments

Even if Riverkeeper somehow were authorized to file the instant pleading, the Response far exceeds the scope of a permissible answer. "Answers should focus (pro or con) on the issues raised by the movant, and should not raise totally new grounds for relief."¹¹ In this respect, the scope of an answer is similar in scope to a reply brief, which may not be used as a vehicle to introduce new arguments or claims.¹²

Despite its characterization as a "response" to the NYS Motion to Strike, Riverkeeper's pleading raises an entirely different claim involving an entirely different contention. The NYS Motion to Strike addresses only Entergy's testimony on NYS-17B and NYS-37. Riverkeeper,

⁹ *Id.*

¹⁰ *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 207 (2006) (holding that notice of adoption of a contention must be "filed within a reasonable time (such as 20 days) after the contention has been filed *and* admitted"), *rev'd in part on other grounds*, CLI-07-16, 65 NRC 371 (2007).

¹¹ *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-08-1, 67 NRC 37, 51 (2008).

¹² *See La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

however, seeks Board relief unrelated to those contentions, asking instead that the Board exclude portions of Entergy's testimony on RK-EC-3/CW-EC-1.¹³ Because Riverkeeper has improperly exceeded the scope of a permissible answer to the NYS Motion to Strike, the Board should disregard Riverkeeper's new request for distinct relief.

The Commission has long recognized that NRC proceedings would be unending if an intervenor could disregard deadlines and belatedly raise new claims "it either originally opted not to make or which simply did not occur to it at the outset."¹⁴ Having chosen not to file its own timely motion on Entergy's testimony on RK-EC-3/CW-EC-1, Riverkeeper cannot bootstrap untimely arguments to its "response" to the NYS Motion to Strike.

C. Riverkeeper's De Facto Motion in Limine Should be Denied

While nominally filed as a "response" pursuant to 10 C.F.R. § 2.323(c), Riverkeeper's pleading is, in effect, a *de facto* motion to exclude Entergy's testimony on RK-EC-1/CW-EC-3.¹⁵ The Board should reject Riverkeeper's request for relief with respect to Entergy's testimony on RK-EC-1/CW-EC-3 because it is procedurally flawed and substantively deficient.

1. Riverkeeper's Request Is Procedurally Flawed

As an initial matter, Riverkeeper's request is untimely. Entergy filed its RK-EC-1/CW-EC-3 statement of position and testimony on March 29, 2012.¹⁶ The Board's Scheduling Order requires that motions in limine are due 30 days following the service of the relevant testimony.¹⁷ As such, any motion concerning Entergy's RK-EC-1/CW-EC-3 testimony was due on April 28,

¹³ See Riverkeeper Response at 3-4.

¹⁴ See, e.g., *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (quoted approvingly in *LES*, CLI-04-25, 60 NRC at 224-25).

¹⁵ See Riverkeeper Response at 3-4 (asking that the Board afford Entergy's testimony on RK-EC-3/CW-EC-1 no weight); see also 10 C.F.R. § 2.323(b) (indicating that a motion states "the grounds and the relief sought").

¹⁶ Entergy's Statement of Position on Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (Mar. 29, 2012) (ENT000300); Entergy RK-EC-3/CW-EC-1 Testimony (ENT000301).

¹⁷ See Scheduling Order at 15.

2012. Because Riverkeeper did not file the instant request until May 14, 2012, it should be denied as untimely.

In addition, the Response should be rejected because Riverkeeper made no attempt to meet the consultation requirement for motions in 10 C.F.R. § 2.323(b). That regulation states that “[a] motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.”¹⁸ The Response contains no such certification, nor did Riverkeeper make any attempt to consult with Entergy’s counsel.¹⁹ Accordingly, Riverkeeper’s request for relief should be rejected because of Riverkeeper’s blatant disregard for the Commission’s consultation requirement.²⁰

2. Riverkeeper Fails to Identify Any Valid Basis for Excluding or Affording No Weight to Entergy’s Expert Testimony

Even if Riverkeeper’s Response were properly before the Board, Riverkeeper’s arguments fail because Entergy’s witnesses offer no impermissible legal argument or conclusions. As explained in Entergy’s Answer to the NYS Motion to Strike, Entergy’s expert testimony on NYS-17B and NYS-37 fully comports with the Commission’s rules of evidence.²¹

¹⁸ 10 C.F.R. § 2.323(b) (emphasis added).

¹⁹ The Response certifies only that Riverkeeper is “unaware of any attempt by the other parties to the proceeding to contact Riverkeeper regarding New York State’s Motion in to Strike.” Riverkeeper Response, Certification Pursuant to 10 C.F.R. § 2.323(b) at 1. While the relevance of this statement is unclear, it ignores Riverkeeper’s burden to initiate consultation for its request for relief concerning RK-EC-1/CW-EC-3 testimony.

²⁰ This is not the first time Riverkeeper has disregarded this requirement. *See* Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) at 3 (Feb. 4, 2009) (unpublished) (voicing “displeasure with the minimal efforts of New York and Riverkeeper to comply with the consultation requirements of 10 C.F.R. § 2.323(b)”; Entergy’s Answer Opposing Riverkeeper, Inc. Motion in Limine to Exclude Portions of Pre-Filed Testimony and Statement of Position Regarding RK-TC-2 (Flow-Accelerated Corrosion) at 3-4 (May 14, 2012), *available at* ML12135A714.

²¹ *See* Entergy’s Answer Opposing New York State’s Motion to Strike Portions of Entergy Pre-filed Testimony on Contentions NYS-17B (Property Values) and NYS-37 (Energy Alternatives) at 5-16 (May 14, 2012), *available at* ML12135A715.

Likewise, Riverkeeper's claim that Entergy's RK-EC-1/CW-EC-3 testimony contains "purely legal argument," "conclusions of law," and is "an unacceptable invasion" of the Board's role in this proceeding is flawed and should be rejected.²²

Expert testimony is admissible if the expert is qualified based on "scientific, technical, or other specialized knowledge," and the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue."²³ Entergy's expert witness testimony satisfies both of these requirements.

Riverkeeper raises no challenge to the qualifications of any Entergy expert witness. Instead, Riverkeeper objects to expert testimony concerning the environmental "significance" of SFP leaks (and related background on how NRC defines significance levels) as purported legal opinion.²⁴ There is simply no basis for Riverkeeper's apparent claim that expertise on NEPA and its implementation at the NRC is within the exclusive province of legal counsel. To the contrary, the Commission has delegated primary responsibility for NEPA implementation to NRC technical staff.²⁵

Moreover, Riverkeeper would have the Board apply a different standard to Entergy than Riverkeeper would have applied to itself. In attempting to prove its contentions, Riverkeeper offered Mr. Gundersen's testimony "to appraise the *adequacy* of the evaluation by Entergy and the NRC Staff of spent fuel pool leaks and groundwater contamination in the Indian Point License Renewal Proceeding"—the mirror image of the testimony to which Riverkeeper now

²² See Riverkeeper Response at 4.

²³ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27-28 (2004) (internal quotation marks omitted).

²⁴ Riverkeeper Response at 3.

²⁵ See, e.g., 10 C.F.R. § 51.31(a) (delegating to NRC staff determination on whether to prepare an environmental impact statement or make a finding of no significant impact).

objects.²⁶ In direct response to Riverkeeper’s contention, Entergy presented qualified experts in the field who analyzed the relevant facts and appropriately weighed those facts against various regulations, NRC Staff guidance, and past NRC environmental review practices. Riverkeeper now claims that Entergy’s expert testimony is barred, while its own testimony is admissible. In fact, neither Riverkeeper’s nor Entergy’s testimony “invades the province of the Board”—the Board may follow, ignore, and accord weight to such evidence as it deems appropriate.

Finally, assuming *arguendo* that Entergy’s expert witnesses have offered legal conclusions, a characterization Entergy does not concede, courts admit expert testimony that is largely legal or regulatory in content when it is helpful to the trier of fact, particularly in complex technical areas.²⁷ Such testimony may be admissible even if it contains both factual and legal conclusions.²⁸ In the context of determining environmental “significance,” which inevitably involves applying complicated technical standards and regulations to the facts, carefully supported expert testimony is almost indispensable to the Board in carrying out its duties. Because the expert witnesses will be subject to questioning by the Board and the Board may accord such weight to the testimony as it sees fit, there is no risk that Entergy’s testimony “usurps the role” of the Board.

²⁶ Gundersen Testimony at 4 (RIV000060) (emphasis added). Compare Riverkeeper Response at 3 (objecting to Entergy expert testimony concerning whether “Entergy has ‘adequately and appropriately’ characterized spent fuel pool leaks at Indian Point”).

²⁷ See, e.g., *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (allowing expert testimony on federal securities registration requirements “to explain intricate regulatory landscape”); *United States v. Owens*, 301 F.3d 521, 526-27 (7th Cir. 2002) (allowing expert testimony to the effect that financial transactions did not comply with regulations and appeared to be fraudulent); *United States v. Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986) (observing that “[e]xpert testimony by an IRS agent which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence”); *Crom Corp. v. Crom*, 677 F.2d 48, 50 (9th Cir. 1982) (allowing expert testimony in a patent infringement action that a patent was infringed).

²⁸ See, e.g., *United States v. Buchanan*, 787 F.2d 477, 483 (10th Cir. 1986) (“the proper inquiry is whether the testimony would ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’”) (quoting Fed. R. Evid. 702).

III. CONCLUSION

For the foregoing reasons, the Board should disregard or reject the arguments made in Riverkeeper's improperly-filed Response.

Respectfully submitted,

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Dated in Washington, D.C.
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Indian Point Nuclear Generating Units 2 and 3))	
_____)	May 23, 2012

ANSWER CERTIFICATION

Counsel for Entergy certifies that he is unaware of any attempt by Riverkeeper to contact Entergy regarding the relief requested in Riverkeeper's Response or NYS's Motion to Strike.

Signed (electronically) by Jonathan M. Rund

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, a copy of the “Entergy’s Reply to Riverkeeper, Inc. Response in Support of State of New York Motion to Strike Portions of Entergy Testimony” was served electronically via the Electronic Information Exchange on the following recipients:

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