

July 5, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO "RIVERKEEPER, INC. MOTION
TO HOLD CONTENTION RK-EC-3/CW-EC-1 IN ABEYANCE
PENDING THE OUTCOME OF SETTLEMENT NEGOTIATIONS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the Atomic Safety and Licensing Board's "Order (Scheduling July 9, 2012, Status Conference)" ("Order") at 2, the NRC Staff ("Staff") hereby files its Answer to the "Motion to Hold Contention RK-EC-3/CW-EC-1 in Abeyance Pending the Outcome of Settlement Negotiations" ("Motion"), filed by Riverkeeper, Inc. ("Riverkeeper") on June 26, 2012. In its Motion, Riverkeeper requests that the time for filing its rebuttal testimony and all further litigation of this contention be deferred, to allow it to pursue a potential settlement of the contention with Entergy Nuclear Operations, Inc. ("Entergy").¹ The Atomic Safety and Licensing Board ("Board") has scheduled a status conference for Monday, July 9, 2012, to discuss Riverkeeper's Motion. Order at 2. For the reasons set forth below, the Staff respectfully submits that the Motion should be denied.

¹ Entergy filed an answer in opposition to Riverkeeper's Motion, on June 28, 2012. See "Entergy's Answer Opposing Riverkeeper Motion to Hold Contention RK-EC-3/CW-EC-1 in Abeyance Pending Outcome of Settlement Negotiations" (June 28, 2012) ("Entergy's Answer").

DISCUSSION

Contention RK-EC-3/CW-EC-1 asserts, in general, that leaks of radioactive liquids from the spent fuel pools at Indian Point have resulted in contamination of the groundwater and the Hudson River ecosystem, that has not been adequately addressed in Entergy's Environmental Report and the Staff's Final Supplemental Environmental Impact Statement ("FSEIS") for license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3").²

Riverkeeper filed its initial testimony,³ statement of position and evidentiary exhibits on this contention on December 22, 2012. Entergy and the Staff filed their testimony, statements of position and evidentiary exhibits, respectively on March 29 and 30, 2012.⁴ Riverkeeper's rebuttal testimony and related filings, if any, were scheduled to be filed on June 29, 2012. Motions in limine are due to be filed by Entergy and the Staff on Riverkeeper's rebuttal presentation, on July 30, 2012 – just 21 days after the newly scheduled July 9 status conference – and all parties are due to file their proposed Board questions on all contentions four weeks later, on August 29, 2012. Hearings on the contention are scheduled to commence in October.

Riverkeeper's Motion requests that the time for filing its rebuttal testimony be deferred indefinitely, and that all further litigation of this contention be held in abeyance while it pursues further settlement discussions with Entergy. Riverkeeper's Motion, if granted, would reduce or

² NUREG-1437, Supplement 38, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Dec. 2010).

³ See (1) "Prefiled Direct Testimony of Arnold Gundersen Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" (Dec. 22, 2012) (Exhibit RIV000060); and (2) "Prefiled Written Testimony of Gillian Stewart Regarding Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks)" (Dec. 22, 2012) (Exhibit RIV000061).

⁴ See, e.g., (1) "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)" (March 29, 2012); and (2) "NRC Staff Testimony of Stephen P. Klementowicz and James D. Noggle Concerning Contention Riverkeeper EC-3/Clearwater EC-1 (Spent Fuel Pool Leaks)" (March 30, 2012).

eliminate the time available for Entergy and the Staff to file motions in limine and proposed Board questions concerning Riverkeeper's rebuttal, and would reduce the time available for the Board to consider the testimony and any related motions; further, the Motion could effectively remove this contention from the group of contentions scheduled for hearing in October.

While Riverkeeper's Motion indicates that it has commenced discussions with Entergy regarding the possible settlement of this contention, it does not describe the current status of those discussions. In contrast, Entergy describes the discussions as "preliminary" in nature; further, Entergy states that "the parties have yet to exchange any detailed settlement proposals or associated documentation."⁵

The Staff supports the resolution of contested issues by settlement of the parties; further, the Staff is mindful of the Commission's long-standing policy – presently codified in 10 C.F.R. § 2.338 – that encourages the settlement of contested issues in NRC adjudicatory proceedings.⁶ At the same time, the Staff observes⁶ that the Commission has encouraged the conduct of adjudicatory proceedings in a prompt and efficient manner without unnecessary delay;⁷ indeed, this principle is reflected in 10 C.F.R. § 2.338(f), which states as follows:

(f) *Effects of ongoing settlement negotiations.* The conduct of settlement negotiations does not divest the presiding officer of jurisdiction and does not automatically stay the proceeding. A hearing must not be unduly delayed because of the conduct of settlement negotiations.

Id.; emphasis added.

⁵ Entergy's Answer at 2.

⁶ See generally, *Pa'ina Hawaii, LLC* (Material License Application), CLI-06-18, 64 NRC 1, 11 (2006); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), CLI-97-13, 46 NRC 195, 205 (1997); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998); *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981).

⁷ *Statement of Policy*, CLI-98-12, 48 NRC at 18, 19; *Statement of Policy*, CLI-81-8, 13 NRC at 453.

A balancing of these principles weighs against Riverkeeper's Motion. Here, Riverkeeper seeks an indefinite deferral of the deadline for its (optional) rebuttal testimony, and an unlimited suspension of all proceedings on this contention. At the same time, Riverkeeper provides no reason to believe that a settlement of this contention is imminent or even likely; nor does it explain why it could not have filed its rebuttal testimony while it pursues a possible settlement of the contention. Simply stated, the Motion would result in an indefinite and unnecessary delay in the resolution of this contention, without offering any concrete benefit. Although the Staff would not have opposed a brief and finite extension of time to permit the parties to pursue their settlement discussions, Riverkeeper's request for an indefinite and open-ended delay would result in "undue delay" in the resolution of this contention, in contravention of 10 C.F.R. § 2.338(f) and the Commission's policy statements.⁸

Further, Riverkeeper filed its motion almost three months after it received the Staff's and Entergy's evidentiary submissions on this contention, and just three days before its own rebuttal testimony was due to be filed. Riverkeeper provides no reason to believe it could not have initiated settlement negotiations earlier, or why it could not have filed its request to defer the filing of its rebuttal testimony more than three days before that testimony was due. Moreover, by waiting to file its Motion until the eve of the date its rebuttal testimony was due and by failing to file its rebuttal testimony as required, Riverkeeper knowingly accepted the risk that its Motion might be denied and that it might be precluded from filing any rebuttal testimony on this contention; moreover, Riverkeeper knew, before filing its Motion, that the Staff and Entergy opposed the Motion, thus rendering it less likely that its Motion would be granted, yet it still chose to refrain from filing its rebuttal under the existing schedule, as required.

⁸ While the Staff would have been willing to consider a reasonable request for adjustment of the schedule for Riverkeeper's filing of its rebuttal testimony, Riverkeeper has made no such request.

Riverkeeper's failure to file its rebuttal testimony in accordance with the Board's existing schedule, and its late filing of its Motion, has reduced the time available for the Staff and Entergy to file a motion *in limine* to strike part or all of any rebuttal testimony or evidence it may now seek to file, and has reduced the time available to the Board to consider the parties' evidentiary submissions on this contention. The Staff respectfully submits that the time for Riverkeeper's submittal of rebuttal has passed, and no additional time should be afforded for the filing of its (optional) rebuttal presentation. In sum, Riverkeeper's Motion should be denied.

CONCLUSION

Riverkeeper's Motion unreasonably seeks an unlimited and indefinite delay in the resolution of this contention, for no certain benefit. Further, by waiting to file its Motion until just before its rebuttal testimony was due, and by failing to file its rebuttal testimony in accordance with the Board's existing schedule, Riverkeeper has adversely impacted the Staff's and Entergy's ability to address any late-filed rebuttal that it may now seek to file. Accordingly, the Staff respectfully submits that Riverkeeper's Motion should be denied, in its entirety.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 5th day of July 2012

CERTIFICATION OF COUNSEL

Counsel for the Staff certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'RIVERKEEPER, INC. MOTION TO HOLD CONTENTION RK-EC-3/CW-EC-1 IN ABEYANCE PENDING THE OUTCOME OF SETTLEMENT NEGOTIATIONS,'" dated July 5, 2012, in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 5th day of July, 2012.

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