

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	August 27, 2012

**ENTERGY'S ANSWER OPPOSING
MOTION FOR EXTENSION OF TIME**

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In accordance with 10 C.F.R. § 2.323(b) and paragraph G.5 of the Atomic Safety and Licensing Board’s (“Board’s”) July 1, 2010 Scheduling Order,¹ as clarified by the Board’s October 7, 2011 Order,² Entergy Nuclear Operations, Inc. (“Entergy”) files this answer opposing the August 24, 2012 Joint Motion by State of New York, State of Connecticut, and Riverkeeper to Amend the Scheduling Order for Responsive Pre-filed Submissions in Support of Contention NYS-38/RK-TC-5 (“Motion”). The State of New York (“New York”) and Riverkeeper, Inc. (“Riverkeeper”) request an extension of time for the submission of *optional* rebuttal testimony, exhibits, and revised statement of position from the allotted ten days to 45 days.³ Likewise, the State of Connecticut (“Connecticut”) requests a similar extension for its optional filing on this contention as an interested state.⁴

¹ Licensing Board Scheduling Order at 8 (July 1, 2010) (unpublished) (“Scheduling Order”).
² Licensing Board Order (Denying New York’s Motion for an Extension of Time) at 4 (Oct. 7, 2011) (“October 7, 2011 Order”).
³ See Motion at 8.
⁴ See *id.*

The extension requested by New York, Riverkeeper, and Connecticut (collectively, “Intervenors”) fails to meet the required standard of unavoidable and extreme circumstances and is excessive. Therefore, the Board should deny the Motion.

I. BACKGROUND

The prefiled testimony on this contention has proceeded on a schedule originally issued four months ago, on April 23, 2012.⁵ That schedule allowed Intervenors ten days to prepare and file any rebuttal testimony they might choose to offer after the filing of Entergy and NRC Staff testimony.⁶ For months thereafter, the Intervenors expressed no objection to this ten-day period. Following an unopposed motion by the NRC Staff, the Board amended that schedule on July 9, 2012, but retained the ten-day deadline for Intervenors’ rebuttal testimony and associated filings.⁷ As noted in the instant Motion, during consultations in July, New York and Riverkeeper informed Entergy and the Staff of their “likely need” for additional time to file rebuttal testimony, but the parties were unable to reach an agreement on the duration of that extension.⁸ During those consultations, Entergy offered a reasonable extension of 21 days beyond the 10 already allowed, which would have more than tripled the allotted time for rebuttal filings, but New York and Riverkeeper declined this offer.

⁵ See Licensing Board Order (Denying NRC Staff’s Motion for Partial Reconsideration and State of New York/Riverkeeper’s Cross-Motion to NRC Staff’s Motion for Reconsideration) at 7 (Apr. 23, 2012) (unpublished) (“April 23, 2012 Order”).

⁶ See *id.* The Board has not specified the basis for ordering a ten-day window, but this deadline is consistent with the fact that Contention NYS-38/RK-TC-5, as pled and admitted, focused on the legal issue of the enforceability and specificity of commitments, as opposed to technical issues that might require extensive expert rebuttal testimony.

⁷ See Licensing Board Order (Memorializing Items Discussed During the July 9, 2012, Status Conference) at 2 (July 12, 2012) (unpublished).

⁸ See Motion at 2.

The hearing in this license renewal proceeding on Track 1 contentions is scheduled to begin less than two months from now, on October 15, 2012.⁹ Contention NYS-38/RK-TC-5 is not currently specified as a Track 1 contention,¹⁰ but the Board recently issued an order requesting the availability for expert witnesses on this contention to present oral testimony during the week of December 10, 2012.¹¹ On August 20, Entergy and the NRC Staff filed their prefiled written testimony, statements of position, and exhibits on this contention. Four days later, the Intervenors filed the Motion.

II. ARGUMENT

This Board may grant extensions of time when warranted by unavoidable and extreme circumstances.¹² The Intervenors cite no case law in their Motion, and do not explain why the various issues it raises meet the appropriate legal standards. On the contrary, the key facts cited in the Motion have long been known and certainly do not amount to unavoidable and extreme circumstances that would warrant the requested significant extension, which would more than quadruple the currently-specified time for rebuttal filings on this contention.

⁹ See Licensing Board Notice of Hearing (Application for License Renewal) at 5 (June 8, 2012) (unpublished) (“Notice of Hearing”).

¹⁰ See *id.* at 4-5 & n.14.

¹¹ See Licensing Board Order (Requesting Witness Availability for Contentions NYS-26B/RK-TC-1B and NYS-38/RK-TC-5 during the week of December 10, 2012) (Aug. 16, 2012) (unpublished).

¹² See *Hydro Res., Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87210), CLI-99-1, 49 NRC 1, 3 n.2 (1999) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998)) (“We caution all parties in this case, however, to pay heed to the guidance in our policy statement that ordinarily only ‘unavoidable and extreme circumstances’ provide sufficient cause to extend filing deadlines.”); see also 10 C.F.R. § 2.334 (in evaluating whether there is a showing of good cause to modify the hearing schedule, the presiding officer should consider factors *such as* whether “the requesting party has exercised due diligence to adhere to the schedule,” whether “the requested change is the result of unavoidable circumstances,” and whether “the other parties have agreed to the change and the overall effect of the change on the schedule of the case”). The Commission recently affirmed the “unavoidable and extreme circumstances” test from CLI-98-12. See *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC 474, 476 & nn.10-11 (2010).

1. *The deadlines for submittal of testimony have long been established, and did not contemplate an extended time for the development of rebuttal testimony on this contention.* As previously noted, the deadline for rebuttal testimony, revised statement of position, and rebuttal exhibits on this contention has long been known. Intervenors knew of their “likely need” for an extension nearly two months ago, if not earlier. Thus, the Intervenors had an obligation to plan accordingly, or seek relief earlier. But they did neither.

Instead, Intervenors’ counsel and expert witnesses have apparently scheduled a significant number of other commitments during a period immediately following Entergy and the NRC Staff’s filings.¹³ Indeed, based on the unavailability of so many individuals for so many different commitments, it appears that the Intervenors have long been counting on the Board’s granting this extension.¹⁴ Intervenors have certainly not “exercised due diligence to adhere to the schedule.”¹⁵ The Motion should therefore be denied.

2. *The requested 45-day period for rebuttal testimony is nearly as long as the time Entergy and the NRC Staff had to prepare the entirety of their prefiled testimony on this contention.* Given that Entergy has the burden of proof,¹⁶ that the filing of rebuttal testimony is optional,¹⁷ and that the scope of rebuttal testimony is narrow,¹⁸ the requested 45-day period to prepare rebuttal testimony and associated filings on an issue where Entergy and the NRC Staff had only 60 days to prepare the entirety of their prefiled written submissions is excessive.

¹³ See Motion at 5-6.

¹⁴ See *id.* Intervenors seek to cover their long-established desire for an extension by pointing to the volume of Entergy and the NRC Staff’s filings and the recent disclosure of certain documents obtained by Entergy during the preparation of its testimony. But this argument is a red herring.

¹⁵ 10 C.F.R. § 2.334(b)(1).

¹⁶ See *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-09-7, 69 NRC 235, 269 (2009).

¹⁷ Scheduling Order at 14.

¹⁸ See 10 C.F.R. § 2.1207(a).

3. *The requested extension, considering also the State of Connecticut's intent to make a filing on this contention, will likely preclude hearings on this contention this year.* Considering the Track 1 hearings to be held in October and December, and the possible need for Entergy to prepare a response to the Connecticut's filings, which would be due on November 5, 2012¹⁹ if the Motion is granted, there will simply be insufficient time for Entergy to prepare for a hearing on this contention in December.²⁰ If the extension is granted, then holding the hearings in December would also likely become impossible from a scheduling perspective. Specifically, following the deadline for motions in limine on rebuttal testimony and responses to Connecticut's anticipated filings of November 5, 2012,²¹ proposed questions for the Board to ask and any motions for cross-examination would be due on December 5.²² Answers to motions for cross-examination would therefore be due on December 15, after the final date for hearings this year.

4. *The Intervenors' arguments regarding recent disclosures are misleading, and, in any case, Intervenors should have expected extensive testimony from Entergy and the NRC Staff on the issues they have raised.* Intervenors state that Entergy and the NRC Staff filed over 1800 pages of testimony and exhibits, including certain documents that were only recently disclosed. Entergy made two supplemental disclosures in the week preceding its filing, to disclose new documents that it had identified and obtained during the preparation of its testimony. This is no different from similar disclosures by all the parties to this proceeding prior to the filing of

¹⁹ See Scheduling Order at 15; April 23, 2012 Order at 8 (“[a]ll other provisions of the Board’s July 1, 2010 Scheduling Order remain in effect”).

²⁰ The scheduling of a hearing on this and numerous other contentions so soon after the final filings would amount to unavoidable and extreme circumstances justifying a delay.

²¹ Given that the hearings will cover half of the time period between October 4 and November 5, Entergy may also require an extension of time for its response to Connecticut.

²² See Scheduling Order at 15-16.

testimony. Those supplemental disclosures, moreover, included documents that were filed as exhibits totaling 50 pages. Entergy's disclosures earlier in August were similarly modest, and certainly nowhere close to 1800 pages. In addition, given the extensive technical testimony filed by the Intervenor on this contention which was originally focused on the legal issue of the adequacy of commitments, they should have anticipated that Entergy and the NRC Staff would have to respond in kind.

5. *The requested extension is excessive given the shorter periods when Intervenor's witnesses and counsel are not available.* In general, the obligations and issues that the Intervenor identify in the Motion are of short duration in comparison to the requested extension. For example, Intervenor point to:

- Dr. Lahey's unavailability for three business days during the ten-day rebuttal period;
- Dr. Hopenfeld's unavailability for four business days during that same period;
- Dr. Duquette's obligations during the last week of August and the first week of September;
- Mr. Sipos unavailability for six days beginning on August 23;
- Ms. Brancato's unavailability from September 17 to 21; and
- The one-day delay that Riverkeeper encountered in downloading submissions from the electronic information exchange ("EIE").²³

These relatively short periods of unavailability certainly provide no justification for a time period for rebuttal testimony more than four times longer the originally-allotted period, particularly given Intervenor's obligation to exercise due diligence to adhere to the established

²³ See Motion at 5-6. The two-week period when Dr. Hopenfeld will be "away from his office" begins one week after the current deadline, is apparently not a period of complete unavailability, and, in any event, is still far shorter than the duration of the requested extension.

hearing schedule.²⁴ The more general commitments of counsel for New York, Riverkeeper, and Connecticut—for which Intervenors provide no specified periods of unavailability—also provide no justification for an extension.²⁵

6. *Entergy repeatedly expressed its willingness to consider a more reasonable extension of time, but the Intervenors rejected Entergy's proposals.* As previously noted, in early July and again immediately preceding this Motion, Entergy repeatedly offered to agree to a more reasonable extension of time. The Intervenors, however, offered no compromise date during the consultation that led to this Motion and, in fact, requested even more time than they originally sought in the prior month.

III. CONCLUSION

For the reasons set forth above, the Motion should be denied.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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Dated in Washington, D.C.
this 27th day of August 2012

²⁴ 10 C.F.R. § 2.334(b)(1).

²⁵ See, e.g., *Bellefonte*, CLI-10-26, 72 NRC at 476-77 (holding that resource constraints are not cause for delay).

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MOTION CERTIFICATION

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

Signed electronically by Raphael P. Kuyler

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the “Entergy’s Answer Opposing Motion for Extension of Time” was served electronically via the Electronic Information Exchange on the following recipients.

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