

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos.
	)	50-247-LR
Entergy Nuclear Operations, Inc.	)	and 50-286-LR
(Indian Point Nuclear Generating	)	
Units 2 and 3)	)	July 26, 2013
	)	

**RIVERKEEPER, INC. MOTION TO HOLD ENTERGY’S  
MOTION TO DISMISS RK-EC-8 (ENDANGERED SPECIES)  
IN ABEYANCE OR FOR EXTENSION OF TIME TO RESPOND**

In accordance with 10 C.F.R. § 2.323(a), for the reasons explained below, Riverkeeper, Inc. (“Riverkeeper”) respectfully requests that the Atomic Safety and Licensing Board (“ASLB”) issue an order holding responses to Entergy’s July 17, 2013 Motion to Dismiss Riverkeeper Contention RK-EC-8, pertaining to endangered species, in abeyance pending the outcome of the ASLB’s ruling on Riverkeeper’s prospective amendment to contention RK-EC-8. In the alternative, in accordance with the ASLB’s July, 1 2010 Scheduling Order,<sup>1</sup> Riverkeeper requests that the ASLB grant Riverkeeper an extension of time in which file a response to Entergy’s motion to dismiss in order to allow Riverkeeper to focus its limited resources on continuing to prepare and timely file a planned amendment to Contention RK-EC-8, as well as to accommodate counsel availability issues.

**BACKGROUND**

On or about December 3, 2010, NRC Staff issued a Final Supplemental Environmental Impact Statement (“FSEIS”) related to the license renewal of the Indian Point nuclear power

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<sup>1</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Scheduling Order (July 1, 2010), at ¶ H.3 (Regarding dispositive motions: “If the answering party concludes that additional time is needed in order to prepare an appropriate answer, it shall file a motion for additional time within which to respond to the dispositive motion within ten (10) days after service thereof.”)

plant.<sup>2</sup> In accordance with established filing deadlines, on February 3, 2011, Riverkeeper filed a Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement.<sup>3</sup> Based upon NRC Staff's failure to commence or complete required consultation procedures pursuant to section 7 of the Federal Endangered Species Act ("ESA"), Riverkeeper's contention challenged the analyses and conclusions contained in NRC Staff's FSEIS related to the impact of the continued operation of Indian Point on endangered aquatic resources in the Hudson River.<sup>4</sup> On July 6, 2011, the ASLB admitted Riverkeeper's new contention, RK-EC-8, for adjudication in the Indian Point license renewal proceeding.<sup>5</sup>

Thereafter, on December 14, 2011, the ASLB issued an order holding Contention RK-EC-8 "in abeyance pending further order of th[e] Board in light of the Staff's announcement that a draft supplement to its Final Supplemental Environmental Impact Statement that addresses issues raised in th[e] contention is expected to be issued. . ."<sup>6</sup> Thus, Contention RK-EC-8 was placed on hearing "Track 2" in the proceeding, and put on hold to await the outcome of NRC

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<sup>2</sup> U.S. NRC, Indian Point Nuclear Generating Unit Nos. 2 and 3 - License Renewal Application, <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html> (last visited July 26, 2013); Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 (NUREG-1437, Supplement 38), available at, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/> (last visited July 26, 2013).

<sup>3</sup> Riverkeeper, Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement (February 3, 2011), ADAMS Accession No. ML110410362.

<sup>4</sup> See generally *id.*

<sup>5</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011), at 60-71, ADAMS Accession No. ML111870344.

<sup>6</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (December 14, 2011), at 2, ADAMS Accession No. ML11348A032.

Staff's supplemental environmental review process.<sup>7</sup> On a teleconference call among the parties held on June 10, 2013, in advance of the NRC Staff's then-imminent issuance of its FSEIS supplement, the ASLB explicitly acknowledged that intervenors would have opportunity to review the FSEIS supplement and file amended or new contentions based upon it.<sup>8</sup> The ASLB directed intervenors to advise the ASLB within 10 days of the publication of the FSEIS supplement about their positions regarding how much time would be necessary in order to file any such new or amended contentions.<sup>9</sup>

Subsequently, and over a year and a half after first announcing its intention to undertake a supplemental NEPA review, on or about June 21, 2013, NRC Staff issued a final supplement to its Indian Point FSEIS, which contained information relevant to Contention RK-EC-8.<sup>10</sup> In accordance with the ASLB's directives, on July 1, 2013, Riverkeeper advised the ASLB that, based upon its initial review of NRC Staff's FSEIS supplement, Riverkeeper intended to file an amendment to Contention RK-EC-8, and advised the ASLB about the amount of time that Riverkeeper deemed necessary in order to do so.<sup>11</sup> Based on the input from intervenors, on July

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<sup>7</sup> *Id.*; see also In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Granting NRC Staff's Unopposed Time Extension Motion and Directing Filing of Status Updates) (February 16, 2012), at 2, ADAMS Accession No. ML12047A308 ("Because of the current dynamic nature of the NRC Staff's uncompleted safety reviews, we place Contention NYS-25 on the second hearing track that already includes NYS-38/RK-TC-5 and RK-EC-8.").

<sup>8</sup> Transcript of June 10, 2013 Teleconference at 4539.

<sup>9</sup> *Id.* ("But what I would ask is for both New York and Riverkeeper within 10 days after the issuance of the supplement to the Environmental Impact Statement, if you notify the Board and the parties of a proposed schedule"); In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Granting New York's Motions, Denying Clearwater's Motion, and Denying CZMA Motions) (June 12, 2013) ("Finally, the parties have 10 days after the publication of the forthcoming FSEIS to inform the Board whether 30 days will be sufficient time to file motions for new and amended contentions" (footnotes omitted)).

<sup>10</sup> See Letter from S. Turk (Counsel for NRC Staff) to ASLB (June 21, 2013); Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 - Final Report Supplemental Report and Comment Responses (NUREG-1437, Supplement 38, Volume 4), available at, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement38/v4/>.

<sup>11</sup> See Letter from D. Brancato (Riverkeeper) to ASLB (July 1, 2013).

9, 2013, the ASLB issued an order setting August 20, 2013 as the deadline for filing new or amended contentions based upon information contained in NRC Staff's FSEIS supplement.<sup>12</sup>

Despite Riverkeeper representations to the parties regarding Riverkeeper's intention to file an amendment to Contention RK-EC-8, on July 17, 2013, Entergy filed a Motion to Dismiss Riverkeeper Contention RK-EC-8 (Endangered and Threatened Aquatic Species) As Moot (hereinafter "Entergy's Motion to Dismiss"). Under the guidelines previously established by the ASLB, any responses to this motion must be filed within 20 days, thus, by August 6, 2013.<sup>13</sup>

### **ARGUMENT**

#### **I. The ASLB Should Hold Entergy's Motion to Dismiss in Abeyance Pending a Ruling on the Admissibility of Riverkeeper's Planned Amendment to Contention RK-EC-8**

Riverkeeper respectfully requests that the ASLB hold responses to Entergy's Motion to Dismiss in abeyance pending the outcome of the ASLB's ruling on Riverkeeper's prospective amendment to contention RK-EC-8. Riverkeeper's request is based upon the fact that Contention RK-EC-8 is admittedly going to be altered by Riverkeeper's planned amended contention. Riverkeeper, thus, submits that it is a waste of Riverkeeper's limited time and resources to respond to a motion that may become obsolete, moot, and/or unnecessary depending on whether Riverkeeper's forthcoming amended contention is admitted into the proceeding for adjudication. It is simply illogical for Riverkeeper to respond to a motion to dismiss Contention RK-8 at this point in time, when the bases for that contention are going to change.

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<sup>12</sup> In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Establishing Deadline for Motions for New and Amended Contentions) (July 9, 2013).

<sup>13</sup> See In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Scheduling Order (July 1, 2010), at ¶ H.3.

As the parties and ASLB are aware, Riverkeeper plans to file an *amended* contention related to RK-EC-8, and not a wholesale *new* contention. While the bases for Riverkeeper's prospective contention may be somewhat different and will have evolved to reflect the admittedly changed circumstances, the contention cannot properly be characterized as "new," since it will continue to be derived from deficiencies initially identified by Riverkeeper regarding ESA consultation and NRC Staff's assessment and conclusions regarding endangered species in the Indian Point FSEIS. Moreover, Entergy's Motion to Dismiss being interposed at this time affirmatively prejudices Riverkeeper's ability to formulate our amended contention and rely upon the framework established by the existing contention, given that the status of the existing contention would be in flux and unknown.

Notably, Entergy's request for summary disposition related to RK-EC-8 is contrary to the logical path forward contemplated and laid out by the ASLB. In particular, the ASLB has explicitly contemplated that Riverkeeper would have an opportunity to amend contention RK-EC-8 based upon the outcome of the NRC Staff's supplemental environmental review process.<sup>14</sup> Indeed, when, during the teleconference call with the ASLB on June 10, 2013, counsel for NRC Staff, Sherwin Turk, squarely indicated NRC Staff's position that RK-EC-8 should be dismissed, and the ASLB responded that such a suggestion "raises the issue of whether or not having reviewed the staff's supplement to the Environmental Impact Statement a new or amended contention based on adequacy of the EIS may or may not be appropriate. *We won't know that.*"<sup>15</sup> That is, it is not clear whether a motion to dismiss would be appropriate or necessary until Riverkeeper determines if there is cause and basis to amend the contention.

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<sup>14</sup> Transcript of June 10, 2013 Teleconference at 4539.

<sup>15</sup> *Id.* at 4542 (emphasis added).

In this case, as the parties are all aware, Riverkeeper has determined that NRC Staff's FSEIS supplement continues to be inadequate with respect to the ESA § 7 consultation and endangered species impact assessment, and, accordingly, Riverkeeper plans to file an amendment to RK-EC-8.<sup>16</sup> Thus, we now *know* that a motion to dismiss is not appropriate at this time, and not until after Riverkeeper files its amended contention and the ASLB rules upon the admissibility of that amended contention – that is, until there is more definitiveness with respect to the status of Contention RK-EC-8.

While requiring Riverkeeper to respond to Entergy's Motion to Dismiss at this time would be prejudicial to Riverkeeper, it is noteworthy that holding Entergy's Motion to Dismiss in abeyance would not result in any such prejudice to Entergy or any other party. Entergy will not lose the opportunity to oppose Riverkeeper's contention, or articulate its arguments in response to Riverkeeper's amended contention, or to file a motion for summary disposition at a later, more appropriate date. In addition, Riverkeeper respectfully submits that the requested abeyance will have no material effect on the timing of the overall Indian Point license renewal proceeding at all in light of the unresolved status of several outstanding "Track 2" contentions, which will not be adjudicated for several months at the earliest.

In order to avoid unnecessary legal filings and any prejudice to Riverkeeper, the ASLB should hold Entergy's Motion to Dismiss in abeyance pending the ASLB's ruling on the admissibility of Riverkeeper's prospective amended contention RK-EC-8.

**II. In the Alternative, the ASLB Should Grant Riverkeeper an Extension Until August 30, 2013 to Respond to Entergy's Motion to Dismiss**

In the alternative, Riverkeeper respectfully requests until August 30, 2013 to file a response to Entergy's Motion to Dismiss. As an initial matter, for the reasons discussed above,

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<sup>16</sup> See Letter from D. Brancato (Riverkeeper) to ASLB (July 1, 2013).

requiring Riverkeeper to respond to Entergy's Motion to Dismiss *before* Riverkeeper files its planned amended contention is illogical and prejudicial. If a response to Entergy's Motion to Dismiss is necessary at all, it is far more appropriate and reasonable to require any such response *after* Riverkeeper has been given the opportunity to amend Contention RK-EC-8.

Riverkeeper's request for an additional 24 days, to August 30, 2013, to file a response to Entergy's Motion to Dismiss (should the ASLB not hold Entergy's motion in abeyance), is also warranted for various other reasons. First, the timing of Entergy's Motion to Dismiss serves to disrupt and interfere with Riverkeeper's limited timeframe to prepare and file Riverkeeper's planned amendment to contention RK-EC-8. Notably, when Riverkeeper communicated to the ASLB the amount of time that might be necessary to file any amended contentions based upon NRC Staff's FSEIS supplement, Riverkeeper did not contemplate or take into account Entergy's Motion to Dismiss. Riverkeeper, thus, respectfully submits that an extension of time to respond to Entergy's Motion to Dismiss until *after* Riverkeeper files its amended contention concerning RK-EC-8 is appropriate, in order to allow Riverkeeper to focus on, and dedicate its limited resources to, formulating a well-constructed amended contention.

Second, additional time to file a response to Entergy's Motion to Dismiss is warranted due to Riverkeeper's counsels' preexisting summer vacation plans. Riverkeeper's counsel who is primarily working on this matter, Deborah Brancato, will be on vacation starting August 7, 2013 through August 18, 2013.<sup>17</sup> Riverkeeper's limited request to have until August 30, 2013 to file any response to Entergy's Motion to Dismiss is reasonable in light of these circumstances. During the consultation process, as described below, counsel for Entergy indicated that Entergy would support, at maximum, a 10-day extension of time to respond to Entergy's Motion to

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<sup>17</sup> Notably, Riverkeeper's other counsel in this proceeding will also be out of the office due to preexisting vacation plans for the latter two weeks in August.

Dismiss. While Riverkeeper appreciates the fact that Entergy was amenable to Riverkeeper's extension request, Riverkeeper notes that a 10-day extension would fall entirely over the period during which Riverkeeper's primary counsel on this matter will be unavailable, and, thus, would not be an adequate extension of time.

Lastly, Riverkeeper respectfully submits that the requested extension will have no material effect on the timing of the overall Indian Point license renewal proceeding at all in light of the unresolved status of several outstanding "Track 2" contentions, which will not be adjudicated for several months at the earliest. In addition, the requested limited additional time would not prejudice any other party to the proceeding.

### **CONCLUSION**

For the foregoing reasons, the ASLB should grant Riverkeeper's Motion to hold Entergy's Motion to Dismiss Riverkeeper's Contention RK-EC-8 in abeyance, or, in the alternative, grant Riverkeeper until August 30, 2013 to file a response to Entergy's Motion to Dismiss.

Respectfully submitted,

***Signed (electronically) by Deborah Brancato***

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**Certification Pursuant to 10 C.F.R. § 2.323(b)**

In accordance with the ASLB’s July 1, 2010 Scheduling Order (at ¶ G.6.) and 10 C.F.R. § 2.323(b), I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful. Clearwater support this motion, and counsel for New York State supports the motion and has indicated its position that the motion will promote efficiency, conserve resources, and result in no prejudice to the parties. However, counsel for Entergy and NRC Staff have indicated they oppose the motion. Counsel for Entergy, Paul Bessette, has indicated that Entergy opposes Riverkeeper’s request to hold Entergy’s Motion to Dismiss in abeyance, and would support at maximum a 10-day extension to respond to the motion to ostensibly accommodate Riverkeeper’s timing needs.<sup>18</sup> Counsel for NRC Staff, Sherwin Turk, has indicated that NRC Staff opposes both of Riverkeeper’s requests for relief.<sup>19</sup>

**Signed (electronically) by Deborah Brancato**  
Deborah Brancato, Esq.

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<sup>18</sup> Riverkeeper notes that this 10 day period falls entirely during the period during which Riverkeeper’s counsel will be unavailable due to preexisting vacation plans, and, thus, would not be an adequate extension of time.

<sup>19</sup> During consultation on Riverkeeper’s instant motion, Mr. Turk indicated a willingness to entertain a request for additional time for filing amended contentions based upon NRC Staff’s FSEIS supplement, but was unwilling to agree to any extension for filing responses to Entergy’s motion, even though it was filed weeks after the NRC Staff’s issuance of the its FSEIS supplement. Riverkeeper indicated to NRC Staff counsel that there was no need to delay the Aug. 20 filing date for new or amended contentions, which had already been established by the ASLB, and which Riverkeeper’s was planning to comply with. Mr. Turk’s suggestion was illogical for the reasons discussed in this motion, namely since Entergy’s Motion to Dismiss may be unnecessary depending on the outcome of Riverkeeper’s prospective amended contention, and since Riverkeeper’s requested relief is aimed at avoiding the wasting of time and resources.

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**CERTIFICATE OF SERVICE**

I certify that on July 26, 2013 copies of Riverkeeper Inc. Motion to Hold Responses to Entergy’s Motion to Dismiss RK-TC-8 (Endangered Species) in Abeyance or For Extension of Time to Respond, were served on the following by NRC’s Electronic Information Exchange:

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**Signed (electronically) by Deborah Brancato**  
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July 26, 2013