

**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))	
	August 1, 2013

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

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. (“Entergy”) files this Answer opposing Riverkeeper, Inc.’s (“Riverkeeper”) Motion to Hold Entergy’s Motion to Dismiss RK-EC-8 (Endangered Species) in Abeyance or for Extension of Time to Respond (“Motion”), dated July 26, 2013.¹ Riverkeeper proposes that the Atomic Safety and Licensing Board (“Board”) hold Entergy’s Motion to Dismiss Riverkeeper Contention RK-EC-8 (“Entergy’s Motion to Dismiss”)² in abeyance pending the outcome of the Board’s ruling on Riverkeeper’s prospective amendment to contention RK-EC-8. In the alternative, Riverkeeper requests an additional 24 days in which to respond to Entergy’s Motion to dismiss. As described further below, Riverkeeper’s request to hold Entergy’s motion in abeyance is inconsistent with the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) precedent, and its request

¹ Riverkeeper, Inc. Motion to Hold Entergy’s Motion to Dismiss RK-EC-8 (Endangered Species) in Abeyance or for Extension of Time to Respond (July 26, 2013) (“Motion”), *available at* ADAMS Accession No. ML13207A426.

² Entergy Motion to Dismiss Riverkeeper Contention RK-EC-8 (Endangered and Threatened Aquatic Species) as Moot (July 17, 2013) (“Entergy’s Motion to Dismiss”), *available at* ADAMS Accession No. ML13198A353.

for a 24-day extension is excessive and not supported by good cause. As such, the Board should deny Riverkeeper's Motion in its entirety.

II. RIVERKEEPER'S MOTION SHOULD BE DENIED

A. Background

As submitted in 2011, RK-EC-8 alleged that: (1) the NRC Staff had not completed Endangered Species Act ("ESA") consultations with the National Marine Fisheries Service ("NMFS"); (2) the Staff's Final Supplemental Environmental Impact Statement ("FSEIS") did not include or consider NMFS' assessment of impacts to endangered species; and (3) the Staff must prepare a supplemental environmental impact statement that considers and documents the outcome of the consultation process, including NMFS' forthcoming biological opinion.³ The Board admitted RK-EC-8 as proposed, noting "Riverkeeper's *legal* dispute is that the FSEIS did not take a hard look at the environmental impacts to endangered species by not including the [biological opinion] from NMFS, and Riverkeeper's sought remedy for that deficiency is a supplementation of that FSEIS."⁴

Since then, all three alleged deficiencies have been cured and RK-EC-8 is now moot.⁵

Accordingly, on July 17, 2013 Entergy filed a timely Motion to Dismiss the contention for

³ Riverkeeper Inc. Consolidated Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement at 1 (Feb. 3, 2011), *available at* ADAMS Accession No. ML110410362.

⁴ Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 69 (July 6, 2011) (unpublished) (emphasis added). In its Motion, Riverkeeper describes RK-EC-8 as challenging "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." Motion at 2. But, as originally proffered and admitted, the contention challenged only the omission of certain information from the FSEIS. Indeed, numerous statements by Riverkeeper confirm this, including Riverkeeper's statement that: "Contention EC-8 does not squarely challenge statements made in the Revised [biological assessment], but rather, challenges the NRC Staff's decision to conclude the NEPA review process without considering NMFS' [biological opinion], or explaining how the [biological opinion] will factor into the relevant NEPA assessments and determinations." Riverkeeper Inc. Combined Reply to NRC Staff and Entergy Answers to Riverkeeper's Motion for Leave to File a New Contention and New Contention Concerning NRC Staff's Final Supplemental Environmental Impact Statement at 13 (Mar. 14, 2011), *available at* ADAMS Accession No. ML110820514.

⁵ Entergy's Motion to Dismiss at 12-14.

failure to state a claim upon which relief can be granted.⁶ Answers to the Motion to Dismiss are due by August 6, 2013.⁷

B. Riverkeeper’s Request to Hold Entergy’s Motion to Dismiss in Abeyance is Contrary to Commission Precedent and Should be Rejected.

Riverkeeper contends that Entergy’s Motion to Dismiss is not “appropriate or necessary” because it intends to file an amended contention related to RK-EC-8.⁸ Riverkeeper argues that dispositive motions will not be appropriate until “after Riverkeeper files its amended contention and the ASLB rules upon the admissibility of that amended contention.”⁹ It further asserts that it would be illogical to respond to Entergy’s Motion to Dismiss “when the bases for that contention are going to change.”¹⁰ Riverkeeper’s arguments, however, are squarely inconsistent with Commission precedent which establishes that a motion to dismiss a contention and a motion for leave to amend that same contention are separate and distinct procedural actions.¹¹

The Commission’s principal decision on this issue is *McGuire/Catawba*, which established that, where a contention alleges the omission of particular information and the information is later supplied or considered by the Staff, “the contention is moot.”¹² The Commission also noted that, “where a contention is superseded by the subsequent issuance of licensing-related documents . . . the contention must be disposed of or modified.”¹³ In order to

⁶ See generally *id.*

⁷ Licensing Board Scheduling Order at 11 (July 1, 2010) (unpublished) (“Scheduling Order”).

⁸ Motion at 4-6.

⁹ *Id.* at 6.

¹⁰ *Id.* at 4.

¹¹ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373 (2002); Scheduling Order at 6, 11 (establishing that proposed new and/or amended contentions must be filed within 30 days and that dispositive motions must be filed within 30 days, and not providing any alternative filing scheme if both are contemplated).

¹² *McGuire/Catawba*, CLI-02-28, 56 NRC at 382-83.

¹³ *Id.* at 382 (internal quotation omitted).

raise specific challenges to the later-supplied information, an intervenor must “timely file a new or amended contention that addresses the factors in section [2.309].”¹⁴ Thus, a motion to dismiss the original contention is appropriate—regardless of whether Riverkeeper intends to file an amended contention. There is no valid legal basis for delaying action on the resolution of RK-EC-8 to accommodate a proposed amended contention that may not be admitted.

Riverkeeper also asserts that Entergy’s Motion to Dismiss prejudices its ability to formulate an amended contention, “given that the status of the existing contention would be in flux and unknown.”¹⁵ To the contrary, regardless of the status of Entergy’s Motion to Dismiss, Riverkeeper must now timely identify *new* bases for an amended contention that meet all of the NRC contention admissibility criteria. Accordingly, there is no present uncertainty regarding Riverkeeper’s obligations as they relate to an amended contention.

Moreover, contrary to Riverkeeper’s assertions, holding Entergy’s Motion to Dismiss in abeyance would prejudice Entergy and the NRC Staff.¹⁶ Entergy and the NRC Staff have engaged in a substantial effort to complete and document the ESA consultation process with NMFS, thereby mooting Riverkeeper’s original contention. Entergy acted well within its rights and obligations as a party to this proceeding by promptly seeking dismissal of RK-EC-8 as

¹⁴ *Id.* (without such a requirement, contentions of omission “could readily be transformed—without basis or support—into a broad series of disparate new claims,” effectively circumventing the purposes of the rules governing contention admission). *Id.* at 383.

¹⁵ Motion at 5

¹⁶ *Id.* at 6.

moot.¹⁷ Thus, Entergy and NRC Staff are entitled to a ruling on RK-EC-8 as a matter of law, as it was pled and admitted.¹⁸

C. Riverkeeper’s Alternate Request for an Additional Twenty-Four Days to Respond to Entergy’s Motion to Dismiss is Excessive and Not Supported by Good Cause

If its request to hold Entergy’s Motion to Dismiss in abeyance is denied, then Riverkeeper alternatively requests that the Board grant it an additional 24 days to respond.¹⁹ Riverkeeper asserts that the Motion to Dismiss “serves to disrupt and interfere” with its limited time to prepare and file an amended contention.²⁰ Riverkeeper also states that when it calculated the amount of time it would need to file an amended contention, it did not contemplate or take into account Entergy’s Motion to Dismiss.²¹ Riverkeeper’s arguments ring hollow. The possibility that Entergy or the NRC Staff might file motions to dismiss was explicitly discussed during a June 10, 2013 teleconference.²² Furthermore, Entergy began the consultation for its Motion to Dismiss on July 1, 2013, the same day Riverkeeper filed its letter seeking 45 days to file an amended contention.²³ Finally, while Riverkeeper sought 45 days to file its proposed new

¹⁷ See Licensing Board Order (Denying New York State’s Motion to Strike) at 3 (June 16, 2009) (unpublished) (“If Entergy believes an admitted contention is now moot and should be dismissed it should say so in a motion before the Board.”); Scheduling Order at 10-11.

¹⁸ Riverkeeper also asserts that Entergy Motion to Dismiss RK-EC-8 is contrary to the path laid out by the Board. *Id.* at 5. While the Board did contemplate that Riverkeeper would have an *opportunity* to seek to amend RK-EC-8, it never held that any planned dispositive motions on the current contention must await such a filing by Riverkeeper and a Board ruling on the admissibility of any amended contention.

¹⁹ *Id.* at 6-8.

²⁰ *Id.* at 7

²¹ *Id.* at 7; Letter from D. Brancato and P. Musegaas, Counsel for Riverkeeper, to Board, Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR, 50-286-LR (July 1, 2013) (“July 1, 2013 Letter”), available at ADAMS Accession No. ML13182A724.

²² Official Transcript of Proceedings, Indian Point Units 2 & 3 at 4542:13-20 (Turk) (June 10, 2013) (stating that once the FSEIS was issued “it would be appropriate to dismiss the contention as a legal matter” and that perhaps Entergy would file such a motion).

²³ See July 1, 2013 Letter.

or amended contention(s), the Board granted intervenors 60 days.²⁴ Thus, the Board already has granted Riverkeeper 15 extra days, giving Riverkeeper sufficient time to prepare an answer to Entergy's Motion to Dismiss and file an amended contention.²⁵

Nevertheless, in the spirit of cooperation, Entergy informed Riverkeeper that it supported a 10-day extension of time for Riverkeeper to respond to Entergy's Motion to Dismiss. This would give Riverkeeper a total of 30 days to file its answer, which is the same amount of time that Entergy had to prepare its Motion to Dismiss.

III. CONCLUSION

For the reasons set forth above, the Board should deny the Motion because it is contrary to Commission precedent and its request for an extension of time is excessive.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.
this 1st day of August 2013

²⁴ *Id.* at 2.

²⁵ In addition, Entergy's Motion to Dismiss involves a relatively straightforward and discrete legal matter (*i.e.*, the curing of an alleged omission via the NRC's completion of ESA consultations with NMFS), rather than a highly complex or technical one. Therefore, preparing a response does not entail an inordinate burden.

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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 party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Executed in accord with 10 C.F.R. § 2.304(d)

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of “Entergy Answer Opposing Riverkeeper, Inc. Motion to Hold Entergy’s Motion to Dismiss RK-EC-8 (Endangered Species) in abeyance or for Extension of Time” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Lance A. Escher

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