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June 30, 2016

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Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Administrative Judges:

The State of New York respectfully submits its Motion to Establish a Schedule for Waiver and Contention Filings Concerning Site-Specific Review of Spent Fuel Storage Accidents and Mitigation Alternatives for the Indian Point Site and the New York City Metropolitan Area along with a certificate of service via the NRC's Electronic Information Exchange.

Respectfully submitted,

Signed (electronically) by

John J. Sipos
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cc: All individuals, parties, or NRC offices on the Service List

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. June 30, 2016
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**STATE OF NEW YORK
MOTION TO ESTABLISH A SCHEDULE FOR WAIVER AND CONTENTION
FILINGS CONCERNING SITE-SPECIFIC REVIEW OF SPENT FUEL STORAGE
ACCIDENTS AND MITIGATION ALTERNATIVES FOR THE INDIAN POINT SITE
AND THE NEW YORK CITY METROPOLITAN AREA**

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Certificate Pursuant to 10 C.F.R. § 2.323

Attachment 1

The State of New York (“New York” or the “State”) respectfully requests that the Atomic Safety and Licensing Board (“ASLB” or the “Board”) enter a scheduling order setting deadlines for filing waiver petitions and/or new or revised contentions relating to two important issues: (1) the site-specific environmental impacts of spent nuclear fuel accidents at the Indian Point nuclear facilities, stemming from the D.C. Circuit’s recent decision in *State of New York v. Nuclear Regulatory Commission*, No. 14-1210 (June 3, 2016) (“*New York I*”), and (2) potential alternatives and mitigation measures at Indian Point which could lessen or eliminate the impact of on-site accidents on the surrounding New York metropolitan area. Through such a scheduling order, the State respectfully requests at least 90 days from the date that the D.C. Circuit issues a mandate or the litigation is resolved (whichever is later), to file waiver petitions and/or contentions.

The State submits that good cause exists for setting a schedule. In addition to the other reasons set forth below, the D.C. Circuit’s decision in *New York II* endorses the filing of waiver petitions to address site-specific environmental impacts such as those potentially due to the on-site storage of spent nuclear fuel. Moreover, the U.S. Nuclear Regulatory Commission (“NRC”)’s regulations, 10 C.F.R. § 2.335, contemplate no deadline for filing or responding to waiver petitions, and absent such deadlines, significant expenditure of resources and time would be consumed, including expert retention, for this effort. Entergy Nuclear Operations, Inc. (“Entergy”) maintains that if the State wished to file a waiver petition it should do so as quickly as possible, and both Entergy and NRC Staff contend that the waiver petitions and/or contentions the State plans to file stemming from *New York II* are untimely. Both oppose the entering of a scheduling order for this purpose. Riverkeeper, Inc. (“Riverkeeper”), Hudson River Sloop Clearwater (“Clearwater”), and the State of Connecticut each support New York’s request.

Proposed Filing

The State has challenged NRC's practice of storing spent nuclear fuel at the Indian Point site, both in this relicensing proceeding and in federal court. In light of the D.C. Circuit's recent decision in *New York II*, the State is now considering whether to submit contentions and/or a petition pursuant to 10 C.F.R. § 2.335 for a waiver or exception of regulations that may preclude – or may be interpreted by NRC Staff or the Commissioners as precluding – the NRC's site-specific consideration of the environmental impacts of spent fuel pool accidents or incidents at the Indian Point site, as well as precluding NRC's consideration of alternatives and mitigation measures that could minimize or prevent such environmental impacts to the New York metropolitan area. This motion merely seeks a scheduling order because the parties could not reach agreement on a schedule; it does not seek to litigate the merits of a waiver petition or contentions.

Background

Overview of the Indian Point Site

With approximately 17 million people currently living within 50 miles of Indian Point, no other operating reactor, spent fuel pool, or waste storage site in the country has a surrounding population that comes close to that of Indian Point.¹ According to NRC:

Typically, nuclear power plant sites and the surrounding area are flat-to-rolling countryside in wooded or agricultural areas. More than 50 percent of the sites have 80-km (50-mile) population densities of less than 200 persons per square mile, and over 80 percent have 80-km (50-mile) densities of less than 500 persons per square mile. *The most notable exception is the Indian Point Station, located within 80-km (50-mile) of New York City, which has a projected 1990 population density within 80-km (50-mile) of almost 2000 persons per square mile.*

¹ See NUREG-1437 (1996) at §2.2 & Table 2.1 (based on 1990 census); NUREG-1437, Rev. 1 (2013) at §3.1, Figure 3.1.1, Table 3.1.1 (based on 2000 census). Indian Point's current operator projects that the population living within 50 miles of the plant will grow to 19.2 million people by 2035. See Environmental Report for License Renewal of Indian Point Unit 2 and Unit 3 (2007) at 2-35 ("The total population (including transient populations) within a 50-mile radius of the site is projected to be 19,228,712 in 2035.").

NUREG-1437 (1996) at p. 2-2 (emphasis added).² The location of the Indian Point reactors and fuel pools is unique in many other ways. For example, the reactors and pools are six miles west of the New Croton Reservoir in Westchester County, which is part of the New York City reservoir system that provides drinking water to New York City residents, and are in close proximity to other reservoirs in the metropolitan area. The communities within the 50-mile radius around Indian Point also contain some of the most densely-developed and expensive real estate in the country, critical natural resources, centers of national and international commerce, numerous corporate headquarters, transportation arteries and hubs, and historic sites. The spent fuel pools at Indian Point site have not been subject to a site-specific severe accident mitigation alternatives analysis.³

Procedural History

Brief History of “Waste Confidence”

When NRC initially licensed most of the reactors currently in operation, including Indian Point Units 1, 2, and 3, it was “anticipated . . . that spent fuel would be stored at the reactor site only long enough to allow the fuel assemblies to cool sufficiently to permit safe shipment off-site for reprocessing (the extraction from the rods of usable uranium and plutonium) or permanent disposal.” *Minnesota v. NRC*, 602 F.2d 412, 413-14 (D.C. Cir. 1979). After reprocessing was abandoned in the 1970s, *see Minnesota*, 602 F.2d at 414, the federal government then decided to establish a common geologic repository for the disposal of spent fuel and other nuclear waste. *See* 42 U.S.C. § 10134. NRC initially predicted that a repository would be operational by 1985,

² Indian Point’s surrounding population has likely increased in the last 26 years – since the 1990 census – and will likely continue to increase in future years.

³ Although Entergy and NRC Staff issued a severe reactor accident mitigation alternatives analysis for Indian Point Unit 2 and for Indian Point Unit 3, the Commission recently found significant flaws in those analyses. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-07, ___ N.R.C. ___ (May 4, 2016).

NRDC v. NRC, 582 F.2d 166, 173 (2d Cir. 1978), but revised its prediction twice, eventually abandoning any effort to predict when a repository will be established, *New York v. NRC*, 681 F.3d 471, 475 (D.C. Cir. 2012) (“*New York I*”). Due to the failure to establish a repository, an ever-increasing volume of spent fuel has been accumulating in pools. See *New York I*, 681 F.3d at 474; *Minnesota*, 602 F.2d at 414.

Responding to a 1979 D.C. Circuit decision, NRC addressed the safety and environmental impacts of continued onsite storage of spent fuel through a Waste Confidence Decision, initially issued in 1984 and revised through a series of updates between 1990 and 2010. See *New York I*, 681 F.3d at 474-75. The iterations of the Waste Confidence Decision incorporated Waste Confidence Findings that addressed, among other things, the date when NRC expected a geologic repository to be available and the length of time beyond a plant’s license during which spent fuel could be stored onsite without significant environmental impacts. *Id.* The initial Waste Confidence Findings stated that a repository would be available by 2007-2009 and that spent fuel could be stored in an onsite pool or an onsite or offsite independent spent-fuel installation for thirty years after the expiration of a plant’s operating license. *Id.* The Commission updated the Waste Confidence Findings several times over the years.

Contention NYS-34

As the planning and permitting processes for a single disposal site were extended, NRC determined it could no longer identify any date by which it expected a repository to be available and thus declared that a repository would be available “when necessary.” *New York I*, 681 F.3d at 474-75. At the same time, NRC doubled its assessment of the period for which spent fuel could be stored onsite without significant environmental impacts, to sixty years beyond the licensed life of a plant. See *id.* at 475. In 2010, the Commission codified its revised findings in a

Temporary Storage Rule that made them binding in individual plant-licensing proceedings. *See id.* at 475, 476-77. The Temporary Storage Rule displaced any environmental review of the impacts of post-operation onsite spent-fuel storage. *See id.*

When NRC Staff issued the NRC's Draft Supplemental Environmental Impact Statement ("DSEIS") for Indian Point, the State filed Contention NYS-34 pursuant to the National Environmental Policy Act ("NEPA") alleging a failure to account for new and significant information found in the Commission's October 2008 Proposed Waste Confidence Decision Update and Temporary Storage Rule – the precursor to the 2010 Temporary Storage Rule. *State of New York Contentions Concerning NRC Staff's DSEIS* at 37-40 (Feb. 27, 2009) (ML090690303). Contention NYS-34 cited the Commission abandoning its previously-stated policy expectation that a spent fuel repository would be available and admitting to no longer being confident that there would be "sufficient high level waste repositories available within 30 years after cessation of operation of nuclear power plants for the wastes generated during license renewal" (73 Fed. Reg. 59,551 at 59,557, 59,561 (Oct. 9, 2008)) as new and significant information that NRC Staff should have addressed in the DEIS.

The Board, however, denied Contention NYS-34, finding that the 2008 Update and Temporary Storage Rule had not yet been adopted by the Commission and that 10 C.F.R. § 51.23(b) does not permit "discussion of any environmental impact of spent fuel storage" at nuclear reactor sites. *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on New York State's New and Amended Contentions)*, slip op. at 13-16 (June 16, 2009) (ML091670435).

Clearwater's NEPA and AEA Contentions

In September 2009, after the Commissioners voted to update the Waste Confidence Findings, intervenor Clearwater filed two contentions – one environmental and one safety related – arguing that NRC Staff could not satisfy its responsibilities under the Atomic Energy Act (“AEA”) and NEPA with respect to certain high-level radioactive waste issues at Indian Point. Among other things, Clearwater contended that NRC could not grant a license renewal without a plan from Entergy for the disposal of high-level radioactive waste generated at Indian Point Units 2 and 3 after the plant’s current licenses expire. The State and others filed answers in support of Clearwater. *See, e.g., Answer of the State of New York to Hudson River Sloop Clearwater, Inc.’s Petition Presenting Supplemental Contentions EC-7 and SC-1 Concerning Storage of High-Level Radioactive Waste at Indian Point*, (Nov. 19, 2009) (ML100820028). The Board certified the questions raised by Clearwater to the Commission, and the Commission denied the contentions. *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing)*, CLI-10-19, 72 N.R.C. 98 (July 8, 2010).

New York I

In December 2010, the Commission released and published the new Temporary Storage Rule discussed above. In that rule, the Commission concluded that spent fuel can be safely stored at plants for at least 60 years beyond the licensed life of a plant and that a permanent repository will be available “when necessary.” *See* 10 C.F.R. § 51.23 (2010); *Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation*, 75 Fed. Reg. 81,032 (Dec. 23, 2010); *Temporary Storage Rule*, 75 Fed. Reg. 80,137 (Dec. 23, 2010). On February 15, 2011, a coalition of states led by New York and a coalition of

environmental organizations including Riverkeeper filed a timely petition for judicial review that challenged the 2010 Temporary Storage Rule and the Waste Confidence Decision Update, respectively, in the D.C. Circuit Court of Appeals. On June 8, 2012, the D.C. Circuit vacated the 2010 Temporary Storage Rule and the Waste Confidence Decision Update. *New York I*, 681 F.3d at 473.

Contention NYS-39/RK-EC-9/CW-EC-10

After the D.C. Circuit's decision in *New York I*, the State, Riverkeeper, and Clearwater filed new joint contention NYS-39/RK-EC-9/CW-EC-10, concerning the on-site storage of nuclear waste at Indian Point. *State of New York, Riverkeeper, and Clearwater's Joint Motion for Leave to File a New Contention Concerning the On-Site Storage of Nuclear Waste at Indian Point* (Jul. 8, 2012) (ML12190A003); *State of New York, Riverkeeper, Inc., and Hudson River Sloop Clearwater's Joint Contention NYS-39/RK-EC-9/CW-EC-10 Concerning the On-Site Storage of Nuclear Waste at Indian Point* (July 8, 2012) (ML12190A002). The Commission stated that it would not issue any new licenses dependent upon the vacated 2010 Temporary Storage Rule, and held in abeyance all new contentions concerning the on-site storage of spent nuclear fuel beyond a reactor's licensed life for operation and prior to ultimate disposal. *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 N.R.C. 63, 67 (Aug. 7, 2012); *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2), CLI-14-3, 79 N.R.C. 31, 37 (Feb. 12, 2014) (slip. op. at 3, 8-9) (indicating that further direction regarding pending contentions would be provided "concurrent with issuance of the final rule").

Continued Storage GEIS and Rule

In September 2013, in response to the D.C. Circuit's decision in *New York I*, NRC published the Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg.

56,621 (Sept. 13, 2013) (“draft GEIS”) and proposed Waste Confidence—Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013) (“Proposed Continued Storage Rule”). The State submitted extensive comments on both the draft GEIS and the Proposed Continued Storage Rule. *See* Comment No. 693 from the State of New York, dated December 20, 2013 CI-733⁴; Comment No. 725 from the States of New York, Vermont, Connecticut, the Commonwealth of Massachusetts, the Vermont Department of Public Service, and the Prairie Island Indian Community, dated December 20, 2013. With expert support, New York expressed concern that the GEIS both ignored Indian Point’s site-specific differences between nuclear operating facilities that may affect the impacts of fires and leaks at spent-fuel pools and failed to use data that would account for those site-specific differences. CI-733: 49-53, 80-94, 106-111, 117-120. Further, the State objected that NRC would not consider site-specific differences in individual licensing proceedings or provide a meaningful opportunity for interested parties to raise them in those proceedings. CI-733: 129-30. Additionally, the States and Prairie Island Indian Community asked NRC to consider mitigation measures or licensing alternatives in the GEIS or in individual license proceedings. CI-733: 58-68, 94-95.

In September 2014, NRC issued and published the final rule for the Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Final Continued Storage Rule”), and Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (NUREG-2157), 79 Fed. Reg. 56,263 (Sept. 19, 2014) (“Final GEIS”). The Commission lifted its earlier suspension on final licensing decisions it had imposed after *New York I*. *See Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs

⁴ The citation “CI” refers to the revised and corrected Certified Index prepared by the NRC Secretary and submitted to the U.S. Court of Appeals for the D.C. Circuit in *New York v. NRC*, proceeding no. 14-1210, Document No. #1558365 (June 18, 2015) (ML15175A322). New York’s submissions are also available on ADAMS at ML13361A000, ML13365A345, and ML14091A442 (errata). The State’s March 2014 presentation to the Commissioners is available at ML14084A324.

Nuclear Power Plant, Unit 3), Memorandum and Order, CLI-14-08, 80 N.R.C. 71 (Aug. 26, 2014) (effective October 20, 2014) (ML14238A236). In that order, the Commission directed the Board in the Indian Point proceeding to dismiss Contention NYS-39 to the extent it raised issues resolved by the Continued Storage Rule, but to assess its admissibility to the extent it raised other matters. CLI-14-08 at 10. After additional briefing by the State, Entergy, and NRC Staff, the Board dismissed Contention NYS-39 due to “the Commission having determined that site-specific environmental aspects of continued storage should not be considered in individual licensing proceedings.” See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Dismissing Contentions NYS-39/RK-EC-9/CW-EC10 and CW-Sc-4), slip op. at 3 (Nov. 10, 2014) (ML14314A350).

New York II

The final rule and environmental document do not include any of the modifications requested by New York or the other States and Prairie Island. In particular, it does not include a site-specific evaluation and analysis of the impacts of spent nuclear fuel storage at the Indian Point site or include any site-specific analysis of alternatives and mitigation measures for accidents involving spent nuclear fuel at the Indian Point site. On October 27, 2014, New York, the State of Connecticut, and the Commonwealth of Massachusetts timely filed a petition for judicial review of the Commission’s action with the U.S. Court of Appeals for the D.C. Circuit. On Friday, July 3, 2016, the D.C. Circuit Court of Appeals issued a ruling in *State of New York v. U.S. Nuclear Regulatory Commission* (D.C. Cir. No. 14-1210) (“*New York II*”).

In *New York II*, the State argued, among other things, that the generic findings codified by the rule did not cover the impacts of spent nuclear fuel storage at Indian Point and that the GEIS should be invalidated on that basis. The D.C. Circuit, however, found that the GEIS was

adequate under NEPA even though “the NRC’s analysis is not ‘bounding’ in a strict sense.” Slip op. at 13. The Court noted that “the NRC admits that this data covers only ‘the 90th percentile population density’ and that ‘the accident consequences could be greater at higher population sites.’” Slip op. at 14 (quoting JA 868). The quoted reference (JA 868 (NUREG-2157 at F-8)) cites to Table 53 of COMSECY-13-0030, wherein NRC states that the Peach Bottom site with a 2010 census population of 722 people per square mile represented the “high estimate” case and the “90th percentile” statistical parameter. *See* Attachment 1 hereto. As noted above, NRC has stated – based on the earlier 1990 census – that the Indian Point site had approximately 2,000 people per square mile. NUREG-1437, p. 2-2 (1996).

Also in *New York II*, the State argued that the GEIS did not adequately analyze mitigation and alternatives under NEPA. In their joint brief to the D.C. Circuit, the United States of America and NRC stated that “mitigation would be addressed as part of the site-specific component of its environmental reviews, such that ‘[a]ny determinations by the NRC about whether to require mitigation measures of any type will occur on a site-specific basis during facility licensing or during the course of ongoing NRC oversight.’” Federal Respondents Brief at 62 (filed Nov. 13, 2015, PACER ECF Document #1583397). “Further, any potential methods to mitigate the impacts of continued storage will not necessarily be unique to the period beyond the time of reactor operations. Because mitigation measures may apply during both reactor operations and thereafter, such measures relating to construction, operation, and storage can be (and, in NRC’s considered judgment, should be) evaluated, as appropriate, whenever a license is issued or renewed.” Federal Respondents Brief at 63. The D.C. Circuit ruling confirmed that NRC must include mitigation and alternatives not only for normal reactor operations, but during NRC’s proceedings and decisions for license issuance and renewal. Noting that “[a]t this stage,

we take the NRC at its word,” the D.C. Circuit found that “[w]hen the NRC does make a licensing decision in partial reliance on the GEIS, it must at that time ensure that it has fully complied with NEPA” including meeting NEPA’s requirements for alternatives and mitigation. Slip op. at 12. NRC Staff has not met this requirement for the Indian Point site.

Additionally in *New York II*, the State argued that NRC could not rely on the waiver provision in 10 C.F.R. § 2.335 as a substitute for meeting its NEPA obligations and analyzing the impacts associated with continued storage for all plants, including Indian Point, in an environmental impact statement – either in a revised GEIS or in a site-specific environmental impact statement for Indian Point. Under the heading “NRC’s Waiver Process Ensures Consideration of Site-Specific Impacts,” the D.C. Circuit disagreed with the State’s objections to NRC’s reliance on the waiver petition and stated “we expect that the NRC will give due consideration to waiver petitions raising non-frivolous site-specific challenges to reactor licensing.” Slip op. at 17-19. Thus, while the court disagreed with the State’s claim that the waiver process was illusory, its ruling confirmed the viability of the waiver remedy to pursue non-frivolous site-specific issues thereby opening the door for New York to pursue such a remedy. Prior to the D.C. Circuit’s ruling, New York was doubtful that a waiver would be available in the context of this Indian Point licensing proceeding based on the stated purpose of the Continued Storage Rule, the opposition of NRC Staff to Contention NYS-39, the dismissal of that contention, and 10 C.F.R. § 2.335. *See* States’ Opening Br. at 33 (noting that 10 C.F.R. § 2.335 requires a showing that “the application of the rule . . . would not serve the purposes for which the rule or regulation was adopted,” and arguing that, given the Continued Storage Rule’s stated purpose to ensure that participants in licensing proceedings may not raise site-specific impacts, a petition to waive the Continued Storage Rule in individual plant licensing proceedings

would likely fail) (filed Nov. 13, 2015, PACER ECF Document #1583633). In discussing this issue, the D.C. Circuit quoted from the Commission’s statement announcing the Continued Storage Rule, underscoring that “concerned parties who meet the waiver criteria in 10 C.F.R. § 2.335 *will* be able to raise site-specific issues related to continued storage at the time of a specific license application.” Slip op. at 19 (quoting 79 Fed. Reg. at 56,242, emphasis added by the D.C. Circuit).

Proposed Schedule

The State respectfully requests a minimum of 90 days from the issuance of the D.C. Circuit’s mandate or the resolution of the litigation⁵ (whichever is later) to submit any waiver petitions or contentions pertaining to the storage of spent nuclear fuel at the Indian Point stemming from the D.C. Circuit’s decision in *New York II*. Under Federal Rule of Appellate Procedure 41, the mandate does not issue until seven days after (i) the time to file a petition for panel rehearing or rehearing en banc expires, or (ii) the disposition of any such petition, if one is filed. Additionally, the State would not oppose a reasonable amount of time for NRC Staff and Entergy to respond to the State’s filings.

Timeliness of the State’s Proposed Filings

Had New York prevailed at the D.C. Circuit, the filing of additional petition(s) and/or contention(s) may not have been necessary. It is because the D.C. Circuit upheld the Final GEIS and Final Continued Storage Rule, and rejected the State’s arguments, that the State is planning to file a waiver petition(s) and/or contention(s) related to the storage of spent nuclear fuel at the Indian Point site and the issues the D.C. Circuit decided. Additionally, the Commission’s recent ruling on NYS-12C, which challenged the severe reactor accident mitigation analysis for Indian Point, underscores the concerns the State raised in comments on the Continued Storage Rule’s

⁵ The time to file a motion with the circuit court for further review has not expired. *See* Fed. R. App. P. 40, 41.

GEIS that were rejected by NRC – namely that the GEIS does not cover the Indian Point site. Many of the studies NRC relied upon for GEIS conclusions use MACCS2 inputs that the Commission found were invalid for the Indian Point site in the context of site-specific severe reactor accident mitigation alternatives. *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-16-07, ___ N.R.C. ___ (May 4, 2016)*. These same MACCS2 concerns – which have now been validated by the Commission’s ruling on NYS-12C – may also apply to and inform site-specific spent fuel pool accident mitigation and alternatives for the Indian Point site.

The State’s request is also timely because it can be viewed as a continuation of Contention NYS-39 now that the D.C. Circuit has interpreted the Continued Storage Rule. Given the fact that the Board dismissed NYS-39 in light of the GEIS/Continued Storage Rule, filing another contention or waiver petition at that time or any time before the D.C. Circuit’s decision in *New York II* would have been futile. The D.C. Circuit’s decision is the “trigger” for the State’s proposed filings and that decision will be final once the mandate issues.

Reasons Supporting the Proposed Schedule

The State submits that a schedule would provide clarity to the parties given that NRC’s regulations do not set a deadline for filing or responding to waiver petitions. In 2008, the State asked the ASLB to set a deadline for waiver petitions, but it declined to do so, stating that “[w]e believe that the waiver regulation does not set deadlines because it anticipates that the Board will use a rule of reason in considering such petitions.” *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3, Memorandum & Order (Scheduling Prehearing Conference and Ruling on New York State’s Motion Requesting Consideration of Additional Matters) at 4 (Dec. 18, 2008) (ML083530659)*. At that time, the Board also advised “parties to

file such petitions as soon as practicable with the understanding that a failure to do so may well result in the rejection of an otherwise meritorious petition.” *Id.* The State respectfully requests a schedule to ensure that it does not inadvertently run afoul of the Board’s guidance.

The State respectfully submits that 90 days is the minimally-appropriate amount of time. Extensive resources, including the retention of experts, organization of expert reports, will be required to prepare waiver petition(s), contention(s), and related motions. The expert retention and contracting process can be time-consuming, especially for a State entity. The Part 2 regulations allow petitioners 60 days following notice in the Federal Register to develop initial contentions, 10 C.F.R. § 2.309 (b)(3), (4) (2007 edition), but does not provide a specific time line for supplemental or amended contentions. In this proceeding, the Board’s Scheduling Order provides that new contentions must generally be filed within 30 days after new, material information becomes available. *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Scheduling Order at 6 (July 1, 2010) (ML101820387).*⁶ Given the work necessary to prepare a waiver petition, contentions, and supporting documents, the State does not believe that 30 or 60 days will provide the State with sufficient time to prepare these filings.

Consultation with Parties Pursuant to 10 C.F.R. § 2.323

Given the lack of guidance on timing regarding the submission of waiver petitions, the State contacted Entergy and NRC Staff to explore with the parties whether or not they would be interested in developing a negotiated schedule that could apply for submissions in such a waiver process. New York suggested that a schedule would be helpful and efficient for the parties, their counsel, and the Board. New York, Connecticut, Riverkeeper, Clearwater, Entergy, and NRC

⁶ On occasion, the Board has expanded this 30-day period. *See, e.g., Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Order (Establishing Deadline for Motions for New and Amended Contentions), (July 9, 2013) (ML13190A063).*

Staff conferred on June 17. Ultimately, the parties could not reach agreement on the State's proposal, with Entergy communicating its position on June 20. *See* Letter from AAG John Sipos to ASLB (June 23, 2016) (ML16175A497).

The storage of waste at Indian Point site presents substantial issues for the New York City metropolitan area – an issue the State has continually and diligently sought to be heard at all levels through contentions, comments, and federal court litigation. During the most recent litigation at the D.C. Circuit, the federal government represented that alternatives and mitigation measures would be considered in individual licensing actions. The circuit court's recent decision holds the federal respondents to their word. The court also recognized that the Commission's environmental review was not necessarily bounding for all power plant and waste storage sites. Given this recent judicial decision, it is appropriate for the State of New York to have a meaningful opportunity to prepare a request for site-specific analysis of alternatives and mitigation measures concerning the storage of spent nuclear fuel at the site which Staff proposes to issue an operating license. Rather than wait for the circuit court to issue its mandate or for the conclusion of that litigation, the State promptly and proactively sought to explore whether the parties wished to develop a common understanding for a briefing schedule on this important issue.

The State presents this motion to establish a schedule that provides State meaningful opportunity to raise these important substantive issues on behalf of the more than 17 million people living within 50 miles of Indian Point and its spent nuclear fuel, which could be stored onsite indefinitely – without an analysis of severe accident impacts, alternatives, or mitigation.

Conclusion

For the above reasons, the State of New York respectfully requests that the Atomic Safety and Licensing Board grant the motion to establish the schedule proposed by the State. The State respectfully requests at least 90 days from the date that the D.C. Circuit issues a mandate or the litigation is resolved (whichever is later), to file waiver petitions and/or contentions.

Respectfully submitted,

Signed (electronically) by

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June 30, 2016

Certificate Pursuant to 10 C.F.R. § 2.323

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York has made a sincere effort to contact the other parties in the to explain, to them the factual and legal issues raised in this motion, and resolve the issues raised in the motion. I certify that the efforts of the State's counsel have been unsuccessful. Riverkeeper, Clearwater, and the State of Connecticut support the State's motion. Entergy and NRC Staff oppose the State's request.

Signed (electronically) by

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June 30, 2016

Attachment 1

Excerpt from

NRC COMSECY-13-0030 (Nov. 12, 2013)
and enclosures including

Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on
Expedited Transfer of Spent Fuel, Page 99 & Table 53

available at:

<http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2013/2013-0030comscy.pdf>

[at PDF frame 126]

Table 53 Population Density within a 50 Mile Radius of U.S. Nuclear Power Plant Sites

Case	Statistical Parameter	Average Population Density within 50 miles (No. of people per square mile)	Representative Site Demographics
High estimate	90 th percentile	722	Peach Bottom
Mean estimate	Mean	303	Surry
Median estimate	Median	183	Palisades
Low estimate	20 th percentile	102	Point Beach

Source: 2010 census. Population density calculations do not correct the area within the radius that is water

Representative site demographics were selected to represent the 90th percentile, the mean, the median, and the 20th percentiles. For each representative site, the site population and economic data was created for 16 compass sectors and then interpolated onto a 64 compass-sector grid for better spatial resolution for the consequence analysis. Site population data is projected to the year 2011 using the latest version of the computer code SECPOP2000 (Ref. C.31). SECPOP2000 uses 2000 census data and applies a multiplier to account for population growth and an economic multiplier to account for the value of the dollar to create site data for the MELCOR Accident Consequence Code System (MACCS2). A multiplier value of 1.1051 from the U.S. Census Bureau was used to account for the average population growth in the U.S. from 2000 to 2011. Consistent with the approach used in the SFPS, the economic values from the database in SECPOP2000 (which uses an economic database based on the year 2002) were scaled to account for price escalation between the years 2002 and 2011. A scaling factor of 1.250 was derived based on the Consumer Price Index.

Population Demographic Sensitivity

The base case and the three additional site population densities and distributions near spent fuel pool locations discussed above were used as additional inputs into the MACCS2 calculations. Although the results provided in Appendix section C.2.12 provides insight into the analysis sensitivity to site population demographics in the United States, the results are not representative of any specific site because site specific meteorology for these additional sites is not used.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

-----x
In re: Docket Nos. 50-247-LR and 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. June 30, 2016
-----x

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, the State of New York's Motion to Establish Schedule for Waiver and Contention Filings Concerning Site-Specific Review of Spent Fuel Storage Accidents and Mitigation Alternatives for the Indian Point Site and the New York City Metropolitan Area was served electronically via the NRC's Electronic Information Exchange public submission portal and directed to the following recipients:

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Dated at New York, New York
this 30th day of June 2016