

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of	)	Docket Nos. 50-247
	)	50-286
ENERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	July 11, 2016
	)	

**ENERGY’S ANSWER TO THE STATE OF NEW YORK’S MOTION TO  
ESTABLISH A SCHEDULE FOR WAIVER PETITION AND/OR CONTENTIONS**

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. (“Entergy”) files this Answer to the State of New York’s (“New York”) June 30, 2016 Motion requesting that the Atomic Safety and Licensing Board (“Board”) issue a scheduling order setting deadlines for the filing of a 10 C.F.R. § 2.335 waiver petition and/or new or revised contentions.<sup>1</sup> New York requests that the Board establish a schedule, based on alternate future events, for possible waiver and/or contention filings related to: (1) the site-specific environmental impacts of spent nuclear fuel accidents at Indian Point, and (2) potential alternatives and mitigation measures at Indian Point that could lessen or eliminate the impact of onsite accidents on the New York metropolitan area.<sup>2</sup>

New York seeks a minimum of 90 days from the issuance of the D.C. Circuit’s mandate for its decision in *State of New York v. Nuclear Regulatory Commission*, No. 14-1210, — F.3d —, 2016 WL 3124946 (D.C. Cir. June 3, 2016) to make its filing.<sup>3</sup> In that decision, the court denied multiple petitions for review (including a petition submitted by New York) of the Nuclear

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<sup>1</sup> See 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 (June 30, 2016) (“Motion”) (ML16182A511).

<sup>2</sup> See *id.* at 1.

<sup>3</sup> See *id.* at 1, 12, 16.

Regulatory Commission’s (“NRC”) September 2014 Continued Storage Rule and associated Generic Environmental Impact Statement (“GEIS”).<sup>4</sup> As New York notes, under Federal Rule of Appellate Procedure (“FRAP”) 41, the court’s mandate will issue seven days after (1) the time to file a petition for panel rehearing or rehearing en banc expires, or (2) the disposition of any such petition, if one is filed.<sup>5</sup> Therefore, New York seeks at least 90 days from the issuance of the D.C. Circuit’s mandate or the resolution of any further litigation resulting from a rehearing petition—whichever is later—to file its proposed waiver petition and/or contentions.<sup>6</sup> Practically speaking, this means that the trigger date for New York’s proposed 90-day filing could be as little as two weeks away or more than one year away, depending on whether rehearing is sought and granted.<sup>7</sup>

For the reasons set forth below, issuance of the requested scheduling order is not appropriate in this proceeding, at this point in time. As the Board noted in rejecting a similar request by New York early in this proceeding,<sup>8</sup> parties should file waiver petitions as soon as practicable.<sup>9</sup> Following that precedent, the Board also should reject New York’s instant request to establish a specific deadline for the filing of a waiver petition and/or related contentions. New York fails to

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<sup>4</sup> See *New York*, 2016 WL 3124946, at \*9; Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (“Continued Storage Rule”); NUREG-2157, Vol. 1, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, Final Report (Sept. 2014) (“GEIS”) (ML14196A105).

<sup>5</sup> See Motion at 12; FRAP 41(b); D.C. Circuit Rule 41(a)(1).

<sup>6</sup> See Motion at 1, 12.

<sup>7</sup> The timely filing of a petition for panel rehearing or petition for rehearing en banc stays the mandate until disposition of the petition, unless the court orders otherwise. See FRAP 41(d)(1). Under FRAP 40(a)(1) and D.C. Circuit Rule 35(a), any petition for a panel rehearing or a rehearing en banc in this case must be filed 45 days after the entry of judgment; *i.e.*, July 18, 2016. If no petition for a rehearing is filed, then the court’s mandate must issue within seven days after that date; *i.e.*, July 25, 2016. See FRAP 41(b). Accordingly, the timely filing of a petition for rehearing likely would delay issuance of the court’s mandate and/or ultimate disposition of the case by months (even if the court denies the petition) to more than a year (if the court grants the petition and directs reargument or resubmission).

<sup>8</sup> See *New York State Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order* at 5 (Sept. 10, 2008) (ML082630567).

<sup>9</sup> See *Licensing Board Memorandum and Order (Scheduling Prehearing Conference and Ruling on New York State’s Motion Requesting Consideration of Additional Matters)* at 4 (Dec. 18, 2008) (unpublished) (“December 18, 2008 Board Order”) (ML083530659).

demonstrate good cause for the requested action. In short, the period for filing a *timely* waiver petition and/or proposed contentions related to the Continued Storage Rule has long since passed, and further delaying any such submissions for an as-yet undefined but potentially lengthy period is not warranted. Furthermore, New York’s contrary position rests on a number of erroneous legal and factual suppositions, including the notion that the D.C. Circuit has “interpreted” the Continued Storage Rule and “endorsed” the filing of waiver petitions.<sup>10</sup>

### **ARGUMENT**

I. Contrary To New York’s Claim, The D.C. Circuit’s Recent Decision Is Not A “Trigger” For Filing Waiver Petitions Or Associated Contentions In This Proceeding

New York’s Motion rests on the erroneous premise that the D.C. Circuit’s decision is the “trigger” for the State’s proposed filing of a waiver petition and/or new or revised contentions.<sup>11</sup> Specifically, New York claims that a waiver petition stemming from that decision would be timely, once the decision becomes final upon issuance of the mandate.<sup>12</sup> It contends that the D.C. Circuit recognized that the Commission’s environmental review, as documented in the Continued Storage Rule and supporting GEIS, was not necessarily bounding for all power plant and waste storage sites,<sup>13</sup> and that the court’s decision therefore “endorses” the filing of waiver petitions to address site-specific environmental impacts of continued onsite spent nuclear fuel storage.<sup>14</sup>

New York’s reading of the D.C. Circuit’s decision is patently flawed. The court did not endorse the waiver petition process as suggested by New York, or otherwise indicate that its decision denying the various petitions for review of the Continued Storage Rule is *ipso facto* a valid basis or trigger for filing waiver petitions in individual NRC licensing proceedings. Rather, in

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<sup>10</sup> Motion at 1, 13.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> *Id.* at 1.

rejecting petitioners’ arguments that the waiver process is “illusory,” the court concluded that the NRC’s regulations “already provide” an adequate mechanism by which petitioners can challenge the GEIS in site-specific proceedings.<sup>15</sup> The court stated that it expects the NRC to “give due consideration to waiver petitions raising non-frivolous site-specific challenges to reactor licensing.”<sup>16</sup> However, that statement cannot reasonably be construed as resetting the clock for filing a timely waiver petition and associated contentions nearly two years after the NRC issued the final Continued Storage Rule, or approximately seven months after the NRC Staff issued—in this proceeding—a second draft supplement to its Final Supplemental Environmental Impact Statement (“FSEIS”) that specifically relies on the final rule.<sup>17</sup> Contrary to New York’s claim, the D.C. Circuit’s statement merely reflects its unremarkable expectation that the NRC would rationally implement its existing regulations. The court’s ruling in no way countermands the timeliness requirements governing the filing of such petitions and/or contentions.<sup>18</sup>

Additionally, the D.C. Circuit did not suggest that the Continued Storage Rule and associated GEIS fail to adequately address the environmental impacts of continued storage of spent fuel at Indian Point Units 2 and 3 (or at any other NRC-licensed reactor) beyond the licensed operating lives of those plants. In fact, the court cited the need for deference to the NRC’s technical

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<sup>15</sup> *New York*, 2016 WL 3124946, at \*7.

<sup>16</sup> *Id.* As the court noted, there are other procedural avenues by which petitioners like New York may pursue their site-specific claims or objections to the Continued Storage Rule. For example, the court noted “should the agency fail to consider a necessary aspect of the problem during site-specific proceedings, the parties might be able to challenge the final licensing decision.” *Id.* at \*4 (citing *Massachusetts v. NRC*, 924 F.2d 311, 315 (D.C. Cir. 1991)). It further stated that “the petitioners retain the ability to petition the NRC for a rulemaking to amend the GEIS.” *New York*, 2016 WL 3124946 at \*7 (citing *NRDC v. NRC*, No. 14-1225, — F.3d —, —, 2016 WL 1639661, at \*5, \*12 (D.C. Cir. Apr. 26, 2016)).

<sup>17</sup> See NUREG-1437, Supplement 38, Vols. 1-3, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Final Report” (Dec. 2010) (“FSEIS”); NUREG-1437, Supplement 38, Vol. 5, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report” (Dec. 2015) (“Draft Second Supplement”).

<sup>18</sup> See 10 C.F.R. §§ 2.309(c), (f)(2).

decision-making,<sup>19</sup> and reiterated its previous holding that the NRC may generically analyze risks that are “essentially common” to all plants as long as that analysis is “thorough and comprehensive.”<sup>20</sup> And, with respect to this last point, the court concluded: “In this case, we are convinced that the NRC has met that standard.”<sup>21</sup> There is nothing in the court’s decision to suggest that the NRC’s generic assessments of the environmental impacts of, or alternatives and mitigation measures for, the continued storage of spent fuel are inapplicable to Indian Point. New York’s claim that the D.C. Circuit’s decision provides a basis for its proposed waiver petition and contentions has no merit.

## II. New York Could And Should Have Filed The Proposed Waiver Petition Much Earlier In This Proceeding, But Failed To Do So

As noted above, this Board rejected a previous New York request to establish a deadline for the filing of waiver petitions.<sup>22</sup> In doing so, the Board explained that “the waiver regulation does not set deadlines because it anticipates that the Board will use a rule of reason in considering such petitions.”<sup>23</sup> It further stated that it is “more appropriate to advise the 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.”<sup>24</sup>

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<sup>19</sup> *New York*, 2016 WL 3124946, at \*6.

<sup>20</sup> *Id.* at \*5 (quoting *New York v. NRC*, 681 F.3d 471, 481 (D.C. Cir. 2012)). *See also Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 78-79 (2014) (“As part of the analysis underpinning the GEIS, however, we concluded that the impacts of continued storage will not vary significantly across sites; the impacts of continued storage at reactor sites ... can be analyzed generically.”); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 435 (2011) (“It is within our discretion to resolve issues generically by rulemaking, and it is sound regulatory practice to base the generic conclusion on experience with, and commonalities across, a number of plants.”).

<sup>21</sup> *New York*, 2016 WL 3124946, at \*5.

<sup>22</sup> *See* December 18, 2008 Board Order at 4.

<sup>23</sup> *Id.* In determining whether a waiver petition has been timely filed, the Board stated that it will consider the nature of the request, the materiality of the issue that would be implicated by granting the waiver, the delay, if any, that would result if the petition was granted, and the time elapsed between when the petitioner learned of the matters that give rise to the request and when the petition is filed. *Id.*

<sup>24</sup> *Id.* (emphasis added).

Given New York’s incorrect characterization of the D.C. Circuit’s decision as the “trigger” for its proposed waiver petition and the foregoing Board guidance, the Motion should be denied under this rule of reason. New York could have prepared and filed a waiver petition “as soon as practicable” after the Commission issued the Continued Storage Rule, which became effective nearly two years ago, on October 20, 2014.<sup>25</sup> New York implicitly acknowledges this fact, noting that it submitted extensive comments (including expert analysis) on both the draft GEIS and the proposed Continued Storage Rule, and that those comments raised the same concerns that New York apparently intends to raise (again) in its proposed waiver petition.<sup>26</sup>

Nor did New York even attempt to file a waiver petition after the NRC Staff issued its Draft Second Supplement to its FSEIS for Indian Point license renewal on December 22, 2015. In Section 6.0 of the Draft Second Supplement, the Staff explicitly stated that “the impacts of continued storage of spent nuclear fuel are those presented in NUREG–2157 [the GEIS] and are deemed incorporated into this FSEIS supplement pursuant to 10 CFR 51.23.”<sup>27</sup> Accordingly, the Staff concluded that “the information in NUREG–2157 provides the appropriate NEPA analyses of the potential environmental impacts associated with the continued storage of spent fuel beyond the licensed life for reactor operations at Indian Point.”<sup>28</sup>

In potentially seeking a waiver of the Continued Storage Rule, New York’s apparent intention is to file a new or amended site-specific NEPA contention in this proceeding. As the Commission noted in CLI-16-10, where the same information is available in both the draft and final NEPA document, contentions must be based on the draft NEPA document to be considered

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<sup>25</sup> See Continued Storage Rule, 79 Fed. Reg. at 56,238. Indeed, in issuing the rule, the Commission stated that “concerned parties who meet the waiver criteria in 10 CFR 2.335 will be able to raise site-specific issues related to continued storage at the time of a specific license application.” *Id.* at 56,242.

<sup>26</sup> Motion at 8.

<sup>27</sup> Draft Second Supplement at 121.

<sup>28</sup> *Id.*

timely.<sup>29</sup> As such, the Draft Second Supplement was yet another missed “trigger event” for filing new or amended contentions and an accompanying waiver petition. Because the Draft Second Supplement was issued nearly seven months ago, any newly-filed waiver petition based on that document cannot now reasonably be regarded as timely. Further, any waiver petition and/or contention based on the final version of the Second Supplement would be unjustifiably late under the NRC’s adjudicatory rules and precedent.<sup>30</sup>

III. New York’s Reference To The Commission’s Decision In CLI-16-7 Is Irrelevant And Fails to Support The Timeliness of New York’s Proposed Waiver and Contention Filings

Finally, New York’s reference to the Commission’s recent appellate ruling in CLI-16-7 concerning contention NYS-12C is irrelevant, and fails to provide any support for the timeliness of its proposed filings.<sup>31</sup> New York claims that CLI-16-7 supports its timeliness argument because it “underscores” the State’s concerns that the GEIS does not cover the Indian Point site.<sup>32</sup> That argument, however, is devoid of any factual or legal merit.

The Commission’s ruling in CLI-16-7 has nothing to do with the Continued Storage Rule or the supporting GEIS. In CLI-16-7, the Commission reversed the portion of the Board’s decision in LBP-13-13 relating to contention NYS-12C, which challenged the adequacy of Entergy’s severe accident mitigation alternatives (“SAMA”) analysis for the Indian Point Unit 2

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<sup>29</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-10, 83 NRC \_\_ (June 2, 2016) (slip op. at 33) (“New York’s contentions challenged the legal sufficiency of explanations regarding why SAMA implementation was not required for license renewal. But these same explanations had appeared earlier in the Staff’s Draft SEIS ....”).

<sup>30</sup> See *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (stating that the “institutional unavailability of a licensing-related document [(e.g., a final EIS or supplement thereto)] does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention”).

<sup>31</sup> See Motion at 12-13 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-7, 83 NRC \_\_ (May 4, 2016) (slip op.)).

<sup>32</sup> *Id.* at 12-13.

and Unit 3 reactors.<sup>33</sup> The Commission directed the NRC Staff to supplement its NEPA review of the Indian Point SAMA analysis with additional sensitivity analyses involving the decontamination time and cost input values to the MACCS2 code.<sup>34</sup> It is quite simply irrelevant to the instant Motion and certainly does not reset the clock for New York's proposed filings.

### CONCLUSION

For the reasons set forth above, New York has failed to show good cause for its request that the Board issue a scheduling order establishing deadlines for the filing of a 10 C.F.R. § 2.335 waiver petition and/or new or revised contentions related to the NRC's Continued Storage Rule and its applicability in this proceeding. Accordingly, the Board should deny New York's Motion.

Respectfully submitted,

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

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*Counsel for Entergy Nuclear Operations, Inc.*

Dated at Washington, DC  
this 11th day of July 2016

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<sup>33</sup> *Indian Point*, CLI-16-7, 83 NRC at \_\_ (slip op. at 2, 47); *see also Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-13-13, 78 NRC 246, 450-74 (2013).

<sup>34</sup> *Indian Point*, CLI-16-7, 83 NRC at \_\_ (slip op. at 47).

**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)	)	July 11, 2016	

**CERTIFICATION OF COUNSEL**

In accordance with the Board's Scheduling Order of July 1, 2010, and 10 C.F.R. § 2.323(b), the undersigned Counsel hereby 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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**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)	)	
	)	July 11, 2016

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of “Entergy’s Answer to the State of New York’s Motion to Establish a Schedule for Waiver Petition and/or Contentions” were served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned proceeding.

*Signed (electronically) by Martin J. O’Neill*  
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