

July 11, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO NEW YORK'S MOTION TO SET A SCHEDULE
FOR THE FILING OF A WAIVER PETITION AND/OR CONTENTIONS
RELATED TO SPENT-FUEL STORAGE AT INDIAN POINT

INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby submits its answer to the State of New York's ("New York" or "State") motion to establish a filing schedule in this license renewal proceeding for Indian Point Units 2 and 3 ("Indian Point" or "IP2" and "IP3").¹ In its Motion, New York requests that the Board issue a scheduling order providing a timetable for it to file a petition for waiver of the Commission's Continued Storage Rule ("CSR")² and any new or revised contentions it may want to file concerning the site-specific environmental impacts of spent nuclear fuel storage at Indian Point.³ Specifically, New York asks the Board to afford the State at least 90 days from the issuance of the mandate in the D.C. Circuit's decision in *State of New York v. NRC*, Docket

¹ 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" ("Motion") (June 30, 2016).

² 10 C.F.R. 51.23(a); see Final Rule, "Continued Storage of Spent Nuclear Fuel," 79 Fed. Reg. 56,238 (Sept. 19, 2014).

³ Motion at 1.

No. 14-1210 (June 3, 2016) (“*New York II*”), or from the date that such litigation is concluded (whichever is later), for it to file its CSR waiver petition and contentions.⁴

For the reasons set forth below, the Staff respectfully submits that New York’s request for the establishment of a filing schedule should be denied. In brief, this Board has previously rejected a similar request filed by New York, declining to set a schedule and instructing that the timeliness of a waiver petition is to be governed by a rule of reason. New York has shown no reason why the Board’s previous ruling should be altered now. Further, as discussed below, New York reasonably could have filed a petition for waiver and any new or revised contentions concerning the on-site storage of spent nuclear fuel shortly after the publication of the CSR and the associated Generic Environmental Impact Statement (“GEIS”) in September 2014.⁵ New York’s request that it be allowed to file its petition and contentions 90 days or more after the mandate issues in *New York II*, or even later, should be rejected as unreasonable. Rather, if New York wishes to file a petition for waiver and new or revised contentions, it should do so as soon as possible, after which the Staff and other parties may respond within the times provided in the Commission’s Rules of Practice in 10 C.F.R. Part 2.

DISCUSSION

I. The Board Should Deny New York’s Request To Set a Schedule for Filing a Waiver Petition.

The Board should decline to grant New York’s request to set a schedule for it to file a petition for waiver of the CSR, as inconsistent with the Board’s ruling in response to a similar request filed by New York many years ago. In this regard, in September 2008, New York filed a

⁴ *Id.*

⁵ Further, New York was on notice since November 2014, when the Board rejected Contention NYS-39, that a waiver petition would be required if it wished to litigate site-specific continued storage issues in this proceeding. See discussion *infra* at 4-5.

similar request that the Board set a deadline for the submission of waiver petitions in this proceeding.⁶ The Board denied that request in December 2008, stating as follows:

New York has asked the Board to set a deadline for the submission of waiver petitions. In support of the Motion, New York suggests that establishing a deadline “will add predictability to a process, which if not subjected to a deadline, could be disruptive to the orderly resolution of the issues in this proceeding.” We disagree.

We 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. In determining whether such a petition has been timely filed, this Board 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.

We do not believe that it is appropriate to set such a deadline in a vacuum. Instead we believe that it 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.⁷

New York’s latest request to establish a schedule for the filing of a new waiver petition disregards the Board’s previous ruling in this proceeding, and provides no reason for the Board to abandon the rule of reason that it established years ago for addressing the timeliness of

⁶ “Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order” (Sept. 10, 2008).

⁷ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), “Memorandum and Order (Scheduling Prehearing Conference and Ruling on New York State’s Motion Requesting Consideration of Additional Matters),” at 4 (Dec. 18, 2008) (emphasis added; footnotes omitted).

waiver petitions.⁸ Rather, consistent with the Board's previous ruling, New York should file any petition for waiver in this proceeding "as soon as practicable."⁹

Nor does New York's request that it be allowed to file a waiver petition sometime in the future meet the test of "reasonableness." New York should have known long ago that it would need to file a waiver petition to litigate site-specific concerns related to the continued storage of spent nuclear fuel at Indian Point. Notably, the *Federal Register* notice announcing the issuance of the CSR in September 2014 specifically indicated 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."¹⁰ Thus, from the time the CSR was published, New York should have been aware that site-specific concerns related to continued storage should be raised through the waiver process.¹¹

Moreover, New York was on notice that it would need to file a waiver petition to litigate any site-specific concerns related to continued storage 18 months ago, when the Board rejected Contention NYS-39. In this regard, in July 2012, New York and other Intervenors in this

⁸ The Board in the *Watts Bar* licensing proceeding (chaired by Administrative Judge McDade) adopted a similar rule of "reasonableness" in assessing the timeliness of a waiver petition. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-10-12, 71 NRC 656, 669 (2010) ("There being no NRC regulation that governs the timing of waiver petitions, we agree with SACE that the appropriate standard for determining whether a waiver petition is timely is reasonableness.").

⁹ *Accord, Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2073 (1982) ("Section 2.758 [now Section 2.335] does not specify a time limit for filing a petition. However, . . . any such petitions should be prepared and filed as soon as practicable. Such a petition filed inexcusably late in the proceeding would be viewed with disfavor and possibly denied on that basis alone.") (emphasis added).

¹⁰ 79 Fed. Reg. at 56,242 (emphasis added).

¹¹ The Commission recently reiterated that a waiver petition must be filed to adjudicate site-specific continued storage issues in *Union Electric Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC 546, 549 (2015).

proceeding filed two contentions (Contentions NYS-39/RK-EC-9/CW-EC-10¹² and CW-SC-4¹³), based on the D.C. Circuit's decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) ("*New York I*"). The Commission held those contentions in abeyance until the publication of the revised CSR and GEIS in September 2014, and then directed the Board to assess whether all aspects of the contentions had been resolved by the CSR.¹⁴ In an Order issued in November 2014, the Board dismissed those contentions, holding (a) that "Contention NYS-39/RK-EC-9/CW-EC-10 was resolved in its entirety by the final CSR and associated generic environmental impact statement (GEIS)," and (b) the Commission had explicitly determined in the CSR GEIS that "the impacts of continued storage will not vary significantly across sites," and that the "site-specific environmental aspects of continued storage should not be considered in individual licensing proceedings."¹⁵ Thus, New York was on notice that the CSR barred litigation of the concerns raised in those contentions, and only if the rule was waived could it litigate any site-specific continued storage considerations in this proceeding.

New York argues its request is timely because if the D.C. Circuit had invalidated the CSR and the Continued Storage GEIS, New York would have been able to raise its site-specific

¹² See "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" (July 8, 2012); and "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).

¹³ See "Hudson River Sloop Clearwater, Inc.'s Motion for Leave to Add A New Contention Based Upon New Information and Petition to Add New Contention" (July 9, 2012).

¹⁴ *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 (2012) (holding all continued storage contentions in abeyance); *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-8, 80 NRC 71, 79-80 (2014) (dismissing all continued storage contentions aside from those filed in *Indian Point*, and directing the *Indian Point* Board to determine whether the specific continued storage issues raised by New York and the other intervenors had been resolved).

¹⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) "Order (Dismissing Contentions NYS-39/RK-EC-9/CW-EC-10 and CW-SC-4)," at 3 (Nov. 10, 2014).

concerns in this proceeding without resorting to a waiver petition.¹⁶ However, this argument does not make New York's request reasonable or timely. The CSR was valid when enacted in September 2014, and New York had the opportunity to challenge its application to Indian Point at that time by filing a waiver petition. A litigant cannot wait and see if one avenue of challenge is successful before pursuing another. If New York wished to file a waiver petition, it should have done so in parallel with its appeal to the D.C. Circuit regarding the sufficiency of the CSR.

New York also suggests that it did not file a waiver petition earlier because until the D.C. Circuit rendered its decision in *New York II*, it "was doubtful that a waiver would be available,"¹⁷ and it asserts that filing a petition for one "would have been futile."¹⁸ But it is unclear how New York could have reasonably reached such a conclusion. The D.C. Circuit in *New York II* did not revise the Commission's rules governing the availability of waiver; rather, the court indicated that parties could avail themselves of the existing waiver process to challenge site-specific issues in an individual proceeding.¹⁹ Thus, although the court noted that the possibility of waiver existed, it did not "open the door for New York to pursue such a remedy."²⁰ To the contrary, that door opened in September 2014. Accordingly, New York's delay in seeking to file a waiver petition renders its current request to establish a schedule for filing such petitions unreasonable.

¹⁶ Motion at 12.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 13.

¹⁹ See *New York II*, Docket No. 14-1210, slip op. at 17-18 ("NRC's regulations already provide a means by which the petitioners can raise site-specific challenges during licensing proceedings[.] . . . We hold that the NRC's waiver provision provides an adequate mechanism by which the petitioners can challenge the GEIS in site-specific proceedings.") (emphasis added).

²⁰ Motion at 11.

II. The Board Should Decline to Set a Schedule for the Filing of New or Revised Contentions.

In its Motion, New York indicates that it may want to file new or revised contentions concerning matters addressed in the CSR, along with its waiver petition.²¹ New York's request that a schedule be established for the filing such new or revised contentions, however, disregards the fact that such a schedule already exists. Pursuant to 10 C.F.R. § 2.309(c)(1), contentions filed after the initial deadline for filing contentions will not be entertained absent a determination by the presiding officer that the proponent has demonstrated "good cause" by showing that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

Further, this Board has already ruled that contentions are generally to be filed within 30 days after the event that gave rise to the filing thereof.²² These established requirements govern the timeliness of any new or revised contentions that New York may seek to file. Here, New York has not shown that any new information has been made available by the D.C. Circuit's decision that was not available previously. The CSR and Continued Storage GEIS were published in September 2014, nearly two years prior to the D.C. Circuit's opinion, and have remained in force until now. Thus, the D.C. Circuit's decision did not "trigger" a new filing

²¹ See Motion at 1, 12 ("the State is planning to file a waiver petition(s) and/or contentions").

²² *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Scheduling Order" (July 1, 2010), at 6 ("A motion and proposed new contention . . . shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. . . ."). See also *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Establishing Deadline for New and Amended Contentions)," at 2 (July 9, 2013) (new contentions are to be filed within 60 days after publication of Staff's first FSEIS Supplement).

deadline or provide additional time for New York to file a new contention or to “continue” litigating its previous contention.²³

For these reasons, New York’s request that the Board set a schedule for the filing of contentions should be denied. If and when New York files its waiver petition “and/or” any new or revised contentions, the timeliness of its contentions can be evaluated in accordance with Section 2.309(c).

CONCLUSION

For the foregoing reasons, the Staff respectfully submits that New York’s Motion requesting that the Board establish a schedule for the filing of a waiver petition and/or new or revised contentions raising site-specific spent fuel storage issues in this proceeding should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Rockville, Maryland
this 11th day of July 2016.

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

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²³ See Motion at 13.

CERTIFICATION OF COUNSEL

In accordance with the Atomic Safety and Licensing Board's "Scheduling Order" of July 1, 2010 (at 8), I hereby certify that I have made a sincere effort to make myself available to listen and respond to New York, and to resolve the factual and legal issues raised in New York's "Motion to Establish a Schedule for Waiver," and that my efforts to resolve the issues have been unsuccessful.

Executed this 11th day of July 2016.

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 hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO NEW YORK'S MOTION TO SET A SCHEDULE FOR THE FILING OF A WAIVER PETITION AND/OR CONTENTIONS RELATED TO SPENT-FUEL STORAGE AT INDIAN POINT," dated July 11th, 2016, have been served via the NRC's Electronic Information Exchange (the NRC's E-Filing System), in the above captioned proceeding, this 11th day of July 2016.

/Signed (electronically) by/

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