UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No.
(Oyster Creek Nuclear Generating Station)	)	50-219-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos.
(Indian Point Nuclear Generating	)	50-247-LR
Units 2 and 3)	)	and 50-286-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No.
(Pilgrim Nuclear Power Station)	)	50-293-LR
	)	
In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No.
(Vermont Yankee Nuclear Power Station)	)	50-271-LR
	)	

NRC STAFF'S ANSWER TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS

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May 27, 2008

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NRC STAFF'S ANSWER TO
SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION
AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Supplemental Petition by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmothers, Mothers, and More for Energy Safety; New Jersey Public Interest Research Group; New Jersey Sierra Club; New Jersey Environmental Federation; Riverkeeper, Inc; Pilgrim Watch and New England Coalition ("Petitioners") for Additional Investigation and Correction of Deficiencies Regarding License

Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants" ("Supplemental Petition") served May 15, 2008.[1] For the reasons set forth below, the Staff submits that this joint Supplemental Petition should be denied.

BACKGROUND

On May 15, 2008, the eve of the Commission's tentatively scheduled May 16, 2008 affirmation session on Petitioners' January 3, 2008 Petition to "Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Review Process and Correction of Deficiencies" ("January Petition"), Petitioners served the instant Supplemental Petition on the parties to the Oyster Creek, Vermont Yankee, Indian Point, and Pilgrim license renewal proceedings. The January Petition requested: (1) suspension of all aspects of the Oyster Creek, Pilgrim, Vermont Yankee, and Indian Point license renewal proceedings, including Staff technical reviews; (2) a comprehensive overhaul of the manner in which the Staff carries out license renewal reviews; and (3) reopening of the record in the Oyster Creek proceeding and in any other proceeding in which the record closes before final Commission resolution of this Petition so that revised safety reviews resulting from the overhaul can be used to form the basis of new contentions. January Petition at 1-2. The January Petition was based upon three separate matters: (1) the NRC Office of Inspector General ("OIG"), *Audit of NRC's License Renewal Program* (OIG-07-A-15) (Sept. 6, 2007) ("OIG Report"); (2) a claimed inadequacy in the Oyster Creek license renewal safety evaluation; and (3) licensing board decisions in three Early Site Permit cases.

The stated purpose of the instant May 15 Supplemental Petition is to "supplement the basis of [the January Petition] and request additional relief in each of the respective license

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[1] The Staff is responding to this Supplemental Petition in accordance with 10 C.F.R. § 2.323(c). Although Petitioners have not cited a regulation authorizing this pleading, they do refer to their Supplemental Petition as a "motion." Supplemental Petition at 2 n.1.

renewal proceedings in which each Petitioner is an intervenor or has petitioned to intervene." Supplemental Petition at 2. The Petitioners "supplemental basis" for this petition is a memorandum from Inspector General Hubert T. Bell to Chairman Dale E. Klein regarding NRC Staff review of license renewal applications dated May 2, 2008 ("OIG Memo"), and served on the parties to the above-captioned proceedings on May 8, 2008. The additional relief requested includes (1) Commission investigations to determine: (a) how the Staff's "illegal document destruction became standard practice" (Supplemental Petition at 14), (b) "whether the culture within the agency is hostile to decision-making in a transparent manner with meaningful public participation" (*id.* at 14-15), and (c) "why managers attempted to shield information from the public and why managers have a policy of destroying papers that would allow the quality of the NRC Staff safety reviews to be fully audited" (*id.* at 18); (2) Commission review "of each approved AMP [Aging Management Program] to determine whether the documents reviewed by license renewal audit teams were sufficient to fulfill the expectations of NRC managers and support the conclusion that the AMP is adequate to maintain the CLB and preparation of a report clearly stating the rationale for a finding that the scope of review was adequate including a finding that the AMP is adequate" (*id.* at 17); and (4) an order requiring the Staff to "publicly release all non-public documents upon which the Staff relied during the safety review, reopen the record if necessary, and allow Petitioners an opportunity to file new contentions based upon materially different information in the documents" (*id.* at 18).

OIG[2] Memo reports the results of an audit performed to follow up on the findings contained in "Audit of NRC's License Renewal Program," OIG-07-A-15 (Sept. 6, 2007) ("OIG

[2] The NRC's Inspector General is an independent and objective unit responsible for conducting audits and investigations related to the administration of programs and operations of the NRC. Inspector General Act, 5 U.S.C. Appx. § 2, as amended 1988; 10 CFR §1.12(d).

Report").[3] OIG Memo at 1. According to the OIG Memo, the OIG focused on the Staff's review of two aging management programs each at Browns Ferry, Brunswick, D.C. Cook, and Oyster Creek. *Id.* at 1-2. Browns Ferry, Brunswick, and D.C. Cook received renewed licenses in May 2006, June 2006, and August 2005, respectively. The OIG's audit included interviews of NRC Staff members and contractors and review of documents, including Staff work hour data. *Id.* at 4. This review was not based on adjudicatory findings nor was it conducted for adjudicatory purposes. The OIG Memo does not discuss Vermont Yankee, Pilgrim, or Indian Point.

The above-captioned proceedings are in various stages of the license renewal application review and adjudicatory process. In the Oyster Creek proceeding, the Atomic Safety and Licensing Board ("Board") issued its initial decision on December 18, 2007. *AmerGen Entergy Co. LLC* (Oyster Creek Nuclear Generating Station), LBP-07-17, 66 NRC 327 (2007). An appeal of LBP-07-17[4] and a petition to stay the proceeding[5] is pending before the Commission. A motion to reopen the record and for leave to file a new contention, and petition to add a new contention[6] is pending before the Board. *See* Order (May 9, 2008) (unpublished) (stating that pursuant to 10 C.F.R. § 2.346(i), the Office of the Secretary was referring Citizens'

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[3] The September 2007 OIG Report discusses an OIG audit conducted between March and December 2006. OIG Report at 42. The final safety evaluation reports for Oyster Creek and Vermont Yankee were completed after the audit, in March 2007 and February 2008, respectively. The OIG audit did not evaluate either the applications or the NRC license renewal audit, inspection, or SERs for Pilgrim and Indian Point. *See* OIG Report, Table 2 at 46.

[4] Citizens' Petition for Review of LBP-07-17 and the Interlocutory Decision in the Oyster Creek Proceeding (Jan. 14, 2008).

[5] Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmother, Mothers and More for Energy Safety; Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation to Stay License Renewal Proceedings for Oyster Creek Nuclear Power Plant Pending Resolution of the Significant New Issue Notified by the Staff (Apr. 11, 2008).

[6] Motion by Nuclear Information and Resource Service; Jersey Shore Nuclear Watch, Inc.; Grandmother, Mothers and More for Energy Safety; Jersey Public Interest Research Group; New Jersey Sierra Club; and New Jersey Environmental Federation to Reopen the Record and for Leave to File a New Contention, and Petition to Add a New Contention" (Apr. 18, 2008).

May 18, 2008 Motion to the Board for appropriate resolution). In the Vermont Yankee proceeding, an evidentiary hearing is scheduled for the week of July 21, 2008. In the Pilgrim proceeding, an evidentiary hearing was held on April 10, 2008 on the one admitted contention. Since the hearing, several motions have been filed on a matter unrelated to the admitted contention. In addition, the First Circuit Court of Appeals directed the NRC to keep the Pilgrim proceeding open until fourteen days after that court's mandate issues to allow the Commonwealth of Massachusetts enough time to invoke "interested state" status if it chooses to do so and seek a stay of the proceeding until the resolution of a pending rulemaking petition filed by the Commonwealth.[7] The Commonwealth has since invoked "interested state" status, but it has not indicated yet whether it will file any motions for a suspension or stay, though it has "reserved the right" to do so "at some future point in [the Pilgrim Renewal] proceeding."[8] The Commission has further issued a Memorandum and Order clarifying that the Pilgrim license renewal proceeding may move forward on the admitted contention. *See* Entergy Nuclear Generating Co & Entergy Nuclear Operations, Inc, (Pilgrim Nuclear Power Station), CLI-08-09, 67 NRC __ (May 16, 2008) (slip op. at 5). Regarding the Indian Point proceeding, the Staff again notes that the only prospective party in that proceeding involved in this Supplemental Petition, Riverkeeper, is not eligible to file a motion to stay the Indian Point proceeding because, while Riverkeeper has filed a petition to intervene in the Indian Point license renewal proceeding, the assigned Board has not yet ruled on Riverkeeper's petition, and has not yet determined if Riverkeeper is to be admitted as a party to that proceeding. *See* NRC Staff

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[7] *Massachusetts v. N.R.C.*, Nos. 07-1482, 07-1483 (Apr. 8, 2008).

[8] *See* "Commonwealth of Massachusetts' Notice of Intent to Participate as an Interested State" (May 6, 2008).

Answer To Petition For Suspension Of License Renewal Reviews Pending Investigation Of NRC Staff License Renewal Process (Jan. 18, 2008) ("Staff Answer") at 7 n.7.

DISCUSSION

With respect to issues of plant safety, the purpose of a license renewal adjudicatory proceeding is to determine the adequacy of the renewal application, not the adequacy of the Staff's review of that renewal application. Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004); *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 121-22 (1995); *see also Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165 (2000) (rejecting arguments by intervenors to a license transfer proceedings that the Commission deemed to be "general attacks on the agency's regulations and competence"); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 334 (1999) ("[A] petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or express generalized grievances about NRC policies.").

The Supplemental Petition challenges certain aspects of the Staff's safety reviews of license renewal applications;[9] it does not, however, raise challenges against the content of the four license renewal applications involved in the instant proceedings. The Commission should therefore deny the Supplemental Petition on the grounds that the issues it raises are outside the scope of the four license renewal proceedings in which it was filed.

In addition to that fundamental flaw, which is sufficient on its own to merit denial of the Supplemental Petition, there are several additional reasons why the Supplemental Petition must be denied. The Staff addresses those additional reasons below.

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[9] The Supplemental Petition does not provide any factual basis for its claims other than the OIG Memo, *see* Supplemental Petition at 1-2, and the OIG Memo deals solely with "preparation of [the Staff's] license renewal Safety Evaluation Reports." OIG Memo at 1.

I. The OIG Memo Does Not Support Petitioners' Assertions

A key flaw in the Supplemental Petition is that the OIG Memo depicted in the Supplemental Petition is strikingly different from the actual OIG Memo. The basic premise of the Supplemental Petition is that the OIG Memo reveals improprieties by the Staff with respect to maintenance of records related to renewal reviews. Yet the OIG Memo makes no such findings. The OIG Memo observes that license renewal review staff do not keep all the checklists, notes, and copies of licensee-held documents that they utilize in preparing the audit reports that are in turn utilized in preparing safety evaluation reports ("SER"). OIG Memo at 3. According to the OIG Memo, once these working papers have served their purpose, the Staff discards them. *Id.*

If the OIG had believed or had evidence that this failure to maintain working papers or copies of licensee-provided documents represented a violation of law, regulation, or Commission policy, it presumably would have said so in its memo or otherwise asked the Commission to respond to or take action on such violations. After all, a primary role of the OIG is to uncover and report such violations. *See* 10 C.F.R. § 1.12. Indeed, the OIG Memo included a footnote referencing the relevant Commission Management Directive ("MD 3.53"), *see* OIG Memo at n.7, which demonstrates that the OIG was not ignorant of applicable Commission policies.

The OIG Memo did not claim that the Staff had violated any law, regulation, or Commission policy. The OIG Memo also did not claim that the Staff's failure to preserve these working papers in perpetuity hindered the Staff in its renewal review tasks. Rather, the OIG Memo simply noted that the OIG's own after-the-fact audit would have been able to verify more details about the Staff's on-site work effort if the Staff had preserved more documents related to these reviews. OIG Memo at 4-5. This observation about the OIG's own ability to conduct an after-the-fact audit cannot reasonably be viewed as supporting a radical overhaul of Staff review practices and suspension of several ongoing renewal review proceedings. The OIG Memo

contained no audit recommendation nor did it require a response from the Commission or the Executive Director for Operations. Moreover, as explained in subsequent sections of this Answer, both settled law and Commission policy make clear that agency employees *are* often permitted to discard the sorts of preliminary working papers described by the OIG Memo. Therefore, the mere fact that the OIG Memo concluded that certain individuals' working papers had been discarded does not mean that the license renewal staff have violated any legal or policy requirement or infringed upon Petitioners' rights.

Contrary to what Petitioners suggest, the OIG did not find that the Staff improperly destroyed licensees' documents. Supplemental Petition at 6. Rather the OIG found that the Staff does not preserve copies of licensees' documents reviewed during the Staff's on-site audits. OIG Memo at 4. Moreover, there is no need for the Staff to preserve copies of licensees' documents reviewed on site because, pursuant to 10 C.F.R. § 54.37(a) licensees are required to maintain all information and documentation required by, or otherwise necessary to document compliance with 10 C.F.R. §54, in auditable and retrievable form so that the NRC can retrieve licensees' documentation as needed.

In light of the wide gap between what the OIG Memo actually reveals and what Petitioners say it reveals, the OIG Memo cannot reasonably be viewed as providing any meaningful support for Petitioners' claims. As a result, their Supplemental Petition lacks merit.

However, even if the OIG Memo could somehow be reasonably construed in a manner that reflects negatively upon staff renewal reviews, the remainder of this Answer will demonstrate there would *still* be no basis for granting the relief requested by Petitioners.

II. The Supplemental Petition Does Not Meet the Requirements for Suspension or Re-opening

Petitioners assert that the OIG Memo provides additional support to their January 2008 Petition. As stated above, the relief requested in the January Petition included suspension or stay of the Oyster Creek, Vermont Yankee, Pilgrim, and Indian Point license renewal

proceedings, and reopening of the record in Oyster Creek and in any other proceeding in which the record closes before final Commission resolution of the Petition. January Petition at 1-2. In response to the January Petition, the Staff argued that Petitioners lacked the necessary legal bases for suspension of proceedings and for reopening records. *See* Staff Answer at 4-8; 10-22. The Staff maintains its position.

Petitioners have again failed to meet the legal requirements for suspension and/or reopening the record. Like the January Petition, the instant Supplemental Petition does not show that moving forward with license renewal proceedings will jeopardize the public health and safety, a showing that is necessary to suspend a proceeding. *See Duke Energy Corp*., (McGuire Nuclear Station Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 389-90 (2001). Petitioners rely on the OIG Memo to supplement their claims, yet nothing in the OIG Memo indicates a threat to public health and safety or a significant safety issue, a showing required for reopening a closed record.[10] Petitioners have not shown any relationship between the alleged inadequacies in the Staff's review and/or the Staff's failure to retain personal working notes and the applicants' ability to conduct safe plant operations. Speculation by Petitioners' counsel that Petitioners *might* file additional contentions if the Commission conducts the requested investigations and issues the requested order to the Staff to release all previously non-public documents upon which they relied during the safety review does not and cannot demonstrate that materially different results would occur, or be likely to occur. The adequacy of the Staff's review is beyond the scope of license renewal proceedings and contentions must be based on the adequacy of the license renewal application. *See*

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[10] Section 2.326(a)(1) requires that motions to reopen be timely, address a significant safety issue, and demonstrate that a materially different result would be or would have been likely had the new evidence been considered initially. Section 2.326(b) requires that motions to reopen be accompanied by affidavits given by competent individuals with knowledge of the facts alleged or by experts in the appropriate discipline in support of the movant's claim. Petitioners have not provided affidavits.

Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (citing Commission case law). Thus, neither suspension nor reopening of any records is warranted.

III. The OIG Memo Does Not Indicate There Was a Violation of Federal Law or Commission Policy

Petitioners have failed to show that individual staff members' working papers were improperly destroyed. *See* Supplemental Petition at 7, 14. The Federal Records Act ("FRA")[11] does not support the proposition that all working files, drafts and handwritten notes are agency records appropriate for preservation. Under Federal law, a "record" is defined as material "made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operation, or other activities of the Government or because of the informational value of data in them." Records Disposal Act, 44 USC § 3301. Although in some instances it may be appropriate to identify and preserve working files and drafts as records, Petitioners have failed to show that is the case here.

Contrary to Petitioners' assertion, controlling regulations and guidance indicates that preservation of working files, including checklists and notes, is required only where two conditions are met. *See* Supplemental Petition at 10. First, the document must be circulated or made available to persons other than the creator for official purposes, ***and*** second, the

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[11] The FRA refers to a series of statutes governing the creation, management and disposal of Federal agency records. *Citizens for Responsibility and Ethics in Washington v. US Dep't of Homeland Security,* 527 F. Supp. 2d 101, 108 (D.D.C. 2007) (internal citations omitted) (Granting the Department of Homeland Security's (DHS) motion to dismiss a claim filed under the Freedom of Information Act ("FOIA"), the FRA, and the Administrative Procedure Act, which included a demand that records previously transferred to the White House be returned, and a declaration that the record keeping policy of the DHS failed to meet the FRA. The Court discussed current case law and found that the plaintiff lacked standing and in addition was precluded from seeking an injunction that would require agency staff to comply with agency recordkeeping guidelines or the FRA, or to retrieve records that had been transferred to the White House.).

document must contain unique information that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities. *See* 36 CFR § 1222.34(c). *See also* Electronic Mail Systems (National Archives and Records Administration ("NARA") Proposed Rule), 59 Fed. Reg. 13,906, 13,908 (Mar. 24, 1994) (stating that preliminary drafts must be maintained for records purposes if "(1) they contain unique information, such as annotations or comments, that helps explain the formulation or execution of agency policies, decisions, actions, or responsibilities, ***and*** (2) they were circulated or made available to employees other than the creator for the purpose of approval, comment, action, recommendation, follow-up, or to keep staff informed about agency business") (emphasis added).[12]

The Commission policy mirrors the NARA regulations requiring that two conditions be satisfied before a working file, including preliminary drafts and rough notes, will be preserved: first, the working file must be circulated and second, it must contain unique information. *Compare id.* at 19-20 *with* 10 C.F.R. § 1222.34(c).[13] There is no indication in the OIG Memo that the working files were circulated and contained unique information. Rather, the OIG Memo simply states that the Staff used their own working papers, including checklists and notes, to prepare "their formal input for an audit report which is then used as input to the SER." OIG Memo at 3. Thus, Petitioners have failed to show that the working files satisfied both conditions necessary to require their preservation.

Furthermore, the OIG Memo did not find that the Staff violated federal law or

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[12] The final rule did not change the philosophy of the proposed rule. *See* 60 Fed. Reg. 44,634, 44,635 (Aug. 28, 1995).

[13] Similarly, other agencies have also interpreted NARA's regulations to mean that, for purposes of recordkeeping, both conditions are required. *See e.g.,* U.S. Dep't of Energy, Records Management Handbook, at 8 (Sept. 2006) available at http://cio.energy.gov/RM_Handbook.pdf (last visited May 27, 2008).

Commission policy by discarding their working papers.[14] Pursuant to federal regulations, non-records may be disposed of in accordance with instructions in an agency's printed disposition manual. 36 C.F.R. § 1228.24(b)(5). The implementing policies for the NRC's disposition schedule[15] state that a non-record "may be destroyed when its purpose is served." MD 3.53 at 45. In this case, the Staff disposed of their personal working papers "when they were no longer needed to support the review and approval of the application," OIG Memo at 3 (citing MD 3.53), which is in accordance with Agency policy and Federal disposition requirements. Thus, the assertion that the Staff violated Federal law or Commission policy is unfounded.

IV. The Commission Has Sufficient Information to Make A Finding

Contrary to Petitioners' assertions, the Commission has or will have once the Staff's review is complete, sufficient information to determine whether a finding of reasonable assurance can be made.[16] In support of their assertion, Petitioners suggest that the Staff's audit report for Oyster Creek ("Oyster Creek Audit Report")[17] constitutes the sum total of the Staff's license renewal application review process, and that because the Staff relied "largely or exclusively on high level summary [program basis documents] that were prepared by the

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[14] It should be noted that MD 3.53 is an internal guidance document that is applicable to all NRC employees. MD 3.53 at 3.53-042 (Applicability).

[15] *See* NUREG-0910, NRC Comprehensive Records Disposition Schedule, Rev. 4 at Introduction (March 2005) (ADAMS ML051390495). Because the actual disposition schedule in NUREG-0910 has few references to "non-records," the policies in MD 3.53 are instructive.

[16] In uncontested license renewal proceedings, the Commission has authorized the Director of the Office of Nuclear Reactor Regulation ("NRR") to issue renewed operating licenses once he or she has made the appropriate findings. In contested proceedings, the Commission, as a matter of policy, has not allowed the Director of NRR to make the appropriate findings and renew operating licenses without Commission authorization. Staff Requirements Memorandum-SECY-02-0088-Turkey Point Nuclear Plant, Units 3 & 4, Renewal of Full Power Operating Licenses (SRM-SECY-02-0088) (June 5, 2002). Therefore the Director of NRR must seek Commission authorization to issue renewed licenses in contested proceedings.

[17] Audit and Review Report for Plant Aging Management Reviews and Programs for the Oyster Creek Generating Station License Renewal Application (Aug. 18, 2006) (ML062280051).

applicant for purposes of relicensing," the Staff's review of the Oyster Creek renewal application was inadequate. Supplemental Petition at 15.[18] Petitioners, however, provide no authority in support of their assertion that the Staff's reliance on program basis documents in some instances makes the Staff's review inadequate *per se*. *See* Supplemental Petition at 15-16. Second, in focusing on audit reports, and the Oyster Creek Audit Report in particular, Petitioners ignore the volume of information available through the Staff's safety evaluation reports, licensee responses to Staff audit questions, and licensee responses to Staff requests for additional information. Petitioners ignore the fact that a safety evaluation with open items,[19] a supplemental safety evaluation,[20] and a final safety evaluation containing over 800 pages were prepared by the Staff on Oyster Creek's license renewal application.[21] In addition, the Staff also completed draft and final environmental impact statements.[22] Furthermore, Petitioners also ignore the fact that the Staff propounded over a hundred requests for additional information and over 350 audit questions in the course of its review of Oyster Creek's license renewal application. Transcript of Advisory Committee on Reactor Safeguards Plant License Renewal Subcommittee Meeting (Oct. 3, 2006) at 122-123. Petitioners also ignore that, in accordance with the Atomic Energy Act and 10 C.F.R. § 54.25, the Advisory Committee on

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[18] Petitioners speculate that the Staff's license renewal reviews for other facilities suffer from the same deficiencies. Supplemental Petition at 16.

[19] Safety Evaluation with Open Items Related to the License Renewal of Oyster Creek Generating Station (Aug. 2006).

[20] Safety Evaluation Related to the License Renewal of Oyster Creek Generating Station December 2006 Update (Dec. 29, 2006).

[21] NUREG-1875 Safety Evaluation Report Related to the License Renewal of Oyster Creek Generating Station (completed Mar. 2007) (published Apr. 2007).

[22] NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28, Regarding Oyster Creek Nuclear Generating Station (Jan. 2007); NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28, Regarding Oyster Creek Nuclear Generating Station, Draft Report for Comment (June 2006).

Reactor Safeguards independently reviews all license renewal applications and advises the Commission on whether to renew the license. Finally, Petitioners ignore the fact that the SER reflects the final Staff position. The SER reflects the Staff's consensus position and is more comprehensive and understandable than an individual Staff member's personal working notes. Contrary to what Petitioners suggest, the Commission does not need to reevaluate every detail of the Staff's review by reading individual Staff members' notes and licensee documents in order to fulfill its responsibilities under the Atomic Energy Act. *See* Supplemental Petition at 15-16. The reasonable assurance finding in license renewal proceedings is based on the adequacy of the application, not the adequacy of the Staff's review or an individual's contemporaneous mental processes. *See* 69 Fed. Reg. at 2,202; *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC at 121-22. Therefore, all that is necessary is the Staff's decision document, i.e. the SER, which reflects the Staff's evaluation of the application and the Staff's judgment on its adequacy.

V. Petitioners' Participation Has Not Been Hindered

A. Petitioners Have Had a Full and Fair Opportunity to Participate

Petitioners assert that their participation has been "impaired" by the Staff taking "great pains to avoid public disclosure [of the documents the Staff relied upon to review the Oyster Creek License Renewal Application]." Supplemental Petition at 16-17. Petitioners' assertion is without basis. Petitioners have presented no evidence that the Staff improperly withheld licensees' documents. Therefore, their assertion that their participation has been hindered is without merit. Petitioners' assertion contradicts their assertion in Section IV of the Petition (as well as in their January Petition) that the Staff's license renewal review at Oyster Creek (and Petitioners presume elsewhere) was inadequate because the Staff reviewed so few documents and, at least in some instances, relied "exclusively on high level [program basis documents]." Supplemental Petition at 15. Petitioners' assertion is puzzling in light of their acknowledgment

that they received thousands of documents from Oyster Creek through discovery in the license renewal proceeding.[23] *See* Supplemental Petition at 15.

Petitioners' assertion is flawed for several reasons. First, as required by 10 C.F.R. §§ 2.336(b) and 2.1203, the Staff publicly disclosed Oyster Creek's license renewal application and all supplements thereto; all correspondence between the Staff and the licensee (including summaries of meetings and teleconferences between the applicant and the Staff); all of the Staff's requests for additional information and audit questions, as well as Oyster Creek's responses thereto, and licensee documents in the possession and control of the Staff. In addition, the Staff prepared an audit report (listing licensee documents reviewed), inspection reports, and three SERs.[24]

Second, Petitioners are extremely late in complaining that the Staff's public disclosures were incomplete or inadequate because the Staff's "Oyster Creek Audit Report" only listed licensee documents reviewed by the Staff during the on-site audit instead of including the documents in the Agency Document Access and Management System ("ADAMS"). They fail to identify any legal authority requiring the Staff to put the licensee documents listed in the audit report in ADAMS. Moreover, 10 C.F.R. § 2.323(a) requires that motions be filed no later than ten (10) days after the occurrence or the circumstances giving rise to the motion. The Oyster Creek Audit Report referenced by Petitioners (Petition at 15), which lists documents reviewed by the Staff during on-site audits, was completed and made public in August 2006. Thus, Petitioners have known for more than a year and a half (and more than a year before the close of the record in the Oyster Creek proceeding in September 2007) that the Staff does not include

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[23] Parties other than the NRC Staff must generally disclose all documents relevant to the contentions. *See* 10 C.F.R. § 2.336(a)(2).

[24] *See supra* notes 19-21.

licensee documents reviewed by the Staff during on-site audits in ADAMS and thus should have raised their concerns long ago.

Third, Petitioners' assertion is flawed because, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), contentions must demonstrate a genuine dispute with the applicant on a material issue and include references to specific portions of the application. Petitioners appear to have forgotten that the safety issue in license renewal proceedings is the adequacy of the application. *See* 69 Fed. Reg. at 2,202. None of the criticisms, arguments, or assertions put forward by the Petitioners demonstrates a genuine dispute with the Oyster Creek, Vermont Yankee, Pilgrim, or Indian Point license renewal applications. In short, Petitioners' assertions simply reflect disagreement with the Commission position that contentions must be based on the contents of the applications not the adequacy of the Staff's review process.

B. Petitioners Are Not Entitled to Probe the Minds of Staff Reviewers

Petitioners assert that their inability to review individual Staff members' "working papers" from their on-site audits during the license renewal review process impedes Petitioners' ability "to review the quality of the Staff's work." Supplemental Petition at 6. Petitioners imply that without this ability, the Staff's decision-making is not transparent and hinders meaningful public participation. *See id.* at 14-15. As discussed above, the OIG Memo does not support Petitioners' assertion that license renewal staff improperly discarded their "working papers." Also, as discussed above, only the license renewal application, not the Staff's safety review, is the proper subject of an NRC adjudicatory proceeding. *See* 69 Fed. Reg. at 2,202; *see also Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC at 121-22. Therefore, Petitioners' ability to participate in these license renewal proceedings does not depend upon Petitioners' ability "to review the quality of the Staff's" safety reviews. Nevertheless, as discussed below, *if* the Staff's "working papers" were agency records, and those "working papers" existed, it is highly unlikely that such documents would be appropriate for release either to Petitioners or to the public at large, because the deliberative process privilege precludes public scrutiny of Staff documents

that are predecisional and deliberative.[25]

The deliberative process privilege protects "inter- and intra-agency communications that reflect advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions . . . are formulated." *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994) (citing *NLRB v. Sears Roebuck Co*., 421 U.S. 132, 150 (1975)). The privilege applies to documents that are both predecisional and deliberative. *Vogtle*, CLI-94-5, 39 NRC at 197. Furthermore, although stated in terms of protecting documents from disclosure, the privilege protects the *deliberative process itself*, as well as the documents associated with it.[26] *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993); *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974). Finally, while the privilege is not absolute, once an agency has shown that the privilege is applicable, a litigant seeking protected material must demonstrate an "overriding need for the material" to overcome the privilege. *Vogtle*, CLI-94-5, 39 NRC at 198.

An important purpose of the deliberative process privilege is to "ensure that the mental processes of decision-makers are not subject to public scrutiny." *Montrose Chemical*, 491 F.2d at 70. Indeed, the fundamental basis for the deliberative process privilege is "the belief that were agencies forced to operate in a fishbowl . . . the frank exchange of ideas and opinions

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[25] Although the deliberative process privilege is codified in Exemption 5 of FOIA and appears most often in the FOIA context, the privilege itself predates FOIA. *See Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 69 (D.C. Cir. 1974) (stating that "the bar against probing the mental processes of an executive branch decision-maker" has long been recognized by courts).

[26] In *Montrose Chemical*, the issue was whether the plaintiff could use FOIA "to discover what factual information the Administrator's aides cited, discarded, compared, evaluated, and analyzed to assist the Administrator in formulating his decision," or whether such discovery "would be an improper probing of the mental processes behind a decision of an agency." *Id.* at 68. The D.C. Circuit upheld the EPA Administrator's decision to withhold summaries of a lengthy administrative proceeding record prepared by his aides, stating that "[t]o probe the summaries … would be the same as probing the decision making process itself" and "[t]o require disclosure of the summaries would result in the publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision." *Id*.

would cease and the quality of administrative decisions would consequently suffer." *Hinckley v. United States*, 140 F.3d 277, 285 (D.C. Cir. 1998) (quoting *First Eastern Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C.Cir.1994)). In the context of this case, the privilege would generally preclude Petitioners from reviewing the notes or "working papers" made by individual Staff members during the safety review process, because allowing Petitioners access to those documents would permit them to "probe the minds" of the Staff reviewers. *See Porter County Chapter of the Izaak Walton League of America, Inc. v. U.S. Atomic Energy Commission*, 380 F.Supp 630, 633 (N.D. Ind. 1974) ("*Porter County")* (ruling that disclosure of AEC Staff notes pertaining to licensing review "would be akin to revealing the opinions, advice, recommendations and detailed mental processes of government officials").

There are several additional reasons to bar Petitioners' (and Applicant's) scrutiny of the Staff's deliberative process and associated documents. First, information in the Staff's predecisional documents could easily be misunderstood or taken out of context. For example, the personal views expressed in working papers such as notes or checklists, which may represent only the personal opinions of Staff reviewers, may be misconstrued as agency positions. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (stating that the deliberative process privilege guards against disclosure of such documents). Additionally, because the views of the Staff may change over the course of the review process, the information in such documents may represent views that are no longer held. *See Hinckley*, 140 F.3d at 285-86 (noting that "[o]ne of the key insights behind this privilege is that governmental decisionmakers will frequently disagree and debate many options before they reach any final conclusion, and that such predecisional and deliberative discussions and disputes should be protected from public review").

Second, if the Staff's notes or other predecisional, deliberative documents were made available to the public, the potential public disclosure of the Staff's views could have a chilling effect on individual members of the Staff. *See Porter County*, 380 F.Supp at 633 (stating that

disclosure of Staff notes would "preclude employees from ever committing any thoughts to writing which the author is unprepared . . . to disseminate publicly"). Revealing the Staff's predecisional notes would create an environment in which Staff members may be less likely to express candid views, negatively impacting the quality of NRC licensing decisions. See *NLRB v. Sears Roebuck Co*., 421 U.S. 123, 150-51 (1975) (quoting *United States v. Nixon*, 418 U.S. 683, 705 (1974) (noting that "those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process")).

Finally, although the deliberative process privilege is not absolute, Petitioners must demonstrate a compelling need or special circumstances to overcome the deliberative process privilege. *Long Island Lighting Co*. (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1343 (1984). Petitioners have not made such a demonstration.[27] The mere fact that a document serves as input into an audit report, which in turn, serves as input into the SER, OIG Memo at 3, is not sufficient to demonstrate compelling need. *See Id*. at 1346. Therefore, contrary to their assertions, Petitioners' participation in the above-captioned proceedings has not been hindered.

VI. The Requested Relief is Unnecessary

As stated above, Petitioners request new forms of relief in addition to the relief requested in the January Petition. First, Petitioners request that the Commission order the Staff to disclose all non-public documents upon which the Staff relied during its safety reviews. Supplemental Petition at 18. This request has no apparent connection to the OIG Memo on

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[27] In the Oyster Creek proceeding, for example, the Applicant provided thousands of documents to Petitioners, but Petitioners have not explained why those documents, in addition to documents released by the Staff, were insufficient to allow Petitioners to identify potential inadequacies in the license renewal application.

which the Supplemental Petition is based. The OIG Memo mentions documents not in the Staff's possession, not documents the Staff does possess and control but are non-public. The OIG did not make any finding regarding incorrect document preservation, and did not suggest that the Staff incorrectly withheld licensee documents from the public. Therefore the Supplemental Petition does not support the requested relief.

Petitioners also request that the Commission change the Staff's current practices regarding document retention and preservation. *Id.* at 18. Such relief is unnecessary and not required. The OIG Memo did not find any violation of law or policy, and did not recommend any changes to any policy or practice. *See* OIG Memo. Accordingly, there is no need or reason for the Commission to change the Staff's practices, nor the Commission's policies, and the relief should be denied. Similarly, there is no need for Petitioners' requested relief of "prob[ing] the culture of the NRC management" regarding the policies on working paper destruction. *See* Supplemental Petition at 18.

Last, the Petitioners request that the Commission "investigate and report upon" the Staff's determination on completeness of licensees' AMPs and how such AMPs assure that the current licensing basis ("CLB") for the plants is maintained. *Id.* at 19. This request is not supported by the OIG Memo's findings. Accordingly, there is no basis for the Commission to undertake the investigations and create the reports demanded by the Petitioners.

CONCLUSION

The four corners of the OIG Memo do not support any allegation that agency records were improperly destroyed. Thus, for the reasons set forth above, the Commission should deny the Supplemental Petition.

Respectfully submitted,

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Dated at Rockville, Maryland
this 27th day of May 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-219-LR
	)	
(Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 27th day of May, 2008.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR GENERATION CO. AND	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-293-LR
	)	
(Pilgrim Nuclear Power Station)	)	ASLBP No. 06-848-02-LR
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 27th day of May, 2008.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LR
	)	ASLBP No. 06-849-03-LR
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO SUPPLEMENTAL PETITION FOR ADDITIONAL INVESTIGATION AND CORRECTION OF DEFICIENCIES IN LICENSE RENEWAL REVIEWS" in the above-captioned proceeding have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system or, as indicated by an asterisk, by electronic mail, with copies by U.S. mail, first class, this 27th day of May, 2008.

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