

RAS-E-116

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY LICENSING BOARD

DOCKETED  
USNRC

June 30, 2008 (1:30pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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In re:

License Renewal Application Submitted by

Entergy Nuclear Indian Point 2, LLC,  
Entergy Nuclear Indian Point 3, LLC, and  
Entergy Nuclear Operations, Inc.

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

DPR-26, DPR-64

June 30, 2008

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**MOTION TO PRESERVE ALL NRC STAFF NOTES AND  
WORKING PAPERS PURSUANT TO 10 C.F.R. § 2.336(b)(3)**

Pursuant to 10 C.F.R. § 2.323, the State of New York moves for an order requiring NRC Staff to preserve all NRC Staff documentation that would have to be produced, or identified as allegedly privileged pursuant to 10 C.F.R. § 2.336(b), to any party in this proceeding. This Motion is necessary in light of recent statements made by NRC Staff at a public meeting held June 18, 2008, in Cortlandt Manor, New York. At that meeting, NRC Staff acknowledged a conflict between the Indian Point Audit and Review Plan and internal guidance, the latter of which provides for lesser retention of documents, but Staff did not commit to following the more protective retention policy.

**CONSULTATION WITH PARTIES PURSUANT TO 10 C.F.R. § 2.323**

Prior to filing this motion, on Tuesday, June 24, 2008, Assistant Attorney General Janice A. Dean contacted Sherwin Turk, Esq., counsel to the NRC Staff, and inquired whether NRC Staff would agree to preserve audit-related working papers. AAG Dean explained the basis for her request, namely, the statements made by NRC Staff at the June 18, 2008, meeting detailed

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below, and agreed to speak with Mr. Turk again on the issue when he had had the opportunity to consult with Staff. Mr. Turk and AAG Dean spoke again on Thursday, June 26, 2008, when Mr. Turk stated that NRC Staff opposed the motion, and that he would not discuss the Staff's position on the conflict between policy documents or Staff's position on whether the IP Audit and Review Plan even controlled here. Also on June 26, AAG Dean contacted Paul Bessette, Esq., counsel for the Applicant, explained the basis for her motion, and gave Entergy the opportunity to take a position. Mr. Bessette indicated that Entergy opposed the motion, and expressed his view that the potential conflict between policy documents was an internal NRC issue.

#### **BACKGROUND ON THIS ISSUE**

On September 6, 2007, the OIG released an Audit Report which concluded its audit of the NRC License Renewal Process. See NRC Inspector General Audit, NRC's License Renewal Program, (Sept. 6, 2007), ML072490486. The Audit found that NRC Staff often copied, word-for-word, language provided by applicants in NRC documents, casting doubt on NRC Staff's independent role in reviewing of license renewal application. *Id.* As a result of this audit finding, the OIG conducted a further review of NRC Staff's preparation of license renewal Safety Evaluation Reports for four nuclear plants. On May 2, 2008, the OIG released a report which observed that NRC Staff does not regularly retain (that is, Staff discards) the working papers developed by inspectors during license renewal audits, documents which, according to the Inspector General, "provide direct support of the specifics of the NRC review." See Memorandum from Hubert T. Bell, Inspector General, to Dale E. Klein, Chairman, NRC, dated May 2, 2008, ML081280227.

The State of New York was concerned with the OIG's findings but did not move for protection of documents within the context of this proceeding because the Audit and Review Plan for Indian Point imposes document retention obligations on NRC Staff, and because the State of New York relied on the IP Audit and Review Plan being followed. *See* Audit and Review Plan for Plant Aging Management Reviews and Programs, Indian Point Nuclear Generating Station, Units 2 and 3 (IPNGS), Sept. 27, 2007, ML072290180 (the "IP Audit and Review Plan"). Specifically, the IP Audit and Review Plan, at section 6.6, states:

Any documents reviewed that were used to formulate the basis for resolution of an issue, such as the basis for a technical resolution, the basis for the acceptance of an exception or an enhancement, etc., should be documented as a reference in the SER input.

Upon issuance of the SER input, all worksheets that were completed by contractor and NRC personnel shall be given to the NRC project team leader.

After the NRC has made its licensing decision, all copies of documents collected and all documents generated to complete the SER input, such as audit worksheets, question and answer tracking documentation, etc., are to be discarded.

IP Audit and Review Plan, § 6.6, ML072290180, at 41. This provision appeared to adequately protect potentially discoverable information until the final completion of the license renewal process, including all possible appeals and remands.

However, at the NRC's Region One License Inspection Exit Management Meeting held in Cortlandt Manor, New York, on June 18, 2008, NRC Staff members Rani Franovich (Chief, Environmental Branch, Division of License Renewal) and Sam Collins (Region I Administrator) stated that the IP Audit and Review Plan was not controlling and that an internal conflict existed between this Plan and another internal directive. The document to which Staff referred may be Management Directive 3.53, "NRC Records and Document Management Program," NRC Office

of Information Services, June 15, 1995, Revised March 15, 2007, ML071160026.<sup>1</sup> Management Directive 3.53 authorizes destruction of “personally held nonrecord materials,” materials which pertain to the agency business but which may nevertheless be retained or discarded “at the author’s sole discretion.” Management Directive 3.53 at 62. Management Directive 3.53 therefore appears to allow individual Staff members to exercise their own discretion concerning document classification and subsequent destruction, in contrast to the IP Audit and Review Plan’s strict requirements. Therefore, absent intervention by this Board, the Staff believes it has the authority to destroy documents, and presumably is destroying documents, whose preservation is required under the IP Audit and Review Plan and whose production, or listing on a privilege log, is mandated by 10 C.F.R. § 2.336(b)(3).

NRC Region One staff indicated at the June 18, 2008, public meeting that although Staff is currently following the permissive provisions of the Management Directive, this internal conflict is currently undergoing Commission review. During the June 18, 2008, meeting, representatives from Riverkeeper, Inc., and the Office of the New York State Attorney General asked NRC Staff to preserve all working papers until the end of the license renewal process for Indian Point, and certainly through the resolution of the NRC’s conflict between directives, but NRC Staff did not affirmatively state that they would do so. While Staff did not identify the precise document retention policy under which they believed they are now subject, they did indicate that they do not believe the IP Audit and Review Plan to be controlling; that is, Staff stated that the broader policy of Management Directive 3.53 takes precedence over the more

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<sup>1</sup> To the best of the movant’s knowledge, the meeting held on June 18, 2008 was not transcribed. Representatives from the State of New York were in attendance.

specific IP Audit and Review Plan.

### **Discovery Obligations in this Proceeding**

10 C.F.R. § 2.336(b)(3) requires the NRC Staff to, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene, disclose or provide “[a]ll documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC Staff’s review of the application or proposed action that is the subject of the proceeding.” 10 C.F.R. § 2.336(b)(3). Significantly, the documents which must be disclosed, or included on a privilege claim log, are those that support the “review,” *i.e.*, the process conducted by the Staff, not the conclusion of that process. Thus, notes by individual auditors and staff members taken during onsite plant audits, document reviews, and meetings with Entergy or others, as well as memoranda and draft and final reports generated in reliance on such notes, are included within the scope of the document production duties imposed on the Staff by § 2.336(b)(3). Since a review of the license application and its acceptance or rejection for docketing is within the scope of the Staff’s review of the application, notes and other documents created during that part of the review process are also subject to the obligations imposed by § 2.336(b).

The appeal from a decision to grant or deny the license renewal application will be based, at least in part, on the quality and thoroughness of the Staff’s review. For example, the justification for not considering various safety issues during the LRA process is the assumed adequacy of the NRC Staff’s ongoing safety reviews. *See, e.g.*, 10 C.F.R. § 54.30. However, pursuant to 10 C.F.R. § 2.335, the exclusion of safety issues from this proceeding imposed by § 54.30 may be modified if there is evidence that “special circumstances” exist that would make

application of the rule inconsistent with the purposes for the rule. Thus, the adequacy of the NRC Staff audit and regulatory activities with regard to Indian Point 2 and 3 can become an issue in this proceeding, including any appellate review of the final agency decision. As the NRC itself has acknowledged, it has an obligation to provide "a record adequate for judicial review." See NRC Brief, *CAN v. NRC*, 59 F.3d 284 (1st Cir. 1995)(brief on file with authors; available upon request). Therefore, it is imperative that the NRC preserve all the documents that support its review of Entergy's license renewal application, as required by the IP Audit and Review Plan.

Should Management Directive 3.53 control in this instance, NRC's document destruction policies would conflict not only with the IP Audit and Review Plan but also with NRC Chairman Klein's dedication to transparency in government. Indeed, Chairman Klein recently stated that the NRC "continue[s] to emphasize the value of regulatory openness by ensuring that our decisions are made in consultation with the public, our Congress, and other stakeholders." He continued, "[w]e view nuclear regulation as the public's business and, as such, we believe it should be transacted as openly and candidly as possible."<sup>2</sup> The NRC's failure to maintain

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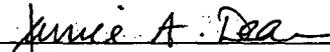
<sup>2</sup>"Report to the Convention on Nuclear Safety": Remarks Prepared for NRC Chairman Dale E. Klein, Vienna, Austria (Apr. 15, 2008), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2008/s-08-015.html> (last visited Apr. 27, 2008); *see also* "Guiding Principles: Culture, Transparency, and Communication": Prepared Remarks by The Honorable Gregory B. Jaczko, Commissioner, U.S. Nuclear Regulatory Commission before the Regulatory Information Conference, Washington, DC (Mar. 9, 2005), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2005/s-05-006.html> (last visited Apr. 27, 2008); "Openness and Transparency: The Road to Public Confidence": Prepared Remarks for The Honorable Gregory B. Jaczko, Commissioner, U.S. Nuclear Regulatory Commission at the Organization for Economic Co-operation and Development's Nuclear Energy Agency Workshop on the Transparency of Nuclear Regulatory Activities, Tokyo, Japan (May 22, 2007), *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/S-07-032.html> (last visited Apr. 27, 2008).

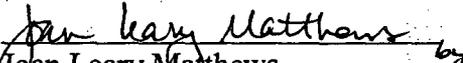
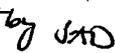
documentation that relates to its decisionmaking simply fails to conform to the Chairman's stated philosophy.

### Conclusion

Document destruction would prevent a petitioner, the public, or the Commission as the NRC's appellate body from conducting a meaningful, in-depth review of the NRC Staff's activities, which form a vital part of the license renewal process. As required by the IP Audit and Review Plan, NRC Staff must be required to maintain all Indian Point-related working papers through the conclusion of the Indian Point license renewal proceeding and through the conclusion of Commission and judicial review.

Respectfully submitted,  
June 30, 2008

  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DECLARATION OF SERVICE

Pursuant to 28 U.S.C. §1746, Teresa Fountain hereby declares upon penalty of perjury that:

1. I am over 18 years old and am an employee of the Office of the Attorney General for the State of New York, counsel for the petitioner State of New York.

2. On June 30, 2008, I forwarded the attached motion to preserve all NRC staff notes and working papers to the following judges, law clerk, offices, organizations, attorneys, and/or petitioners at the e-mail addresses that follow.

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Executed on:

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Albany, New York

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