

July 11, 2008 (8:30am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 10, 2008

**ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING
STATE OF NEW YORK'S MOTION TO PRESERVE NRC STAFF WORKING PAPERS**

I. INTRODUCTION

Pursuant to 10 C.F.R § 2.323(c) and the Atomic Safety and Licensing Board's ("Board") Order dated July 3, 2008,¹ Entergy Nuclear Operations, Inc. ("Entergy") hereby responds in opposition to the State of New York's ("New York") Motion to Preserve All NRC Staff Notes and Working Papers Pursuant to 10 C.F.R. § 2.336(b)(3), served on June 30, 2008 ("Motion").

In that Motion, New York seeks an unduly broad Board Order "requiring [the] 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."² New York asserts that the 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,"³ at which members of the NRC Staff purportedly acknowledged a "conflict" between the Indian Point ("IP") Audit and

¹ Atomic Safety and Licensing Board Order (Directing Briefing in Response to New York's Motion to Preserve Working Papers) (unpublished) (July 3, 2008).

² Motion at 1 (emphasis added).

³ *Id.*

Review Plan⁴ and agency guidance contained in Management Directive (“MD”) 3.53.⁵ New York surmises that, as a result of this alleged conflict, the NRC Staff is “presumably destroying documents” in contravention of the IP Audit and Review Plan and 10 C.F.R. § 2.336(b)(3).⁶

Entergy opposes New York’s Motion. The Motion seeks relief that, respectfully, exceeds this Board’s jurisdiction. Specifically, the precise concerns alleged by New York: (1) are already before the Commission by virtue of a petition filed by another petitioner in this proceeding, and (2) relate to the Staff’s performance of its administrative functions. Furthermore, the Motion is premature and lacks an adequate legal basis. Accordingly, the Board should deny the Motion.

II. BACKGROUND

A. **New York’s Motion**

New York claims that its June 30 Motion is necessary in view of certain statements made by NRC Staff management at the agency’s Region I License Renewal Inspection Exit Meeting held on June 18, 2008, in Cortlandt Manor, New York.⁷ At that meeting, representatives of Riverkeeper and New York requested that the NRC Staff preserve all “working papers” related to the Staff’s pending review of Entergy’s license renewal application (“LRA”) for IP Units 2 and 3.⁸ The request apparently stems from the petitioners’ belief that the IP Audit and Review Plan imposes “strict” document retention “requirements” on the NRC Staff.⁹

⁴ “Audit and Review Plan for Plant Aging Management Reviews and Programs,” Indian Point Nuclear Generating Unit Nos. 2 and 3, Docket Nos. 50-247 and 50-286 (Sept. 27, 2007) (ADAMS Accession No. ML072290180) (“IP Audit and Review Plan”).

⁵ MD 3.53, “NRC Records and Document Management Program” (Mar. 15, 2007) (ML071160026).

⁶ Motion at 4.

⁷ *Id.* at 3-5.

⁸ *Id.* at 4.

⁹ *Id.*

According to the Motion, the Staff representatives indicated that the IP Audit Plan is “not controlling” and is in “conflict” with MD Directive 3.53.¹⁰ In response, New York infers that the Staff “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).”¹¹ New York offers no concrete information to corroborate this assertion.

B. The License Renewal “Suspension” Proceedings Pending Before the Commission

New York readily concedes that the very concerns it claims warrant “intervention” by this Board are “currently undergoing Commission review.”¹² Specifically, on January 3, 2008, Riverkeeper and various other petitioners (collectively, “Petitioners”) filed a petition seeking, among other things, the suspension of all aspects of this and other license renewal proceedings, including Staff technical reviews, and a “comprehensive overhaul” of the manner in which the Staff carries out license renewal reviews.¹³ Petitioners cited a September 6, 2007, report prepared by the NRC Office of Inspector General (“OIG”) concerning its audit of the NRC’s license renewal program as the principal basis for the petition.¹⁴

The Petitioners (including Riverkeeper) in the suspension proceeding filed a supplemental petition with the Commission on May 15, 2008, in response to a May 2, 2008, OIG follow-up memorandum to Chairman Klein¹⁵ summarizing the OIG’s additional reviews of Staff

¹⁰ *Id.* at 3-4.

¹¹ Motion at 4 (emphasis added).

¹² *Id.*

¹³ The January 3, 2008, petition was filed jointly by Riverkeeper and numerous other petitioners in this proceeding and in three other pending license renewal proceedings (Pilgrim, Vermont Yankee, and Oyster Creek). See “Petition by [Petitioners] 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” (Jan. 3, 2008) (ML080110264).

¹⁴ See Audit of NRC’s License Renewal Program (OIG-07-A-15) (Sept. 6, 2007) (ML072490486).

¹⁵ See Memorandum from Hubert T. Bell, Inspector General, NRC, to Chairman Dale E. Klein, NRC, “NRC Staff Review of License Renewal Applications” (May 2, 2008) (ML081290354).

documentation of license renewal reviews.¹⁶ The supplemental petition contains an extensive discussion of the “NRC general document retention policies” as set forth in MD 3.53.¹⁷ Among other things, it alleges that the NRC Staff has destroyed, and continues to destroy, license renewal audit-related working papers in violation of federal law and Commission policy (*i.e.*, MD 3.53). The supplemental petition requests that the Commission order the release of all the non-public documents upon which NRC Staff relied during the safety reviews and demands generic changes to the Commission’s document retention and publication practices.

Finally, on June 4, 2008, the Petitioners in the suspension proceeding filed a motion seeking leave to reply to the Staff’s answer to their supplemental petition.¹⁸ Notably, Petitioners therein allege a conflict between the IP Audit and Review Plan and MD 3.53—*i.e.*, the *same* alleged “conflict” underpinning New York’s Motion.¹⁹ The Petitioners assert that “[t]he NRC Staff’s argument regarding the alleged legitimacy of the Staff’s destruction of audit documents is also *directly contradicted by the Audit and Review Plans for the Indian Point and Oyster Creek relicensing reviews.*”²⁰ Like New York in its Motion, the Petitioners quote Section 6.6 of the IP Audit and Review plan, similarly asserting that it “clearly requires the retention of a wide range of documents created by Staff reviewers and contractors,” including Staff “working papers.”²¹

¹⁶ See “Supplemental Petition by [Petitioners] for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants” (May 15, 2008) (ML081640245).

¹⁷ See generally *id.* at 5-15.

¹⁸ See “Motion by [Petitioners] for Leave to Reply to NRC Staff’s Opposition to Supplemental Petitions for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants” (June 4, 2008) (ML081710525).

¹⁹ See “Reply by [Petitioners] to NRC Staff Opposition to Supplemental Petitions for Additional Investigation and Correction of Deficiencies Regarding License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants” (June 4, 2008) (ML081710525) at 2-8.

²⁰ *Id.* at 3 (emphasis added).

²¹ *Id.*

The Commission has yet to rule on any of the Petitioners' filings in the suspension proceeding. The NRC Staff and Entergy, as appropriate, have responded in full to those submittals.²² Although both the Staff and Entergy have contended that Petitioners' filings therein are procedurally defective and warrant dismissal on that basis alone, they also have addressed Petitioners' substantive legal arguments. The Staff, in particular, has addressed the legality of its document retention practices. Thus, while New York and Petitioners seek different remedies, the same document-retention concerns raised by New York in this license renewal proceeding sit squarely before the Commission in the pending suspension proceeding.

III. ARGUMENT

The Motion should be denied for the reasons set forth below. There is clear, significant overlap between the concerns prompting New York's Motion in this proceeding and those raised by the Petitioners seeking to suspend this and three other license renewal proceedings. Accordingly, the Board should defer to the Commission's resolution of the controversy.

Moreover, the Motion improperly asks the Board—contrary to controlling legal precedent—to direct the Staff in the conduct of its administrative functions. In this regard, New York wrongly posits that the “quality and thoroughness” of the Staff's safety review process is litigable in this proceeding.²³ Finally, the Motion is premature, as the Board has yet to admit any petitioner, including New York, as a party to this proceeding, or to admit any contention for hearing.

²² See “NRC Staff Answer to Petition for Suspension of License Renewal Reviews Pending Investigation of NRC Staff License Renewal Process” (Jan. 18, 2008) (ML080280305); “Answer of Entergy Nuclear Operations, Inc. Opposing Petition to Suspend License Renewal Reviews and Proceedings” (Jan. 18, 2008) (ML080290414); “NRC Staff's Answer to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews” (May 27, 2008) (ML081490215); “Answer of Entergy Nuclear Operations, Inc. Opposing Supplemental Petition to Suspend License Renewal Proceedings” (May 27, 2008) (ML081620456); “NRC Staff's Response to Joint Motion for Leave to Reply to NRC Staff Opposition to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews” (June 16, 2008) (ML081690064) (“NRC Staff June 16 Response”).

²³ Motion at 5.

A. The Board Should Refrain From Ruling on the Motion Because the Specific Concerns Underlying the Motion Are Already Before the Commission

New York's Motion centers on the ostensible "conflict" between MD 3.53 and the IP Audit and Review Plan, and its implications for Staff compliance with the mandatory-disclosure requirements set forth in 10 C.F.R. § 2.336(b). This is the same "conflict" that the Petitioners seeking suspension of this and three other license renewal proceedings identified in alleging that the NRC Staff's document retention practices violate federal law and Commission policy.²⁴ Indeed, as noted above, New York concedes that this alleged "internal conflict is currently undergoing Commission review" as a result of the petition filed by Riverkeeper to suspend this proceeding.²⁵ Specifically, the issue of the legal status and effect of MD 3.53 (and the IP Audit and Review Plan) is before the Commission in the suspension proceeding. "It would be inappropriate for the Board to litigate [or otherwise pass judgment] on an issue that is directly before the Commission."²⁶

The Commission has long exercised "inherent supervisory authority" over NRC adjudicatory proceedings, particularly where novel legal or policy issues or issues of generic applicability are involved.²⁷ A ruling on the adequacy or proper scope of the NRC Staff's document retention practices may have implications for NRC licensing proceedings well beyond this one.²⁸ Thus, even if the Board is not inclined to deny the Motion, it should refer the Motion

²⁴ Entergy recognizes that the relief requested by New York (a Board Order mandating preservation of Staff working papers) is narrower than the relief sought by Riverkeeper (suspension of this proceeding).

²⁵ Motion at 4.

²⁶ *La. Energy Servs. (Claiborne Enrichment Center)*, LBP-91-41, 34 NRC 332, 341 (1991).

²⁷ *See, e.g., N. Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1)*, CLI-98-18, 48 NRC 129, 130 (1998) (where the Commission exercised inherent supervisory authority to take *sua sponte* review of a "novel" legal issue with "broad implications for this and other proceedings").

²⁸ New York itself recognizes that its concerns involve Commission policy considerations. New York contends that "[t]he NRC's failure to maintain documentation that relates to its decisionmaking simply fails to conform to [Chairman Klein's] stated philosophy [of regulatory openness]." Motion at 6-7. The extent to which particular NRC Staff actions conform with the Commission's "regulatory philosophy" is, without question, a

to the Commission for resolution (whether in the context of the pending “suspension” proceeding initiated by Riverkeeper or as a separate adjudicatory matter).²⁹

B. The Board Lacks Authority to Direct the NRC Staff in the Conduct of Its Administrative Functions, Which Include the Procedures Used by the Staff to Perform and Document its Safety Evaluation of a License Renewal Application

Even if the matters raised by New York were not already before the Commission, Entergy respectfully submits that the Board lacks the legal authority to grant the relief requested by New York. New York’s Motion fundamentally concerns the manner in which the Staff conducts its safety review of the LRA, with particular focus on the process by which it documents that review. As such, New York—which has not yet been admitted as a party to this proceeding—is asking the Board to probe and potentially intervene in the Staff’s performance of what clearly are Staff administrative functions.

The Commission has long held that a board’s delegated authority does not include the authority to “direct the [S]taff in performance of their administrative functions.”³⁰ Entergy recognizes that the Commission’s rules give licensing boards broad authority to regulate the

policy matter within the purview of the Commission. No one is better suited to judge the NRC Staff’s adherence to Commission policy expectations than Chairman Klein himself and his fellow Commissioners

²⁹ See *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516-17 (1980) (stating that in situations where licensing boards are concerned about the conduct of the Staff’s administrative functions, they may bring the matter to the Commission’s attention or certify a question to the Commission); see also *Statement of Policy on Conduct of Adjudicatory Hearings*, CLI-98-12, 48 NRC 18, 23 (1998) (encouraging licensing boards to refer rulings or certify questions on novel issues to the Commission in accordance with Part 2 procedures early in the proceeding).

³⁰ *Shearon Harris*, CLI-80-12, 11 NRC 514, 516 (1980); see also *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121 (1995) (“As a general matter, the Commission’s licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews.”); *Philadelphia Elec. Co.* (Fulton Generating Station, Units 1 and 2), LBP-79-23, 10 NRC 220, 223 (1979) (staff license application docketing and review activities are not under supervision of Licensing Board); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279-80 (1978) (denying request that a Licensing Board suspend the staff’s review of operating license application); *Rockwell Int’l Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), *aff’d on other grounds*, CLI-90-5, 31 NRC 337 (1990) (noting the “inherently different functions of the technical staff and neutral adjudicators”).

conduct of adjudicatory hearings. However, “[o]nly in most unusual circumstances . . . should a licensing board interfere in the review activities of the Staff.”³¹

The Commission’s aversion to licensing board interference with Staff administrative functions reflects the well-established principle that “in adjudications, the issue for decision is not whether the Staff performed well, but whether the *license application* raises any safety concerns.”³² New York’s Motion ignores this longstanding principle, and, indeed, posits precisely the opposite. Specifically, New York asserts that the “[t]he appeal from a decision to grant or deny the [LRA] will be based, at least in part, on the *quality and thoroughness of the Staff’s review*.”³³ It further states that “the *adequacy of the NRC Staff audit and regulatory activities* with regard to Indian Point [Units] 2 and 3 can become an issue in this proceeding, including any appellate review of the final agency decision.”³⁴

New York’s request for relief thus rests on an erroneous premise. Challenges to the adequacy of the Staff’s review of an application (as opposed to the application itself) are not cognizable in licensing hearings.³⁵ As the board explained in *Diablo Canyon*, “the central focus of an adjudicatory proceeding . . . is the contentions, or issue statements, that an intervening party raises relative to a license application.”³⁶ Therefore, “arguments contending that

³¹ *Fulton*, LBP-79-23, 10 NRC at 224; see also *NEP*, LBP-78-9, 7 NRC at 279 (stating that “it is apparent that the Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff,” and that “10 C.F.R. § 2.718 [now § 2.319] applies only to the hearing process” and “is not an all-purpose delegation of power to licensing boards to control or direct the work of the Staff in carrying out its primary responsibilities”) (citation omitted).

³² *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 396 (1995) (emphasis added).

³³ Motion at 5 (emphasis added).

³⁴ *Id.* at 6 (emphasis added).

³⁵ Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (“With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.”).

³⁶ *Pac. Gas and Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-03-11, 58 NRC 47, 66 (2003).

[Entergy's LRA] cannot be granted based on a Staff failure to perform as a result of what it did or did not consider in reaching a licensing determination . . . are not ones that support the need for [a hearing]."³⁷

Entergy recognizes that the Staff is likely to participate as a party with respect to some, if not all, admitted contentions. Furthermore, the Board undoubtedly would give due consideration to any evidentiary presentations made by the Staff. These observations, however, do not mean that the adequacy of the NRC Staff safety review process is a proper subject for a hearing, as New York contends in its Motion.³⁸ It is the applicant—not the Staff—who bears the burden of proof on any admitted safety issues.³⁹ In fact, “the adequacy of [the] Staff’s safety review is, in the final analysis, not determinative of whether the application should be approved.”⁴⁰

Here, New York asks the Board—before the commencement of any discovery—to order the Staff “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.”⁴¹ In so doing, New York asks this Board to overstep the bounds of the authority delegated to it by the Commission by taking action that clearly would be “an infringement on the Staff’s function.”⁴²

³⁷ *Id.* at 66-67 (internal citations omitted).

³⁸ New York’s argument that the Staff’s safety review process may become the subject of hearing, by virtue of a waiver of 10 C.F.R. § 54.30 granted pursuant to 10 C.F.R. § 2.335, lacks merit. *See* Motion at 5-6. New York conflates two disparate issues. Section 54.30 provides that current licensing basis (“CLB”) issues are not within the scope of a license renewal proceeding, which focuses on aging-management issues.

³⁹ *See Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC at 121; *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), (citing *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 17 (1975)).

⁴⁰ *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC at 121 (citations omitted).

⁴¹ Motion at 7. Contrary to New York’s suggestion, the adequacy of any record subject to judicial review hinges on the evidentiary record compiled through the hearing process (*i.e.*, the parties’ evidentiary presentations and the adjudicatory decisions rendered on the basis of those presentations)—not on the Staff’s safety review process *per se*.

⁴² *Fulton*, LBP-79-23, 10 NRC at 224.

C. New York's Motion is Premature and Lacks an Adequate Basis

Entergy further submits that the Motion is premature, and that New York lacks standing to seek the relief requested therein. The Board's ruling on the admissibility of all petitioners' proposed contentions is forthcoming. As such, no petitioner—including New York—has been admitted as party to this proceeding. The mandatory disclosure process established by 10 C.F.R. § 2.336(b) does not commence until the Board admits at least one proposed contention contesting the LRA.

In addition, the Motion is based on unsupported assertions. Specifically, New York fails to provide any basis for its conclusory assertion that the IP Audit and Review Plan imposes “strict requirements” on Staff reviewing the LRA.⁴³ In the pending “suspension” proceeding before the Commission, the Staff already has explained its position on this issue:

In the Staff's view, [] Audit Plans constitute merely the license renewal division staff's own internal guidance to itself and are intended to serve pragmatic managerial purposes rather than legal purposes. Moreover, the Audit Plans never claim to be setting forth or interpreting any laws or Commission policies regarding document retention. After all, the goal of instructing the Staff how to comply with laws and Commission policy regarding document retention is already being served by MD 3.⁴⁴

New York merely avers that the IP Audit and Review Plan “imposes document retention obligations on [the] NRC Staff,”⁴⁵ and provides no information to controvert the Staff's clearly contrary position concerning the legal or regulatory status of that document.

⁴³ Motion at 4.

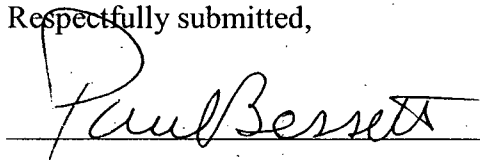
⁴⁴ NRC Staff June 16 Response at 6.

⁴⁵ Motion at 3.

IV. CONCLUSION

For the foregoing reasons, the Board should deny New York's Motion. In the alternative, the Board should refer the Motion to the Commission. As explained above, the specific document retention concerns underlying New York's Motion are directly and currently before the Commission.

Respectfully submitted,



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Dated at Washington, D.C.
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DBI/61956675.1

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

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC:)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	July 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Answer of Entergy Nuclear Operations, Inc. Opposing State of New York's Motion to Preserve NRC Staff Working Papers" dated July 10, 2008, was served this 10th day of July, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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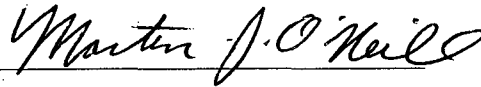
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