

July 21, 2008

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))

NRC STAFF'S RESPONSE TO THE STATE OF NEW YORK'S
MOTION TO PRESERVE ALL NRC STAFF NOTES AND WORKING PAPERS,
AND THE LICENSING BOARD'S RELATED BRIEFING ORDER OF JULY 3, 2008

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to "Motion to Preserve All NRC Staff Notes and Working Papers Pursuant to 10 C.F.R. § 2.336(b)(3)" ("Motion") filed by the State of New York ("New York" or "State") on June 30, 2008. Further, as directed in the Atomic Safety and Licensing Board's related "Order (Directing Briefing in Response to New York's Motion to Preserve Working Papers)" ("Briefing Order"), issued on July 3, 2008, the Staff herein responds to the Licensing Board's questions concerning this matter.¹ For the reasons set forth below, the Staff respectfully submits that the State's Motion should be denied.²

¹ An extension of time for the filing of this response was afforded by the Licensing Board in its "Order (Granting the NRC Staff's Unopposed Motion for Extension of Time)," dated July 10, 2008.

² This response is supported by the Affidavit of Dr. James A. Davis, Senior Materials Engineer in Engineering Review Branch 1, Division of License Renewal ("DLR"), Office of Nuclear Reactor Regulation ("NRR"), attached hereto. As stated therein, Dr. Davis served as Senior Auditor and team leader in the Staff's audit of Indian Point Aging Management Programs ("AMPs"), Time-Limited Aging Analyses ("TLAAs"), and Aging Management Reviews ("AMRs").

BACKGROUND

This proceeding concerns the license renewal application ("LRA") for Indian Point Nuclear Generating Units 2 and 3 ("Indian Point" or "IP"), submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on April 23, 2007. On August 1, 2007, the Staff published a "Notice of Consideration" and "Notice of Opportunity for Hearing" in the *Federal Register*. 72 Fed. Reg. 42,134 (Aug. 1, 2007). The Notice advised that the Staff had found the Indian Point LRA to be acceptable for docketing, and it afforded members of the public an opportunity to request a hearing and to intervene in the NRC's consideration of the LRA. Requests for hearing and petitions for leave to intervene were timely filed by the State and other individuals and organizations, and responses to those petitions and the Petitioners' proposed contentions were then filed by the Applicant and Staff. An oral argument on the Petitioners' proposed contentions was held before the Licensing Board on March 10-12, 2008, and a decision on the Petitioners' standing and the admissibility of contentions is expected by July 31, 2008.³

During this same period, the Staff commenced its review of the Indian Point LRA. As part of its review, the Staff issued numerous Requests for Additional Information (RAIs) to the Applicant regarding the safety and environmental impacts of license renewal, to which the Applicant has responded. In addition, during the period of August 2007 – February 2008, the Staff conducted six on-site audits as part of its environmental and safety reviews of the LRA.⁴

³ See "Memorandum (Notice of Expected Date for Decision on the Admissibility of Contentions)," dated June 16, 2008, at 3.

⁴ The Staff conducted the following on-site audits for the Indian Point LRA: (1) An environmental audit was conducted on September 10-14 and 24-26, 2007; (2) an audit of the Applicant's AMPs and TLAA's was conducted on August 27-31, 2007; (3) an audit of the Applicant's LRA Scoping and Screening Methodology was conducted on October 9-12, 2007; (4) an audit of the Applicant's AMRs was conducted on October 22-26, 2007; (5) an AMP/TLAA/AMR audit was conducted on November 27-29, 2007; and (6) an AMP/TLAA/AMR audit was conducted on February 19-21, 2008. The Staff expects to issue an Audit Report and a Safety Evaluation Report (with open items) later this year.

Four of these six audits related to the Applicant's AMPs, TLAA's and AMRs, and were performed by the Indian Point audit team, generally using the "Audit and Review Plan for Plant Aging Management Reviews and Programs," Indian Point Nuclear Generating Station Unit Nos. 2 and 3 (Sept. 27, 2007) (ADAMS Accession No. ML072290180) ("IP Audit and Review Plan"); in performing these audits, the Staff examined various on-site documents to verify that they are consistent with and support the Applicant's statements in the license renewal application.

On May 2, 2008, the NRC's Office of the Inspector General ("OIG") issued a written report based on its audit of the Staff's review of four other license renewal applications (Browns Ferry, Brunswick, D.C. Cook, and Oyster Creek).⁵ In its report, OIG stated that Staff reviewers who participated in the on-site audits of license renewal applications used "working papers" (including notes and checklists) "during and following the on-site audit to prepare their formal input for an audit report which is then used as input to the SER." OIG Report at 3. OIG further observed that "[t]he reviewers disposed of these working papers when they were no longer needed to support the review and approval of the application."⁶ *Id.* at 3. Further, OIG observed that Staff reviewers did not "preserve copies of all applicant documents reviewed during the on-site audit, and [did] not preserve their own audit working papers as permanent records." *Id.* at 4. OIG opined that the Staff's "failure to retain applicant documents and NRC working papers made it difficult to verify specific details of staff on-site review activities." *Id.* at 5.

⁵ Memorandum from Hubert T. Bell, Inspector General, to Dale E. Klein, NRC Chairman ("NRC Staff Review of License Renewal Applications"), dated May 2, 2008 ("OIG Report") (ADAMS Accession No. ML081280227). An earlier OIG report, issued in September 2007, had addressed the sufficiency of Safety Evaluation Reports ("SERs") prepared by the Staff for license renewal applications.

⁶ The OIG Report noted that the Staff's audit reviewers stated that these working papers "were not retained as agency records and were not maintained in any formal record keeping system"; further, the Report observed that "Handbook 1 of NRC Management Directive 3.53 provides criteria as to what constitutes personally held non-record materials which may be retained or discarded at the author's sole discretion." OIG Report at 3 n.7; emphasis added.

On May 15, 2008, citing the May 2008 OIG Report, Riverkeeper, Inc. and various petitioners in the Oyster Creek, Pilgrim and Vermont Yankee license renewal proceedings filed a “Supplemental Petition” before the Commission, seeking Commission review of the Staff’s license renewal document retention practices in each of those proceedings, including the Indian Point license renewal proceeding.⁷

On June 18, 2008, at a public meeting held by NRC Region I concerning the Region’s inspection of matters related to the Indian Point LRA, Riverkeeper’s legal representative questioned a member of the Staff regarding the Indian Point NRR audit team’s document retention policy. In response, the Staff member stated her belief that the NRR audit team followed the agency’s document retention policy in NRC Management Directive 3.53 (“NRC Records and Document Management Program”), rather than the IP Audit and Review Plan.⁸

On June 30, 2008, the State filed the instant Motion, requesting that the Licensing Board issue an Order compelling the Staff to preserve “all Staff documentation that would have to be produced, or identified as privileged pursuant to 10 C.F.R. § 2.336(b), to any party in this proceeding.” Motion at 1; emphasis added. The State’s Motion generally describes and contrasts the guidance contained in NRC Management Directive 3.53 and in the Indian Point Audit and Review Plan. *Id.* at 3-4. Further, the Motion argues that an Order compelling the retention of documents is required to assure the preservation of all notes, “drafts,” “working

⁷ “Supplemental Petition by Nuclear Information and Research Service; [*et al.*] 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. The petitioners had previously filed, on January 3, 2008, an initial Petition to “Suspend License Renewal Reviews for Oyster Creek, Indian Point, Pilgrim, and Vermont Yankee Nuclear Power Plants Pending Investigation of NRC Staff Process and Correction of Deficiencies” (“Initial Petition”), challenging other aspects of the Staff’s license renewal review practices, based upon an OIG Report of September 3, 2007. Both the Initial Petition and the Supplemental Petition are pending before the Commission.

⁸ Further information regarding the actual document retention practices followed by the Indian Point audit team is set forth below. See discussion *infra*, at 6-11.

papers,” and other documents prepared by Staff members during the Staff’s audit and review of the Indian Point LRA. *Id.* at 5, 6, 7.

On July 3, 2008, the Licensing Board issued its Briefing Order. Therein, the Board Chairman directed the Staff to retain “all documents now in existence that would potentially have to be produced, or identified as privileged pursuant to 10 C.F.R. § 2.336(b) . . . pending further Order from this Board.”⁹ In addition, the Licensing Board directed the Staff to address five questions in its response to the State’s Motion; raising certain legal issues and questions of fact regarding the Staff’s document retention policy and the possible destruction or disposal of the Staff’s audit-related documents.

In the following discussion, the Staff provides its response to the questions presented in the Licensing Board’s Briefing Order and to the State’s Motion. For the reasons set forth below, the Staff respectfully submits that (a) the Staff’s document retention practices are consistent with existing NRC policies and legal requirements, (b) the Licensing Board lacks the authority to compel the Staff to modify its document retention practices, (c) the State’s Motion is fatally defective in that it is premature, and lacks any factual or legal basis, and (d) the State’s Motion essentially repeats the issues raised in *Riverkeeper, et al.*’s Supplemental Petition (currently pending before the Commission), and the Licensing Board should therefore deny the State’s Motion, or refer the Motion to the Commission for its consideration in conjunction with its consideration of the Supplemental Petition.

⁹ In accordance with the Licensing Board’s Order, the Staff has directed its employees and consultants to retain any such documents, pending further Order by the Board. See NRC Staff’s Unopposed Motion for Extension of Time, dated July 9, 2008, at 3, n.3.

I. STAFF RESPONSE TO THE LICENSING BOARD'S QUESTIONS

The Staff provides the following information in response to the questions presented in the Licensing Board's Briefing Order. The statements of fact set forth in response to the Licensing Board's questions, as well as the statements of fact presented elsewhere in this Response, have been verified to be correct by the Staff's IP audit team's unofficial leader, as set forth in the attached Affidavit of Dr. James A. Davis, based on his personal observations and communications with the Indian Point audit team members.¹⁰ To the extent that the Board's questions raise legal issues, additional legal analysis is presented in the Staff's response to the State's Motion, *infra* at 14-27.

A. Statement of Facts

As stated above, the NRC Staff conducted four on-site audits of Indian Point AMPs, TLAAs and AMRs, on August 27-31, 2007; October 22-26, 2007, November 27-29, 2007, and February 19-21, 2008. See n. 4, *supra*. The Staff's Indian Point audit team for AMPs, TLAAs and AMRs ("IP audit team") was comprised of seven NRC employees and four employees of the Brookhaven National Laboratory ("BNL"), who served as consultants to the Staff under a technical assistance contract. These 11 individuals performed their Indian Point audit team duties under the general direction and supervision of Dr. James A. Davis, a Senior Materials Engineer in License Renewal Branch C ("RLRC"), Division of License Renewal, NRR, who acted as the Staff's audit team's unofficial team leader. In addition, the Project Manager for the Staff's review of the Indian Point LRA and various members of NRR management were also

¹⁰ In preparation for filing this Response, Dr. Davis contacted all members of the Indian Point audit team and Staff management involved in overseeing the IP audit (with the exception of one individual who has retired from the NRC and has a medical condition which precludes his communication with the Staff); the facts stated herein are based upon the information provided by the IP team members and Dr. Davis's personal knowledge.

involved to a limited extent in overseeing the Staff's IP audit team, but had no role in the preparation or retention of audit documents related to the IP LRA.

Dr. Davis oversaw the preparation of the IP Audit and Review Plan,¹¹ to serve as a guidance document for the Staff's audit team members' use in performing their AMP, TLAA and AMR audits. This audit plan was prepared pursuant to the general direction in NRR Office Instruction RNWL-100, Rev. 1 (Dec. 21, 2005), which instructs the Staff, in part, as follows:

The staff will also perform consistency with GALL audits at the applicant's facilities. The purpose of these on-site audits is to confirm that the applicant's determination on the aging management reviews and the aging management programs as being consistent with the GALL report or previously approved staff positions are sound and justifiable. The RLRC team leader will lead the audit with support from RLRC staff, NRR technical staff, and contractors. A plant-specific audit plan will be prepared for each LRA which contains the detailed procedures that the project team will follow to plan, perform and document its work.

Id. at 12; emphasis added. Significantly, while NRR Office Instruction RNWL-100 instructs that an audit plan is to be developed, it is silent as to any particular procedures to be employed or any document retention practices to be followed by a license renewal audit team.¹²

¹¹ See Memorandum from James A. Davis to Kimberly Green, dated September 27, 2007, and attached "Audit and Review Plan for Plant Aging Management Reviews and Programs for Indian Point Generating Unit Nos. 2 and 3." The IP Audit and Review Plan was prepared by participants in the NRC's "nuclear safety professional development program" under Dr. Davis' supervision, based on the audit plan for another license renewal application; the draft plan was then reviewed by Staff consultants at Brookhaven National Laboratory.

¹² The license renewal audit and review plans for other facilities have varied considerably over time. The NRC Staff's first audit and review plan was prepared by the Staff for the Robinson, Ginna, Summer, Dresden and Quad Cities facilities; that plan was only three pages in length, and did not include any document retention procedures; this plan was concurred in by the Staff's license renewal program director. Subsequent audit and review plans were prepared by a series of NRC contractors, including Information Systems Laboratories, Inc., Advanced Technologies and Laboratories International, Inc., Brookhaven National Laboratory, and Pacific Northwest National Laboratory; those plans varied significantly (ranging in size to more than 400 pages), and included document retention procedures, with some variations; these plans, however, were not concurred in by OGC, the license renewal program director or any NRC manager higher than the RLRC branch chief. More recently, the Beaver Valley AMP/TLAA/AMR audit team – which Dr. Davis led earlier this year – was conducted without using any audit plan or document retention guidelines. In addition, Dr. Davis expects to conduct an audit of the (continued. . .)

The IP Audit and Review Plan provides a set of audit and review procedures and a list of items to be audited by the IP audit team members, and includes two sentences concerning the document retention procedures to be followed by the IP audit team. In this regard, it states:

6.6 Documents Reviewed and Document Retention

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 at 41; emphasis added. Dr. Davis's memorandum transmitting the IP Audit and Review Plan to his team members was concurred in by the RLRC Branch Chief (Dr. Davis's supervisor), but was not concurred in by other management officials in DLR or NRR or the Office of the General Counsel ("OGC").

In sum, the IP Audit and Review Plan was an internal guidance document developed for use by the Indian Point audit team members.¹³ While certain document retention procedures were included in the plan, other audit and review plans have omitted any document retention guidelines. The Staff was not obliged to include document retention guidelines in the IP Audit

(. . .continued)

Three Mile Island license renewal application in the near future, using an audit plan that does not include any document retention guidelines.

¹³ Further, it should be noted that the IP Audit and Review Plan does not apply to the Staff's audits of other license renewal matters (i.e., the environmental audit and the LRA Scoping and Screening Methodology audit), nor does it apply to any other aspect of the Staff's review of the Indian Point LRA.

and Review Plan, and those guidelines are not and were not intended to be binding upon the Staff's audit team.

B. Responses to the Board's Questions

QUESTION 1

For the retention of documents relevant to this proceeding, is the NRC Staff following the Audit and Review Plan for Aging Management Reviews and Programs, Indian Point Nuclear Generating Station, Units 2 and 3 (Sept. 27, 2007) [IP Audit and Review Plan]?

STAFF RESPONSE

As discussed below, the Staff's IP audit team has generally retained the documents related to its Indian Point AMP/ TLAA/AMR audits. While the Staff's audit team has not been following, specifically, the document retention policy set forth in the IP Audit and Review Plan, its retention of documents has been generally consistent with the policies set forth in that plan.

In this regard, the IP audit team members were given a copy of the IP Audit and Review Plan prior to commencing their on-site audits of the Indian Point LRA; however, with the exception of one team member who followed the audit plan; the team members informed Dr. Davis that they did not review the document retention guidance set forth in that document prior to or while performing their Indian Point audit duties. Further, the IP audit team members have formed Dr. Davis that they retained all documents in their possession, including their personal notes and working papers -- with the exception of the electronic drafts of write-ups prepared for inclusion in the Staff's SER, which were discarded upon being superseded by subsequent drafts thereof. The IP audit team members and Dr. Davis state that these document retention practices are consistent with their usual document retention practices, and that they would only dispose of documents after they are no longer needed -- *i.e.*, drafts are discarded upon being superseded, while all other documents would be discarded after a final

decision has been made on license renewal.¹⁴ In sum, the IP audit team did not intentionally follow the document retention procedures specified in the IP Audit and Review Plan, but the team has, in effect, acted in a manner consistent with that plan, inasmuch as the team members have retained and are retaining their documents (other than superseded drafts) until a final decision is reached on the Indian Point LRA.

QUESTION 2

If the Staff is not following the IP Audit and Review Plan for document retention, what guidance is the Staff using, and who made the decision to use that guidance as opposed to the IP Audit and Review Plan?

STAFF RESPONSE

See Response to Question 1 above. The IP audit team members were unable to point to any specific written NRC document retention guidance document, policy statement, or requirements upon which they based their Indian Point-related document retention practices.

QUESTION 3

Explain the legal basis, and the policy basis, for using an alternative to the IP Audit and Review Plan.

STAFF RESPONSE

See Response to Questions 1 and 2 above. The document retention practices followed by the Staff's Indian Point audit team, as described above, are generally consistent with the document retention practices set forth in the IP Audit and Review Plan, in that the team members' personal notes and working papers (other than superseded electronic drafts of

¹⁴ One individual on the Indian Point audit team (employed by Brookhaven National Laboratory) advised Dr. Davis that he normally retains audit-related documents for three months after the audit report has been issued; he is however, retaining his Indian Point audit-related documents until authorized to discard them.

documents) have been retained. The circumstances involved in the Staff's development of the IP Audit and Review Plan demonstrate that the document retention guidance set forth in the IP Audit and Review Plan constitutes informal, internal guidance solely for the individuals who comprise the IP audit team. Further, the IP Audit and Review Plan does not constitute an official NRC policy or requirement, it was never formally adopted or imposed as a requirement by the NRC, and it does not constitute a legally binding document.

Moreover, as discussed below, the Indian Point Audit and Review Plan was not intended to, and does not, supplant the document retention policies set forth in Management Directive 3.53 – which applies to all NRC employees. That document, which was formally promulgated by the Executive Director for Operations, establishes document retention policies that apply to the Staff's review of the Indian Point LRA as well as to the Staff's performance of its regulatory responsibilities in all other matters. To the extent, if any, that the IP Audit and Review Plan may be inconsistent with MD 3.53, the IP Audit and Review Plan has no legal or regulatory basis and should be disregarded. See discussion *infra* at 17-23.

QUESTION 4

Explain the Board's legal authority to order parties to retain records, and describe the authority for and nature of any sanctions the Board may issue to parties that violate such an order.

STAFF RESPONSE

As pertinent to the State's pending Motion, at this stage of the Indian Point proceeding -- prior to the entry of an Order directing that a hearing will be held, and prior to the admission of any party to such a hearing -- the Licensing Board lacks the authority to direct a potential party

to preserve or disclose documents.¹⁵ In the event that the Licensing Board issues an Order directing that a hearing will be held in this proceeding, the mandatory disclosure obligations set forth in 10 C.F.R. § 2.336 will apply.¹⁶ In that event, parties in the proceeding would be obliged to comply with the mandatory disclosure requirements set forth in 10 C.F.R. § 2.336,¹⁷ and to disclose the discoverable documents subject to such requirements. In this regard, if the Staff elects to participate as a party in the proceeding,¹⁸ it would then produce or identify the documents which it is required to disclose under 10 C.F.R. § 2.336(b), consistent with its responsibilities as a party in the proceeding.¹⁹

With respect to sanctions, the Staff notes that parties who fail to comply with the agency's mandatory disclosure requirements or an Order issued by the Licensing Board may be subject to sanctions. The Licensing Board possesses broad powers to regulate the conduct of parties in an adjudicatory proceeding and to impose such litigative sanctions as may be appropriate, under 10 C.F.R. §2.319. Such sanctions could include, for example, the exclusion

¹⁵ See, e.g., *Rockwell International Corp.* (Rocketdyne Division) (SNM License No. SNM-21, License Renewal), ALAB-925, 30 NRC 709, 718-19, 721-22 (1989) (prior to the grant of any intervention petition, the Licensing Board in an informal proceeding lacked the authority to request information from the Staff and applicant concerning matters not put in controversy by their written presentations, nor could the Board direct the Staff in the performance of its "administrative" (i.e., non-ministerial review) functions).

¹⁶ Such disclosures are required to be made within 30 days following the issuance of an order granting a hearing, and are to be supplemented on a continuing basis, pursuant to 10 C.F.R. § 2.336(a), (b) and (d).

¹⁷ In addition, in any informal proceeding the Staff is obliged to prepare and make available a hearing file, as set forth in 10 C.F.R. § 2.1203.

¹⁸ See 10 C.F.R. § 2.1202(b)(1)-(3).

¹⁹ In any event, the Staff would prepare a hearing file for use in the proceeding, pursuant to 10 C.F.R. § 2.1203.

of evidence, the dismissal of a contention, or even the dismissal of the offending party if warranted.²⁰

Further, 10 C.F.R. § 2.336(e) specifically provides that sanctions may be imposed where a party fails to make its required disclosures:

(e)(1) The presiding officer may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action, or the use of the discovery provisions in subpart G of this part against the offending party, for the offending party's continuing unexcused failure to make the disclosures required by this section.

(2) The presiding officer may impose sanctions on a party that fails to provide any document or witness name required to be disclosed under this section, unless the party demonstrates good cause for its failure to make the disclosure required by this section. A sanction that may be imposed by the presiding officer is prohibiting the admission into evidence of documents or testimony of the witness proffered by the offending party in support of its case.

The Staff further submits that a determination as to whether sanctions are appropriate in any given situation should consider the circumstances involved, including any explanation or justification offered by the offending party, and the potential harm to other parties which may have resulted from that party's conduct. *See Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

QUESTION 5

Advise the Board whether any documents that would potentially have been discoverable in this proceeding have been destroyed, identify those documents, explain when the documents were destroyed, why the documents were destroyed and identify the individual(s) who directed that the documents be destroyed.

²⁰ See, e.g., *Long Island Lighting Co. (Shoreham Nuclear Power Station)*, CLI-89-2, 29 NRC 211, 214-15, 231-32 (1989); *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

STAFF RESPONSE

As set forth above, the Staff's Indian Point audit team has not destroyed any documents, other than electronic drafts of write-ups that were superseded by subsequent drafts. To the best of the Staff's knowledge, no direction was given to the audit team to discard or destroy documents, apart from the guidance contained in the IP Audit and Review Plan and the standard document retention/destruction policies set forth in Management Directive 3.53.

II. STAFF RESPONSE TO THE STATE'S MOTION

A. New York's Claims.

In its Motion, New York claims that urgent Licensing Board action is required, based on statements made by an NRC Staff member at a public meeting on June 18, 2008, that the IP Audit and Review Plan is in conflict with NRC Management Directive 3.53,²¹ and that Management Directive 3.53 (which allows agency employees to discard any "personally held nonrecord materials" at the author's own discretion) is controlling. Motion at 3-4. Based on those statements, New York asserts that "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). *Id.* at 4; emphasis added. New York argues that all documents generated during the license renewal review, including "notes by individual auditors and staff members taken during onsite plant audits, document reviews, and meetings with Entergy or others" are required to be preserved and disclosed under the mandatory document disclosure requirements of 10 C.F.R. § 2.336(b)(3). *Id.* at 5. Further,

²¹ NRC Records and Document Management Program, Directive 3.53 (June 15, 1995, as revised March 15, 2007) ("MD 3.53").

New York asserts that such notes and other documents need to be preserved and disclosed, not only if they were created during the Staff's review of the merits of the LRA, but also if they were created during the Staff's review for "acceptance or rejection for docketing" of the LRA – based on the State's assertion that all such documents are part of "the Staff's review of the application." *Id.* Underlying these broad claims are the State's claims that "the quality and thoroughness of the Staff's review" and "the adequacy of the NRC Staff audit and regulatory activities . . . can become an issue in this proceeding," *Id.* at 5, 6, and that "[d]ocument destruction would prevent a petitioner, the public or the Commission . . . from conducting a meaningful, in-depth review of the NRC Staff's activities." *Id.* at 7. These claims are altogether lacking in factual or legal basis.

In the following discussion, the Staff provides its response to the State's assertions. As set forth below, the Staff submits that the State's Motion is (a) overly broad and lacking in factual basis, (b) lacking in any legal basis, (c) premature and procedurally defective, and (d) improperly asks the Licensing Board to rule upon an issue that is currently pending before the Commission. The Staff respectfully submits that the State's Motion should be denied.

B. The State's Motion Is Overly Broad, and Lacks Any Factual Basis.

The fundamental premise underlying the State's Motion is its claim that the Staff "presumably is destroying documents," and that "absent intervention by this Board, such documents will disappear, thereby hindering the State in its efforts to challenge the Applicant's LRA. This *ipse dixit* claim, however, lacks any factual basis whatsoever.

First, the State's claim that all Staff documents and personal notes are required to be preserved under the IP Audit and Review Plan goes too far: As discussed above, the IP Audit and Review Plan applies only to the Staff's audit of AMPs, TLAAs and AMRs; it has absolutely no bearing on any other Staff review activity or documents. Despite the State's apparent belief,

the IP Audit and Review Plan relates only to the Staff's AMP/TLAA/AMR audit, it does not set out procedures applicable to any other Staff's activities, such as determining whether to accept the LRA for docketing or non-audit aspects of the Staff's review of the LRA. Thus, to the extent that the State claims that the IP Audit and Review plan pertains to all documents created during the Staff's review of the Indian Point LRA, other than documents created during the AMP/TLAA/AMR audit, its claims are overly broad and are not supported by the Staff's IP Audit and Review Plan.

Second, notwithstanding the State's attempt to argue that the Staff's documents are being or will be destroyed absent intervention by the Board, the facts simply do not support the State's "presumption." Rather, regardless of any statements which may have been made by an NRC employee at the June 18 meeting, as to whether the IP Audit Review Plan or Management Directive 3.53 governs the Staff's document retention policies, the facts recited above demonstrate that there is no basis for the State's Motion. Rather, as discussed above, the Staff's audit team members have, in fact, retained the Indian Point audit-related documents in question, including their personal notes; moreover, the team members have indicated that they would retain those documents until a decision is made to grant or deny the LRA. See discussion *supra* at 9-10. The State's "presumption" is simply wrong.

In sum, there is no factual basis for the State's claim that this Board is required to "intervene" to assure the preservation of those documents. To the contrary, if and when the Licensing Board orders that a hearing is to be held in this proceeding, the Staff will produce or identify, within 30 days of the Board's Order, those documents which it is required to disclose under 10 C.F.R. § 2.336(b). At that time, if the State believes that the Staff should have disclosed other documents, the State may then file an appropriate motion with the Licensing Board, under 10 C.F.R. § 2.323. If the Licensing Board concludes that additional documents

should be disclosed, it may then enter an appropriate Order. Thus, there is no basis for the State's assertion that "intervention" by the Licensing Board is required at this time.²²

C. The State's Motion Is Wholly Lacking in Legal Basis.

In its Motion, New York asserts that the Staff is required to preserve documents under the IP Audit and Review Plan, and that the production or listing of those documents on a privilege log "is mandated by 10 C.F.R. § 2.336(b)(3)." Motion at 4. These assertions are altogether flawed, for a number of reasons:

First, as stated above, the IP Audit and Review Plan, developed specifically for the Staff's Indian Point AMP/TLAA/AMR audit team, relates only to documents created during the Staff's audit of Indian Point AMPs, TLAAs and AMRs. It does not relate to any other document, whether related to the Staff's review of the Indian Point LRA or any other facility or Staff activity. See discussion *supra*, at 7-11. Thus, even if the IP Audit and Review Plan established a legally binding requirement, it would only pertain to a limited set of documents, created by members of the Indian Point audit team relating to their audit activities at Indian Point; it has no relevance to or bearing upon the retention of any other document.

Second, the IP Audit and Review Plan did not, and was not intended to, establish a legally binding requirement, even with respect to Indian Point AMP/TLAA/AMR audit-related documents. As discussed above, this plan was created by Staff employees, solely as a guidance document for the Indian Point AMP/TLAA/AMR audit team, without concurrence by senior NRR management or OGC. See discussion *supra*, at 7-11. As discussed above, for

²² Cf. *Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 60 NRC 686, 698 (2004) (rejecting an intervenor's argument in support of using Subpart G hearing procedures, *inter alia*, based on the Board's refusal to "presume that a party will not comply with its duty to disclose 'all documents . . . relevant to the contentions,'" and noting that if there is an unexcused failure to make a full disclosure, the Board would not hesitate to issue appropriate discovery sanctions against the offending party).

some facilities the Staff never adopted any audit plan, while for other facilities the Staff's audit plan omitted any document retention procedures; and for various other facilities, the document retention procedures differed from those in the IP Audit and Review Plan. *Id.* at 7, n.12. Thus, whatever the IP Audit and Review Plan may say, given (a) the disparity in treatment for other license renewal applications, (b) the lack of concurrence by senior NRC management or OGC, and (c) the intent and informal nature of the policies set forth in the IP Audit and Review Plan, one can hardly argue (much less conclude) that the audit plan established a legally binding requirement which this Licensing Board is now obliged to elevate in importance and enforce.

Third, notwithstanding the State's assertions, as discussed below, it is well established that the Staff is not legally required to retain all documents generated prior to or during the review process. The Staff performs its functions under the supervision of the Executive Director for Operations ("EDO") – who is, in turn, subject to supervision and direction by the Chairman of the Commission.²³ As such, the Staff follows and complies with the Commission's established document retention policies and requirements. In this regard, the Commission has adopted a document retention policy to comply with Federal records management laws and regulations issued by the National Archives and Records Administration ("NARA") and the General Services Administration ("GSA"); this policy, applicable to all NRC Offices and organizational units, is set forth in NRC Management Directive 3.53.²⁴ Handbook 1 of Management Directive 3.53 contains "procedures, standards and guidelines for managing NRC records in accordance with NARA and GSA regulations." See MD 3.53, § 3.53-05.

As set forth in Management Directive 3.53, Federal law and regulations require the preservation of agency "records." See MD 3.53, §§ 3.53-01 and 3.53-02. An agency "record"

²³ See 10 C.F.R § 1.32 ("Office of the Executive Director for Operations").

²⁴ See MD 3.53, § 3.53-01.

is defined as documentary 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 . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government or because of the informational value of the data in them.”²⁵ Significantly, this requirement does not include “all” working files, drafts, and handwritten notes. While some of these documents may constitute agency records, Management Directive 3.53, Handbook 1, states as follows:

Drafts, Working Files, and Similar Materials (3)

Working files, such as preliminary drafts and rough notes and other similar materials, will be maintained and filed with the official record for purposes of adequate and proper documentation if they meet the following two conditions:

- They were circulated or made available to employees, other than the creator, for official purposes such as approval, comment, action, recommendation, followup, and to communicate with agency staff about agency business.
- They contain unique information, such as substantive annotations or comments, that adds to a proper understanding of the agency's formulation and execution of basic policies, decisions, actions, or responsibilities.

Examples include—

- Drafts of records (e.g., SECY papers) circulated for approval, comment, or action that are significantly changed in the final version based on comments submitted and those comments, provided insight into the basis for an agency position or decision and the comments are not documented in the official record.
- Information . . . generated or acquired by NRC while inspecting a licensee's facility that contain unique information, the rationale for an NRC decision, or guidance that is not documented in the official record.

²⁵ MD 3.53, Handbook 1, Part 1, at 11; Records Disposal Act, 44 USC § 3301.

MD 3.53, Handbook 1, at 19-20; emphasis added. Agency employees have no obligation to retain all personally held non-record materials. As federal law and Commission policy indicate, personal notes are to be retained only if they were circulated or made available to persons other than the creator for official purposes and contain unique information, not documented in the official record, where that information helps to explain the formulation or execution of agency policies, decisions, actions or responsibilities.²⁶ Personal notes and drafts that do not meet the standards set forth in MD 3.53 need not be retained by their creators.²⁷

The Staff's role as a party in an NRC adjudication does not expand the obligations of NRC employees and consultants to retain personal notes and drafts other than those that are required to be preserved by the Commission's document retention requirements. The

²⁶ Similarly, Handbook 1 of MD 3.53 provides that Federal officials may dispose of "personally held nonrecord materials." MD 3.53, Handbook 1, at 61. "Personal papers" or "personal records" are defined to include the following:

Notes prepared by the NRC employee pertaining to agency business but that—

Are prepared for the individual's own use and have not been circulated to others in the course of transacting NRC business

Are not required to be maintained by NRC policy or procedures

Are retained or discarded at the author's sole discretion

Would not be considered agency records if requested under the FOIA

Id. at 62. MD 3.53, Handbook 1, further states that the "NRC does not have authority over the disposition of or access to personal papers as defined in this section." *Id.*

²⁷ *Cf.* U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters), CLI-06-05, 63 NRC 143; 146-47, 155-56 (2006) (draft license application was not required to be included in the Licensing Support Network for the high level waste proceeding under 10 C.F.R. § 2.1003(a)(1), which requires inclusion of information for "all documentary material (including circulated drafts but excluding preliminary drafts)").

mandatory disclosure requirements set forth in 10 C.F.R. § 2.336 were adopted in 2004,²⁸ long after the Commission adopted Management Directive 3.53. Nowhere in § 2.336 or the Statements of Consideration accompanying the proposed or final rule did the Commission state that it intended to modify the NRC Staff's document retention obligations when an adjudicatory proceeding is held on a license application or proposed action.²⁹ To the contrary, in the Statement of Consideration accompanying the final rule, the Commission stated, "Section 2.336(b) sets forth the disclosure obligations of the NRC staff, regardless of whether it is a party." 69 Fed. Reg. at 2225; emphasis added. There is simply no basis to conclude that the agency's staff is obliged to follow expanded document retention requirements when it is a party

²⁸ Pursuant to 10 C.F.R. § 2.336(b), the Staff is required to disclose and/or provide:

(1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) All 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;

(4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and

(5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

10 C.F.R. § 2.336(b)(1)-(5).

²⁹ See "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004) (Final Rule); "Changes to Adjudicatory Process," 66 Fed. Reg. 19,610, 19,625 (April 16, 2001) (Proposed Rule).

in an adjudicatory proceeding conducted before the Licensing Board and the Commission that differ in any way from its document retention obligations in other circumstances, such as when the Staff does not participate as a party in an adjudication. Moreover, the Commission's document retention policies, established in Management Directive 3.53, establish the agency's document retention practices for all purposes -- including any judicial litigation in which the agency may become involved, where no adjudicatory hearing had been held within the agency on that matter (e.g., in judicial litigation regarding a FOIA request).³⁰

Significantly, New York offers no legal support for any proposition that Management Directive 3.53 does not apply in this proceeding, or that personal notes and drafts are required to be retained in this proceeding where they do not meet the applicable criteria in MD 3.53 (*i.e.*, circulation to others and uniqueness of information that adds to a proper understanding of the agency's decisions).³¹ The IP Audit and Review Plan constitutes nothing more than the license

³⁰ Under the Commission's Freedom of Information Act ("FOIA") regulations in 10 C.F.R. § 9.13; an "agency record" is similarly defined to exclude "personal records," as follows:

Agency record means a record in the possession and control of the NRC that is associated with Government business. Agency record does not include records such as -- . . .

(3) Personal records in possession of NRC personnel that have not been circulated, were not required to be created or retained by the NRC, and can be retained or discarded at the author's sole discretion, or records of a personal nature that are not associated with any Government business; . . .

Cf. Porter County Chapter of the Izaak Walton League of America, Inc. v. AEC, 380 F. Supp. 630; 633 (N.D. Ind. 1974) (handwritten personal notes prepared by AEC staff members in executing their review responsibilities, which are not circulated to or used by anyone other than the authors, and which are discarded or retained at the author's sole discretion, do not constitute "agency records" under FOIA).

³¹ Even if such notes and drafts were deemed to constitute "agency records," they would be subject to withholding under the pre-decisional deliberative process privilege, which 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 & 2)*, CLI-94-5, 39 NRC 190, 197 (1994); *Izaak Walton League*, (continued. . .)

renewal division staff's own guidance to itself; it does not reference MD 3.53 or any laws or regulations regarding document retention, and it does not establish legally binding obligations. The State fails to show any basis for its claim that the IP Audit and Review Plan established legally binding obligations. In sum, the State's Motion is altogether lacking in legal support.³²

D. The State's Motion Is Premature and Procedurally Defective.

Even if the State had presented some factual or legal basis in support of its Motion, the Motion should nonetheless be denied as premature and procedurally defective. In this regard, it should be noted that an adjudicatory proceeding concerning the Indian Point LRA has not yet commenced, and would only commence upon issuance of an Order by the Licensing Board granting a petitioner's request for hearing. Further, no ruling has yet been made on the State's request for hearing, and the State is therefore not a party as yet in any proceeding on the LRA. As a non-party, the State has no standing at this time to file a motion seeking the entry of an Order by the Licensing Board, much less an Order preserving its putative future rights to obtain documents in discovery.³³ Moreover, until an Order has been issued directing that a hearing

(. . .continued)

supra, 380 F. Supp at 633 (even if uncirculated handwritten notes of AEC staff members constituted agency records, the disclosure of such personal documents would invade the privacy of and impede the working habits of individual staff members; would impede employees from committing their thoughts to writing, and would not be available by discovery in ordinary litigation).

³² Nor is there any basis for the State's apparent claim that the Staff's document retention practices or MD 3.53 are inconsistent with the "philosophy" of "transparency" in government. See Motion at 6-7. To the contrary, the Commission's directives in MD 3.53 were adopted in order to assure that NRC document retention and destruction practices are consistent with federal law. Compliance with those directives, including directives pertaining to the NRC's Agencywide Documents Access and Management System assures that documents disclosing agency actions and their underlying bases are readily available for examination by the public, consistent with the philosophy of transparency in government.

³³ See, e.g., *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear power Station) and *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-13, 65 NRC 211, 214-15 (2007) (as a non-party whose contentions had been rejected, the Massachusetts Attorney General lacked standing to request a stay of the proceeding); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power (continued. . .))

will be held in this proceeding, and until the Staff determines that it will participate in a hearing in the proceeding, the Staff (and other potential parties) cannot be compelled to abide by any specific discovery procedures. Rather, 10 C.F.R. § 2.336 imposes mandatory disclosure obligations to commence thirty days after the issuance of an Order granting a request for hearing or petition to intervene. Inasmuch as the Licensing Board has not yet ruled that a hearing will be held, no discovery rights exist at this time³⁴ -- and the State has shown no basis to “presume” that the Staff will not comply with its document retention and discovery obligations if it becomes a party after a hearing has commenced. Therefore, the State’s Motion is premature and procedurally defective, and should be denied.

Finally, the State’s motion improperly asks the Licensing Board to direct the Staff in the performance of its regulatory responsibilities, with respect to its document retention practices. As the Commission has explained, licensing boards have not been delegated the authority to “direct the staff in performance of their administrative functions,”³⁵ or “to supervise the NRC Staff in the performance of its regulatory duties.”³⁶ The creation and retention of notes, drafts

(. . .continued)

Plant, Unit 1), LBP-07-11, 65 NRC 41, 97-98 (2007) (prior to the admission of contentions, a petitioner could not request a stay of the proceeding).

³⁴ *Cf. Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 315 (1991) (no right to discovery or preservation of documents prior to admission of the contention); *see also U.S. Department of Energy* (High-Level Waste Repository), LBP-05-27, 62 NRC 478, 500 n.91 (2005) (Pre-Application Presiding Officer (“PAPO”) Board, prior to the granting of any petitions to intervene, counseled all parties and potential parties to preserve potentially material documents, in a “unique” Subpart J proceeding, where 10 C.F.R. § 2.1003(a) imposes disclosure obligations before intervention petitions have been granted).

³⁵ *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); *see also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), *rev’d in part on other grounds*, CLI-85-2, 21 NRC 282 (1985); *Rockwell International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-22 (1989), *aff’d on other grounds*, CLI-90-5, 31 NRC 337 (1990).

³⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 570 n.87 (2005) (*citing Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004) (“licensing boards do not sit to . . . supervise or direct NRC Staff regulatory reviews” (continued. . .)

and documents by Staff members and consultants during the course of the Staff's review of license applications constitute an integral part of the Staff's administrative review functions. A Licensing Board Order directing the Staff's reviewers to preserve their uncirculated personal notes and preliminary drafts (not required to be retained under Commission law and document retention policies) could have a chilling effect on the Staff's performance of its duties, in that NRC employees and consultants might subsequently refrain from creating personal notes and preliminary drafts, lest those documents suddenly become the unnecessary subject of discovery and scrutiny in an agency adjudication. The State's request that the Licensing Board issue an Order directing the Staff, in the performance of its duties, to preserve non-record documents which need not be retained under existing Commission document retention policies should therefore be rejected.³⁷

E. The State's Motion Improperly Raises an Issue Which Is Now Pending Before the Commission.

While the State urgently requests the immediate entry of a document preservation order by the Licensing Board, it fails to address the fact that its Motion raises an issue that is currently pending before the Commission in this proceeding. Thus, in a Supplemental Petition filed by

(. . .continued)
and "have no jurisdiction over non-adjudicatory activities"); *Curators of the University of Missouri* (TRUMP-S Project), 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.").

³⁷ Nor is there any basis for the State's argument that "the quality and thoroughness of the Staff's review," "the adequacy of the Staff's review," or "the adequacy of the NRC Staff audit and regulatory activities" is an appropriate subject for consideration in this proceeding or any subsequent appellate review. See Motion at 5-6. To the contrary, the only issue appropriate for consideration in this proceeding, on which the Applicant bears the burden of proof, is the sufficiency of its application. See Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (*citing Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807, *review declined*, CLI-83-82, 18 NRC 1309 (1983) ("the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.")). See also Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

Riverkeeper and other petitioners on May 15, 2008, the Commission was asked to undertake review of the Staff's document retention practices in this license renewal proceeding, based on the same OIG Report that underlies the State's Motion.³⁸ In that petition, Riverkeeper, *et al.*, asserted that the Staff's audit-related document retention practices are "illegal"; they further asked the Commission, *inter alia*, to investigate those practices, to determine whether those practices are "hostile to decision-making in a transparent manner with meaningful public participation," to determine whether the documents reviewed by the license renewal audit teams support the conclusion that "the scope of review was adequate including a finding that the AMP is adequate," and to order 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." Supplemental Petition at 14-15, 17-18. The Supplemental Petition further explicitly cites and relies, in part, on the IP Audit and Review Plan. *Id.* at 3. The Staff and Applicant responded at length to the petitioners' assertions,³⁹ and the issues raised in the Supplemental Petition are now under consideration by the Commission.

The State's request for urgent intervention by the Licensing Board fails adequately to apprise the Licensing Board that the issues raised in its Motion are now pending before the

³⁸ As noted *supra* at 3 n.6, the OIG Memo cites Management Directive 3.53, but nowhere states that the Staff failed to comply with MD 3.53 in the four proceedings which OIG examined, nor does it claim that Management Directive 3.53 does not apply to Staff audits.

³⁹ See "NRC Staff's Answer to Supplemental Petition for Additional Investigation and Correction of Deficiencies in License Renewal Reviews," dated May 27, 2008; "Answer of Entergy Nuclear Operations, Inc. Opposing Supplemental Petition to Suspend License Renewal Proceedings," dated May 27, 2008; "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," dated June 16, 2008.

Commission,⁴⁰ or that the Board's consideration of the State's Motion could potentially interfere with, and lead to results that are inconsistent with, the Commission's consideration of these matters, as raised in Riverkeeper, *et al.*'s Supplemental Petition. Further, the State failed to join in Riverkeeper, *et al.*'s Supplemental Petition, and it should not be allowed to inject itself into this issue indirectly, by obtaining Licensing Board consideration of the same matters that are now under consideration by the Commission. The State's Motion should be denied, if for no other reason, on the grounds that the Board's consideration of the Motion would promote inefficiency and inconsistency in this adjudicatory proceeding.⁴¹

CONCLUSION

For the foregoing reasons, the Staff respectfully submits that the State's Motion is altogether lacking in any factual or legal support, is procedurally defective, and improperly raises a matter that is currently under review by the Commission. The Motion should be denied.

Respectfully submitted,



Sherwin E. Turk
Jessica A. Bielecki
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of July 2008

⁴⁰ Indeed, the State makes only an oblique reference to this fact, reporting that Staff members had stated, at a public meeting on June 18, 2008, that "this internal conflict [presumably between the IP Audit and Review Plan and Management Directive 3.53] is currently undergoing Commission review." Motion at 4. No other discussion or mention of the Supplemental Petition appears in the State's Motion.

⁴¹ See generally *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-01, 65 NRC 1, 9 (2007) (Commissioners Merrifield and McGaffigan, concurring); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 ("The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication").