

July 30, 2008

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

DOCKETED
USNRC

July 31 2008 (8:30am)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	
)	
Entergy Nuclear Operations, Inc.)	Docket Nos.
(Indian Point Nuclear Generating)	50-247-LR
Station Units 2 and 3))	and 50-286-LR
)	

**RIVERKEEPER, INC.'S COMMENTS ON NRC STAFF'S AND ENTERGY'S
RESPONSES TO STATE OF NEW YORK'S MOTION TO
PRESERVE WORKING PAPERS**

I. INTRODUCTION

As permitted by the Atomic Safety and Licensing Board's ("ASLB's") Order of July 3, 2008, as amended by its Orders of July 10 and 17, 2008, Riverkeeper, Inc. ("Riverkeeper"), hereby comments on the State of New York's Motion to Preserve All NRC Staff Notes and Working Papers Pursuant to 10 C.F.R. § 2.336(b)(3) (June 30, 2008) ("State's Motion") and the responses by the U.S. Nuclear Regulatory Commission ("NRC") Staff and Entergy Nuclear Operations, Inc. ("Entergy").¹ Riverkeeper supports the State's Motion and believes that the relief requested by the State is both authorized and necessary to ensure that any hearing conducted by the ASLB is fair to all parties and

¹ 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 (July 21, 2008) ("NRC Staff's Response"); Answer of Entergy Nuclear Operations, Inc. Opposing State of New York's Motion to Preserve NRC Staff Working Papers (July 10, 2008) ("Entergy's Answer").

is based on a complete record. Neither the NRC Staff nor Entergy have made meritorious arguments in opposition.

II. COMMENTS

A. Riverkeeper Supports the State's Motion.

The State has requested the ASLB to issue an order:

requiring NRC Staff to preserve all NRC documents that would have to be produced, or identified as allegedly privileged pursuant to 10 C.F.R. § 2.339(b), to any party in the proceeding.

State's Motion at 1. Riverkeeper supports the State's Motion because Riverkeeper has also submitted contentions in this proceeding, raising issues on which the Staff presumably has conducted and will continue to conduct licensing reviews and/or audits which may yield relevant information regarding the adequacy of Entergy's license renewal application. Like the State, Riverkeeper attempted to obtain the Staff's agreement to preserve all discoverable documents without resort to an order by the ASLB, but was unable to do so. *See* State's Motion at 4. Because, in its Response, the Staff continues to refuse to commit to preserving all documents that are discoverable under 10 C.F.R. § 2.336(b)(3), Riverkeeper believes an order by the ASLB to preserve those documents is necessary to ensure the fairness of this proceeding and the completeness of the record.

Moreover, as discussed below in Section II.B, nothing in the responses submitted by the NRC Staff or Entergy persuades Riverkeeper that an order by the ASLB is unauthorized or unwarranted.

Riverkeeper also notes that the relief sought in the State's Motion is distinct from the relief sought in the Petition and Supplemental Petition that Riverkeeper and other

petitioners submitted to the NRC Commissioners on January 3, 2008 and May 15, 2008. Those petitions sought a comprehensive investigation and overhaul of the NRC Staff's program for reviewing aging management-related issues in the Indian Point proceeding and other license renewal proceedings. In contrast, the State's Motion seeks immediate action by the ASLB to preserve discoverable information that may be used in hearings on specific contentions that have been filed in this proceeding. Thus, there is no merit to arguments by the Staff and Entergy that the ASLB may not consider the State's Motion because the same issues are currently before the Commission. *See* NRC Staff's Response at 25-26, Entergy's Answer at 6.

B. The NRC Staff Has an Obligation to Preserve Discoverable Evidence, Starting At the Time That Hearing Requests Were Filed.

Because NRC rules do not specifically address the requirement to preserve discoverable documents, it is appropriate to follow guidance provided in federal case law. *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, LBP-83-17, 27 NRC 490, 494-95 (1983). The U.S. Court of Appeals for the Second Circuit has found that:

The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation – most commonly when suit has already been filed, providing the party responsible for the destruction with express notice . . .

Kronisch v. U.S., 150 F.3d 112, 126 (2nd Cir. 1998). Here, the Staff's obligation to preserve records of its license renewal review arose when the State, Riverkeeper, and other petitioners filed hearing requests regarding the Indian Point license renewal application, thus putting the Staff on notice that the Staff's review of the adequacy of the license application would be relevant to the outcome of the case.

C. The NRC Staff's Assertion That It is Entitled to Destroy Some Review Documents Is Based on the Erroneous Assumption That Government Documents Are Not Discoverable Unless They Meet the Definition of a "Record" Under Federal Record Retention Laws and Guidance.

The NRC Staff argues that "it is well established that the Staff is not legally required to retain *all* documents generated prior to or during the review process." Staff's Response at 18 (emphasis in original). According to the Staff, under federal record retention laws and guidance, including NRC Management Directive 3.53, NRC employees "have no obligation to retain all personally held non-record materials." *Id.* at 20.

The NRC's mandatory document disclosure regulations in 10 C.F.R. § 2.336(b)(3), however, do not limit the Staff's disclosure obligations to documents that meet the definition of a "record." Instead, the standard is much broader, encompassing:

[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). Nothing in this regulation or the history of the regulation indicates that the Commission intended to limit the scope of discovery against the NRC Staff to a subset of documents narrower than described in Section 2.336(b).

The Staff ascribes significance to the facts that (a) the mandatory disclosure requirements in 10 C.F.R. § 2.336(b) were adopted "long after the Commission adopted Management Directive 3.53" and (b) the Statements of Consideration for the proposed and final versions of 10 C.F.R. § 2.336(b)(3) do not mention Management Directive 3.53. Staff's Response at 21. But the absence of any reference to Management Directive 3.53 in the history of Section 2.336(b)(3), and the failure of the rule to use the same terminology as Management Directive 3.53, raise the opposite inference, *i.e.*, that the

Commission did not intend to apply the standard of the Management Directive in its discovery rules. Moreover, had the Commission intended to adopt a discovery standard that was significantly narrower than the concept of relevance used in the regulation that was supplanted by Section 2.336(b) – *i.e.*, 10 C.F.R. §2.744 -- it would have been necessary to explain the departure.

Finally, pointing out that Section 2.336(b) applies to the Staff regardless of whether it is a party to a proceeding, the Staff argues that there is “no basis to conclude that the agency’s staff is obliged to follow expanded document retention requirements when it is a party in an adjudicatory proceeding . . . that differ in any way from its document retention obligations in other circumstances.” Staff’s Response at 21-22.

The Staff’s argument is not persuasive. Generally, hearing notices go out early in the Staff’s review process, and thus review documents are unlikely to have been discarded or destroyed at that point. Once a hearing request is filed, the Staff is placed on notice that the documents it generates in its review may be relevant to the proceeding, and therefore should preserve them. The fact that the Staff may not participate as a party to the proceeding is irrelevant. In any event, as of the filing of a hearing request, the Staff is also on notice that it may be required by the ASLB to participate as a party if “the resolution of any issue in the proceeding would be aided materially by the NRC staff’s participation in the proceeding.” 10 C.F.R. § 2.1202(b)(1)(2).

D. The ASLB Has the Authority and the Responsibility to Enforce the NRC Staff’s Discovery Obligations.

There can be no doubt that the ASLB has the responsibility and the authority to take measures to protect the integrity of this proceeding, including the discovery process. NRC regulation 10 C.F.R. 2.319 provides that:

A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.

As the Commission explained in a 1981 policy statement:

The Commission's Rules of Practice provide the board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) ("1981 Policy Statement").

The NRC Staff's and Entergy's arguments to the effect that the ASLB lacks authority to grant the requested relief are entirely without merit. First, they argue that the ASLB's authority to regulate discovery does not commence until an order is issued admitting contentions. NRC Staff's Response at 23, Entergy Response at 10. As discussed above, however, the obligation to preserve relevant documents arose at the time when the NRC Staff received notice that its review documents could be relevant to an adjudicatory proceeding. The ASLB has the authority to act now on that pre-hearing matter. 10 C.F.R. § 2.319. *See also Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 n.8 (2001) (ruling that Commission could act on a motion to suspend a licensing proceeding before standing had been granted or contentions had been admitted.)

The Staff and Entergy also argue that the ASLB has no authority to instruct the NRC Staff regarding the performance of its administrative functions. NRC Staff's Response at 24-25, Entergy's Response at 7-9. In making this argument, they misconstrue the nature of the relief sought. The State does not seek an order directing the

Staff's internal affairs, but an order directing certain conduct in this license renewal adjudication. The ASLB has full authority to manage this proceeding, including putting parties on notice that if they discard or destroy discoverable evidence they risk being sanctioned pursuant to 10 C.F.R. § 2.336(e)(1) and (2).² None of the cases cited by the Staff and Entergy contradict the ASLB's authority to manage discovery in this proceeding by ordering the Staff to preserve relevant documents or to impose sanctions on the Staff's ability to participate in the proceeding if the Staff ignores the ASLB's instructions.

The Staff also argues that the State improperly seeks to make the adequacy of the Staff's review a subject of the hearing. Staff's Response at 25 n.37. While the Staff is correct that the subject of the hearing is the adequacy of the license renewal application, the Staff's review nevertheless plays an important role in evaluating the adequacy of the application. As the Appeal Board explained in *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985):

We would be less than candid were we to deny that the adjudicatory boards have traditionally found it useful and desirable to rely on the staff's expertise for an evaluation of contested issues, especially technical ones. *See, e.g., Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-553, 10 NRC

² The sanctions that may be imposed by the ASLB apply to the offending party's participation in the hearing, not to its conduct outside of the hearing:

A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding.

1981 Policy Statement, 13 NRC at 454. As discussed in *Kronisch*, 150 F.3d at 126, sanctions may also include taking an adverse inference from the destruction of evidence.

12, 14 n.7 (1979). *See also South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1156 (1981), *review declined*, CLI-82-10, 15 NRC 1377 (1982). This is particularly true where, as here, the primary basis for the proposed contentions is a series of findings that resulted from staff inspections and investigations. Thus, the staff's review is a significant ingredient of NRC licensing proceedings, even though its adequacy cannot be litigated per se, as a contention.

Given the significance of the Staff's role in the license renewal proceeding, preservation of documents that may contain information or conclusions that are adverse to the position presented by the Staff in the hearing is necessary to ensure that the record is complete and the hearing is fair.

D. An Order Requiring the Conservation of NRC Staff Documents is Necessary and Appropriate in This Case.

The U.S. Court of Claims has held that it is appropriate to issue an order to preserve documents where the movant has shown it is "necessary," *i.e.*, that otherwise "relevant evidence will be lost or destroyed." *The Pueblo of Laguna v. the United States*, 60 Fed. Cl. 133, 138 (2004). The movant must also show that the preservation of documents will not be "unduly burdensome." *Id.*

The first prong of the test is satisfied by a demonstration that "the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place." 60 Fed. Cl. at 138. Here, as discussed in the State's Motion at 2, the NRC's Inspector General has found that the NRC regularly discards the working papers developed by inspectors during license renewal audits.

Moreover, the Staff's Response demonstrates that it does not have procedures in place for preserving all documents that are discoverable under 10 C.F.R. § 2.336(b)(3). In fact, as discussed above at page 4, the Staff denies that it has an obligation to do so. Moreover, the Staff's representations in its Response about whether it has preserved

documents or has committed to preserve them in the future are so internally contradictory and confusing that it would be irresponsible for the ASLB to refrain from issuing an order. The Staff's lack of an understandable or consistent policy for preserving discoverable documents is summed up in its response to the ASLB's Question 5, which asked the Staff to advise the Board regarding whether potentially discoverable documents have been destroyed:

As set forth above, the Staff's Indian Point audit team has not destroyed any documents, other than electronic drafts or 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.

Staff's Response at 14. Given that Management Directive 3.53 specifically instructs NRC employees that they may, at their "sole discretion," destroy "non-record" documents (*see* Staff's Response at 20 n.26)-- even though those documents may otherwise meet the mandatory disclosure standards in 10 C.F.R. § 2.336(b)(3) -- the Staff's Response amounts to a statement that documents have not been destroyed unless they have been destroyed. Thus, an order clearly establishing the Staff's obligation to preserve discoverable documents is necessary to ensure the fairness of the hearing and the completeness of the record in this proceeding.

Riverkeeper believes that such an order would not be unduly burdensome, because the NRC obviously has in place a management structure that would allow it to issue appropriate instructions and supervise the identification and assembly of relevant documents.

III. CONCLUSION

Having been put on notice, by the filing of hearing requests, that its license

renewal review documents would be subject to discovery under 10 C.F.R. § 2.336(b)(3), the Staff was required to preserve all documents that support the Staff's review, including all documents that provide support for or opposition to Entergy's license renewal application. The Staff may not rely on Management Directive 3.53 to narrow the category of documents that it preserves.

Because the Staff has explicitly stated that its document preservation obligations are governed by Management Directive 3.53 rather than 10 C.F.R. 2.336(b)(3), because the Staff has refused to commit to retain all documents that are discoverable under 10 C.F.R. § 2.336(b)(3), and in light of the Staff's previous practice of destroying documents relevant to its license renewal reviews, the ASLB should immediately issue an order requiring the Staff to preserve all documents that meet the criteria of Section 2.336(b)(3) for mandatory disclosure.

Respectfully submitted,



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July 30, 2008

CERTIFICATE OF SERVICE

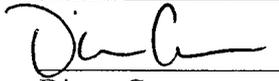
I certify that on July 30 2008, copies of the foregoing Riverkeeper, Inc.'s Comments on NRC Staff's and Entergy's Responses to State of New York's Motion to Preserve Working Papers were served on the following by e-mail and first-class mail:

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