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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY LICENSING BOARD

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 July 30, 2008

THE STATE OF NEW YORK'S REPLY TO NRC STAFF'S AND ENTERGY'S RESPONSES TO THE BOARD'S ORDER DATED JULY 3, 2008

On June 30, 2008, the State of New York moved for an order requiring NRC Staff to preserve all NRC Staff documentation that would have to be produced, or identified as allegedly privileged pursuant to 10 C.F.R. § 2.336(b), to any party in this proceeding. On July 3, 2008, the Board issued an Order related to the State's motion, seeking answers to five questions from NRC Staff. NRC Staff submitted a response to the Board's Order on July 21, 2008. The Board's July 3, 2008 Order granted the State of New York a right of reply (*see* Order, July 3, 2008, at n.2, modified by the Board's Orders dated (1) July 10, 2008, allowing the State of New York until July 30, 2008, to reply to NRC Staff, and (2) July 17, 2008, allowing the State to submit one unified reply to both NRC Staff and Entergy).

Entergy and NRC Staff raised similar objections to the State's motion, namely, that the Board lacks the authority to compel NRC Staff to preserve documents; that the motion is premature; and that the motion should somehow be consolidated with another proceeding to

TEMPLATE = SECY-035 DS 03

which the State of New York is not a party.[1] *See* Answer of Entergy Nuclear Operations, Inc., Opposing State of New York's Motion to Preserve NRC Staff Working Papers (July 10, 2008)("Entergy Answer"); NRC Staff's Response Motion to Preserve All Staff Notes and Working Papers (July 21, 2008)("NRC Staff Response"). Staff also argues that it is controlled by no specific document retention policy; that the document retention policy contained in the Indian Point Audit and Review Plan is guidance and not binding; and that its actions in choosing when to retain or discard documents are consistent with NRC's legal and policy requirements.

Both Entergy and Staff appear to misapprehend the State's motion as something more than it is; the State simply seeks a litigation hold on documents which may become discoverable in this proceeding.

A. Ensuring the creation of a full record falls squarely within the Board's authority.

Entergy and NRC Staff incorrectly seek to deprive this Board of authority over its own proceeding. The Atomic Safety and Licensing Appeal Board has stated that a Licensing Board

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[1]Also, as a note of clarification, both Entergy and NRC Staff mischaracterize the State's position on the pending petition to suspend license renewal proceedings currently before the Commission. In the instant motion to preserve documents, the State recounted statements made by NRC Staff at the public meeting on July 18, 2008 in which Staff stated that the conflict between retention policies was undergoing Commission review. Contrary to Entergy's assertion (*see* Entergy Answer at 3), the State did not concede that the referenced review was taking place within the context of the petition to suspend license renewal proceedings. *See also* NRC Staff response at 26-27, stating that the State "fails to adequately apprise the Licensing Board that the issues raised in its Motion are now pending before the Commission." At the June 18 public meeting, NRC Staff did not make clear how, or in what context, the Commission was reviewing the policy conflict, so the State can make no such concession and is not certain in what context the Commission is currently reviewing the conflict between policies, if indeed it is. Also, this Motion is not about the conflict between NRC Staff document retention policies. Rather, it is about preventing the Staff from destroying documents that it is required to produce pursuant to 10 C.F.R. § 2.336(b).

"may consider *ab initio* whether it is empowered to grant relief which has been specifically sought of it." *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 N.R.C. 741, 742 (1980)(addressing whether the Atomic Safety and Licensing Board convened in a licensing proceeding, or the Atomic Safety and Licensing Appeal Board, had jurisdiction over a petition for intervention).

Additionally, the Licensing Board "has the right and duty to develop a full record for decision making in the public interest." *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-82-87, 16 N.R.C. 1195, 1199 (1982)(ordering NRC Staff to produce information regarding witnesses Staff had sought to withhold). As the Commission itself stated in *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), CLI-77-11, 5 N.R.C. 719, 722 (1977), "[t]he Licensing Boards exist for the very purpose of compiling a factual record in a particular proceeding, analyzing the record, and making a determination based on the record." It is logical, then, that the Board would have the authority to require preservation of documents that may form the record upon which the Board's decision is based. NRC Staff's jurisdictional argument, if accepted, would make a mockery of NRC adjudicatory proceedings and would frustrate both formal Subpart G and informal Subpart L proceedings.

The State of New York is not asking the Board to take over the Staff's safety evaluation; rather, the State asks that the Board simply tell the Staff not to throw out any documents. Thus, the statements contained in *Rocketdyne* and other cases cited by Entergy and Staff do not apply here. *See* Entergy Answer at 7 (n.29, 30), 8 (n.31); NRC Staff Response at 12, n.15.

B. NRC Staff's arguments concerning the relevance - or irrelevance - of the IP Audit and Review Plan and Management Directive 3.53 ignore 10 C.F.R. § 2.336's requirements

NRC Staff devotes much of its response to explaining its position that the IP Audit and Review Plan is mere guidance, and that Management Directive 3.53 is the more authoritative policy on the subject of document retention.[2] However, in doing so, Staff disregards the real authority controlling this issue, which is 10 C.F.R. § 2.336. This regulation takes precedence over all Management Directives and internal guidance documents. Staff cannot possibly meet the requirements of 10 C.F.R. § 2.336(b)(3), which require it to produce "[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" if those documents are destroyed. If the requirements of 10 C.F.R. § 2.336(b) are to be fully met, the preservation of potentially discoverable documents prior to contention admissibility decisions and final agency action is essential. The State of New York seeks no more than a hold on Staff's asserted right to destroy documents so that if, and when, Staff is required to comply with 10 C.F.R. § 2.336(b) it will do so fully.

C. The quality and thoroughness of the Staff review is a relevant issue in this proceeding.

In their oppositions both Staff and Applicant strongly object to the suggestion that the

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[2] Also, NRC Staff misrepresents Ms. Franovich's statements at the June 18 public meeting. *See* NRC Response at 4 ("In response [to questions], the Staff member stated her belief that the NRR team followed ... Management Directive 3.53"). The State of New York representatives present at the meeting do not recall Ms. Franovich stating that the IP audit team followed Management Directive 3.53 in performing audits; instead, Ms. Franovich noted the conflict between documents and stated her position that in the event of a conflict the IP Audit and Review Plan would be superceded.

Staff's performance could be a relevant issue in this proceeding, citing numerous cases where the Commission has ruled that the failure of the Staff to carry out its duties cannot be a basis for denial of a license. These oppositions miss the point.

Pursuant to § 2.336(b)(3) the Staff is obligated to produce the documents that support its review. Thus, it is the regulation, not New York State, that has made preservation of these documents essential. Moreover, as a party to this proceeding, as the Staff will most certainly become, it will submit testimony and documents that arise out of the review it has done and is doing of the LRA. To the extent the Staff review has been inadequate or flawed in any way, it will reflect on the credibility of the testimony offered by the Staff.

For example, if the Staff has not done a thorough review of the underlying documents upon which an aging management proposal of Entergy is based, the Staff's support of that proposal, and Entergy's reliance on Staff approval of that proposal, will be much less persuasive. Both the parties and the Board have every right to assess the thoroughness of the Staff review given the central role its work product will play in this proceeding. Staff notes also may shed light on weaknesses contained in Entergy's license renewal applications, Entergy's responses to NRC information requests, and NRC or third party guidance documents.

In addition, the underlying policy of § 54.30, which excludes consideration of a wide range of safety issues from Board review, is substantially based on the premise that "the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security." Nuclear Power Plant License Renewal Revisions, 60 Fed. Reg. 22461, 22464. If the Board relies on§ 54.30 to exclude some

contentions – ostensibly because Staff reviews demonstrate that licensed activities will be conducted in accordance with the current licensing basis (CLB) – New York and other parties can challenge the Board's application of § 54.30 under 10 C.F.R. § 2.335 on the grounds that Staff has not conducted an appropriate review that would warrant the exclusion afforded by § 54.30. While such a challenge on that basis is still speculative, preserving the documents that may be essential to the formation of such a challenge is appropriate.

D. Relief sought in the pending petition to suspend various license renewal proceedings, even if granted, would not address the State's motion.

Entergy devotes much of its response to the argument that a similar petition, raised before the Commission, addresses similar issues, and NRC Staff makes this argument as well. *See* Entergy Answer at 3 (Referencing the Petition by Nuclear Information Resource Services, et al., 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; *see also* NRC Staff Response at 26-27. However, the State of New York, although it did submit responses in support of the petition in that matter, is not a party to that proceeding. Moreover, the relief sought by petitioners there – primarily, the suspension of all pending license renewal proceedings and increased Commission oversight of NRC Staff, would not address the State's motion, even if granted.[3] The State of

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[3] That petition sought, *inter alia*, an investigation into NRC's technical reviews of license renewal applications, Commission oversight of the preparation and revision of NRC procedures for license renewal reviews and of the establishment of a quality assurance program for NRC Staff review of license renewal applications, Commission oversight of the conduct of NRC Staff safety reviews, and an independent verification by the Commission of whether newly conducted NRC Staff safety reviews provide sufficient basis for the safety findings required by the AEA. *See* Petition by Nuclear Information Resource Services, et al. to Suspend License

New York seeks the immediate implementation of a preservation requirement to ensure the availability of relevant documentation when and if it becomes potentially discoverable; that is, the State seeks a litigation hold. In contrast to the relief sought by the petition to suspend license renewal proceedings, the State here seeks a simple, ministerial, prospective remedy. Moreover, here, the State seeks to preserve a broader set of documents than is at issue in the petition pending before the Commission. To the extent the license renewal suspension proceeding is relevant here, if anything, a continuance of the Board's temporary stay seems particularly appropriate, since a subsequent Commission Order directing that documents be retained for all license renewal proceedings would be hollow relief if the Staff, exercising the rights it claims in its opposition here, were to have already destroyed many of those documents.

E. NRC Staff's ambiguous response concerning documents it has retained justifies the Board's entry of a document preservation order applicable to Staff.

On pages 9-10 of NRC Staff's response, Staff states that "the Staff's IP audit team has generally retained the documents related to its Indian Point audit AMP/TLAA/AMR audits." This statement does not indicate that the breadth of documentation required to be disclosed by 10 C.F.R. § 2.336(b) has been preserved and does not indicate a commitment on the part of NRC Staff to continue to preserve documentation throughout the proceeding. The statement that "[t]o the best of 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" (NRC Staff Response at 16) provides no assurance that either one of the policies has been consistently

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Renewal Reviews, ML080110264.

followed, and even if one or both policies were followed, this statement does not indicate that documents required to be produced by 10 C.F.R. § 2.336(b) have been preserved.

Moreover, NRC Staff repeatedly disavows any obligation to preserve documents and candidly states on multiple occasions in its response that it has followed no document retention policy at all. *See, e.g.,* NRC Response at 8 ("The Staff was not obliged to include relevant document retention guidelines in the IP Audit and Review Plan, and those guidelines were not and are not intended to be binding upon the Staff's audit team"); at 8-9 ("the Staff's audit team has not been following, specifically, the document retention policy set forth in the IP Audit and Review Plan"); at 9 (indicating that Staff "did not review the document retention guidance set forth" in the IP Audit and Review Plan); at 10 ("the IP audit team did not <u>intentionally</u> follow the document retention procedures specified in the IP Audit and Review Plan")(emphasis in original); at 11 ("The IP audit team members were unable to point to any <u>specific</u> written NRC document retention guidance document, policy statement, or requirements upon which they based their Indian Point-related document retention practices.")(emphasis in original). NRC Staff candidly states that the audit team never even read the document retention guidance contained in the IP Audit and Review Plan. NRC Staff Response at 9.

NRC Staff's statements provide no assurance to the public that documents necessary for a transparent analysis of Staff's decisionmaking, and an evaluation of the credibility of its testimony in this proceeding, are being preserved. Instead, NRC Staff's statements concerning the actions taken to preserve documents show ad hoc efforts at best. Moreover, nowhere in Staff's response does it define "documents" it claims to have preserved. Thus, it is not clear if the documents Staff has preserved include electronic documents, emails, notes taken during

meetings or phone calls, etc., although those categories of documents would fall within the normal definition of the phrase "[a]ll documents" which defines the scope of the Staff's obligations under § 2.336(b)(3).

NRC Staff ignores a history of questionable document retention at the agency when stating that "the OIG memo cites Management Directive 3.53 but nowhere states that Staff failed to comply with MD 3.53 in the four proceedings which OIG examined." NRC Staff Response at 26, n.39. While the OIG did not make that express statement in its most recent report, the OIG has found NRC Staff to be non-compliant with Management Directive 3.53 in the past. *See* Audit Report: Review of NRR's License Amendment/Safety Evaluation Process (Sept. 18, 2001)(OIG-01-A-05)(noting that in the context of license amendments,

> NRR [the Office of Nuclear Reactor Regulation] is not complying with the agency's own document retention standards in some cases. [*See* Management Directive Handbook 3.53, Part 1, Volume 3, Part 2 - Records Management, NRC Records Management Program (MD 3.53) and the ADAMS 3.3 Desk Reference Guide (ADAMS Guide).]. ... Working files (e.g., preliminary drafts, rough notes, other similar materials) are to be retained if 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. ... The documents NRR could not provide in a timely manner to OIG in support of the license amendment process (either those missing or incomplete) constitute official agency records and should be available for review and readily retrievable. Without such documents, NRR cannot provide stakeholders the relative confidence that staff implement the thorough, well planned license amendment process as described.).

In fact, the OIG found insufficient document retention going as far back as 1998. *See* OIG's 1998 Follow up Review of NRC's Process for Issuing and Tracking Notices of Enforcement Discretion (NOED)(OIG/98A-06)(July 30, 1998). Commissioner Jaczko, as recently as two weeks ago, acknowledged to the United States Senate that the NRC's document retention practices could be improved. *See* Transcript, United States Senate Subcommittee on Clean Air

and Nuclear Safety Hearing on the Nuclear Regulatory Commission's Licensing and Relicensing Processes for Nuclear Plants (July 17, 2008), at 19-20. Given NRC Staff's history of problematic document retention practices, and its unwillingness here to adhere to a basic litigation principle, there is no basis for the State of New York to put full confidence in Staff's statements that although it is adhering to no specific document retention policy, no relevant documentation has been or will be discarded prior to discovery.

Moreover, NRC Staff's response raises more questions than it answers. Staff submits an affidavit from James A. Davis in support of its response. *See* Affidavit of James A. Davis, sworn to July 21, 2008. Mr. Davis indicates that he was Senior Auditor and team leader for the NRC Staff's audit of Aging Management Programs, Time-Limited Aging Analyses, and Aging Management Reviews related to Entergy's license renewal application for Indian Point Units 2 and 3 since September 2007. *See* Davis Aff., ¶ 2. However, Mr. Davis does not state when in September he assumed this position, which is relevant because Staff had been reviewing the application since May 2007, and had already decided to docket Entergy's application in late July, and he does not indicate familiarity with documents outside of the AMP, TLAA, and AMRs (for example, he does not state that he was involved with phone conversations between Staff and Entergy concerning this, or other relevant license renewal applications, where discoverable notes were likely created). NRC Staff also provides no indication of who was team leader from April 30, 2007 (the date of the submission of Entergy's application) to September 2007. Therefore NRC Staff has not provided this Board with a full assurance that all relevant documentation has been preserved.

Also, NRC Staff state in footnote 10 that "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)." NRC Staff Response at 6, n10. The State of New York believes this description refers to Dr. Kenneth Chang. NRC Staff did not indicate that following Dr. Chang's departure they took any measures to preserve his documents, notes, or computer files.

F. Entergy and NRC Staff's assertion that the State's motion is premature and that the State lacks standing to seek preservation of documents is nonsensical.

Entergy and NRC Staff's argument that the State's motion is premature and that the State lacks standing to seek preservation of documents is nonsensical and meritless. First, the motion is not premature because, unlike the premise of the argument by Staff and Entergy, New York State is not seeking an order to produce documents, which admittedly are not due until after the Board rules on admissibility of parties and contentions, but rather is seeking an order to preserve such documents so that they can be produced in the future should the Board convene an evidentiary hearing. Second, Entergy's position regarding the appropriate timing of seeking document preservation is inconsistent with federal caselaw which requires document preservation to begin as soon as parties are on notice of potential litigation. *See, e.g., UMG Recordings, Inc. v. Hummer Winblad Venture Partners* (In re Napster, Inc. Copyright Litig.), 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006). Entergy's argument that no document retention policy need be followed until at least one petitioner is admitted as a party is difficult to justify, and indeed, Entergy offers no justification for it. Finally, the argument that this motion is premature is irrelevant as the Board's contention admissibility decision is scheduled to follow quickly on

the heels of this filing.

CONCLUSION

The State of New York believes the Board does have the authority to address this straightforward request under its authority to create a full record. However, should the Board find otherwise, the State of New York requests that the Board refer this motion to the Commission and maintain its current stay of document destruction by the Staff pending Commission action.

Respectfully submitted,
July 30, 2008

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DECLARATION OF SERVICE

Pursuant to 28 U.S.C. §1746, Janice A. Dean hereby declares upon penalty of perjury that:

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

2. On July 30, 2008, I forwarded the attached reply to the responses of NRC and Entergy to the State of New York's motion to preserve documentation to the following judges, law clerk, offices, organizations, attorneys, and/or petitioners at the e-mail and street addresses that follow.

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