UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	December 18, 2008

MEMORANDUM AND ORDER
(Scheduling Prehearing Conference and Ruling on New York State's Motion Requesting Consideration of Additional Matters)

This Order deals with several pending issues before the Board. First, the Board hereby notifies the parties that, in accordance with 10 C.F.R. §§ 2.329 and 2.332, it will convene a prehearing conference via telephone at 10:00 AM EDT on Wednesday, January 14, 2009 for the purpose of developing an "Initial Scheduling Order" to govern the conduct of this proceeding. On or before Wednesday, January 7, 2009, counsel for each of the participants shall inform Zachary Kahn, the Board's law clerk, via e-mail (Zachary.Kahn@nrc.gov) who will be participating in the call. They shall also advise him of the number of separate phone lines that each party's representatives will be using to call in on.

All parties and other participants (Interested Governmental Bodies) should advise the Board no later than 5:00 PM EDT on January 7, 2008, of any issues they wish to discuss at the prehearing conference. Pursuant to the accompanying Order issued today,[1] the parties shall provide the mandatory disclosures required under 10 C.F.R. § 2.336 as soon as possible. At

[1] Licensing Board Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) (Dec. 18, 2008).

the prehearing conference, the parties shall be prepared to provide a progress report and a projected time table for providing the remaining disclosures required under 10 C.F.R. § 2.336. The NRC Staff should be prepared to provide the most recent estimate of the dates for completion of the Environmental Impact Statement ("EIS") and Safety Evaluation Report ("SER").

Second, the State of New York (New York) has asked the Board to consider various matters in a case scheduling and management order.[2] Entergy and the NRC Staff generally oppose New York's Motion[3] and Riverkeeper, Inc. (Riverkeeper) and the Town of Cortlandt (Cortlandt) support it.[4] Below we address these issues.

A. Site Visit

New York asks the Board to schedule a site visit.[5] We deny this request and will not order a site visit at this time. At a later date, after the Board has had the opportunity to review the EIS and the SER, the Board may sua sponte order a site visit in order to better understand the issues before us. Alternatively, after the Intervenors have received and reviewed the mandatory discovery materials, and/or the EIS and SER, they may well be able to make a compelling argument for a site visit (10 C.F.R. § 2.705), but they have not done so at this time.

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[2] Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order (Sept. 10, 2008) [New York Motion].

[3] Applicant's Answer to New York State Motion Requesting Consideration of Additional Matters in the Licensing Board's Forthcoming Scheduling and Case Management Order (Sept. 22, 2008) [Applicant's Answer]; NRC Staff's Response to the State of New York's "Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order"(Sept 22, 2008) [NRC Staff Answer].

[4] Riverkeeper, Inc.'s Response in Support of New York State Motion Requesting Consideration of Additional Matters (Sept. 18, 2008) [Riverkeeper Response]; Town of Cortlandt's Answer in Support of New York State's Motion Requesting Consideration of Additional Matters in Scheduling and Case Management Order (Sept. 22, 2008) [Cortlandt Response].

[5] New York Motion at 3.

B. Conference Regarding the Production of Electronically Stored Information

New York requests that the Board address procedures for the production of electronically stored information (ESI) in a Case Management Order. Specifically, New York asks that we address: (1) the format and timing of disclosure of ESI including whether it will be provided in a searchable format; (2) how parties will be given access to computer models; (3) whether paper production will accompany ESI; and (4) how oversized documents such as diagrams, photographs, and maps will be produced.[6]

We believe that New York's proposal has merit. Accordingly we direct the parties to confer with each other, discuss matters relating to the production of ESI that were raised by New York, and, if possible resolve these issues. To the extent that the parties cannot resolve these matters, the Board will resolve them at the Section 2.332 scheduling conference to be held on January 14, 2008.

Since New York is the moving party, we place the burden on New York to coordinate these discussions among the parties. If these matters are not resolved before our scheduling conference, all parties should be prepared to fully discuss and resolve these issues at that time. Accordingly, we do not anticipate an answer of "I don't know" to questions from the Board such as – why, how, how many, or how long?

C. Deadline for Filing Section 2.335 Petitions

New York has asked the Board to set a deadline for the submission of waiver petitions.[7] In support of the Motion, New York suggests that establishing a deadline "will add predictability

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[6] Id at 3-4.

[7] Id at 5.

to a process, which if not subjected to a deadline, could be disruptive to the orderly resolution of the issues in this preceding."[8] We disagree.

We believe that the waiver regulation does not set deadlines because it anticipates that the Board will use a rule of reason in considering such petitions. In determining whether such a petition has been timely filed, this Board will consider the nature of the request, the materiality of the issue that would be implicated by granting the waiver, the delay, if any, that would result if the petition was granted, and the time elapsed between when the petitioner learned of the matters that give rise to the request and when the petition is filed.

We do not believe that it is appropriate to set such a deadline in a vacuum. Instead we believe that it more appropriate to advise the parties to file such petitions as soon as practicable with the understanding that a failure to so may well result in the rejection of an otherwise meritorious petition.

D. Advance and Timely Notification of Meetings and Communications Between Entergy and the NRC Staff

New York next asks the Board to order the NRC Staff:

> to provide notice of all future meetings and phone calls between Entergy and NRC Staff concerning the license renewal application and/or this administrative proceeding sufficiently in advance to allow representatives of [New York] or other parties or participants to attend the meetings or listen in on the phone conversation.[9]

We do not believe that we have the authority to grant the relief sought by New York and, even if the Board did have such authority, we do not believe that it would be appropriate.

As pointed out by the NRC Staff, granting New York's request would prevent the NRC Staff from communicating spontaneously with Entergy when, in completing its independent

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[8] Id

[9] Id at 6.

review function, the NRC Staff deems it necessary and appropriate to do so.[10] This would, in our view, retard the review process and limit the flow of relevant information to the appropriate reviewers. We are not predisposed toward that course. Accordingly, we deny New York's request at this time but direct the NRC Staff to inform the Board at, or before, the scheduling conference on January 14, 2009, of the procedures that it has in place to insure that the substance of communications between the NRC Staff and Entergy is provided to all the parties and the other participants in a complete and timely manner.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[11]

/RA/
Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
December 18, 2008

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[10] NRC Staff Answer at 13.

[11] Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR
	)	50-286-LR
	)	
(Indian Point Nuclear Generating Station,	)	
Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (Scheduling Prehearing Conference and Ruling on New York State's Motion Requesting Consideration of Additional Matters) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of December, 2008