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ADJUDICATIONS STAFFUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

Docket Nos. 50-247-LR and
50-286-LR

ENTERGY NUCLEAR OPERATIONS, INC.)

(Indian Point Nuclear Generating Units 2 and 3))

January 29, 2009

**CONSENT MOTION OF PARTIES REGARDING
INITIAL AND SUPPLEMENTAL MANDATORY DISCLOSURES ON
CONSOLIDATED CONTENTION RIVERKEEPER EC-3/CLEARWATER EC-1****Introduction**

Pursuant to 10 C.F.R. § 2.323(a), Entergy Nuclear Operations, Inc. ("Entergy"), Riverkeeper, Inc. ("Riverkeeper"), Hudson River Sloop Clearwater, Inc. ("Clearwater"), and the NRC Staff (collectively, the "Parties") hereby move the Licensing Board ("Board") to extend the time for certifying completion of initial mandatory disclosures on Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 ("Consolidated Contention"), as required by 10 C.F.R. § 2.336. Additionally, the Parties move the Board to issue a temporary stay on supplemental mandatory disclosures on the Consolidated Contention. Specifically, for the reasons set forth below, the Parties request that the Board take the following actions with respect to the Consolidated Contention only:

- (1) Grant Riverkeeper, Clearwater, and the NRC Staff a 4-week extension, to February 28, 2009, to certify that their initial mandatory disclosures on the Consolidated Contention are complete and accurate, as required by 10 C.F.R. § 2.336 with respect to the Consolidated Contention.
- (2) Issue a 3-month stay, through April 30, 2009, on the supplemental disclosures required by 10 C.F.R. § 2.336(d) with respect to the Consolidated Contention. If, at the conclusion of the 3-month stay, the Commission has yet to rule on Entergy's pending interlocutory appeal, then the parties will renew discussions to determine whether any further stay of supplemental disclosures is warranted.

Riverkeeper, Clearwater, and the NRC Staff, through counsel of record or other designated representative, have authorized counsel for Entergy to make the representations herein and to execute this motion on behalf of each of the Parties. In support, the Parties respectfully state as follows:

Relevant Procedural History

1. On November 30, 2007 and December 10, 2007, Riverkeeper and Clearwater filed Contentions EC-3 and EC-1, respectively, alleging that Entergy's Environmental Report does not adequately assess the significance of new information regarding the environmental impacts of radionuclide leaks from the Indian Point Unit 1 and Unit 2 (IP1 and IP2) spent fuel pools.

2. On July 31, 2008, the Board admitted both contentions and consolidated them pursuant to 10 C.F.R. § 2.316.¹ The Board also held initial disclosures in abeyance pending a ruling on the applicable hearing procedures. On August 11, 2008, Entergy sought reconsideration of the Board's decision to admit the Consolidated Contention.²

3. On December 18, 2008, the Board denied Entergy's request for reconsideration and ordered that the Consolidated Contention be admitted.³ On that same date, the Board also deferred a ruling on the hearing procedure question and directed the parties "to immediately begin mandatory discovery as outlined in Section 2.336."⁴

4. On January 7, 2009, Entergy filed a Petition for Review under 10 C.F.R. § 2.341(f)(2), seeking interlocutory Commission review of the Board's decision admitting the

¹ LBP-08-13, slip op. at 187-88, 191-92, 228.

² Applicant's Motion for Reconsideration of the Board's Decision to Admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 (Aug. 11, 2008).

³ Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) at 16 (Dec. 18, 2008) (unpublished).

⁴ Memorandum and Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) at 13 (Dec. 18, 2008) (unpublished).

Consolidated Contention.⁵ Riverkeeper opposes, and the NRC Staff supports, the Petition for Review.

5. On January 13, 2009, the Parties filed with the Licensing Board a Letter Agreement memorializing certain mandatory disclosure protocols that the parties have agreed to follow in this proceeding.⁶ Among other things, the parties have agreed to supplement (*i.e.*, update) their respective mandatory disclosures every 30 days (at the end of each month).

6. On January 14, 2009, the Board and Parties held a prehearing conference by telephone to discuss various procedural matters, including the mandatory disclosure process. During the conference, the Board ratified the parties' Letter Agreement and directed the Parties to make their initial mandatory disclosures by Friday, January 30, 2009. It also directed the parties to make a "real effort" to resolve issues presented by any future motions filed under 10 C.F.R. § 2.323(a).

Entergy's Proposed Motion and the Parties' Section 2.323(b) Consultations

7. On January 21, 2009, counsel for Entergy notified representatives for Riverkeeper, Clearwater, and the NRC Staff that Entergy intended to file a motion with the Board seeking a temporary stay or deferral of mandatory disclosures on the Consolidated Contention pending final Commission action on Entergy's Petition for Review. In accordance with 10 C.F.R. § 2.323(b) and the Board's January 14, 2009, directive, Entergy requested that the Parties hold a conference call to discuss, with the intent of resolving, the issues presented by Entergy's putative motion.

8. The Parties held a total of three telephone conference calls on Friday, January 23, and Monday, January 26, 2009, to discuss Entergy's proposed stay on mandatory disclosures.⁷ During these calls, the Parties were able to reach agreement regarding the scope and duration of the stay

⁵ Entergy's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Consolidated Riverkeeper EC-3/Clearwater EC-1 (Jan. 7, 2009) ("Petition for Review").

⁶ Agreement of the Parties Regarding Mandatory Discovery Disclosures (Jan 13, 2009).

⁷ Participating representatives included Martin O'Neill and Kathryn Sutton for Entergy; Phillip Musegaas and Deborah Brancato for Riverkeeper; Manna Jo Greene and Ross Gould for Clearwater; and Sherwin Turk, Marcia Simon, and Brian Harris for the NRC Staff.

sought by Entergy. It became evident during the Parties' discussions that the NRC Staff, Riverkeeper, and Clearwater desired additional time to identify documents relevant to IP1/IP2 spent fuel pool ("SFP") leakage.

9. Accordingly, on January 26, 2009, based on their discussions, the Parties agreed as follows with respect to their initial and supplemental disclosures on the Consolidated Contention:

- a. **NRC Staff Initial Disclosure Logs:** The NRC Staff will identify those materials requiring identification pursuant to its mandatory disclosure and hearing file obligations under 10 C.F.R. §§ 2.336(b) and 2.1203, on Friday, January 30, 2009. To the extent that the Staff may possess and identify additional documents related to IP1/IP2 SFP leakage that are within the scope of the Consolidated Contention, but not included in the Staff's January 30, 2009, disclosures, the Staff will identify such documents and certify that its initial mandatory disclosures on the Consolidated Contention are complete and accurate, by February 28, 2009.
- b. **Riverkeeper/Clearwater Initial Disclosure Logs:** Riverkeeper and Clearwater will identify those documents relevant the Consolidated Contention, pursuant to 10 C.F.R. § 2.336, that are reasonably available to them based on their initial searches of their records, on Friday, January 30, 2009. To the extent that Riverkeeper and Clearwater may possess and identify additional documents related to IP1/IP2 SFP leakage that are within the scope of the Consolidated Contention, but not contained in their January 30, 2009, disclosures, they will identify such documents and certify that their initial mandatory disclosures on the Consolidated Contention are complete and accurate, by February 28, 2009.
- c. **Entergy Initial Disclosure Logs:** Entergy will identify those documents relevant to the Consolidated Contention, pursuant to 10 C.F.R. § 2.336, that are reasonably available to it, on Friday, January 30, 2009, and certify that those disclosures are accurate and complete as of October 30, 2008, the date on which Entergy completed its initial search of its records in support of its initial mandatory disclosure obligation. Any relevant documents identified after October 30, 2008, will be included in future supplements to Entergy's initial mandatory disclosures.
- d. **Parties' Production of Documents:** After the Parties provide copies of their initial disclosure logs, they will have the opportunity to request copies of documents identified in other parties' respective disclosure logs. The Parties have agreed that, in accordance with their January 13, 2009, Letter Agreement, they will produce electronic copies of documents identified in their initial mandatory disclosure logs, as specifically requested by other parties, within a reasonable period of time.⁸

⁸ Recognizing that the time required to produce documents might vary from one request to the next (e.g., depending on the size of the request or the particular records at issue), the Parties decided not to establish a specific interval or time period for producing requested documents. The parties agreed, however, that a reasonable period of time might range from a few days to between one and two weeks.

- e. **Temporary Stay on Supplemental Disclosures of Entergy, Riverkeeper, and Clearwater:** Counsel for Entergy, Riverkeeper, and Clearwater agreed to request that the Board issue a 3-month stay on those parties' monthly supplemental disclosures on the Consolidated Contention (*i.e.*, through April 30, 2009), pending final Commission action on Entergy's pending interlocutory appeal. Counsel for the NRC Staff indicated that the Staff does not oppose the requested stay.

If the Commission issues a final ruling on Entergy's interlocutory appeal before the conclusion of the 3-month stay (*i.e.*, April 30, 2009), then the stay will automatically terminate. If supplemental disclosures on the Consolidated Contention still are required, then the Parties will resume making those disclosures within 14 days of the Commission's final ruling or on the last day of the month, whichever occurs later. Subsequent supplemental disclosures will be made on or before the last day of each month, as previously agreed to by the Parties.

If it appears that the Commission may not take final action by April 30, 2009, then the Parties will renew consultations to discuss whether a further stay might be warranted. The Parties reserve the right to seek, for good cause shown, additional time to request and review documents whose disclosure and production may be delayed by institution of the stay on supplemental disclosures.

Board Authority and Basis for Granting the Requested Schedule Modifications and Stay

10. The Board is authorized to approve the mandatory disclosure schedule modifications proposed herein pursuant to 10 C.F.R. §§ 2.319, 2.332(c), and 2.336(a). Section 2.319, in particular, states that the Board "has all the powers necessary" to "take appropriate action to control the prehearing and hearing process," including the authority to set reasonable schedules.

11. The Board actions requested in this Motion are fully warranted. The certification-related schedule modifications will allow the Parties to ensure that their initial disclosures are complete and accurate as of the date of certification.

12. Considerations of judicial and administrative economy support issuance of the requested 3-month stay on monthly supplements to the initial disclosures (which, in any event, will not preclude voluntary disclosures by any party). First, Commission action on the pending interlocutory appeal, if consistent with the position of Entergy and the NRC Staff, may eliminate the need for further disclosures on the Consolidated Contention or, alternatively, narrow the scope of the Parties' future supplemental disclosures. It is well settled that the presiding authority (be it

administrative or judicial) properly exercises its discretion to control the course of proceedings by staying discovery when a dispute is in its early stages and could be disposed of on motion (*e.g.*, interlocutory appeal).⁹

13. Second, the proposed stay avoids the potential unnecessary expenditure of the Parties' limited adjudicatory resources in a proceeding that involves numerous other admitted contentions and associated disclosure obligations. The disclosure obligation is a continuing one. As noted above, future required disclosures on the Consolidated Contention may be rendered unnecessary or narrowed in scope by the Commission's ruling on Entergy's interlocutory appeal.

14. Third, the requested stay on supplemental disclosures will not prejudice any of the Parties.¹⁰ The Parties still will have ample time to prepare for any necessary evidentiary hearing on the Consolidated Contention, which arises under the National Environmental Policy Act ("NEPA") and 10 C.F.R. Part 51. Section 2.332 of NRC regulations requires that any hearing on a NEPA contention await issuance of the Staff's final supplemental environmental impact statement ("SEIS").¹¹ The Staff is not scheduled to issue its final SEIS until at least February 2010. Accordingly, any hearing on the Consolidated Contention is over a year away, thereby leaving sufficient time to accommodate the requested deferral of disclosures pending a final Commission ruling on Entergy's interlocutory appeal.

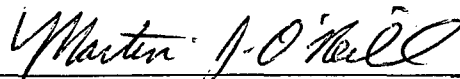
⁹ See, *e.g.*, *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1304 n.13 (5th Cir. 1983); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery."); *White v. Fraternal Order of Police*, 909 F.2d 512, 515-17 (D.C. Cir. 1990) (no abuse of discretion in staying discovery pending resolution of dispositive motion); *19th St. Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000) (internal citations and quotation marks omitted) (stating that "a stay is proper where the likelihood that such [petition] may result in a narrowing or an outright elimination of discovery outweighs the likely harm to be produced by the delay").

¹⁰ See, *e.g.*, *Ingram*, 698 F.2d at 1304 n.13 (stating that "[a] decision to prevent unnecessary discovery because the case could well be decided on the parties' motions is not, on its face, fundamentally unfair to a party desiring discovery").

¹¹ See 10 C.F.R. § 2.332(d) ("Where an environmental impact statement (EIS) is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS.").

WHEREFORE, the Parties have consulted in good faith pursuant to 10 C.F.R. § 2.323(b) and the Board's directive of January 14, 2009, they respectfully request that the Board take the following actions in accordance with the terms specified in paragraph 9 above: (1) extend the time for certifying completion of initial mandatory disclosures on the Consolidated Contention, and (2) issue a 3-month stay on supplemental mandatory disclosures on the Consolidated Contention.

Respectfully submitted,



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Dated at Washington, DC
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	January 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Consent Motion of Parties Regarding Initial and Supplemental Mandatory Disclosures on Consolidated Contention Riverkeeper EC-3/Clearwater EC-1," dated January 29, 2009, were served this 29th day of January, 2009 upon the persons listed below, by first class mail and, except where indicated by an asterisk, by e-mail as shown below.

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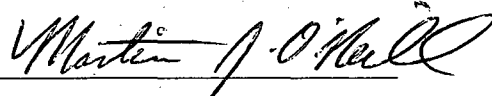
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** Original and 2 copies provided to the Office of the Secretary.

A handwritten signature in black ink, reading "Martin J. O'Neill". The signature is written in a cursive style with a horizontal line underneath it.

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