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NUCLEAR REGULATORY COMMISSION

Title: Entergy Nuclear Operations, Inc.
Indian Point Nuclear Plant

DOCKETED
USNRC

Docket Number: 50-247-LR and 50-286-LR
ALSBP Number: 07-858-03-LR-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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PRE-HEARING CONFERENCE

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In the Matter of: :
ENTERGY NUCLEAR OPERATIONS, : Docket Nos. 50-247-LR
INC. : 50-286-LR
: ASLBP No.
(Indian Point Nuclear : 07-858-03-LR-BD01
Generating Units 1 and 2) :

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Monday, August 24, 2009

Nuclear Regulatory Commission
11545 Rockville Pike
Rockville, Maryland

BEFORE:

LAWRENCE G. McDADE, Chair
DR. KAYE D. LATHROP, Administrative Judge
DR. RICHARD E. WARDWELL, Administrative Judge

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P R O C E E D I N G S

(2:05:17 p.m.)

1
2
3 JUDGE McDADE: Okay. This hearing will
4 now come to order. We're here in the matter of ASLBP
5 number 07-858-03-LR. It is a license renewal matter
6 involving Entergy's Indian Point Facilities 2 and 3.
7 Lawrence McDade is the Chairman of this particular
8 panel. With me are Judges Lathrop, and Judge
9 Wardwell. I would like to go through and, for the
10 record, have those parties identify themselves.
11 Please just indicate who you represent, and just have
12 one person list the names of those people from that
13 entity.

14 First of all, from the NRC Staff, Mr.
15 Turk.

16 MR. TURK: Thank you, Your Honor. I'm
17 Sherwin Turk. With me today are Beth Mizuno, David
18 Roth, Andrea Jones, Brian Harris, Brian Newell,
19 Kimberly Green, and Andrew Stuyvenberg.

20 JUDGE McDADE: From Entergy?

21 MR. BESSETTE: Yes, Your Honor. This is
22 Paul Bessette. I have Jonathan Rund, Kathryn Sutton,
23 and Martin O'Neill.

24 JUDGE McDADE: From the State of New York?

25 MR. SIPOS: Good afternoon, Judge. This

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1 is John Sipos, Assistant Attorney General. I'm in
2 Albany, New York, and with me on the line are
3 Assistant Attorneys General Janice Dean, and I believe
4 Lisa Feiner in our New York City office, and Mr.
5 Anthony Roisman is also on the line, I believe.

6 JUDGE McDADE: Okay. And from
7 Riverkeeper?

8 MR. MUSEGAAS: Yes, Your Honor. This is
9 Phillip Musegaas, -U-S-E-G-A-A-S is my spelling, and
10 I'm here with Deborah Brancato, B-R-A-N-C-A-T-O.
11 Thank you.

12 JUDGE McDADE: Okay. From Clearwater?

13 MR. GOULD: This is Ross Gould, a member
14 representative of Clearwater. I'm on the line. Manna
15 Jo Greene is to be joining us from another location,
16 but I'm not sure if she's on the line yet.

17 MS. GREENE: I am, Your Honor. Manna Jo
18 Greene from Clearwater, Environmental Director.

19 JUDGE McDADE: Okay. Thank you. From the
20 State of Connecticut?

21 MR. SNOOK: This is Robert Snook, S-N-O-O-
22 K, for the State of Connecticut.

23 JUDGE McDADE: For the City of New York?

24 MR. DELANEY: Michael Delaney appearing,
25 D-E-L-A-N-E-Y.

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1 JUDGE McDADE: For the Town of Cortlandt?

2 MS. STEINBERG: Jessica Steinberg.

3 JUDGE McDADE: Okay. Is there anyone on
4 the line yet from Westchester County? Apparently not.
5 And from the Town of Buchanan? Apparently not. Have
6 I missed anybody?

7 MR. SHEEHAN: Your Honor, Neal Sheehan
8 from NRC Public Affairs is also on the line.

9 JUDGE McDADE: Okay. Thank you.

10 There are a number of matters that we want
11 to discuss today. Basically, it's been a while since
12 we've spoken, and we wanted to find out sort of where
13 the status of this case is, where we are, and to get
14 an idea of the time frame that we will be proceeding
15 with.

16 The final Safety Evaluation Report has
17 been published. From the standpoint of the Staff, the
18 indications had been that the final Environmental
19 Impact Statement would be filed sometime in February
20 of 2010. Is that still the best estimate?

21 MR. TURK: Yes, it is, Your Honor.

22 JUDGE McDADE: Okay. So, it's still
23 realistic then that we would be able to have that
24 document by February of 2010.

25 MR. TURK: In February of 2010, yes.

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1 JUDGE McDADE: Okay. What is the current
2 status with regard to the mandatory disclosures? How
3 close -- have they been completed? And, if not, how
4 close are they to being completed? Let me first of
5 all ask from the perspective of the Staff. Do you
6 have additional disclosures? I think there have been
7 several that have been made so far that we've been
8 notified about. How close are you to completing your
9 mandatory disclosures?

10 MR. TURK: We have completed our initial
11 mandatory disclosures. And then, as the Board knows,
12 we're under an obligation to continue to disclose,
13 which we do on a monthly basis.

14 JUDGE McDADE: Okay. So, at this point in
15 time, do the Interveners agree that the mandatory
16 disclosures have been completed? New York?

17 MR. SIPOS: Judge, this is John Sipos from
18 New York. I don't know that the State is in a
19 position yet to make a final determination on that.
20 I certainly would take Staff Counsel at his word, but
21 we believe that there are potentially additional
22 documents which may be relevant to the State's
23 contentions that should be produced. I'm not prepared
24 today to make an extensive presentation on that. We
25 understand that the Staff and Entergy have been

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1 working together to get the FSER completed. We have
2 come across at least one document that we thought
3 should have been produced. And we understand the
4 burden that the Staff is under. We have not -- and we
5 are incorporating that in a motion, which we hope to
6 be filing this Friday on Summary Disposition. So, we
7 are just not in a position yet to say yes or no to
8 that question.

9 JUDGE McDADE: Okay. Well, let me sort of
10 note for the record at this point in time, what we're
11 concerned about is that we not get closer to the date
12 for the hearing, and then wind up in a situation where
13 we have discovery disputes that are going to come
14 forward that are going to delay things. So, what we
15 would ask you to do is, first of all, with regard to
16 discovery, to the degree possible, work it out among
17 yourselves. If there is a document that you believe
18 should be produced that hasn't been, to ask the party
19 that you believe is in possession of those documents
20 with regard to them, if there is a dispute, to then
21 bring that to the attention of the Board at the
22 earliest possible time.

23 At this point in time, of any of the
24 participants who are currently involved, does anybody
25 have any discovery issues that they need to bring to

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1 the Board's attention, or that they think are ripe for
2 bringing to the Board's attention at this time?

3 MR. BESSETTE: Your Honor, this is Paul
4 Bessette. I would like to add that I think overall
5 the mandatory disclosures have been going well. All
6 the parties made an initial disclosure, and have been
7 doing monthly updates. To the extent any parties have
8 had subsequent requests for documents, or questions,
9 I think they've been addressing them between the
10 parties, at least from our perspective. We're getting
11 very good cooperation from the other parties. And I
12 think to date, we've been able to resolve mostly every
13 issue, so I just want to add that I think the process
14 is working well.

15 JUDGE McDADE: Okay. Well, I hope that
16 continues. Again, we don't want to interject
17 ourselves into the discovery process unless it is
18 necessary, and the ideal situation is when the
19 litigants are acting responsibly, as it appears to be
20 in this particular case, and are responding to the
21 requests of the other parties, and doing so in a
22 professional manner. And, hopefully, we won't have to
23 get involved in any of the discovery disputes.
24 Hopefully, there won't be any. But all I'm indicating
25 is in the event that there are, please bring that to

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1 our attention, so that they can be resolved at the
2 earliest time.

3 MR. TURK: Your Honor, this is Sherwin
4 Turk. May I address one comment, briefly?

5 JUDGE McDADE: Please.

6 MR. TURK: We believe that everyone has
7 been working very cooperatively together, including
8 all parties in the case. Mr. Sipos referred to one
9 document that he has discovered, which he discovered
10 through ADAMS. It is not in the hearing file, and
11 need not be in the hearing file. And when he files
12 his Motion for Summary Disposition, we'll state our
13 position on that document. But I think that everyone
14 has been working very well cooperatively.

15 JUDGE McDADE: Okay. Now, the next thing
16 I wanted to discuss, when this issue has been raised
17 before, specifically, with regard to whether or not
18 this would be a Subpart G or a Subpart L hearing, it
19 was left that we were proceeding as possibly a Subpart
20 L, but we did not rule out the possibility of a
21 Subpart G hearing if through the discovery, through
22 the mandatory disclosures that were made, one of the
23 participants were able to justify a Subpart G hearing.
24 At this point in time, do any of the parties
25 anticipate filing a motion to make this a Subpart G

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1 proceeding? Let me ask, first of all, New York?

2 MR. SIPOS: Thank you, Your Honor. This
3 is John Sipos, again. And as the Court is aware, we
4 have raised this issue at a number of junctures in
5 this proceeding. And, again, at this time, I do not
6 believe we're in a position to say if and when we
7 would file such a motion. We are still reviewing the
8 documents that have been produced, both by Entergy,
9 and by NRC Staff. I believe we have a ways to go
10 through that, and I understand that it would be -- it
11 would certainly be appropriate not to delay such a
12 motion. And, as Your Honor previously indicated, not
13 wait until the very end. We would certainly not wish
14 to do that, but we are still going through the
15 documents that were produced as part of the initial
16 disclosure, and then the supplemental monthly
17 disclosures, which have also taken place. And have
18 been also working on a number of other issues, as
19 well, as the Board may be aware of. So, at this time,
20 I cannot give a definitive yes or no as to that.

21 JUDGE McDADE: Okay. Rather than going
22 through each of the parties with that same question,
23 let me just note that we would anticipate probably in
24 about 60 days having another status conference. We
25 would ask all of the parties to consider that

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1 particular issue as they are going through the
2 mandatory disclosures, the materials they have
3 received. And, at our next status conference, we will
4 again raise that issue, and, at that point, may be in
5 a position to set a date by which such motions should
6 be filed, if they were going to be filed. But we'll
7 just shelve it at this point in time. New York has
8 indicated that they're not ready, at this point.
9 We're really not hoping to get a whole lot of motions
10 at a different point in time. In other words, even if
11 Riverkeeper, or Clearwater wanted to move for a G, we
12 would probably hold all of those motions, and rule on
13 it at one time, rather than bifurcated, or
14 trifurcated, or whatever the next one would be. So,
15 let's move on with that, unless anybody has an
16 objection.

17 MR. BESSETTE: No objection here, Your
18 Honor.

19 JUDGE McDADE: Okay. The next has to do
20 with the MAC and the CHECWORKS codes. There were
21 ongoing discussions with regard to that. Are those
22 discussions continuing to be ongoing, first of all,
23 with the MAC codes? New York?

24 MR. SIPOS: Yes, Judge. This is John
25 Sipos, again. And I believe the discussions are

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1 moving forward, and I think they've been productive.
2 NRC, as I understand it, NRC Staff would like New York
3 to enter into a licensing agreement for the use of the
4 MACS2 code, and has provided New York with a licensing
5 agreement. We have looked at that, filled in the
6 blanks, we've made some modifications to it. I am
7 optimistic that we will be able to work that out. So,
8 I'm optimistic that will be able to be worked out.
9 Apparently, there may be a licensing fee, as well, but
10 we'll cross that bridge when we get to it.

11 JUDGE McDADE: Okay. What is the status
12 with regard to CHECWORKS with Riverkeeper?

13 MR. BESSETTE: Your Honor, this is Paul
14 Bessette. I think we can address that. We have
15 agreed, the parties have agreed to have a tutorial on
16 the CHECWORKS with Riverkeeper, between Riverkeeper,
17 EPRI, and Entergy. And that has been scheduled for
18 September 22nd, and Riverkeeper's expert will be
19 attending that. So, that is -- I believe that's on
20 the schedule, and the parties are in agreement on
21 that.

22 JUDGE McDADE: Okay. The next, and let me
23 first put this to the Staff, and see whether or not
24 there's a general agreement with this. From the
25 Staff's standpoint, what would your projection be as

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1 to when this case would be ready to go to hearing?
2 Assume for the sake of argument, and a couple of
3 questions there. One, assuming that the final
4 Environmental Impact Statement is issued in mid-
5 February of 2010, would the Staff view it as having a
6 bifurcated hearing, having safety issues heard
7 sometime before that, or to have the entire matter
8 heard after the Safety Evaluation Report - excuse me -
9 after the Environmental Impact Statement is issued.
10 And, if so, how much after that? Mr. Turk?

11 MR. TURK: Thank you, Your Honor. The
12 Staff believes that we do not need to bifurcate the
13 hearing. And that if we did bifurcate, it could
14 create two tracks that would keep people from being
15 able to prepare their cases properly while they're
16 working both tracks. We think it's important that the
17 Board allow time for Summary Disposition motions to be
18 filed, and ruled upon before testimony has to be
19 filed. And I was going to suggest, I don't know if
20 you're going to address Summary Disposition motions as
21 a separate item today.

22 JUDGE McDADE: Yes.

23 MR. TURK: It would be my suggestion that
24 when you set a schedule for Summary Disposition
25 motions, that you allow enough time for people to

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1 prepare them, and for you to rule upon them. And, as
2 I see it, that would get us pretty much to the end of
3 this year. And then we will then issuing the final
4 EIS in February. I would say maybe you could rule on
5 the safety issues, Summary Disposition motions early
6 next year, and then we could prepare to go to hearing
7 on safety issues in perhaps late spring, and possibly
8 start hearings on environmental issues later in the
9 year. I don't know if we do that as a bifurcated
10 hearing, or simply as a matter of scheduling based
11 upon how many issues remain to be heard.

12 JUDGE McDADE: This is Judge McDade,
13 again. I would think that in the event we had a
14 schedule similar to what you described, we would go to
15 hearing on all issues at one time. The only reason
16 that we would bifurcate it, and do safety, as opposed
17 to environmental, is if there could be a significant
18 time saving by getting one out of the way while the
19 environmental review is continuing. Based on what the
20 Staff said, if we were to do that, if anything, it
21 might delay the environmental delay, and really
22 wouldn't move the ultimate resolution of this matter
23 ahead at all.

24 MR. TURK: But without bifurcation, Your
25 Honor, it would be my suggestion that we go to hearing

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1 next summer, which would allow time for ruling on all
2 Motions for Summary Disposition on all issues.

3 JUDGE McDADE: Okay. Now, with regard to
4 the motions that are currently out there, one motion
5 that we have in front of us, there was a Motion for a
6 Protective Order. And in that motion, it indicated
7 that the parties were basically in agreement with the
8 protective order, but that the Staff had some
9 additional comments it would file. Mr. Turk, when do
10 you anticipate that we'll see the Staff filing?

11 MR. TURK: We'll file today, Your Honor.

12 JUDGE McDADE: Okay. Is it the kind of
13 thing that is going to be relatively self-evident, or
14 is it something that you anticipate that we would need
15 to get the parties together again on?

16 MR. TURK: I believe it will be self-
17 evident. I don't know if any of the other parties
18 will want to file a response. I did coordinate with
19 the parties last week. I told them what the Staff was
20 going to propose to be modified in the order. I've
21 heard from the parties. In fact, I'm changing what I
22 suggested based on what I've heard, but there may
23 still be a few people who -- or a few parties who want
24 to respond to what we give you.

25 Essentially, what I'm going to do is, I'm

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1 going to give you a very lightly marked up copy of the
2 protective order that the other parties proposed,
3 along with an explanation of why we think it's
4 appropriate to make those few small changes. So, if
5 the other parties need to respond, perhaps they could
6 do that quickly, so that you could rule.

7 JUDGE McDADE: Okay. What we would ask
8 is, once the parties have an opportunity to take a
9 look at the document, we certainly will not rule
10 without having an opportunity -- allowing the other
11 parties an opportunity to comment. Certainly, at
12 least 10 days in which to comment. However, if prior
13 to that point in time it becomes evident that you're
14 not going to file a response, if you could please just
15 notify Mr. Kahn so that we will not be waiting for a
16 reply from someone who isn't going to file it. It may
17 well be that after the parties get an opportunity to
18 look at what the Staff's comments are, they'll either
19 be able to respond quickly, or will be able to
20 indicate that no response is going to be forthcoming.
21 But, in any event, we'll give you at least 10 days
22 within which to file a response.

23 Okay. The next has to do with Motions for
24 Summary Disposition. First, we did a get a Motion for
25 Summary Disposition from the State of New York, or,

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1 rather, a request for an extension of time within
2 which to file the Motion for Summary Disposition. We
3 did grant that. Subsequent to that, we did receive a
4 pleading from Entergy, in which they indicated that
5 although they did not oppose the motion, they thought
6 that it was unnecessary.

7 We understand -- we agree with the content
8 of Entergy's memorandum. At the same point in time,
9 we understand the State of New York in dealing with
10 the Commission recognizing that it's better to request
11 than to just assume that you don't need to file, and
12 then wind up not having the opportunity. So, we did
13 grant the motion. However, we do note that it is
14 anticipated under 10 CFR 2.1204 that Motions for
15 Summary Disposition are to be treated differently than
16 other motions. Ordinarily, they would be due only 45
17 days before the date of the hearing, unless a
18 different date is set by the Board. So, for future
19 purposes, to notify the parties that they need not
20 feel compelled to file Motions for Summary Disposition
21 at an earlier date. As we get further towards the
22 hearing, we will set a date by which Motions for
23 Summary Dispositions are to be filed.

24 With regard to motions that have to do
25 with what are viewed as contentions of omission, or

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1 purely legal contentions, those Motions for Summary
2 Disposition can be filed at any time. For other kinds
3 of Motions for Summary Disposition, we would suggest
4 to the parties that you wait until we have set a date
5 for the filing of Motions for Summary Disposition,
6 rather than having these things come in piecemeal.
7 They can be coordinated better in that way.

8 We will be setting the date for the
9 Motions for Summary Disposition significantly before
10 the hearing. Although, it's anticipated by the
11 regulation that it will be at least 45 days, we would
12 anticipate doing it significantly more than 45 days
13 before the hearing. This is a matter that is quite
14 complex, and don't want the parties wasting time
15 putting together testimony when something can be
16 resolved on summary disposition, or, likewise, to be
17 responding to other parties' Motions for Summary
18 Disposition at the same time they are trying to
19 prepare the testimony for the hearing itself. So, we
20 anticipate, given the number of contentions, the
21 number of parties, and the complexity of some of the
22 issues that are currently before us, that we will be
23 setting the motion for filing Motions for Summary
24 Disposition significantly before the hearing date.

25 MR. BESSETTE: Your Honor, this is Paul

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1 Bessette. Just a point of clarification. I'm not
2 sure I understood your point that you would -- was it
3 that you rather not see them before that due date?

4 JUDGE McDADE: What I am suggesting is
5 that they need not be filed for motions that are
6 purely legal, or motions that are -- have to do with
7 contentions of omission. Those can be resolved as
8 quickly as possible based on the record that you
9 currently have, but that there is no need to file
10 other Motions for Summary Disposition prior to that.
11 And it may well be those kinds of motions would simply
12 delay matter until such time as all the parties have
13 had a full opportunity to go through the mandatory
14 discovery. And then I anticipate that if there is a
15 motion to change this to a G hearing that might result
16 in additional discovery, if the motion to change to a
17 G hearing were granted, that having a lot of Motions
18 for Summary Disposition that then would need to sit in
19 abeyance until these other matters are resolved, might
20 not be in the interest of efficiency. So, what we are
21 trying to do is encourage Motions for Summary
22 Disposition on purely legal matters, or relating to
23 motions -- contentions of omission. But to suggest
24 that you think about the timing of filing other
25 motions, given the fact that the parties are still

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1 reviewing the mandatory disclosures, and no decision
2 has been made yet irrevocably whether additional
3 discovery under Subpart G might be justified based on
4 a motion that would be filed upon completion of the
5 review of the mandatory discovery.

6 MR. SIPOS: Judge, this is John Sipos, and
7 if I just may make a brief observation. The State
8 appreciates your observations and guidance, and this
9 was an issue we thought it was better to request than
10 assume. And we would much rather be on the side of
11 prudence and safety here.

12 I guess I should also just note that in
13 reviewing the Statement of Consideration, when the
14 rules were changed back in 2004, that there was this
15 addition that was placed into Rule 2.323. And,
16 apparently, it was a request by industry, which the
17 Staff also agreed with, and the Commissioners agreed
18 with, which was that there be a 10-day clause in
19 2.323. So, that is of concern to us, and we read it
20 as applying to all motions. It's a regulation that we
21 thought, whatever it is, we have to deal with that
22 regulation, as it is written. And that is what
23 motivated our motion. And, as you say, it's better to
24 request than assume, but is the State to take it that
25 that is an observation, or for going forward, as well?

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1 JUDGE McDADE: Yes.

2 MR. SIPOS: Will Your Honors enter an
3 order along those lines? I just do not wish to run
4 afoul of the Statement of Considerations, or the
5 language of the rule.

6 JUDGE McDADE: Okay. One, I think the
7 position of Entergy was clear from their filing. I
8 think the position of the Board is clear from what
9 I've had to say today, that 2.1205 is of a different
10 class than other motions, that the 10-day rule would
11 not be applicable here, that we will set a date by
12 which Motions for Summary Disposition need be filed.
13 And if the parties file on or before that date, or
14 receive an extension from us, it would be viewed by
15 the Board as timely.

16 MR. TURK: Your Honor, this is Sherwin
17 Turk. I'd like to address one point that you made in
18 terms of the timing for filing Motions for Summary
19 Disposition. I'm a little concerned that if all
20 motions are filed on a certain due date, then the
21 parties and the Board will be overwhelmed at that time
22 trying to respond to numerous motions, which they
23 might have been able to address better along the way,
24 rather than waiting for one date to trigger off the
25 20-day response time on everything. So, I'd like to

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1 ask that when you set out an order requiring Summary
2 Disposition motions to be filed by a certain date,
3 that the parties be allowed to file before that date,
4 if they're able to. And any party who is unable to
5 respond because they're waiting for something in
6 discovery, could always then file a Motion for
7 Extension of Time for their response, based on
8 whatever good cause showing they make.

9 JUDGE McDADE: Okay. There certainly is
10 not going to be a trip wire that you cannot file prior
11 to. There will be a trip wire that you cannot after.
12 What we were suggesting is that, at this point, with
13 regard to Motions for Summary Disposition, that they
14 be focused on those that have to do with motions
15 relating to contentions of omission, or purely legal
16 issues. Given the fact that the parties are still
17 reviewing the mandatory disclosure materials, those
18 Motions for Summary Disposition that are inherently
19 fact-based, it may not be in the interest of
20 efficiency to file those while the parties are still
21 digesting the mandatory disclosures. We are not going
22 to set a date, specific date to say you cannot file
23 before this particular date. We're just simply
24 raising that as a consideration, and the parties will
25 then use their own judgment in regard to that. From

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1 your standpoint, it may well be that you won't want a
2 Motion for Summary Disposition that you file to be
3 sitting out there for several months while the parties
4 respond to it, while they are going through and
5 looking for additional discovery material, or feel
6 comfortable with the materials that they've already
7 received. We're not going to set a date. But, as I
8 said, I think we're clear as to what we're expecting.
9 And, again, we're not looking to have an Oklahoma land
10 rush, on a particular day everybody is going to rush
11 in with all of their Motions for Summary Disposition.
12 It will be a cutoff date, not a start date. But all
13 we're doing is suggesting that as you decide how to
14 prepare, you focus, initially, on motions having to do
15 with contentions of omission, and purely legal, and
16 those that are more fact-based that come along later
17 than that.

18 The next having to do with the motions
19 that are currently before us. We do have a motion
20 filed by Entergy with regard to a Motion for Summary
21 Disposition. It was filed on the 14th. The responses
22 would ordinarily be due on September 3rd. There was
23 a motion filed by the State of New York asking for an
24 additional 20 days until September 23rd. We received
25 a reply from Entergy. Entergy points out that under

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1 the Statement of Considerations for 2.1205, the
2 Commission in issuing that regulation was very
3 concerned that Motions for Summary Disposition would
4 be treated expeditiously, and would be treated in a
5 way that would not interfere with, or delay the
6 hearing.

7 In this particular instance, given the
8 fact that we still do not have a hearing date, the
9 Staff has indicated that in its view, we're probably
10 a year away from actually being in the hearing, or
11 very close to that. Does the additional 20 days
12 requested by the State of New York create a
13 possibility in this instance, not to say what we would
14 rule if a similar motion were filed 10 months from now
15 as we get closer to the hearing date, but at this
16 point in time, from the standpoint of Entergy, how do
17 you view giving New York an additional 20 days would
18 interfere with the progress of this hearing?

19 MR. TURK: Your Honor, obviously, with the
20 hearing not scheduled, it would -- we would not state
21 that there is a delay to the hearing. However, we
22 have to state that there is a pattern, we believe,
23 that has developed of the parties not necessarily
24 meeting the published due dates in the Commission's
25 regulations. I think every due date has had request

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1 for extension. And we just believe that certainly
2 Entergy has met all of its due dates, tries
3 judiciously and puts extensive resources into meeting
4 all of its due dates. And we believe that the parties
5 have a reciprocal obligation. And with regard to the
6 position put forth by New York, that we just don't
7 believe they've established the requisite good cause
8 for such a delay. But we understand your position,
9 Your Honor, with regard to not delaying the hearing.

10 We would also note that we have no ongoing
11 mandatory disclosures. There's no pending mandatory
12 disclosures on transformers, because we believe it is
13 more of a -- not a purely legal, but, generally, a
14 legal issue. So, we don't believe any review of
15 mandatory disclosures would delay any ruling on that
16 issue.

17 JUDGE WARDWELL: This is Judge Wardwell.
18 Why do you say it's a legal issue?

19 MR. TURK: Well, Your Honor, we went
20 through the regulatory history of the transformer
21 issue, and we believe that the Commission has ruled,
22 has provided guidance in the Statement of
23 Considerations on active and passive components. And
24 we believe that we've established that it meets that
25 definition. And I don't mean to imply it's a purely

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1 legal issue, Your Honor.

2 JUDGE McDADE: Does the Staff wish to be
3 heard?

4 MR. TURK: We'd like to address two
5 points, Your Honor. I'll address one, I'll ask Mr.
6 Roth to address the second. The first point I want to
7 make is that New York's basis for asking for an
8 extension of time was not really because they needed
9 the additional time; although, they did mention that
10 some of their people have been on vacation. But what
11 they'd like to do is restructure the Commission's
12 rules to give them a chance to file responses after
13 the Staff files its response. And that's really
14 unheard of. The same rules that apply in this
15 proceeding, apply in dozens of other NRC proceedings.
16 Any party that wishes to respond to a Motion for
17 Summary Disposition does so on the schedule set up in
18 the regulations.

19 And, by the way, for New York's benefit,
20 I would point out that the Staff typically does not
21 raise new matters in response to a Motion for Summary
22 Disposition. We consider what the Applicant filed,
23 and then indicate whether or not we agree with it. If
24 we disagree, in which case we might be in the same
25 position as the State, we indicate why we disagree.

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1 So, I don't see any reason for the State to believe ab
2 initio that it needs more time to respond, simply
3 because the Staff will be filing a response 20 days
4 after the Applicant's paper. That's not a good reason
5 to get an extension of time here.

6 In fact, I was going to file a paper today
7 indicating that view, and indicating that I don't
8 think the State has shown good cause. I would simply
9 state my position now on this telephone conference and
10 avoid having to file that paper. But in response to
11 your question about does it really matter since the
12 hearing is so far off, I would say I agree with
13 Entergy, no, it doesn't matter if the State gets 20
14 additional days here, as long as we're not setting
15 ourselves up for a situation in the future where New
16 York believes that any time a Motion for Summary
17 Disposition is filed, they can refer to this telephone
18 conference call, and be given additional 20 days to
19 respond after the Staff's response is filed.

20 JUDGE McDADE: Okay. Let me, at least,
21 state my view, that I don't view this thing as
22 precedential. Specifically, 2.1205 sets a very tight
23 schedule. It sets a very tight schedule anticipating
24 that Motions for Summary Disposition would be filed
25 within a relatively short period of time before the

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1 hearing. And in a situation where, under 1205(a) a
2 motion were filed only 45 days prior to the hearing,
3 the other party would have 20 days to respond. That
4 brings us down to 25 days before the hearing. And the
5 panel is required to rule no more than 15 days. So,
6 obviously, under those circumstances, it would be
7 impossible for the panel to allow an extra 20 days for
8 a response, because the response would then come in
9 after the panel's ruling was already past due.

10 That said, under the circumstances we have
11 here, the consensus of the Board is to grant the
12 Motion for an Extension of Time until, I believe it's
13 September 23rd that was requested by New York, but to
14 make it very clear that this is not precedent for the
15 fact that an additional 20 days is going to be granted
16 in every instance. And, very specifically, as we get
17 closer to the hearing, these times will be adhered to,
18 because it is, basically, unfair to the other parties
19 if they are not. And, also unfair to the Board, who
20 is both preparing for the hearing, and also trying to
21 rule on the Motions for Summary Disposition, and need
22 a reasonable amount of time in order to do that
23 properly, to make sure that its read, digested, and
24 understood, and ruled on. So, at this point, we would
25 note for the record that the motion filed by the State

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1 of New York for an extension of time within which to
2 respond to Entergy's Motion for Summary Disposition
3 with regard to New York State Contention Eight is
4 granted, but with the caveat that we have noted, that
5 this is not precedential, that in the future, and very
6 specifically as we get closer towards the hearing,
7 that the motions will be treated in the same way.

8 At this point, when we sent out the
9 original email notice, we asked the parties to
10 consider whether there are other matters that needed
11 to be discussed during the course of this status
12 conference. We did not hear from any of the parties
13 with regard to any additional matters that they wish
14 to have discussed or resolved at this particular
15 status conference. We would anticipate having another
16 status conference in about 60 days, just to see where
17 we are, and see if we're in a position to set a more
18 specific schedule at that point in time.

19 Mr. Turk, at this point, is there anything
20 that the Staff has that they would like to discuss at
21 this status conference?

22 MR. TURK: Your Honor, just one brief
23 item. Inasmuch as the Board has granted New York the
24 extension of time to respond to Entergy's Summary
25 Disposition motion, may we request that the Staff be

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1 allowed to file on the same date, September 23rd, only
2 because people have been away on vacation. It's been
3 a little difficult to coordinate.

4 MR. SIPOS: Judge, this is John Sipos.
5 May I be heard on that, as well?

6 JUDGE McDADE: Yes.

7 MR. SIPOS: I have certainly no objection
8 to providing the Staff with some additional period of
9 time here, and I certainly understand their vacation-
10 needs, just like the State has some scheduling
11 conflicts. In fact, next week, I am the one who is
12 going to be out all week, and that's when the motion
13 was to come due.

14 But I think it would be helpful,
15 appropriate, and efficient if there was some period of
16 time in this particular instance where the State could
17 see what the NRC Staff is suggesting. This is a
18 contention, which the Staff opposed -- I understand
19 that -- back at the contention admissibility. This is
20 a motion where Entergy and Staff consulted, which is
21 certainly appropriate, but they had discussions about
22 this before the motion was filed. And I think the
23 Staff -- I assume the Staff is going to -- it is
24 undertaking the effort, because it believes it has
25 something substantive to say, and to add to whatever

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1 Entergy has already prepared. And I think from just
2 a due process perspective, in this instance, rather
3 than asking to file a -- making a motion to file a
4 reply, if the Staff says something else, I mean,
5 making the analogy to Federal Court, this would be a
6 situation where a defendant might make a Motion for
7 Summary Judgment, and while the plaintiff then
8 responds, another defendant comes in with more
9 supporting arguments on the same day that the
10 plaintiff's response is due. And I just think from an
11 efficiency and fairness perspective -- I'm certainly
12 not opposing the Staff's request for additional time,
13 but I think it would be helpful if the State could see
14 what the Staff is proposing, and take that into
15 account with expert availability, and things like
16 that.

17 JUDGE McDADE: Okay. What I'm going to do
18 is this. And, basically, 2.1205 does not anticipate
19 the kind of response reply that the State of New York
20 is suggesting here. And part of the reason for that,
21 based on the Statement of Consideration, is the very
22 tight time frame that people would be under in ruling
23 on Motions for Summary Disposition, as you approach
24 the hearing.

25 In this particular interest, and speaking

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1 selfishly for the Board, I think it might well be
2 helpful for the Board to allow the State of New York
3 to read and digest the Staff's position, and to
4 comment on it, so that the Board's decision would be
5 more fully informed. And given the fact that in this
6 instance we are not under tight time constraints, what
7 I would propose to do is this; view what the Staff
8 said here today as an oral motion for an extension of
9 time, to grant them a 10-day extension, and to grant
10 New York a 20-day extension. So, therefore, both
11 parties will have an extension of time, but the State
12 of New York will have an opportunity in that last 10-
13 day period to read what the Staff has said, and if
14 appropriate, if necessary from their view, to address
15 any additional issues raised by the Staff in that
16 pleading.

17 MR. BESSETTE: Your Honor, this is Paul
18 Bessette. I hate to bring this up, but I will. New
19 York is planning on similarly filing a Motion for
20 Summary Disposition in a week or so. I believe -

21 MR. SIPOS: We're going to try for this
22 Friday, Paul.

23 MR. BESSETTE: Within a week. And with
24 the Labor Day holiday, I mean, is everything that New
25 York is requesting, does that apply to Entergy, as

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1 well? We get 20 extra days, 10 days after the Staff
2 replies?

3 JUDGE McDADE: The answer is, I'm not
4 going to commit ourselves one way or the other at
5 this. Let's see what's filed, and when it's filed.
6 Certainly, again, not setting a precedent, as we get
7 closer toward the hearing, we're going to be much
8 tighter on time frames, but also recognizing that the
9 parties don't have control over when other parties
10 file, and we do have the Labor Day weekend coming up.
11 If Entergy believed that it would be -- given your
12 schedules you would want additional time to respond to
13 New York's motion, I think given what we have said
14 today, you could anticipate that the Board would be
15 very liberal. We would be surprised, given the
16 request by New York, and the Board's ruling on it,
17 that they would oppose your request for an extension
18 of time, and that reasonably you could anticipate that
19 the Board view that liberally.

20 MR. BESSETTE: Thank you, Your Honor.

21 MR. TURK: Your Honor, this is Sherwin
22 Turk.

23 JUDGE McDADE: Yes.

24 MR. TURK: We thank you very much for the
25 additional time in which to respond to Entergy's

1 motion. Our Safety Project Manager has just returned
2 from vacation, so she's new to reviewing the motion,
3 so the additional time will come in handy for her, and
4 for Staff Counsel.

5 But I would point out two things that the
6 State raised in supporting its motion. I know the
7 rule has been made, but I want to point out two
8 things. There were no consultations between Entergy
9 and the Staff with respect to the substance of the
10 motion, in terms of framing it, or anything that the
11 State may have suggested was somehow untoward.

12 MR. SIPOS: I wasn't suggesting it was
13 untoward, Mr. Turk.

14 MR. TURK: All right. Because what
15 happens is the -- whenever someone files a motion,
16 there's this initial consultation which takes place.
17 And I don't think anything more than that has happened
18 here. And, by the way, I would offer my view that
19 it's -- a Summary Disposition motion does not require
20 consultation, because by its nature, it's the kind of
21 thing that can't be resolved by the parties before
22 going to the Board. Perhaps it can, but in most cases
23 it's going to require some sort of a detailed
24 response. Anyway, that was the first point.

25 And the second point was, there's nothing

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1 in the Federal Rules that would support the State's
2 position. The Federal Rules simply, under Rule 56,
3 simply provide an opportunity for a party against whom
4 a Motion for Summary Disposition is filed, to file a
5 response. There's nothing in the structure of that
6 rule that supports the State's motion.

7 MR. SIPOS: Well, I would comment that
8 there is a symmetry both in the Federal Rules, and in
9 Federal Court practice. And for one party to be
10 filing a response to the Summary Judgment Motion while
11 another adverse party gets to chime in on the same
12 day, I have not seen that take place.

13 MR. TURK: I do not oppose what the Board
14 has done in anyway, and I'm not asking for any
15 consideration, but -

16 JUDGE McDADE: This is Judge McDade. Let
17 me interrupt. One, with regard to the initial
18 comment, we did not anticipate -- we did not view that
19 what the State was saying is that anything
20 inappropriate had occurred. We certainly did not view
21 it that way. Quite the opposite, we viewed it as
22 everything went exactly the way it was supposed to go
23 between Entergy and the Staff. The Staff now has to
24 make a decision, and it may well be that the Staff
25 could come out in either position, either supporting

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1 the motion, or opposing the motion. We'll find out
2 when the Staff files its response, as will New York.

3 There is a somewhat different situation
4 here than what you would ordinarily have in a Motion
5 for Summary Judgment in the District Court, in that
6 there you generally have only two parties. Now, here,
7 we have a number of parties. We also have a number of
8 participants, who are not parties, so the situation is
9 somewhat different. We appreciate the analogy, and we
10 understand, also, the distinction in the analogy is
11 that in litigation in the District Court, you would
12 not have a party such as the NRC Staff that really is
13 not an adverse party to any other party. Now, quite
14 frankly, we view the Staff as being sort of a closer
15 to an amicus, that the Staff's view in this is not to
16 see that Entergy prevails, or that any Intervener
17 prevails, but rather that the Board get things right,
18 as a matter of fact and law. But I do understand from
19 the standpoint of the other parties of wanting to know
20 what the Staff's position is, and having a legitimate
21 interest when time allows to know what the Staff's
22 position is, and to comment on that to the Board.

23 Now, recognizing that unlike most District
24 Court litigation, the Staff is not an adverse party,
25 but the Staff's response in any particular motion

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1 could be adverse to any of the other parties who may
2 wish either to explain why the Staff is right, or why
3 the Staff is wrong. So, drawing that distinction,
4 from the Staff's standpoint, is there anything else
5 that we should take up at this status conference? Mr.
6 Turk?

7 MR. TURK: I'm sorry, Your Honor. The
8 last sentence was cutoff, Your Honor. I didn't hear
9 it.

10 JUDGE McDADE: Was there anything further
11 that we need to take up at this status conference?

12 MR. TURK: There is no additional matter,
13 Your Honor. Just in response to your statement,
14 however, all of the rules on motions have the same
15 provision, that parties opposing or supporting file at
16 a certain time. And the rules do not contemplate that
17 simply because the Staff files a response to any
18 motion, that parties adverse to the Staff's position
19 then get additional time. There's always an
20 opportunity for a party to file a motion for leave to
21 file a reply, but they have to show good cause that
22 it's something that they could not have anticipated.
23 And we certainly wouldn't oppose when somebody says
24 the Staff has raised a new matter that we want to
25 address, and we certainly would agree, new matters

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1 should have an opportunity for people to respond to.

2 JUDGE McDADE: I understand. And I
3 thought I made it clear that what the thinking was, is
4 that under ordinarily circumstances where time may
5 well be pressing, we would not be in a position to do
6 this. It should not be viewed as precedential, but
7 that under these circumstances, we thought it might be
8 helpful for the Board to allow the State of New York
9 to review, to digest, and to comment on the Staff's
10 position. It may support the State of New York, it
11 may oppose the position of the State of New York. We
12 simply don't know, and it is simply more efficient at
13 this point to allow them the extra 10 days, than it is
14 to put us all in a position of them having to file a
15 motion once you file, and then our having to rule on
16 that motion, and taking time, and delay at that point.
17 So, that's why we did it. We understand what the
18 rules are, and we're making a modification based on
19 the factual circumstances of this particular matter.

20 MR. TURK: Thank you, Your Honor.

21 JUDGE McDADE: Does Entergy have anything
22 further to be taken up at this status conference?

23 MR. BESSETTE: No, Your Honor. We have
24 nothing further.

25 JUDGE McDADE: Does the State of New York?

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1 MR. SIPOS: Yes, Judge. This is John
2 Sipos. I have what I hope is a very small logistical
3 issue. As has been indicated, the State is planning
4 to file a Motion for Summary Disposition on New York
5 State Contention Sixteen this Friday. And we,
6 obviously, intend to eFile all the documents, the
7 declarations, Memorandum of Law, and Statement of
8 Uncontested Facts. The question is, a number of the
9 documents that we plan, or we believe that we are
10 going to file at this time, are voluminous. And I am
11 proposing that, as part of our paper file, our paper
12 service, that we put the supporting documentation on
13 a CD-ROM. I think this would save trees, and also
14 make life for our support staff a little bit easier.
15 And I was hoping that that would be agreeable to
16 everyone. And we have -- I think, Ms. Dean has told
17 us we have 26 folks or entities that we usually do
18 service on in this proceeding one way or another, and
19 I'm requesting whether or not this would be acceptable
20 to the Board, and to the parties. And I guess I would
21 also offer, if anyone really wanted paper copy, we
22 could do that, if that was an absolute preference.

23 JUDGE McDADE: This is Judge McDade,
24 again. Would the CD-ROM be electronically searchable?

25 MR. SIPOS: I believe it will have

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1 individual PDF files on it, and based on their status
2 as we import them, I believe some or all will be
3 searchable. Certainly, every document will be set out
4 as a PDF file.

5 JUDGE McDADE: What's the Staff's view on
6 that?

7 MR. TURK: Your Honor, if the State serves
8 a CD-ROM, we'll have to print out the documents for
9 use by the people here, so we're not going to end up
10 really saving trees. It's just a matter of who is
11 going to be the ones to make the copy. We would
12 prefer to get the paper copy. Also, I don't know what
13 documents the State is referring to. The only
14 document I'm aware of so far is a set of slides that
15 they found in ADAMS, so I -- it's really hard to
16 address what these documents are, or how we'll be able
17 to view them without knowing what they are at all.

18 JUDGE McDADE: Well, rather than
19 discussing that right now, why don't you all talk with
20 regard to this. Generally speaking, I think most
21 people's experience has been getting electronically
22 searchable CD-ROMs is preferable to getting a turn-
23 page paper copy, but I don't think it's necessary for
24 us to get into this at this point in time; nor, do I
25 feel really in a position to be able to make any kind

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1 of an intelligent ruling on it. I don't know what's
2 involved. I don't know if these are readily available
3 documents, how voluminous these documents are. So,
4 why don't after the status conference concludes, the
5 parties get together, discuss what documents we're
6 talking about, and it may well be that the Staff has
7 a legitimate basis for saying we want paper copies,
8 and it may well be that the Staff and Entergy, and the
9 other parties, their response is going to be we don't
10 want the paper, we already have copies of those
11 documents. So, rather than getting into it right now,
12 as in most discovery, have the parties get together,
13 talk on the phone, have New York explain to you what
14 documents they're talking about, see if you have any
15 objection. And if there is an objection, like they
16 say, we'll be here all week.

17 MR. SIPOS: And, Judge, perhaps I could
18 add a little more detail, and I'm sorry, I apologize
19 for not having done this before. I believe most, if
20 not all, of the documents are either on the web, the
21 internet, or are on ADAMS.

22 JUDGE McDADE: Okay. Well, that's what
23 I'm saying, is to talk. I mean, there are an awful
24 lot of things on the web that you may or may not want
25 to try to access. ADAMS, from the standpoint of the

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1 Staff is a different matter. Also, from the other
2 participants in the litigation, as well, as to what
3 they want, and what's going to be most useful to them.
4 For all I know, the State of Connecticut may be very
5 opposed to getting this stuff in paper, saying we can
6 never find anything in ADAMS, telling us it's in ADAMS
7 doesn't help us. It just leads us on a merry search.
8 So, all I'm saying is with regard to that, if there's
9 going to be something out of the norm, just simply
10 call the other participants in the litigation. If you
11 wish, you can stay on the line after the Board gets
12 off, and discuss it right now, or set a time for
13 further discussion of it. If you don't have the list
14 of the documents immediately available so that you are
15 not in a position to fully or adequately describe to
16 the other participants, so they know whether or not
17 they want paper copies, or hard copies." And, again,
18 as Mr. Turk pointed out, I think most people when they
19 do get a disk with a lot of documents, it's a lot
20 easier for them to read it, particularly older people
21 like myself, on paper, than reading it on the machine.
22 So, one of the first things you do when you get the
23 disk is to print it out, so it doesn't save a tree.
24 It's just a different tree. I guess, maybe a Virginia
25 tree instead of a New York tree. But, at this point,

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1 we'll just leave that unresolved.

2 Anything else from the standpoint of the
3 State of New York, at this point?

4 MR. SIPOS: I do not believe so, Your
5 Honor. Thank you.

6 JUDGE McDADE: Okay. From the State of
7 Connecticut?

8 MR. SNOOK: No, Your Honor. Thank you.

9 JUDGE McDADE: Riverkeeper?

10 MR. MUSEGAAS: No, we're all set, Your
11 Honor. Thank you.

12 JUDGE McDADE: Clearwater?

13 MR. GOULD: No, we have nothing to add at
14 this time.

15 JUDGE McDADE: Okay. New York City?

16 MR. DELANEY: No, Your Honor.

17 JUDGE McDADE: Okay. Cortlandt?

18 MS. STEINBERG: No, Your Honor.

19 JUDGE McDADE: Has Buchanan or Westchester
20 ever called in? Apparently not. Judge Wardwell, do
21 you have anything in addition?

22 JUDGE WARDWELL: No, I do not.

23 JUDGE McDADE: Judge Lathrop?

24 JUDGE LATHROP: No, I do not.

25 JUDGE McDADE: Okay. That being the case,

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1 this status conference will be terminated. We are
2 going to go off the line, so if you guys want - and
3 let me be a little bit more formal - if the parties or
4 participants wish to further discuss any discovery
5 issues, stay on the line, or to set a different time
6 for you to get back together to discuss those matters.
7 There being nothing further, this is terminated.
8 Thank you.

9 MR. TURK: Thank you, Your Honor.

10 (Whereupon, the proceedings went off the
11 record at 3:03 p.m.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Indian Point Nuclear Plant


Name of Proceeding: Pre-hearing Conference

Docket Number: 50-247-LR & 50-286-LR

ASLBP NO. 07-858-03-LR-BD01

Location: (teleconference)

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