

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
ENERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	August 13, 2010

ENERGY'S ANSWER TO RIVERKEEPER INC.'S MOTION  
TO COMPEL DISCLOSURE OF DOCUMENTS

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") files this Answer to the "Riverkeeper, Inc. Motion to Compel Disclosure of Documents Relevant to Riverkeeper Contention TC-2" ("Motion"), dated August 3, 2010. As Riverkeeper recognizes, "[i]n pertinent part, RK-TC-2 questions the sufficiency of the benchmarking of the CHECWORKS code at the 2004 and 2005 uprated power levels."<sup>1</sup>

Despite the well-defined scope of this contention, and as discussed further in Section II below, Riverkeeper originally requested "any documentation relating to the implementation of any [flow-accelerated corrosion ("FAC")] related program (including the 'FAC program,' the 'erosion-corrosion program,' and any other predecessor programs) . . . in order to properly evaluate how FAC is dealt with at Indian Point," without any limitation in time or scope.<sup>2</sup> Entergy appropriately objected to this clearly overbroad request as not relevant to the admitted contention and beyond the scope of this proceeding. Nevertheless, in the spirit of cooperation,

<sup>1</sup> Motion at 4.

<sup>2</sup> *Id.* attach. C at 2 (June 25, 2010) (Letter from D. Brancato, Riverkeeper Staff Attorney, to K. Sutton, et al., Counsel for Entergy) ("Attachment C") (emphasis added).

Entergy disclosed thousands of pages of documents related to CHECWORKS and the FAC program at Indian Point, including some documents dating as far back as 1997.

Despite Entergy's substantial cooperation and good faith efforts to date, Riverkeeper now seeks *all* CHECWORKS reports and "documentation with equivalent information," including "other computer code" data, again without any limitation in time or scope.<sup>3</sup> In their Motion, Riverkeeper maintains that *any* and *all* documentation related to the implementation of CHECWORKS at Indian Point are relevant to the admitted contention and, thus, demands disclosure of "*any* and *all* reports for Unit 3 *prior to 2001.*"<sup>4</sup> Again, Entergy objects to this document request as being vague, irrelevant, overbroad, beyond the scope of this proceeding, and unduly burdensome. Therefore, such documents need not be disclosed pursuant to Entergy's 10 C.F.R. § 2.336(a) disclosure obligations and Riverkeeper's Motion to Compel should be denied.<sup>5</sup>

Nonetheless, to the extent that Riverkeeper would agree to narrow its request to only Unit 3 CHECWORKS reports, Entergy would agree to provide Riverkeeper with any additional Unit 3 CHECWORKS reports prepared prior to 2001 that are in Entergy's possession, custody, or control. In extending this good faith offer, however, Entergy does not waive its objections to the relevance of this material or agree to provide Riverkeeper further historical documents or data that Riverkeeper believes may be more generally relevant to "*any* FAC related program" or

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<sup>3</sup> *Id.* attach. A at 2 (Apr. 2, 2010) (Letter from D. Brancato, Riverkeeper Staff Attorney, to K. Sutton, et al., Counsel for Entergy) ("Attachment A").

<sup>4</sup> Motion at 4, 6 (emphasis added). There is no dispute that all available Indian Point Unit 2 documents have been disclosed. *See id.* at 4. *See also id.* attach. E at 3, 9 (July 14, 2010) (Letter from K. Sutton & P. Bessette, Counsel for Entergy, to D. Brancato, Riverkeeper Staff Attorney) ("Attachment E") (discussing Riverkeeper FAC requests and Entergy disclosures).

<sup>5</sup> None of the documents currently at issue in Riverkeeper's Motion to Compel are referenced or relied upon in the pending Applicant's Motion for Summary Disposition of Riverkeeper Technical Contention 2 (Flow-Accelerated Corrosion), filed on July 26, 2010.

“other computer code” data, as Entergy continues to believe that such a request is vague, overbroad, and beyond the scope of the admitted contention.<sup>6</sup>

## II. BACKGROUND

Riverkeeper submitted proposed TC-2 on November 30, 2007.<sup>7</sup> The Atomic Safety and Licensing Board (“Board”) admitted TC-2 on July 31, 2008, identifying two issues for further proceedings:

[T]he Board admits Riverkeeper’s TC-2 which contends that (1) Entergy’s AMP for components affected by FAC is deficient because it does not provide sufficient details (*e.g.*, inspection method and frequency, criteria for component repair or replacement) to demonstrate that the intended functions of the applicable components will be maintained *during the extended period of operation*; and (2) Entergy’s program relies on the results from CHECWORKS without benchmarking or a track record of performance at *IPEC’s power uprate levels*.<sup>8</sup>

The instant dispute concerns only the second of these issues, which addresses whether Entergy’s FAC aging management program (“AMP”) for the license renewal period relies on the results from the CHECWORKS program without benchmarking to address the Indian Point Unit 2 (“IP2”) and Unit 3 (“IP3”) power uprates that occurred in 2004 and 2005, respectively.<sup>9</sup>

Entergy made its initial mandatory disclosures for the admitted contentions, including TC-2, on January 30, 2009. Since then, Entergy has appropriately supplemented these disclosures every 30 days as agreed to by the parties and the Board. Through March 2010, Entergy has disclosed thousands of pages of documentation relevant to TC-2. On April 2, 2010, Riverkeeper sent Entergy a letter asking various questions about Entergy’s mandatory

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<sup>6</sup> Attachment C at 2 (emphasis added).

<sup>7</sup> See Riverkeeper, Inc.’s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant at 15-23 (Nov. 30, 2007).

<sup>8</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 177 (2008) (emphasis added).

<sup>9</sup> See *id.*

disclosures and requesting disclosure of additional documents relating to TC-2.<sup>10</sup> Specifically, Riverkeeper requested additional CHECWORKS “or other computer code” data and documents without *any* limitations in time or scope, or *any* explanation as to how such an overly broad, undefined request was relevant to the scope of TC-2, as admitted by the Board.<sup>11</sup>

On May 14, 2010, Entergy responded to Riverkeeper’s April 2, 2010 letter, providing numerous documents, totaling more than six-thousand pages of CHECWORKS data. This supplemental production included CHECWORKS documents and data relevant to IP2 outages 2R16 (2004) through 2R18 (2008) and outages 3R13 (2005) through 3R15 (2009).<sup>12</sup> Entergy, however, objected to Riverkeeper’s request for additional CHECWORKS documents related to modeling for IP2 prior to outage 2R16 (2004) and for IP3 prior to outage 3R13 (2005) as not relevant to the admitted contention and beyond the scope of the proceeding.<sup>13</sup> Nevertheless, yet again in the spirit of cooperation, Entergy also provided additional CHECWORKS reports from 2000 to 2002, as well as FAC outage reports dating back to 1999.<sup>14</sup>

On June 25, 2010, Riverkeeper sent Entergy another letter stating that its earlier request “was appropriate in its entirety,” asserting that the admitted contention “questions the overall adequacy of the program at Indian Point to address FAC.”<sup>15</sup> Therefore, according to Riverkeeper, “*any* documentation relating to implementation of *any* FAC related program

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<sup>10</sup> See Attachment A at 1-2.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> Motion attach. B at 3 (May 14, 2010) (Letter from K. Sutton and P. Bessette, Counsel for Entergy, to D. Brancato, Riverkeeper Staff Attorney) (“Attachment B”). Although most of these documents were previously-disclosed, these documents were disclosed again on May 14, 2010, due to assembly issues associated with the initial document production process. *See id.* at 2-4.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 2, 4.

<sup>15</sup> Attachment C at 2.

(including the 'FAC program,' the 'erosion-corrosion program,' and *any* other predecessor programs) is relevant in order to properly evaluate how FAC is dealt with at Indian Point."<sup>16</sup>

After engaging in discussions with Riverkeeper in an attempt to reach an agreement over this dispute, Entergy responded on July 14, 2010.<sup>17</sup> Entergy reiterated its commitment to disclose all documents relevant to the admitted contention, but noted its disagreement with Riverkeeper's characterization of the contention as encompassing "the overall adequacy of the program at Indian Point to address FAC" without any limitations in time or scope.<sup>18</sup> But again, in the spirit of cooperation and in an attempt to reach a compromise with Riverkeeper, Entergy confirmed to Riverkeeper that it had already disclosed all available IP2 CHECWORKS reports (including one report from 2000).<sup>19</sup>

With regard to IP3, Entergy further confirmed that it had already provided Riverkeeper with over 10 years worth of FAC outage reports (from 1999 to the present)—and all reports that were prepared since Entergy purchased IP3 in 2001. Entergy also agreed to provide any additional IP3 CHECWORKS reports from 2001 that were not already disclosed.<sup>20</sup> Further, Entergy explained that FAC reports prepared prior to 1999 are not relevant to the admitted contention because those outages substantially pre-date both power uprates, such documents were prepared under the erosion-corrosion program and not the FAC program, and those documents predate Entergy's use of EN-DC-315, Flow Accelerated Corrosion Program—the

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<sup>16</sup> *Id.* at 2 (emphasis added).

<sup>17</sup> Attachment E at 1-5.

<sup>18</sup> *Id.* at 1, 6.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *Id.* at 3-4.

Entergy fleet procedure that will be used during the period of extended operation.<sup>21</sup> Indeed, the information now sought by Riverkeeper even predates Entergy's consolidated ownership of IP2 and IP3, which were previously separately owned by Consolidated Edison Company of New York and the New York Power Authority respectively. Accordingly, Entergy reiterated its position that it fully understands and has complied in good faith with all of its discovery obligations.

In summary, Entergy has already disclosed or agreed to disclose: all available IP2 CHECWORKS reports; all available IP2 inspection outage reports; all available IP3 CHECWORKS reports from 2001 to the present; and all IP3 FAC inspection outage reports from 1999 to the present.<sup>22</sup>

On August 3, 2010, Riverkeeper filed the instant Motion alleging that Entergy "failed to disclose certain documentation related to the implementation of the CHECWORKS computer code at Indian Point."<sup>23</sup> Specifically, Riverkeeper argues that Entergy should have disclosed "all available documentation for Unit 3 predating the 2001 timeframe."<sup>24</sup>

### **III. LEGAL STANDARD**

Under 10 C.F.R. § 2.336(a)(2)(i), Entergy must disclose all documents in its possession custody, or control "that are relevant to the contentions." This provision was added to NRC regulations in 2004, and was "generally modeled on Rule 26 of the Federal Rules of Civil Procedure."<sup>25</sup> It has long been the practice in NRC proceedings to look to the analogous

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<sup>21</sup> *Id.* at 7. Entergy's July 14, 2010 response provides a detailed summary of numerous FAC and CHECWORKS documents disclosed to Riverkeeper.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> Motion at 1.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2194 (Jan. 14, 2004).

provisions of the Federal Rules of Civil Procedure for guidance.<sup>26</sup> In explaining the scope of discovery under Rule 26, the Advisory Committee on the Federal Rules of Civil Procedure made clear that the parties and the court should “focus on the *actual claims and defenses* involved in the action,” and that “[t]he rule change signals to the court that it has the authority to confine discovery to the claims and defenses *asserted in the pleadings*, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.”<sup>27</sup> Under this standard, “[w]hen parties have made requests with no temporal, locality or other restriction, courts have denied the requests as overbroad or unduly burdensome.”<sup>28</sup>

#### IV. DISCUSSION

Entergy’s duty under 10 C.F.R. § 2.336(a)(2)(i) is to disclose documents relevant to the admitted contentions. In pertinent part, Riverkeeper TC-2, as admitted by the Board, is limited in scope to whether Entergy’s FAC AMP for the license renewal period relies on the results from the CHECWORKS program without benchmarking to address the IP2 power uprate that occurred in 2004 and the IP3 power uprate that occurred in 2005. In accordance with the scope

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<sup>26</sup> See *Cincinnati Gas & Elec. Co.* (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982); *Pub. Serv. Co. of Okla.* (Black Fox Station, Units 1 & 2), ALAB-573, 10 NRC 775, 780 n.18 (1979).

<sup>27</sup> Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 389 (2000) (emphasis added).

<sup>28</sup> *Republic Envt'l Sys., Inc. v. Reichhold Chems., Inc.*, 157 F.R.D. 351, 353 (E.D. Pa. 1994). See also *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 306 (6th Cir. 2007) (discovery properly limited to four-year period in personal injury action because discovery dating back fifteen years as requested by plaintiff would be unduly burdensome); *Rodger v. Elec. Data Sys. Corp.*, 155 F.R.D. 537, 540 (E.D.N.C. 1994) (holding that plaintiff entitled to information concerning defendant’s reductions in force only for period beginning in June 1991, when he began his employment with defendant, and not for three-year period preceding his employment); *Amcast Indus. Corp. v. Detrex Corp.*, 138 F.R.D. 115, 120-121 (N.D. Ind. 1991), *aff'd in part, rev'd in part on other grounds & remanded*, 2 F.3d 746 (7th Cir. 1993) (request for all writings relating to or describing any clean-ups, removal actions, remedial actions, remedial investigations, or feasibility studies in which defendant participated or had been involved was too broad because not limited as to time, type of contaminating incident, or type of writing); *Finch v. Hercules, Inc.*, 149 F.R.D. 60, 64-65 (D. Del. 1993) (discovery of information relating to corporate downsizings for two-year period preceding plaintiff’s termination allowed, but discovery of such information for six-year period overly broad).

of this contention, Entergy focused its initial disclosures on the power uprates and the time period following the power uprates. Therefore, among the hundreds of documents disclosed related to the FAC program at IP3, Entergy disclosed the IP3 CHECWORKS report prepared for the 2005 uprate, and all three IP3 CHECWORKS reports prepared to incorporate inspections performed after the uprate, *i.e.*, the reports prepared after the 3R13 (2005), 3R14 (2007), and 3R15 (2009) outages.<sup>29</sup>

Furthermore, despite the clear focus in Riverkeeper TC-2 on the timeframe *after* the power uprates, Entergy also agreed to disclose all IP3 CHECKWORKS reports from 2001 (when Entergy purchased the plant) to the present. Thus, in an effort to resolve this dispute without Board involvement, Entergy agreed to disclose the CHECWORKS reports from the two outages immediately preceding the uprate; *i.e.*, the reports incorporating inspection data from 3R11 (2001) and 3R12 (2003) outages.<sup>30</sup> These disclosures together provide Riverkeeper with approximately 10 years worth of CHECWORKS data.

Despite the voluminous IP3 CHECWORKS and FAC-related documentation already disclosed and unequivocal regulations limiting the parties' disclosure obligations to documents that are relevant to the admitted contentions, Riverkeeper still seeks all documents related to the "historic" use CHECWORKS and "documentation with equivalent information," including "other computer code" data, again without any limitation in time or scope.<sup>31</sup> This request is vague, irrelevant, overbroad, beyond the scope of this proceeding, and unduly burdensome.<sup>32</sup>

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<sup>29</sup> Attachment E at 2-3. As noted above, Entergy disclosed all available IP2 CHECWORKS reports and thus, there is no dispute regarding IP2 reports. *See* Motion at 4; Attachment E at 3, 9.

<sup>30</sup> Prior to the uprate, a "Global Input" report and seven system-specific CHECWORKS reports were prepared following each outage. *See id.*, Attachment E at 4. Also, as discussed in Section II of this Answer, Entergy also disclosed numerous other FAC-related documents going as far back as 1997.

<sup>31</sup> Attachment A at 2.

<sup>32</sup> *See* Motion at 5.

In an attempt to support its unbounded request, Riverkeeper asserts that review of these historic documents might reveal how long it initially took for CHECWORKS to calibrate and how accurately calibrated CHECWORKS was prior to the uprates.<sup>33</sup> Riverkeeper claims that such information is “critical” to “fully understanding” the Indian Point CHECWORKS models.<sup>34</sup>

Yet this asserted basis does little or nothing to cure the overbroad nature of Riverkeeper’s request. Taken literally, Riverkeeper is seeking any and all documents ever generated at IP3 related to CHECWORKS or other computer code data since the inception of the Erosion Correction Program in 1984 (subsequently changed to the FAC program). Researching and locating such documentation, to the extent it exists, would be extremely burdensome and would be far removed from “the *actual claims and defenses* involved in the action.”<sup>35</sup> In effect, Riverkeeper is seeking to impermissibly expand the scope of TC-2.<sup>36</sup>

In addition to being vague, irrelevant, overbroad, beyond the scope of this litigation, and unduly burdensome, Riverkeeper’s request for additional historical documents is based on nothing more than speculation and conjecture by counsel.<sup>37</sup> Riverkeeper’s Motion to Compel simply speculates that additional reports prior to 2001 will somehow assist in their assessment of more recent CHECWORKS data. It appears that Riverkeeper essentially wishes to conduct a fishing expedition into all of Entergy’s FAC-related documents, regardless of relevance or

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<sup>33</sup> *Id.* at 5-6.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> Amendments to Federal Rules of Civil Procedure, 192 F.R.D. at 389 (emphasis added).

<sup>36</sup> See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 386 (2002) (quoting *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 42 (1993)) (“An intervenor may not freely ‘change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention.’”).

<sup>37</sup> Although Riverkeeper indicates that they communicated with an “expert” regarding their request for additional document, the Motion is supported only by the arguments of counsel, asserting that historic CHECWORKS information is “clearly relevant, since it will assist Riverkeeper’s ability to properly assess and put in perspective the CHECWORKS data produced after the power uprates, and, thus, accurately evaluate the adequacy of the calibration of the CHECWORKS model.” Motion at 6. See also *id.* at 3.

vintage. Riverkeeper never explains why almost ten years of already-disclosed CHECWORKS reports—the two sets of reports prior to the uprate and the three reports since the uprate—in addition to thousands of pages of other FAC-related documents are insufficient for them to “properly assess” whether CHECWORKS has been properly benchmarked to the uprated power level for the period of renewed operation. Riverkeeper should not be allowed to engage in such unwarranted supposition simply in hope that some surmised support for their contention might by chance be uncovered. Accordingly, the Board should deny Riverkeeper’s Motion to Compel.

V. CONCLUSION

For the foregoing reasons, Entergy respectfully requests that the Board deny Riverkeeper’s Motion to Compel. Entergy further notes that if Riverkeeper would agree to narrow its request to only IP3 CHECWORKS reports, Entergy would, without waiving objections to their relevance, agree to provide Riverkeeper with any additional IP3 CHECWORKS reports prepared prior to 2001 that are in Entergy’s possession, custody, or control.

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Dated in Washington, D.C.  
this 13th day of August 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Docket Nos. 50-247-LR and  
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August 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the letter entitled "Entergy's Answer to Riverkeeper Inc.'s Motion to Compel Disclosure of Documents," dated August 13, 2010, were served this 13th day of August, 2010, upon the persons listed below, by first class mail and e-mail as shown below.

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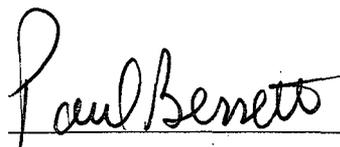
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