

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of  
ENERGY NUCLEAR OPERATIONS, INC.  
(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-0247-LR and 50-286-LR

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

November 4, 2010

ORDER

(Ruling on Riverkeeper's Motion to Compel)

On August 3, 2010, Riverkeeper, Inc. (Riverkeeper) moved to compel Entergy Nuclear Operations, Inc. (Entergy or the Applicant) to disclose "certain documentation related to the implementation of the CHECWORKS computer code at Indian Point."<sup>1</sup> Entergy responded on August 13, 2010, opposing the Motion.<sup>2</sup> For the reasons stated below, the Board denies Riverkeeper's Motion.

The Board admitted Riverkeeper Contention TC-2, which alleged, in pertinent part, that Entergy's program for managing flow-accelerated corrosion (FAC) "relies on results from CHECWORKS without benchmarking or a track record of performance at IPEC's power uprate levels."<sup>3</sup> As a result of that action by the Board, Entergy had an

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<sup>1</sup> Riverkeeper, Inc. Motion to Compel Disclosure of Documents Relevant to Riverkeeper Contention TC-2 (Aug. 3, 2010) at 1 [hereinafter Riverkeeper Motion].

<sup>2</sup> Entergy's Answer to Riverkeeper, Inc.'s Motion to Compel Disclosure of Documents (Aug. 13, 2010) at 10 [hereinafter Entergy Answer].

<sup>3</sup> LBP-08-13, 68 NRC 43, 177 (2008).

obligation, pursuant to 10 C.F.R. § 2.336, to provide documents and data in its possession relevant to this contention.

The NRC's mandatory disclosure requirements set out in Section 2.336 are drawn from Rule 26 of the Federal Rules of Civil Procedure<sup>4</sup> which, in general, permits a tribunal to order discovery "for good cause, . . . of any matter relevant to the subject matter involved in the action," and does not require such information to necessarily "be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."<sup>5</sup> The NRC mandatory disclosure regime provides that, other than the NRC Staff, all parties to a proceeding "shall . . . disclose and provide: . . . [a] copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions."<sup>6</sup> Moreover, the disclosing party shall certify "that all relevant materials required by [Section 2.336] have been disclosed, and that the disclosures are accurate and complete as of the date of the certification."<sup>7</sup> However, a Board may limit discovery if:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the proceeding, the parties' resources, the importance of the issue in the

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<sup>4</sup> See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2194 (Jan. 14, 2004). Because the standard governing mandatory disclosures in Subpart L in 10 C.F.R. § 2.336(a) derives from Rule 26 and the language governing discovery in Subpart G appears to also come from Rule 26, we find the standard defining what is "relevant" for discovery in Subpart G partially applicable to the standard of what is "relevant" and thus subject to mandatory disclosure under Subpart L. But see infra note 7.

<sup>5</sup> Fed. R. Civ. P. 26(b)(1).

<sup>6</sup> 10 C.F.R. § 2.336(a)(2)(i) (emphasis added).

<sup>7</sup> Id. § 2.336(c).

proceeding, and the importance of the proposed discovery in resolving the issues.<sup>8</sup>

Since the admission of this contention, Entergy and Riverkeeper have exchanged letters and engaged in discussions that have resulted in the production of documents potentially relevant to Riverkeeper Contention TC-2 and have also resulted in various representations by Entergy regarding the availability of other documents requested by Riverkeeper.<sup>9</sup> As the Board understands the current status of production, Entergy has, without conceding relevance, represented that based on a search of the electronic and paper records that are within its care, custody, or control, it has provided to Riverkeeper all Indian Point Unit 2 (IP2) CHECWORKS documents of which it is aware.<sup>10</sup> Based on this representation, Riverkeeper understands, as does the Board, that Entergy is not in possession of CHECWORKS documentation related to IP2 that were generated prior to the year 2000.<sup>11</sup> Accordingly, it is the Board's understanding that Riverkeeper's Motion is limited to information relating to Indian Point Unit 3 (IP3).

With regard to IP3, Entergy has represented that it has provided to Riverkeeper "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."<sup>12</sup> More specifically, Entergy has provided the CHECWORKS reports from the two outages immediately preceding the 2005 uprate at IP3 (the 2001 and 2003 outages) and the three outages that occurred

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<sup>8</sup> 10 C.F.R. § 2.705(b)(2)(i)-(iii); cf. Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

<sup>9</sup> Riverkeeper Motion at 2-4; Entergy Motion at 2-6.

<sup>10</sup> See Riverkeeper Motion, Attach. E, Letter from Kathryn M. Sutton and Paul M. Bessette, counsel for Entergy Nuclear Operations, Inc., to Deborah Brancato, counsel for Riverkeeper, Inc. at 3 (July 14, 2010) [hereinafter July 14, 2010 Letter from Entergy, to Riverkeeper]. See also Entergy Answer at 5.

<sup>11</sup> See Riverkeeper Motion at 4 n.9.

<sup>12</sup> Entergy Answer at 5.

since the uprate at IP3 (the 2005, 2007, and 2009 outages).<sup>13</sup> In addition, Entergy has agreed “to provide Riverkeeper with any additional IP3 CHECWORKS reports prepared prior to 2001 that are in Entergy’s possession, custody, or control.”<sup>14</sup> With regard to other documents generated at IP3 prior to 1999, Entergy argues that “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 this action.’”<sup>15</sup> We agree.

Riverkeeper Contention TC-2 questions the sufficiency of Entergy’s Aging Management Plan (AMP) addressing the effects of FAC which, according to Riverkeeper, relies on the results from CHECWORKS without the benchmarking or track record of performance at Indian Point Energy Center’s (IPEC) power uprate levels.<sup>16</sup> However, the data generated during seven post-power uprate outages at Indian Point is already available to assess the ability of CHECWORKS to account for changed plant conditions.<sup>17</sup> Moreover, Riverkeeper’s expert does not explain how the additional historical data generated several years or more prior to the power uprates at IPEC and requested by Riverkeeper in its Motion to Compel could impact his opinion regarding the adequacy of Entergy’s AMP to address FAC in the wake of such uprates. Likewise, Riverkeeper in its Motion to Compel does not explain how this historical data could lead to the discovery of evidence that would be relevant to the decisions to be made by this Board regarding the adequacy of Entergy’s FAC AMP. Entergy has produced several

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<sup>13</sup> Entergy Answer at 8.

<sup>14</sup> Id. at 10. The Board’s ruling on Riverkeeper’s Motion to Compel assumes that these additional CHECWORKS reports will be provided by Entergy to Riverkeeper.

<sup>15</sup> Id. at 5-6, 9.

<sup>16</sup> Riverkeeper Motion at 2, 4-5.

<sup>17</sup> Riverkeeper Opposition to Entergy’s Motion for Summary Disposition of Riverkeeper Technical Contention 2 (Flow-Accelerated Corrosion), Attach. 2, Declaration of Dr. Joram Hopenfeld at ¶ 29 (Aug. 16, 2010).

years of CHECWORKS data generated prior to the power uprates at IPEC<sup>18</sup> and several years of CHECWORKS data generated since the power uprates that could be relevant to evaluating the accuracy of the CHECWORKS code in predicting or tracking future FAC.<sup>19</sup> Riverkeeper has not demonstrated how the additional data it seeks would add, even marginally, to our assessment of CHECWORKS as a predictive tool. In a Motion to Compel, the moving party must, inter alia, demonstrate that the potential value of the requested data outweighs the burden and expense of production. Riverkeeper has not met this burden.

The record reflects that Entergy does not have ready access to the data requested and thus has not, and cannot, rely on it to provide the track record for its AMP that Riverkeeper claims is lacking.<sup>20</sup> Nor, to the extent that Entergy must demonstrate that its use of CHECWORKS is adequately benchmarked, could this data which the Applicant has not reviewed be of practical use to either party in this proceeding. Likewise, given that this historical data was not generated by Entergy, and cannot be searched for electronically, we conclude that it would be unreasonably burdensome to require Entergy to search for and produce this data which could not, in the Board's view, impact our decision on the merits of this contention.

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<sup>18</sup> See Riverkeeper Motion at 3.

<sup>19</sup> See July 14, 2010 Letter from Entergy, to Riverkeeper at 2.

<sup>20</sup> See Riverkeeper Motion at 4.

Accordingly, Riverkeeper's Motion to Compel is denied.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>21</sup>

*/RA/*

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

*/RA, by Edward R. Hawkens for/*

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Dr. Kaye D. Lathrop  
ADMINISTRATIVE JUDGE

*/RA, by Edward R. Hawkens for/*

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Dr. Richard E. Wardwell  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 4, 2010

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<sup>21</sup> Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Sean Murray, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Ruling on Riverkeeper's Motion to Compel) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-247-LR and 50-286-LR  
ORDER (Ruling on Riverkeeper's Motion to Compel)

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Docket Nos. 50-247-LR and 50-286-LR  
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ORDER (Ruling on Riverkeeper's Motion to Compel)

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

Dated at Rockville, Maryland  
this 4<sup>th</sup> day of November, 2010.