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**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re:

License Renewal Application Submitted by

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.
-----X

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

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

DPR-26, DPR-64

May 12, 2011

**STATE OF NEW YORK'S MOTION FOR LEAVE
TO REPLY TO NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S MOTION
TO COMPEL THE PRODUCTION OF DOCUMENTS**

Office of the Attorney General
for the State of New York
The Capitol
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Albany, New York 12224

TEMPLATE = SECY 041

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The State of New York respectfully requests that the Atomic Safety and Licensing Board grant this motion for leave to file a reply to NRC Staff's Answer to the State of New York's Motion to Compel the Production of Documents, filed with this Board on May 9, 2011. The opportunity for reply is necessary for the State to address NRC Staff's newly-disclosed principal basis for its refusal to produce virtually all documents it relied upon in the FSEIS (not the deliberative process privilege, but the work product doctrine), to address the propriety of withholding newly-disclosed documents, to discuss newly-disclosed information about documents previously withheld, and to respond to legal arguments contained in Staff's Answer that the State of New York could not have reasonably anticipated. The State has consulted with Staff about this Motion, and Staff opposes this motion because it believes the State does not have good cause.

REGULATORY BACKGROUND

NRC regulations permit a party to file a reply to an answer to a motion upon leave from the Board:

The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

10 C.F.R. § 2.323(c). This Board's July 1, 2010 Scheduling Order provides that:

A motion for leave to file a reply shall be submitted not less than three (3) business days prior to the time the reply would be required to be filed.²² A motion to file a reply must demonstrate good cause for permitting the reply to be filed and must indicate whether the request is opposed or supported by the other participants in the proceeding and, if opposed, to succinctly describe the grounds stated for such opposition.

²²Although the agency's rules of practice regarding motions do not provide for reply pleadings, the Board will presume that for a reply to

be timely it would have to be filed within seven (7) days of the date of service of the answer it is intended to address. See 10 C.F.R. § 2.309(h)(2).

Scheduling Order ¶ G.3.

GOOD CAUSE SUPPORTS THIS MOTION

NRC Staff's Answer to the State of New York's Motion to Compel the Production of Documents ("Answer") presents both new arguments and new information which the State "could not reasonably have anticipated" based on its initial filing, and as such this motion meets the standards set forth in the regulations and in this Board's Scheduling Order. *See* 10 C.F.R. § 2.323(c).

First, Staff reveals, for the first time, that now the principal basis for its refusal to list or produce the documents generated by Sandia and ISL, and upon which Staff expressly relied in the FSEIS, is that those Sandia and ISL documents are now protected under the work product doctrine. *See* Answer at 19-20. During the consultations leading up to the filing of the Motion to Compel, Staff had made a passing reference to a Sandia document – DPP-18-005 – as having been prepared in anticipation of litigation and that Staff might assert that as a defense to producing that one document. *See* Dean Declaration attached to NYS Motion to Compel, at ¶ 9 and Attachment 5 to that Declaration. The State could not have reasonably anticipated that Staff's opposition to the Motion to Compel would primarily rest on the work product doctrine nor that Staff would assert that the doctrine applied to the vast majority of documents which New York seeks, many of which have only just been disclosed in Appendices B and C of Staff's May 9 Answer. In its Motion to Compel, the State challenged Staff's assertion that it possessed no documents prepared by Sandia or ISL and used in preparation of the FSEIS,

see Motion to Compel at 9-10, and Staff's assertion that the State seeks to pierce Staff's deliberative process privilege, *see id.* at 12.

Second, Staff Appendix C disclosed for the first time the existence of 74 documents that reflect Sandia or ISL work, which the Staff asserts are protected by various privileges. The information contained in Appendix C discloses that a potentially much larger group of documents exist that are responsive to the State's request and that they are being withheld solely under the work product doctrine. This reply, if allowed, will be the first opportunity the State will have to challenge the basis for withholding these documents. The State could not have anticipated this issue before the Staff filed Appendix C as the information had not been previously disclosed in any previous log because documents for which work product is asserted did not have to be disclosed and at no time during the lengthy consultation period did Staff indicate that there were a large number of documents relevant to the State's request that were being withheld because of the work product doctrine. Along the same lines, Staff's April 29, 2011 disclosure includes six documents from Nathan Bixler at Sandia prepared in 2009 (DPP-27-016 to DPP-27-021). These documents are now also listed in Appendix A to Staff's May 9, 2011 Answer (DPP-27-016 to DPP-27-021), but the State could not have discussed or addressed those documents in its Motion to Compel, which was filed on April 22, 2011 – seven days before Staff's April 29 disclosure.

Third, Staff, in its Answer, disclosed substantial new information, including, for the first time, a description of the work performed by ISL and Sandia and upon which Staff relied in preparing the FSEIS. *See* Answer at 11-13. Much of this new information clarifies the nature of the reports relied upon by Staff in the FSEIS and prepared by ISL

and Sandia. The State has not yet had the opportunity to demonstrate why the newly-disclosed information further supports the State's Motion to Compel.

Fourth, Staff also submitted to the Board an Appendix A to its Answer that contained new information about documents that were previously disclosed and withheld. The log contained in Staff Appendix A contains material information that had not been previously disclosed to the State in Staff's monthly deliberative process logs, including:

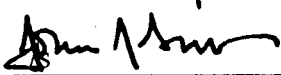
- identification of the recipient of the document (none of the documents in the Staff's privilege logs after the initial disclosures contained that critical piece of information),
- additional, substantial statements in the comments column, and
- in several instances, disclosing an entirely different document with a different title and/or different number of pages, an error Staff now acknowledges and proposes to correct by Monday, May 16th.

Staff asserts that the additional information contained in Appendix A represents its attempt to further explain the bases for withholding those documents. However, the State could not have reasonably anticipated this new information as it had not previously been disclosed to the State.

CONCLUSION

In light of the above, the State of New York respectfully submits that good cause exists for the Board to permit the State to file a Reply to NRC Staff's Answer to the State of New York's Motion to Compel the Production of Documents. If this motion is granted, the State's Reply will be filed with the Board on or before May 16, 2011.

Respectfully submitted,



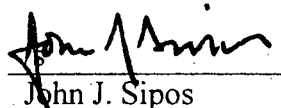
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Dated: May 12, 2011

10 C.F.R. § 2.323(b) Certification

I certify that I have made a sincere effort to contact counsel for NRC Staff in this proceeding, to explain to NRC Staff the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful with respect to Staff.

NRC Staff's position is that the State has not shown good cause, and further, if the Board grants the State's Motion for Leave, the Staff requests leave to reply to any new points or arguments in the State's reply.



John J. Sipos

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

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License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. May 12, 2011
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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2011, copies of the State of New York's Motion for Leave to Reply to NRC Staff's Answer to the State of New York's Motion to Compel the Production of Documents, was served upon the following persons via U.S. Mail and e-mail at the following addresses:

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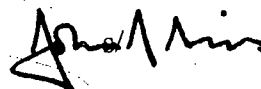
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Dated at Albany, New York
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