

**Attachment 5**

State of New York's Letter to NRC Staff  
dated October 21, 2009



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO  
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE  
ENVIRONMENTAL PROTECTION BUREAU

October 21, 2009

Sherwin Turk  
Office of the General Counsel  
Mail Stop O-15-D-21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
*Via electronic and U.S. Mail*

Re: License Renewal Application submitted by Entergy Indian Point Unit 2, LLC, Entergy Indian Point Unit 3, LLC, and Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Station, Unit 2 and Unit 3  
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Mr. Turk:

As you know, in the August 24, 2009 status conference held by telephone in the above-referenced proceeding, the Board asked parties to consider the Subpart G/Subpart L issue in anticipation of our next status conference at which time the issue, as well as any specific motion deadlines, will be discussed. The Board suggested another status conference approximately sixty days from the date of the last conference; that time period will expire shortly. In furtherance of the Board's request, the State has reviewed, and will continue to review, the Staff's disclosures pursuant to 10 C.F.R. §§ 2.336(b) and 2.1203. The State has the following concerns regarding the Staff's disclosures.

As an initial matter, the State understands Staff's disclosure obligations to be multi-faceted. Pursuant to § 2.336(b):

the NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose and/or provide, to the extent available (but excluding those documents for which there is a claim of privilege or protected status):

(1) The application and/or applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding;

(2) NRC correspondence with the applicant or licensee associated with the application or proposed action that is the subject of the proceeding;

(3) *All documents (including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;*

(4) Any NRC staff documents (except those documents for which there is a claim of privilege or protected status) representing the NRC staff's determination on the application or proposal that is the subject of the proceeding; and

(5) A list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.

*Id.* (emphasis added). The NRC Staff is also obligated, now that it has become a party to this hearing, to meet the obligations imposed upon it by § 2.1203. Those regulations state that

(a)(1) Within thirty (30) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file. . . .

(b) The hearing file consists of the application, if any, and any amendment to the application, and, when available, any NRC environmental impact statement or assessment and *any NRC report related to the proposed action*, as well as any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action. Hearing file documents already available at the NRC Web site and/or the NRC Public Document Room when the hearing request/petition to intervene is granted may be incorporated into the hearing file at those locations by a reference indicating where at those locations the documents can be found. The presiding officer shall rule upon any issue regarding the appropriate materials for the hearing file.

(c) The NRC staff has a continuing duty to keep the hearing file up to date with respect to the materials set forth in paragraph (b) of this section and to provide those materials as required in paragraphs (a) and (b) of this section.

*Id.* (emphasis added).

Given these obligations, the State is concerned about the following documents which were not disclosed in the Staff's mandatory disclosures, yet which are evidently relevant to the Staff's consideration of issues implicated in the license renewal process for Indian Point because they were annexed to Staff's response to the State of New York's Motion for Summary Disposition of Contention 16, and about the extent to which there are other discoverable documents which Staff has not disclosed but which fall under 10 C.F.R. §§ 2.336(b) and 2.1203.

Exhibit E	Severe Accident Mitigation (SAMA) Analysis Guidance Document, Nuclear Energy Institute, November 2005
Exhibit F	NRC -Regulatory Guide 1.174, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions On Plant-Specific Changes to the Licensing Basis," November 2002
Exhibit G	NRC Fact Sheet, Probabilistic Risk Assessment
Exhibit H	The American Society of Mechanical Engineers, Addenda to ASME/ANS RA-S-2008, Standard for Level 1/Large Early Release Frequency Probabilistic Risk Assessment For Nuclear Power Plant Applications
Exhibit I	NUREG/CR-2300, Probabilistic Risk Assessment Procedures Guide, January 1983
Exhibit J	NUREG/BR-0184, Regulatory Analysis Technical Evaluation Handbook, January 1997
Exhibit K	NUREG/CR-6613, SAND97/0594 Code Manual for MACCS2
Exhibit L	NUREG/CR-6853, Comparison of Average Transport and Dispersion Among A Gaussian, a Two-Dimensional and a Three Dimensional Model Lawrence Livermore National Laboratory, October 2004
Exhibit O	AERMOD Implementation Guide, USEPA January 9, 2008
Exhibit P	AERMOD: Latest Features and Evaluation Results, USEPA
Exhibit Q	A Comparison of Calpuff Modeling Results To Two Tracer Field Experiments US EPA June 1998

As we have discussed previously, the Staff had also failed to disclose a PowerPoint presentation by Mr. Stephen F. LaVie in which he identified substantial deficiencies in the ATMOS air dispersion model's ability to reliably predict air dispersion in areas of complex terrain. The documents used by the Staff in its opposition to the New York States' Summary Disposition Motion are documents "supporting the NRC Staff review," and the NUREG documents upon which NRC Staff relies are "NRC reports related to the proposed action."

The disclosure obligations imposed by 10 C.F.R. §§ 2.336(b) and 2.1203 are not limited to the license renewal portion of the Staff, or even to the licensing portion of the Staff. The obligations are imposed on "the NRC staff." *Id.* This includes not only the employees of the NRC but also its consultants. *See* 10 C.F.R. § 2.4, definition of NRC Personnel ("(2) For the purpose of §§ 2.336, 2.702, 2.709 and 2.1018 only, persons acting in the capacity of consultants to the Commission, regardless of the form of the contractual arrangements under which such persons act as consultants to the Commission."). In addition, the obligation to produce all relevant "documents" is not limited to final position papers of the agency but includes all

documents. *See* 10 C.F.R. § 2.4, definition of NRC records and documents (“NRC records and documents means any book, paper, map, photograph, brochure, punch card, magnetic tape, paper tape, sound recording, pamphlet, slide, motion picture, or other documentary material regardless of form or characteristics, made by, in the possession of, or under the control of the NRC pursuant to Federal law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities. “NRC records and documents” do not include objects or articles such as structures, furniture, tangible exhibits or models, or vehicles and equipment.”). Thus, for example, documents from, and in the possession of, Sandia Laboratories and from Mr. LaVie should have been disclosed to the extent they contained information relevant to the State’s Contention 16.

While the State is not aware of other specific documents that are relevant to its other contentions which are in Staff’s possession but which have not been disclosed by Staff, the State is concerned that the absence of the above-referenced documents from Staff’s disclosures to date indicates that Staff may have also failed to disclose documents relevant to other admitted contentions. The State seeks clarification of the Staff’s understanding of its discovery obligations in general as well as in relation to its contractors, as the disclosures made to date appear to be deficient under both of the regulatory provisions governing Staff’s obligations. Based on Staff’s response, the State will be in a better position to assess the need, if any, for a motion concerning application of certain Subpart G procedures.

Thank you for your consideration.

Sincerely,

s/

Janice A. Dean  
John J. Sipos  
Assistant Attorneys General