

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

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In re: Docket Nos. 50-247-LR; 50-286-LR

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. January 30, 2012
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**STATE OF NEW YORK AND RIVERKEEPER
MOTION TO COMPEL COMPLIANCE
WITH DISCLOSURE OBLIGATIONS BY NRC STAFF**

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PRELIMINARY STATEMENT

The State of New York, Riverkeeper, and the NRC Staff have a disagreement over the scope of Staff's disclosure obligations in this adjudicatory proceeding that directly impacts the disclosures Staff has made and will be making with regard to NYS-38/RK-TC-5. The dispute centers on the scope of the Part 2 disclosure obligations when NRC Staff has elected to participate in a proceeding as a party and actively opposes a contention that has been admitted by an Atomic Safety and Licensing Board. The disagreement involves the interplay of 10 C.F.R. §§ 2.336, 2.1202 and 2.1203. The State and Riverkeeper understand the Staff's position to be that (1) Staff need not disclose documents that are *relevant to admitted contentions* even though Staff has elected to become a party and oppose the contentions (2) Staff's disclosure obligation extends only to documents *supporting Staff's review of the application itself* (along with the application itself, correspondence, and Staff documents such as the Safety Evaluation Report and Environmental Impact Statement) and (3) Staff need not disclose documents generated by and reviewed by Staff's consultants and experts in response to admitted contentions or in connection with the application itself. Staff's position would exempt from disclosure documents that are relevant to admitted contentions or have been reviewed by Staff's consultants and experts in response to admitted contentions or in connection with the application itself thus allowing Staff to avoid the disclosure documents of a type that all other parties are required to routinely disclose pursuant to 10 C.F.R. § 2.336(a). Given this dispute, the State and Riverkeeper present this motion seeking an order to compel Staff's compliance with the Part 2 disclosure obligations.

REGULATORY FRAMEWORK

The disagreement between the State (and Riverkeeper) and NRC Staff with respect to disclosures relevant to NYS-38/RK-TC-5 implicates various regulations that are summarized in the following paragraphs.

NRC's Part 2 regulations include rules of practice for NRC proceedings. Part 2 includes general provisions (Subpart C "Rules of General Applicability") and then specific provisions for specific types of proceedings, known by their subparts (Subparts D to O). (An appendix including pertinent provisions of Part 2 accompanies this filing.)

NRC Staff's Choice. At the outset, once an intervenor's or licensee's proposed contention has been admitted by an Atomic Safety and Licensing Board, NRC Staff may decide whether or not it wishes to participate in the ensuing proceeding as a "party" under NRC regulations for Subpart L Informal Proceedings. 10 C.F.R. § 2.1202 (b)(2). The NRC Staff need not participate as a party in such a proceeding unless Staff has denied the requested license, the proceeding involves an enforcement action against a licensee, or the ASLB makes the affirmative finding that Staff's participation would materially advance the resolution of the proceeding. 10 C.F.R. § 2.1202 (b)(1)(i), (ii).

Option 1: NRC Elects Not to Participate as a Party. If NRC Staff elects not to participate as a party in a proceeding where the ASLB has admitted a contention, the Staff must nevertheless place in the docket and make available a "hearing file." 10 C.F.R. § 2.1203 (a)(1). NRC regulations specify that the hearing file shall contain the application at issue, any amendments thereto, NRC's Environmental Impact Statement or Environmental Assessment pursuant to National Environmental Policy Act, any NRC report related to the proposed action,

and any correspondence between the applicant and the NRC that is relevant to the proposed action. 10 C.F.R. § 2.1203 (b). (As noted below, the regulatory requirements for the contents of a hearing file are similar, if not identical, to certain classes of documents that NRC Staff must disclose under §§ 2.336(b)(1), (2), (4) regardless of whether it chooses to participate in the proceeding or not.) As the proceeding continues, NRC Staff has a continuing obligation to keep the hearing file current as new documents that are within the scope of § 2.1203(b) come into existence. 10 C.F.R. § 2.1203 (c).

Option 2: NRC Elects to Participate as a Party. On the other hand, if an ASLB admits a contention and if the NRC Staff elects to participate in the proceeding as party as to an admitted contention, it shall so notify the ASLB and the parties and identify the admitted contentions as to which it will participate. 10 C.F.R. § 2.1202 (b)(2). In addition, in such a situation, NRC Staff must also make “disclosures” required by § 2.336(b)(3) through (5). *Id.* NRC’s Subpart L regulations further specifically provide that “[o]nce the NRC staff chooses to participate as a party, it shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.” 10 C.F.R. § 2.1202(b)(3).

“General discovery.” The Part 2 regulations contain provisions pertaining to disclosure of information in various different types of NRC proceedings – which, in turn, have additional specific provisions (Subparts D to O). 10 C.F.R. § 2.336 (“General discovery”).

Regardless of whether Staff elects to participate as a party, 10 C.F.R. § 2.336(b) directs NRC Staff to disclose:

- the application and “applicant/licensee requests associated with the application or proposed action that is the subject of the proceeding” (subsection (b)(1));

- correspondence between NRC and the applicant “associated with the application or proposed action that is the subject of the proceeding” (subsection (b)(2));
- “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”) (subsection (b)(3));
- any NRC Staff documents representing “NRC staff’s determination on the application or proposal that is the subject of the proceeding” (subsection (b)(4)); and
- a list of documents withheld because of privilege (subsection (b)(5)).

In addition, a “party, including the NRC staff, is not excused from making the required disclosures because it has not fully completed its investigation of the case, it challenges the sufficiency of another entity’s disclosures, or that another entity has not yet made its disclosures.” § 2.336(c). With the exception of subsections (b)(3) and (b)(5), the documents that Staff must disclose under § 2.336(b)(1),(2), and (4) are similar, if not identical, to the documents that Staff must place in the hearing file under 10 C.F.R. § 2.1203(b).

10 C.F.R. § 2.336(a) directs parties to disclose names of any person, including any expert upon whose opinion the party bases its contentions and claims, and upon whom a party may rely, and a copy of the analysis or authorities upon which the expert may base her or his opinion (subsection (a)(1)), a copy or description of all documents that are relevant to the contentions (subsection (a)(2)(i)), all tangible things, such a books, publications, or treatises, that are relevant to a contention (subsection (a)(2)(ii)), and a list of documents withheld because of privilege (subsection (a)(3)). 10 C.F.R. § 2.336(a) states that it applies to “all parties, other than the NRC Staff.”

Finally, § 2.336(f) provides that the “disclosures required by this section constitute the

sole discovery permitted for NRC proceedings under this part *unless there is further provision for discovery under the specific subpart under which the hearing will be conducted. . . .*”

(Emphasis added). Those additional discovery obligations applicable to NRC Staff for this Subpart L proceeding are contained in §§ 2.1202(b)(2), (b)(3) and 1203(b) discussed above.

STATEMENT OF FACTS

The parties’ dispute over the scope of NRC Staff’s disclosure obligations is set forth in the accompanying Declaration of Assistant Attorney General John Sipos (“Sipos Decl.”) and the Attachments to this motion. A brief summary follows.

On November 10, 2011, the Board admitted Joint Contention NYS-38/RK-TC-5. *Entergy Nuclear Operations, Inc.*, (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5) (Nov. 10, 2011) ML11314A211. That contention concerns various issues and components including aging of reactor pressure vessel and steam generator components. *Id.* On November 30, 2011, NRC Staff made its first mandatory disclosure following the ASLB’s admission of NYS-38/RK-TC-5 (Attachment 1). Later the same day, the State wrote to NRC Staff and inquired why certain documents that appeared to reflect NRC discussion and review of various aging degradation mechanisms were not included in Staff’s November 2011 disclosure (Attachment 2). Staff responded on December 30, 2011 (Attachment 4) and its response reflected Staff’s view that its disclosure obligations are limited to documents supporting Staff’s review of the application itself. The same day, Staff also filed its December 30, 2011 mandatory disclosure update (Attachment 3). Staff’s November and December 2011 disclosure updates included only four documents available for public review; none of those documents appeared relevant to NYS-

38/RK-TC-5 or to issues concerning embrittlement, fatigue, or corrosion of reactor pressure vessels or steam generators. Sipos Decl. at ¶ 9; Attachments 1 & 3). The representatives of the State, Riverkeeper, and NRC discussed this issue during January 2012. While certain issues were resolved, a fundamental disagreement remains between the State and Riverkeeper on one hand and NRC Staff on the other concerning the scope of NRC's Staff's disclosure obligations. Sipos Decl. at ¶ 10.

In January 2012, NRC's Office of General Counsel released a January 10, 2012 memorandum to the NRC Commissioners concerning an ongoing rulemaking proceeding that concerns, among other things, the Part 2 regulations (Attachment 7). As discussed below, the State and Riverkeeper believes that OGC's views as expressed in the January 10, 2012 memorandum as well as the related rulemaking (Attachment 8) and an earlier memorandum (Attachment 9) support the view that Staff's disclosure obligations include documents that are relevant to admitted contentions and documents reviewed by Staff's experts and contractors.

During the January 18, 2012 hearing and status conference, Staff indicated that it had completed much of its prefiled testimony. Sipos Decl. at ¶ 13. Also, in January 2012, the State learned that Idaho National Laboratories has begun a program to study age related degradation (including embrittlement) of reactors. *Id.* at ¶ 16.

ARGUMENT

I. STAFF HAS FAILED TO MEET ITS DOCUMENT DISCLOSURE OBLIGATIONS

NRC Staff views its disclosure obligation as limited to documents supporting Staff's review of the application itself. This view excludes from Staff's ongoing monthly disclosure two categories of documents that it is required by NRC Regulations to disclose:

1. documents related to admitted contentions that were not examined as part of the Staff's review of the application itself, but have been used, or reviewed, or generated as part of the Staff's response to the admitted contentions;
2. documents that are used, reviewed, or generated by contractors (*e.g.*, SNL, ISL, PNNL, or Idaho National Laboratories (INL)) working for NRC Staff as part of their review of the application or as part of their review and response to admitted contentions.

By not including such documents within the scope of its disclosures Staff is limiting its responsibilities as a party and impeding the rights of other parties in their development of expert reports and prefiled direct testimony and prejudicing their preparation for hearings.

Staff's narrow approach to its disclosure obligations violates the obligations imposed on it by 10 C.F.R. §§ 2.336(b)(3) and (4), 2.1202(b)(2) and (3), and 2.1203(b). Staff takes the position that it is a privileged party that may contest contentions without making the disclosures required of other parties with regard to those contentions and that, because NRC has an allegedly searchable and public database (Agencywide Documents Access and Management System ("ADAMS")), it need not provide the same level of document disclosure as all other parties.

There is no support in NRC Regulations for Staff's position.

Staff's disclosure obligations begin with 10 C.F.R. § 2.336(b) which provides in pertinent part that:

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 . . .

(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;

Id. It is significant that this obligation is imposed on Staff whether or not it chooses to be a party to the proceeding. Staff apparently relies on the phrases “supporting the NRC staff’s review of the application or proposed action” and “representing the NRC staff’s determination on the application or proposal” to confine the disclosures to documents related to review of the application, excluding documents related to admitted contentions that are not also part of the application review. Thus, Staff’s position is that if a contention raises a matter or a document that is not being reviewed in conjunction with the application – for example, a contention like NYS-38/RK-TC-5 that challenges a practice by Entergy that Staff believes is acceptable – work done by Staff or its contractors or experts in contesting that contention is immune from the disclosure requirements of 10 C.F.R. § 2.336(b)(3) and (4).

This NRC Staff position is contrary to NRC Regulations and contravenes the underlying public policy that these hearings be fair. New York offers two alternative bases for concluding that Staff’s position is in error.

A. The Mandatory Disclosure Obligations of 10 C.F.R. § 2.336(b) Require Staff to Disclose All Documents Relevant To Admitted Contentions.

Although NRC Staff interprets 10 C.F.R. § 2.336(b) to require it to disclose a large number of documents related to its review of the application whenever there is an adjudicatory hearing held with regard to an application, it insists that the documents in its possession most relevant to the hearing – *i.e.*, the documents related to the admitted contentions – do not need to be disclosed unless Staff has reviewed or generated those documents as part of its review of the application. If, on the other hand, the documents are reviewed or generated solely to respond to an admitted contention, Staff insists it has no disclosure obligation. There is no reason such a

distinction would exist in 10 C.F.R. § 2.336(b) and recent statements by the Commission and NRC's Office of General Counsel ("OGC") confirm the distinction does not exist.

Analysis of the obligations imposed by 10 C.F.R. § 2.336(b)(3) by the OGC and recognized by the Commission, confirm that Staff disclosure obligations under § 2.336(b)(3) include disclosure of all documents relevant to admitted contentions because they are part of the larger group of documents that are relevant to the application. In a recent proposed rulemaking, 76 Fed. Reg. 10781 (Feb. 28, 2011), Amendments to Adjudicatory Process Rules and Related Requirements, Proposed Rules ("Proposed Rule") (Attachment 8), NRC solicited comments on potential amendments to NRC Staff mandatory disclosure obligations under 10 C.F.R. § 2.336(b) and identified the "problem" that might warrant correction as follows:

under § 2.336(b)(3) the NRC staff must disclose all documents supporting the staff's review of the application or proposed action that is the subject of the proceeding without regard to whether the documents are relevant to the admitted contentions.

Proposed Rule, 76 Fed. Reg. at 10790. The memorandum from OGC that accompanied the proposed rule to the Commission made clear that the current requirements of 10 C.F.R. § 2.336(b)(3) include all documents related to admitted contentions since they are part of all documents associated with the application itself:

Because the disclosure obligation [§ 2.336(b)(3)] is not limited to the *issues in the proceeding* but instead extends to documents "*associated with*" the application or proposed NRC action, the staff has been required to review, produce, and, in some cases, redact a large number of documents that are irrelevant to the issues actually in dispute.

SECY-10-0106, Proposed Rule—10 CFR Parts 2, 51, and 54 "Amendments to Adjudicatory Process Rules and Related Requirements" (RIN 3150-AI43)) August 13, 2010 at 5-6 (emphasis in original) ML102250347 (Attachment 9). In the January 10, 2012, OGC memo recommending

adoption of the final rule, OGC confirms the view that as currently written § 2.336(b)(3) requires, *inter alia*, disclosure by Staff of all documents in its possession relevant to admitted contentions:

OGC recommends that the Commission adopt a revised § 2.336(b) that will limit the scope of the staff’s mandatory disclosures to documents relevant to the admitted contentions; currently, the staff’s mandatory disclosure obligations effectively extend to all documents relevant to the application

SECY-12-0004, Final Rule—10 CFR Parts 2, 12, 51, 54, and 61 “Amendments to Adjudicatory Process Rules and Related Requirements” (RIN 3150-AI43) January 10, 2012 at 5, ML 12010A063 (Attachment 7).¹

The view of the reach of disclosure obligations imposed by § 2.336(b) expressed by OGC in its recent memoranda supporting an amendment to that provision reflects the same position taken by NRC when it successfully defended the Part 2 amendments adopted in 2004 (Attachment 10). In its Brief before the United States Court of Appeal for the First Circuit in *Citizens Action Network v. United States*, NRC made the following argument:

B. Subpart L requires mandatory disclosure of relevant documents

* * *

First and foremost, Subpart L, and Subpart G also, mandate disclosure of an immense amount of material, precisely the sort of material subject in the past to rounds of document requests and interrogatories – “documents relevant to the issues in the proceeding.” 10 C.F.R. 2.336.

Brief for the Federal Respondents (July 14, 2004) at 48 (footnote omitted) ML041980581

¹ See also *S. Tex. Project Nuclear Operating Co.*, (South Texas Project, Units 3 and 4), CLI-10-24, 2010 NRC LEXIS 35 (Sept. 29, 2010) at n. 70 (“Our discovery rules impose disclosure obligations on the Staff that are somewhat different from those imposed on other parties. Under section 2.336(a), parties other than the Staff are required to disclose certain information relevant to the admitted contentions. See 10 C.F.R. § 2.336(a). The Staff’s disclosure obligations, on the other hand, are not tied to the admitted contentions. Rather, the Staff must make available documents that relate to the application and its review as a whole. See

(Attachment 10 hereto (excerpt)). The First Circuit took this, and other representations by the Commission in defense of its amended Part 2 regulations, seriously and cautioned that:

Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges.

Citizens Action Network v. U.S., 391 F.3d 338, 354 (1st Cir. 2004). Nonetheless, Staff claims that documents in its possession that are relevant to the issues in the proceeding but were not used as part of the review of the application itself, are not required to be disclosed. Staff's position would reward the Staff for doing an inadequate review of the Application that ignores serious issues raised by intervenors by allowing them to avoid having to disclose such documents to the intervenors and the public. Staff's position that it need only produce documents supporting its review of the application itself (and need not produce all documents relevant to admitted contentions) is also not consistent with the representations made by the Commission to the First Circuit.

B. Alternatively, Once Contentions Are Admitted And NRC Staff Chooses To Participate In the Hearing With Regard to Any Contention, NRC Staff Must Disclose All Documents In Its Possession Relevant To That Contention.

Staff's narrow view of the disclosure obligations imposed by § 2.336(b) might arguably make some sense if, and only if, the disclosure obligations imposed by 10 C.F.R.

§ 2.1202(b)(2) and (3) are viewed as expanding the Staff's disclosure obligations once Staff chooses the contentions for which it will be a party to a proceeding. Pursuant to § 2.1202(b)(2):

Within fifteen (15) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If

10 C.F.R. §§ 2.336(b), 2.1203").

the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, *identify the contentions on which it wishes to participate as a party, and make the disclosures required by §2.336(b)(3) through (5)*

Id. (emphasis added). Since Staff is already obligated to make the § 2.336(b) disclosures regardless of its party status, the only logical meaning of the emphasized phrase is that when Staff identifies specific contentions as to which it chooses to be a party it is required to make *additional* disclosures related to those contentions and not merely disclosures related to the application itself. Otherwise, the language of 10 C.F.R. § 1202(b)(2) would be superfluous, a result that is disfavored in regulatory interpretations. *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 N.R.C. 227, 264 (2009) (“A court should not adopt an interpretation that would render a statutory provision ‘redundant’ or ‘nonsensical.’ . . . ‘[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error’”)(citations omitted)).

This interpretation of § 2.1202(b)(2) is reinforced by the provisions of § 2.1202(b)(3) that require that once Staff has chosen to be a party with respect to particular contentions it “shall have all the rights and *responsibilities* of a party with respect to the admitted contention/matter”.

Id. (emphasis added). One of the responsibilities of a party is to disclose “[t]he name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion . . . [and] [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”. 10 C.F.R. §§ 2.336(a)(1) and (2). Thus, pursuant to § 2.1202(b)(3), Staff, upon becoming a party, must accept the responsibilities of a party, including disclosing its experts and their relevant documents and all documents relevant to admitted contentions. However, in this proceeding Staff has made clear that it does not interpret §§ 2.336 and 2.1202 as requiring it to disclose all documents relevant to the admitted contentions, has not disclosed any experts and has only disclosed documents related to work by its contractors when forced by a motion to compel. *See* discussion *infra* regarding this prior Motion.

Staff will likely cite to the limiting language in 10 C.F.R. §§ 2.336(a)(1) and (2), indicating those obligations do not apply to NRC Staff. But, that limiting language in general Subpart C regulations of 10 C.F.R. Part 2 is superseded by the explicit language in Subpart L that requires that “[o]nce the NRC staff chooses to participate as a party, it shall have all the ... responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.” 10 C.F.R. § 2.1202(b)(3). Pursuant to 10 C.F.R. § 2.3(a) “[i]n any conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.” Thus, the obligation imposed by § 2.1202(b)(3) in Subpart L controls and Staff, once it chooses to be a party with regard to a contention, is obligated to comply with all requirements applicable to parties as well as its obligations to make certain disclosures relevant to all matters

related to its review of the application pursuant to § 2.336(b)(3)-(5).²

Thus, a fair reading of the language of the regulations compels the conclusion that once Staff has chosen to participate as a party as to a contention, it should comply with the same requirements as all other parties with regard to that contention. There is no justification for a contrary view. .

C. Staff's Disclosures With Regard to NYS-38/RK-TC-5 Are Incomplete

Thus, whether § 2.336(b)(3) is read to limit disclosures by Staff to documents directly involved in reviewing the application and § 2.1202(b)(2) and (3) are read to extend that disclosure obligation to documents relevant to admitted contentions *or* § 2.336(b)(3) is read to include, *inter alia*, all documents relevant to admitted contentions, Staff is failing to meet its disclosure obligations by refusing to disclose documents relevant to all admitted contentions in this proceeding and that failure directly impacts disclosures relevant to NYS-38/RK-TC-5. This

² Although the regulatory history of the Part 2 regulations does not identify § 2.336(a) as applying to Staff when it becomes a party, the language of the regulations could not be clearer imposing on Staff “all . . . responsibilities of a party”. It is well-established that:

As is the case with statutory construction, interpretation of any regulation must begin with the language and structure of the provision itself. 1A Sutherland, Statutory Construction § 31.06 (4th ed. 1984); *Lewis v. United States*, 445 U.S. 55, 60 (1980). Further, the entirety of the provision must be given effect. 2A Sutherland, Statutory Construction § 46.06 (4th ed. 1984). Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation. *Abourezk v. Reagan*, 785 F.2d 1043, 1053 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987); *GUARD v. NRC*, 753 F.2d 1144, 1146 (D.C. Cir. 1985).

Calvert Cliffs 3 Nuclear Project, LLC, LBP-9-15, 70 N.R.C. 198, 214 (July 30, 2009) *quoting Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 N.R.C. 275, 288 (1988)(footnote and internal citations omitted).

failure to disclose by NRC Staff prevents New York and Riverkeeper from fully preparing their testimony in support of NYS-38/RK-TC-5. Since the Board admitted NYS-38/RK-TC-5 on November 10, 2011, NRC Staff has disclosed a total of four documents for which it asserted no privilege claim. Those document concerned aquatic issues (two documents) and emails to the Advisory Committee on Reactor Safeguards (two documents). Sipos Decl. at ¶ 10; Attachments 1 and 3.

II. STAFF IS FAILING TO DISCLOSE DOCUMENTS REVIEWED AND GENERATED BY ITS EXPERTS AND CONSULTANTS

A related problem with Staff's disclosures is that Staff has been reluctant to produce documents that even it agrees would have to be produced if they were reviewed or generated by NRC Staff personnel, but that outside consultants and experts are exempt from this requirement even though they are carrying out Staff functions under contract with NRC. This problem has been presented to the Board previously in the context of documents reviewed and generated by Sandia and ISL in their analysis of the State's Contention 12, 35 and 36. The State's first knowledge of the full extent of Sandia's and ISL's involvement was when Staff extensively relied upon work by Sandia and ISL in the FSEIS, as discussed in the State's previous Motion to Compel. *See* State of New York Motion to Compel NRC Staff To Produce Documents Relied upon in Staff's Final Supplemental Environmental Impact Statement (April 22, 2011) ML11132A149 ("Motion to Compel") and State of New York's Reply to NRC Staff's Answer to the State's Motion to Compel the Production of Documents (May 16, 2011) ML11140A135 ("Motion to Compel Reply"). Although the issue as to those documents was eventually resolved with NRC Staff, the underlying position by NRC Staff has not changed and continues to inform Staff's view of its disclosure obligations. Thus, as noted above, Staff continues to be less than

forthcoming in its monthly disclosures with respect to exchanges between Staff and Westinghouse and others regarding WESTEMS and Staff concerns with its use of unconstrained operator modifications, Staff has not disclosed all documents regarding its ongoing exchanges with EPRI regarding the modifications it required be made to MRP-227 and Staff has not disclosed any documents relevant to its ongoing communications with EPRI regarding its Steam Generator Management Program (“SGMP”) Engineering and Regulatory Technical Advisory Group. *See* Supplemental Safety Evaluation Report, NUREG 1930, Supplement 1, August 30, 2011 (“SSER”) at 3-21 to 3-22, 4-2 to 4-3.

Relevant NRC case law establishes that the disclosure obligations imposed on a party extend to the experts and consultants retained by that party.

The duty to disclose applies to the parties and the NRC Staff (“[e]ach party and the NRC staff shall make its initial disclosures ... based on the information and documentation then reasonably available to it.” 10 C.F.R. § 2.336(c) (emphasis added)). But, as we see it, this obligation flows down to an individual who is retained to serve as expert witnesses on behalf of a party. Thus, if the expert witness has “a copy of the analysis or other authority” upon which his or her opinion is based, see 10 C.F.R. § 2.336(a)(1), and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that “analysis or other authority.” We note that the phrase “other authority” does not require the production of an extensive library of articles or material only tangentially referenced by the expert, but only the authority substantially relied upon by the expert and likely to be proffered as a supporting exhibit at the hearing. Further, this duty is a continuing one and if an expert witness is subsequently selected, or any “analysis or other authority” is subsequently amended or newly developed, then this information must be promptly disclosed. 10 C.F.R. § 2.336(d). Finally, if the “other authority” that the expert is relying upon is already available to the opposing party and/or subject to copyright or other restrictions, then the parties may agree among themselves as to a reasonable method for disclosing it.

Progress Energy Fla., Inc., (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-30, 70 N.R.C. 1039, 1048 n. 10 (2009).

In a subsequent decision in *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, Slip op. (December 22, 2010), the Board addressed in detail the usual defenses to producing documents that are reviewed or generated by consultants and outside experts. *Id.*, slip op. at 10-18. The Board ruled that “relevant” documents should be given a broad interpretation, even broader than that used in the Federal Rules of Evidence. *Id.* at 11. It also ruled that documents reviewed or generated by experts or consultants retained by a party are in the “possession, custody or control” of the party that has retained them and rejected arguments that such documents could be withheld because the party did not have actual possession of them in its offices. “Documents are deemed to be within the control of a party if the party has the right to obtain the documents on demand” and “[t]he concept of control extends to situations in which the party has the practical ability to obtain materials in the possession of another, even if the party does not have the legal right to compel the other person or entity to produce the requested materials.” *Id.* at 14 (footnotes and citations omitted).

Because of the limited disclosures being made by Staff, the State and Riverkeeper cannot say that Staff has retained experts or consultants to address the issues raised by NYS-38/RK-TC-5, but it is likely that such expertise is being sought given the fact that much of the information that forms the basis for NYS-38/RK-TC-5 involves work done by third party entities upon whom Staff is relying. *See* NYS-38/RK-TC-5, Basis 2 for a discussion of the portions of the SSER that address reliance on yet to be completed work of Westinghouse and Entergy on WESTEMS, of EPRI on MRP-227 and of the Steam Generator Management Program (“SGMP”) Engineering and Regulatory Technical Advisory Group of EPRI addressing stress corrosion

cracking of the steam generator divider plates. The connection between NRC Staff and these third parties often involves NRC Staff incorporating or using the third parties' work as NRC Staff guidance. *See e.g.* Final Safety Evaluation of EPRI Report, Materials Reliability Program Report 1016596 (MRP-227), Revision 0, "Pressurized Water Reactor (PWR) Internals Inspection And Evaluation Guidelines" (TAC No. ME0680), ML111600498 (accepting MRP-227, with modifications, as providing a framework (albeit incomplete) for PWR internals inspections) and Notice of Availability of the Final License Renewal Interim Staff Guidance LR-ISG-2006-03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses, 72 Fed. Reg. 45466 (August 14, 2007) (accepting the Nuclear Energy Institute's guidance for conducting SAMA analyses as Staff guidance). Outsourcing the work on these vital elements of the Application and Entergy's AMPs for Indian Point cannot be allowed to be used by NRC Staff as a barrier to full and timely disclosure of all documents relevant to Contention NYS-38/RK-TC-5.

By withholding the documents reviewed and generated by its experts and consultants, and even withholding the names of its experts and consultants, Staff is obtaining a substantial strategic advantage in its attempt to defeat the State of New York's Contentions (and those consolidated with Riverkeeper). Rather than provide advance notice of its experts and consultants, the documents reviewed and generated by its experts and consultants, and rather than disclosing all documents that its experts and consultants reviewed and generated - all of which disclosures are required to be made by the other parties - Staff is both restricting the State's and Riverkeeper's ability to challenge its testimony and forcing the State and Riverkeeper to prepare all of its refutations of Staff's position on those Contentions in the brief time available for filing replies to Staff testimony and legal arguments.

All other parties are required to routinely disclose documents reviewed and/or generated by their experts to facilitate the preparation of responses to the positions ultimately espoused by those experts. There is no meaningful policy justification for creating such a strategic advantage for Staff. Its role in the hearings with regard to safety issues leaves it free to add its challenges to those of Entergy regarding the State and Riverkeeper's experts and opinions, even though it is Entergy that must ultimately prove its case. In that capacity as an extra challenger and opposing party to New York and Riverkeeper, Staff should not also be allowed to shield its experts and consultants from having to disclose important documents upon which the experts and consultants rely and have generated in their work in opposition to the State and Riverkeeper's Contentions.

CONCLUSION

For the above reasons, the State and Riverkeeper respectfully request that the Board grant the motion to compel and direct the NRC Staff pursuant to 10 C.F.R. §§ 2.336, 2.1202, and 2.1203 to disclose with respect to NYS-38/RK-TC-5:

1. documents related to admitted contentions that were not examined as part of the Staff's review of the application itself, but have been used, or reviewed, or generated as part of the Staff's response to the admitted contentions;
2. documents that are used, reviewed, or generated by contractors (*e.g.*, SNL, ISL, PNNL, INL) working for NRC Staff as part of their review of the application or as part of their review and response to admitted contentions.

Such a directive would be consistent with OGC's recent statement about the scope of Staff's disclosure obligations, provide symmetry among active parties in a proceeding, and comport with NRC representation in 2004 when it promulgated the current regulations.

Respectfully submitted,

Signed (electronically) by

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January 30, 2012

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 scheduling order, I certify that I have made a sincere effort to contact counsel for NRC Staff in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

NRC Staff believes it has satisfied its mandatory disclosure/hearing file obligations, and would oppose the filing of a motion to compel. The Staff further believes that New York's filing of a motion to compel at this time would be late and would reduce the time available for the Staff's preparation of prefiled testimony.

Signed (electronically) by

John J. Sipos
Assistant Attorney General
State of New York

dated: January 30, 2012

APPENDIX

Selected Provisions of 10 C.F.R. Part 2

10 C.F.R. § 2.3

10 C.F.R. § 2.336

10 C.F.R. § 2.1202

10 C.F.R. § 2.1203

Nuclear Regulatory Commission

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2093, 2111, 2133, 2134, 2135); sec. 114(f); Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10143(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.321 also issued under secs. 102, 103, 104, 105, 183i, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161 b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 90, as amended by section 3100(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note). Subpart C also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712, also issued under 5 U.S.C. 557. Section 2.340 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553, and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154).

Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart M also issued under sec. 184 (42 U.S.C. 2234) and sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Subpart N also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-550, 84 Stat. 1473 (42 U.S.C. 2135).

SOURCE: 27 FR 377, Jan. 13, 1962, unless otherwise noted.

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for—

(a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license;

(b) Issuing orders and demands for information to persons subject to the Commission's jurisdiction, including licensees and persons not licensed by the Commission;

(c) Imposing civil penalties under Section 234 of the Act;

(d) Rulemaking under the Act and the Administrative Procedure Act; and

(e) Standard design approvals under part 52 of this chapter.

[56 FR 40684, Aug. 15, 1991, as amended at 72 FR 49470, Aug. 28, 2007]

§ 2.2 Subparts.

Each subpart other than subpart C of this part sets forth special rules applicable to the type of proceeding described in the first section of that subpart. Subpart C sets forth general rules applicable to all types of proceedings except rulemaking, and should be read in conjunction with the subpart governing a particular proceeding. Subpart I of this part sets forth special procedures to be followed in proceedings in order to safeguard and prevent disclosure of Restricted Data.

[69 FR 2233, Jan. 14, 2004]

§ 2.3 Resolution of conflict.

(a) In any conflict between a general rule in subpart C of this part and a special rule in another subpart or other part of this chapter applicable to a particular type of proceeding, the special rule governs.

(b) Unless otherwise specifically referenced, the procedures in this part do not apply to hearings in 10 CFR parts 4, 9, 10, 11, 12, 13, 15, 16, and subparts H and I of 10 CFR part 110.

[69 FR 2233, Jan. 14, 2004]

§ 2.4 Definitions.

As used in this part,

ACRS means the Advisory Committee on Reactor Safeguards established by the Act.

Act means the Atomic Energy Act of 1954, as amended (68 Stat. 919).

Adjudication means the process for the formulation of an order for the final disposition of the whole or any part of any proceeding subject to this part, other than rule making.

Administrative Law Judge means an individual appointed pursuant to section 11 of the Administrative Procedure Act to conduct proceedings subject to this part.

(or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking under § 2.802.

§ 2.336 General discovery.

(a) Except for proceedings conducted under subparts G and J of this part or as otherwise ordered by the Commission, the presiding officer or the Atomic Safety and Licensing Board assigned to the proceeding, all parties, other than the NRC staff, to any proceeding subject to this part 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 provide:

(1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion;

(2)(i) 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, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (e.g., books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, <http://www.nrc.gov>, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to

the relevant document, data compilation, or tangible thing.

(3) A list of documents otherwise required to be disclosed 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.

(b) Except for proceedings conducted under subpart J of this part or as otherwise ordered by the Commission, the presiding officer, or the Atomic Safety and Licensing Board assigned to the proceeding, 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.

(c) Each party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it. A party, including the NRC staff, is not excused from making the required

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disclosures because it has not fully completed its investigation of the case, it challenges the sufficiency of another entity's disclosures, or that another entity has not yet made its disclosures. All disclosures under this section must be accompanied by a certification (by sworn affidavit) that all relevant materials required by this section have been disclosed, and that the disclosures are accurate and complete as of the date of the certification.

(d) The duty of disclosure under this section is continuing, and any information or documents that are subsequently developed or obtained must be disclosed within fourteen (14) days.

(e)(1) The presiding officer may impose sanctions, including dismissal of specific contentions, dismissal of the adjudication, denial or dismissal of the application or proposed action, or the use of the discovery provisions in subpart G of this part against the offending party, for the offending party's continuing unexcused failure to make the disclosures required by this section.

(2) The presiding officer may impose sanctions on a party that fails to provide any document or witness name required to be disclosed under this section, unless the party demonstrates good cause for its failure to make the disclosure required by this section. A sanction that may be imposed by the presiding officer is prohibiting the admission into evidence of documents or testimony of the witness proffered by the offending party in support of its case.

(f) The disclosures required by this section constitute the sole discovery permitted for NRC proceedings under this part unless there is further provision for discovery under the specific subpart under which the hearing will be conducted or unless the Commission provides otherwise in a specific proceeding.

§ 2.337 Evidence at a hearing.

(a) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(b) Objections. An objection to evidence must briefly state the grounds of objection. The transcript must include the objection, the grounds, and the ruling. Exception to an adverse ruling is preserved without notation on-the-record.

(c) Offer of proof. An offer of proof, made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony, must consist of a statement of the substance of the proffered evidence. If the excluded evidence is in written form, a copy must be marked for identification. Rejected exhibits, adequately marked for identification, must be retained in the record.

(d) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(e) Official record. An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(f) Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this paragraph must be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by filing an appeal from an initial decision or a petition for reconsideration of a final decision. The appeal must clearly and

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when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.

§ 2.1201 Definitions.

The definitions of terms contained in § 2.4 apply to this subpart unless a different definition is provided in this subpart.

§ 2.1202 Authority and role of NRC staff.

(a) During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which is the subject of the hearing and as authorized by law, the NRC staff is expected to issue its approval or denial of the application promptly, or take other appropriate action on the underlying regulatory matter for which a hearing was provided. When the NRC staff takes its action, it shall notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's position on the matters in controversy before the presiding officer with respect to the staff action. The NRC staff's action on the matter is effective upon issuance by the staff, except in matters involving:

(1) An application to construct and/or operate a production or utilization facility (including an application for a limited work authorization under 10 CFR 50.12, or an application for a combined license under subpart C of 10 CFR part 52);

(2) An application for an early site permit under subpart A of 10 CFR part 52;

(3) An application for a manufacturing license under subpart F of 10 CFR part 52;

(4) An application for an amendment to a construction authorization for a high-level radioactive waste repository at a geologic repository operations area falling under either 10 CFR 60.32(c)(1) or 10 CFR part 63;

(5) An application for the construction and operation of an independent spent fuel storage installation (ISFSI) located at a site other than a reactor site or a monitored retrievable storage installation (MRS) under 10 CFR part 72; and

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(6) Production or utilization facility licensing actions that involve significant hazards considerations as defined in 10 CFR 50.92.

(b)(1) The NRC staff is not required to be a party to a proceeding under this subpart, except where:

(i) The proceeding involves an application denied by the NRC staff or an enforcement action proposed by the NRC staff; or

(ii) The presiding officer determines that the resolution of any issue in the proceeding would be aided materially by the NRC staff's participation in the proceeding as a party and orders the staff to participate as a party for the identified issue. In the event that the presiding officer determines that the NRC staff's participation is necessary, the presiding officer shall issue an order identifying the issue(s) on which the staff is to participate as well as setting forth the basis for the determination that staff participation will materially aid in resolution of the issue(s).

(2) Within fifteen (15) days of the issuance of the order granting requests for hearing/petitions to intervene and admitting contentions, the NRC staff shall notify the presiding officer and the parties whether it desires to participate as a party, and identify the contentions on which it wishes to participate as a party. If the NRC staff desires to be a party thereafter, the NRC staff shall notify the presiding officer and the parties, identify the contentions on which it wishes to participate as a party, and make the disclosures required by § 2.336(b)(3) through (5) unless accompanied by an affidavit explaining why the disclosures cannot be provided to the parties with the notice.

(3) Once the NRC staff chooses to participate as a party, it shall have all the rights and responsibilities of a party with respect to the admitted contention/matter in controversy on which the staff chooses to participate.

[69 FR 2267, Jan. 14, 2004, as amended at 72 FR 49483, Aug. 28, 2007]

§ 2.1203 Hearing file; prohibition on discovery.

(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.

(2) The hearing file must be made available to the parties either by service of hard copies or by making the file available at the NRC Web site, <http://www.nrc.gov>.

(3) The hearing file also must be made available for public inspection and copying at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room.

(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.

(d) Except as otherwise permitted by subpart C of this part, a party may not seek discovery from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise.

§ 2.1204 Motions and requests.

(a) General requirements. In proceedings under this subpart, requirements for motions and requests and responses to them are as specified in § 2.323.

(b) Requests for cross-examination by the parties. (1) In any oral hearing under this subpart, a party may file a motion with the presiding officer to permit cross-examination by the par-

ties on particular admitted contentions or issues. The motion must be accompanied by a cross-examination plan containing the following information:

(i) A brief description of the issue or issues on which cross-examination will be conducted;

(ii) The objective to be achieved by cross-examination; and

(iii) The proposed line of questions that may logically lead to achieving the objective of the cross-examination.

(2) The cross-examination plan may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated. The presiding officer shall then provide each cross-examination plan to the Commission's Secretary for inclusion in the official record of the proceeding.

(3) The presiding officer shall allow cross-examination by the parties only if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision.

§ 2.1205 Summary disposition.

(a) Unless the presiding officer or the Commission directs otherwise, motions for summary disposition may be submitted to the presiding officer by any party no later than forty-five (45) days before the commencement of hearing. The motions must be in writing and must include a written explanation of the basis of the motion, and affidavits to support statements of fact. Motions for summary disposition must be served on the parties and the Secretary at the same time that they are submitted to the presiding officer.

(b) Any other party may serve an answer supporting or opposing the motion within twenty (20) days after service of the motion.

(c) The presiding officer shall issue a determination on each motion for summary disposition no later than fifteen (15) days before the date scheduled for commencement of hearing. In ruling on motions for summary disposition, the presiding officer shall apply the standards for summary disposition set forth in subpart G of this part.