

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

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

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

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

March 16, 2012

ORDER

(Granting in Part and Denying in Part State of New York and Riverkeeper's Motion to Compel)

On January 30, 2012, the State of New York (New York) and Riverkeeper, Inc. (Riverkeeper) (collectively, Intervenor) filed a Motion to Compel Compliance with Disclosure Obligations by the NRC Staff (Motion to Compel).¹ On February 9, 2012, the NRC Staff filed its Answer to the Motion to Compel (NRC Staff Answer).² For the reasons discussed below, we grant in part and deny in part the Intervenor's Motion to Compel.

I. BACKGROUND

On November 10, 2011, we admitted Contention NYS-38/RK-TC-5, which alleges that Entergy Nuclear Operations, Inc. (Entergy):

is not in compliance with the requirements of 10 C.F.R. §§ 54.21(a)(3) and (c)(1)(iii) and the requirements of 42 U.S.C. §§ 2133(b) and (d) and 2232(a) because Entergy does not demonstrate that it has a program that will manage the effects of aging of several critical components or systems and thus NRC

¹ State of New York and Riverkeeper Motion to Compel Compliance with Disclosure Obligations by NRC Staff (Jan. 30, 2012) [hereinafter Motion to Compel].

² NRC Staff's Answer to "State of New York and Riverkeeper Motion to Compel Compliance with Disclosure Obligations by NRC Staff" (Feb. 9, 2012) [hereinafter NRC Staff Answer].

does not have a record and a rational basis upon which it can determine whether to grant a renewed license to Entergy as required by the Administrative Procedure Act.³

In a December 6, 2011, teleconference, when discussing a potential timeline for evidentiary filings addressing this Contention, we became aware of an ongoing dispute between New York and the NRC Staff regarding mandatory disclosures.⁴ In that teleconference, New York noted that it had located several documents on the Agencywide Documents Access and Management System (ADAMS) that it believed should have been, but had not been, provided to it by the NRC Staff pursuant to 10 C.F.R. § 2.336(b).⁵ Urging the parties to attempt to reach a meeting of the minds regarding the scope of Section 2.336(b) disclosures, we directed the parties to discuss the issue and to notify us whether a motion to compel would be forthcoming.⁶ On January 6, 2012, New York submitted a letter to the Board, informing us that discussions between the Intervenor and the NRC Staff were ongoing, but if the negotiations remained unsuccessful, New York would file a motion to compel by January 26, 2011.⁷ During a teleconference on January 18, 2012, we again urged the parties to attempt to resolve the issue without litigation.⁸

³ Licensing Board Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5) (Nov. 10, 2011) at 2 (unpublished) (internal quotations omitted) (quoting State of New York and Riverkeeper's New Joint Contention NYS-38/RK-TC-5 (Sept. 30, 2011)).

⁴ Tr. at 994-95.

⁵ Id. at 995.

⁶ Id. at 996-97, 1044; see also Licensing Board Order (Dec. 14, 2011) at 1-2 (unpublished).

⁷ See Letter from John J. Sipos, Counsel for State of New York, to Atomic Safety and Licensing Board (Jan. 6, 2012).

⁸ Tr. at 1089-93.

On January 30, 2012, the Intervenor filed a Motion to Compel seeking an order directing the NRC Staff's compliance with its 10 C.F.R. Part 2 disclosure obligations.⁹ The Intervenor states that the NRC Staff had erroneously taken the position 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.¹⁰

According to the Intervenor, the NRC Staff neglected to disclose various categories of documents that NRC regulations require it to disclose. First, the Intervenor alleges that the NRC Staff failed to disclose "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."¹¹ Second, the Intervenor alleges that the NRC Staff withheld "documents that [were] 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."¹² By failing to disclose these categories of documents, the Intervenor argues that the NRC Staff has failed to meet the obligations imposed by 10 C.F.R. §§ 2.336(b)(3) and (4), 2.1202(b)(2) and (3), and 2.1203(b).¹³

The NRC Staff Answer makes several arguments opposing the Motion to Compel. The NRC Staff argues that the Intervenor's Motion "flatly misstates the Staff's clearly articulated

⁹ Motion to Compel at 1.

¹⁰ Id. (emphasis in original).

¹¹ Id. at 7.

¹² Id.

¹³ Id.

position concerning its mandatory disclosure and hearing file obligations in this proceeding” and “omits important information concerning the Staff’s repeated efforts to resolve this motion.”¹⁴ In particular, the NRC Staff disputes the Intervenor’s representation that the NRC Staff’s position is that it is exempt from disclosing documents relevant to admitted contentions.¹⁵ The NRC Staff also argues that the Intervenor has misunderstood the NRC Staff’s regulatory obligations under 10 C.F.R. §§ 2.336(b) and 2.1203(b) and “effectively seeks to have the Board compel the Staff to perform a broad discovery search on behalf of the Intervenor for documents that are not required to be disclosed under 10 C.F.R. §§ 2.336(b) and 2.1203(b).”¹⁶ Finally, the NRC Staff argues that the Motion to Compel is untimely.¹⁷

II. LEGAL STANDARDS

The NRC Staff has disclosure obligations unique from the other parties in this proceeding. General disclosure obligations for “all parties, other than the NRC staff” are governed by 10 C.F.R. § 2.336(a), while the NRC Staff is required to comply with the disclosure obligations governed by 10 C.F.R. § 2.336(b). The NRC Staff is also required to maintain a hearing file containing documents specified under 10 C.F.R. § 2.1203(b).

Section 2.336(a) requires

all parties, other than the NRC staff, to any proceeding subject to this part . . . [to] 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;

¹⁴ NRC Staff Answer at 2.

¹⁵ Id. at 13.

¹⁶ Id. at 2.

¹⁷ Id. Intervenor delayed filing a Motion to Compel because the Board repeatedly instructed New York to make further attempts to resolve this dispute through negotiation. See Tr. at 994-97, 1044, 1089-93. Accordingly, we view it as timely filed.

(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 . . . , 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.¹⁸

NRC regulations provide the NRC Staff with a separate set of disclosure obligations.

Specifically, Section 2.336(b) requires the NRC Staff to disclose:

(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.¹⁹

¹⁸ 10 C.F.R. § 2.336(a)(1)-(3).

¹⁹ Id. § 2.336(b).

As a separate obligation, the NRC Staff must also prepare and docket a hearing file in accordance with 10 C.F.R. § 2.1203. Section 2.1203(b) and (c) outlines the NRC Staff's hearing file obligations:

(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 section²⁰

Thus, while all parties other than the NRC Staff have narrower discovery and disclosure obligations under Section 2.336(a), the NRC Staff, pursuant to Sections 2.336(b) and 2.1203(b), bears a broader burden of production.

III. ANALYSIS

The Motion to Compel requests relief under two broad categories:

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.²¹

We agree that such documents should be produced by the NRC Staff. The first category, "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

²⁰ Id. § 2.1203(b)-(c).

²¹ Motion to Compel at 19.

response to the admitted contentions,”²² was at the heart of the discussions between the Intervenor and the NRC Staff. The Intervenor repeatedly accused the NRC Staff of only disclosing documents related to its review of the application itself.²³ From the pleadings before us, however, it is not clear that the NRC Staff has withheld such documents.

Section 2.336(b)(3) requires the NRC Staff to disclose “[a]ll 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.”²⁴ Accordingly, the NRC Staff must disclose documents related to admitted contentions even if these documents were not examined as part of the NRC Staff’s review of the application itself, but which have been used, reviewed, or generated as part of the NRC Staff’s response to the admitted contentions in this proceeding.

The NRC Staff acknowledges that its disclosure obligations are “quite broad”²⁵ and that, unlike other parties, who are required to produce documents related solely to the contentions, the Staff is required to produce all documents that support its review of the application. In practice, this results in the disclosure of thousands of documents [And c]onsistent with its obligations, the Staff discloses and places in the hearing file all such documents, without attempting to parse out the numerous documents that do not relate to admitted contentions.²⁶

We read the NRC Staff’s response as saying that they have produced all documents that “have been used, or reviewed, or generated” as part of the NRC Staff’s response to admitted contentions. If we read the NRC Staff’s response correctly, they need disclose no more.

²² Id.

²³ See id. at 1, 6, 8.

²⁴ 10 C.F.R. § 2.336(b)(3) (emphasis added).

²⁵ NRC Staff Answer at 15.

²⁶ Id. at 15-16; see also id. at 16 n.19 (discussing how the Commission’s proposed rulemaking on Section 2.336(b)(3) evidences that, at present, Section 2.336(b)(3) encompasses a broader disclosure burden than Section 2.336(a) because it requires disclosure of documents related to the application without regard to the admitted contentions, while the other parties are simply obligated to disclose documents related to admitted contentions).

An attached communication between New York and the NRC Staff indicates another dispute over the scope of the NRC Staff's obligations under Section 2.336(b).²⁷ While we agree that the NRC Staff's disclosure obligations are broader than those of the other parties in the proceeding, they are not without limitation. One such limitation applies to generically applicable documents that reside in ADAMS but do not relate to the application or proceeding at hand. Section 2.336(b) requires the NRC Staff to disclose documents used in its review of the application or proposed action that is the subject of the proceeding. While this may encompass thousands of documents, it does not include every document in the NRC Staff's possession applicable to a particular system, structure, component, facility, or issue in a proceeding. As the NRC Staff has stated, if this interpretation were correct, then

the Staff would be required, in each and every licensing proceeding, to create a massive hearing file that contains every record pertaining to any generic or site-specific issue that was ever raised regarding any facility, regardless of whether those documents were utilized or referred to by Staff members in their review of the application at hand. For example, all generic documents relating to nuclear power plant safety, all documents pertaining to the environmental impacts of nuclear power plants, and all documents pertaining to any nuclear plant's operating experience, would have to be included in each license renewal proceeding hearing file – notwithstanding the fact that such documents are available in ADAMS – since one could never know whether that document might have some general relevance to an issue that has been or might later be raised in the specific proceeding. That view is simply unsupportable.²⁸

We agree. Generically applicable documents or documents that the NRC Staff simply did not use in its review might be useful to other parties in this and other proceedings, but that does not bring such documents within the scope of Sections 2.336(b) and 2.1203(b). Nevertheless, simply because such documents are not legally required to be placed into a proceeding's

²⁷ See Motion to Compel, attach. 2, State of New York's Letter to NRC Staff Concerning Scope of Disclosure Obligations (Nov. 30, 2011) (also filed as NRC Staff Answer, attach. 11); Motion to Compel, attach. 4, NRC Staff's Response Letter (Dec. 30, 2011) (also filed as NRC Staff Answer, attach. 12).

²⁸ NRC Staff Answer, attach. 8, E-mail from Sherwin Turk, Counsel for NRC Staff, to John J. Sipos, Counsel for State of New York (Jan. 27, 2012, 10:44 AM EST) [hereinafter NRC Staff Answer, attach. 8].

hearing file does not mean that they are hidden from public view. On the contrary, the NRC provides multiple avenues for litigants to access its generically applicable materials and reports, including its website, ADAMS, and its Public Document Room. Moreover, in this proceeding the NRC Staff appears to have acted in a professional spirit of cooperation to assist the Intervenor in reviewing such materials.

Another ancillary dispute is the complaint that the “NRC has not disclosed the identity of expert witnesses that it may rely on at the evidentiary hearing.”²⁹ The Intervenor argues that, because the NRC Staff is participating as a party in this proceeding, the regulations require that 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.”³⁰ But, according to the NRC Staff, Section 2.336(a) applies to “all parties, other than the NRC staff”³¹ and requires those parties to disclose inter alia “[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.”³²

The NRC Staff also represents that it is “explicitly exempt” from any requirements to produce expert reports.³³ However, in so doing, it is misreading the regulation. Expert reports are not expressly exempt from disclosures pursuant to Section 2.336(b). Therefore, if the documents provide support for or are in opposition to the proposed action (here, the relicensing

²⁹ Motion to Compel, Declaration of John J. Sipos (Jan. 30, 2012) at 4.

³⁰ 10 C.F.R. § 2.1202(b)(3); see Motion to Compel at 12.

³¹ 10 C.F.R. § 2.336(a) (emphasis added).

³² Id. § 2.336(a)(1); NRC Staff Answer at 15-16.

³³ NRC Staff Answer at 15.

of Indian Point Units 2 and 3), they must be disclosed even if they relate to the opinion of experts consulted by the NRC Staff in order to address proffered or admitted contentions.³⁴

Nevertheless, the NRC Staff's direct testimony, including that of its expert witnesses, must be submitted on or before March 30, 2012. Accordingly, Intervenor will soon have the information regarding NRC Staff experts that it seeks. Moreover, if the NRC Staff has in its possession documents that provide support for or opposition to its expert testimony, then those documents must be disclosed. Intervenor will then have ample opportunity to prepare rebuttal testimony, to propose questions for the Board to ask these witnesses, or to move for the ability to cross-examine these witnesses.

More easily disposed of is the next category, "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."³⁵ The NRC Staff has represented that "those documents are routinely placed in the hearing file or explicitly identified in the Staff's review documents (such as the SER [Safety Evaluation Report], the FSEIS [Final Supplemental Environmental Impact Statement], and Sandia's reports)."³⁶ As such, contractor documents used in the NRC Staff's review "are disclosed as part of the Staff's disclosures, in that the Staff does not exempt consultants who assist the Staff in its review of the application from the Staff's disclosure requirements."³⁷ These documents "are treated no differently from documents used by the Staff in reviewing or responding to admitted contentions

³⁴ In this ruling we note a significant distinction between what is required of the NRC Staff pursuant to Section 2.336(b)(3) and what is required of other parties pursuant to Section 2.336(a)(1). The NRC Staff need only disclose existing documents that fall within the definition specified in this Order. It need not prepare an expert report or any other document to comply with Section 2.336(b)(3).

³⁵ Motion to Compel at 19.

³⁶ NRC Staff Answer, attach. 8.

³⁷ NRC Staff Answer at 17 (emphasis in original).

. . . [and] are included in the hearing file, as required by § 2.336 (b)(3).³⁸ The NRC Staff represents it has disclosed all documents that have been used, reviewed, or generated by contractors in its review of the application or as part of the NRC Staff's review of and response to admitted contentions, and the Intervenor point to no document or other evidence that indicates otherwise. Therefore, with regard to this category of documents, we find no cognizable dispute.

Our holding today does not conclude that the NRC Staff has improperly withheld documents. Rather, our intent is merely to state clearly what documents must be disclosed and to direct that, if any such documents exist that have not been disclosed to date, they promptly be provided to Intervenor. The NRC Staff can comply with this Order by providing any documents that have been used, reviewed, or generated as part of the NRC Staff's response to the admitted contentions, including but not limited to such documents relating to expert testimony and such documents that were used, reviewed, or generated by contractors. In the alternative, the NRC Staff can comply with this Order by notifying the parties and the Board by letter no later than March 23, 2012, that it does not have any documents in its possession that meet the above description and that have not previously been disclosed.

IV. CONCLUSION

For the reasons stated above, we grant the Intervenor's Motion to Compel to the extent that the NRC Staff must disclose any existing documents that (1) have not been previously disclosed and were examined as part of the NRC Staff's review of the application itself or (2) have been used, reviewed, or generated as part of the NRC Staff's response to the admitted contentions and provide support for or opposition to the proposed action that is the subject of the proceeding, i.e., the relicensing of Indian Point Units 2 or 3. To the extent the Motion asks for more, we deny it.

³⁸ Id.

Because we have resolved the discovery dispute regarding NYS-38/RK-TC-5, we lay out the following schedule for evidentiary submissions relating to this contention in order to bring the contention in line with the other contentions on track for the first round of the evidentiary hearing in this proceeding:

1. New York and Riverkeeper shall have forty-five (45) days after issuance of this Order to present their evidentiary submissions on this contention (April 30, 2012).
2. Entergy and the NRC Staff shall have thirty (30) days thereafter to present their evidentiary submission on this contention.
3. New York and Riverkeeper shall have ten (10) days thereafter to present their revised or rebuttal testimony on this contention.
4. All subsequent steps pursuant to the Board's July 1, 2010 Scheduling Order shall resume and follow the track and timing for other pending contentions in the first round of the evidentiary hearing.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 16, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Granting in Part and Denying in Part State of New York and Riverkeeper's Motion to Compel) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 50-247-LR and 50-286-LR
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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 16th day of March 2012