April 15, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO STATE OF NEW YORK'S CROSS-MOTION FOR DECLARATORY ORDER ON COASTAL ZONE MANAGEMENT ACT ISSUES

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files its answer to the State of New York's ("New York") "Cross-Motion for Declaratory Order" filed on April 5, 2013.[1] In its Response and Cross-Motion, New York (a) provided its response to the "Motion and Memorandum by Applicant Entergy Nuclear Operations, Inc. for Declaratory Order that It Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point 2 and 3 for Renewal of the Operating Licenses" ("Entergy's Motion") (July 30, 2012),[2] and (b) filed a cross-motion for a

[1] *See* "State of New York Response to Entergy's Request to the Atomic Safety and Licensing Board for a Declaratory Order Concerning Coastal Zone Management Act Issues and Cross-Motion for Declaratory Order" (Apr. 5, 2013) ("Response and Cross-Motion"), at 22-31. The Staff does not address herein New York's response to Entergy's motion for a declaratory order, set forth at pages 1-21 of New York's Response and Cross-Motion.

[2] The Staff is filing a separate answer to Entergy's Motion, in accordance with the Board's scheduling Orders in this proceeding. *See* "NRC Staff's Answer to Applicant's Motion and Memorandum for Declaratory Order that It Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point 2 and 3 For Renewal of the Operating Licenses" (April. 15, 2013) ("Staff Answer").

declaratory order "that Entergy's license renewal application is subject to Federal consistency review by the New York Department of State." Response and Cross-Motion at 22.

In the Staff's Answer to Entergy's Motion, the Staff set forth its views that the Applicant had not demonstrated that the Atomic Safety and Licensing Board ("Board") should issue a Declaratory Order that no further consistency review is required for license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3") under the Coastal Zone Management Act ("CZMA") of 1972, 16 U.S.C. § 1451, *et seq.* Accordingly, the Staff recommended that Entergy's Motion be denied. For many of the same reasons, the Staff submits that New York has failed to demonstrate that its Cross-Motion for a Declaratory Order should be granted; accordingly, the Staff opposes New York's Cross-Motion and recommends that it, too, should be denied.

II. BACKGROUND

In its Answer to Entergy's Motion, the Staff described the background for Entergy's Motion, including (a) statements contained in Entergy's LRA regarding its intention to seek a certification by New York that the IP2/IP3 LRA is consistent with the New York State Coastal Management Program ("NYCMP" or "CMP"); (b) Entergy's revision of those statements in July 2013, to indicate that a further New York consistency review is not required; (c) the Staff's issuance of a request for additional information ("RAI") to Entergy concerning these issues on August 13, 2012, and Entergy's RAI response of September 11, 2012; and (d) Entergy's initiation of three separate actions in New York State proceedings concerning CZMA issues, including a judicial challenge to New York's recent amendment of coastal habitat designations, a petition with the New York State Department of State ("NYSDOS") asserting that Indian Point is exempt from a consistency review under NYCMP grandfathering provisions, and a CZMA consistency certification before the NYSDOS regarding license renewal of IP2 and IP3. *See*

Staff's Answer at 3-6.[3] To avoid unnecessary repetition, the Staff hereby incorporates that background discussion by reference herein.

III. DISCUSSION

A. Applicable Legal Standards.

1. Issuance of a Declaratory Order

Under the Administrative Procedure Act, 5 U.S.C. § 554(e), an agency, in its sound discretion, may issue a declaratory order to terminate a controversy or to remove uncertainty." This principle has been applied in NRC adjudicatory proceedings. Thus, the Commission has held that its presiding officers have been delegated the authority to issue declaratory relief under 10 C.F.R. § 2.718, which gives them "all powers necessary" to carry out their duties "to take appropriate action to avoid delay." Such relief may be granted, "provided there is the requisite connection between the rendering of a declaratory order and fulfillment of the board's duty to take appropriate steps to avoid delay in a proceeding otherwise before it." *Kansas Gas & Elec. Co.* (Wolf Creek Nuclear Generating Station, Unit 1), CLI-77-1, 5 NRC 1, 5 (1977).[4] Further, the Commission has held that "[t]he costs to the applicants of either proceeding or of waiting because of uncertainty as to its legal obligations create the type of dilemma which declaratory relief is fashioned to resolve." *Id.* at 4, *citing Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967).

In determining whether to grant declaratory relief, another board has held that two questions must be answered in the affirmative:

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[3] Entergy reserved the right to argue that IP2/IP3 license renewal is exempt from review under the terms of the NYCMP. *See* Staff Answer to Entergy's Motion at 5-6, and Attachment 4 to New York's Response. *See* Letter from Kathryn M. Sutton, Esq. and Paul M. Bessette, Esq. to the Board (Dec. 21, 2012) at 1-2. *See also,* Letter from Kathryn M. Sutton, Esq. and Paul M. Bessette, Esq. to the Board (Dec. 17, 2012) at 1-2 and n.2; and letter from John J. Sipos, Esq. to the Board (Dec. 21, 2012) at 1-2

[4] *Accord, Advanced Medical Systems, Inc.* (One Factory Row Geneva, Ohio 44041), LBP-89-11, 29 NRC 306, 314 (1989); *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), LBP-77-15, 5 NRC 643, 645 (1977).

> First, does a genuine and live controversy exist between the Licensee and the Staff sufficient to support a declaratory order. Second, is the issuance of declaratory relief appropriate in this proceeding. The former is necessary to ensure that a board has jurisdiction over the matter to be decided, without which it cannot issue any relief, declaratory or otherwise. The latter is necessary because declaratory relief is discretionary and is to be granted only to terminate a controversy or eliminate uncertainty and avoid unnecessary delay.

AMS, 29 NRC at 314.[5] Thus, whether or not a Declaratory Order should be issued is a matter within the sound discretion of the Board.

2. Jurisdiction and Procedural Requirements

The Board has jurisdiction to rule upon New York's Cross-Motion, pursuant to the Commission's delegation of authority to resolve matters placed into controversy by the parties pertaining to issuance of renewed licenses for IP2 and IP3. In this regard, the Board has jurisdiction to resolve those issues that fall within the delegation of authority contained in the Commission's Notice of Opportunity for Hearing for the proceeding.[6] *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). Inasmuch as issuance of a renewed license may require that the Commission consider the Applicant's consistency certification in accordance with Section 307 of the CZMA,[7] this issue appears to fall within the scope of this proceeding and the Board's general jurisdiction.

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[5] *See Yale Broadcasting Corp. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (FCC was not required to issue a declaratory order "merely because a radio broadcaster asks for one. . . . An administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion.").

[6] *See* "Establishment of Atomic Safety and Licensing Board," 72 Fed. Reg. 60,394 (Oct. 24, 2007) (establishing a Board to preside over the IP2/IP3 license renewal proceeding). *See generally*, "Final Rule, "Part 2—Rules of Practice; Authority of Atomic Safety and Licensing Board to Rule on Certain Petitions," 37 Fed. Reg. 28,710 (Dec. 29, 1972); NRC Management Directive 9.5, Chap. 0106 ("Organization and Functions/ Atomic Safety and Licensing Board Panel"), §§ 022 (Functions), 023 (Authority), and 033 (Delegation to Atomic Safety and Licensing Boards).

[7] Section 307 of the CZMA states that "[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, . . . " *See* discussion *infra* at 7.

Finally, as a matter of procedure, it must be noted that New York's Cross-Motion pertains to an issue that is not the subject of any contention in this proceeding. In this regard, the Board's authority to rule upon issues in a license renewal proceeding is limited to the matters placed in controversy by the parties – which the Commission's regulations generally require be the subject of an admitted contention, in accordance with 10 C.F.R. § 2.309(f);[8] in contrast, issues that are not the subject of admitted contentions are to be resolved by the Staff under its delegated authority from the Commission.[9] Accordingly, New York's Cross-Motion may be denied in that it does not relate to any admitted contention in the proceeding.

3. The Coastal Zone Management Act

The Coastal Zone Management Act recognizes a national interest in "the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451(a). The CZMA seeks to balance "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development" with the need to protect "important ecological, cultural, historic, and esthetic values" in such areas. 16 U.S.C. § 1451(c) and (e). Accordingly, Congress declared it is the national policy, *inter alia*, to encourage and assist the states in developing and implementing "management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for

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[8] *See also* 10 C.F.R. §2.340(a)(1) (in OL, OL amendment and license renewal proceedings, the Board is to make findings of fact and conclusions of law on (a) "the matters put into controversy by the parties," (b) any matter designated by the Commission, and (c) any matter that was not placed in controversy by the parties, "but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer. . . ." *See generally, Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) ("[t]he scope of a particular proceeding is limited to the scope of the admitted contentions and any issues the Commission authorizes the Board to raise sua sponte.").

[9] *See, e.g.*, 10 C.F.R. §§ 1.32(c), 1.43, 2.103, and 2.1202(a); *see generally, Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 35-36 (2005) (in a proceeding with a mandatory hearing, the Staff has "prime responsibility for technical fact-finding on uncontested matters" associated with the application).

compatible economic development," to encourage coordination and cooperation among Federal, State and local agencies, and to support State and Federal regulation of land use practices affecting coastal resources, among other stated objectives. 16 U.S.C. § 1452(2) & (5).

In particular, the CZMA requires that "any coastal state which has completed the development of its management program" shall submit that program to the U.S. Secretary of Commerce for review and approval. 16 U.S.C. § 1454.[10] Under Section 306 of the Act, before approving such program, the Secretary must find that the state or program has satisfied 16 specified criteria regarding, *inter alia*, required program elements, coordination with other authorities, organization, administrative processes, and approval by the State Governor. 16 U.S.C. § 1455.[11] Once a state's CMP has been approved by the Secretary, Section 307 of the Act requires that any applicant for a required Federal license or permit to conduct an activity, affecting any land or water use or natural resource of the coastal zone of that state, "shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program"; in addition, the applicant is required to provide the state or its designated agency a copy of that certification. 16 U.S.C. § 1456(c)(3)(A); emphasis added. Section 307 of the Act further provides as follows:

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[10] The term "coastal state" includes, *inter alia*, states that border on the Atlantic Ocean or Long Island Sound. 16 U.S.C. § 1453(4). The term "coastal waters" includes, *inter alia*, "those waters, adjacent to the shorelines, which contain a measurable quantity or percentage of sea water, including, but not limited to, sounds, bays, . . . and estuaries." 16 U.S.C. § 1453(3). The term "estuary" means "that part of a river or stream . . . having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage." 16 U.S.C. § 1453(7).

[11] Included among these is a requirement that the CMP "provides for adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program." 16 U.S.C. § 1455(d)(8).

> Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state [or] its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

Id., emphasis added.

The U.S. Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"), has adopted regulations under Sections 306 and 307 of the Act, establishing (a) requirements for a state's CMP to be approved, as set forth in 15 C.F.R. Part 923,[12] and (b) requirements governing implementation of the federal consistency requirement of the CZMA, as set forth in 15 C.F.R. Part 930.[13] Subpart D of Part 930 pertains to "Consistency for Activities Requiring a Federal License or Permit." Section 930.51 provides, in pertinent part, that when a State has previously reviewed the federally licensed action for consistency with the CZMA, and the Federal agency determines that license renewal will not have any "substantially different effects" on the environment than were previously considered, no further CZMA review is required:

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[12] *See* 15 C.F.R. § 923.1(a)-(b).

[13] *See* 15 C.F.R. § 930.1(b).

> **§ 930.51 Federal license or permit.**
>
> (a) The term "federal license or permit" means any authorization that an applicant is required by law to obtain in order to conduct activities affecting any land or water use or natural resource of the coastal zone and that any Federal agency is empowered to issue to an applicant. . . .
>
> (b) The term also includes the following types of renewals and major amendments which affect any coastal use or resource:
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> (1) Renewals and major amendments of federal license or permit activities not previously reviewed by the State agency;
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> (2) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which are filed after and are subject to management program changes not in existence at the time of original State agency review; and
>
> (3) Renewals and major amendments of federal license or permit activities previously reviewed by the State agency which will cause an effect on any coastal use or resource substantially different than those originally reviewed by the State agency.
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> * * * *
>
> (e) The determination of substantially different coastal effects under paragraphs (b)(3), and (c) of this section is made on a case-by-case basis by the Federal agency after consulting with the State agency, and applicant. The Federal agency shall give considerable weight to the opinion of the State agency. The terms "major amendment," "renewals" and "substantially different" shall be construed broadly to ensure that the State agency has the opportunity to review activities and coastal effects not previously reviewed. . . .

Id., emphasis added. *See California v. Norton*, 311 F.3d 1162, 1174 n.8 (9th Cir. 2002).

While Entergy relied upon § 930.51(b)(3) in support of its Motion, New York asserts that § 930.51(b)(3) is inapplicable, in that the State has not conducted a previous consistency review of the activities that would be authorized by license renewal of IP2 and IP3; according to New York, regardless of any reviews conducted by other State agencies, no consistency review was conducted by the NYSDOS, which New York asserts is the sole agency designated under the NYCMP to conduct a CZMA consistency review. *See* Cross-Motion at 23-27. Further, New York asserts that consultation between the NRC and New York is required under 15 C.F.R. § 930.51(b)(2) and (3) before a federal agency can determine whether the effects of operation have been previously considered, *id.* at 27, and that even if a previous review was conducted,

changes in the NYCMP and other (actual or potential) changes in regulatory requirements warrant that a further review be conducted, *id.* at 27-30.

B. New York Has Not Established A Sufficient Factual Basis for Its Cross-Motion.

In accordance with 10 C.F.R. § 2.325, "[u]nless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof." Thus, as the proponent of its Cross-Motion, New York must demonstrate that it is entitled to the entry of a declaratory order that a CZMA consistency review is required for license renewal of IP2 and IP3.

1. Consultation Between the NRC and the State.

In accordance with 15 C.F.R. § 930.51(e), a determination as to whether license renewal would cause substantially different coastal effects than those previously reviewed is to be made by the Federal licensing agency after consulting with the State agency and the applicant; the opinion of the cognizant State agency is to be given "considerable weight." *Id.* Here, there has been no consultation between the NRC and the NYSDOS, the State agency whose opinion is to be given considerable weight in the NRC's decision.[14] Thus, like Entergy, New York has not provided a sufficient basis to support its request for issuance of a Declaratory Order in its favor.

2. Prior Review of Activities to Be Authorized by License Renewal.

A finding under 15 C.F.R. § 930.51(b)(3) that license renewal will not have substantially different effects on the coastal environment than the effects that were reviewed previously necessarily requires that a prior review has been conducted of the effects of plant operation. Thus, the Statement of Consideration for § 930.51(b)(3) observed that the rule sought to avoid "unnecessary State agency review":

[14] While actual consultation has not occurred, New York's opposition to Entergy's Motion and its assertion that no prior consistency review has been conducted, may be construed to demonstrate that the State does not concur in Entergy's views.

> Paragraph [930.51](b) is founded on the principle that an applicant does not have a vested right to receive approval of a renewal or a major amendment without first complying with the law existing at the time approval is sought. However, this principle must operate in the context of avoiding unnecessary State agency review. Therefore subparagraph (1) assures the State agency of an opportunity to review licenses and permits which were originally approved by the Federal government prior to management program approval and are subject to major amendment or renewal following management program approval. In the event the State agency has previously reviewed a license or permit activity, further review is limited to cases where changes in management program provisions necessitate reevaluation of the activity (subparagraph (2)), or the activity will be modified substantially causing new coastal zone effects (subparagraph (3)).[15]

While New York's Cross-Motion asserts that the NYSDOS has not previously conducted CZMA consistency reviews of IP2 and IP3 operations, it fails to provide any meaningful discussion of the legal effect of the reviews that were conducted by other State agencies, or of the potential effect of NYSDOS's tacit or implicit acceptance of those reviews. In the Staff's view, New York has not provided sufficient information to support a conclusive finding that the State has not previously conducted a review of the effects on coastal zone resources that may be occasioned by operation of IP2 or IP3.

C. New York Has Not Established that Issuance of A Declaratory Order Is Appropriate.

As discussed *supra* at 3-4, the Board may issue a declaratory order "only to terminate a controversy or eliminate uncertainty and avoid unnecessary delay." *AMS*, 29 NRC at 314. Significantly, apart from arguing that the Board lacks jurisdiction to resolve the issues raised by Entergy's Motion concerning CZMA consistency reviews,[16] New York's Cross-Motion fails to address these requirements. The Staff submits that issuance of a Declaratory Order as requested in New York's Cross-Motion would not accomplish the purposes enunciated in *AMS*.

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[15] Final Rule, "Part 930 – Federal Consistency with Approved Coastal Management Programs," 43 Fed. Reg. 10,510, 10,523 (Mar. 13, 1978) ("1978 Rule").

[16] See Cross-Motion at 17-21.

First, issuance of a Declaratory Order would not terminate a controversy. Under the CZMA, New York is responsible for conducting a review to determine whether the activities to be authorized by a federal permit or license (including license renewal) are consistent with the State's CMP. In December 2012, Entergy filed a consistency certification with the State – and New York is presumably now (or soon will be) engaged in a review of that certification. As part of its review, New York can determine whether the effects of IP2/IP3 operation license renewal are consistent with the NYCMP – including a determination as to whether previous consistency reviews were conducted and, if so, whether the effects of license renewal are substantially different than the effects previously considered. The outcome of New York's consistency review can be appealed to the Secretary of Commerce, whose decision, in turn, can be reviewed in federal court.[17] Rather than terminating controversy, issuance of a Declaratory Order by the Board could lead to conflicting results and may, in fact, only add to the controversy.[18]

Second, issuance of a Declaratory Order would not eliminate uncertainty. Unlike the situation in *Wolf Creek*, where the applicant needed to know whether certain construction activities would run afoul of this agency's own requirements, here the Board is not "uniquely positioned" to avoid delay by resolving the "legal uncertainty."[19] Rather, the issues raised by

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[17] *See Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 463 (1st Cir. 2009) ("the CZMA also limits state authority to delay or prohibit projects subject to consistency review, by providing for federal review of state agency determinations. If the state agency objects to consistency certification, the applicant may appeal the decision to the Secretary of Commerce, who can override the objection on a finding 'that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.' 16 U.S.C. 1456(c)(3)(a). The Secretary's decision, in turn, may be reviewed in federal district court."). On appeal, NOAA could reverse New York's findings on the grounds that the previous reviews exempted Entergy from obtaining a new consistency determination for license renewal. *See, e.g., Pan American Grain Co.*, (Attachment to the Staff's Response to Entergy's Motion) at 4.

[18] Moreover, while New York argues that Entergy's Motion has been mooted by Entergy's filing of a consistency certification with the NYSDOS (*see* New York Response at 16-17), that same "mootness" argument would seem to apply to New York's Cross-Motion.

[19] *See Wolf Creek*, CLI-77-1, 5 NRC at 4-5. In *Wolf Creek*, the applicant's only alternative to a declaratory order would have been to seek an opinion from the General Counsel; the Commission dismissed that alternative due to the Board's greater "familiarity with possible crucial factual issues." *Id.*

New York's Cross-Motion pertain to the NYCMP and New York's own administrative processes; accordingly, any legal uncertainty that may exist regarding New York's authority to conduct a CZMA consistency review at this time can be resolved by the State, subject to review by the U.S. Secretary of Commerce and a federal court.

Third, resolution of this issue by the Board would not avoid unnecessary delay. In light of Entergy's filing of its consistency certification with the NYSDOS, the State presumably will consider the effects of license renewal on coastal zone resources and/or whether those effects are different than any effects previously considered. Issuance of a decision by the Board in response to New York's Cross-Motion will not serve to expedite the State's review or the ultimate resolution of CZMA issues related to license renewal of IP2 and IP3. Thus, a favorable ruling on New York's Cross-Motion would not "avoid unnecessary delay."

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that New York's Cross-Motion does not demonstrate that the Board should issue a Declaratory Order that a CZMA consistency review is required for license renewal of IP2 and IP3. New York's Cross-Motion should, therefore, be denied.

Respectfully submitted,

Signed Electronically by

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Dated at Rockville, Maryland
this 15th day of April 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO STATE OF NEW YORK'S CROSS-MOTION FOR DECLARATORY ORDER ON COASTAL ZONE MANAGEMENT ACT ISSUES," dated April 15, 2013, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 15th day of April, 2013.

/Signed (electronically) by/

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