January 9, 2014

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 MOTION FOR LEAVE TO FILE REPLY ON MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION OF CONTENTION NYS-12C

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith files its answer in opposition to the "State of New York Motion for Leave to File Reply on Motion to Reopen the Record and for Reconsideration of Contention NYS-12C" ("New York's Request for a Reply"). The Staff submits that New York's Request for a Reply should be denied, on the grounds that the State of New York ("New York" or "State") has not demonstrated that it has met the requirements in 10 C.F.R. §2.323(c).

BACKGROUND

New York requests leave to reply to the "NRC Staff's Response to State of New York Motion to Reopen the Record and for Reconsideration on Contention NYS-12C" ("Staff's Opposition"), filed on December 23, 2013. The Staff's Opposition was filed in response to "State of New York Motion to Reopen and for Reconsideration on Contention NYS-12C" ("New York's Motion to Reopen"), filed on December 7, 2013.

New York claims that it could not have reasonably anticipated (1) the information contained in the "Affidavit of S. Tina Ghosh in Support of the NRC's Staff's Opposition to State of New York Motion to Reopen the Record and for Reconsideration on Contention NYS-12C,"

("Dr. Ghosh's Affidavit"); (2) the Staff's discussion of the State's August 1, 2013 Comment letter;[1] (3) arguments regarding the scope of the Staff's disclosures; and (4) Entergy's examination of New York's disclosures on this same issue.

DISCUSSION

I. Legal Standard Governing Motions for Leave to Reply

Section 2.323(c) of the Commission's Regulations provides that there is no right to reply to answers to motions, but that permission to file a reply may be granted "only in *compelling circumstances*, such as where the moving party *demonstrates* that it could not have reasonably anticipated the arguments to which it seeks leave to reply" (emphasis added). In 2004, when the Commission added the "compelling circumstances" standard to 10 C.F.R. §2.323(c),[2] it stated that in order to satisfy the compelling circumstances, the moving party must show that manifest injustice would occur in the absence of a reply and that the arguments raised in the reply could not have been raised earlier.[3]

II. New York's Claims of Compelling Circumstances are Unsupported

A. Dr. Ghosh's Affidavit is Entirely Consistent with the Staff's Testimony

New York argues that could not have anticipated that the Staff would explain why New York's unsupported and unqualified conclusions regarding the use of an 1-year decontamination time in the Spent Fuel Pool Scoping Study are incorrect. Further, New York states that "[d]uring consultation on the State's motion, NRC Staff stated that its use of a 365-day TIMDEC in the Spent Fuel Pool [Scoping] Study was not relevant because it came from a different study", and, again, "[t]he material in the Ghosh affidavit was not previously available to the State (or the public) and was not discussed during the consultation preceding the State's Motion to reopen

[1] Letter from John Sipos, Assistant Attorney General for New York, to Cindy Bladey, Chief of Rules, Announcements, and Directives Branch, NRC, ("August 1, 2013 Comment Letter"), Staff's Opposition, Attachment B, dated August 1, 2013.

[2] *See* Changes to Adjudicatory Process (Final Rule), 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

[3] *Id.*

and reconsider. New York is mistaken.

1. New York's Characterization of the Consultations are Incorrect

New York's characterization of the consultations regarding both its Motion to Reopen and its Request for Reply are incorrect. First, New York represents that Staff's position on the "use of the 1-year decontamination time in the Spent Fuel Pool Scoping Study was not relevant because it came from a different study"[4] and that the "Staff provided no further elaboration."[5] Contrary to these statements by New York, the Staff explained that the Spent Fuel Pool Scoping Study represented a single highly unlikely event that could conditionally result in widespread contamination and, thus, represented an analysis unlike the SAMA analysis. The Staff had previously discussed this same issue during the consultation on New York's Motion to Reopen and communicated it by email to New York when the MACCS2 files were made available to the public. [6] During the consultation on the instant motion and New York's Motion to Reopen, the Staff explained that the decontamination times should be selected to represent the range of accidents being modeled.[7] For SAMA analysis of reactor accidents, this would include nominal releases from reactor accidents without containment failure.[8] With respect to the Spent Fuel Pool Scoping Study, the Staff explained that it represented a single accident that resulted in either no release or conditional large release. In other words, the Spent Fuel Pool Scoping Study did not model accidents with nominal or minor releases to environment due to its limited purpose.

2. New York's Expectations Regarding Consultations Are Not Equitable

New York complains that the Staff should have discussed the precise contents of Dr.

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[4] New York's Request for a Reply at 3.

[5] *Id.*

[6] *See, e.g.,* New York's Motion to Reopen, Attachment 5, at 4, 8

[7] Transcript at 1907, 2139-40, 2146, 2153-55

[8] *Id.* at 1907, 2153-54.

Ghosh's affidavit prior to New York's filing of its Motion to Reopen, Mr. Sipos' declaration, and Mr. Mahilrajan's declaration.[9] During New York's consultation on its Motion to Reopen, Mr. Sipos made no reference to his declaration or Mr. Mahilrajan's declaration. As such, New York cannot claim that the Staff had any obligation to discuss the precise nature of Dr. Ghosh's affidavit.[10] New York's expectations that other parties describe in detail the exact nature and specific contents of their opposition in response to the State's general description of its proposed motion are inequitable. New York, however, exempts itself from these inequitable requirements. For example, when the Staff and Entergy both questioned New York on why it should not have been aware of the 1-year decontamination time disclosed in the Draft Spent Fuel Pool Scoping Study, the State provided only a cursory response that the MACCS2 input/output files confirmed the TIMDEC and that the term, TIMDEC, did not appear in the studies.[11]

3. Dr. Ghosh's Affidavit Repeats the Information Provided to the Board During the Hearing

New York also complains that information in Dr. Ghosh's Affidavit is new and was not previously available. In support of this argument, New York asserts that Dr. Ghosh's Affidavit "for the first time attempts to set forth an explanation why Staff used a 365-day TIMDEC value, and attempts to distinguish the study of spent fuel pool severe accidents from the Indian Point [SAMA] Analysis."[12] Yet, New York points to no requirement or reason for the NRC Staff to

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[9] New York's Request for a Reply at 3.

[10] At the time of New York's consultation, the Staff had not yet determined whether it would need or include any affidavit from the Staff.

[11] Although it difficult to integrate many of New York's incongruent statements and actions with respect to the Spent Fuel Pool Scoping Study, New York did explain that they had conducted a word search of the Spent Fuel Pool Scoping Study and were unable to locate the term "TIMDEC." *See* New York's Request for a Reply at 5. Conducting a single search for a single term merely represents New York's failure to conduct appropriate due diligence for information made available to the public. As explained in the Staff's Opposition, the information regarding the 1-year decontamination time was available to anyone who cared to read the document.

[12] New York's Request for a Reply at 3.

have needed to explain its selection of a 1-year decontamination time or explain the differences between the Spent Fuel Pool Scoping Study and a SAMA analysis conducted under NEPA. It is important to note that up and until New York filed its Motion to Reopen, there was no reason to distinguish Indian Point's SAMA analysis from the Spent Fuel Pool Scoping Study or provide any explanation of the 1-year decontamination times.[13]

Dr. Ghosh's explanation is entirely consistent with the testimony provided in this proceeding. Her affidavit was provided in direct response to New York's declarations from Mr. Sipos and Mr. Mahilrajan and their conclusions. Witnesses at the hearing explained that the TIMDEC should represent all modeled scenarios and not just a worst case scenario.[14] Prior to New York's Motion to Reopen, the Staff had cautioned the State that the Spent Fuel Pool Scoping Study was unique. By email, the Staff indicated that the Spent Fuel Pool Scoping Study represented "a highly unlikely spent fuel pool accident …."[15] In other words, the Spent Fuel Pool Scoping Study examined a singular type of spent fuel pool accident and not the full range of accidents. As a result of the scope of the Spent Fuel Pool Scoping study and its very limited purpose of whether to expedite transfer of spent fuel from the pool to dry casks, a 1-year decontamination time was selected.[16]

4. Dr. Ghosh's Affidavit is Not Misleading

New York asserts that Dr. Ghosh's Affidavit is misleading.[17] In New York's opinion, Dr. Ghosh's Affidavit is misleading because (1) it does not discuss the impact of population on the

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[13] As explained later, New York admits that it did not think that the Spent Fuel Pool Scoping Study was relevant to Contention NYS-12C until receiving the input/output files. As such, New York can hardly suggest that the Staff should have anticipated the State's arguments when it drafted the Spent Fuel Pool Scoping Study.

[14] *See* Staff's Testimony on NYS-12C, Ex. NRC000041, at 89-90; Entergy's Testimony on NYS-12C, Ex. ENT000450, at 12; Transcript at 2139-40, 2146, 2153-55.

[15] New York Motion to Reopen, Attachment 5, at 4, 8 (emphasis added).

[16] Staff's Opposition at 13.

[17] New York's Request for a Reply at 3.

economic costs of an accident and (2) it overstates the unlikeliness of the spent fuel pool accident in comparison to the accidents modeled in the Indian Point SAMA analysis.

New York argues that Dr. Ghosh's Affidavit should have discussed the impact of population on the overall economic costs.[18] New York's Motion to Reopen, however, focused solely on the 1-year decontamination time. New York's own motion did not discuss any relationship between the decontamination time and population residing in any particular sector. As such, the Staff was under no obligation to address an issue New York failed to raise. If New York believes that TIMDEC was tied to the resident population, it was incumbent on the State to raise the issue in its initial filing.[19]

New York, also, argues that the frequency Dr. Ghosh provides in her affidavit "is on par with the frequencies of accident scenarios, *i.e.* releases, examined by Entergy in its Indian Point SAMA analysis ...."[20] New York misreads the meaning and context Dr. Ghosh's Affidavit. New York interprets this frequency as the fully developed statement of probability similar to the frequencies identified in the Indian Point SAMA analysis. However, the Draft Spent Fuel Pool Scoping Study and the Final Spent Fuel Pool Scoping Study explain that this frequency simply provides the upper bound for analysis. The Final Spent Fuel Scoping Study states that, "The inclusion of probabilistic aspects within the current study allows the study to consider some aspects of likelihood, but will not support definitive statements on risk."[21] The study explains that actual frequencies are likely to be much lower than 10^{-7} per reactor year.[22] Thus, New York's comparison of frequencies of the modeled reactor accidents with the modeled spent fuel

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[18] New York's Request for a Reply at 3-4.

[19] TIMDEC is, in fact, independent of the population residing in the modeled area, unlike decontamination costs.

[20] New York's Request for a Reply at 4.

[21] New York's Motion to Reopen, Attachment 7, at 7.

[22] Although not quantified in this study, the study does indicate that the overall likelihood of a spent fuel pool accident once credit for 10 C.F.R. 50.54(hh)(2) mitigation measures is incorporated is approximately a factor of 20, 5.5x10-9 per reactor year. *Id.*, Attachment 7, at x.

pool accident is incorrect because it fails to control for the significant differences in the analyses. The frequencies New York argues are on par with the Reactor accidents are not directly comparable. New York's belated arguments on frequency also fail to account the Final Spent Fuel Pool Scoping Study's conclusion that the actual accident is likely to be 20 times lower than the frequency used in its analysis. [23] Once this conservatism is removed, the spent fuel pool accident frequency is an order of magnitude less probable than the least likely accident modeled at either Indian Point Unit 2 or Unit 3. Regardless, this information was available to New York prior to its Motion to Reopen and should have been raised earlier.

Belatedly, New York seeks through its request for a reply to substitute a qualified expert's declaration for the declarations submitted by Mr. Sipos and Mr. Mahilrajan.[24] The regulations required that a party seeking to reopen a closed record must submit affidavits by competent and qualified individuals.[25] The time for providing an expert's declaration in support of its Motion to Reopen has passed and cannot be cured through wholesale substitution in a reply.

B. New York's August 1, 2013 Comment Letter Demonstrates Its Active Participation in the Spent Fuel Pool Scoping Study

New York asserts that the Staff mischaracterized the August 1, 2013 Comment Letter.[26] New York explains that it is seeking a reply "to correct NRC Staff's mischaracterization of the letter and to reiterate that it was not aware of the 365-day TIMDEC until its experts had a chance to review the MACCS2 input/output files."[27] Beginning first with New York's second reason, the State asserts that it simply wants to repeat its arguments from its Motion to Reopen

[23] New York's Motion to Reopen, Attachment 7, at x

[24] New York's Request for Reply at 3-4.

[25] 10 C.F.R. § 2.326(b).

[26] New York's Request for a Reply at 6.

[27] *Id.* at 6.

that it was not aware of the 1-year decontamination time until it received the MACCS2 input/output files in their native format.[28] New York fully articulated this argument in its Motion to Reopen. The mere repetition of New York's previous arguments regarding timeliness is inadequate to satisfy the compelling circumstances and manifest injustice required to grant a reply. In light of the consultation preceding New York's filing, the State was fully aware that the Staff was going to oppose the Motion to Reopen based on timeliness. Simply put, the August 1, 2013 Comment Letter clearly demonstrates that New York should have identified this information earlier and that New York's failure to exercise sufficient due diligence cannot excuse its untimeliness. Thus, there is no reason to allow New York to reiterate or supplement its timeliness arguments.

New York also argues that the Staff mischaracterized its August 1, 2013 Comment Letter.[29] Even if New York's arguments were assumed to be true, it would not give raise to any manifest injustice if the request for a reply was denied because the Staff provided a full copy of the State's letter. The Board is capable of examining the August 1, 2013 Comment Letter and giving it the appropriate weight in its ruling.

New York's assertions regarding the Staff's interpretation of August 1, 2013 Comment Letter, however, are incorrect. While the Staff would acknowledge that the August 1, 2013 Comment Letter is vague, New York's selected quotation regarding sufficient time and experts references a conversation between Ms. Janice Dean, counsel for New York, and Mr. Don Algama, Office of Nuclear Regulatory Research, during the week of July 22. The full quotation states:

> During the week of July 22, New York State Assistant Attorney General Janice Dean communicated with NRC Staff to request an extension of the comment period noticed in the Federal Register. As AAG Dean explained to Don Algama at NRC's Office of

[28] New York's Request for a Reply at 6.

[29] *Id.* at 6.

> Nuclear Regulatory Research, the 30-day comment period did not afford sufficient time for the State to identify and retain expert consultants to review the highly technical Draft Study.[30]

New York seemingly asserts that this description of Ms. Dean's July conversation shows that New York did not consult with its experts. If that was the only reference to the State's experts, New York might be correct that the letter was unclear regarding expert consultation. But, the August 1, 2013 Comment Letter states fairly conclusively that the State used its experts. Mr. Sipos stated "the short 30-day comment period and the release of the study occurred in the middle of the summer vacation season, which further complicated review and expert interaction."[31] Notably, Mr. Sipos statements in the August 1, 2013 Comment Letter appear to contradict his statements in New York's Request for a Reply. New York's reasons for seeking a reply to Staff's characterization of the August 1, 2013 Comment Letter fail to satisfy the "compelling circumstances" standard because the Board has August 1, 2013 Comment Letter before them and is capable of drawing any appropriate inferences. Furthermore, the Staff's characterization is fully consistent with the letter. Thus, New York's Request for a Reply should denied.

C. The Staff's Discussion of its Disclosure Obligations is Entirely Consistent with the Board's Orders in this Proceeding

New York argues, first, that the Staff "misinterpret[ed] its disclosure argument and contradicts the Commission's 2012 amendments to 2.336(b)";[32] and second, based solely on attorney argument, that the Staff failed to disclose information New York believes to be contradictory to the Staff's testimony in this proceeding.[33] New York's arguments are incorrect.

New York's arguments that it could not anticipate that the Staff would argue that the

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[30] Staff's Opposition, Attachment B, at 1.

[31] *Id.*, Attachment B, at 2.

[32] New York's Request for a Reply at 6.

[33] *Id.* at 7.

scope of its discovery obligations were different than New York's assertions in its Motion to Reopen are not plausible. New York has previously argued in motions to compel[34] that the scope of the Staff's discovery included without limitation any "documents that were relevant to admitted contentions."[35] The Staff, however, opposed New York's assertions regarding the scope of discovery in every set of filings. For example, the Staff explained that although the scope of discovery was broad it was not without limitation.[36] The Staff's discovery obligations extended to "documents … supporting the Staff's review."[37] Inexplicably, both New York's Motion to Reopen and its Request for a Reply fail to address the Board's Order in this proceeding. The Board, in ruling on one of New York's motions to compel, adopted the Staff's interpretation regarding the scope of discovery and explicitly ruled that documents like the Spent Fuel Pool Scoping Study are not within the Staff's discovery obligations in this proceeding.[38] As such New York cannot credibly claim that it could not anticipate the Staff's arguments regarding the scope of its discovery. New York should have anticipated that the Staff would raise the Board's previous rulings regarding the scope of the Staff's discovery and, specifically addressed how that ruling should not apply here. Finally, New York's description of the arguments it seeks to include in its reply appear to rehash the arguments previously raised in its Motion to Reopen.

Despite asserting that the Staff failed to disclose information contradicting its previous testimony in this proceeding, New York fails to identify any statements by the Staff during its testimony regarding SAMA analysis that is contradicted by the information in the Spent Fuel Pool Scoping Study or Dr. Ghosh's Affidavit. Importantly, New York has not pointed to any

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[34] State of New York And Riverkeeper Motion to Compel Compliance with Disclosure Obligations By NRC Staff, at 11-14 (Jan. 30, 2012).

[35] New York's Request for a Reply at 8.

[36] NRC Staff's Answer to " State of New York And Riverkeeper Motion to Compel Compliance with Disclosure Obligations By NRC Staff," at 11.

[37] *See* Order (Granting in Part and Denying in Part State of New York and Riverkeeper's Motion to Compel), at 8 (March 16, 2012) (unpublished).

[38] *Id.*

contradictory statements by Staff. New York's unsupported assertion is insufficient to satisfy the compelling circumstances required to grant a reply.

New York's should have anticipated that the Staff would (1) object in similar matter as in its previous filings to the scope of discovery advanced by New York, (2) argue that the scope of discovery should be governed by the controlling precedent contained in the Board's previous rulings, and (3) assert that the information contained in the Spent Fuel Pool Scoping Study and Dr. Ghosh's Affidavit are consistent with the Staff's previous representations and testimony. Thus, New York's Request for Reply does satisfy the requirements of 10 C.F.R. §2.323(b) and should be denied.

D. Entergy's Examination of the State's Disclosures

New York takes issue with Entergy's analysis of the State's disclosures. New York's arguments appear to misconstrue "Entergy's Answer Opposing State of New York Motion to Reopen the Record and for Reconsideration of Contention NYS-12C" ("Entergy's Opposition"), filed on December 23, 2013. New York inexplicably focuses only on Entergy's reference to the presiding officer's inherent ability to impose sanctions on a party. Entergy's argument, however, simply suggests that New York's failure to disclose documents related to the Draft and Final Spent Fuel Pool Scoping Study was either a result of New York's determination that they were not particularly relevant or had not been disclosed properly.[39] Importantly, New York admits that it did not believe the information in the studies to be relevant to Contention NYS-12C. New York states that it "did not believe the Spent Fuel Pool Consequence Study was relevant to NYS-12C",[40] until reviewing the MACCS2 input/output files which provided the 1-year decontamination time in an equally accessible but different format. Regardless, New York's request to respond to Entergy's discussion of the State's disclosures does not satisfy the

[39] Entergy's Opposition at 11.

[40] New York's Request for a Reply at 5-6.

compelling circumstances standard or result in some manifest injustice if the reply was not granted. Thus, New York's Request for a Reply should be denied.

CONCLUSION

New York's request for leave to reply to the Staff's Answer is not authorized by 10 C.F.R. § 2.323(b). New York failed to establish that it could not have reasonably anticipated the arguments raised in the Entergy's Opposition and the Staff's Opposition. New York, also, failed to demonstrate why it could not have raised issues in its initial filing. Finally, New York never showed how manifest injustice would occur in the absence of a reply. Thus, New York's Motion should be denied.

Respectfully submitted,

Signed Electronically by
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Dated at Rockville, Maryland
this 9th day of January 2014

CERTIFICATION OF COUNSEL

Counsel for the Staff certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

Signed Electronically by

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Dated at Rockville, Maryland
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UNITED STATES OF AMERICA
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ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR/286-LR
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(Indian Point Nuclear Generating Units 2 and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO STATE OF NEW YORK MOTION FOR LEAVE TO FILE REPLY ON MOTION TO REOPEN THE RECORD AND FOR RECONSIDERATION OF CONTENTION NYS-12C," dated January 9, 2014, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 9th day of January, 2014. :

Signed Electronically by
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