UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 25, 2016

JOINT MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION OF THE JULY 13, 2016 LICENSING BOARD ORDER SCHEDULING FURTHER FILINGS ON THE TRACK 2 CONTENTIONS

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a) and § 2.323(e), Entergy Nuclear Operations, Inc. ("Entergy"), on behalf of itself, the NRC Staff ("Staff"), the State of New York ("New York"), and Riverkeeper, Inc. ("Riverkeeper"), hereby seeks leave from the Atomic Safety and Licensing Board ("Board") to file this Joint Motion for reconsideration and/or clarification of the Board's July 13, 2016 Order, which establishes a schedule for further filings on the Track 2 contentions.[1] For the reasons set forth below, the parties submit that compelling circumstances justify the filing of this Motion, and that granting the procedural relief requested herein is necessary to avoid the potential for manifest injustice.[2]

First, Entergy and the Staff request that the Board reconsider its decision to require the parties to submit to the Board certain technical documents prior to filing their supplemental

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[1] Licensing Board Order (Scheduling of Further Filings on Track 2 Contentions) (July 13, 2016) (unpublished) ("July 13, 2016 Order" or "Order"). Counsel for Entergy, under the express authorization of counsel for New York, Riverkeeper, and the Staff, represents that counsel of record for the other parties have authorized counsel for Entergy to execute this Motion on their behalf. This Motion is timely because it has been filed within 10 days of the Board's July 13, 2016 Order, in accordance with 10 C.F.R. § 2.323(a)(2) and (e).

[2] 10 C.F.R. § 2.323(e); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (stating that the reconsideration standard "is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier").

testimony.[3] Documents on which the parties rely to support their testimony and case in chief in contested proceedings ordinarily are filed as exhibits to their testimony.[4] This practice ensures that such documents, if admitted into evidence by the Board, become part of the evidentiary record, and that the Board's factual findings are based only on the evidentiary record.[5] Entergy and the Staff are concerned that documents which are submitted months before the parties' supplemental testimony, but which are not ultimately included in the evidentiary record, could nonetheless influence (even if inadvertently) the Board's merits decision on the contested issues, to the possible prejudice of one or more parties.[6] Further, the parties have agreed that key technical documents will be made available to the other parties as soon as practicable after they become available. Thus, no prejudice will result to the parties if the Board reconsiders and eliminates the requirement that such documents be filed in the docket prior to their identification as exhibits in the proceeding. New York and Riverkeeper have authorized Entergy to state that those parties do not oppose this request. Therefore, Entergy requests that the Board reconsider its decision to require the parties' advance filing of key technical documents, and instead await the parties' filing of their supplemental testimony and the supporting exhibits upon which they rely.

Second, the parties request that the Board reconsider the current Track 2 filing schedule, with regard to the timing of the parties' submittal of their proposed findings of fact and

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[3] During the parties' consultations, New York and Riverkeeper stated that given the tight timeline for the filing of supplemental testimony in relation to the production of the last set of relevant documents, they request that any revised Board Order require the disclosure of key documents as soon as practicable after they become available. However, they take no position regarding the filing of such documents with the Board, and thus Entergy's and the NRC's Staff reconsideration request with respect to that issue in Section III.A of this Motion. New York and Riverkeeper support the requested modification to the schedule for filing proposed findings of fact and conclusions of law set forth in Section III.C of this Motion.

[4] *See*, *e.g., Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification,* LBP-87-15, 25 NRC 671, 687-88 (1987) (stating that parties wishing to rely on documents as evidence in the hearing should offer the documents as exhibits before the close of the record).

[5] *See* 10 C.F.R. § 2.1210(c); *Consolidated Edison Co. of New York, Inc.* (Indian Point Station, Unit No. 2), ALAB-188, 7 AEC 323, 358 (1974) ("The decision in this proceeding must be based on the evidentiary record.").

[6] *See* 10 C.F.R. § 2.319 (stating that a presiding officer has the duty to conduct a fair and impartial hearing according to law).

conclusions of law.[7] Specifically, the parties request that the Board set a single, *post-testimony* due date for all parties to file their initial proposed findings (*e.g.*, 45 days after the last set of supplemental testimony is filed), followed by a single date for all parties to submit their reply findings (*e.g.*, 45 days after the parties file their initial proposed findings). Under the schedule established by the Board's July 13, 2016 Order, New York and Riverkeeper would be required to file their proposed findings of fact before receiving the Staff's and Entergy's supplemental testimony and exhibits; and Entergy and the Staff would be required to file their proposed findings of fact before receiving each other's supplemental testimony and exhibits or the Intervenors' reply testimony. The parties submit that a modification of the schedule is necessary to ensure that all parties will have an opportunity to consider the testimony and exhibits relied upon by other parties prior to their submittal of proposed findings of fact. The requested schedule modification is warranted because it will ensure that all parties receive a fair and equal opportunity to develop a complete evidentiary record, and to prepare their proposed findings based on that evidentiary record. Although the requested modification would extend the Track 2 filing schedule by three months, the parties agree that this delay will not materially impact the overall proceeding schedule and will promote greater equity and efficiency in the post-hearing process.

II. LEGAL STANDARDS

A. Motions for Reconsideration

To avoid "manifest injustice," parties may file motions for reconsideration upon leave of the presiding officer, and "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that

[7] As discussed in Section III.C of this Motion, the parties agree that the Board should retain the deadlines for filing of supplemental testimony established by the July 13, 2016 Order.

renders the decision invalid."[8] Insofar as a party requests modification of a procedural order, as in this case, the Board has ample authority to act on such requests.[9]

B. Motions for Clarification

NRC regulations do not explicitly address motions for clarification. However, as in this proceeding, parties may file such motions to obtain clarification of procedural matters from the Commission and Licensing Boards.[10]

C. Requests to Modify the Hearing Schedule

Section 2.334(b) of the NRC's regulations allows the Board to modify the hearing schedule upon a finding of good cause. In making such a good cause determination, the Board should consider, *inter alia*, whether: (1) the moving party or parties have exercised due diligence to adhere to the schedule; (2) the requested change is due to unavoidable circumstances; and (3) the parties have agreed to the change and the overall effect of the change on the case schedule.[11]

III. ARGUMENT

A. The Board Should Reconsider Its Request That the Parties Submit Key Technical Documents Prior to Their Filing of Supplemental Testimony and Exhibits

In its Order, the Board stated that it expects that the parties' supplemental testimony "will be supported by technical documents," and that in reaching its decision on the contested issues, the Board "will have the opportunity to review at a minimum the root cause evaluation performed by Entergy, the IP2 repair plan, the NRC August 15, 2016 Inspection Report, the results of the hot lab

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8 *See* 10 C.F.R. § 2.323(e); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2207; Licensing Board Order (Denying NRC Staff's Motion for Partial Reconsideration and State of New York/Riverkeeper's Cross-Motion to NRC Staff's Motion for Reconsideration) at 3-4 (Apr. 23, 2013) (unpublished).

9 *See* 10 C.F.R. § 2.319(g), (h) (stating that a presiding officer has the authority to regulate the course of the hearing and the conduct of participants and to dispose of procedural requests or similar matters).

10 *See*, *e.g.*, Licensing Board Order (Granting Entergy's Motion for Clarification of Licensing Board Memorandum and Order Admitting Contention NYS-38/RK-TC-5) (Dec. 6, 2011) (unpublished); Licensing Board Order (Granting Entergy's Motion for Clarification) (July 9, 2013) (unpublished).

11 10 C.F.R. §2.334(b)(1)-(3).

testing and evaluation of IP2 baffle-former bolts (expected in October 2016), and any key supporting documents for these analyses and reports."[12] The Board further stated that it "expects the parties to file these documents promptly as they become available and that further updates on any matters relating to these issues be filed with the Board as soon as practicable."[13]

To the parties' knowledge, the Board's request that they file key technical documents with the Board immediately upon their availability, and prior to the submission of their written testimony and supporting exhibits, deviates from the typical practice in NRC and contested adjudications—including this case.[14] The Board, in essence, has requested to review potential record evidence before the parties determine whether the documents will be relied upon and before they ever become actual record evidence.[15] Commission regulations and adjudicatory precedent require that the Board's findings be based on the evidentiary record.[16] The Board's review and potential reliance on documents that may (or may not) at some point be relied upon by the parties, yet are not admitted into evidence, would contravene this requirement. The Board's request thus potentially prejudices one or more parties.

This potential for prejudice that could result from the Board's review of non-record

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12 July 13, 2016 Order at 3-4.

13 *Id.* at 4.

14 *See*, *e.g.*, Licensing Board Revised Scheduling Order at 2-3 (Dec. 9, 2014) (unpublished).

15 As the Commission has noted: "[T]he responsibility for developing an adequate record for decision is on the parties, not the presiding officer…. [T]he parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens." Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2213. *See also Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 865 n.122 (2008), *rev'd on other grounds and remanded*, CLI-10-17, 72 NRC 1 (2010) ("[T]he Board repeatedly adjured the parties that it was their responsibility to present all evidence necessary to support their positions.").

16 *See* 10 C.F.R. § 2.1210(c) ("An initial decision must be in writing and must be based only upon information in the record or facts officially noticed."); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-16-7, 83 NRC __ (May 4, 2016) (slip op. at 27) ("We cannot make factual determinations based on items never introduced for review into the case record or otherwise confirmed."); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 30 (1980), *rev'd in part*, *vacated in part*, CLI-80-12, 11 NRC 514 (1980) (emphasis added) (stating that it is the duty of a Licensing Board to include in its decision "the full range of the determinations it had reached in *its appraisal of the record before it*").

evidence is an unanticipated and compelling circumstance that could result in a manifest injustice to one or more parties. Accordingly, the Board should require the disclosure of key technical documents as soon as practicable after they become available,[17] but reconsider its decision to require the parties' advance submittal to the Board of key technical documents. Under this scenario, the Board would receive the documents as part of the parties' supplemental testimony and supporting exhibits,[18] with ample time to review those key technical documents before issuing its ultimate decision on the merits.

B. In the Alternative, the Board Should Further Clarify Its Expectations Concerning the Parties' Advance Submittal of Key Technical Documents

If the Board declines to grant reconsideration and the relief requested above, then the parties request, in the alternative, that it clarify the specific (1) timing, (2) form, (3) scope, and (4) evidentiary status of the requested document submissions. Regarding the first two issues, the parties seek clarification as to whether the Board wishes to receive the initial document submission by a date certain, and the specific form in which the Board wishes to receive the documents (especially given that many, if not most, of the documents may be proprietary).[19]

With regard to the scope of the requested document submissions, the parties note that they already have disclosed numerous key documents related to the March 2016 baffle-former bolt inspection results. The Board presumably does not wish to receive copies of all of those documents, but instead only some discrete subset thereof (including the specific examples cited by the Board in its July 13, 2016 Order). Towards that end, and should the above-requested relief be denied, the parties propose that the Board require the disclosure of key technical documents as

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[17] *See* Licensing Board Scheduling Order at 4 (July 1, 2010) (unpublished).

[18] In the event that the Board grants this reconsideration request, the parties certainly would be amenable to holding periodic status calls with the Board to keep it informed of any new developments.

[19] For example, the documents could be provided to the Board electronically via one of several means: the NRC's Electronic Information Exchange ("EIE") system, compact disks or memory sticks, or regular e-mail.

soon as practicable after they become available, and that the parties jointly identify and submit the key technical documents to be filed with the Board. This would avoid parallel and potentially redundant filings by multiple parties, and minimize the total number of document submissions to the Board.

Additionally, the parties seek clarification regarding the evidentiary status of any documents filed with the Board in advance of the parties' supplemental testimony. Specifically, they request that the Board clarify how it intends to treat those documents filed with the Board in advance by the parties, but not included by any parties as exhibits to their supplemental testimony.

C. Request to Reconsider and Modify the Schedule for Filing Proposed Findings of Fact and Conclusions of Law

With regard to the Track 2 filing schedule, the Board's July 13, 2016 Order states:

> [A]bsent further order from the Board, New York and Riverkeeper, Inc.'s (Riverkeeper) proposed findings of fact and conclusions of law on the Track 2 contentions, supplemental testimony on baffle-former bolt issues, and New York's reply testimony related to its February 5, 2016 motion for the admission of six exhibits, shall be filed no later than 5:00 PM EST on November 17, 2016. Entergy and the NRC Staff's proposed findings of fact and conclusions of law on the Track 2 contentions and supplemental testimony shall be filed no later than 5:00 PM EST on January 19, 2017. New York and Riverkeeper's reply testimony and any amendments to their proposed findings of fact and conclusions of law shall be filed no later than 5:00 PM EST on March 2, 2017.[20]

Thus, in an apparent and understandable effort to expedite the completion of these filings,[21] the Board has directed the parties to submit their supplemental testimony in parallel with their proposed findings on the Track 2 contentions.[22]

Although the parties appreciate the Board's presumed intention to streamline the Track 2

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[20] July 13, 2016 Order at 4.

[21] The Board also may have taken into account the fact that the parties proffered detailed written and live testimony on the Track 2 contentions earlier in this proceeding, first in 2012-2013 and then again in 2015, and that two rounds of hearings were conducted in 2012 and 2015.

[22] *See* July 13, 2016 Order at 4.

post-hearing process, they are concerned that the current schedule may undermine their ability to fairly and fully consider the views and evidence submitted by other parties and to address that evidence in their proposed findings of fact, and thereby contribute to the development of a complete evidentiary record. Further, the parties submit that reconsideration is warranted, to allow them to submit proposed findings that reflect the *entire* record, thereby avoiding the potential for manifest injustice. "[T]he cardinal rule, so far as fairness is concerned, is that each side must be heard."[23]

Under the current schedule, New York and Riverkeeper (while having the option to later amend their proposed findings) must submit their initial proposed findings *before* Entergy and the Staff file their supplemental testimony. Entergy and the Staff, in turn, are required to submit their proposed findings simultaneously with their supplemental testimony, *before* New York and Riverkeeper submit their reply testimony and, unlike New York and Riverkeeper, currently have no opportunity to amend those proposed findings based on that reply testimony. Finally, because the Board's Order requires Entergy and the Staff to submit their proposed findings concurrently with their supplemental testimony, and does not allow those parties to submit reply or amended findings, Entergy and the Staff will have no opportunity to respond to or address each other's supplemental testimony or proposed findings.

For these reasons, the parties request that the Board reconsider the current Track 2 filing schedule, and modify the schedule to adjust the timing of the parties' submittal of their proposed findings of fact and conclusions of law. Specifically, the parties request that the Board retain the current schedule for filing supplemental testimony,[24] but set a single, *post-testimony* due date for

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[23] *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979) (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *United States v. Steel Tank Barge H 1651*, 272 F. Supp. 658, 659 n.1 (E.D.La. 1967)).

[24] The Board's July 13, 2016 Order focuses on supplemental testimony related to the Indian Point baffle-former bolts. The parties also may wish to amend their Track 2 testimony based on other new information in documents

all parties to file their initial proposed findings (45 days after the last set of supplemental testimony is filed), followed by a single date for all parties to submit their reply findings (45 days after the parties file their initial proposed findings).[25] Consistent with this request, the proposed new schedule would be as follows:

Due Date*	Party Filings
November 17, 2016	New York and Riverkeeper file their supplemental testimony
January 19, 2017	Entergy and NRC Staff file their supplemental responsive testimony
March 2, 2017	New York and Riverkeeper file their supplemental reply testimony
April 17, 2017	All parties file their initial proposed findings of fact/conclusions of law
June 1, 2017	All parties file their reply findings of fact/conclusions of law
* Consistent with the Board's July 13, 2016 Order, all filings must be filed no later than 5:00 PM EST on the specified date.	

The parties recognize that the requested modification will extend the Track 2 filing schedule by three months. However, they respectfully submit that, under the criteria set forth in 10 C.F.R. § 2.334(b), there is good cause for the proposed schedule modification. In this instance, the parties are requesting a change only to the timing of their proposed findings—not their supplemental testimony. In addition, the requested change is due to unavoidable circumstances, in that the parties did not specifically propose a schedule for filing proposed findings in their Third Joint Status Report, and did not anticipate that the Board would schedule such filings simultaneously with their filing of supplemental testimony. [26] Finally, the parties agree that the overall effect of the change on the proceeding is not material given the pendency of other actions

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disclosed since the conduct of the Track 2 hearing that is unrelated to the baffle-former bolts but still is relevant to the contested issues.

[25] This revised sequence of filings would be consistent with that followed by the Board and parties for the Track 1 proposed findings. *See* Licensing Board Order (Scheduling Post-Hearing Matters and Ruling on Motions to File Additional Exhibits) at 1 (Jan. 15, 2013) (unpublished); Licensing Board Order (Granting Parties Joint Motion for Alteration of Filing Schedule) at 1-2 (Feb. 28, 2013) (unpublished). It also would be consistent with the approach first proposed by the Board for the Track 2 contentions in December 2015. *See* Licensing Board Order (Setting Post-Hearing Briefing Schedule) (Dec. 7, 2015) (unpublished).

[26] In their Third Joint Status Report, the parties provided two proposed schedules for the filing of supplemental testimony and supporting exhibits (one schedule was jointly proposed by New York, Entergy, and the NRC Staff; the other schedule was separately proposed by Riverkeeper). The parties did not address the filing of proposed findings of fact and conclusions of law in their proposed schedules. *See* Third Joint Status Report Regarding Proposed Track 2 Schedule, at 4-6 (June 28, 2016).

that must be completed before the agency can issue a final decision on license renewal.[27] In fact, the requested schedule change will promote greater procedural equity and efficiency (by eliminating the need for "amendments" to findings). Thus, the benefits of the requested modification outweigh the delay caused by extending the Track 2 filing schedule by three months.

IV. CONCLUSION

The parties respectfully request that the Board grant leave to file this Joint Motion. Further, compelling circumstances exist that warrant granting the foregoing reconsideration requests. In addition, the requested schedule modification is supported by good cause.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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Dated at Washington, DC
this 25th day of July 2016

[27] *See, e.g.,* NRC Staff's 53rd Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012, at 4 and 6 (July 1, 2016) (noting that the Staff expects to issue a second Final FSEIS Supplement in January 2017, and a third FSEIS supplement may be issued regarding SAMA sensitivity analyses).

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	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	July 25, 2016

CERTIFICATION OF COUNSEL

In accordance with 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he contacted the other parties in this proceeding and, on July 20, 2016, explained to them the procedural issues raised in this Motion, and sought to ascertain their views and positions regarding those issues. New York and Riverkeeper took no positon with respect to Entergy's and the NRC Staff's request for reconsideration and/or clarification in Section III.A of the Motion , but support the Track 2 filing schedule modification requested in Section III.B of the Motion.

Executed in accord with 10 C.F.R. § 2.304(d)
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Joint Motion for Reconsideration or, In the Alternative, Clarification of the July 13, 2016 Licensing Board Order Scheduling Further Filings on the Track 2 Contentions" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill
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