



STATE OF NEW YORK
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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 8, 2017

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Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3
Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01

Dear Administrative Judges:

Pursuant to the telephone conference held with the Board on January 18, 2017, enclosed for the Board's consideration please find Intervenors' Notice of Withdrawal of Track 2 Contentions and Unopposed Motion to Dismiss Those Contentions and This Proceeding in its Entirety, dated February 8, 2017, as well as all underlying papers.

The State appreciates the Board's time and attention in this matter.

Respectfully submitted,

Signed (electronically) by

Lisa S. Kwong
Assistant Attorney General

cc: All individuals, parties, and NRC offices on the Public Service List

**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))	
)	February 8, 2017

**INTERVENORS' NOTICE OF WITHDRAWAL OF TRACK 2 CONTENTIONS
AND UNOPPOSED MOTION TO DISMISS THOSE CONTENTIONS
AND THIS PROCEEDING IN ITS ENTIRETY**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323, New York State (“New York,” “NYS” or the “State”) and Riverkeeper, Inc. (“Riverkeeper”) (jointly, “Intervenors”) hereby notify the Atomic Safety and Licensing Board (“ASLB” or “Board”) of their voluntary withdrawal of Contentions NYS-25, NYS-26B/RK-TC-1B, and NYS-38/RK-TC-5 (collectively “Track 2 Contentions”) and move for dismissal of the contentions and this proceeding in its entirety. Entergy Nuclear Operations, Inc. (“Entergy”) supports this motion.¹ The Nuclear Regulatory Commission (“NRC”) Staff does not oppose the motion, and will file an answer hereto. In addition, this motion is not opposed by Hudson River Sloop Clearwater (“Clearwater”).²

This notice of withdrawal and motion to dismiss Intervenors’ Track 2 Contentions is based on a global settlement agreement entered into on January 8, 2017, between New York,

¹ Entergy currently intends to submit a brief answer to this motion.

² Though Clearwater is no longer a party to this proceeding, it was an active litigant in the Track 1 phase of this proceeding. Clearwater’s Contention CW-EC-3A (Environmental Justice) was admitted by the ASLB in LBP-08-13, 68 NRC 43 (2008); heard by the ASLB in 2011 and 2012; and decided in LBP-13-13, 78 NRC 246 (2013) (aff’d in part and rev’d in part, CLI-15-6, 81 NRC 340 (2015)). *See also*, Kwong Declaration, Paragraph 22.

Riverkeeper, and Entergy (the “Indian Point Agreement”), which resolves pending state administrative proceedings and federal litigation between the parties related to Entergy’s current and future operation of Indian Point Units 2 and 3 (each respectively, “IP2” and “IP3”). As part of this Agreement, the parties have agreed to a resolution of Intervenors’ remaining contentions in this license renewal proceeding before the Board.³ Among other things, the Agreement provides for the cessation of operations of IP2 and IP3 by no later than April 30, 2020 and April 30, 2021, respectively. The Agreement further provides that only in the event that the State determines that an emergency exists could Indian Point operate beyond 2020 and 2021, and then only for a maximum of two two-year periods, *i.e.*, until their renewed licenses terminate in 2024 (IP2) and 2025 (IP3).⁴ Copies of Entergy’s notice of permanent cessation of operations and license renewal application amendment submitted today to the NRC are appended to the Kwong Declaration as Attachments 5 and 6, respectively.⁵

This motion is also based on augmented aging management and other safety measures agreed to by Entergy in the Indian Point Agreement, such as the accelerated inspection and

³ See Declaration of Lisa S. Kwong (Feb. 8, 2017) (for New York) (“Kwong Declaration”) and Declaration of Diane Curran (Feb. 8, 2017) (for Riverkeeper) (“Curran Declaration”).

⁴ The parties note that neither the NRC nor the NRC Staff are parties to the Agreement. The parties recognize the NRC’s continuing role, authority and jurisdiction over the safe operation, licensing, inspection, enforcement, and decommissioning of IP2/IP3 in accordance with NRC regulatory requirements. Nothing in the Global Settlement nor in this Motion should be interpreted as interfering with, usurping, obstructing, encumbering or otherwise affecting the NRC’s regulatory responsibilities and authority regarding IP2 and IP3 or the Indian Point site. Further, the parties recognize that the NRC could order continued operation of the facility in certain circumstances, such as if the Commission finds that the public convenience or necessity requires continued operation, or in the event of war or national emergency. See 10 CFR §§ 50.102 and 50.103, and Sections 108 and 188 of the Atomic Energy Act of 1954, as amended, 42 USC §§ 2138 and 2238.

⁵ See NL-17-021, Entergy Notification of Permanent Cessation of Power Operations at Indian Point Nuclear Generating Unit Nos. 2 and 3 (Feb. 8, 2017), Attachment 5, Kwong Declaration; NL-17-019, Entergy Amendment to License Renewal Application – Reflecting Shortened License Renewal Terms for Units 2 and 3 (Feb. 8, 2017), Attachment 6, Kwong Declaration.

replacement of baffle-former bolts at IP2 and IP3 in response to Indian Point and industry operating experience with bolt cracking. Entergy recently updated its reactor vessel internal aging management program to reflect these enhancements.⁶ Additionally, under the Agreement, Entergy has agreed to other operational commitments at IP2 and IP3, such as its agreement to permit annual plant inspections by New York State personnel, its commitment to perform general inspections of the steam generator channel head and tubesheet region during the IP3 2017 and IP2 2018 refueling outages in accordance with newly-issued NRC guidance,⁷ and its agreement to expedite the transfer of fuel assemblies from the spent fuel pools to dry cask storage, among other things, are additional bases for Intervenors' motion. Intervenors have determined that these contractually binding commitments by Entergy, along with its agreement for earlier retirement of IP2 and IP3, are sufficient to address the aging management concerns raised by Intervenors' contentions.

In light of Intervenors' voluntary withdrawal of their contentions, the Board should dismiss the contentions without prejudice, thereby terminating this proceeding. Intervenors respectfully submit that following Intervenors' withdrawal of their contentions, no further action by the ASLB is required by NRC regulations or precedents. Additionally, Intervenors respectfully submit that *sua sponte* consideration of the contentions under 10 C.F.R. § 2.340(a) is not warranted in this case because no "serious safety, environmental, or common defense and security matter exists" that requires referral of the contentions to the Commission for approval of *sua sponte* consideration by the ASLB.

⁶ See NL-17-020, Entergy License Renewal Application – Revisions to Reactor Vessel Internals Aging Management Program and Inspection Plan (Feb. 6, 2017), Attachment 4, Kwong Declaration.

⁷ NRC License Renewal Interim Staff Guidance ISG-LR-2016-1, "Changes to Aging Management Guidance for Various Steam Generator Components" (December 2016).

This motion also addresses the questions raised by the ASLB in its January 18, 2017 teleconference with the parties regarding the applicability of 10 C.F.R. § 2.338 to this motion and whether additional testimony from the parties on baffle bolt cracking is necessary or appropriate. As discussed below in Section III.B, Intervenors respectfully submit that 10 C.F.R. § 2.338 does not govern this motion. Although Intervenors' decision to withdraw their Track 2 contentions is based on actions taken or committed to by Entergy pursuant to the Agreement, Intervenors are not seeking ASLB review and approval of the Agreement and do not seek to make the Agreement "binding in this proceeding" pursuant to 10 C.F.R. § 2.338(i). Indeed, because the Agreement also involves other litigation not before the Board, the filing of this motion is one of several actions the parties have taken and will take under the Agreement, and consequently the parties have already begun to implement the Agreement. Intervenors have therefore not submitted a copy of the Agreement for the Board's review and approval as part of this motion.⁸ Because the Board need neither review the Agreement nor determine whether continued adjudication is in the public interest, Intervenors respectfully submit that the parties' submission of further testimony is not warranted.

II. FACTUAL BACKGROUND

Given the lengthy and somewhat complex procedural history of the Track 2 contentions, Intervenors provide a brief summary of the Track 2 contentions.⁹

⁸ Although Intervenors indicated during the conference call that a copy of the Agreement would be provided to the Board along with its motion to dismiss, Intervenors at the time were unaware that submission of the Agreement would be inconsistent with the procedure and the relief they are now seeking, that is, dismissal of the contentions pursuant to 10 CFR § 2.340(a) rather than approval of the Agreement pursuant to 10 CFR § 2.338.

⁹ See Kwong Declaration, Paragraphs 7-12.

The NRC's Proceeding and Intervenor's Track 2 Safety Contentions

In April 2007, pursuant to 10 C.F.R. Part 54, Entergy submitted a license renewal application (“LRA”) to the NRC Staff to renew each of the operating licenses for IP2 and IP3 (License Nos. DPR-26 and DPR-64, respectively) for additional 20-year periods. In November 2007, New York and Riverkeeper each moved to intervene by submitting various safety and environmental contentions to the Board.¹⁰ In February 2012, the Board placed contention NYS-25 onto the second hearing track that already included NYS-38/RK-TC-5 and RK-EC-8, which had been placed in abeyance.¹¹ NYS-26 was also placed into the Track 2 proceeding.

In Contention NYS-25, the State challenged, among other things, Entergy’s approach to monitoring and managing the effects of aging due to embrittlement of the reactor pressure vessel and its internal components over the proposed 20-year period of extended operation.¹² Subsequently, in September 2010 and in February 2015, New York moved to amend and supplement Contention NYS-25 to account for various revisions and amendments to Entergy’s “Reactor Vessel Internals Program” (or “RVI Program”) and to address NRC Staff’s Supplement 2 to its Safety Evaluation Report (SSER2).¹³ The State’s motions were supported by declarations

¹⁰ *New York State Notice of Intention to Participate and Petition to Intervene* (“NYS Petition”) (Nov. 30, 2007) (ML073400187); *Riverkeeper, Inc’s Request for Hearing and Petition to Intervene in the License Renewal Proceeding for the Indian Point Nuclear Power Plant* (“RVK Petition”) (Nov. 30, 2007) (ML073410093).

¹¹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order Granting NRC Staff’s Unopposed Time Extension Motion and Directing Filing of Status Updates (February 16, 2012) (unpublished) (ML12047A308).

¹² See NYS Petition, at 223-27.

¹³ State of New York’s Motion for Leave to File Additional Bases for Previously-Admitted Contention NYS-25, etc. (Sept. 15, 2010) (ML103050402); State of New York’s Motion to Supplement Previously-Admitted Contention NYS-25 (February 13, 2015) (ML15044A493); New York State February 2015 Supplement to Previously-Admitted Contention NYS-25 (February 13, 2015) (ML15044A491).

of Dr. Richard T. Lahey.¹⁴ The Board admitted contention NYS-25 in July 2008 and later admitted the State's amended and supplemental bases for Contention NYS-25.¹⁵

In Contention NYS-26, New York asserted that Entergy's LRA, as filed, did not include an adequate plan to monitor and manage the effects of aging due to metal fatigue on key reactor components.¹⁶ In Riverkeeper Contention TC-1, Riverkeeper asserted that Entergy had performed an inadequate aging analysis of various important components, had not expanded its aging analysis to other components, and did not demonstrate that it would adequately manage metal fatigue of various components. Subsequently, Intervenors submitted amended and supplemental Contentions NYS-26A and Riverkeeper TC-1A to challenge Entergy's recalculation of cumulative usage factors for certain RVI components at IP2 and IP3 to account for the contribution of environmentally-assisted fatigue.¹⁷ Two years later, in September 2010, New York and Riverkeeper moved to admit a new and amended Consolidated Contention NYS-26B/RK-TC-1B, which challenged various aspects of Entergy's further revised calculations of environmentally-assisted fatigue and continued to argue that Entergy had not submitted an

¹⁴ Declaration of Richard T. Lahey, Jr. (Sept. 15, 2010) (included in ML103050402) (Exh. NYS000301); Declaration of Richard T. Lahey (February 13, 2015) (ML15044A499) (Exh. NYS000483).

¹⁵ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 N.R.C. 43 (July 31, 2008) (ML082130436); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), Memorandum and Order Ruling on Pending Motions for Leave to File New and Amended Contentions (July 6, 2011) (unpublished) (ML111870344); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Granting Motions for Leave to File Amendments to Contentions NYS-25 and NYS-38/RK-TC-5) (March 31, 2015) (unpublished) (ML15090A771).

¹⁶ NYS Petition, at 227-233.

¹⁷ See Petitioner State of New York's Request for Admission of Supplemental Contention No. 26-A (Metal Fatigue) (Apr. 7, 2008) (included in ML081750691); Riverkeeper's Request for Admission for Amendment Contention 6 [TC-1A] (Mar. 5, 2008) (ML080840441) (this became Contention RK-TC-1).

adequate plan to manage the aging effects of metal fatigue.¹⁸ In November 2010, the Board admitted Consolidated Contention NYS-26B/RK-TC-1B.¹⁹ In June 2012, Intervenors submitted further support for Consolidated Contention NYS-26B/RK-TC-1B.²⁰

In 2011, Intervenors added Consolidated Contention NYS-38/RK-TC-5, which alleged that Entergy's license renewal application lacked sufficient information, adequate programs, and enforceable, binding commitments concerning the aging management of certain components, such as the steam generators, to provide NRC with a record and a rational basis to grant a renewed license as required by NRC regulations at 10 C.F.R. § 54.21 and the Administrative Procedure Act, 42 U.S.C. §§ 2133 and 2232.

Intervenor's Track 2 safety contentions, as amended and consolidated, are currently designated: NYS-25, NYS-26B/RK-TC-1B, and NYS-38/RK-TC-5. Between July and October, 2015, the parties filed their statements of position, pre-filed expert testimony and exhibits, and replies for the Track 2 safety contentions. From November 16-19, 2015, the Board presided over hearings on Intervenors' three Track 2 safety contentions in Tarrytown, New York.

In January 2016, New York moved to admit six additional evidentiary exhibits related to the Track 2 contentions.²¹ The Board granted New York's motion on February 19, authorizing

¹⁸ State of New York's and Riverkeeper's Motion for Leave to File a New and Amended Contention Concerning the August 9, 2010 Entergy Reanalysis of Metal Fatigue (Sept. 9, 2010) (ML102670665).

¹⁹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Motion for Summary Disposition of NYS 26/26A/Riverkeeper TC-1/1A [Metal Fatigue of Reactor Components] and Motion for Leave to File New Contention NYS-26B/Riverkeeper TC-1B) (Nov. 4, 2010) (ML103080987).

²⁰ See Revised Statement of Position (Exh. NYS000439), pre-filed rebuttal testimony from Dr. Lahey (Exh. NYS000440) and Dr. Hopenfeld (Exh. RIV000114), and additional technical exhibits.

²¹ State of New York Motion for Leave to File Six Documents as Additional Exhibits (Feb. 5, 2016).

the parties to file the additional exhibits with supplemental testimony.²² New York filed supplemental testimony on March 4; Entergy and Staff filed responsive testimony on March 18.²³

Baffle-Former Bolt Cracking

On March 29, 2016, prior to New York's submission of testimony in reply to the March 18 filings by Entergy and NRC Staff, Entergy advised the Board and the parties that, during a scheduled maintenance outage, visual and ultrasonic inspections of the baffle-former assembly bolts in IP2 revealed indications of degradation in approximately one quarter of the baffle-former bolts.²⁴ As a result of these findings and at the request of the parties,²⁵ the Board deferred Track 2 post-hearing schedule for filings and evidentiary submissions.²⁶

In a joint status report dated June 28, 2016, Entergy informed the Board that it planned to send cracked baffle-former bolts removed from IP2 to a "hot lab" facility for testing and recommended an extended briefing schedule to allow the parties time to prepare evidence and testimony related to bolt degradation issues.²⁷ On July 13, the Board accepted the parties' recommended briefing schedule and requested the parties to address in their filings the cause and consequences of bolt failures, and what steps would be taken to promptly identify and mitigate

²² Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), "Order (Requesting Expert Testimony on New York's Proposed Exhibits and Suspending Deadline for Filing Proposed Findings of Fact and Law)" (Feb. 19, 2016).

²³ See Kwong Declaration, Paragraphs 13-15.

²⁴ Letter from Counsel for Entergy Nuclear Operations, Inc., to Lawrence G. McDade, Chairman, Dr. Michael F. Kennedy, and Dr. Richard Wardwell, Atomic Safety and Licensing Board (Mar. 29, 2016).

²⁵ Joint Motion for Track 2 Hearing Schedule Deferral (Mar. 30, 2016).

²⁶ Order (Adopting Joint Motion for Track 2 Hearing Schedule Deferral) (Apr. 1, 2016) (unpublished).

²⁷ Third Joint Status Report Regarding Proposed Track 2 Schedule (June 28, 2016).

such failures.²⁸ Following several extensions of the briefing schedule to accommodate the parties' request for additional time, on November 2, the Board issued an order setting forth new deadlines for the parties' filing of supplemental testimony, and proposed findings of fact and conclusions of law.²⁹

On December 8, 2016, the Board issued an order requesting updates on pending litigation and other matters related to Indian Point relicensing, including the status of Entergy's water use-related permits, approvals or licenses that could potentially affect NRC license renewal for IP2 and IP3.³⁰ Entergy filed its response on December 21. NRC filed its response on January 6, 2017.

Other Pending, Non-NRC Litigation: the NYSDEC Matter and the NOAA Matter

In addition to this NRC relicensing proceeding, the parties have been engaged in long-standing litigation in other matters related to Indian Point operation and relicensing.³¹

NYSDEC Matter (WQC/SPDES Proceeding)

Entergy, New York and Riverkeeper, among other individuals and entities, are parties to consolidated, mandatory adjudicatory proceedings before a panel of NYSDEC Administrative Law Judges relating to (i) certain NYSDEC-Staff proposed modifications to the renewed State Pollutant Discharge Elimination System ("SPDES") Permit for Indian Point, and (ii) NYSDEC Staff's proposed denial of Entergy's application for a Water Quality Certificate ("WQC") under

²⁸ See *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, Order (Adopting Schedule Deferral at Request of the Parties and Requesting Conference Call Availability) (June 8, 2016) (unpublished).

²⁹ See *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, "Order (Granting Unopposed Motion for Extension of Time)" (Nov. 2, 2016); "Order (Granting Joint Motion for Reconsideration)" (Aug. 3, 2016); "Order (Scheduling of Further Filings on Track 2 Contentions)" (July 13, 2016).

³⁰ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, "Order (Requesting Updated Information on Pending Litigation and Other Matters)" (Dec. 8, 2016).

³¹ See Kwong Declaration, Paragraph 16.

Section 401 of the Federal Clean Water Act (“CWA”) (the proceedings relating to (i) and (ii) collectively referred to as the “NYSDEC Matter”) for purposes of Indian Point operating license renewal.

CZMA Matter (NOAA Proceeding/N.D.N.Y. Action)

The parties have also been engaged in proceedings and other actions relating to Indian Point’s compliance with the Federal Coastal Zone Management Act of 1972 (“CZMA”), in the context of license renewal. The CZMA issues involving Indian Point were pending before the National Oceanic and Atmospheric Administration (“NOAA”) and the U.S. District Court for the Northern District of New York (“CZMA Matter”).

The Indian Point Settlement Agreement

On January 8, 2017, as a result of extensive negotiations between Entergy, New York, and Riverkeeper, the parties reached a global settlement agreement to resolve all pending litigation between the parties related to Indian Point operations, including the NRC re-licensing proceeding, the NYSDEC Matter and the CZMA Matter (both of which are distinct from this NRC license renewal proceeding).³² The most significant aspect of the parties’ agreement, and of greatest relevance to this proceeding, is Entergy’s commitment to an early closure plan for IP2 and IP3. That commitment and other key elements of the agreement are discussed below:³³

- **Early Closure Date:** Entergy will permanently cease operations at IIP2 by April 30, 2020, and IP3 by April 30, 2021. This would, in effect, result in closure of the plants 13 to 14 years earlier than anticipated under Entergy’s original license renewal application. Only in the event of an emergency situation, such as a terrorist attack affecting electricity generation, would the State consider allowing operations to continue, but not beyond April 30, 2024 (IP2) and April 30, 2025 (IP3).

³² See Kwong Declaration, Paragraph 17.

³³ The parties recognize that Entergy’s undertakings and commitments, recited herein, are subject to NRC review and approval to the extent that they are incorporated in Entergy’s revised license renewal application, and that the NRC and NRC Staff have not yet reviewed or approved those undertakings and commitments.

- **Reduced Re-Licensing Period:** Entergy will amend its license renewal application to update the proposed term of the renewed licenses from 20 years for each unit to the periods ending April 30, 2024 for Unit 2 and April 30, 2025 for Unit 3. Renewed licenses for IP2 and IP3 would therefore expire no later than April 30, 2024 and April 30, 2025, respectively.
- **Enhanced Inspection Programs:** New York will make annual inspections of the plants relating to key operational, regulatory, and environmental matters. In addition, at every refueling outage through 2020 and 2021, Entergy will inspect all accessible baffle former bolts, and replace bolts as needed to ensure the reactors' structural integrity and maintain safety margin, taking into account the rate and pattern of bolt failures during operating experience.³⁴ Entergy will also inspect the steam generator channel heads and tubesheet region for potential cracking in accordance with newly-issued NRC guidance.
- **Retrieval of Loose Parts:** Entergy will inspect for, find and remove or assess the safety consequences of any loose parts on a cycle-to-cycle basis starting with the 2018 IP2 inspections.
- **Expedited Transfer of Spent Fuel to Dry Storage:** Entergy will use its best efforts to maximize the amount of spent fuel transferred to dry storage each year, with a minimum of four casks per year and a total of 24 casks by 2021.
- **Tritium Mitigation:** Entergy will implement in 2017 targeted plant and hardware modifications at Indian Point to minimize potential releases of radiologically-contaminated fluids to groundwater from normal and temporary plant systems and operations.
- **New Emergency Operations Facility:** Entergy will design and construct a new alternate emergency operations facility to provide key support for emergency planning activities for Indian Point.
- **Ongoing Environmental Protection:** Entergy has also agreed to establish a \$15 million fund to support environmental restoration and community benefit projects.
- **Resolution of Outstanding Litigation:** Entergy, New York, and Riverkeeper will terminate all pending state and federal administrative and judicial litigation related to Indian Point license renewal.

Notice of Parties' Global Settlement

By letter dated January 11, 2017, Counsel for Entergy advised the Board that the parties had entered into an agreement with New York and Riverkeeper regarding the continued

³⁴ This is a general description of the enhanced baffle bolt inspection program. More specific information regarding the program is contained in Entergy's updated RVI AMP, Attachment 4, Kwong Declaration.

operation of Indian Point Units 2 and 3.³⁵ The letter requested a conference call to discuss the agreement and a proposed deferral of near-term filing deadlines. On January 12, the Board issued an order holding further filings in abeyance.³⁶ On January 18, 2017, the Board held a telephone conference call with the parties in which Entergy provided a general description of the Agreement and Intervenor notified the ASLB of their intention to move to withdraw the contentions without prejudice.³⁷

Implementation of the Agreement

The parties have begun implementation of the Agreement.³⁸ On January 27, 2017, the NYSDEC Commissioner issued a decision and order concluding the protracted adjudication of Entergy's Water Quality Certification and discharge permit requirements and remanding the matter to DEC Staff for processing in accordance with State administrative procedure and environmental quality review regulations.³⁹ Entergy has likewise withdrawn its appeal to NOAA regarding prior New York Department of State CZMA-consistency determinations.⁴⁰ On January 31, 2017, Entergy submitted to the New York Department of State a new CZMA consistency

³⁵ See Kwong Declaration, Paragraph 18, and Letter from Paul M. Bessette, Esq. to the Board (Jan. 11, 2017) (“Joint Request for Conference Call to Discuss the Parties’ Recent Settlement Agreement and Need for Immediate Deferral of Near-Term Filing Deadlines”).

³⁶ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, “Order (Holding Further Filings in Abeyance and Requesting Availability for Telephone Status Conference)” (Jan. 12, 2017).

³⁷ See *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, “Official Transcript of Proceedings” (Jan. 18, 2017), Tr. 5,895-5,938.

³⁸ See Kwong Declaration, Paragraphs 19-21.

³⁹ NYSDEC Commissioner Decision and Order (January 27, 2017), Attachment 1, Kwong Declaration.

⁴⁰ NL-17-015, Notice of Withdrawal of Previous Review Claim Pursuant to the New York Coastal Management Program and Coastal Zone Management Act (Jan. 24, 2017), Attachment 2, Kwong Declaration.

certification,⁴¹ and the State’s concurrence with the new CZMA consistency certification is expected to be issued shortly. On February 6, 2017, Entergy submitted to NRC a revised RVI Aging Management Plan incorporating recent operating experience involving baffle bolt cracking.⁴²

Today, Entergy filed with NRC a notice pursuant to 10 C.F.R. 50.82(a)(1)(i), of its intention to permanently cease operations for IP2 and IP3 by 2020 and 2021, respectively.⁴³ Entergy also filed with the NRC an amendment to its license renewal application requesting reduced renewal terms for IP2 and IP3.⁴⁴ These actions taken under the Agreement support Intervenors’ withdrawal of their claims.

⁴¹ Entergy CZMA Consistency Certification (January 31, 2017), Attachment 3, Kwong Declaration.

⁴² NL-17-020, Updated Reactor Vessel Internals Aging Management Plan (February 6, 2017), Attachment 4, Kwong Declaration. Among other things, the updated RVI AMP describes Entergy’s Spring 2016 bolt inspection and replacement activities, as well as its plan for addressing bolt cracking going forward. *Id.*, Attachment 2, Section 6.2, pp. 62-63. The plan provides that “[B]ased on as-found conditions and current industry knowledge, including the results of the fractographic examinations of the eight IP2 baffle former bolts discussed in Westinghouse Report MCPE-TR-16-18, IPEC concludes that performing a volumetric examination (i.e., UT) of the required original bolts during each refueling outage, and replacing those bolts found to be degraded until none of the remaining original bolts is required to be credited for the baffle structure to be capable of performing its intended safety function, is a reasonable and acceptable approach.” Entergy’s plan for baffle former bolts will consist of: UT inspections at every outage, including replacement bolts if degradation is observed. In addition to replacing all bolts with indications, Entergy will replace “good” bolts with new anti-cluster bolts as necessary to ensure adequate safety margin.

⁴³ NL-17-021, Entergy Notification of Permanent Cessation of Power Operations at Indian Point Nuclear Generating Unit Nos. 2 and 3 (Feb. 8, 2017), Attachment 5, Kwong Declaration.

⁴⁴ NL-17-019, Entergy Amendment to License Renewal Application – Reflecting Shortened License Renewal Terms for Units 2 and 3 (Feb. 8, 2017), Attachment 6, Kwong Declaration.

III. DISCUSSION

A. The ASLB Should Grant Intervenors' Motion to Dismiss Their Contentions and Terminate This Proceeding.

1. Standards for withdrawal of contentions and dismissal of proceeding.

Voluntary withdrawal of contentions is permissive in NRC proceedings. *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382 (1985). The Commission has held that withdrawal of the only remaining contentions in a proceeding must result in dismissal of the contentions and termination of the proceeding. *Florida Power & Light Co.* Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188-89 (1991) (citing attached Commission Order in *Public Service Co. of Colorado* (Fort St. Vrain Independent Spent Fuel Storage Installation) (Oct. 29, 1990)).

NRC regulations do allow licensing boards, with Commission approval, to undertake *sua sponte* consideration of withdrawn contentions if “a serious safety, environmental, or common defense and security matter exists.” 10 C.F.R. § 2.340(a). *See also Houston Lighting and Power*, 21 NRC at 382. But *Florida Power & Light* and *Public Service Co. of Colorado* appear to limit the ASLB’s *sua sponte* authority to proceedings where litigation of other issues is still ongoing. As the Commission stated in *Florida Power & Light*, “We wish to make clear that a licensing board does not have the authority to raise a *sua sponte* issue relating to an application for an operating license or amendments to an operating license when there is no proceeding before the board relating to the application.” 34 NRC at 188.

2. The ASLB should grant Intervenors' motion to dismiss their contentions.

Because Intervenors are the only remaining parties to the Indian Point proceeding and their Track 2 contentions are the only remaining contentions at issue, their notice of withdrawal of their contentions must lead to dismissal of the contentions and termination of this proceeding

without opportunity for *sua sponte* consideration of their contentions by the ASLB. *Houston Lighting and Power*, 21 NRC at 382; *Florida Power & Light*, 34 NRC at 188.

B. Even Assuming That the Board May Consider Intervenors' Track 2 Contentions *Sua Sponte*, the Standard for *Sua Sponte* Consideration is Not Satisfied Here.

While Intervenors believe their withdrawal of their Track 2 contentions should lead to dismissal of their contentions and the termination of this proceeding without the Board's *sua sponte* review, in an abundance of caution, this motion addresses the standard for *sua sponte* consideration. The ASLB may undertake *sua sponte* consideration of contentions only if "a serious safety, environmental, or common defense and security matter exists." 10 C.F.R. § 2.340(a). The authority to conduct *sua sponte* review "is to be exercised only in extraordinary circumstances." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998). *Sua sponte* review also requires approval from the Commission. *Id.*; 10 C.F.R. § 2.340(a). Should such review be approved, the scope of a *sua sponte* review is limited to the scope of the contentions. 10 C.F.R. § 2.340(a).

Intervenors respectfully submit that the "extraordinary circumstances" that would justify retention of the contentions and exercise of *sua sponte* consideration under 10 C.F.R. § 2.340, *see Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 23, are not present here. Because Indian Point will now shut down 13-14 years earlier, and because Entergy has agreed to measures that will significantly address Intervenors' safety concerns during the remaining years of the plant's operation, this case does not present the ASLB with any "serious safety, environmental, or common defense and security matter" that warrants referral to the Commission for approval of *sua sponte* consideration by the Board. 10 C.F.R. § 2.340(a).

Intervenors respectfully submit that the extraordinary circumstances justifying *sua sponte* consideration of Intervenors' Track 2 contentions are not present here, because the aging

management issues that were raised by intervenors' contentions have been more than adequately addressed by Entergy's actions and commitments under the Agreement. Entergy's early retirement of IP2 in 2020, 13 years sooner than the 2033 date proposed in its original license renewal application; and IP3 in 2021, 14 years sooner than the proposed date of 2035 significantly mitigates intervenors' concerns regarding the effects of cumulative aging degradation on the Indian Point reactors and steam generators. Moreover, Entergy has committed to accelerate its schedule for more frequent and/or rigorous inspections of safety-related equipment such as the baffle former bolts and steam generators, beginning with the IP3 refueling outage in Spring 2017. By agreeing to more conservative inspection and component replacement programs instead of relying on predictive models, Entergy has, in intervenors' view, significantly improved the prospects for safe future operation of Indian Point between now and when the closures set forth under the Agreement will occur. Entergy has also agreed to inspect for, find, remove or assess the safety consequences of loose parts on a cycle-to-cycle basis, starting with the 2018 refueling outage at IP2. Entergy has also agreed to annual inspections of Indian Point by NYS-designated representatives, which will afford the State the opportunity to closely monitor operations and obtain inspection results. Finally, the Agreement provides for enforcement by the parties of Entergy's commitments in any New York State or New York Federal court of competent jurisdiction. Any concerns that may arise due to Entergy's failure to comply with the Agreement can be addressed in an action for specific performance. NRC's ongoing review of Entergy's License Renewal Application ensures continued NRC Staff attention to aging related issues at Indian Point, and, any failure by Entergy to comply with its renewed licenses, if issued, would be subject to NRC review and enforcement as the NRC may deem

appropriate and/or warranted. Thus, there is no serious safety issue present to warrant the Board's *sua sponte* review of Intervenor's remaining contentions.

In considering whether to proceed *sua sponte*, the ASLB should take into account the fact that the settling parties include the State of New York, an "independent governmental entity that is responsible for the health and safety of the public." *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830, 843-44 (2006) ("LBP-06-18").⁴⁵ Furthermore, both New York and Riverkeeper have been "well represented in this proceeding" by competent and diligent counsel." *Id.* Thus, the attached declarations by Intervenor's counsel should be considered in that light. In addition, the NRC Staff's and the ACRS' ongoing review of the adequacy of Entergy's license renewal application weigh against retaining the contentions and proceeding *sua sponte*. *Id.* Finally, Clearwater -- the only other organization that has been an active participant in hearings before the ASLB -- does not object to this motion. A resolution by Clearwater's board of directors regarding the Indian Point Agreement is appended to this Motion.⁴⁶

Under the circumstances, Intervenor respectfully submit that no serious safety issues remain that warrant independent *sua sponte* consideration by the ASLB.

C. Response to ASLB's Questions

In the January 18, 2017 teleconference with the parties, the ASLB posed several questions that are addressed herein. First, the ASLB asked the parties to address the question of

⁴⁵ While the ASLB reached this conclusion in the context of reviewing whether approval of the Vermont Yankee settlement was "in the public interest" pursuant to 10 C.F.R. § 2.338(h), it also found that the public interest considerations for Section 2.338(h) were relevant to the question of whether to *sua sponte* consideration was appropriate. 63 NRC at 843.

⁴⁶ See Clearwater Resolution of Non-Opposition to Intervenor's Motion to Withdraw (January 26, 2017), Attachment 7, Kwong Declaration.

whether 10 C.F.R. § 2.338 applies.⁴⁷ Briefly stated, that section provides that a party may submit a *proposed* settlement to the Board, authorizes the Board to impose additional requirements as part of the settlement, mandates certain form and content requirements for a settlement agreement, and assuming these form and agreement requirements are met, further authorizes the Board to issue its approval of the settlement in order to make such settlement agreement binding on the proceeding, unless public interest requires the rejection of the agreement.

Intervenors respectfully submit that Section 2.338 does not apply to this proceeding for two reasons. First, the provision is not mandatory. Instead, it offers parties the “opportunity” to seek ASLB approval of a “proposed” settlement.⁴⁸ 10 C.F.R. § 2.338. It is well-established that NRC approval of settlement agreements is not required where the parties have not specifically submitted a proposed settlement to the Board for its review and approval such that it may be deemed binding in the proceeding. *See, e.g., Arizona Public Service Company* (Palo Verde Nuclear Station, Unit Nos. 1,2, and 3), LBP-91-37a, 34 NRC 199 (1991) (“Since the settlement is founded on the voluntary withdrawal of the Intervenors’ only contention, there is nothing for

⁴⁷ Tr. 5932.

⁴⁸ Insofar as the NRC licensing boards have reviewed and approved settlement agreements under 10 C.F.R. § 2.338 since that regulation’s enactment in 2004, they have done so at the explicit request of the parties. *See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-05-18, 62 NRC 126 (2005) (The Intervenor and the Applicant filed with the Board a joint motion for approval of a proposed settlement agreement and termination of the proceeding. The settlement agreement specifically stated: “This Settlement Agreement shall not be effective, final and binding on the parties hereto unless this Settlement Agreement is approved in its entirety by the Board or the Commission and the proceeding terminated.”); *Babcock & Wilcox Nuclear Operations Group, Inc.* (Lynchburg, VA Facility), LBP-10-18, 72 NRC 519 (2010) (The parties submitted to the ASLB a joint motion to approve their proposed settlement agreement and to terminate the proceeding, to which they attached their proposed settlement agreement and proposed Board order.); *AmerenUE* (Callaway Plant, Unit 2), LBP-09-23, 70 NRC 659 (2009) (The parties filed a joint motion seeking ASLB approval pursuant to 10 C.F.R. § 2.338(i) of an accompanying proposed settlement agreement that would bring to an end the contested adjudicatory hearing associated with this 10 C.F.R. Part 52 combined operating license proceeding.).

this Board to approve or disapprove. Terminating the proceeding is a ministerial act in that the withdrawal of the Intervenors brings the proceeding to a close.”); *International Uranium (USA) Corp.* (Receipt of Additional Material from Tonawanda, New York), LBP-00-11, 51 NRC 178, 180 (2000); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, and 3), LBP-73-43, 6 AEC 1062, 1062-63 (1973). In this case, the Agreement is a private contractual agreement that is final and binding on the parties to the Agreement.

Second, Intervenors do not seek to make the Agreement binding in this adjudicatory proceeding, as would be achieved by ASLB approval of the Agreement under Section 2.338(i). As discussed above in Section III.A, the Agreement provides for enforcement by the parties in state and federal court. Moreover, any operational or licensing conditions provided for in the Agreement, if made a part of any renewed license to be issued by the NRC, would be subject to NRC review and enforcement as to the NRC may deem appropriate and/or warranted. Finally, the Agreement resolves pending issues and claims outside of the NRC license renewal proceeding, such as the NYSDEC Matters and the federal CZMA Matters, over which this Board has no jurisdiction. Board review and approval of the Agreement under these circumstances is neither necessary nor appropriate.

The ASLB also asked the Intervenors to address the relevance of LBP-06-18 (*Vermont Yankee*) to this proceeding. Tr. 5914. In evaluating the applicability of that case to the Intervenors’ Motion, it is helpful to begin by reviewing the circumstances of LBP-06-18, which concerned Entergy’s license renewal application for the Vermont Yankee reactor. Entergy and one of the Intervenors, the State of Vermont, agreed to settle the State’s contentions without the participation of another Intervenor, New England Coalition (“NEC”). 63 NRC at 833. The State

filed a notice of withdrawal and request for dismissal of its contentions, and attached a copy of the settlement agreement. *Id.*

The ASLB gave the State and Entergy two options: either to brief the question of whether 10 C.F.R. § 2.338 applied, or to revise and re-submit the settlement agreement to comply with the procedural requirements of 10 C.F.R. § 2.338(h). *Id.* The ASLB also declared that if Entergy and the State chose the second option, the Board would not make a binding ruling that Section 2.338 applied. *Id.*, 63 NRC at 833-34. Entergy and the State responded by submitting an amended settlement agreement that addressed the requirements of 10 C.F.R. § 2.338(h). The ASLB offered an opportunity for public comment on the settlement, and NEC objected that the ASLB should not dismiss the contentions and should instead consider the contentions *sua sponte*. *Id.*, 63 NRC at 834.

While Entergy joined the State in submitting a revised settlement agreement for the ASLB's approval, Entergy also chose to brief the applicability of 10 C.F.R. § 2.338 to the settlement agreement. 63 NRC at 834, 839-41. Because no other party addressed the issue, the ASLB issued a non-binding opinion (i.e., dictum) that Section 2.338 applied because the parties had voluntarily submitted the settlement agreement to the ASLB. 63 NRC at 835 n.10. In its analysis, the ASLB determined that the settlement was "binding in this proceeding" under 10 C.F.R. § 2.338(h) because the settlement led to the dismissal of the State's contentions with prejudice and the removal of the State as a party. *Id.* The ASLB concluded, based on the factors enunciated in *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-97-13, 46 NRC 195, 203-23 (1997), that approval of the settlement was in the public interest, 63 NRC at 842-43, and that for the same reasons there was no justification for undertaking *sua sponte* consideration of the State's contentions. 63 NRC at 842-44.

Intervenors respectfully submit that this case is distinct from *Vermont Yankee* in several important respects. First and foremost, Intervenors do not seek the ASLB's approval of the Indian Point Agreement, and therefore have *not* submitted it to the ASLB. Nor do the Intervenors seek to make the Agreement binding in this proceeding. Instead, Intervenors will rely for enforcement of the Agreement on specific enforcement provisions within the Agreement, and on the Cessation Notice and license renewal application amendment that Entergy has filed today with the NRC Staff.⁴⁹ Unlike the MOU at issue in *Vermont Yankee*, which represented a "final resolution of all contested issues between [the parties in the] uprate proceeding," 63 NRC at 839, the Indian Point Agreement is a global agreement that resolves claims both in and outside of this relicensing proceeding. That distinction is significant because the final disposition of the NYSDEC and CZMA matters is not contingent on this Board's approval of the Agreement.

In addition, unlike *Vermont Yankee*, this is not a case where other parties to the license renewal proceeding object to the dismissal of Intervenors' contentions. No other parties are active in the Track 2 litigation; and Clearwater, the only other party to litigate a contention before the ASLB has stated that it does not object to the dismissal of the contentions.⁵⁰

⁴⁹ To the extent that the ASLB ruled that mere dismissal of the State's contentions made the *Vermont Yankee* settlement binding in the license renewal proceeding, Intervenors respectfully submit that the ASLB erred. This ASLB is not obligated to follow the *Vermont Yankee* ASLB's reasoning, because the ASLB itself said its ruling was not binding in that case. In any event, one ASLB's ruling is not binding on any other ASLB. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-14, 58 NRC 104, 110 (2003). Moreover, unlike the *Vermont Yankee* parties, the Indian Point Intervenors have not sought dismissal of their contentions with prejudice. Although the ASLB has correctly pointed out that it would be difficult to reopen the record of this case and re-admit the contentions after they are dismissed, it is legally possible; and thus, the ASLB is not conclusively removing the Intervenors as potential future litigants on the Track 2 issues.

⁵⁰ *See*, Clearwater Resolution of Non-Opposition to Intervenors' Motion to Withdraw (January 26, 2017), Attachment 7, Kwong Declaration.

Accordingly, Intervenors respectfully submit that the facts of LBP-06-18 are distinguishable from the facts before this Board, and should therefore in no way bind or guide this Board's disposition of Intervenors' motion. Intervenors do not seek Board approval of the settlement; the only relief Intervenors seek is termination of this proceeding based on their voluntary withdrawal of their remaining Track 2 contentions.

As to whether additional testimony regarding the baffle bolts is necessary or appropriate at this juncture, Intervenors believe their voluntary withdrawal of the remaining contentions should result in termination of the proceeding, thereby rendering the bolt issue moot. Moreover, because the Board need not review the Agreement nor determine whether continued adjudication is in the public interest pursuant to 10 CFR §2.338(i), the parties' submission of further testimony is unwarranted.

IV. CERTIFICATION REGARDING CONSULTATION

Pursuant to the requirements of 10 C.F.R. §2.323(b), NYS and Riverkeeper have made sincere efforts to contact the other parties and resolve the issues addressed in this motion. Entergy has authorized NYS and Riverkeeper to represent that it supports the motion. NYS and Riverkeeper have also consulted with counsel for the NRC Staff, who have authorized Intervenors to represent that the NRC Staff does not oppose this motion. Finally, although Clearwater is no longer a party to this proceeding, Intervenors contacted Clearwater's executive director, who provided a resolution stating that Clearwater does not oppose the motion and withdrawal of Intervenors' Track 2 contentions.

Respectfully submitted,

State of New York

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

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February 8, 2017

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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

License Renewal Application Submitted by

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

Entergy Nuclear Indian Point 2, LLC,
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc.

DPR-26, DPR-64

February 8, 2017

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing Intervenor's Notice of Withdrawal of Track 2 Contentions and Unopposed Motion to Dismiss Those Contentions and This Proceeding in its Entirety, along with underlying documents, dated February 8, 2017, has been served electronically via the NRC Electronic Information Exchange public submission portal in the above-captioned proceeding.

Signed (electronically) by

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Dated at Albany, New York
this 8th day of February 2017