**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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| 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 21, 2017 |

**ENTERGY'S ANSWER IN SUPPORT OF INTERVENORS' MOTION TO DISMISS THE PENDING TRACK 2 CONTENTIONS AND TERMINATE THE PROCEEDING**

## I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") files this Answer in support of the "Intervenors' Notice of Withdrawal of Track 2 Contentions and Unopposed Motion to Dismiss Those Contentions and This Proceeding in its Entirety" ("Intervenors' Motion" or "Motion"), filed by New York State and Riverkeeper, Inc. (jointly, "Intervenors") on February 8, 2017. Entergy fully concurs with the factual assertions and legal arguments underpinning the Intervenors' Motion to Dismiss. Accordingly, Entergy agrees that the Atomic Safety and Licensing Board ("Board") should dismiss the Intervenors' pending Track 2 contentions without prejudice and terminate this proceeding in light of Intervenors' voluntary withdrawal from the proceeding.

As the Intervenors note, their decision to seek Board dismissal of their voluntarily-withdrawn contentions and termination of the adjudicatory proceeding is predicated on a global settlement agreement (the "Indian Point Agreement") entered into on January 8, 2017, by New York State, Riverkeeper, and Entergy (collectively, "the parties").[1] The Indian Point Agreement is a final, legally-binding agreement that is enforceable in federal and/or state courts. Moreover, as a

[1] *See* Intervenors' Motion at 1-2.

global settlement, the Indian Point Agreement is broad in scope, resolving all 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 ("IP2" and "IP3").

Under the present circumstances, there is no legal requirement or basis for the Board to review and approve the Indian Point Agreement, which the parties executed following extensive negotiations conducted outside the context of this Nuclear Regulatory Commission ("NRC") license renewal proceeding. Unlike the *Vermont Yankee* case cited by the Board during its January 18, 2017 status call with the parties,[2] the instant case does not involve the submittal of a proposed settlement agreement "for the Board's imprimatur" under 10 C.F.R. § 2.338, such that the agreement may be made "binding in the proceeding."[3] Indeed, because the Indian Point Agreement is final, binding on the parties, and judicially-enforceable, the parties view Section 2.338 as inapplicable on its face, and thus are not seeking Board approval of any aspect of the Agreement pursuant to that regulation (or any other NRC regulation).

Entergy also agrees that no Board action beyond the strictly ministerial relief sought by the Intervenors in their Motion is required in this case. NRC tribunals long have held that an intervenor's withdrawal of its remaining contentions "terminates the contested proceeding, and hence both the necessity and the occasion for any further action by the Board."[4] As such, there is no need for further Board review of the remaining contested issues, which the Intervenors expressly note have been resolved to their satisfaction.[5] Insofar as the Board is authorized to

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2 *See Entergy Nuclear Operations, Inc*. (Indian Point Nuclear Generating Units 2 and 3), Official Transcript of Proceedings (Jan. 18, 2017) (ML17019A342), Tr. at 5914 (citing *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-18, 63 NRC 830 (2006)).

3 *Vt. Yankee*, LBP-06-18, 63 NRC at 842; 10 C.F.R. § 2.338(i).

4 *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), Memorandum and Order (Dismissing Proceeding), 1991 WL 307327 at *1 (Sept. 3, 1991).

5 *See* Intervenors' Motion at 15-16 (stating that "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").

review contested issues *sua sponte*, the exercise of that authority is limited to "extraordinary circumstances" that, for reasons explained below, are not present here.[6]

Finally, although Entergy is aware of no legal requirement that the Board make a "public interest" finding in this case, Entergy is confident that the circumstances prompting the Intervenors' request to terminate the proceeding are favorable to the public interest. In short, through the Indian Point Agreement, the parties have managed to resolve a host of long-running and complex legal issues spanning multiple judicial fora—without resort to further litigation and in a manner that protects the public health and safety.

## II. DISCUSSION

### A. The Indian Point Agreement Is a Final, Legally-Binding, and Judicially-Enforceable Agreement That Does Not Require Board Approval Under 10 C.F.R. § 2.338

During a January 18, 2017 teleconference with the parties, the Board queried whether 10 C.F.R. § 2.338 ("Settlement of issues; alternative dispute resolution") applies to the Indian Point Agreement, such that Board review and approval thereof would be required.[7] For the reasons set forth in their Motion, Intervenors conclude that Section 2.338 does *not* apply to the Indian Point Agreement.[8] Entergy agrees with that conclusion.

First, 10 C.F.R. § 2.338 does not require parties to NRC contested adjudications to engage in settlement discussions or to enter into a settlement agreement as part of the NRC adjudicatory process. Instead, it "encourage[s]" parties to use various methods of alternate dispute resolution ("ADR") to address the issues without the need for litigation in proceedings governed by 10 C.F.R. Part 2.[9] The regulation states that "parties shall have the *opportunity* to submit a *proposed*

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6 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22-23 (1998).

7 Jan. 18, 2017 Tr. at 5910-12.

8 *See* Intervenors' Motion at 17-22.

9 10 C.F.R. § 2.338.

settlement of some or all issues to the Commission or presiding officer, as appropriate, or submit a request for alternative dispute resolution."[10] Towards that end, Section 2.338(a) identifies two specific scenarios to which the regulation applies to the parties in an NRC contested adjudication: (1) the parties reach a "proposed settlement" that they wish to submit for approval by the Board in accordance with the provisions of § 2.338(i); or (2) the parties seek the assistance of the Board and the Chief Administrative Judge in establishing a formal ADR process under § 2.338(b) that may result in a "proposed settlement" to be submitted for approval under § 2.338(i).[11] As explained by the Intervenors, the Indian Point Agreement does not fall into either of these categories, thereby rendering 10 C.F.R. § 2.338 facially inapplicable.[12] Entergy fully agrees.

The Indian Point Agreement is a private contractual agreement that is final and binding on the parties to the Agreement and enforceable in any New York State or New York Federal court of competent jurisdiction.[13] The parties have neither submitted a "proposed settlement" for approval by the Board nor requested the appointment of a Settlement Judge to conduct settlement negotiations or to remit the proceeding to alternative dispute resolution. On the contrary, they have completed settlement negotiations and entered into a final, judicially-enforceable settlement agreement that encompasses not only NRC-related issues, but also certain federal and state environmental issues that do not fall within the Commission's or this Board's jurisdiction. Accordingly, Section 2.338(i)'s language that a settlement be approved by the presiding officer or the Commission as appropriate "in order to be binding in the proceeding" does not apply here, and the Indian Point Agreement's terms need not "be embodied in a decision or order" issued by the

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10 *Id.* at § 2.338(a) (emphasis added).

11 *Id.* at § 2.338(a), (b)(1).

12 *See* Intervenors' Motion at 17-19.

13 *See id.* at 16.

Board and reviewable by the Commission under 10 C.F.R. § 2.341.[14]

Based upon its review of NRC adjudicatory precedent, Entergy concurs with the Intervenors' assertion that 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. The parties hereto have posed no such request to the Board. In this regard, the facts of this case are readily distinguished from those underlying the Board's ruling in the *Vermont Yankee* proceeding, LBP-06-18.[15] As the Intervenors explain in their Motion, unlike the *Vermont Yankee* litigants, they do not seek Board approval of the Indian Point Agreement (which resolves claims both in and outside of this NRC proceeding), and therefore have not submitted it to the Board. The only relief they seek is termination of this proceeding based on their voluntary withdrawal of their remaining Track 2 contentions.

**B. <u>The Settlement Agreement Obviates the Need for Further Testimony Concerning the Track 2 Safety Issues and Board Review of Those Issues</u>**

During discussions with the parties, the Board also inquired whether additional testimony from the parties on the subject of baffle-former bolt cracking is necessary or appropriate.[16] Entergy agrees with the Intervenors that such testimony is not warranted under the present circumstances. As the Intervenors indicate in their Motion, the voluntary withdrawal of their remaining contentions renders the baffle-former bolt issue moot and compels the termination of

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[14] 10 C.F.R. § 2.338(i).

[15] In the *Vermont Yankee* proceeding, the State of Vermont filed a notice of withdrawal and request for dismissal of its contentions, to which it attached a memorandum of understanding ("MOU") signed by the State and Entergy. The State and Entergy later chose to submit an amended notice intended to satisfy 10 C.F.R. § 2.338. After the Board issued an order setting the deadline for any comments from the public supporting or objecting to the amended notice and MOU addendum, Entergy submitted a legal brief arguing that the MOU addendum was not a settlement within the meaning of Section 2.338 because that section applies only to settlement agreements that are intended to be binding in the proceeding and that are facilitated by third-party neutrals or supervised by the Board. The Board ultimately found that "the Amended Notice and MOU Addendum constitute a written agreement between the State and Entergy that was submitted for the Board's imprimatur" under section 2.338. *See Vt. Yankee*, LBP-06-18, 63 NRC at 842.

[16] Jan. 18, 2017 Tr. at 5934.

this adjudication.[17] Indeed, the *Palo Verde* decision cited by Intervenors in their Motion is directly apposite here insofar as it holds that "[t]erminating the proceeding is a ministerial act in that the withdrawal of the Intervenors brings the proceeding to a close."[18] Thus, at this juncture, there is no legal basis (or practical need) for the parties' submittal of additional testimony.

Entergy also agrees with the Intervenors that the Board's *sua sponte* review of any of the pending safety contentions—which, under 10 C.F.R. § 2.340(a), requires the express approval of the Commission—is not warranted in these circumstances, because no "serious safety, environmental, or common defense and security matter" exists.[19] Quoting the Commission's 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, Intervenors state that "[t]he authority to conduct *sua sponte* review 'is to be exercised only in extraordinary circumstances.'"[20] Notably, the Commission reaffirmed this longstanding tenet in a 2015 decision issued in the *Fermi* COL proceeding, in which it rejected the Licensing Board's request to review, *sua sponte*, issues related to the environmental impacts of the proposed transmission-line corridor for Fermi Unit 3.[21] The Commission cited the "heightened" standard for *sua sponte* review:

> [O]ur 1998 Policy Statement, which instructs boards to limit their use of *sua sponte* review, remains valid. Further, section 2.340(b) references the standard for

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17 *See* Intervenors' Motion at 22.

18 *See id.* at 18-19 (quoting *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2, and 3), LBP-91-37a, 34 NRC 199 (1991)).

19 Intervenors' Motion at 15 (quoting 10 C.F.R. §2.340(a)). When the Commission amended its hearing rules in 2004, it issued § 2.340(a) (formerly § 2.760(a)), which allows a licensing board to examine a "serious" issue *sua sponte* only when "the Commission approves such examination and decision upon referral of the question" to the Commission. Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. 2,182, 2,210 (Jan. 14, 2004) ("2004 Part 2 Final Rule"); 10 C.F.R. § 2.340(a). The pre-2004 regulations contained no such explicit requirement. *See* 10 C.F.R. § 2.760(a) (2003). This fact reflects the Commission's clear intent that, consistent with longstanding NRC practice, licensing boards engage in *sua sponte* review only sparingly – *i.e.*, in extraordinary circumstances – and only with prior Commission approval. *See* 2004 Part 2 Final Rule, 69 Fed. Reg. at 2,210 (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998), as published at 63 Fed. Reg. 41,872 (Aug. 5, 1998); *Tex. Utilities Generating Co*. (Comanche Peak Steam Elec. Station, Units 1 & 2), CLI–81–24, 14 NRC 614, 615 (1981)).

20 Intervenors' Motion at 15 (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 23).

21 *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 8-9 (2015).

> Commission review in sections 2.323 and 2.341, both of which, we have held, require a heightened showing to prevent overuse, including a demonstration of "extraordinary circumstances." *See* 10 C.F.R. §§ 2.323(f), 2.341(f)(1) (governing referred rulings or certified questions that raise "significant and novel legal or policy issues" or issues whose early resolution "would materially advance the orderly disposition of the proceeding"); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC 681, 685 (2012); *cf. Diablo Canyon,* CLI-12-13, 75 NRC at 687 (regarding the standard for interlocutory review). The Board correctly notes that "a request to engage in *sua sponte* review should not be undertaken lightly." LBP-14-9, 80 NRC at 39.[22]

Entergy respectfully submits that no serious safety, environmental, or common defense and security matter exists in light of the numerous actions taken by Entergy and the NRC Staff in response to the baffle-former bolt degradation issues identified at IP2—and any such issues remain in the scope of the Staff's ongoing safety and environmental reviews pending issuance of the requested renewed operating licenses.[23] Importantly, Entergy has incorporated its numerous corrective and preventative actions into the IP2 and IP3 Reactor Vessel Internals Aging Management Program and Inspection Plan submitted as part of the license renewal proceeding and documented them in its corrective action program.[24]

Furthermore, as the Intervenors note, "the NRC Staff's ongoing review of the Indian Point license renewal application ensures continued agency attention to aging-related issues at Indian Point, and any failure by Entergy to comply with its renewed licenses, if issued, would be subject

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[22] *Id.* at 9 n.39.

[23] Through inspections conducted outside of the license renewal process, the NRC Staff confirmed that Entergy's actions and evaluations provide reasonable assurance that the IP3 baffle bolts will perform as required until the planned refueling outage in spring 2017, during which Entergy will examine the IP3 baffle-former bolts. *See* NRC Integrated Inspection Report 05000247/2016002 and 05000286/2016002 at 34 (Aug. 30, 2016) (ML16243A245). Additionally, the Staff performed a risk-informed evaluation of the safety significance of recently-identified reactor vessel baffle-former bolt degradation issues, including those identified at IP2. The Staff concluded that the observed baffle-former bolt degradation does not present an imminent safety hazard, and that immediate plant shutdowns to inspect and repair degraded baffle-former bolts are not necessary. *See* Memorandum from J. Lubinski, NRR and J. Giitter, NRR, to W. Dean, NRR, "Degradation of Baffle-Former Bolts in Pressurized-Water Reactors – Documentation of Integrated Risk-Informed Decisionmaking Process in Accordance with NRR Office Instruction LIC-504" (Oct. 20, 2016) (ML16225A341).

[24] *See* Entergy Letter NL-17-020, "Updated Reactor Vessel Internals Aging Management Plan" (Feb. 6, 2017), Attachment 4, Kwong Declaration.

to NRC review and enforcement as the NRC may deem appropriate and/or warranted."[25] As a result, any decision by the Board to pursue *sua sponte* review of the baffle-former bolt aging management issue or other matters could intrude inappropriately upon the Staff's pending safety review of Entergy's license renewal application.[26]

In conclusion, the Intervenors' voluntary withdrawal of their three remaining safety contentions ends their participation in this adjudication and warrants Board termination of the contested proceeding.[27] There is no legal basis or practical need for the submittal of additional testimony by the parties given the Intervenors' withdrawal and express acknowledgment that the safety concerns raised in their pending Track 2 contentions have been adequately addressed by Entergy's commitments, as memorialized in the Indian Point Agreement.[28] Nor is there any need for the Board's *sua sponte* review of the contentions given the lack of any serious safety, environmental, or common defense and security matter. As noted, above, the NRC Staff has concluded that the baffle-former bolt degradation issue does not constitute an imminent safety concern for operating reactors (including IP2 and IP3), and the Staff must approve Entergy's proposed aging management activities before issuing the renewed licenses for IP2 and IP3.

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25 *See* Intervenors' Motion at 16-17.

26 *Cf. New England Power Co.* (NEP, Units 1 & 2), LBP-78-9, 7 NRC 271, 279-80 (1978) ("it is apparent that the Board does not have any supervisory authority over that part of the application review process that has been entrusted to the Staff.").

27 *See Pub. Serv. Co. of Colo.* (Fort St. Vrain Indep. Spent Fuel Storage Installation), CLI-91-13, 34 NRC 185, 190-91 (1991) (accepting the notice of withdrawal of the proceeding's lone intervenor and closing the proceeding, per the terms of the agreement that resolved the intervenor's concerns); *Int'l Uranium (USA) Corp.* (Receipt of Additional Material from Tonawanda, New York), LBP-00-11, 51 NRC 178, 180 (2000) ("In light of the resolution of the State's concerns and the lack of opposition to its motion for withdrawal, there are no longer any issues for the Presiding Officer to resolve. Therefore, there State's motion for withdrawal *is granted* . . . .") (emphasis added); *Pub. Serv. Elec. & Gas Co.* (Hope Creek Generating Station), LBP-85-6A, 21 NRC 468, 468-69 (1985) (approving the withdrawal of the intervenor and dismissing its contentions).

28 *See* Intervenors' Motion at 16 ("Entergy's early retirement of IP2 in 2020 . . . and IP3 in 2021 . . . significantly mitigates Intervenors' concerns regarding the effects of cumulative aging degradation on the Indian Point reactors and steam generators. . . . 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.").

## C. Although NRC Regulations Do Not Require the Board to Make a "Public Interest" Finding In This Case, the Indian Point Agreement Is, In Fact, in the Public Interest

For the reasons states above and in the Intervenors' Motion, 10 C.F.R. § 2.338 does not apply to the Indian Point Agreement. Thus, there is no legal requirement that the Board find that the termination of the contested proceeding effectuated by the Agreement (by virtue of Intervenors' withdrawal from the proceeding as a condition of the settlement) is in the public interest. Nevertheless, Entergy respectfully submits that the circumstances precipitating Intervenors' request to terminate to the proceeding inure to the benefit of the public.[29]

The Commission long has encouraged parties, even during the advanced stages of a contested proceeding, to resolve disputed issues through alternative (*i.e.*, non-litigation) means. Among other things, a settlement "averts further costs that could be incurred by the parties and the NRC if appeals are filed, as they usually are."[30] Furthermore, "a settlement permits the parties to fashion a solution that goes beyond the power of a licensing board, which must decide issues before it according to the applicable law."[31] The parties have accomplished these ends by forging an agreement that resolves a wide and complex array of NRC and non-NRC issues, and in a manner that protects public health and safety. For example, in addition to expediting IP2 and IP3 closure, the Agreement requires Entergy to: (1) undertake specified baffle-former bolt inspection and replacement activities at IP2 and IP3 to maintain the reactors' structural integrity and safety margins; (2) 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; (3) use its best efforts to maximize the amount of spent fuel transferred to dry storage each year, with a minimum of four casks per

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[29] *Cf. Ga. Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-96-16, 44 NRC 59 (1996). In LBP-96-16, the Board dismissed a contested proceeding after the sole intervenor withdrew his petition and contention pursuant to a settlement agreement with the licensee. The Board determined, without reviewing the settlement agreement, that it was in the public interest to accept the withdrawal of the petition and the contention.

[30] *Id.* at 65.

[31] *Id.*

year and a total of 24 casks by 2021; (4) 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; (5) design and construct a new alternate emergency operations facility to provide key support for emergency planning activities for Indian Point; and (6) establish a $15 million fund to support environmental restoration and community benefit projects.[32] All of these provisions, which were negotiated by competent counsel with public health and safety in mind, are plainly in the public interest.[33]

## III. CONCLUSION

For the reasons stated above, Entergy supports Intervenors' request that the Board dismiss the three Track 2 contentions and terminate the proceeding without prejudice.

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[32] *See* Intervenors' Motion at 10-11.

[33] *See id*. at 17 (stating that the Board "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.'") (quoting *Vt. Yankee*, LBP-06-18, 63 NRC at 843-44).

Respectfully submitted,

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

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Dated at Washington, DC
this 21st day of February 2017

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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 "Entergy's Answer in Support of Intervenors' Motion to Dismiss the Track 2 Contentions and Terminate This Proceeding In Its Entirety" 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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