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By Federal Express

Frank Scardilli
Senior Staff Counsel
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

RE: *Riverkeeper, Inc. v. Collins et al.*, No. 03-4313

Dear Mr. Scardilli:

Enclosed please find an original and four copies of the Utility Respondents' Response in Support of Federal Respondents' Motion To Dismiss, Utility Respondents' Response in Support of Federal Respondents' Motion To Suspend Schedule, Utility Respondents' Corporate Disclosure Statement, and Certificate of Service in the above-captioned case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed postage-prepaid envelope at your earliest convenience.

Sincerely,

Jay E. Silberg

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Enclosures: As stated

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC., Petitioner, v. COLLINS, et al. Respondents,	Docket No. 03-4313

UTILITY RESPONDENTS' RESPONSE IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS

Respondents Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, the "Utility Respondents") submit this response in support of the June 3, 2003 Motion to Dismiss filed by the United States Nuclear Regulatory Commission ("Commission" or "NRC") and the United States of America (the "Federal Respondents"). The Motion to Dismiss seeks to dismiss the Petition for Review (the "Petition") filed in this Court by Riverkeeper, Inc. ("Petitioner" or "Riverkeeper"). As more fully discussed below, both controlling legal precedent and compelling policy considerations require the dismissal of the Petition for lack of jurisdiction.

STATEMENT OF FACTS

The relevant facts are set forth in the Motion to Dismiss and will be only briefly summarized here. Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC are the owners, respectively, of the Indian Point Unit 2 and Indian Point Unit 3 nuclear power plants (the "Indian Point Units"). Entergy Nuclear Operations, Inc. (the "Licensee") is the

NRC-licensed operator of both plants. Riverkeeper is an environmental group campaigning for "the immediate and permanent closure of the Indian Point nuclear power plant."[1] As part of this campaign, on November 8, 2001 Riverkeeper filed an enforcement petition with the NRC pursuant to 10 C.F.R. § 2.206 ("the 2.206 Petition") asking for the immediate shutdown of the Indian Point Units, together with other relief.[2] The principal ground asserted for seeking such draconian action by the agency was not the alleged violation of any applicable law or NRC regulation, but rather Riverkeeper's fear that terrorist attacks might be directed against the Indian Point Units causing "a catastrophic effect." *See* 2.206 Petition at 2.

The NRC gave thoughtful and careful consideration to Riverkeeper's enforcement petition. On December 20, 2001, the NRC wrote Riverkeeper that the NRC had in effect partially granted the relief sought by the 2.206 Petition through the Commission's actions immediately following September 11, 2001 to enhance security at all nuclear power plants, including the Indian Point Units, as well as security enhancements implemented at Indian Point on the recommendation of the Federal Bureau of Investigation. The NRC accepted a December 20, 2001 supplement to the Petition, which set forth a declaration from a Riverkeeper consultant.

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1 *See* http://riverkeeper.org/campaign.php/indian_point for a description of Riverkeeper's campaign to shut down the Indian Point Units. The quoted language is at the top of the website's first page.

2 Riverkeeper requested the NRC to: (1) issue an order suspending operations, revoke the operating licenses, or adopt other measures that would result in a temporary shutdown of the Indian Point Units; (2) order the Licensee to conduct a full review of the facilities' vulnerabilities, security measures, and evacuation plans; (3) require the Licensee to provide information documenting the existing and readily attainable security measures which protect the Indian Point facility against land, water, and airborne terrorist attacks; (4) immediately modify the operating licenses for the Indian Point Units to mandate certain security measures, such as the establishment of a permanent no-fly zone in the air space within 10 miles of the Indian Point site; (5) order the revision of the Licensee's emergency response plan and Westchester County's Radiological Emergency Response Plan to account for possible terrorist attacks and prepare comprehensive response to multiple, simultaneous attacks in the region; (6) order Entergy "to undertake the immediate conversion of the current spent fuel storage technology from a water cooled system to a dry cask system in a bunkered structure" and (7) promptly order the retirement of the Indian Point facility if "the NRC cannot sufficiently ensure the security of the Indian Point facility against terrorist threats." 2.206 Petition at 1-2.

A Federal Register notice of the Petitions was published on December 28, 2001. 66 Fed. Reg. 67,334 (2001). On January 7, 2002, members of the NRC Staff discussed with Riverkeeper the processing of the 2.206 Petition.[3] On May 16, 2002, the NRC sent Riverkeeper a copy of its proposed decision on the 2.206 Petition and gave Riverkeeper the opportunity to provide comments, which it did on August 9, 2002. The NRC issued its Director's Decision on November 18, 2002 (the "Director's Decision"). *Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296 (2002).[4] The Director's Decision again pointed out that the NRC had, in effect, partially granted Riverkeeper's "request for an immediate security upgrade" at the Indian Point Units with the actions taken by the Commission in the immediate aftermath of September 11, as well as by orders issued on February 25, 2002 to all nuclear power plants, including the Indian Point Units, to implement interim compensatory security measures. The Director's Decision denied those aspects of the 2.206 Petition that had not already been imposed by the NRC. *Id.* at 311-3, Motion Exhibit A at 19-22.

In accordance with NRC regulations, the Commission may undertake *sua sponte* review of the denial of a 2.206 petition within twenty-five days of its issuance. 10 C.F.R. § 2.206(c)(1). If the Commission does not review the decision within that period, it becomes a final agency action. *Id.* In this instance, the Commission did not review the Director's Decision, which therefore became final NRC action on December 13, 2002. The instant Petition followed.

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3 *See* March 13, 2002 letter from John Zwolinski, NRC to Alex Matthiessen, Riverkeeper.

4 The Director's Decision, which contains a detailed exposition of the reasons for the partial denial of the 2.206 Petition, is attached to the Motion to Dismiss as Exhibit A ("Motion Exhibit A").

ARGUMENT

I. CONTROLLING PRECEDENT DICTATES THAT THE NRC'S PARTIAL DENIAL OF THE 2.206 PETITION IS NOT REVIEWABLE

A. The Standard Set by the U.S. Supreme Court in *Heckler v. Chaney* Controls the Disposition of the Instant Petition

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the U.S. Supreme Court established an analytical procedure for determining whether a federal agency's decision not to institute an enforcement proceeding is reviewable by the courts. The procedure announced in *Chaney* is dispositive on whether the Petition is reviewable by this Court.[5]

The first part of the *Chaney* analysis is to determine, pursuant to 5 U.S.C. § 701(a)(1), whether the controlling statute precludes judicial review of a "no enforcement" decision. If it does not, the second part is to establish, under 5 U.S.C. § 701(a)(2), whether the agency's decision on whether to take enforcement action "is committed to agency discretion by law." *Chaney*, 470 U.S. at 828. With respect of the second part of the analysis, which is the one applicable to this case,[6] "an agency's decision not to take enforcement action should be

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[5] The U.S. Supreme Court decided the *Chaney* case on the same day it decided *Florida Power & Light v. Lorion*, 470 U.S. 729 (1985). The narrow issue presented and decided in *Lorion* was whether the U.S. courts of appeals or the district courts had original jurisdiction under 28 U.S.C. 2342(4) and 42 U.S.C. 2239 over petitions to review NRC denials of enforcement requests filed under 10 C.F.R. § 2.206. In holding that the courts of appeal have original subject matter jurisdiction over such petitions, the Court went out of its way to make it clear that it was not deciding, because the issue had not been raised by any of parties, whether review of a denial of a 2.206 petition would be barred by the presumptive unreviewability of agency denials of enforcement action it was announcing in *Chaney*. Thus, the Court wrote in *Lorion*:

> In addition, no party has argued that under the APA, 5 U.S.C. 701(a)(2), Commission denials of 2.206 petitions are instances of presumptively unreviewable "agency action . . . committed to agency discretion by law" because they involve the exercise of enforcement discretion. See Heckler v. Chaney, post, at 828-835. Because the question has been neither briefed nor argued and is unnecessary to the decision of the issue presented in this case, we express no opinion as to its proper resolution. The issue is open to the Court of Appeals on remand should the Commission choose to press it.

470 U.S. at 735 n.8. Therefore, the Supreme Court's *Lorion* decision is irrelevant to the instant motion.

[6] There is no statutory preclusion of judicial review of NRC enforcement actions.

presumed immune from judicial review under § 701(a)(2)." *Id.* at 832. This presumption is rebuttable by a finding that "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833 (footnote omitted). If such guidelines exist, the agency must follow them, and whether it has done so is reviewable by the courts. *Id.*[7]

B. The *Chaney* Analysis Shows that an NRC Decision Declining to Take Enforcement Action is Not Reviewable

Application of the *Chaney* analysis to the NRC statutory framework yields an unequivocal answer: there is "no law to apply" that would permit judicial review of an NRC decision not to take enforcement action because the statute that governs the NRC's regulatory role "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830. That statute, the Atomic Energy Act ("the Act"), 42 U.S. § 2011 *et seq.*, has been recognized by numerous Federal Courts (including this Court), to vest an extraordinary amount of discretion in the agency to set its own charter on how to proceed in achieving its statutory objectives. *County of Rockland v. NRC*, 709 F.2d 766, 776 (2nd Cir.), *cert. denied*, 464 U.S. 993 (1983); *Arnow v. NRC*, 868 F.2d 223, 234 (7th Cir.), *cert. denied*, 493 U.S. 813 (1989); *Mass. Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9, 15 (1st Cir. 1988); *Pub. Serv. Co. of N. H. v. NRC*, 582 F.2d 77, 82 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). This discretion is

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[7] In *Chaney*, the Court left open the possibility that, even if no express guidelines exist in the statute for the agency to exercise its enforcement powers, there may be a situation in which the "agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities," in which case such a policy might be reviewable by a court. 470 U.S. at 833 n.4. As further discussed below, this footnote does not create an exception to the general rule, but rather describes a case in which statutory guidelines for the exercise of agency enforcement discretion exist.

evidenced in every provision of the Act that could conceivably be relevant to enforcement actions by the NRC vis-a-vis a nuclear power plant licensee:[8]

- General enforcement provision, 42 U.S.C. § 2201(c): "In the performance of its functions the Commission *is authorized to* . . . make such studies and investigations, obtain such information, and hold such meetings or hearings *as the Commission may deem necessary or proper* to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder." (Emphasis added).

- Authority to issue rules and regulations, 42 U.S.C. § 2201(p): "In the performance of its functions the Commission *is authorized to* . . . make, promulgate, issue, rescind, and amend such rules and regulations *as may be necessary* to carry out the purposes of this Act." (Emphasis added).

- Authority to revoke licenses, 42 U.S.C. § 2236(a): "Any license *may* be revoked for any material false statement in the application or any statement of fact required under section [2232 of this title], or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this Act or of any regulation of the Commission." (Emphasis added).

- Authority to seek injunction relief, 42 U.S.C. § 2280: "Whenever *in the judgment of the Commission* any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the Attorney General on behalf of the United States *may* make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted." (Emphasis added).

See generally, Arnow, 868 F.2d at 233. The same result obtains upon review of the NRC's regulations for the § 2.206 enforcement process, which give the NRC Staff unlimited discretion

[8] There are no express provisions in the Act that address enforcement actions against nuclear reactor licensees. That, in itself, should suffice to demonstrate that there is "no law to apply" to permit judicial review of NRC decisions not to take enforcement action. *Chaney*, 470 U.S. at 830.

as to whether to take the requested enforcement action.[9] Thus, 10 C.F.R. § 2.206(b) states that, upon receipt of an enforcement request under § 2.206, the Director of the NRC office with responsibility for the subject matter of the request shall "*either* institute the requested proceeding . . . *or* shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision." (Emphasis added). Wide discretion is also vested on the NRC staff whether to institute an enforcement action on its own.[10]

The wide discretion vested in the NRC by its controlling statute and the agency's own regulations forecloses the possibility of any judicial review of its decisions not to take enforcement action under 10 C.F.R. § 2.206, and brings such decisions squarely within the non-reviewability rule defined by *Chaney*.

C. Every Court that has Examined the Issue Has Concluded that Denials of Section 2.206 Petitions Are Not Reviewable

Since the Supreme Court issued the *Chaney* decision, three Circuits have examined the reviewability of NRC decisions not to institute enforcement actions that have been requested under 10 C.F.R. § 2.206. In each case, the Court has concluded that the Act and the NRC regulations provide "no law to apply" to evaluate an NRC decision not to take enforcement action. Therefore, the Courts have found that they lack jurisdiction to review such a decision.

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[9] Several Federal Courts have held that the regulations promulgated by an agency may provide a standard for judicial review of a decision not to take enforcement action. *Arnow*, 868 F.2d at 234; *Mass. Pub. Interest Research Group*, 852 F.2d at 16; *Center for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988).

[10] 10 C.F.R. § 2.202, which addresses the *sua sponte* institution of enforcement actions by the NRC staff against licensees, states that the Commission "*may* institute a proceeding to modify, suspend, or revoke a license *or to take such other action as may be proper* by serving on the licensee or other person subject to the jurisdiction of the Commission" an order to that effect. 10 C.F.R. § 2.202(a) (emphasis added).

The First Circuit examined the issue in *Mass. Pub. Interest Research Group, Inc. v. NRC, supra.* In that case, as here, the petitioner had requested that the NRC shut down a nuclear power plant and have its license to operate suspended until the licensee took certain specified actions (including actions involving off-site emergency planning). The NRC effectively granted some of the relief sought but denied the balance of the request. The Court ruled that no meaningful standard existed to examine the NRC's choice of enforcement alternatives and dismissed the petition for review, finding "as a matter of law, that the agency action in this case is unreviewable." *Id.* at 13, 14, 19.

The Seventh Circuit considered, in light of *Chaney*, the reviewability of an NRC denial of a 10 C.F.R. § 2.206 enforcement petition in *Arnow v. NRC, supra.*[11] The petitioners in *Arnow* contended that certain tests conducted by licensees on the reactor containments at three nuclear power plants were deficient, and asked that the operating licenses be suspended and the plants shut down until the deficiencies were corrected. The NRC declined to take enforcement action on the grounds that petitioners' claims were groundless. 868 F.2d at 225.

The *Arnow* Court exhaustively analyzed the reviewability of NRC non-enforcement decisions in light of *Chaney*. 868 F.2d at 232-36. It determined, as the First Circuit had, that such decisions are not reviewable because the Act entrusts the NRC with wide discretion in the area of enforcement. *Id.* at 233. The Court concluded: "Because Congress has not provided us

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[11] Prior to the issuance of the *Chaney* decision, the Seventh Circuit had reviewed and dismissed a petition to review an NRC decision not to institute a 2.206 proceeding to revoke the construction permit for a nuclear power plant. *Rockford League of Women Voters v. NRC*, 679 F.2d 1218 (7th Cir. 1982). The Court in *Rockford League* denied the review petition on the basis that the 10 C.F.R. § 2.206 regulations are permissive, but not mandatory, and the courts cannot tell agencies, such as the NRC, how to allocate their enforcement resources. The same reasoning was employed, and the same result reached, in another earlier Seventh Circuit case, *Illinois v. NRC*, 591 F.2d 12, 14-16 (7th Cir. 1979).

with any meaningful standard of review under the Atomic Energy Act, nor has the NRC under its own regulations, we must dismiss the petition for want of jurisdiction . . . ." *Id.* at 236.

The D.C. Circuit also examined whether NRC's denial of a 10 C.F.R. § 2.206 enforcement petition is subject to review by the courts. In *Safe Energy Coalition of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989), the Court was asked to overturn an NRC denial of an enforcement petition relating to a nuclear plant's quality assurance program. The NRC declined to take the actions requested by petitioners. The Court noted that, under *Chaney*, agency refusals to take enforcement action are presumed to be unreviewable, and analyzed the Act and NRC regulations to determine whether their provisions supplied any criteria by which a reviewing court could measure the NRC's refusal to take action. The Court concluded that no such criteria existed. Therefore, the presumption of unreviewability stood. *Id.* at 1477-78.

The unanimity exhibited by the courts of appeals on this issue conclusively establishes that enforcement decisions by the NRC under 10 C.F.R. § 2.206 are the product of a broad statutory grant of discretion to the agency. The existence of such discretion and the lack of standards against which a judicial review of the agency's action or inaction could be conducted render NRC denials to take enforcement action unreviewable.

II. THE SECOND CIRCUIT HAS APPLIED THE *CHANEY* ANALYSIS TO FIND ANALOGOUS AGENCY DECISIONS NOT TAKE ACTION UNREVIEWABLE

This Court has not previously had the occasion to apply the *Chaney* analysis to an NRC denial of a 2.206 petition. However, the Court has, in a number of other contexts, followed *Chaney* to find that decisions by an administrative agency not to take enforcement action were unreviewable because the applicable statute afforded the agency discretion as to whether to act.

See, e.g., Dina v. Attorney Gen. of U.S., 793 F.2d 473, 474-76 (2nd Cir. 1986); *Doherty v. Meese*, 808 F.2d 938, 943-44 (2nd Cir. 1986); *Marlow v. U.S. Dept. of Educ.*, 820 F.2d 581, 582-83 (2nd Cir. 1987); *Christianson v. Hauptman*, 991 F.2d 59, 62-63 (2nd Cir. 1993); *Lunney v. United States*, 319 F.3d 550, 558 (2nd Cir. 2003). These cases are direct authority for the Court to find that the NRC's decision not to take enforcement action in response to a 2.206 petition is unreviewable, given the broad discretion that the Act vests in the NRC in the enforcement area.

Of particular relevance to the instant petition is this Court's recent decision in *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316 (2nd Cir. 2003). Petitioners challenged the decision by the U.S. Environmental Protection Agency ("EPA") not to issue a notice of deficiency ("NOD") to the State of New York's Department of Environmental Conservation for violating the Clean Air Act. After examining the relevant language in the Clean Air Act, the Court ruled that the statute affords the EPA discretion whether to issue a determination that a state agency is not adequately administering its permitting program for major stationary sources of air pollution. The Court wrote:

> This conclusion effectively resolves NYPIRG's challenge to the EPA's decision not to issue a NOD, because under the APA an agency's decision not to invoke an enforcement mechanism provided by statute is not typically subject to judicial review. *See* 5 U. S. C. § 701(a)(2); *Heckler v. Chaney*, 470 U. S. 821, 832 (1985) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)."); see *also Dina v. Attorney Gen. of the United States*, 793 F. 2d 473 (2d Cir. 1986) (per curiam) (U. S. Information Agency's discretionary decision not to recommend waiver of residency requirement is immune from review).
>
> The presumption against judicial review of such refusal avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes . . .

321 F.3d at 331 (citations omitted). The precedent set by the Court's decision in *Whitman* should be dispositive of the instant Petition, for the Atomic Energy Act, like the Clean Air Act, affords each agency ample discretion not to invoke its enforcement powers.

III. THE "ABDICATION" LANGUAGE IN *CHANEY* IS NOT AN EXCEPTION TO THE UNREVIEWABILITY PRINCIPLE AND, EVEN IF IT WERE, IT DOES NOT APPLY TO THE INSTANT SITUATION

A. The "Abdication" Language Is a Particular Application of the *Chaney* Analysis, not Relevant to the Instant Petition

In a footnote in *Chaney*, the Court indicated in *dictum* that there could be one possible situation in which judicial review of the lack of agency enforcement action might be allowed:

> Nor do we have a situation [here] where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, *e.g.*, *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 702(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

470 U.S. at 833 n.4. As the last sentence of the footnote makes clear, the hypothetical scenario is not an "exception" to the unreviewability doctrine, but rather one instance of the rule established by *Chaney* that enforcement is presumptively committed to agency discretion "unless Congress has indicated otherwise." *Id.* at 838. Thus, the situation alluded to in the footnote is one in which the underlying statute, expressly (as in *Adams*) or (perhaps) by strong implication, leaves no choice to the agency but to take enforcement action. [12]

This reading of *Chaney* is consistent with the holding of the D.C. Circuit in *Adams*. There, the Court specifically noted that the agency had "consciously and expressly adopted a

[12] There appears to be no reported case, however, in which a court has held that there has been "abdication" by an agency where there is no *express* statutory duty to act.

general policy which is in effect an abdication of its *statutory duty*." *Adams*, 480 F.2d at 1162 (emphasis added). Thus, the inquiry into whether denial of enforcement action is reviewable requires the Court to examine whether or not "the statute conferring authority on the agency . . . indicate[s] that such decisions were not 'committed to agency discretion.'" *Chaney*, 470 U.S. at 833 n.4. In other words, the presumption that agency enforcement decisions are unreviewable, "like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent" to the contrary. *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

In order for the presumption against reviewability to be overcome, courts generally require that there be "clear statutory commands" in order to make a finding that an agency has "consciously and expressly . . . abdicated its statutory responsibilities." *See, e.g., Sierra Club v. Yeutter*, 911 F.2d 1405, 1412 (10th Cir. 1990). For example, in *Collins Music Co. v. United States*, 21 F.3d 1330 (4th Cir. 1994), the Fourth Circuit addressed a situation where the Internal Revenue Service had failed to promulgate a regulation, but because it had no statutory duty to do so, the Court held that the failure was unreviewable, as it was committed to agency discretion. The Fourth Circuit ruled that the IRS's inaction did not constitute an abdication of statutory responsibility under *Chaney*, because the agency had no statutory responsibility to promulgate the regulation. *Id.* at 1337-38.

Thus, far from being an exception to the rule against reviewability of discretionary enforcement inaction, the *Chaney* footnote merely emphasizes one aspect of the rule in *Chaney*: if Congress has indicated that the agency action is not discretionary, but rather is statutorily required, agency inaction is reviewable. Clearly, the statute involved in the instant Petition

contains no requirement that the NRC take *any* enforcement action. Thus the "abdication" branch of the *Chaney* analysis does not apply.

B. If an "Abdication" Exception Does Exist, It Does Not Apply Here Because the NRC Has Been Singularly Proactive on Security Issues

1. The NRC Has Aggressively Carried Out Its Mandate to Ensure the Security of Nuclear Power Plants

As discussed above, in order for a potential "abdication" exception to non-reviewability to apply, the agency would have to have "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4. For example, in the *Adams* case cited in *Chaney*, the Secretary of Health, Education, and Welfare had declined to enforce an entire statutory scheme, Title VI of the Civil Rights Act of 1964. *Adams*, 480 F.2d at 1161. The Secretary, in violation of an unambiguous statutory directive that HEW "effectuate the provisions of . . . this title" (42 U.S.C. § 2000d-1), had failed to take appropriate action to terminate federal funding to segregated school systems, a failure that the *Adams* Court called "a dereliction of duty." *Id.* at 1163.

There is nothing in the NRC conduct with respect to nuclear reactor security that even vaguely resembles a "'consciously and expressly adopted . . . general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." To the contrary, the NRC has exercised remarkable initiative in coming to grips with the challenge of ensuring a proper level of security for nuclear reactors in today's environment.

At least as far back as 1973, the NRC (and its predecessor the U.S. Atomic Energy Commission) have had in place regulations requiring security plans subject to Commission approval against sabotage and theft of nuclear materials. *See, e.g.* 38 Fed. Reg. 30,537-42

(1973). Pursuant to 10 C.F.R. §73.55, the physical protection requirements for nuclear power reactors include a specified "design basis" threat ("DBT"). 10 C.F.R. §73.55 requires that every nuclear power plant licensee have in place a security organization and plant physical protection systems capable of defending against attacks from external armed groups and internal saboteurs. The plant security measures must be able to prevent unauthorized access of personnel, vehicles, and materials; ensure only authorized activities are conducted; permit only authorized handling of nuclear material; and detect and respond to unauthorized penetrations.

A written Safeguards Contingency Plan must be developed and maintained by nuclear plants in accordance with 10 C.F.R. Part 73, Appendix C, identifying a predetermined set of threat response actions, the means for their implementation, and the personnel responsible for responding to the threats. Further, nuclear plants are required to establish and document a working liaison with local law enforcement authorities, which they can summon for assistance in the event of an attack.[13]

Threats at nuclear plants are to be countered by an armed tactical force, permanently stationed at the plant, whose mission is to quickly ascertain the threat's existence, assess its magnitude, and interpose itself between the threat and specific key plant areas. The capability of security response forces and systems to defend against threats is tested in live exercises monitored by the NRC using mock attack forces. *See* NRC Inspection Manual, Inspection Procedure 81110, Operational Safeguards Response Evaluation ("OSRE") (July 1, 1997). In short, the NRC's regulations and inspection and enforcement activities concerning physical

[13] The contents of the Safeguards Contingency Plan are confidential information protected from public disclosure. 10 C.F.R. §73.21(b)(1)(viii). For the same reason, the specific security measures that the NRC requires nuclear power plant licensees to take may not be publicly disclosed and are not discussed herein.

security are comprehensive and continual, amply demonstrating that the NRC has not "abdicated" its statutory responsibilities.

In addition to these long-standing requirements, the NRC took action following the September 11, 2001 attacks to further augment security at nuclear power plants. Shortly after the attacks, it issued a threat advisory that all nuclear plants impose a heightened state of alert, and required them to augment security forces and patrols, increase coordination with law enforcement and military authorities, implement additional site access limitations for personnel and vehicles, and take other short-term and long-term actions to strengthen each plant's capability to respond to terrorist attacks.[14]

In early 2002, the NRC made additional modifications to the security requirements for all nuclear power plants, further increasing the level of protection that licensees are required to provide against terrorist acts. *Order Modifying Licenses to All Operating Power Reactor Licensees* dated February 25, 2002, 67 Fed. Reg. 9792 (2002).

The NRC issued further security directives in April 2003. *Orders Modifying Licenses of All Operating Reactor Licensees* dated April 29, 2003, 68 Fed. Reg. 24,510, 24,514, and 24,517 (2003). These additional changes are intended to provide regulatory stability in this evolving area.[15] However, NRC has stated that it will continue its review of security requirements for

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[14] *See* Director's Decision, 56 NRC at 302-03, Motion Exhibit A at 7-8.

[15] The NRC Chairman stated recently as follows:

> With the completion of the revised design basis threats, we expect that there will be a period of regulatory stability during which our power reactor licensees can consolidate the various enhancements that we have ordered. But we intend to continue to work with the Department of Homeland Security and other Federal agencies, as well as State and local law enforcement and emergency planning officials, to ensure an overall integrated approach to the security of these critical facilities. At each step over the past 17 months,

nuclear power plants and will further modify those requirements as more information on the nature of potential terrorist threats becomes available, and as other circumstances warrant.[16]

Specifically regarding the security of the Indian Point facility, the NRC has been actively involved in reviewing the adequacy of that security. The Indian Point Units have in place formal, documented Physical Security Protection Programs and Safeguards Contingency Plans.

> we have done what needed to be done to secure these facilities, but as we learn more, I am confident that the NRC, the Department of Homeland Security and other agencies will do whatever it takes to protect the people of this country.

Realistic Conservatism, Remarks of Chairman Nils J. Diaz, United States Nuclear Regulatory Commission, before the NRC Regulatory Information Conference, Washington, D.C. April 16, 2003, NRC News Rel. No. S-03-009, available online at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2003/s-03-009.pdf at 6.

[16] As NRC Chairman Diaz stated on April 16, 2003:

> Another important point bears emphasizing: it is not possible to resolve all new security issues that confront the nation and the NRC as quickly as they appear, or as fast as we would want. As the NRC confronts such issues, we must review them in the context of our long-standing and enhanced requirements, of the capabilities of the affected regulated entities, and of the multiple sources of information and coordination that are part of the NRC's exercise of its ongoing common defense and security responsibilities. Those issues that present the higher risk deserve earlier consideration. For certain issues, such as the use or range of weaponry for guard force, legislative action may be appropriate. I also have to say that one would be hard pressed to find a faster or more comprehensive and effective response to an increased security threat than has been demonstrated by the NRC and the power reactor sector, and that is a fact.

Id. at 4.

Speaking at the same conference, NRC Commissioner McGaffigan reinforced Chairman Diaz's view that the Commission's examination of security requirements for nuclear power plants will continue for the foreseeable future:

> When the Commission completes its deliberations on the DBT, we will have put in place all the results of our comprehensive security review as they pertain to power reactors. As Chairman Diaz has said, we then expect a period of regulatory stability during which our power reactor licensees can consolidate the various enhancements that we have ordered. But our work will be far from over. We intend to continue to work with the Department of Homeland Security and other Federal agencies, as well as State and local law enforcement and emergency planning officials, to insure an overall integrated approach to the security of these critical facilities. You saw the early fruits of that effort on March 17 as part of Operation Liberty Shield, in which DHS took the lead in talking to Governors about possible augmentation of security at power reactor facilities. And we will continue to try to identify possible cost-effective mitigating strategies against beyond-DBT threats.

Remarks by NRC Commissioner Edward McGaffigan, Jr. before the NRC Regulatory Information Conference, Washington, D.C. April 17, 2003, NRC News Rel. No. S-03-012, available online at http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2003/s-03-012.pdf at 4.

These documents have been reviewed and approved by the NRC. The existence and implementation of these plans and their approval by the NRC assure that appropriate levels of security exist at Indian Point, in accordance with current regulatory requirements. In addition to documentary compliance, the NRC has repeatedly confirmed through inspections and exercises that the security provisions at Indian Point adequately implement the Indian Point Units' security plans and comply with NRC requirements.[17]

Far from abdicating enforcement activities, the NRC has actively and continuously augmented and enforced its regulations and orders regarding nuclear reactor security nationwide and at the Indian Point facility specifically.

2. The NRC Gave Proper Consideration to Petitioner's Concerns

As discussed above, upon receipt of Riverkeeper's enforcement petition, the NRC gave due consideration to the issues it raised, gave Petitioner repeated opportunities to present facts and analysis to substantiate its concerns, granted some of the relief sought in the 2.206 Petition, and issued a Director's Decision that explained in detail the agency's rationale for its actions. Therefore, Petitioner cannot argue that the NRC offhandedly ignored its concerns.

Indeed, in the final analysis, what Petitioner is complaining about is not that the NRC has failed to give attention to security issues, but that the many steps taken by the agency in this area are not sufficient to meet the Petitioner's desires. Such a complaint (even if had substantive merit, which it does not) may not be raised with the courts. As the Supreme Court noted, "[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not

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[17] *See, e.g.*, November 6, 2002 letter from Brian E. Holian (NRC Division of Reactor Projects to Fred Dacimo (Entergy) enclosing Inspection Report 50/247/02-06.

necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance." *Chaney*, 470 U.S. at 834.

IV. AS A MATTER OF POLICY, THIS COURT SHOULD REFRAIN FROM REVIEWING THE NRC'S DECISION NOT TO GRANT PETITIONER'S ENFORCEMENT REQUEST

The Supreme Court in *Chaney* listed several policy reasons why agency decisions not to take enforcement action are unsuitable for judicial review. First, "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including "whether the particular enforcement action requested best fits the agency's overall policies." 470 U.S. at 831-32. Second, "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Third, "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict - a decision which has long been regarded as the special province of the Executive Branch." *Id.*

These policy reasons fully apply to NRC decisions not to institute enforcement proceedings under 10 C.F.R. § 2.206, particularly when the subject of the requested agency action is one as complex and sensitive as physical security. As the record shows, since the events of September 11, 2001, the NRC has given a very substantial portion of its attention to security issues and has taken repeated actions to enhance the level of protection afforded to nuclear power plants. Presented with a Section 2.206 Petition that sought the imposition of specific security requirements at a particular installation, the NRC had to make a judgment as to how each of the actions that Petitioner requested be taken at Indian Point fit within the overall

security requirements the agency had in place for the entire industry, as well as the measures in place at Indian Point, and engaged in the complicated analysis that the Supreme Court in *Chaney* noted is peculiarly within the expertise of the agency. Examination of the NRC's analysis would require the Court to delve into areas for which judicial review is ill suited.

In deciding that no additional enforcement action with respect to plant security was warranted in this case, the NRC has not exercised the kind of "coercive power over an individual's liberty or property rights" that the Supreme Court in *Chaney* found might justify judicial intervention. On the contrary, the NRC has granted some of the relief sought by Petitioners.[18] Rather than being deprived of liberty or property rights, Petitioner has been granted relief, but feels that the NRC has not gone as far as it would like the agency to go. Such a complaint is not a proper subject for judicial review. As the First Circuit Court noted in a similar situation:

> The NRC has chosen one option among its available enforcement alternatives. One the one hand, it has denied petitioners' request to issue an order to show cause, while on the other hand, it has deferred the restart of the Pilgrim plant until Edison corrects identified deficiencies to the satisfaction of the agency. This choice reflects the very sort of agency decisionmaking which *Chaney* cited in support of the presumption of immunity from judicial review. *See Chaney*, 470 U.S. at 821, 105 S.Ct. at 1649 (agency expertise includes decision "whether the particular enforcement action requested best fits the agency's overall policies.") We are hesitant to second guess the judgment of the NRC in this area.

Mass. Pub. Interest Research Group, 852 F.2d at 19. The same analysis applies here.

Finally, the decision whether to institute an enforcement proceeding pursuant to 10 C.F.R. § 2.206 lies within the "prosecutorial" functions within the NRC, as to which the enabling statute grants the agency unfettered discretion. *See* 42 U.S.C. § 2201(c). Thus, the NRC's

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[18] *See* Director's Decision, 56 NRC at 311-12, Motion Exhibit A at 19-20.

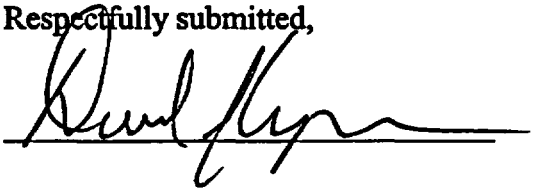
refusal to institute enforcement proceedings is, as the Supreme Court observed in *Chaney*, akin to the decision of a prosecutor not to indict – "a decision which has long been regarded as the special province of the Executive Branch" and beyond judicial examination. 470 U.S. at 832.

In short, NRC denials of 10 C.F.R. § 2.206 enforcement requests generally (as well as in the context of this case's specific facts) meet all policy reasons announced in *Chaney* for foreclosing judicial review.

CONCLUSION

For the above reasons, the Utility Respondents submit that the Court should grant the Federal Respondents' Motion to Dismiss and dismiss the Petition for want of jurisdiction.

Respectfully submitted,



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Dated: June 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC., Petitioner, v. COLLINS, et al. Respondents,	)	Docket No. 03-4313

UTILITY RESPONDENTS' RESPONSE IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO SUSPEND BRIEFING SCHEDULE PENDING CONSIDERATION OF MOTION TO DISMISS

Respondents Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (collectively, "Utility Respondents") submit this response in support of the motion by the United States Nuclear Regulatory Commission and the United States of America ("the Federal Respondents") to suspend the briefing schedule entered on May 8, 2003 in this proceeding pending consideration of their Motion to Dismiss the petition for review filed by Petitioner Riverkeeper, Inc.

We agree with the Federal Respondents that judicial economy dictates that the parties not proceed with briefing the merits of the petition for review while the potentially dispositive Motion to Dismiss is pending. If the Motion to Dismiss is granted, preparing the briefs on the merits will have proved a pointless act. If the Motion to Dismiss is denied, the Court can at that time issue a revised briefing schedule.

Furthermore, suspending the briefing schedule makes eminent sense in this instance because there is a strong probability that the motion to dismiss will be granted. *See* Utility Respondents' Response in Support of Federal Respondents' Motion to Dismiss, filed simultaneously herewith ("Utility Response"). As discussed there, policy considerations and controlling legal precedent by the Supreme Court, three other Courts of Appeals, and this own Court require the dismissal of Riverkeeper's Petition for lack of jurisdiction.[1]

Nor is there prejudice to Petitioners in suspending the briefing schedule. The ultimate disposition of this case is likely to be expedited by the Court ruling on the Motion to Dismiss. The law is so clear-cut and compelling that a favorable decision by the Court on the Motion to Dismiss could well be issued before the briefing on the merits is completed. Given that possibility, proceeding with the briefing schedule is inconsistent with judicial efficiency.

Petitioner also makes the highly rhetorical (and, at this time, irrelevant) argument that time is of the essence because "[e]very day of delay in this proceeding puts the entire [New York] metropolitan area at risk." Petitioner's Memorandum at 3. However, this Court's early ruling on the Motion to Dismiss, regardless of the outcome, would be consistent with the

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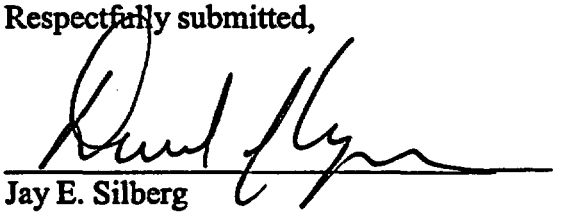
[1] The Utility Respondents are in receipt of "Petitioner's Memorandum in Opposition to Respondents' Motion to Suspend Briefing Schedule Pending Consideration of Motion to Dismiss," dated June 11, 2003 ("Petitioner's Memorandum"). In that filing, Petitioner erroneously contends that the jurisdiction of this Court to review the final decisions of the NRC is "clearly established" under "Supreme Court precedent," citing *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985) for that proposition. Petitioner's Memorandum at 1. As more fully described in the Utility Response, the *Lorion* case only held that the courts of appeals, not the district courts, have original jurisdiction to review NRC denials of enforcement requests under 10 C.F.R. §2.206. The Court expressly did not rule on whether such denials are unreviewable because they constitute agency action committed to agency discretion by law. 470 U.S. at 735 n.8; 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821 (1985).

Petitioners also argue that the Court of Appeals cases that have found the NRC denials of 2.206 petitions unreviewable are "distinguishable from the present case" because they "went to the full briefing before the court of appeals; none were dismissed on motion before full briefing and filing of the administrative record." Petitioner's Memorandum at 2. Whatever the procedural stance of those cases, they were all dismissed on jurisdictional grounds, without reaching the merits. The same result is warranted here.

expeditious resolution of this matter, for the jurisdictional issue would need to be addressed in any case before proceeding to the merits.

For the above reasons, the Utility Respondents submit that the Court should suspend the briefing schedule issued on May 8, 2003 until it has ruled on the pending Motion to Dismiss.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC., Petitioner, v. COLLINS, et al. Respondents,	Docket No. 03-4313

UTILITY RESPONDENTS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Respondents Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. (the "Utility Respondents"), by and through their undersigned counsel, hereby certify that:

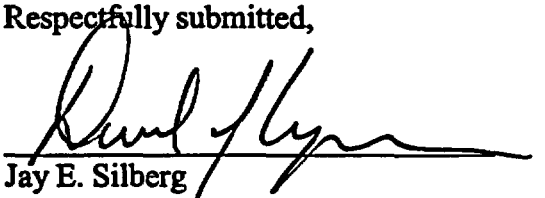
1) Respondent Entergy Nuclear Indian Point 2, LLC, a Delaware Limited Liability Company, is a direct subsidiary of Entergy Nuclear New York Investment Co. III, a privately owned company; an indirect subsidiary of Entergy Nuclear Holding Co. #3, a privately owned company; an indirect subsidiary of Entergy Nuclear Holding Company, a privately owned company; and an indirect subsidiary of Entergy Corporation, a publicly traded company.

2) Respondent Entergy Nuclear Indian Point 3, LLC, a Delaware Limited Liability Company, is a direct subsidiary of Entergy Nuclear New York Investment Co. I and Entergy Nuclear New York Investment Co. II, both privately owned companies; an indirect subsidiary of

Entergy Nuclear Holding Co. #1 and Entergy Global Investments, Inc., both privately owned companies; and an indirect subsidiary of Entergy Corporation, a publicly traded company.

3) Respondent Entergy Nuclear Operations, Inc., a Delaware Corporation, is a direct, wholly-owned subsidiary of Entergy Nuclear Holding Co. #2, a privately owned company, and an indirect subsidiary of Entergy Corporation, a publicly traded company.

Respectfully submitted,



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Dated: June 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC., Petitioner, v. COLLINS, et al. Respondents,	)	Docket No. 03-4313

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2003, copies of the enclosed "Utility Respondents' Response in Support of Federal Respondents' Motion to Dismiss," "Utility Respondents' Response in Support of Federal Respondents' Motion to Suspend Briefing Schedule Pending Consideration of Motion to Dismiss," and "Utility Respondents' Corporate Disclosure Statement" were served by mail, postage prepaid, upon the following counsel:

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