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OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

Michele G. Evans, Director
Division of Operating Reactor Licensing
Office of Nuclear Reactor Regulation
United State Nuclear Regulatory Commission
Washington, D.C. 20555 - 0001

August 1, 2012

Re: March 28, 2011 Petition Pursuant to 10 C.F.R. § 2.206
Requesting that NRC Take Enforcement Action Against
Entergy Nuclear Operations, Inc. and its Affiliates for
Violations of NRC's Fire Safety Regulations at
Indian Point Unit 1, Indian Point Unit 2, and Indian Point Unit 3,
and to Compel Actual Compliance with such Regulations

Dear Director Evans:

On July 2, 2012, the Nuclear Regulatory Commission ("NRC") asked for comment on a Proposed Director's Decision under 10 C.F.R. § 2.206 addressing New York Attorney General Eric T. Schneiderman's March 28, 2011 Petition for Indian Point compliance with 10 C.F.R. Part 50, Appendix R fire safety regulations. This letter responds to the Proposed Director's Decision.

The Proposed Director's Decision notes that NRC is requiring Indian Point to eliminate certain fire safety violations that Entergy Nuclear Operations, Inc., ("Entergy") sought to excuse through exemptions requested in 2009, and that Entergy has submitted a plan stating its intent to correct all but three of these violations by the end of 2012. The New York State Attorney General's Office believes that NRC's denial of the requested exemptions is appropriate and a significant step towards protection of the public; nevertheless, the protection of the public afforded by the Proposed Director's Decision is weakened by multiple deficiencies. The proposed decision is deficient because it:

- (1) fails to explicitly state whether the decision identifies all fire safety violations at Indian Point, or simply those from which Entergy was denied exemption;
- (2) fails to explain why it does not address possible fire safety violations at Indian Point Unit 1;
- (3) is unenforceable;

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- (4) sets no date by which Indian Point must be in compliance with fire safety regulations;
- (5) endorses permanent exemptions that forego regulatory compliance that would make Indian Point safer; and
- (6) does not mention or impose financial penalties even though Entergy has known about the identified fire safety violations for over 11 years.

Requiring Entergy to fix the majority of the identified fire safety violations at Indian Point should benefit New Yorkers who could be at risk from a fire at the facilities. However, the NRC's acceptance of a voluntary plan to correct long-standing violations does not give proper priority to public safety. As a regulator, NRC should identify all fire safety violations at Indian Point and require full fire safety compliance at all Indian Point plants by a date certain. Finally, the NRC should either impose financial penalties or explain why it thinks that it is appropriate not to impose such penalties for long-standing, known fire safety violations at the facilities.

Procedural History

The New York State Attorney General's March 28, 2011 Petition (*available at* ML110890871) requested that NRC identify all fire safety violations at all Indian Point plants, enforce compliance by September 11, 2011, and hold an evidentiary hearing to adjudicate violations. The relief requested included, but was not limited to, denial of certain fire safety exemptions that Entergy had applied to NRC for on March 6, 2009. On May 9, 2011, representatives of the New York State Attorney General's Office made an oral presentation to the Petition Review Board in at NRC headquarters in Rockville, Maryland. Transcript of May 9, 2011 Meeting (*available at* ML111520469.)

On June 30, 2011, an NRC letter (*available at* ML111520393) denied expeditious fire safety enforcement, and accepted the Petition for review and referred it to the NRC's Office of Nuclear Reactor Regulation ("NRR"). In February 1, 2012 letters (*available at* ML112140509 and ML112200442), NRC approved some of the fire safety exemptions Entergy requested in March 2009 (*available at* ML090770151 and ML090760993) and denied the rest. In a separate February 1, 2012 letter (*available at* ML12031A176), NRC asked Entergy for plans for correcting the Indian Point's numerous unexcused fire safety violations.

On March 1, 2012, Entergy submitted a voluntary schedule (*available at* ML12074A028) for correcting a list of fire safety violations at Indian Point – for which no exemption had been granted. Entergy proposed to correct all but three of the listed violations by the end of 2012 and the remainder during Indian Point Unit 2's refueling outage in Spring 2014 (*id.*).

In a March 22, 2012 letter (*available at* ML120820384), NRC advised Entergy that its voluntary schedule for correcting fire safety violations at Indian Point was acceptable.

In early July 2012, NRC released for comment a “Proposed Director’s Decision under 10 C.F.R. 2.206” (*available at* ML120880203) on the Attorney General’s March 28, 2011 petition (“Proposed Director’s Decision”). NRC Staff provided the Attorney General’s Office with a copy of the Proposed Director’s Decision on July 3, 2012.

The Proposed Director’s Decision

The Proposed Director’s Decision (at 9 - 10) notes that New York State Attorney General Schneiderman requested that NRC identify all fire safety violations at Indian Point existing as of the date of the Attorney General’s Petition (March 28, 2011), compel correction of such violations by September 20, 2011, and convene an evidentiary hearing to adjudicate the violations. The Proposed Director’s Decision would dispose of these requests by accepting Entergy’s voluntary correction schedule as adequate resolution of all fire safety violations at the facilities, observing that the Attorney General’s request for expeditious correction was denied in 2011, and rejecting the request for an evidentiary hearing.

Discussion

- 1. The Proposed Director’s Decision is not responsive to the Attorney General’s request that NRC identify all fire safety violations at Indian Point. The final Director’s Decision should identify all Indian Point fire safety violations.**

The final Director’s Decision must state “the reasons for the decision” “fully” so that a court may determine whether the NRC’s decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 10 C.F.R. § 2.206(b); *See also* Presidential Memorandum of January 21, 2009 - Transparency and Open Government, *available at* 74 Fed. Reg. 4685 (Monday, Jan. 26, 2009); NRC Principles of Good Regulation, *available at* <http://www.nrc.gov/aboit-nrc/values.html>; Written Statement by Allison M. Macfarlane, Chairman, United States Nuclear Regulatory Commission, to that House Committee on Energy and Commerce, Subcommittee on Energy and Power, Environment and the Economy, July 24, 2012, at 2 (“I make this commitment to you today: I will devote all my energies to serving on the NRC with the attributes that I consider important to good governance – openness, efficiency and transparency.”).

The New York State Attorney General requested that NRC identify all fire safety violations at Indian Point existing as of the date of the March 28, 2011 Petition. The Proposed Director’s Decision is not responsive in that it explicitly declines to address fire safety violations at Indian Point Unit 1, and does not explicitly indicate that it identifies all such violations at Indian Point Unit 2 and Indian Point Unit 3.

a. The Proposed Director's Decision provides no rational basis for not addressing fire safety violations at Indian Point Unit 1.

The Proposed Director's Decision states at page 5 that "systems, structures, and components for Unit No. 1 are not applicable to [the New York State Attorney General's] petition," and offers in support:

Indian Point Nuclear Generating Unit No. 1 was permanently shut down on October 31, 1974. The Unit No. 2 station blackout diesel generator, that also supports alternative shutdown capability for Appendix R, is located in a Unit No. 1 structure. However, neither the diesel generator fire area nor any OMAs related to the Unit No. 2 station blackout diesel generator were included in the licensee's request for exemptions and therefore, systems, structures, and components for Unit No. 1 are not applicable to this petition.

Id. at 4 - 5.

The Proposed Director's Decision provides no explanation, much less a rational basis for why either Indian Point Unit 1's retirement or the content of Entergy's fire safety exemption request justifies the exclusion of Indian Point Unit No. 1 fire safety violations from NRC's response to the Attorney General's Petition. Consequently, NRC's refusal to identify fire safety violations at Indian Point Unit No. 1 is arbitrary and capricious, and will remain so unless the final Director's Decision either identifies all fire safety violations at Indian Point Unit No. 1 as of March 28, 2011 or provides an explanation for not doing so that satisfies 5 U.S.C. § 706.

The Proposed Director's Decision refusal to identify Indian Point Unit No. 1 fire safety violations is also arbitrary and capricious because Entergy's schedule for correcting Indian Point Unit No.2 fire safety violations includes two violations in an Indian Point Unit No. 1 structure. Entergy proposes to correct fire safety violations in the Indian Point Unit 1 Superheater Building at Fire Area J, Zones 25-23 (*so in the original*) and 270. Letter, Michele G. Evans, Director, Division of Operating Reactor Licensing to Vice President for Operations, Entergy Nuclear Operations, Inc., re: Indian Point Nuclear Generating Unit No.2 -Exemption From The Requirements of 10 CFR Part 50, Appendix R, Paragraph III.G.2 (TAC No. ME0798) (Feb. 1, 2012) at 51-53 and 70-72 (*available at* ML112140509). The Proposed Director's Decision provides no explanation, much less a rational basis, for exclusion of Indian Point Unit No. 1 fire safety violations from NRC's response to the New York State Attorney General's Petition while NRC approves Entergy's schedule for correcting two such violations.

- b. The Proposed Director's Decision implies that the fire safety violations Entergy identified in its 2009 exemption requests are the only such violations at Indian Point but does not make an explicit finding that these are the only such violations.**

As the Proposed Director's Decision acknowledges, the New York State Attorney General's Petition asked NRC to "identify the violations of paragraphs F and G of Section III of Appendix R ... which exist as of the date of the petition (i.e., March 28, 2011), as Indian Point Unit Nos. 1, 2 and 3." Proposed Director's Decision, at 2. The Proposed Director's Decision's description of its response to the Petition is that "systems, structures, and components for Unit No. 1 are not applicable to this petition," and "NRC is granting the Petitioner's request to identify violations of fire protection regulations at Indian Point." Proposed Director's Decision at 4-5 and 9. This language is at best ambiguous; "identify violations" may mean "identify [all] violations," which is what the Attorney General requested, or "identify [some] violations," which is less than what the Attorney General requested.

The Proposed Director's Decision implies that the fire safety violations Entergy identified are the only such violations at Indian Point. At page 10, the Proposed Director's Decision asserts that "The licensee's schedule currently anticipates full compliance with the Commission's fire protection regulations at both operating units following the spring 2014 refueling outage at Indian Point Unit No. 2." However, the reference to "both units" and the explicit refusal to address Indian Point Unit No. 1 violations suggest that the Proposed Director's Decision does not identify all Indian Point fire safety violations that existed as of March 28, 2011.

The New York State Attorney General's Office requests that the final Director's Decision explicitly state whether NRC has identified all fire safety violations at Indian Point as of the date of the Petition, or if it does not address all, state which violations it does address and explain why it does not identify all the fire safety violations that existed at Indian Point as of March 28, 2011.

- 2. The Proposed Director's Decision is unenforceable, but the final Director's Decision should be enforceable.**

Neither the Proposed Director's Decision, Entergy's schedules for correcting Indian Point fire safety violations, nor NRC's acceptance of those schedules contains a single mandatory requirement. Both of Entergy's schedules for correcting Indian Point fire safety violations are entirely voluntary. Indeed, each schedule contains a single "Commitment" (to promptly communicate to NRC any change in resolution concept and/or completion) (*see, e.g.*, March 1, 2012 Entergy letter NL-12-041, Attachment 3, List of Regulatory Commitments (*available at* ML12074A028)), and commitments are not enforceable.

NRC staff (specifically, the NRC Director of the Division of Reactor Safety) recently clarified during the Vermont Yankee relicensing proceeding, "how regulatory commitments fit into the overall hierarchal structure of licensing basis information for a nuclear power plant."

Letter, Christopher H. Miller to Sarah Hofmann, Vermont Department of Public Service, Regarding Response to Question in State of Vermont Letter of December 23, 2011 (Mar. 20, 2012), at 1 (*available at* ML12171A526). In the enclosure to this letter, the Director of the Division of Reactor Safety distinguished between: (1) legally binding obligations placed on a licensee (also known as regulatory requirements); (2) mandated license basis documents such as UFSAR, the quality assurance program, the security plan, and the emergency plan; and (3) commitments, which are the least enforceable. In addition, the Director indicated that:

For commitments that have not been elevated into obligations or a licensing basis document licensees may change the commitments using the guidance described in Nuclear Energy Institute (NEI) document NEI 99-04, "Managing NRC Commitment Changes," July 1999 (ADAMS Accession No. ML003680088), or similar licensee-specific administrative controls. Some commitment changes require prior NRC approval and some changes may be made without NRC prior approval.

Id. at 2. In other words, it appears that NRC Staff would permit a licensee to unilaterally change or modify any commitment that NRC staff does not include in a license basis document.

Given that the fire safety regulations with which Indian Point must comply have existed since 1980, that NRC has known since 2000 that Indian Point was not in compliance with the fire safety regulations (*see, e.g.*, Proposed Director's Decision, at 6; Regulatory Issue Summary (RIS) 2006-10, "Regulatory Expectations with Appendix R Paragraph III.G.2 Operator Manual Actions" (June 30, 2006) (*available at* ML061650389)), and that Entergy waited until the very last day allowed to request exemptions for the Indian Point fire safety violations (*see, e.g.*, Proposed Director's Decision, at 6; Enforcement Guidance Memorandum (EGM) 07-004, "Enforcement Discretion for Post-Fire Manual Actions Used as Compensatory Measures for Fire Induced Circuit Failures" (June 30, 2007) (*available at* ML071830345)), NRC – in light of its regulatory responsibilities to the American public – should not allow Entergy to chart its own voluntary course with respect to fire safety at Indian Point. Instead of continuing its business-as-usual voluntary approach, NRC must issue an enforceable order that actually requires prompt compliance.

3. The Proposed Director's Decision does not contain a target date for full fire safety compliance at Indian Point, but the final Director's Decision should.

Neither the Proposed Director's Decision, Entergy's compliance schedules, nor any other document identified in the Proposed Director's Decision contains a target date for bringing Indian Point into full compliance with fire safety regulations. The closest thing to a target date is Entergy's statement of intent to correct all non-exempted violations by Indian Point Unit 2's Spring 2014 refueling outage (*see, e.g.*, March 1, 2012 Entergy letter NL-12-041, Attachment 1 - Resolution of Indian Point Unit 2 III.G.2 OMAs For Which Exemptions Have Been Denied, List of Regulatory Commitments, at 1 (*available at* ML12074A028)).

Instead of establishing an unambiguous date by which the Indian Point facilities must achieve full compliance with the federal fire safety regulations that NRC promulgated and enforces, the Proposed Director's Decision indicates, at 8 - 9, that NRC:

would verify that plans for achieving full compliance with fire protection regulations have been entered into the licensee's corrective action program, compensatory measures are appropriate and remain in place, and that the schedule for achieving full compliance will adequately assure public health and safety. The NRC also advised the licensee that additional inspections would be performed to monitor progress in its completion of corrective actions.

This language is consistent with acceptance of entry of an action into a corrective action program, rather than actual correction of a fire safety violation, as sufficient to satisfy NRC.

Accepting as fact the propositions that radiation exposure or safety considerations prevent the correction of certain Indian Point Unit 2 fire safety violations until the plant is shut down for at least the duration of a refueling outage and that the dates of Indian Point Unit 2's Spring 2014 refueling outage are to some degree uncertain does not preclude setting a target date for full Indian Point fire safety compliance a specified number of days after the completion of that outage. Nor do constraints on correcting violations at Indian Point Unit 2 preclude setting earlier target dates for Indian Point Unit 1 and Indian Point Unit 3.

If the NRC is serious about its enforcement responsibilities and the federal fire regulations that it promulgated, the final Director's Decision should explicitly set an absolute date, such as six months from today, for full Indian Point fire safety compliance, or explain why the citizens of New York do not deserve the protection afforded by those federal fire regulations.

4. The Proposed Director's Decision endorses permanent fire safety exemptions that forego regulatory compliance that would make Indian Point safer.

The Proposed Director's Decision would let stand NRC's approval of permanent exemptions of Indian Point from fire safety regulations. In two letter decisions, NRC approved several permanent fire safety regulations exemptions for Indian Point Unit 2 (February 1, 2012 letter decision on exemption requests for Indian Point Unit 2, Exemption at 12-16, 27-34, 46-49 and 76-81 (*available at* ML112140509)), and for Indian Point Unit 3 (February 1, 2012 letter decision on exemption requests for Indian Point Unit 3, Exemption at 12-15 and 43-45 (*available at* ML112200442)).

Neither the Proposed Director's Decision nor the two NRC letter decisions approving the exemptions indicates: (1) that the exemptions make Indian Point safer than it would be with compliance with fire safety regulations; (2) that compliance with fire safety regulations would make Indian Point less safe than it would be with the exemptions; (3) that the avoided fire safety compliance conflicts with other NRC rules or requirements; (4) that compliance with fire safety

regulations would impose any undue hardship or cost on Entergy; or (5) that there are other material considerations not considered when the fire safety regulations were adopted. Instead, NRC permanently approved the fire safety exemptions on the basis that alternatives make Indian Point just as safe as it would be if it complied with the fire safety regulations. *See, e.g.*, February 1, 2012 Entergy letter decision on exemption requests for Indian Point Unit 2, Exemption at 12-16 (*available at* ML112140509)).

The results of NRC's approving fire safety exemptions can be seen in its exemption of Entergy from having to separate safety-related trains of equipment (here power cables for auxiliary feedwater pumps that supply water to Indian Point Unit 2's steam generators if Indian Point Unit 2's reactor trips) so that fire would not disable more than one train at a time. *See* February 1, 2012 letter decision on exemption requests for Indian Point Unit 2, Exemption at 12-13 (*available at* ML112140509). NRC made no finding that the safety-related trains could not be separated as required by fire safety regulations. Instead, NRC based its decision on Entergy's representations that the area at issue contained limited combustible material, had fire detection equipment, some electrical cables had limited fire-resistant covering, and alternative manual methods of operating the auxiliary feedwater pumps exist. *Id.* at 12 - 16. NRC found that these factors justified leaving the auxiliary feedwater pump power cables where a fire could knock out more than one at a time.

What NRC rejected by approving the fire safety exemption for the Indian Point Unit 2 auxiliary feedwater pump power cables was the higher level of fire safety Indian Point Unit 2 would have if these power cables conformed to the fire safety regulations. The alternatives NRC accepted in lieu of compliance with fire safety regulations exist. Bringing the cables up to the standard required by the fire safety regulations would make the cables less vulnerable to fire.

The final Director's Decision should either reopen the Indian Point fire safety exemptions for further discussion, or explain both why these exemptions were made permanent and why NRC chose less safety for Indian Point than full compliance with the fire safety regulations would provide.

5. Despite 30 years of noncompliance with fire safety regulations at Indian Point, the Proposed Director's decision does not propose any financial penalty.

As pointed out above and in the New York State Attorney General's Petition (at 7 - 21), known fire safety violations have existed at Indian Point since 1980. Entergy has been responsible for these violations for over 11 years at *both* Unit 2 and Unit 3. The fact that Entergy projects that it will correct most of the identified violations in less than a year after NRC's toleration ended strongly suggests that the violations could have been corrected over a decade ago. The Attorney General's Office notes that NRC Staff did assess a financial penalty against Entergy when the Indian Point facilities did not deploy public warning systems in a timely manner in accordance with the Energy Policy Act of 2005.

Despite Entergy's foot-dragging on fire safety, the Proposed Director's Decision does not propose any financial penalty. Indeed, the Proposed Director's Decision make no mention of penalties even though the Attorney General's Office raised this issue while addressing NRC in person in May 2011. *See, e.g.*, Transcript, May 9, 2011 meeting in Rockville, Maryland (available at ML111520469) (The Proposed Director's Decision states, at page 4, that the transcript of the May 9, 2011 meeting, included in the meeting summary dated June 8, 2011, is being treated as a supplement to the Petition). Accordingly, the final Director's Decision should impose civil penalties against Entergy for the long-standing violations of the federal fire safety regulations.

Conclusion

The final Director's Decision should be amended and expanded to incorporate the points set out above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Charlie Donaldson", with a long horizontal flourish extending to the right.

Charlie Donaldson
Assistant Attorney General
Environmental Protection Bureau