

**UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD**

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In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC,	DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and	
Entergy Nuclear Operations, Inc.	May 22, 2013
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**STATE OF NEW YORK ANSWER TO  
ENTERGY'S MOTION FOR LEAVE TO SUPPLEMENT ITS MOTION  
FOR DECLARATORY ORDER**

On May 21, 2013, Entergy filed a Motion for Leave to Supplement its Motion for Declaratory Order that it Has Already Obtained the Required New York State Coastal Management Program Consistency Review of Indian Point Unit 2 and 3 for Renewal of the Operating Licenses. Entergy requests leave to supplement its Motion for Declaratory Order with four additional exhibits that it says shed additional light on previous state consistency reviews performed by different agencies in different contexts at Indian Point over the years. Entergy makes its motion pursuant to 10 C.F.R. § 2.323. Entergy Motion at 1.

**ENTERGY'S MOTION IS UNTIMELY**

Pursuant to 10 C.F.R. § 2.323(a) motions are required to be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." Entergy's motion fails to meet this requirement, and indeed Entergy offers no justification at all for its untimeliness.

Entergy submits here four documents in support of its Motion for Declaratory Order, which is already fully briefed: a declaration by a former Department of Public Service employee

testifying to his recollection of events in 2001, and New York Power Authority (NYPA) documents culled from a NYPA Freedom of Information Law (FOIL) response, including an email chain from 1999, testimony from a hearing in 1999, and a letter dated February 2, 2000. Entergy's motion acknowledges that it obtained these documents from NYPA on February 27, 2013 – 83 days before it filed this motion, 40 days before Entergy requested leave to file a reply to the State and Riverkeeper's responses to Entergy's motion (which notably did not make any reference to Entergy having received FOIL responses that it might seek to use in this proceeding), and 67 days before Entergy submitted its reply. Entergy also did not make reference to reviewing these documents while requesting – on more than one occasion – more time to submit its reply. *See* Entergy's Unopposed Motion For Extension of Time to Answer New York's Cross-Motion for Declaratory Order and Motions for Leave to File Limited Replies in Support of Entergy's Motion for Declaratory Order (Apr. 9, 2013); Entergy's Motion For Extension Of Time To File Combined Answer And Replies (Apr. 17, 2013). At no time while requesting the right to submit a reply or at any other time did Entergy represent to the Board or parties that it was parsing through Freedom of Information Law responses, and that it could require additional time to complete briefing on this issue. Indeed, Entergy waited until August 27, 2012 – nearly a month after Entergy submitted its Motion for Declaratory Order to the Board – to even submit a Freedom of Information Law request to NYPA. *See* Letter, Matthew Leland, Counsel for Entergy, to New York Power Authority FOIL Officer (Aug. 27, 2012), attached hereto as Attachment 1. Entergy's statement that "[n]one of the documents Entergy proposes as exhibits were available when Entergy filed its Motion with the Board on July 30, 2012" (Entergy Motion at 2) is inaccurate and disingenuous – the documents were always available pursuant to the Freedom of Information Law, but Entergy did not submit a request for them until after it filed

its motion. That Entergy chose to file an inadequately researched motion in 2012, before even reviewing all available documentation, does not countenance violation of the NRC's motion practice regulations and the expenditure of additional resources by the Board and parties now.

During consultation, Entergy's counsel had no response to the State's concerns about timeliness other than to assert that the 10-day rule somehow did not apply. Surprisingly, Staff counsel also stated it was not aware of a 10-day requirement, inquiring of State counsel whether this requirement was found in a scheduling order, and if so, where it could be found. As the Board is aware, Staff counsel itself opposed a State submission in this proceeding on timeliness grounds only last year. *See* NRC Staff's Answer to "State of New York's and Riverkeeper's Response and Cross-Motion To NRC Staff's Motion for Partial Reconsideration of The Board's March 16, 2012 Order" (Apr. 12, 2012) at 9 ("Pursuant to 10 C.F.R. § 2.323(a) motions are required to be filed 'no later than ten (10) days after the occurrence or circumstance from which the motion arises.'").

Even assuming the Board forgives Entergy's belated decision to ascertain the basis for its motion by seeking information from State agencies upon whose actions it relies to absolve it of a legal obligation under federal law, the latest possible "occurrence or circumstance from which the motion arises" would be February 27, 2013, the date on which Entergy took possession of the documents it now seeks to introduce. At no time during the last 83 days did Entergy ask for additional time to consider information from its belated FOIL request to NYPA<sup>1</sup>, even while seeking leave to file, and preparing, its May 6, 2013 reply.

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<sup>1</sup> Entergy and its counsel are very familiar with New York's Freedom of Information Law, Public Officers Law Article 87. Since 2011, on Entergy's behalf, various counsel have submitted at least 9 FOIL requests regarding Indian Point to executive agencies, including the New York Departments of State and Environmental Conservation. *See, e.g. Entergy Nuclear*

## CONCLUSION

For the foregoing reasons, Entergy's Motion for Leave should be denied as untimely. However, should Entergy's motion be granted and its Motion for Declaratory Order modified, the State respectfully requests thirty days to respond to Entergy's supplemental declaration and exhibits.

Respectfully submitted,

s/

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May 22, 2013

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*Indian Point 2, LLC, et al v. New York State Department of State, et al*, 2013 N.Y. Misc.1885, 2013 N.Y. Slip Op. 50701(U).

**Attachment 1**  
**Letter, Matthew Leland, Counsel for Entergy, to New York Power Authority FOIL Officer**  
**(Aug. 27, 2012)**

August 27, 2012

**VIA FEDERAL EXPRESS**

FOIL Officer  
Law Department  
123 Main Street, 15-M  
White Plains, NY 10601

**Re: Request for Information Pursuant to New York State Freedom of Information Law**

Dear Sir or Madam:

Pursuant to New York's Freedom of Information Law ("FOIL"), New York Public Officers Law, Art. 6 §§ 84-90, we request copies of the following records from September 28, 1982 to the present:

1. All records relating to correspondence by or among the Office of the Governor of the State of New York, the New York State Department of State, the New York Department of Environmental Conservation, the New York Power Authority (NYPA), the New York State Public Service Commission, and/or the New York State Energy Research and Development Authority concerning any evaluation, analysis, consideration, review, or determination of whether a proposed action involving Indian Point Nuclear Generating Units 2 and/or 3 is consistent with the enforceable policies of the New York Coastal Management Program, article 42 of the New York Executive Law, and/or 19 NYCRR § 600.5;
2. All records relating to any Negative Declaration pursuant to the State Environmental Quality Review Act ("SEQR") for a proposed action concerning Indian Point Nuclear Generating Units 2 and/or 3;
3. All records relating to any certification that a proposed action concerning Indian Point Nuclear Generating Units 2 and/or 3 would be consistent with the enforceable policies of the New York Coastal Management Program, article 42 of the New York Executive Law, and/or 19 NYCRR § 600.5;
4. All records relating to any Federal Consistency Assessment Form or Coastal Assessment Form prepared in response to or in connection with any application to a federal or state

agency for a permit, license, waiver, certification, or similar type of approval for a proposed activity involving Indian Point Nuclear Generating Units 2 and/or 3;

5. All Environmental Impact Statements pursuant to SEQR, including any appendices or other materials attached thereto, involving Indian Point Nuclear Generating Units 2 and/or 3;
6. All Environmental Assessments pursuant to SEQR involving Indian Point Nuclear Generating Units 2 and/or 3; and
7. Records sufficient to show NYPA's institutional policy with respect to preservation and retention of documents and records.

If you conclude that NYPA does not currently possess any requested record after a diligent search, please so certify. If you determine that any requested record or portion thereof should not be disclosed, please provide access to the non-exempt records and the non-exempt portions of the remaining records. If you propose not to disclose any requested record or portion thereof, please provide an index and a description of each record or portion thereof not disclosed, and a statement describing the basis for the nondisclosure.

My name and address are as follows:

Matthew M. Leland  
McDermott Will & Emery LLP  
600 Thirteenth Street, N.W.  
Washington, D.C. 20005

Please send your response to me at the above address, along with an invoice for any associated photocopying costs, and we will promptly remit payment.

As you know, the Freedom of Information Law requires that an agency respond to a request within five (5) business days of receipt of a request. If you have any questions concerning this request, please do not hesitate to contact me at (202) 756-8077. Thank you for your prompt attention to this matter.

Sincerely,



Matthew M. Leland

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
  
ATOMIC SAFETY AND LICENSING BOARD**

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-----X	

**CERTIFICATE OF SERVICE**

I hereby certify that on May 22, 2013, copies of the State of New York's Answer to Entergy's motion for leave to supplement its motion for declaratory order with attachment were served electronically via the Electronic Information Exchange on the following recipients:

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Richard E. Wardwell, Administrative Judge  
Michael F. Kennedy, Administrative Judge  
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*Signed (electronically) by*

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Dated at New York, New York  
this 22nd day of May 2013