

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

DPR-26, DPR-64

January 8, 2014

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**STATE OF NEW YORK
MOTION FOR LEAVE TO FILE
REPLY ON MOTION TO REOPEN THE RECORD AND FOR
RECONSIDERATION OF CONTENTION NYS-12C**

Office of the Attorney General
for the State of New York
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The State of New York respectfully requests leave from the Atomic Safety and Licensing Board to file a reply, including a responsive expert declaration, to (1) NRC Staff's Response to State of New York Motion to Reopen the Record and for Reconsideration of Contention NYS-12C (ML13357A775 package) and (2) Entergy's Answer Opposing State of New York Motion to Reopen the Record and for Reconsideration of Contention NYS-12C (ML13357A254). Both were filed on December 23, 2013. On December 31, 2013, the Board granted the State an extension of time to file its motion for leave until January 8, 2014.¹

Good cause and compelling circumstances exist for a reply to be filed. First, the opportunity for a reply is necessary to respond to the Affidavit of S. Tina Ghosh, submitted by NRC Staff as part of its responsive papers, which contains new facts and technical information not previously available to the State either during consultation or otherwise. The Ghosh affidavit represents the first time that Staff has attempted to explain why a 365-day TIMDEC was used, and it contains several misleading statements. As such, the State could not have reasonably anticipated the substance of this affidavit, and the State requests an opportunity to address these points with a responsive expert declaration. Additionally, a reply is necessary for the State to respond to Entergy's allegation that the State violated disclosure obligations, including Entergy's assertion that the State could be subject to sanctions; to correct NRC Staff's mischaracterization of the State's August 1, 2013 comment letter (ML13357A781); and to address NRC Staff's arguments regarding the correct standard for relevancy in disclosure obligations.

The State has consulted with counsel for Entergy, NRC Staff, Clearwater, and Riverkeeper regarding this motion for leave. Clearwater and Riverkeeper do not oppose this motion. Entergy and NRC Staff oppose this motion because they believe the State has not met

¹ ASLB Order Granting New York's Motion for an Extension of Time (Dec. 31, 2013) (ML13365A162).

the standard justifying a reply and should have anticipated these points.

STANDARD FOR REPLY

NRC's regulations provide that

The moving party has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer. Permission may be granted only in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.

10 C.F.R § 2.323(c). The Board's July 1, 2010 Scheduling Order states that "[a] motion to file a reply must demonstrate good cause for permitting the reply to be filed and must indicate whether the request is opposed or supported by the other participants in the proceeding and, if opposed, to succinctly describe the grounds stated for such opposition." ASLB Scheduling Order, ¶ G.3. (Jul. 1, 2010) (ML101820387).

GOOD CAUSE AND COMPELLING CIRCUMSTANCES JUSTIFY THE STATE'S REQUEST FOR A REPLY

In its motion to reopen and for reconsideration, the State of New York requests that the Atomic Safety and Licensing Board reopen the hearing record on Contention NYS-12, consider the evidence presented by the State, and reconsider its recent ruling in light of information that NRC Staff used a TIMDEC input value of 365 days in a MACCS2 analysis of a severe accident at a spent fuel pool.

Both NRC Staff's and Entergy's answers to the State of New York's Motion for Reconsideration and to Reopen present new facts, new information, and new arguments which the State "could not reasonably have anticipated" based on its initial filing. As such this motion meets the standards set forth in the regulations and in this Board's Scheduling Order. *See* 10 C.F.R. § 2.323(c); ASLB Scheduling Order, ¶ G.3. (Jul. 1, 2010) (ML101820387).

1. Ghosh Affidavit. During consultation on the State’s motion, NRC Staff stated that its use of a 365-day TIMDEC in the Spent Fuel Pool Consequence Study was not relevant because it came from a different study. Staff provided no further elaboration on its position, nor do any documents available to the State explain why Staff used a 365-day TIMDEC.

The Ghosh affidavit, submitted by NRC Staff with its responsive papers on December 23, 2013, for the first time attempts to set forth an explanation why Staff used a 365-day TIMDEC value, and attempts to distinguish the study of spent fuel pool severe accidents from the Indian Point Severe Accident Mitigation Alternatives (“SAMA”) Analysis. The material in the Ghosh affidavit was not previously available to the State (or the public) and was not discussed during the consultation preceding the State’s motion to reopen and reconsider. Thus, the State could not have reasonably anticipated these new facts and new technical justifications and arguments.

NRC Staff asserted, “As stated in the attached Declaration of Dr. Tina Ghosh, one of the Staff’s testifying experts, the differences between the SAMA analysis performed at Indian Point and the analysis conducted for the SFP Scoping Study are stark.” NRC Staff Resp. at 13. But after working with its experts to review the Ghosh affidavit, the State has discovered that some of the information in the Ghosh affidavit is misleading, and the Indian Point SAMA analysis and the Spent Fuel Pool Consequence Study are more similar than NRC Staff maintains.

For example, Dr. Ghosh claims that “[b]ecause of the *large magnitude of contaminated land areas*, the team chose a TIMDEC of 365 days, which is longer than what has been chosen historically in most reactor accident PRAs.” Ghosh Affidavit ¶ 3 (emphasis added). Dr. Ghosh, however, fails to discuss the population in those contaminated land areas, despite the fact that the economic costs of an accident as modeled by MACCS2 are influenced by population. The State should be afforded an opportunity to demonstrate, in a reply expert declaration, that the

contaminated populations, as opposed to land areas, in the Indian Point SAMA analysis are similar or greater than those in the Spent Fuel Pool Consequence Study.

As another example, Dr. Ghosh claims “[t]he Spent Fuel Pool Study focused on a single challenging accident scenario: a severe accident from an example spent-fuel pool initiated by an extreme seismic event, *with an estimated frequency of occurrence of 10^{-7} per reactor year.*”

Ghosh Affidavit ¶ 3 (emphasis added). This frequency, however, is on par with the frequencies of accident scenarios, *i.e.* releases, examined by Entergy in its Indian Point SAMA analysis:

Table 5 IP2 Mean PDR and OECR Using Year 2000 Meteorological Data

Release Mode	Frequency (/yr)	Population Dose (person-sv)*	Offsite Economic Cost (\$)	Population Dose Risk (PDR) (person-rem/yr)	Offsite Economic Cost Risk (OECR) (\$/yr)
NCF	1.19E-05	4.75E+01	9.98E+04	5.64E-02**	1.18E+00
EARLY HIGH	6.50E-07	6.51E+05	2.05E+11	4.23E+01	1.33E+05
EARLY MEDIUM	4.23E-07	1.94E+05	5.87E+10	8.21E+00	2.48E+04
EARLY LOW	1.11E-07	7.93E+04	6.39E+09	8.81E-01	7.10E+02
LATE HIGH	6.88E-07	1.63E+05	4.64E+10	1.12E+01	3.19E+04
LATE MEDIUM	3.43E-06	6.87E+04	6.06E+09	2.36E+01	2.08E+04
LATE LOW	6.43E-07	1.61E+04	6.59E+08	1.04E+00	4.24E+02
LATE LOWLOW	5.82E-08	1.38E+04	5.62E+08	8.04E-02	3.27E+01
Totals				8.74E+01	2.12E+05

Table 6 IP3 Mean PDR and OECR Using Year 2000 Meteorological Data

Release Mode	Frequency (/yr)	Population Dose (person-sv)*	Offsite Economic Cost (\$)	Population Dose Risk (PDR) (person-rem/yr)	Offsite Economic Cost Risk (OECR) (\$/yr)
NCF	6.30E-06	8.04E+01	2.95E+05	5.06E-02**	1.86E+00
EARLY HIGH	9.43E-07	5.08E+05	1.70E+11	4.79E+01	1.60E+05
EARLY MEDIUM	1.24E-06	2.00E+05	5.55E+10	2.47E+01	6.87E+04
EARLY LOW	1.46E-07	5.21E+04	3.58E+09	7.59E-01	5.21E+02
LATE HIGH	4.23E-07	1.63E+05	4.61E+10	6.89E+00	1.95E+04
LATE MEDIUM	2.01E-06	6.85E+04	6.06E+09	1.37E+01	1.22E+04
LATE LOW	3.75E-07	1.61E+04	6.58E+08	6.03E-01	2.47E+02
LATE LOWLOW	5.66E-08	1.38E+04	5.62E+08	7.81E-02	3.18E+01
Totals				9.48E+01	2.61E+05

ENT000464 (ML12339A570) at Tables 5 and 6. The State requests the opportunity to discuss this, and other technical critiques of the Ghosh affidavit, in a reply filing.

Furthermore, the State notes that the Ghosh affidavit is less absolute in describing Staff’s TIMDEC practices than Staff’s previous testimony on the subject. In discussing the MACCS2

analysis for the Spent Fuel Pool Consequence Study, the Ghosh affidavit stated: “the calculated source terms and contaminated land areas were significantly larger than those calculated in *typical* reactor accident probabilistic risk assessments (PRAs).” Ghosh Affidavit

¶ 3 (emphasis added). The implication of Dr. Ghosh’s sworn statement is that not every probabilistic risk assessment or MACCS2 analysis has used a TIMDEC of 60 and 120 days, which conflicts with testimony Staff provided in the Indian Point relicensing proceeding.

2. Entergy’s Disclosure Arguments. Entergy argues that the information regarding the 365 day TIMDEC was available since mid-2013 and that the State of New York should have previously disclosed the information. Entergy suggests that the State ran afoul of the Commission’s disclosure obligation. Entergy Opp’n at 8, 11. Entergy even goes so far as to state “As such, New York either failed to comply with its disclosure obligations, *subject to the risk of sanctions* under 10 C.F.R. § 2.336(e), or did not consider any of the referenced information relevant to Contention NYS-12C.” *Id.* at 11 (emphasis added). The disclosure issue vis-à-vis the State was not discussed during consultation on the State’s motion to reopen. Further, Entergy’s argument seeks to conflate the information contained in the MACCS2 input and output files with the Spent Fuel Pool Consequence Study and a single line of text therein. The State is not contending that the entire 369-page draft Spent Fuel Pool Consequence Study is relevant—the fact that NRC Staff used a TIMDEC input of 365 days, after contending that it has always used the Sample Problem A / NUREG-1150 values of 60 and 120 days, is what is relevant. The Spent Fuel Pool Consequence Study does not mention “TIMDEC,” and Entergy admits this (Entergy Opp’n at 8, n. 37). In fact, up until the State received the MACCS2 input/output files, and its experts reviewed them and noticed that a 365-day TIMDEC (expressed as “3.15x10E7”) was used, the State did not believe the Spent Fuel Pool Consequence Study was

relevant to NYS-12C. Also, the State included the MACCS2 input and output files in the attachments to its motion to reopen and in its December 2013 disclosures.

3. NRC Staff's Mischaracterization of the State's August 1, 2013 Comment Letter.

In an attempt to demonstrate that the State should have been able to determine that a 365-day TIMDEC was used in the Consequence Study—despite the fact that the Consequence Study does not mention “TIMDEC” and the fact that Staff did not provide the underlying MACCS2 runs to the State until one year from when they were completed—Staff argues “New York has been actively participating in the SFP Scoping Study; thus, New York [] formulated written comments, *apparently upon consultation with its experts*, and submitted those comments on the draft study.” NRC Resp. at 7 (emphasis added). The State's August 2013 comments, however, are clear: the State requested more time to comment on the draft Spent Fuel Pool Consequence Study because “the 30-day comment period did not afford sufficient time for the State to identify and retain expert consultants to review the highly technical Draft Study.” NYS Comment Letter at 1, Attachment B to NRC Staff's Resp. The State seeks to submit a reply to correct NRC Staff's mischaracterization of the letter, and to reiterate that it was not aware of the 365-day TIMDEC until its experts had a chance to review the MACCS2 input/output files.

4. NRC Staff's Argument Regarding the Proper Relevancy Standard

The NRC Staff Response (at 16-18) misinterprets the State's disclosure argument and contradicts the Commission's 2012 amendments to 2.336(b). In its motion (at 4), the State set out what it believed to be a fundamental and generally accepted point regarding disclosure obligations that holds true regardless of what version of 2.336(b) applies—the NRC's own regulation essentially obligated Staff to disclose information within its possession that supported the Staff's position as well as information that contradicted or opposed Staff's position. New

York believed that the NRC's own regulations and basic fairness did not permit Staff to make factual representations to the Atomic Safety and Licensing Board while at the same time exempting Staff from disclosing information within Staff's possession that contradicted such representations by Staff.

In its response, not only did Staff misconstrue New York's concise summary of Staff's § 2.336(b) obligations, but Staff then went on to contradict the Commissioners' statement of the relative scope of the 2004 and 2012 versions of § 2.336(b). The Commission's Statement of Considerations in the August 2012 Federal Register confirm that the Commissioners understood that the Staff's disclosure obligations under the 2004 regulation were substantially broader and more burdensome than were Staff's obligations under the revised 2012 obligations. 77 Fed. Reg. 46562, 46563, *Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements* (Aug. 3, 2012).² "After reviewing the public comments and considering the proposal to make changes to the scope of the staff's disclosure obligations, the *NRC has decided to adopt a revised § 2.336 that will limit the scope of the staff's mandatory disclosures to documents relevant to the admitted contentions.*" *Id.* (emphasis added).

The NRC believes that limiting the staff's mandatory disclosures to only documents relevant to the admitted contentions will reduce the burden on both the NRC staff and the other parties to the proceeding. The NRC staff will have to produce fewer documents and the other parties will have to review fewer documents. Further, the documents provided to the parties by the NRC staff will be relevant to the admitted contentions, which will allow parties to focus on the disputed issues in the proceeding without having to review documents with no relevance to the admitted contentions.

Id. If, in August 2012, the NRC Commissioners revised the 2004 disclosure obligations to "limit" the Staff's disclosure obligations to documents that were relevant to admitted

² Staff's response (at 16, n.59) referred to this Federal Register notice and related rulemaking.

contentions, logic holds that earlier 2004 regulations must have at least as broad and also included an obligation on NRC Staff to disclose documents that were relevant to admitted contentions.

The State could not have anticipated that Staff would mischaracterize the 2012 statement of consideration and regulatory amendments and, hence, the Staff's disclosure obligations under the 2004 and 2012 versions of § 2.336(b). Therefore, the Board should permit the State the opportunity to file a reply to address and refute the Staff's position.

CONCLUSION

In light of the above, the State of New York respectfully submits that good cause exists for the Board to permit the State to file a Reply to NRC Staff's Response and Entergy's Answer to the State's Motion for Reconsideration and to Reopen the Record on NYS-12C. If this motion is granted, the State requests that it have until January 16, 2014 to file its reply with the Board (or 7 days following an order by the Board permitting such a filing).

Respectfully submitted,

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Dated: January 8, 2014

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for the parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that Clearwater and Riverkeeper do not oppose the State's motion for leave, but NRC Staff and Entergy do oppose.

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January 8, 2014

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

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In re:	Docket Nos. 50-247-LR and 50-286-LR
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Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 January 8, 2014
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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2014, copies of the State of New York Motion for Leave to File Reply on Motion to Reopen the Record and for Reconsideration of Contention NYS-12C were served electronically via the Electronic Information Exchange on the following recipients:

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this 8th day of January 2014