UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and
	)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	January 9, 2014

ENTERGY'S ANSWER OPPOSING MOTION FOR LEAVE TO FILE REPLY

In accordance with the Atomic Safety and Licensing Board's ("Board") Scheduling Order,[1] Entergy Nuclear Operations, Inc. ("Entergy") files this Answer opposing the State of New York's ("New York") Motion For Leave To File Reply On Motion To Reopen The Record And For Reconsideration Of Contention NYS-12C ("Motion"), dated January 8, 2014. As described below, New York fails to make the requisite showing of compelling circumstances to overcome the Nuclear Regulatory Commission's ("NRC" or "Commission") general prohibition against replies to motions. Accordingly, the Board should deny the Motion.

Procedural Background

On December 7, 2013, New York filed a motion ("Motion to Reopen") requesting that the Board take the extraordinary action to reopen the record and reconsider that portion of its partial initial decision on Track 1 contentions, which resolved New York's challenge to the accuracy of certain elements of the severe accident mitigation alternatives ("SAMA") analysis for Indian Point Energy Center in favor of the NRC Staff.[2] New York's Motion to Reopen is based on purported new evidence; namely, the NRC Staff's use of a 365-day value for the decontamination time

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1 Licensing Board Scheduling Order at 8 (July 1, 2010) (unpublished) ("Scheduling Order"). This Answer is timely under Section G.5 of the Scheduling Order, having been filed within one business day of the Motion.

2 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-13-13, 77 NRC ___, slip op. at 260-293 (Nov. 27, 2013) ("LBP-13-13").

("TIMDEC") input to the MELCOR Accident Consequence Code System Version 2 ("MACCS2") analysis conducted as part of a post-Fukushima action item (the "Spent Fuel Consequence Study").[3]

On December 23, 2013, Entergy and the NRC Staff submitted answers opposing the Motion to Reopen.[4] Both the NRC Staff and Entergy argued that New York has failed to satisfy the very high standards for either reopening the record or reconsideration because the Motion to Reopen is untimely and the cited information in the Spent Fuel Consequence Study is both irrelevant and immaterial to the Board's merits ruling on Contention NYS-12C.[5] Specifically, Entergy noted, among other things, that it is too late for New York to now seek to reopen the record because information regarding the time to achieve two levels of decontamination used in the Spent Fuel Consequence Study was available in June 2013.[6]

On January 8, 2014, New York submitted the instant Motion seeking leave to reply to those Answers. In its view, New York believes the NRC Staff and Entergy Answers present arguments that it could not have anticipated.[7] Specifically, New York also argues that good cause and compelling circumstances exist for a reply to two of Entergy's arguments. First, New York contends that it could not have reasonably anticipated that Entergy's Answer would cite to New York's failure to identify any documents related to the Spent Fuel Consequence Study in its

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3 *See* Draft Report, Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor (June 2013) ("June 2013 Draft Report"), *available at* ADAMS Accession No. ML13133A132; NRC Staff SECY-13-0112, Enclosure 1, Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor at 160 (Oct. 9, 2013), *available at* ADAMS Accession No. ML13256A339.

4 NRC Staff's Response to State of New York Motion to Reopen the Record and For Reconsideration on Contention NYS-12C (Dec. 23, 2013) ("NRC Staff's Answer"); Entergy's Answer Opposing State of New York Motion to Reopen the Record and For Reconsideration of Contention NYS-12C (Dec. 23, 2013) ("Entergy's Answer").

5 *See generally* NRC Staff's Answer; Entergy's Answer.

6 *See* Entergy's Answer at 7-9.

7 Motion at 2.

mandatory disclosures.[8] Second, New York asserts that it could not have foreseen that Entergy would argue in its Answer that the information supporting the Motion to Reopen has been available since mid-2013 because the Spent Fuel Consequence Study does not mention the term "TIMDEC."[9] With respect to NRC Staff, New York claims that a reply is necessary to: (1) respond to the affidavit accompanying NRC Staff's Answer that purportedly contains new, previously unavailable facts and technical information regarding its rationale for using a one-year TIMDEC value in the Spent Fuel Consequence Study; (2) correct the NRC Staff's alleged mischaracterization of New York's comments on the June 2013 Draft Report; and (3) address NRC Staff's arguments regarding the proper standard for relevancy in disclosure obligations.[10]

Legal Standards

As the Commission has observed, "when reply briefs are permitted, our rules provide explicitly for their filing" or "set strict conditions on their filing."[11] New York's Motion to Reopen, however, was filed pursuant to 10 C.F.R. § 2.323, and that regulation specifies that a movant "has no right to reply, except as permitted by the Secretary, the Assistant Secretary, or the presiding officer."[12] The Commission has made clear that "extra filings," as is the case here, will be permitted "only where necessity or fairness dictates."[13] Leave to reply to an answer opposing a motion "may be granted only in compelling circumstances, such as where the moving party

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8 *Id.* at 1, 5.

9 *Id.* at 5-6. As Entergy noted, the lack of reference to the term "TIMDEC" in the Draft Report is irrelevant because it is clear from the context of the report that the one-year value assumed to achieve decontamination factors of 3 and 15 refers to time to decontaminate or TIMDEC. *See* Entergy's Answer at 8 n. 37 (quoting June 2013 Draft Report at 160).

10 Motion at 1, 3-4, 6-8. Herein, Entergy focuses on the portions of the Motion, which are directed to Entergy's Answer rather than the discussion of areas of disagreement between New York and the NRC Staff.

11 *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008).

12 *See also* Scheduling Order at 6 ("Except for a motion to file a new or amended contention as set forth in Section F supra or where there are compelling circumstances, the moving party shall have no right to reply to an answer or response opposing the granting of a motion") (emphasis in original). Additionally, the NRC rule providing the standards for motions to reopen, 10 C.F.R. §2.326, does not authorize a reply.

13 *High-Level Waste Repository*, CLI-08-12, 67 NRC at 393.

demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply."[14] A movant is expected "to anticipate potential arguments and lengthy responses and to frame their opening pleadings accordingly."[15]

Argument

As noted above, New York presents two arguments as to why a reply to Entergy's Answer is warranted. As demonstrated below, neither of these arguments satisfies the strict standards for a request to submit a reply set forth in 10 C.F.R. § 2.323(c) and the Scheduling Order.

First, New York claims that it could not have anticipated that Entergy would argue in its Answer that New York "violated disclosure obligations" and "could be subject to sanctions."[16] As an initial matter, New York misunderstands Entergy's position. Contrary to New York's assertions, Entergy did not argue that New York has violated its disclosure obligations and should be sanctioned. Rather, as explained in Entergy's Answer, New York's failure to disclose the Spent Fuel Consequence Study and related documents underscores the lack of relevance of the information to Contention NYS-12C.[17]

Given New York's claim that the NRC Staff failed to disclose information related to the TIMDEC value used in the Spent Fuel Consequence Study contrary to its obligations pursuant to

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[14] 10 C.F.R. § 2.323(c); *see also*, *e.g.*, *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008) (finding no "compelling circumstances" justifying a reply where petitioner could have reasonably anticipated the NRC Staff's argument opposing its proposed contention).

[15] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991); *see also U.S. Dept. of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), Memorandum and Order (Denying Petition to Certify Issue to the Commission and Motion for Leave to File Replies) at 4-5 (Dec. 22, 2008) (unpublished) ("Surely NEI could reasonably have anticipated the need to demonstrate compliance with applicable regulatory requirements when it filed its original petition. It is too late to attempt to do so for the first time in a proposed reply."), *available at* ADAMS Accession No. ML083570498.

[16] Motion at 1; *see also id.* at 5 ("Entergy suggests that [New York] ran afoul of the Commission's disclosure obligation.").

[17] *See* Entergy's Answer at 11.

10 C.F.R. § 2.336,[18] New York should have reasonably anticipated that Entergy would point out that New York itself failed to disclose the same or related information it obtained or reviewed over the past six months. Indeed, the Motion to Reopen and supporting counsel affidavit expressly stated that the NRC Staff was required to disclose documents that are relevant to an admitted contention.[19] Entergy agrees, but that is a two-way street. As such, New York should have foreseen that Entergy would address this issue in its Answer, and as such it does not constitute a compelling circumstance.

Nor does New York's complaint that the "disclosure issue vis-à-vis the State" was not discussed during consultation on the Motion to Reopen present compelling circumstances justifying a reply.[20] The issue of New York's disclosures did not become apparent to Entergy until after the consultation, when New York filed its Motion to Reopen and attached several documents and correspondence related to the Spent Fuel Consequence Study. Those attachments only then indicated to Entergy that New York had been reviewing issues related to the spent fuel consequence study for several months.[21] Entergy then reviewed New York's mandatory disclosures during the same time period and determined that it had not identified any documents related to the Spent Fuel Consequence Study—an important point it then raised in its Answer.

Second, New York asserts that leave to reply is justified because it could not have anticipated Entergy's argument that information regarding the one-year decontamination time used

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[18] *See* Motion to Reopen at 4; Declaration of Assistant Attorney General John Sipos in Support of State of New York's Motion to Reopen the Record and for Reconsideration of Board Ruling LBP-13-13 on Contention NYS-12C at ¶¶ 15, 19-20 (Dec. 7, 2013) ("Sipos Decl."). Notably, New York seeks leave to provide additional comments in reply on this very argument. *See* Motion at 6-8.

[19] Motion to Reopen at 4; Sipos Decl. at ¶¶ 15, 19-20.

[20] *See* Motion at 5.

[21] The Motion to Reopen's attachments include the June 2013 Draft Report, a September 18, 2013 transcript of a public meeting on the draft report where New York queried the NRC Staff on elements of the MACCS2 analysis used in the study, and various correspondence dating back to August 2013 demonstrating New York's active participation in the review of the Spent Fuel Consequence Study.

in the Spent Fuel Consequence Study was publicly available several months ago.[22] Again, New York has not demonstrated that it could not have reasonably anticipated this argument. In the Motion to Reopen, New York claimed that it was not aware of such information until very recently, after it received and reviewed the native MACCS2 computer files used in the Spent Fuel Consequence Study. As noted in Entergy's Answer, however, New York notified the parties during consultations that it became aware of the June 2013 Draft Report cited in the Motion to Reopen in early July 2013, and that Report clearly references a one-year decontamination time.[23] Therefore, it is not at all surprising that Entergy's Answer would argue that the availability of such information more than five months ago renders the Motion to Reopen untimely under 10 C.F.R. § 2.326(a). Moreover, New York should have anticipated that Entergy would discuss longstanding Commission case law holding that a motion to reopen cannot rely on new information as the trigger for timeliness if pre-existing information on the same issue is publicly available.[24]

For these reasons alone, the Motion fails to demonstrate compelling circumstances that warrant the need for a reply to Entergy's Answer. New York should have raised all relevant arguments supporting its extraordinary request to reopen the record and reconsider the Board's merits decision on Contention NYS-12C in the first instance. Moreover, the Board's acceptance of the timeliness and relevance arguments raised by Entergy in its Answer would result in denial of the Motion to Reopen and obviate New York's request for a reply to either of the Answers. Accordingly, the Motion should be denied.

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22 Motion at 5

23 Entergy's Answer at 8 n.40.

24 *See* Entergy's Answer at 9 (citing *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 344 (2011)).

Respectfully submitted,

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

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Dated in Washington, D.C.,
this 9th day of January 2014

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CERTIFICATION OF COUNSEL

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

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

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, a copy of "Entergy's Answer Opposing Motion for Leave to File Reply," was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Lance A. Escher

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