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)	)	November 16, 2016

ENTERGY NUCLEAR OPERATIONS, INC.'S RESPONSE TO THE LICENSING BOARD'S NOVEMBER 2, 2016 DIRECTIVE REGARDING THE TIMING OF CERTAIN MANDATORY DISCLOSURES

I. INTRODUCTION

On November 2, 2016, the Atomic Safety and Licensing Board ("Board") issued an Order granting Riverkeeper, Inc.'s ("Riverkeeper") and New York State's ("New York") October 26, 2016 unopposed Motion to extend the Track 2 hearing schedule filing deadlines by 60 days.[1] The Board found good cause for the requested extension given the need for additional time for Riverkeeper's and New York's experts to prepare their supplemental testimony based on the forthcoming final results of hot cell examinations of certain baffle-former bolts removed from Indian Point Unit 2 ("IP2") during the Spring 2016 refueling outage.[2]

In its Order, the Board also cited a letter filed by New York on October 21, 2016, in which New York sought to "inform the Board about recent developments concerning certain documents" and their potential to affect New York's ability to meet its filing deadlines.[3] New York cited alleged delays in Entergy's disclosure of four documents, with particular focus on what it

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1 *See* Board Order (Granting Unopposed Motion for Extension of Time) (Nov. 2, 2016) (unpublished) ("Nov. 2, 2016 Board Order") (ADAMS Accession No. ML16307A354); Unopposed Joint Motion to Extend Track 2 Hearing Schedule Deadlines (Oct. 26, 2016) (ML16300A388).

2 Nov. 2, 2016 Board Order at 3.

3 Letter from John Sipos, Counsel for New York State, to Atomic Safety and Licensing Board, Re: Indian Point Nuclear Generating Station, Unit 2 and Unit 3 Docket Nos. 50-247-LR/50-286-LR; ASLBP No. 07-858-03-LR-BD01, at 1 (Oct. 21, 2016) ("Oct. 21, 2016 New York Letter") (ML16295A189); Nov. 2, 2016 Board Order at 2.

characterized as a "summary report" of the results for the first three baffle-former bolts sent by Entergy to a Westinghouse hot cell facility for detailed fracture surface examination.[4] Citing the July 2016 date for that document listed on Entergy's disclosure log, New York stated that Entergy delayed disclosure of the purported summary report to the other parties for three months.[5] New York also cited the "delayed disclosure" of three other documents, one of which also relates to still-ongoing industry baffle-former bolt testing.[6]

In light of New York's representations, the Board noted that "[f]ailure to disclose the summary report on hot cell testing until 3 months after it had been prepared does not appear to be a 'practicable' delay, nor does it appear to demonstrate an effort to avoid needless deferment."[7] The Board directed Entergy to inform it and the other parties in writing, by November 16, 2016, whether Entergy agrees with the accuracy of New York's representations regarding the four documents in question, and to explain the reasons for any delays in the disclosure of those documents.[8] Entergy responds herein to the Board's directive and, as noted below, disagrees with New York's characterization of the documents in question as well as New York's characterization of the parties' mandatory disclosure obligations in this proceeding.

II. THE PARTIES' MANDATORY DISCLOSURE OBLIGATIONS

In Subpart L proceedings such as this one, "[t]he discovery required by § 2.336 constitutes the totality of the discovery that may be obtained."[9] On December 18, 2008, the Board directed the parties to "provide the mandatory disclosures required under 10 C.F.R. § 2.336 as soon as

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4 Oct. 21, 2016 New York Letter at 1-2.

5 *Id.*

6 *Id.* at 2.

7 Nov. 2, 2016 Board Order at 3 (quoting Board Order (Granting Joint Motion for Reconsideration), at 3 (Aug. 3, 2016) (unpublished) ("Aug. 3, 2016 Board Order") (ML16216A251) (stating that the Parties "have agreed to make available to each other certain key technical documents as soon as practicable")).

8 *Id.*

9 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2225 (Jan. 14, 2004).

possible."[10]

In a January 13, 2009 agreement filed with the Board, the Parties memorialized a mutually agreed-upon mandatory disclosure protocol addressing both the scope and timing of disclosures in this proceeding.[11] As most relevant here, regarding the scope of disclosures, paragraph 1 of that protocol states that "[t]he parties may limit the mandatory discovery disclosures to final documents that they develop, and *need not include drafts* (including comments on drafts, transmittals of drafts, resolution of comments on drafts, and similar documents)."[12] Paragraph 8 of the protocol further states that the parties' continuing obligation under 10 C.F.R. § 2.336(d) is modified so that information or documents subsequently developed or obtained must be disclosed within 30 days.[13]

In a Memorandum and Order issued on February 4, 2009, the Board stated that it "had no objections to the provisions of the Letter Agreement filed by the parties memorializing mandatory disclosure protocols agreed to by all parties."[14] In its initial July 1, 2010 Scheduling Order, the Board noted that the parties' obligation to update disclosures with newly-acquired or developed information that is material to the issues presented in this proceeding continues until the Board has issued its initial decision on the pertinent issues.[15] It further held that "once the hearing has commenced, updates are not to be made in monthly reports but must be made immediately upon the

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[10] Board Memorandum and Order (Scheduling Prehearing Conference and Ruling on New York State's Motion Requesting Consideration of Additional Matters), at 1 (Dec. 18, 2008) (unpublished) (ML083530659).

[11] Letter from Kathryn Sutton and Paul Bessette, Counsel for Entergy, to Atomic Safety and Licensing Board, "RE: Agreement of the Parties Regarding Mandatory Discovery Disclosures" (Jan. 13, 2009) ("Jan. 13, 2009 Mandatory Disclosure Protocol Agreement") (ML090270876).

[12] *Id.* at 1 (emphasis added). Agreements by parties not to disclose draft information are common and have been accepted by the Commission and Licensing Boards. Notably, in its recent Final Procedures for Conducting Hearings on Conformance With the Acceptance Criteria in Combined Licenses, 81 Fed. Reg. 43,266, 43,274 (July 1, 2016), the Commission stated that "[p]arties may agree to exclude certain classes of documents (such as drafts) from the mandatory disclosures," and that "[t]he NRC has no objection to such exclusions if agreed to by the parties, and such exclusions should be discussed at the prehearing conference."

[13] Jan. 13, 2009 Mandatory Disclosure Protocol Agreement at 2.

[14] Board Memorandum and Order (Summarizing Pre-Hearing Conference), at 3 & n.5 (Feb. 4, 2009) (unpublished) (ML090350569) (citing Jan. 13, 2009 Mandatory Disclosure Protocol Agreement).

[15] Board Scheduling Order, at 4 (July 1, 2010) (unpublished) (ML101820387).

discovery of any new, relevant information."[16]

The parties have abided by these mandatory disclosure protocols and Board directives for the entirety of this proceeding. Those protocols and directives remain unchanged and in effect today and define the scope of disclosures in this proceeding. The Board, however, on August 3, 2016, provided additional guidance regarding the timing of disclosures in the Track 2 phase of this proceeding insofar as it stated that the parties "have agreed to make available to each other certain key technical documents as soon as practicable."[17]

III. RESPONSE TO THE BOARD'S DIRECTIVE

A. General Comments Regarding Entergy's Compliance with Its Procedural Obligations

Entergy appreciates the Board's willingness to work with the Parties to make necessary schedule modifications, especially in light of what the Board aptly described in its Order as "an already substantially delayed schedule."[18] That said, throughout this proceeding, Entergy has rigorously met its disclosure obligations and adhered to the procedural deadlines imposed by NRC regulations and the Board's Scheduling Orders. With regard to the latter, Entergy frequently has opposed extensions sought by the other parties in the interest of a more expeditious proceeding.[19] The post-hearing deferral and extension of the Track 2 schedule—including the most recent 60-day extension—were prompted by unanticipated circumstances.

Entergy's established commitment to its mandatory disclosure obligations—which have been substantial given the sheer number of issues admitted for litigation and the duration of this proceeding—has been no different. Entergy has endeavored to make timely and full disclosures of

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16 *Id.*

17 Aug. 3, 2016 Board Order at 3. Importantly, this Order did not alter the substance of the Parties' disclosure obligations, including the agreement not to disclose draft information.

18 *Id.*

19 *See*, *e.g.*, Answer of Entergy Nuclear Operations, Inc. to New York State's Motion for Extension of Time (Feb. 23, 2010) (ML100630441); Applicant's Opposition to the State of New York's Motion for an Extension of Time (Sept. 28, 2011) (ML11271A203); Entergy's Opposition to New York State Motion for Extension of Time (Aug. 7, 2012) (ML12220A612).

potentially relevant documents to the other parties throughout the proceeding.[20] Indeed, of all the parties, only Entergy has made a consistent effort to comply with the Board's directive, in its July 1, 2010 Scheduling Order, that "once the hearing has commenced, updates … must be made immediately upon the discovery of any new, relevant information."[21] In short, the volume of Entergy's disclosures, the relative paucity of discovery disputes, and the parties' demonstrated ability to submit thorough, well-crafted testimony on all contested issues are testament to, among other things, the efficacy and integrity of the disclosure process in this proceeding.

Unfortunately, New York did not attempt to seek from Entergy any explanation or clarification regarding the timing of the disclosure of the four documents at issue before filing its October 21, 2016 letter with the Board. If it had done so, then counsel for Entergy would have explained any perceived gap between each document's date of origin and its date of disclosure to the other parties, thereby avoiding any misconceptions and possibly the need for the Board's recent directive. To be clear, Entergy did not seek to cause undue delay in the proceeding or prejudice to the other parties, as New York's letter suggests.

B. Specific Comments Concerning the Four Documents Cited in New York's Letter

1. Documents Related to Entergy and Industry-Funded Hot Cell Testing of Baffle-Former Bolts (Entergy Proprietary Log Numbers 918 and 919)

Two of the four documents in question pertain to still-ongoing Entergy and industry-funded hot cell examinations, testing, and/or analyses of baffle-former bolt specimens from IP2 and other similarly-designed PWR plants. The first document (Proprietary Log No. 918) is a July 25, 2016

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[20] Entergy made its initial mandatory disclosures on January 30, 2009. *See* Letter from Kathryn Sutton and Paul Bessette, Counsel for Entergy, to Counsel for New York State, Riverkeeper, Hudson River Sloop Clearwater, and NRC Staff, Re: Disclosures Pursuant to 10 C.F.R. § 2.336 (Jan. 30, 2016). Entergy has issued 110 updates or supplements to its mandatory disclosures, which now include nearly 13,000 documents. Seventeen of those supplements have been issued since March 29, 2016 (approximately seven months ago), when Entergy first notified the Board and parties of the IP2 baffle-former inspection results. Since March 29, 2016, New York and the NRC Staff each has made eight supplemental disclosures, and Riverkeeper has made six supplemental disclosures.

[21] July 1, 2010 Scheduling Order at 4.

Westinghouse Proprietary slide package entitled "Summary of Indian Point Unit 2 Baffle Former Bolt Hot Cell Examination." Although titled as a "summary report," that term is a misnomer.[22] The document is actually a PowerPoint presentation containing photographs and fractographic images of IP2 baffle-former bolts with a few *preliminary* observations on the last slide in the package. In fact, with the exception of three of the 68 slides (*i.e.*, the cover slide, a slide titled "Scope" and a final slide titled "Summary of Observations"), the document consists entirely of macrophotographs, Light Optical Microscopy images, and Scanning Electronic Microscopy ("SEM") images of IP2 bolts. More importantly, *every* slide in the package is prominently labeled "**DRAFT DATA ONLY**".

The second document (Proprietary Log No. 919) is a September 12, 2016 Electric Power Research Institute ("EPRI") Proprietary slide package titled "Industry Baffle-Former Bolt Focus Group – Focus Area 5: Irradiated Testing Support." Broadly speaking, that document contains general information regarding the Focus Group team members, technical issues to be addressed by the Focus Group, proposed analytical/testing methods, the availability of bolts for testing, IP2 "preliminary" test results, industry testing plans, and some preliminary summary observations. Notably, the portion of the slide package titled "Fracture Surface Examinations of Indian Point-2 Bolts" contains the label "**Work in Progress – Preliminary Results.**"

Entergy did not initially include these two documents in its supplemental disclosures for two reasons. First, both documents are draft documents intended to convey *preliminary* (*i.e.*, not fully analyzed) fractography data to a discrete group of individuals, namely IPEC personnel directly involved in commissioning the Westinghouse fracture surface examinations of selected IP2 bolts and members of the EPRI Focus Group. Therefore, both documents are not subject to disclosure under the express terms of the Parties' January 13, 2009 Mandatory Disclosure Protocol Agreement.

[22] Oct. 21, 2016 New York Letter at 1.

Second, until very recently, counsel expected that Entergy would receive, no later than October 2016, a final report documenting the results of the fracture surface examinations of the first three IP2 bolts sent by Entergy to Westinghouse's hot cell facility. In fact, counsel conveyed this expectation to the Board in the Parties' Third Joint Status Report filed on June 28, 2016.[23] Accordingly, Entergy fully expected to disclose to the parties *final* bolt test results about a month before their supplemental testimony filing date.

Counsel learned of Entergy's decision to authorize fracture surface examination of five additional IP2 bolts and the corresponding delay of the final test results in early-October. Entergy promptly notified the other parties and the Board of this development (including Entergy's anticipated receipt of a consolidated final report documenting the hot cell fracture surface examination results for all eight bolts in late-November 2016) on October 14, 2016.[24] Given its previous representations and the then-impending filing deadline for New York's and Riverkeeper's supplemental testimony, counsel then made a focused effort to obtain from Entergy and Westinghouse any preliminary results for the first three bolts tested, as well as other documents related to the expanded hot cell testing plan, and voluntarily disclosed those documents to the other parties as soon as practicable, despite their draft/preliminary status.[25]

For the foregoing reasons, Entergy by no means sought to eschew its disclosure obligations or delay the proceeding. On the contrary, Entergy believed (and still believes) that it acted consistent with the Parties' long-standing, Board-approved mandatory disclosure protocol and its

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[23] Third Joint Status Report Regarding Proposed Track 2 Schedule, at 3 (June 28, 2016) (ML16180A548).

[24] Letter from Kathryn Sutton and Paul Bessette, Counsel for Entergy, to the Atomic Safety and Licensing Board, Re: Licensing Board Notification Regarding Status of Hot Cell Testing of Indian Point Unit 2 Baffle-Former Bolts, at 1 (Oct. 14, 2016) (ML16288A753).

[25] *See id.* at 2. Entergy informed the other parties that, in doing so, it did not waive any portion of the Parties' January 13, 2009 Mandatory Disclosure Protocol Agreement, including the provision stating that the Parties need not include draft or preliminary documents in their mandatory disclosures. *See id.* New York and Riverkeeper, therefore, were fully aware at the time that Entergy was voluntarily disclosing draft data, although New York did not mention this in its October 21 letter to the Board.

prior statements to the Board and parties regarding the expected availability of final test results. As soon as Entergy learned of the changed circumstances, it promptly notified the Board and other parties and voluntarily made available the documents in question (in addition to certain other draft documents).

2. The Other Two Documents Cited by New York in its October 21, 2016 Letter (Entergy Proprietary Log Numbers 910 and 903)

The other two documents cited by New York in its October 21, 2016 letter to the Board include two additional slide packages, neither of which is related to Entergy or industry-funded baffle-former bolt testing. One document (Proprietary Log No. 910) is an 11-page internal IPEC slide package titled "IP2 Baffle Bolt Cracking." Although the document has no date on its face, counsel determined the document's origin date to be on or about May 10, 2016. The document provides a high-level snapshot of the Spring 2016 IP2 baffle-former bolt inspection results, the applicable inspection acceptance criteria, and Entergy's preliminary plans for corrective actions. As such, it contains only information that was previously provided to the other parties in other documents disclosed both before and after May 10, 2016.

The second document (Proprietary Log. No. 903) is an 8-page PSEG Nuclear Proprietary slide package titled "Salem 1 Baffle to Former Bolt Status, May 10, 2016" and prepared by PSEG Nuclear.[26] In brief, that document provides an overview of the Spring 2016 outage visual and UT baffle-former bolt inspection results at Salem Unit 1, PSEG Nuclear's planned repair schedule, and then-ongoing activities and issues (*e.g.,* PSEG Nuclear's conduct of root cause and extent of condition analyses, the availability of bolt extraction and replacement tooling).

Importantly, the disclosure of the two May 2016 slide packages in early October was the result of augmented efforts by Entergy counsel to identify potentially relevant documents in light

[26] The cover slide states: "The information provided herein is for MRP and MSC members only and is not for public dissemination. Any questions or discussions on this topic should be addressed to the plant owner/licensee (PSEG Nuclear) as applicable."

of: (1) early-September 2016 inquiries from Riverkeeper counsel (Ms. McCave) about Entergy's possible possession of the Salem Unit 1 root cause analysis "and all other reports/analyses/ documents . . . regarding the recent baffle bolt failures at Salem Unit 1";[27] and (2) the then-approaching filing deadline for the Intervenors' initial supplemental testimony. Counsel for Entergy disclosed both documents within one to two weeks of receiving them, after reviewing them for potential relevance, and processing them for disclosure and production.[28] Again, any perceived "delay" in the disclosure of two documents among the many thousands disclosed by Entergy to date reflects no attempt by Entergy to evade its disclosure obligations or delay the proceeding. Counsel for Entergy continues to diligently pursue collection, review, and disclosure of potentially relevant documents and fully intends to continue these actions for the duration of the proceeding.

IV. CONCLUSION

Entergy respectfully submits that there were legitimate, good-faith reasons for the perceived delayed disclosure of the documents, including the fact that two of the documents clearly contained draft results and are not subject to disclosure under the Parties' long-standing mandatory disclosure protocol. In fact, by obtaining and voluntarily disclosing to the other parties preliminary or draft bolt testing results and plans, Entergy has exceeded its disclosure obligations. Finally, Entergy does not believe that the other parties have been prejudiced by the timing of the specific disclosures at issue, particularly in view of their content and the Board's decision to grant Riverkeeper's and New

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[27] E-mail from Jennifer McCave, Counsel for Riverkeeper, to Paul Bessette, Counsel for Entergy and Sherwin Turk, Counsel for NRC Staff, Re: Request for documents – NRC Proceeding "Indian Point 50-247-LR and 50-286-LR" (Aug. 23, 2016, 4:20 PM).

[28] With respect to the "Salem 1 Baffle to Former Bolt Status, May 10, 2016" slide package, Entergy does not view all Salem Unit 1-related documents, as a categorical matter, as being necessarily relevant to the contested issues is this proceeding. NRC Staff counsel, in an August 26, 2016 e-mail to Riverkeeper counsel responding to a request for documents relating to the Salem Unit 1 baffle-former bolt inspection results, stated: "In general, documents that pertain only to Salem and were not considered in the Staff's review of the Indian Point application are not subject to disclosure in this proceeding. Documents that discuss baffle-former bolt issues at Indian Point, or at both Indian Point and Salem, have been identified by the Staff in its monthly disclosures." E-mail from Sherwin Turk, Counsel for NRC Staff, to Jennifer McCave, Counsel for Riverkeeper, Re: Request for documents – NRC Proceeding "Indian Point 50-247-LR and 50-286-LR" (Aug. 26, 2016, 2:05 PM).

York's unopposed Motion for a 60-day extension of the Track 2 filing schedule.

Respectfully submitted,

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

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Dated at Washington, DC
this 16th day of November 2016

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Entergy Nuclear Operations, Inc.'s Response to the Licensing Board's November 2, 2016 Directive Regarding the Timing of Certain Mandatory Disclosures" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill
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