

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Indian Point Nuclear Generating Units 2&3

Docket Number: 50-247-LR & 50-286-LR

ASLBP Number: 07-858-03-LR-BD01

Location: Teleconference

Date: January 18, 2017

Work Order No.: NRC-2827 Pages 5895-5938

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: :
ENTERGY NUCLEAR : Docket Nos. 50-247-LR
OPERATIONS, INC. : 50-286-LR
(Indian Point Nuclear : ASLBP No. 07-858-03-LR-BD01
Generating Units 2 :
and 3) :

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Wednesday,
January 18, 2017

Teleconference

BEFORE:

LAWRENCE G. McDADE, Chair
DR. MICHAEL F. KENNEDY, Administrative
Judge
DR. RICHARD E. WARDWELL, Administrative
Judge

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P-R-O-C-E-E-D-I-N-G-S

1:32 p.m.

ADMIN. JUDGE McDADDE: My name Lawrence McDade, administrative judge, chairman of this Board. We're here in the matter of Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Units 2 and 3. The docket number: 50-247-LR and 50-286-LR.

What brings us here today is we have been informed that the parties have worked together on a settlement agreement and we are trying to determine the status of the settlement agreement and the impact that that will have on the current proceeding.

At this point before we go further let me turn to Entergy and have one of those representatives from Entergy give us an overview and explanation of the settlement agreement, and again just sort of an overview. I'm not looking for you to read the whole settlement agreement at this point, but just give us an overview of what the settlement agreement is, what it encompasses and who the parties are.

MR. BESSETTE: Yes, Your Honor. This is Paul Bessette. I can give a brief overview. Hopefully the Board -- when we notified the Board of our availability, we provided your clerks with a blank

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1 agreement. So that should have been available to the
2 Board, but I'll go through that.

3 The agreement as signed on --

4 ADMIN. JUDGE McDADE: Just as an aside;
5 and I'm sorry for the interruption, but, yes, that
6 agreement is not submitted to the Board at this period
7 of time, so there's nothing in the record of this
8 proceeding with regard to the settlement agreement.
9 I'm assuming that down the road in the not too distant
10 future we will actually have that submitted and it
11 will be part of our record, but at this point if you'd
12 just give us a brief overview. Thank you.

13 MR. BESSETTE: Yes, Your Honor. The
14 agreement was signed on January 9th, 2017. It is a
15 primary agreement that includes the various parties of
16 Entergy, including Indian Point Unit 1, Entergy
17 Nuclear Indian Point 2 LLC, Entergy Nuclear Indian
18 Point 3 LLC and Entergy Nuclear Operations Inc.
19 Together they're referred to as Entergy.

20 And it's -- the main agreement is also
21 signed by various representatives of the State of New
22 York, including Governor Cuomo, the New York State
23 Department of Environmental Conservation, the New York
24 State Department of Health, the New York Department of
25 State, and the Office of the Attorney General of the

1 State of New York. All of those parties have signed
2 and the agreement is final.

3 There is a -- what's called a collateral
4 agreement that includes --

5 ADMIN. JUDGE McDADE: Let me interrupt
6 here just for a second.

7 MR. BESSETTE: Yes.

8 ADMIN. JUDGE McDADE: You mentioned
9 Entergy, you mentioned the State of New York. Is
10 Riverkeeper a party to this agreement?

11 MR. BESSETTE: Yes, Your Honor. I'm about
12 to state that. Appendix 1 is a collateral Indian
13 Point agreement that includes Riverkeeper on that
14 agreement, and it's between Entergy Nuclear Indian
15 Point 2, Entergy Nuclear Indian Point 3 and Entergy
16 Nuclear Operations Inc., along with the New York State
17 Department of Environmental Conservation, State of New
18 York and Riverkeeper. It's a collateral agreement.
19 It was just signed separately, Your Honor. But
20 Riverkeeper agrees to abide by all the terms of the
21 main agreement.

22 ADMIN. JUDGE McDADE: Is the NRC, either
23 the Commission or the staff, a party to the agreement?

24 MR. BESSETTE: No, Your Honor, the NRC
25 staff is not a party to the agreement.

1 ADMIN. JUDGE McDADE: Okay. During the
2 course of the proceeding we have admitted Clear Water
3 as a intervenor, and also had granted interested
4 government entity status to a number, including New
5 York City, Westchester County, the State of
6 Connecticut, Cortlandt. Are any of these a party to
7 the agreement?

8 MR. BESSETTE: No, Your Honor. The
9 parties to the agreement included active participants
10 in the current ASLB proceeding, which includes New
11 York State and Riverkeeper, and it included active
12 parties in the New York State Department of
13 Environmental Conservation water quality proceeding.
14 Neither of those included -- were -- included active
15 participants of those parties you listed.

16 ADMIN. JUDGE McDADE: Okay. There is on
17 the record reference to significant litigation
18 involving the continued operation of Indian Point's 2
19 and 3 in addition to the proceeding currently before
20 this Board and issues that would need to be resolved
21 nevertheless prior to the Commission granting a
22 license renewal in this case.

23 Does this agreement involve only those
24 matters currently before this Board or is the
25 agreement broader in scope to include the remaining --

1 resolution of the remaining litigation with regard to
2 coastal zone management, water permits, etcetera?

3 MR. BESSETTE: Your Honor, it is a broad
4 agreement. It includes the -- as you noted, the ASLB
5 proceedings, but it has a path to resolution of the
6 Coastal Zone Management Act, including a consistency
7 certification by New York State Department of State,
8 and it resolved the water quality proceeding and the
9 SPDES proceedings.

10 So the two prerequisites related to water,
11 the license renewal, the Coastal Zone Management Act,
12 and the water quality certification are addressed and
13 governed by this agreement.

14 ADMIN. JUDGE McDADE: Okay. Are there any
15 contingencies with this agreement which would allow a
16 party to withdraw from the agreement? If so, what are
17 those contingencies and what would be the impact on
18 our proceeding if one or more parties withdrew?

19 MR. BESSETTE: Yes, Your Honor. On page
20 9 of the agreement; I know you don't have it, there is
21 one paragraph, paragraph 8. It's -- basically there's
22 a very limited ability of the parties to basically
23 fall out of this agreement. It basically says that if
24 there's significant litigation filed against this
25 agreement and by parties who have -- basically parties

1 who are known to the Indian Point proceedings in
2 various -- so it's not somebody completely new. It's
3 somebody who has participated in one or more of the
4 various efforts to challenge Indian Point.

5 If they file litigation and not -- is not
6 resolved to the satisfaction New York State,
7 Riverkeeper or Entergy by the time the license is
8 issued, it provides an opportunity for the -- any of
9 the parties to basically forego the agreement. Again,
10 we think that's a very strict provision and very
11 unlikely.

12 ADMIN. JUDGE McDADE: Okay. Is the
13 agreement as it's currently constituted contingent
14 upon the approval of various entities? If so, what
15 are those entities and what is the status of that? In
16 other words, there's a lot of litigation out there.
17 There are a number of different tribunals that are
18 looking at one point or another of Indian Point.

19 And for example, in your most recent
20 submission to us from Entergy you reference that the
21 litigation in U.S. District Courts of the Northern
22 District, the litigation in the New York State Courts.

23 Is the approval of this agreement
24 submitted to any of those entities and is the
25 agreement contingent upon receiving approval from any

1 of those entities?

2 MR. BESSETTE: The agreement has various
3 steps in which -- in a sequence that those other
4 litigation are resolved either by withdrawing any
5 appeals or withdrawing of filings. We have no reason
6 to believe that will not be granted.

7 Entergy's commitment to shut down as
8 agreed to is contingent upon the assumption that all
9 of the terms and conditions of this agreement will be
10 satisfied, but again the parties fully believe, as
11 they've been cooperating and several of the initial
12 steps have already been completed, that this will be
13 successfully resolved.

14 ADMIN. JUDGE McDADE: Okay. But I guess
15 my question is do you need to file a motion to dismiss
16 with the U.S. District Court? Do you need to file
17 motions to dismiss with the New York State Courts?
18 And if so, are those part of the agreement and what
19 happens to the agreement if those tribunals do not
20 grant the requests? One, are such requests needed?
21 Is such approval needed? And if it isn't received,
22 what then?

23 MR. BESSETTE: Your Honor, for instance,
24 there's a -- on March 9th Entergy is to file a notice
25 of dismissal of the Perales case, and so that is

1 included in the various steps of the agreement. And
2 there's not a contingency in here if they don't
3 approve that dismissal, but as in the parties to those
4 proceedings are a part of this agreement, we believe
5 it will be dismissed.

6 ADMIN. JUDGE KENNEDY: But also going back
7 you indicated; and I think you made a reference to
8 page 9 of the agreement, which I have not seen -- but
9 that if there is significant continuing litigation on
10 these matters, the parties would have the option of
11 withdrawing. Is that correct?

12 MR. BESSETTE: Yes, Your Honor, but that
13 would be new litigation, not anything ongoing, because
14 anything that's ongoing has -- is adequately addressed
15 in the agreement.

16 ADMIN. JUDGE McDADE: Okay. But would it
17 still be adequately addressed if for example the New
18 York State Court or the District Court in the Northern
19 District didn't grant your requests?

20 MR. BESSETTE: Your Honor, I think at that
21 point we would confer with the parties to the
22 agreement, including the State of New York and the
23 various entities, and Riverkeeper, and decide how to
24 proceed from there.

25 ADMIN. JUDGE McDADE: Okay. I'm making an

1 assumption here, and if I'm wrong in this assumption,
2 please correct me, but it would seem that given the
3 fact that right now we are in the period of extended
4 operation, when this proceeding terminates, Entergy
5 either needs to stop operating or needs to have a
6 license approved by the NRC. So it would seem that it
7 would be likely that what will happen is that Entergy
8 will file an amendment to its license renewal
9 application, which currently asks for an extension
10 through 2035 for a shorter period.

11 And question No. 1 is in Entergy's view;
12 and I'm going to ask New York and the staff as well on
13 this -- by the way, when I finish hearing from
14 Entergy, I do want New York, the staff and Riverkeeper
15 to say if you have any disagreements with any of the
16 statements made by Entergy or the interpretations put
17 to them.

18 But I would anticipate that there would be
19 an amendment made to your license renewal application.
20 And at that point the Commission would need to make a
21 determination as to whether or not that was a material
22 change, one that would require a notice of an
23 opportunity for hearing.

24 Do you agree, Mr. Bessette, with that
25 proposition? If so, in the event that the Commission

1 does not so find, namely that this does not require an
2 additional notice of an opportunity for a hearing,
3 what then?

4 MR. BESSETTE: Your Honor, the agreement
5 does include a commitment by Entergy to amend the
6 pending license renewal application to reflect a
7 reduced term through April 30th, 2024 for Indian Point
8 Unit 2 and April 30th, 2025 for Indian Point Unit 3.
9 We have committed to submit that by February 8th. I'm
10 just confirming that, Your Honor. Yes, by February
11 8th.

12 We cannot speak for the staff or the
13 Commission what they'll do with it, but we believe
14 that as our analysis with the license renewal
15 application was conservative, considered all impacts
16 out for an additional 20 years, including safety and
17 environmental impacts -- we believe a shortened term
18 -- they would be certainly bounded and there would be,
19 in Entergy's opinion, no need to re-notice this.

20 ADMIN. JUDGE McDADE: Okay. Mr. Turk or
21 Mr. Roth or Mr. Harris, speaking for the Commission
22 staff, at this point do you concur that that would be
23 a necessary step for an amendment to be filed to the
24 license renewal application and if there would -- a
25 decision would have to be made as to whether that

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1 amendment would require an additional notice of an
2 opportunity for hearing? Is that a correct assumption
3 on my part?

4 MR. TURK: Your Honor, this is Sherwin
5 Turk. It's not necessary from the NRC standpoint that
6 they file an amendment to the LRA, but that is their
7 plan and that's acceptable. From our vantage point
8 they could have reached a side agreement that didn't
9 require an amendment to the LRA. But if they go the
10 route of filing the amendment to the LRA, we have
11 looked -- we the staff have looked at whether there's
12 a need to re-notice, and we're satisfied that there is
13 no need to re-notice in part because the term is
14 bounded by the term of the current application, and
15 also because the proceeding has been ongoing actively.
16 So we do not see any need to re-notice.

17 ADMIN. JUDGE McDADE: I mean, it's only
18 been ongoing actively for at this point less than 10
19 years, Mr. Turk.

20 MR. TURK: Yes, I've been a part of that
21 for all that time, Your Honor.

22 ADMIN. JUDGE McDADE: Okay. You indicated
23 that that's the view, your view, the view of the
24 staff. Would that require approval from anybody up
25 the chain of command or would that basically be a

1 final decision for the Commission?

2 MR. TURK: I think the final decision is
3 for the NRC staff. And it is the staff that has the
4 delegated authority to decide whether there's a need
5 to re-notice or not.

6 ADMIN. JUDGE McDADE: Okay. So you're
7 saying that it's the staff's position that that
8 authority has been delegated to you?

9 MR. TURK: Yes.

10 ADMIN. JUDGE McDADE: Okay. Because it
11 seems like one of three things is going to have to
12 happen here: Either the Commission grants the license
13 renewal for the period through 2035, it grants it for
14 some lesser period of time, or it denies the
15 extension. So it does seem, at least to me, and since
16 it's not something that I need to rule on one way or
17 the other, that there would be -- need to be some
18 amendment if the Commission were going to act and
19 grant the approval for a lesser period of time.

20 But anyway, as I understand it right now
21 that that is anticipated. It's anticipated that it
22 would be filed by February 8th. It is not anticipated
23 that it would need approval and the Commission staff
24 would not seek to get approval for that. And
25 approval, I mean that it doesn't require a notice for

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1 hearing from any other entity.

2 My next question can go to either Entergy
3 or the staff, if you know. Do you have any idea of
4 the time frame within which it would take the
5 Commission to rule on that kind of a request?

6 MR. BESSETTE: I can -- this is Paul
7 Bessette. I can jump in, Your Honor. We believe that
8 the normal staff review process would just continue.
9 We have pending RAIs we have to respond to. There's
10 a pending environmental impact supplement that has to
11 be issued. So we believe the process would continue
12 along that line. And we believe there's -- also
13 timely renewal would continue during that time. We
14 cannot predict when the Commission will make a
15 decision, but it cannot be any sooner than issuance of
16 the next EIS supplement to complete the environmental
17 record.

18 ADMIN. JUDGE McDADE: Okay. To Entergy,
19 is it Entergy's position that this Board needs to
20 approve the settlement agreement pursuant to 10 USC
21 2.338?

22 MR. BESSETTE: No, Your Honor. The
23 settlement agreement has -- is separate from the
24 Board. We would seek the Board approval of a pending
25 -- of a planned motion to dismiss the contentions.

1 ADMIN. JUDGE McDADE: Okay. But doesn't
2 2.338(i) require the Board to pass on any settlement
3 agreement once it's reached this stage of a
4 proceeding?

5 Let me first ask to Entergy, then the
6 staff, then to the intervenors.

7 Entergy?

8 MR. BESSETTE: No, Your Honor. I mean,
9 I'm pulling out my regulations, but you may recall
10 Your Honor was in charge of the Watts Bar proceeding
11 along with Diane Curran, who was representing I
12 believe Southern Alliance for Clean Energy at that
13 point. It was pending litigation. And Ms. Curran
14 submitted a motion to dismiss the pending contentions
15 that the Board granted without approving a separate
16 agreement.

17 ADMIN. JUDGE McDADE: Okay. So it's the
18 position of Entergy that we would not have to approve
19 the separate agreement.

20 What's the position of the staff?

21 MR. TURK: We see no reason for the Board
22 to approve that agreement. The only issue before the
23 Board would be the dismissal of the contentions. And
24 inasmuch as all parties would agree to dismissal of
25 the contentions, we don't think that there would be

1 any reason for the Board to disapprove that.

2 ADMIN. JUDGE McDADE: Okay. Well, not
3 saying whether there would be any reason for the Board
4 to disapprove it, the question is sort of one of form
5 at this particular point in time, and it has to do
6 with 2.338(i), which says, "Following issuance of a
7 notice of hearing a settlement must be approved by the
8 presiding officer or the Commission as appropriate in
9 order to be binding in the proceeding."

10 And the question is given that, is it
11 necessary for us to approve the settlement agreement,
12 and is that something separate from the motion to
13 withdraw the contentions?

14 Entergy?

15 MR. BESSETTE: Your Honor, we believe
16 because the agreement entered into by the other
17 parties is a separate -- in separately enforced legal
18 agreement, there's no reason for the Board or no need
19 for the Board to approve that -- otherwise approve
20 that agreement.

21 ADMIN. JUDGE McDADE: Okay. Staff, what's
22 your view on that?

23 MR. TURK: Just so I understand, Your
24 Honor, are you asking about approval of the underlying
25 agreement that has not been signed?

1 ADMIN. JUDGE McDADE: Yes.

2 MR. TURK: No, we see no reason for the
3 Board to approve that.

4 ADMIN. JUDGE McDADE: Okay. What's the
5 position of New York?

6 MS. KWONG: We agree there is no need for
7 the Board to independently approve the settlement
8 agreement.

9 ADMIN. JUDGE McDADE: And from Ms. Curran
10 and Riverkeeper?

11 MS. CURRAN: Yes, Judge McDade,
12 Riverkeeper takes the same position. And I'd just say
13 based on my experience in the past we -- the
14 settlement agreement, which we know you haven't seen,
15 provides different enforcement mechanisms. There are
16 safety-related measures that the parties have agreed
17 to, but they've agreed to a different method of making
18 sure that they get done and that we purposely decided
19 not to seek approval by the Licensing Board of the
20 agreement that we -- we feel our concerns have been
21 addressed by this independent agreement.

22 ADMIN. JUDGE McDADE: Okay. You indicate,
23 or Entergy has indicated that they anticipate down the
24 road filing a motion to withdraw those contentions.
25 When -- and I don't need to say if, because I'm

1 certain it's when -- when you file that motion, I
2 would ask that -- to take into consideration -- and
3 there was also an Entergy case involving Vermont
4 Yankee. It seems to me that the last person to
5 discuss this was our former Judge Karlin here at 63
6 NRC 830. So if you can address the issues that he
7 discusses in that opinion in any motion to withdraw
8 the pending contentions.

9 And then the next question to Entergy --

10 (Simultaneous speaking.)

11 ADMIN. JUDGE WARDWELL: Before you get
12 into that; this is Judge Wardwell, may I ask either my
13 illustrious Chair of this Board or the parties to
14 clarify for this non-lawyer is there a difference
15 between a motion to withdraw and a motion to dismiss?

16 And let's start with the parties, I guess.
17 Why I don't I start with Mr. Turk for the NRC?

18 MR. TURK: Well, a motion to withdraw --
19 for instance, if some of these contentions are joint
20 motions by Riverkeeper and New York, if one of those
21 parties alone had said we are hereby withdrawing from
22 the proceeding, that's different from a dismissal of
23 the contentions because the other party who was a
24 cosponsor of the contentions would still be involved
25 in the litigation.

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1 If all the parties who were sponsors of
2 the contentions filed a motion to withdraw, then there
3 is no issue left before the Board and effectively
4 there would be a motion to dismiss, in my view.

5 ADMIN. JUDGE McDADE: Well, sir, in other
6 words, Mr. Turk, what would happen is we would then
7 grant the motion to withdraw and issue an order
8 terminating the proceeding.

9 MR. TURK: Yes, and I guess as a sub-
10 sentence in that order you would say you dismiss the
11 contentions and terminate the proceeding.

12 ADMIN. JUDGE WARDWELL: So the next
13 question that -- so in regards to the discussions that
14 were held here, when someone says a motion to dismiss,
15 it's the equivalent of saying a motion to withdraw, is
16 that correct?

17 MR. TURK: I don't know about the other
18 parties' views, their terminology. I would defer to
19 them.

20 ADMIN. JUDGE WARDWELL: Okay. But as far
21 as you're concerned, that's -- is that -- was that --
22 was my statement correct?

23 MR. TURK: If all the parties who are
24 sponsors of the contention withdraw, then that is
25 effectively a motion to dismiss. Because as we know,

1 these are only contentions that are postured by
2 intervenors. Once they are gone, there's no contest.
3 There's no dispute before the Board.

4 ADMIN. JUDGE WARDWELL: So we still have
5 to grant that motion. And to me there might be -- if
6 there is a difference between a motion to withdraw and
7 a motion to dismiss, I'd like to hear what that
8 difference might be in regards to how we judge and
9 make a decision on such a motion.

10 So I'll go to Entergy and your reaction to
11 that.

12 MR. TURK: Your Honor, if I could just
13 follow up for one moment. Again this is Sherwin Turk.
14 If all parties withdraw, then effectively that's a
15 dismissal of the contentions. If however a party to
16 remain in the litigation withdraws or moves to dismiss
17 some of their contentions, then that would not be a
18 termination of the proceeding. But here where the
19 intervenors are moving along with Entergy to dismiss
20 all outstanding litigations, all outstanding
21 contentions, that would terminate the proceeding.

22 ADMIN. JUDGE McDADE: Okay. Let me go
23 back and ask -- and again, I'm going to -- and,
24 please, to the staff, Riverkeeper and New York, keep
25 notes as we're going through this because I'm going to

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1 be asking whether or not there's any disagreement with
2 anything that Entergy has said in outlining this.

3 But a question: We have in front of us
4 three contentions. We have held off issuing an
5 opinion after having the hearing for an extended
6 period of time based on issues raised by the parties:
7 inspections having to do with baffle-former bolts. We
8 currently have on the record in this proceeding and up
9 in the air this issue that has not been addressed in
10 our hearing and not addressed in any testimony before
11 the Board regarding baffle-former bolt failures, the
12 extent of those failures and the impact of those
13 failures.

14 If we were to grant the withdrawal of the
15 three pending contentions, in your view from Entergy
16 does that resolve the baffle-former bolt issue and is
17 it appropriate? If so, is it appropriate for the
18 Board to do that without receiving any information on
19 the record that would indicate, given the issues that
20 have been raised that -- and the baffle-former bolt
21 failures that have been identified in recent
22 inspections -- that the facility could continue to be
23 operated safely through the April of '24 or April of
24 '25 time period?

25 Mr. Bessette?

1 MR. BESSETTE: Yes, Your Honor. Yes, this
2 is Paul Bessette. My basic premise has always been
3 that if the parties do not wish to litigate and they
4 withdraw the contentions, the Board would no longer
5 have jurisdiction over these matters and it would fall
6 to the -- basically the staff normal inspection
7 process and aging management process.

8 ADMIN. JUDGE McDADE: But in this
9 particular proceeding; and to sort of put both sides
10 of the argument here, we've had these contentions.
11 And certainly the baffle-former bolts were covered by
12 the contentions that were filed and that have been
13 litigated. It was just new information with regard to
14 the baffle-former bolts since our hearing.

15 Other entities such as specifically the
16 interested government entities, New York City,
17 Westchester County, Connecticut, etcetera, they could
18 have joined in those contentions with New York and
19 Riverkeeper, but didn't. Is it your view that they no
20 longer have any standing as interested government
21 entities in having a public record resolved with
22 regard to the safety issues involving the baffle-
23 former bolts?

24 MR. BESSETTE: This is -- again, this is
25 Paul Bessette. I believe that's correct, Your Honor.

1 They have the opportunity to participate as full
2 parties or to basically tag along as interested
3 government entities. And they have -- their rights
4 are tied to New York State and Riverkeeper, and if New
5 York State and Riverkeeper withdraw the contentions or
6 dismiss their contentions, then the interested
7 government entities no -- have no independent rights.

8 ADMIN. JUDGE McDADE: Okay. At this point
9 in time you've indicated that you anticipate filing a
10 motion to this Board to withdraw the three pending
11 safety contentions. What do you view are the
12 standards that we should use in determining whether to
13 grant that motion?

14 MR. BESSETTE: Your Honor, first I want to
15 clarify, Your Honor, the motion would be filed by York
16 State and Riverkeeper with consultation to NRC and
17 Entergy, because they are the owners or sponsors of
18 the contentions. I believe the standards is if New
19 York -- essentially if they no longer wish to litigate
20 their matters, I think that's it.

21 ADMIN. JUDGE McDADE: But what you're
22 saying; make sure I understand it, is in your view the
23 only issue before the Board in determining whether or
24 not to grant the motion to withdraw the contention is
25 if the intervenor moves to withdraw the contention and

1 Entergy agrees. That is the only requirement, that
2 that's enough for the Board to grant the motion.
3 There's no finding that needs to be made, there's no
4 weighing of the public interest that needs to be made,
5 there's no clarification of the public record that
6 needs to be made. It's just the motion has been filed
7 by the parties, period.

8 MR. BESSETTE: Yes, under the premise,
9 Your Honor, that the Board is not involved in the
10 review and approval of the settlement, which is our
11 position.

12 ADMIN. JUDGE McDADE: Okay. What's the
13 staff's view on that?

14 MR. TURK: Well, Your Honor, recognizing
15 that it is in your authority to approve the motion, to
16 grant the motion to dismiss. Now in doing that I
17 think it's incumbent upon New York and Entergy and
18 Riverkeeper in their motion to explain the basis for
19 the decision. I think that would help alleviate the
20 Board's concern that you're not aware of what the --
21 how the issues have been resolved technically.

22 I do have a copy of the settlement
23 agreement and it does specify additional inspections
24 that Entergy has agreed to undertake on both Units 2
25 and 3. And I think once they put the settlement

1 agreement before you, and once they explain the
2 agreement in their motion, the Board will have a basis
3 to decide that, yes, there is no reason for the Board
4 to deny the motion to dismiss.

5 At the same time I have to agree with Mr.
6 Bessette that if a party decides that it is satisfied
7 that its contentions no longer need to be litigated,
8 then the Board does not have the authority to continue
9 the litigation after the sponsoring party has a
10 controversy. But nonetheless I think the Board will
11 be satisfied once you see the settlement agreement and
12 once the parties explain it to you. So I think both
13 Entergy and the Board will weigh in on it.

14 ADMIN. JUDGE McDADE: Assume for the sake
15 of argument that the Board believed that there was
16 something more that it needed to review other than
17 just that the parties have asked to withdraw. Does
18 the staff agree that our focus would be limited to
19 those safety issues that have been raised in the
20 contentions and go -- not go beyond that in any way?

21 MR. TURK: Yes.

22 ADMIN. JUDGE McDADE: And does New York
23 agree with that?

24 MS. KWONG: Yes, we would.

25 ADMIN. JUDGE McDADE: And Riverkeeper?

1 MS. CURRAN: Yes.

2 ADMIN. JUDGE McDADE: Okay. Now one of
3 the questions that I have with regard to the
4 contingencies that are possible -- and again, I
5 haven't seen that, so I don't know for sure -- but in
6 Article 3 Court litigation you have motions to
7 dismiss. Motions to dismiss could be either with or
8 without prejudice. Motions that are granted without
9 prejudice, everything can pretty much be refiled just
10 in a matter of course. Under the NRC regulations the
11 standard for reopening a closed proceeding are quite
12 different than they are for Article 3 Court
13 litigation. They are quite stringent.

14 Is there -- are there contingencies that
15 we should, we as a Board should wait for until -- as
16 a condition precedent to us granting the motion and
17 terminating the proceeding? Are there any
18 contingencies out there that we should wait on?

19 And let me start at the other end and
20 start with Riverkeeper this time and work back in the
21 other direction.

22 Ms. Curran?

23 MS. CURRAN: In the settlement
24 negotiations we agreed that there would not be
25 contingencies and that we would simply have the

1 opportunity to refile without prejudice and to pursue
2 that option, but we did not agree to -- we did not --
3 we agreed not to seek a ruling that you would hold it
4 in abeyance.

5 ADMIN. JUDGE McDADE: Okay. But, Ms.
6 Curran, the refiling -- as I just mentioned, with --
7 dismissing without prejudice in Article 3 litigation
8 has a particular meaning. And the NRC proceeding if
9 we dismiss it and terminate the proceeding, for all
10 intents and purposes it's not going to be reopened no
11 matter what happens. I'm not aware of a single
12 instance where anybody has actually been able to meet
13 the standards and the regulation for reopening a
14 proceeding after it's been terminated.

15 Is this an issue here that we should be
16 concerned about, Ms. Curran?

17 MS. CURRAN: No, Your Honor, it's not.

18 ADMIN. JUDGE McDADE: Okay. From New
19 York?

20 MS. KWONG: We do not expect that that
21 will be an issue, however, it is something -- it is
22 language that is present in the settlement agreement.
23 We just wanted to flag for the Board.

24 ADMIN. JUDGE McDADE: The language being
25 that it would be dismissed without prejudice?

1 MS. KWONG: That's correct.

2 ADMIN. JUDGE McDADE: But there's nothing
3 in there that talks about the standards under the NRC
4 Part 2 regulations on reopening?

5 MS. KWONG: That's right.

6 ADMIN. JUDGE McDADE: Okay. I still need
7 to -- first of all, in what we've gone through so far,
8 I've had Entergy talking, putting most of the burden
9 on Mr. Bessette so far. Is there anything that Mr.
10 Bessette has said that the NRC staff: Mr. Turk, Mr.
11 Roth, Mr. Harris, that you believe either needs to be
12 corrected to expanded upon?

13 MR. TURK: Nothing from Mr. Turk.

14 ADMIN. JUDGE McDADE: From New York? Mr.
15 Kwong? Mr. Desai?

16 MS. KWONG: No, I believe that Mr. Turk
17 and Mr. Bessette have covered the agreement fairly
18 thoroughly. I just want to stress that the parties
19 have committed to file by February 8th the instruments
20 that we've been discussing. For example, Riverkeeper
21 and New York do intend to file the motion to withdraw
22 their contentions. So just as a point of
23 clarification I think we've been going around the
24 terms of motion to dismiss and motion to withdraw. It
25 will be in fact a joint motion to withdraw and we

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1 expect that that will be filed on February 8th.

2 On the same --

3 ADMIN. JUDGE McDADE: Okay. Yes, I just
4 wanted to clarify in my own ear here because I had
5 jotted down when Mr. Bessette said it, that the
6 amendment to the license renewal application would be
7 filed by February 8th. Is that correct that that will
8 be filed by February 8th. And also any motion to
9 withdraw the contentions will be filed by February
10 8th?

11 Is that the date for both of those, Mr.
12 Bessette?

13 MR. BESSETTE: Yes, Your Honor. This is
14 Mr. Bessette. There is -- those dates -- simultaneous
15 on that, yes.

16 ADMIN. JUDGE McDADE: Okay. So February
17 8th is the date for both of those?

18 MR. BESSETTE: Yes, Your Honor.

19 ADMIN. JUDGE McDADE: Okay. And one other
20 issue had to do with while this is pending whether or
21 not we should have continued discovery, continued
22 reports coming in or whether or not we just hold
23 everything in abeyance. Does anyone wish to be heard
24 on that?

25 Mr. Turk, you had raised it. What do

1 you --

2 MR. TURK: Yes, Your Honor. From our
3 standpoint we don't see a need to continue our
4 discovery since the other parties have reached an
5 agreement to terminate the litigation.

6 ADMIN. JUDGE McDADE: Okay. Is there any
7 different view from New York, Riverkeeper or Entergy?

8 (No audible response.)

9 ADMIN. JUDGE McDADE: And specifically
10 what my question here is is I have no idea what is
11 out there, what is continuing to happen on the baffle-
12 former bolts, whether or not there are any additional
13 reports that -- or test results that are going to be
14 generated and whether or not New York or Riverkeeper
15 feels that they need to be privy to that additional
16 information as we move forward.

17 Ms. Kwong, Mr. Desai, Ms. Curran?

18 MS. KWONG: The settlement agreement
19 provides for Entergy to perform additional inspections
20 of the baffle bolts and it's our understanding that
21 that -- the information that comes out of those
22 inspections will be shared with NRC and with the
23 state. There are also provisions for annual
24 inspections of the plant with New York State
25 representatives. As a result, we are satisfied that

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1 we will have access to information related to the
2 bolts as well as issues relating to the ongoing
3 operations at IP2 and IP3.

4 ADMIN. JUDGE McDADE: Okay. So --

5 MR. TURK: For the staff, I will mention
6 that we will always continue to put documents into
7 ADAMS. So even though we may not be making a regular
8 monthly disclosure, parties can always search ADAMS
9 and find the latest information that's publicly
10 available.

11 ADMIN. JUDGE McDADE: Okay. But as I
12 understand it from New York and Riverkeeper they're
13 satisfied that the continuing obligation to disclose
14 information under the settlement agreement would meet
15 their legitimate needs as far as additional
16 information on baffle-former bolts or inspections and
17 that they do not feel that there would be any need
18 within the context of this proceeding to have
19 continued reports and discovery.

20 Is that correct, Ms. Kwong and Mr. Desai?

21 MS. KWONG: That is correct?

22 ADMIN. JUDGE McDADE: And, Ms. Curran?

23 MS. CURRAN: Yes, it is.

24 ADMIN. JUDGE McDADE: Okay. From the
25 standpoint of the parties, and let me just go down,

1 Mr. Bessette, Mr. O'Neill, Ms. Sutton, is there
2 anything else that you would like to discuss at this
3 status conference?

4 MR. BESSETTE: No, Your Honor, I believe
5 you covered all the necessary topics. Thank you.

6 ADMIN. JUDGE McDADE: Okay. Mr. Turk, Mr.
7 Roth, Mr. Harris, anything further you want to
8 discuss?

9 MR. TURK: Your Honor, this is Sherwin
10 Turk. We're in different locations, so I would invite
11 Mr. Roth and Mr. Harris to speak if they have any
12 additions that they wish to raise.

13 ADMIN. JUDGE McDADE: I just did.

14 MR. TURK: Yes. I think they defer to me
15 too much.

16 ADMIN. JUDGE McDADE: Do any --

17 MR. HARRIS: This is Mr. Harris. I have
18 nothing else to raise. Thank you, Your Honor.

19 ADMIN. JUDGE McDADE: Mr. Roth?

20 MR. ROTH: This is Mr. Roth. Nothing
21 else. Thank you, Your Honor.

22 ADMIN. JUDGE McDADE: Okay. Mr. Kwong?
23 Mr. Desai?

24 MS. KWONG: We have nothing else. Thank
25 you.

1 ADMIN. JUDGE McDADE: Okay. Mr. Curran?

2 MS. CURRAN: Yes, Judge McDade, I just --
3 I wanted to just explain and get back to an issue you
4 raised earlier whether the Board had a responsibility
5 to make a decision about the issues that have been
6 raised by the parties. Is this resolution adequate to
7 protect safety? And I honestly don't know the extent
8 to which -- I know the Commission has reigned in the
9 Licensing Board significantly over past decades on --

10 ADMIN. JUDGE McDADE: They have.

11 MS. CURRAN: -- the Board's sua sponte
12 authority. But I certainly can tell you that from
13 Riverkeeper's perspective there has been a great
14 degree to which the parties have resolved concerns, at
15 least Riverkeeper's concerns about the issues raised
16 in our pending contentions. And I for one plan to
17 look into what is the standard for what kind of
18 information you need, and I'm sure we'll be submitting
19 the agreement to you and can explain to the Board the
20 ways in which our concerns are now being addressed.

21 Of course it's a settlement. It's not
22 everything that one seeks in litigation, but we have
23 -- we believe that a great deal has been gained
24 through this negotiation in terms of addressing the
25 issues raised in our contentions, and we'd be happy to

1 address that in our motion.

2 ADMIN. JUDGE McDADE: Okay. Yes?

3 ADMIN. JUDGE WARDWELL: This is Judge
4 Wardwell. Ms. Curran, New York State was in the
5 discussion in regards to without prejudice as a
6 modifier to this motion to withdraw. And would you
7 like to comment in regards to how that relates to the
8 reopening clause and whether or not it is or is not a
9 meaningless modifier to your motion to withdraw?

10 MS. CURRAN: Well, it's really -- we agree
11 that it's very uncertain. If one is in a position of
12 say making a motion to reopen a record and reopen a
13 case that's been closed, it's very difficult to do.
14 The standard is very high. And we also don't
15 anticipate that we're going to get into that
16 situation. This is a good settlement agreement. It's
17 encouraging to hear from the staff that they don't
18 think that the amended license renewal application
19 will need to be noticed. So we hope that we are going
20 to be in that situation.

21 The purpose of putting that language into
22 the agreement was to give the intervenors some
23 protection against unilaterally dismissing
24 contentions. In the event say that the NRC staff
25 decided that the license amendment, license renewal

1 application amendment had to be noticed, then the
2 agreement would have provided that Entergy would
3 withdraw the amended application that would have
4 shortened the license renewal term and would be back
5 to 20 years. And in that case we wanted to at least
6 have the opportunity to argue to the Commission that
7 we had raised some serious issues that needed to be
8 addressed.

9 Like everything else in a settlement
10 agreement, it wasn't perfect but it left a door open
11 for us to go through. Again, we do not think we're
12 going to have to go through that door and -- but if we
13 need to, we'll attempt it.

14 ADMIN. JUDGE McDADE: But do you agree
15 that by adding the terms "with -- without prejudice"
16 into your motion to withdraw, if in fact that's what
17 does end up being submitted to us, does not
18 necessarily preempt the reopening clause in some
19 distant future?

20 MS. CURRAN: Does it preempt it?

21 ADMIN. JUDGE McDADE: Yes, would it
22 supersede it? It's not your expectation. Would -- by
23 having that "without prejudice" in your motion to
24 withdraw would not necessarily remove all of the
25 reopening requirements --

1 (Simultaneous speaking.)

2 MS. CURRAN: We didn't interpret it that
3 way, no. It was -- what we interpreted was to dismiss
4 with prejudice would have meant we can't come back
5 ever for any reason. But we didn't agree to that.

6 ADMIN. JUDGE McDADE: Thank you.

7 Okay. At this point I'm going to hit the
8 mute button for a minute to confer with my colleagues
9 before we sign off on this conference call. So please
10 just bear with us for a minute or two.

11 (Whereupon, the above-entitled matter went
12 off the record at 2:17 p.m. and resumed at 2:17 p.m.)

13 ADMIN. JUDGE McDADE: Okay. I think we're
14 just about at the end of this. And as I understand it
15 from the parties, what we anticipate at this point is
16 on or before February 8th we will be receiving a
17 motion to withdraw the three pending contentions. And
18 along with that we will have a copy of the settlement
19 agreement.

20 I would ask, and obviously you're going to
21 put in your pleadings what you think is appropriate to
22 put in your pleadings. But specifically in the motion
23 to withdraw I would ask that the parties specifically
24 address 10 CFR 2.38(i) and specifically the comments
25 following issuance of a notice of a hearing a

1 settlement must be approved by the presiding officer
2 to --

3 ADMIN. JUDGE WARDWELL: That's 388.

4 ADMIN. JUDGE McDADE: I'm sorry. 330. 3

5 --

6 ADMIN. JUDGE WARDWELL: 2.388(i). 38(i).

7 ADMIN. JUDGE McDADE: Yes. That needs to
8 be approved and whether or not there needs to be a --
9 basically two actions by the Board: one to approve the
10 settlement and one to grant the withdrawal of the
11 contentions.

12 The next is specifically 2.338 has certain
13 requirements. If the Board is going to approve a
14 settlement, it needs to be in there. I assume the
15 settlement agreement is already written. And whether
16 or not if you desire to comply with those
17 requirements, it could be incorporated into the motion
18 to withdraw and incorporated by reference in order to
19 meet that requirement.

20 And then the next question is under that
21 regulation as discussed by Judge Karlin at 63 NRC 830
22 a finding to approve a settlement requires a finding
23 by the Board that it is in the public interest.
24 Currently we already have on the record a great deal
25 of information with regard to the three pending

1 contentions. And I am making an assumption that the
2 parties do not feel that it would be necessary for the
3 Board to review and summarize that evidence in
4 granting a motion to withdraw. It is there on the
5 record. And so there would be a basis for making a
6 finding that the settlement is in the public interest.

7 That said, I would like you to address
8 that in any motion to withdraw and state your
9 positions on that. Since it's going to be a joint
10 motion, it would be a joint position.

11 And the other question is with regard to
12 the baffle-former bolt issue that is out there, the
13 question of whether it would be necessary or
14 appropriate for the parties, specifically initially
15 Entergy, to submit by affidavit: one, what the baffle-
16 former bolt problem is; what actions Entergy has taken
17 in order to address those baffle-former bolt issues;
18 and why Entergy believes that those would be
19 sufficient in order for the proceeding or for the two
20 -- Indian Point 2 and 3 to continue to operate safely
21 through April of 2024 and April of 2025, respectively.

22 And to then have a similar affidavit from
23 the staff and the intervenors explaining from their
24 experts of why they are satisfied these actions are
25 sufficient to keep the plant open for that period

1 through 2024, 2025. I will see what it is you all
2 submit. I'm throwing that out as something that might
3 be helpful for the Board and facilitate the speedy
4 resolution of this.

5 That said, there's just one other matter
6 that I wanted to do, and I address this to New York.
7 We have been going here for about 10 years and which
8 New York was represented by Mr. Sipos. Mr. Sipos has
9 now left. If you would please convey to him the
10 Board's best wishes in his new endeavors and our
11 appreciation to him for his professionalism throughout
12 this very long proceeding. It almost seems a shame
13 that he's been here through the entire proceeding and
14 he's not there at the end.

15 So I would appreciate -- this is not a
16 Board order, but a request, that you pass that on to
17 Mr. Sipos. And I would also appreciate if you would
18 pass on to his former boss, the attorney general, the
19 Board's high opinion of his professionalism throughout
20 this proceeding. Does anybody have anything further
21 before we ring off? Judge Kennedy?

22 ADMIN. JUDGE KENNEDY: I do not.

23 ADMIN. JUDGE McDADE: Judge Wardwell?

24 ADMIN. JUDGE WARDWELL: I do not.

25 ADMIN. JUDGE McDADE: Mr. Bessette, Mr.

1 O'Neill, Ms. Sutton?

2 MR. BESSETTE: No, Your Honor. Nothing
3 further from Entergy.

4 ADMIN. JUDGE McDADE: Okay. And I'll
5 start at the other end since I keep saying Mr. Turk.
6 Mr. Harris? Mr. Roth? Mr. Turk?

7 MR. TURK: Mr. Turk. Just one -- should
8 we rely now on representations by other parties that
9 there's no longer any need to continue the
10 disclosures? Shall we now cease?

11 ADMIN. JUDGE McDADE: Well, I mean, it
12 seems to me that, yes, we're going to hear from you
13 all on February 4th. Why don't we say at this -- or
14 February 9th. Why don't we say that -- February 8th?

15 MR. TURK: Yes, Your Honor.

16 ADMIN. JUDGE McDADE: Well, we've actually
17 never heard from anybody on the day that it was
18 supposed to be, so -- but I digress. If there is no
19 objection from the parties, pending further order from
20 the Board none of these additional disclosures need to
21 be made. Is that agreeable to all of the parties?

22 MR. BESSETTE: Entergy, yes, Your Honor.

23 MS. KWONG: For New York that's
24 acceptable.

25 MS. CURRAN: Riverkeeper, yes.

1 ADMIN. JUDGE McDADE: And I assume from
2 the staff that's acceptable?

3 MR. TURK: Yes, Your Honor.

4 ADMIN. JUDGE McDADE: Okay. Mr. Desai,
5 Ms. Kwong, anything further from you?

6 MS. KWONG: No, nothing further. And
7 thank you for your kind words to Ms. Sipos. I will
8 certainly pass that information on down to him.

9 ADMIN. JUDGE McDADE: Okay. And --

10 MS. KWONG: And believe me, he is watching
11 from the sidelines and very happy for this day.

12 ADMIN. JUDGE McDADE: And also, as I said,
13 not only pass it on, but please pass it up.

14 MS. KWONG: Yes, absolutely.

15 ADMIN. JUDGE McDADE: Okay. Ms. Curran?

16 MS. CURRAN: Thanks, Judge McDade. I do
17 have a request. If there's anything you can do to
18 expedite getting the transcript into ADAMS, it will
19 help me to be able to read your questions.

20 ADMIN. JUDGE McDADE: Okay. And let me
21 ask of the court reporter. We have been going less
22 than hour. How long do you think it will be before
23 the transcript is ready?

24 COURT REPORTER: Oh, actually -- this is
25 the court reporter. I actually can't really speak to

1 that, but if you'd like to call the office, they can
2 answer your questions about that.

3 ADMIN. JUDGE McDADE: Okay. And all I can
4 say is, one, we will call the office. We will ask
5 them to expedite getting the transcript together and
6 getting it into ADAMS.

7 MS. CURRAN: Okay. Thank you.

8 ADMIN. JUDGE McDADE: Okay. Thank you.
9 This status conference is terminated. Thank you very
10 much.

11 (Whereupon, the above-entitled matter went
12 off the record at 2:25 p.m.)
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