

February 9, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO APPLICANT'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE PREFILED TESTIMONY, REPORT, AND EXHIBITS FILED BY NEW YORK STATE AND DR. FRANCOIS LEMAY IN SUPPORT OF CONSOLIDATED CONTENTION NYS-12C

INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319, 2.323, 2.337, 2.1204, the Atomic Safety and Licensing Board's ("Board") scheduling Order of July 1, 2010, and Order dated November 17, 2011<sup>1</sup>, the staff of the Nuclear Regulatory Commission ("Staff") files its answer in support of Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") motion *in limine* ("Entergy's Motion").<sup>2</sup>

The testimony and exhibits that Entergy seeks to exclude from the hearing exceeds the scope of the contention as pled and its identified bases.<sup>3</sup> Although the Staff recognizes that the

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<sup>1</sup> See Licensing Board Order (granting Unopposed Motion by the State of New York and Riverkeeper, Inc. to Amend the Scheduling Order) at 1 (Nov. 17, 2011) (unpublished).

<sup>2</sup> Applicant's Motion in Limine to Exclude Portions of the Prefiled Testimony, Report, and Exhibits Filed By New York State and Dr. Francois Lemay In Support of Consolidated Contention NYS-12C ("Entergy's Motion") (Jan. 30, 2012).

<sup>3</sup> See New York State Notice of Intention to Participate and Petition to Intervene ("NYS-12") (Nov. 30, 2007) (Agency-wide Document Access & Management System ("ADAMS") Accession No. ML073400187); State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement ("NYS-12A") (Feb. 27, 2009) (ADAMS Accession No. ML090690303); State of New York's New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives ("NYS-12B") (Mar. 11, 2010) (ADAMS Accession No. ML100780366); State of New York New Contention 12-C Concerning NRC Staff's December 2010 Final

Board is capable of sorting through the testimony and evidence for scope and weight, allowing portions of Dr. Lemay's testimony and certain limited exhibits into evidence will result in the needless expenditure of resources on issues that are not properly before the Board by all parties and create a needlessly cluttered and confusing record on the issues to be decided. Thus, the Board should exclude portions of Dr. Lemay's pre-filed written testimony<sup>4</sup>, portions of his report<sup>5</sup>, and New York State ("NYS") Exhibits ("Ex.") NYS000271, NYS000272, NYS000273, NYS000274, NYS000275, NYS000276, NYS000277 and NYS000278. For the reasons set forth below the Staff supports Entergy's motion to exclude portions of New York State's prefiled testimony, expert report, and exhibits. Accordingly, the Staff submits that the Board should exclude, in full or in part, the testimony and exhibits challenged in Entergy's motion, for the reasons and to the extent set forth therein.

### DISCUSSION

#### I. Legal Standards Governing Motions in Limine

In an evidentiary hearing, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable." 10 C.F.R. § 2.337(a). While the "strict rules of evidence do not apply to written submissions," the Board may "on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a

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Environmental Impact Statement and the Underestimation of Decontamination and Clean Up Costs Associated with a Severe Reactor Accident in the New York Metropolitan Area (Feb 3, 2011) (ADAMS Accession No. ML110680212).

<sup>4</sup> Ex. NYS000241, Pre-Filed Written Testimony of Dr. François J. Lemay Regarding Consolidated NYS-12C (Dec. 21, 2011).

<sup>5</sup> Ex. NYS000242, Review of Indian Point Severe Accident Off Site Consequence Analysis, ISR Report 13014-01-01, prepared by International Safety Research ("ISR") for the Office of the Attorney General – State of New York (Dec. 21, 2011).

written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.”

10 C.F.R. § 2.319(d). *See also* 10 C.F.R. § 2.319(e).

NRC hearings are limited to the scope of the admitted contentions. It is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board had properly excluded the intervenors’ testimony and exhibits that were outside the scope of the admitted contention). As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

*Id.* at 100-01 (internal footnotes omitted). Recently, the Commission emphasized:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

*Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-01, \_\_ NRC \_\_ (Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).

## II. ENTERGY’S MOTION IN LIMINE

The Board has repeatedly emphasized that NYS-12C is “neither a challenge to the acceptability of using the MACCS2 computer program nor a direct challenge to MACCS2

itself.”<sup>6</sup> The Board explained the bases for NYS challenge. In its orders regarding NYS-12C and consolidated contentions, the Board stated:

NYS challenge is based on statements in the Sandia Report such as: “Data on recovery from nuclear explosions that have been publicly available since the 1960s appear to have been misinterpreted, which has led to long-standing underestimates of the potential economic costs of severe reactor accidents.” As cited by NYS, the Sandia Report also questions the appropriateness of decontamination factors (estimates of the effectiveness of clean up measures) used in severe reactor accidents. Based on this information, NYS is not challenging the use of MACCS2 itself, but is questioning ... “specific inputs” and “assumptions.”<sup>7</sup>

Entergy’s Motion raises two distinct reasons for excluding certain portions of Dr. Lemay’s testimony and report, excluding exhibits relied on by Dr. Lemay. First, Entergy’s argues that the issues raised by NYS are simply beyond the scope of the admitted contention and supporting bases.<sup>8</sup> For a small subset of NYS’ submissions, Entergy also argues that information should be excluded because it relies on unauthorized modifications to the MACCS2 source code, which are equivalent to challenging the MACCS2 code.<sup>9</sup> Challenges to the MACCS2 code, as previously indicated, are outside the scope of the admitted contention.

Prior to NYS submission of Dr. Lemay’s pre-filed testimony and related exhibits, NYS had been proceeding under theories expressed in three related papers.<sup>10</sup> NYS filed a report

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<sup>6</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 102 (2008). See also Licensing Board Order (Ruling on New York State’s New and Amended Contentions) (June 16, 2009) at 3-4 (unpublished); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13, 71 NRC 673, 683 (June 30, 2010).

<sup>7</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 102 (2008). See also Licensing Board Order (Ruling on New York State’s New and Amended Contentions) (June 16, 2009) at 3-4 (unpublished); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13, 71 NRC 673, 683 (June 30, 2010).

<sup>8</sup> See Entergy’s Motion, Attachment 1.

<sup>9</sup> See Entergy’s Motion at 14.

<sup>10</sup> D. Chanin and W. Murfin, Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersal Accidents, SAND96-0957, Unlimited Release, UC-502, (May 1996); Beyea, Lyman, von Hippel, Damages from a Major Release of <sup>235</sup>U into the Atmosphere of the United States, Science and Global

from its witness at the time of amending NYS-12C for the last time.<sup>11</sup> Mr. Chanin summarizes that the FSEIS “is inadequate because it bases its analysis of the economic costs of severe accident[s] on erroneously low cost data, it misapplies SAND96-0957 Site Restoration report, and it ignores other reports showing the cost of a severe reactor accident in a densely developed and populated urban area ....”<sup>12</sup> NYS and its previous expert, Mr. Chanin, identify only two errors in the 2010 FSEIS. Mr. Chanin asserts:

- (1) NRC Staff relies on cleanup costs estimates for a city with 1,344 person/km<sup>2</sup> and made no adjustment to New York City, with its assumed 12,000 persons/km<sup>2</sup> ...
- (2) NRC Staff mistakenly claim[] that cleanup costs for “moderate” contamination requiring a [DF] from 5 to 10 for plutonium [was] appropriate for achieving a [DF] of 15 for cesium<sup>13</sup>

Mr. Lemay’s testimony, report, and supporting exhibits stray far from these two discrete issues. NYS and its current expert raised a whole host of new challenges not fairly encompassed by NYS-12C or its supporting bases as identified in Entergy’s Motion.<sup>14</sup> The Staff agrees that those new issues identified by NYS’ new expert should be excluded.

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Security, Vol. 12 at 125-136 (2004) (discussing accident costs at Indian Point and four other sites); Lyman, Chernobyl on the Hudson? The Health and Economic Impacts of a Terrorist Attack at the Indian Point Nuclear Power Plant, Union of Concerned Scientists (September 2004). Mr. Chanin did provide a single declaration in support of the NYS-12B but seems to be limited only to evaluating if Entergy’s 2009 SAMA reanalysis changed the previously submitted analysis. See Amended Contention NYS-12B, Statement of David Chanin (March 11, 2010) (ADAMS Accession No. ML100780366).

<sup>11</sup> NYS-12C, D. Chanin, “Errors and Omissions in NRC Staff’s Economic Cost Estimates of Severe Accident Mitigation Alternatives Analysis Contained in December 2010 Indian Point Final Supplemental Environmental Impact Statement (FSEIS), NUREG-1437, Supplement 38, (Feb. 2011) (ADAMS Accession No. ML110680212).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See Entergy’s Motion at 7-8.

The second issue Entergy raises is that Dr. Lemay made “unauthorized modifications” to the MACCS2 code.<sup>15</sup> Here the issue is not so much whether Dr. Lemay was authorized to alter the MACCS2 code but whether those modifications were made in a way that did not introduce errors into the code calculations and if the alterations were limited to the issues properly before the Board in this proceeding. It seems clear from Dr. Lemay’s testimony and report that changes made to the MACCS2 code were not limited to the issue identified in NYS’ contention. Thus, the Board should exclude the testimony related to these uncontrolled changes.

#### CONCLUSION

Because portions of Dr. Lemay’s testimony and portions of his report as identified by Entergy in its motion are outside the scope of the admitted contention, they should be excluded. Further, NYS’ Exs. NYS000271, NYS000272, NYS000273, NYS000274, NYS000275, NYS000276, NYS000277 and NYS000278 also exceed the scope of the Contention 12C as originally pled by NYS and as subsequently amended, and these exhibits should be excluded from the hearing. Thus, Entergy’s Motion should be granted.

Respectfully submitted,

**/Signed (electronically) by/**

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<sup>15</sup> While the Staff has not yet had an opportunity to fully analyze the changes Dr. Lemay made to code, it does appear that that changes made to the MACCS2 code affected more than the issues raised by NYS in its contention.

Dated at Rockville, MD  
this 9th day of February 2012

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NRC STAFF'S ANSWER TO APPLICANT'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE PREFILED TESTIMONY, REPORT, AND EXHIBITS FILED BY NEW YORK STATE AND DR. FRANCOIS LEMAY IN SUPPORT OF CONSOLIDATED CONTENTION NYS-12C" in the above-captioned proceeding has been filed and served by Electronic Information Exchange (EIE), with copies to be served by the EIE system on the following persons, this 9th day of February, 2012.

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