

**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))	
)	July 12, 2012

**APPLICANTS' MOTION FOR LEAVE TO FILE
SURREBUTTAL TESTIMONY ON CONSOLIDATED CONTENTION NYS-12C**

In accordance with 10 C.F.R. § 2.323(a), Entergy Nuclear Operations, Inc. ("Entergy") hereby moves the Atomic Safety and Licensing Board ("Board") for leave to file written surrebuttal testimony on or before August 13, 2012, concerning New York State ("NYS" or "the State") Consolidated Contention NYS-12C ("NYS-12C").¹ In its revised statement of position and prefiled written rebuttal testimony, NYS and its expert present new arguments and evidence that expand the scope of the arguments set forth in their direct testimony, and to which Entergy has not had a fair opportunity to respond.² Accordingly, there is good cause to permit the filing of surrebuttal testimony on NYS-12C.³ In support of this Motion, Entergy further states as follows:

1. In accordance with the Board's previous scheduling Orders in this proceeding, NYS filed its statement of position, direct testimony, and exhibits on NYS-12C on December 21,

¹ NYS-12C is an environmental contention that challenges the adequacy of decontamination cost inputs used in Entergy's severe accident mitigation alternatives ("SAMA") analysis for Indian Point Units 2 and 3.

² See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-24, 28 NRC 311, 349 (1988) ("In granting the motion to file rebuttal and surrebuttal testimony and in setting deadlines for filing surrebuttal testimony, the Board took account of the fact that the focus of controversy had expanded from that originally specified"), *aff'd in part, rev'd in part*, ALAB-902, 28 NRC 423 (1988).

³ Entergy reserves its right to file a motion in limine related to NYS's rebuttal filings on NYS-12C. +As Entergy counsel noted during the parties' consultations, a motion to strike the new documents and information in question, if granted, could moot the need for Entergy to file surrebuttal testimony.

2011.⁴ Entergy and the Nuclear Regulatory Commission (“NRC”) Staff filed their respective statements of position, direct testimony, and exhibits on the same contention on March 30, 2012.⁵

2. On April 7, 2012, NYS notified the Board and parties of its intent to submit optional rebuttal filings in support of NYS’s admitted contentions, including NYS-12C.⁶ After later obtaining an additional 30 days in which to submit its rebuttal filings,⁷ NYS completed service of its revised statement of position, rebuttal testimony, and associated exhibits on NYS-12C on July 2, 2012.⁸

3. In its rebuttal filings, NYS argues for the first time that, in the 1980s, the NRC commissioned a “site-specific case study” to estimate the costs associated with a severe accident at Indian Point, and that the NRC Staff failed to disclose that study in connection with this proceeding.⁹ NYS states that the NRC’s “site-specific analysis” is described in Chapter 5 of draft NUREG/CR-5148 (PNL-6350), “Property-Related Costs of Radiological Accidents” (Feb. 1990).¹⁰ NYS further states that “[a]ccording to this 1990 document, the results of the Indian

⁴ See State of New York Initial Statement of Position, Consolidated Contention NYS-12-C at 23, 31-42 (Dec. 21, 2011) (NYS000240); Pre-Filed Written Testimony of Dr. François J. Lemay Regarding Consolidated NYS-12-C (NYS-12/12-A/12-B/12-C) (Dec. 21, 2011) (NYS000241).

⁵ Entergy’s Statement of Position Regarding Consolidated Contention NYS-12C (Severe Accident Mitigation Alternatives Analysis) (ENT000449) (“Entergy NYS-12C Position Statement”); Testimony of Entergy Experts Lori Potts, Kevin O’Kula, and Grant Teagarden on NYS-12C (Severe Accident Mitigation Alternatives Analysis) (ENT000450) (“Entergy NYS-12C Testimony”); NRC Staff’s Initial Statement of Position on Consolidated Contention NYS-12C (NRC000039); Testimony of NRC Staff Experts Nathan Bixler, S. Tina Gosh, Joseph A. Jones, and Donald Harrison Concerning NYS’ Contentions NYS 12/16 (NRC000041).

⁶ See Notice Regarding Responsive Filings (Apr. 7, 2012).

⁷ See Board Order (Granting Unopposed Extension of Time) (May 16, 2012) (unpublished).

⁸ See State of New York Revised Statement of Position: Consolidated Contention NYS-12C (NYS000419) (“NYS Revised Position Statement”); Pre-Filed Written Rebuttal Testimony of Dr. Francois J. Lemay Regarding Consolidated Contention NYS-12C (NYS-12/12A/12B/12C) (June 29, 2012) (NYS000241) (“Lemay Rebuttal Testimony”). NYS made a good-faith effort to file its NYS-12C rebuttal submissions on Friday, June 29, 2012, but experienced unexpected technical difficulties with the NRC’s Electronic Information Exchange (“EIE”) system, which had been taken offline in a scheduled maintenance. NYS appropriately completed service of its NYS-12C filings on Monday, July 2, 2012. See E-mail from J. Dean, NYS, to Board, Parties, and Interested Governmental Entities, “Indian Point: Problem with EIE Server” (June 29, 2012).

⁹ NYS Revised Position Statement at 2, 14-15; Lemay Rebuttal Testimony at 25-29.

¹⁰ NYS Revised Position Statement at 14; Lemay Rebuttal Testimony at 25.

Point-specific study were produced and circulated in final *draft* form, *but never published*.”¹¹

4. NYS describes its discovery of draft NUREG/CR-5148 as follows:

The State’s experts discovered it during their review of NUREG-1150, which cites “NUREG/CR-3413 Off-Site Consequences of Radiological Accidents: Methods, Costs and Schedules for Decontamination” (NYS000425). NUREG/CR-3413 describes a database and computer program called DECON developed by an NRC contractor to conduct a decontamination analysis of a large, radiologically contaminated area. . . . An email exchange between Dr. Tawil, one of the authors of NUREG/CR-3413, and ISR reveals that NRC Staff was concerned about the results of a site-specific study at Indian Point.

. . . .

The State’s library located a copy of the site-specific study that Dr. Tawil was referencing: NUREG/CR-5148.¹²

5. The NRC apparently released a copy of draft NUREG/CR-5148 (NYS00424A to Z) to Purdue University in 1992 in response to a Freedom of Information Act (“FOIA”) request.¹³ Although this FOIA request appears in the NRC’s ADAMS Public Legacy Library,¹⁴ counsel for Entergy could find no other record copy of this document on the NRC’s website or on the Internet in general. In fact, the document does not appear in the U.S. Department of Commerce’s National Technical Information Service (“NTIS”) database (<http://www.ntis.gov>), which is a vast repository of government-funded scientific, technical, engineering, and business-related information that includes over 2 million records, including NRC Staff (NUREG) and Contractor (NUREG/CR) reports.

6. NYS first disclosed draft NUREG/CR-5148 on May 31, 2012, two months after Entergy filed its testimony on NYS-12C, and one month before NYS filed its rebuttal testimony.¹⁵

¹¹ NYS Revised Position Statement at 14 (emphasis added).

¹² *Id.* at 14-15 (footnote omitted) (citation omitted); *see also* Lemay Rebuttal Testimony at 26-27.

¹³ *See* NRC Response to Freedom of Information Act (FOIA) Request, FOIA-92-171 (Requester: Suzanne Ward, Purdue University, Manager, Technical Information Service) (Apr. 20, 1992) (NYS00424A).

¹⁴ ADAMS (Public Legacy Library) Accession No. 9210280325 (on microfiche at the NRC Public Document Room).

¹⁵ New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2) (May 31, 2012) (ID No. 1553).

It is not clear why NYS did not disclose and rely on this document in its earlier submission.

Nonetheless, in its rebuttal filings, NYS argues for the first time that:

The results of the study disclose that NRC has actually conducted a site-specific analysis of the decontamination costs associated with a severe accident at Indian Point, without using NUREG-1150 values, and, therefore, without relying upon Sample Problem A. Thus, a site-specific analysis was not only required under NEPA and NRC's regulations, but eminently possible and had been completed in conjunction with NUREG/CR-5148.¹⁶

7. These arguments and documents (*i.e.*, NUREG/CR-3413, draft NUREG/CR-5148 and the “final draft” case study mentioned therein, and ISR's e-mail communications with Dr. Tawil¹⁷) constitute new information to which Entergy and the NRC Staff have not had a fair opportunity to respond.

8. The NYS claims described above all relate to the State's self-described “central” argument that Entergy and the NRC Staff unreasonably relied upon certain MACCS2 inputs derived from NUREG-1150 and Sample Problem A of the MACCS2 User's Guide.¹⁸ Accordingly, they raise issues that are directly relevant and material to the parties' positions. Entergy should therefore have an opportunity to respond to claims by NYS that are entirely new.

9. Neither the Board's scheduling Orders nor NRC regulations directly address surrebuttal testimony. However, it is within the Board's sound discretion to permit such testimony.¹⁹ Under 10 C.F.R. § 2.319, this Board is empowered to regulate the course of the hearing and the conduct of participants, dispose of procedural requests or similar matters, rule on

¹⁶ NYS Revised Position Statement at 15.

¹⁷ Dr. Tawil is neither a consultant nor an expert witness for NYS. Any statements made by Dr. Tawil in e-mail communications with NYS's consultant are hearsay, the reliability of which has not been established by NYS.

¹⁸ NYS Revised Position Statement at 7; NUREG/CR-6613, Code Manual for MACCS2: Volume 1, User's Guide (May 1998) (NYS000243) (“MACCS2 User's Guide”).

¹⁹ See, e.g., *Shoreham*, LBP-88-24, 28 NRC at 349 (noting Board's decision to grant parties' motions for leave to file rebuttal and surrebuttal testimony); *United States v. Williams*, 283 F.Supp.2d 850, 856 (E.D.N.Y.2003) (*quoting United States v. Wilford*, 710 F.2d 439, 452 (8th Cir. 1983)) (holding that the decision whether to admit surrebuttal evidence is left to the “sound discretion” of the trial court).

offers of proof and receive evidence, and issue orders necessary to carry out its hearing duties and responsibilities.²⁰

10. The Board should exercise its discretion to permit limited surrebuttal testimony here for the same reasons that federal courts have long held such evidence is generally admissible: to respond to new issues brought up during rebuttal.²¹ Entergy submits that this Board should be guided by the same principles and give Entergy a fair opportunity be heard on the new issues and evidence presented by NYS. This approach will permit fair and full consideration of the issues in the case.²²

11. Entergy seeks 30 days from the service of this Motion (*i.e.*, until August 13, 2012) to prepare and file its surrebuttal testimony on NYS-12C. Entergy believes that a 30-day period to prepare and file its surrebuttal testimony is reasonable and fair. Entergy has been engaged in an intensive review of the State's NYS-12C rebuttal filings and the numerous other evidentiary submissions that the Intervenor recently filed.²³ Notably, NYS had three months to prepare the *optional* rebuttal filings it submitted on July 2, 2012. The 30 days sought herein to prepare focused surrebuttal testimony and a revised position statement is thus eminently reasonable.

12. Entergy counsel has conferred with the relevant technical experts (Dr. O'Kula, Mr. Teagarden, and Ms. Potts), and they agree that 30 days is necessary to prepare adequate surrebuttal testimony on NYS-12C. For example, Entergy's experts need additional and sufficient time to

²⁰ See 10 C.F.R. § 2.319(d), (g), (h), (q).

²¹ See, e.g., *United States v. King*, 879 F.2d 137, 138 (4th Cir. 1989), *cert. denied*, 493 U.S. 900 (1989).

²² See, e.g., *AmerGen Energy Co.* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Prehearing Conference Call Summary, Case Management Directives, and Final Scheduling Order) at 6 (Apr. 17, 2007) (unpublished) ("Although not required by the regulations, the Board has found that a thoughtful and concise written reply and sur-rebuttal testimony can benefit the Board's efficient analysis of issues.").

²³ Specifically, on June 28, 2012, the Intervenor filed rebuttal testimony on Contentions NYS-5 (buried piping and tanks), NYS-6/7 (low and medium voltage cables), and Clearwater-EC3A (environmental justice). On June 29, 2012, the Intervenor completed their rebuttal filings on NYS-8 (transformers), NYS-17B (property values), NYS-37 (no action alternative), and Riverkeeper-TC2 (flow accelerated corrosion). On July 2, 2012, the Intervenor completed service of additional rebuttal filings on NYS-12C (SAMA decontamination and cleanup costs), NYS-16B (SAMA population estimates), and NYS-26B/ Riverkeeper-TC1B (metal fatigue).

review the entire 500-plus page draft NUREG/CR-5148 to properly understand the report's purpose, context, and pedigree. Relevant inquiries may include the methodology used by the draft report's authors and how they applied it to the Indian Point site; the interface with the CRAC2 code; the types of cost estimated; and how those cost types compare with the MACCS2-based offsite economic costs applied in a SAMA analysis.

13. Entergy recognizes that this proceeding began more than four years ago, and respects the Board's desire to avoid unnecessary delay. Entergy submits, however, that the instant request for leave to file surrebuttal testimony is not unreasonable under the circumstances, and will not cause hardship for any party or substantial delay in the proceeding. Indeed, Entergy's proposed filing date (August 13, 2012) is two months before the hearings on Track 1 contentions are scheduled to commence (October 15, 2012).

14. In accordance with 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he made a sincere effort to contact the NYS and the NRC Staff on July 10, 2012, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and he certifies that his efforts have been unsuccessful. The parties consulted by telephone and e-mail on July 11 and July 12, 2012.

15. NYS does not consent to the proposed Motion at this time and reserves the right to file a response. NYS believes that it appropriately referenced and discussed the NUREG/CR-5148 & Tawil documents (NYS000424 & NYS000426) in its June submissions, and that the evidentiary hearing could provide an opportunity to address the issues. Should, however, the Board grant the Motion and authorize Entergy and NRC to make additional pre-filed submissions on this matter, NYS believes that it should be afforded an opportunity to submit responsive pre-filed evidence and a statement of position.

16. NRC Staff counsel stated that the Staff does not oppose Entergy's Motion, and that if the Board grants the Motion, then the Staff would like to have the opportunity to file surrebuttal testimony and a revised position statement in response to New York's filing as well, should the Staff decide to do so, at the same time as Entergy. Staff counsel further stated that the Staff views NYS's request for the opportunity to submit further responsive filings as premature at this time, and that such a request should await the filing of any Entergy/Staff surrebuttal testimony.

WHEREFORE, Entergy respectfully requests that the Board grant it leave to file surrebuttal testimony and a revised position statement on NYS-12C, focused on the new issues and evidence describe herein, on or before August 13, 2012.

Respectfully submitted,

Signed (electronically) by Martin J. O'Neill

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Dated at Washington, DC
this 12th day of July 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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ENTERGY NUCLEAR OPERATIONS, INC.)	
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(Indian Point Nuclear Generating Units 2 and 3))	
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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2012, a copy of the "Applicant's Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C") was served electronically via the Electronic Information Exchange on the following recipients.

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