

**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 30, 2012

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**ENTERGY’S MOTION IN LIMINE TO EXCLUDE PORTIONS OF CLEARWATER’S  
REBUTTAL FILINGS ON CONTENTION CW-EC-3A (ENVIRONMENTAL JUSTICE)**

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**I. INTRODUCTION**

On June 28, 2012, Hudson River Sloop Clearwater, Inc. (“Clearwater”) filed its revised statement of position, rebuttal testimony, and associated exhibits on Contention CW-EC-3A. That environmental justice (“EJ”) contention challenges whether the Entergy Nuclear Operations, Inc. (“Entergy”) Environmental Report (“ER”) and NRC Staff Final Supplemental Environmental Impact Statement (“FSEIS”) correctly analyze the potential that a severe accident would cause disproportionately significant and adverse impacts on EJ populations near Indian Point Nuclear Generating Units 2 and 3 (collectively, “Indian Point”), as required by the National Environmental Policy Act (“NEPA”) and NRC’s 10 C.F.R. Part 51 NEPA regulations.

In accordance with 10 C.F.R. §§ 2.1204, 2.319, 2.323, 2.337, and the Atomic Safety and Licensing Board (“Board”) Scheduling Order of July 1, 2010, and subsequent Order dated May 16, 2012,<sup>1</sup> Entergy moves to exclude: (1) portions of the rebuttal testimony of Dr. Michael

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<sup>1</sup> Licensing Board Order (Granting Unopposed Extension of Time) (May 16, 2012) (unpublished).

Edelstein<sup>2</sup> and Ms. Manna Jo Greene;<sup>3</sup> (2) the entirety of Dr. Andrew S. Kanter’s rebuttal testimony;<sup>4</sup> (3) all or portions of Exhibits CLE000050 through CLE000059; and (4) portions of the Clearwater Rebuttal Statement Supporting Contention EC-3A.<sup>5</sup> As set forth below, the Clearwater rebuttal testimony, statements, and exhibits identified in Attachment 1 should be excluded from the record because they: (1) broadly challenge the adequacy of emergency plans, contrary to the scope of CW-EC-3A and license renewal; (2) raise issues concerning numerous non-EJ populations and vaguely-defined EJ subgroups, contrary to Commission precedent and NRC Staff guidance; or (3) raise various other issues unquestionably outside the scope of CW-EC-3A and this proceeding, including irrelevant new claims concerning the evacuation-related environmental impacts from terrorist attacks.

## **II. LEGAL STANDARDS**

### **A. Scope of Rebuttal Testimony**

10 C.F.R. § 2.1207 addresses the general process and schedule for evidentiary presentations in hearings conducted pursuant to 10 C.F.R. Part 2, Subpart L. Section 2.1207(a)(2) states that written responses and rebuttal testimony should be “directed to the initial statements and testimony of other participants.” “Being in the nature of rebuttal, the response, rebuttal testimony, and rebuttal exhibits are not to advance any new affirmative claims

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<sup>2</sup> Rebuttal Testimony of Michael Edelstein Regarding Clearwater’s Environmental Justice Contention EC-3A (June 28, 2012) (CLE000047) (“Edelstein Rebuttal Testimony”).

<sup>3</sup> Rebuttal Testimony of Manna Jo Greene Regarding Clearwater’s Environmental Justice Contention EC-3A (June 28, 2012) (CLE000046) (“Greene Rebuttal Testimony”).

<sup>4</sup> Rebuttal Testimony of Dr. Andrew S. Kanter, M.D. M.P.H. in Support of Hudson River Sloop Clearwater, Inc.’s Contention EC-3A Regarding Clearwater’s Environmental Justice (June 28, 2012) (CLE000048) (“Kanter Rebuttal Testimony”).

<sup>5</sup> Hudson River Sloop Clearwater, Inc. Rebuttal Statement Supporting Contention EC-3A Regarding Environmental Justice (June 28, 2012) (CLE000045) (“Rebuttal Position Statement”).

or arguments that should have been, but were not, included in the party's previously filed initial written statement.”<sup>6</sup>

**B. Scope of the Admitted Contention**

Recent Commission decisions confirm that intervenors are not permitted to use testimony to change the scope of a contention as admitted by the Board. For example, in *Vogtle*, the Commission upheld a Board ruling excluding testimony that strayed beyond the scope of the bases as pled and admitted, because those bases “defined the scope of the . . . contention.”<sup>7</sup> In *Seabrook*, the Commission more recently confirmed that “an admitted contention is defined by its bases,”<sup>8</sup> and that licensing boards must specify each basis relied upon for admitting a contention.<sup>9</sup>

**C. Admissibility of Evidence**

NRC regulations governing the admissibility of evidence provide that only relevant, material, and reliable evidence will be admitted, and that material and irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.<sup>10</sup> Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to

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<sup>6</sup> *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-22, 70 NRC 640, 655 (2009).

<sup>7</sup> *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-01 (2010); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (stating that intervenors “may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset” because the Commission does “not allow distinctly new complaints to be added at will as litigation progresses”) (internal quotation marks omitted).

<sup>8</sup> *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC \_\_\_, slip op. at 11 n.50 (Mar. 8, 2012) (emphasis added) (citation omitted).

<sup>9</sup> *Id.*

<sup>10</sup> 10 C.F.R. § 2.337(a); *see also* 10 C.F.R. § 2.319(d) (stating that the presiding officer may strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative, or cumulative); *id.* § 2.319(e) (stating that the presiding officer may restrict irrelevant, immaterial, unreliable, duplicative, or cumulative evidence and/or arguments).

testimony and exhibits that are outside the scope of the admitted contention or the proceeding,<sup>11</sup> or that raise issues that were not properly presented in earlier pleadings.<sup>12</sup>

### **III. ARGUMENT**

#### **A. Scope of Proceeding and of Admitted Contention CW-EC-3A**

CW-EC-3A alleges that Entergy's ER and the NRC Staff's FSEIS contain flawed EJ analyses that fail to address alleged disparate severe accident impacts on EJ populations near Indian Point.<sup>13</sup> In admitting CW-EC-3A, the Board made clear it was *not* admitting a contention claiming that Indian Point emergency plans are deficient.<sup>14</sup> This restriction is wholly consistent with Commission case law and the Board's emphasis on the limited scope of license renewal.<sup>15</sup> Specifically, this Board rejected several contentions challenging the adequacy of emergency preparedness and evacuation planning, explaining that "the NRC Regulation dealing with emergency plans, 10 C.F.R. § 50.47(a)(1)(i), provides that no finding relating to emergency planning is necessary for issuance of a renewed nuclear power reactor operating license" and thus, "[t]his language places consideration of emergency plans outside the scope of this

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<sup>11</sup> See *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Licensing Board Memorandum and Order (Ruling on In Limine Motions) at 3-7 (Jan. 26, 2009) (unpublished) (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Licensing Board Order (Ruling on Pending Matters and Addressing Preparation of Exhibits for Hearing) at 2 (Mar. 24, 2008) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of a license renewal proceeding, because such issues "do not relate to aging and/or because they are addressed as part of ongoing regulatory processes").

<sup>12</sup> See *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Licensing Board Memorandum and Order (Ruling on In Limine Motions) at 2-4 (Feb. 23, 2009) (unpublished) (granting applicant and Staff motions in limine to strike portions on intervenor rebuttal testimony on the ground that the stricken testimony was not relevant to the admitted contention or to the applicant's and Staff's prefiled direct testimony); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).").

<sup>13</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 200-01 (2008); Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56, 60 (July 6, 2011) (unpublished) ("July 6, 2011 Order").

<sup>14</sup> See *Indian Point*, LBP-08-13, 68 NRC at 201.

<sup>15</sup> See *id.* at 149-150, 188.

*proceeding.*”<sup>16</sup> Since then, the Commission has confirmed that it is impermissible to use a license renewal NEPA contention to circumvent this bar against challenges to emergency plans in license renewal proceedings.<sup>17</sup> Accordingly, the scope of Clearwater’s NEPA Contention CW-EC-3A properly excludes challenges to existing emergency plans.

Because extensive portions of Clearwater’s pre-filed direct testimony challenged emergency plan adequacy and addressed non-EJ populations, Entergy previously filed a motion in limine seeking, among other things, to exclude such testimony.<sup>18</sup> The Board denied Entergy’s motion, but appeared to agree that emergency plan challenges and issues concerning non-EJ populations are outside the scope of CW-EC-3A and this proceeding.<sup>19</sup> In particular, the Board stated:

At evidentiary hearing, the Board is capable of distinguishing between disparaging comments against Indian Point’s emergency plans and Clearwater’s witnesses’ descriptions of how certain EJ populations will be adversely harmed by a severe accident compared to the general population. To the extent any populations that Clearwater’s witnesses describe do not fit within the definition of an EJ population and are not necessary to an EJ analysis, we will discount the weight of such evidence in ruling on the merits of the FSEIS’s EJ analysis.<sup>20</sup>

After Entergy and NRC Staff submitted direct testimony and position statements, Clearwater filed its rebuttal position statement and testimony, as well as associated new exhibits.

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<sup>16</sup> *Id.* at 149 (emphasis added) (rejecting proposed contention NYS-29); *see also id.* at 165-66 (rejecting proposed contention Connecticut EC-2).

<sup>17</sup> *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 302 (2010) (ruling that witness statements on “the issue of emergency planning—the need to provide accurate, ‘real time’ projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated” are beyond the scope of a license renewal severe accident mitigation alternative review).

<sup>18</sup> Entergy’s Motion in Limine to Exclude Portions of Clearwater’s Pre-Filed Testimony and Exhibits for Contention CW-EC-3A (Environmental Justice) (Jan. 30, 2012), *available at* ADAMS Accession No. ML12030A200.

<sup>19</sup> *See* Licensing Board Order (Granting in Part and Denying in Part Applicant’s Motion in Limine) at 34-35 (Mar. 6, 2012) (unpublished) (“March 6, 2012 Motion in Limine Order”)

<sup>20</sup> *Id.* at 35.

Not only does Clearwater continue to raise broad emergency planning challenges and issues concerning non-EJ populations, but Clearwater now also argues that the Board's March 6, 2012 Motion in Limine Order authorizes it to do so.<sup>21</sup> Thus, Clearwater has construed the Board's Order as license to inject even more irrelevant evidence in this proceeding. Although the Board can and should give no weight to Clearwater's previously-submitted testimony that challenges emergency plans and raises concerns related to non-EJ populations, Entergy respectfully submits that Clearwater's continued—and now expanded—disregard for such distinctions warrants the exclusion of portions of Clearwater's rebuttal submission that further challenge emergency plan adequacy and raise numerous issues concerning non-EJ populations. Notwithstanding the Board's capacity to disregard irrelevant evidence, such a ruling will promote a more orderly hearing by avoiding the introduction of, and response to, a substantial amount of new testimony that is not correctly admitted in the first place.<sup>22</sup>

**B. Portions of Ms. Greene's Rebuttal Testimony Should Be Excluded Because She (1) Challenges the Adequacy of Emergency Plans, and (2) Raises Issues Concerning Non-EJ Populations**

Clearwater seeks to have Ms. Manna Jo Greene testify in her professional capacity as Clearwater's Environmental Director based on her EJ experience.<sup>23</sup> As discussed below, the Board should exclude portions of Ms. Greene's rebuttal testimony.

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<sup>21</sup> See, e.g., Green Rebuttal Test. at A.3 (CLE000046) (asserting that "the Board substantiated Clearwater's claim that the EJ contention does not challenge the adequacy of emergency planning, but only seeks to emphasize the disparate context in which vulnerable EJ populations would find themselves . . . during a severe accident").

<sup>22</sup> Currently, Clearwater proposes to have *nine* witnesses testify at hearing, all of who raises challenges to existing emergency plans.

<sup>23</sup> Initial Prefiled Written Testimony of Manna Jo Greene Regarding Clearwater's Environmental Justice Contention EC-3A at A.2 (CLE000010).

# **1. Ms. Greene's Rebuttal Testimony Challenges the Adequacy of Emergency Plans**

As noted above, the adequacy of emergency plans is outside the scope of CW-EC-3A<sup>24</sup> and the Commission has confirmed that NEPA-based contentions cannot be used to challenge emergency planning.<sup>25</sup> Nonetheless, the majority of Ms. Greene's rebuttal testimony does just that. She summarizes a Dr. Redlener<sup>26</sup> presentation at a conference Clearwater co-sponsored entitled "Eyewitness Fukushima: What Emergency Responders Need to Know," concerning alleged generic vulnerabilities and challenges during evacuations and his belief that a "comprehensive evaluation" of emergency plan adequacy must be performed during a license renewal proceeding.<sup>27</sup> In this respect, Ms. Greene quotes Dr. Redlener as stating that "the fact that the evacuation plan inadequacy is out of scope is an absurdity."<sup>28</sup> Based on this presentation and an associated summary exhibit,<sup>29</sup> but ignoring the directly applicable Commission and Board direction discussed above, Ms. Greene claims that the following issues are within the scope of CW-EC-3A: shadow evacuations; psychological and emotional trauma for evacuees; secondary illness resulting from evacuation; elderly and disabled population needs during an evacuation; and the preparedness of communities that would receive evacuees.<sup>30</sup> Regardless of Ms. Greene's characterization of these issues as relevant to CW-EC-3A, all of these issues relate directly to the adequacy of emergency plans. Because the adequacy of emergency plans is not subject to

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<sup>24</sup> See *Indian Point*, LBP-08-13, 68 NRC 201; see also *id.* at 149, 165-66.

<sup>25</sup> See *Pilgrim*, CLI-10-11, 71 NRC at 302.

<sup>26</sup> According to Ms. Greene, Dr. Redlener a professor at Columbia University's Mailman School of Public Health and the director the University's National Center for Disaster Preparedness. Greene Rebuttal Test. at 3: A.7 (CLE000046).

<sup>27</sup> *Id.* at A.5 to A.18 (CLE000046).

<sup>28</sup> *Id.* at A.18 (CLE000046).

<sup>29</sup> Erwin Redlener, *Evacuation Planning: The Achilles Heel of Disaster Readiness* (March 2012) (CLE000056).

<sup>30</sup> Greene Rebuttal Test. at A.10 through A.14 (CLE000046).



challenge in this proceeding, this testimony and the associated summary exhibit are irrelevant. Accordingly, the evidence identified in Attachment 1 should be excluded.

## **2. Ms. Greene's Rebuttal Testimony Addresses Non-EJ Populations That Are Beyond the Scope of CW-EC-3A**

Portions of Ms. Greene's rebuttal testimony are irrelevant for an additional reason. The Board admitted CW-EC-3A with respect to the potential for disproportionately high, adverse impacts on *EJ populations* in the event of a severe accident.<sup>31</sup> Commission precedent and established guidance defines EJ populations as *low-income and minority* communities.<sup>32</sup> Further, the Commission has made clear that an EJ evaluation does not involve looking at "vaguely defined, shifting 'subgroups'" within low-income and minority communities "because the potential universe of aggrieved individuals and groups is . . . 'virtually infinite, limited only by one's imagination.'"<sup>33</sup>

Ms. Greene's rebuttal testimony ignores this precedent and expands the definition of EJ populations well beyond the scope of CW-EC-3A as admitted. Specifically, relying on an NRC Staff member's presentation entitled, "Environmental Justice and the NRC" (CLE000051),<sup>34</sup> she seeks to expand EJ populations and thus, the scope of CW-EC-3A as admitted, to encompass "(a)nyone without full access to, or protection from, the decision making process."<sup>35</sup> As such,

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<sup>31</sup> See *Indian Point*, LBP-08-13, 68 NRC at 200-01.

<sup>32</sup> See *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 64 (2001); *La. Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 100 (1998); Final Policy Statement; Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. at 52,040, 52,041 (Aug. 24, 2004) (ENT000260); LIC-203, Rev. 1, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues at D-4 (May 24, 2004) (ENT000261).

<sup>33</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 155-56 (2002).

<sup>34</sup> David Matthews, *Environmental Justice and the NRC: A Progression to Excellence* at 4 (CLE000051).

<sup>35</sup> Greene Rebuttal Test. at A.3 (CLE000046).

Ms. Greene testifies about individuals in daycare centers, nursing homes, hospitals, assisted living facilities, adult care and rehabilitation centers, jails, and numerous other subgroups.<sup>36</sup>

Ms. Greene's expanded EJ definition would open the floodgates to testimony regarding populations not permitted by relevant EJ precedent nor contemplated by this Board in admitting the contention. In doing so, it would introduce an area for testimony that would also be impossible to define or objectively limit.

Furthermore, to the extent that Ms. Green and other Clearwater witnesses seek to rely on an NRC Staff member presentation to introduce an expanded definition of EJ populations, that exhibit and associated testimony should be excluded as irrelevant and contrary to Commission precedent and NRC Staff guidance. The cited presentation does not address license renewal proceedings or Indian Point, but rather focuses on an EJ analysis in a single, new reactor proceeding. Moreover, that presentation is contrary to current, established Commission precedent and guidance<sup>37</sup> and Clearwater provides no indication that NRC, through this presentation by a single NRC Staff member, has changed its position on this issue. Accordingly, the evidence identified in Attachment 1 related to this issue should be excluded as irrelevant.

**B. Portions of Dr. Edelstein's Rebuttal Testimony and Report Should Be Excluded Because He (1) Challenges the Adequacy of Emergency Plans, (2) Raises Issues Concerning Non-EJ Populations, (3) Presents An Irrelevant Discussion of Entergy and NRC Staff Psycho-Social Motives, and (4) Challenges Binding Supreme Court Precedent**

Clearwater offers Dr. Michael Edelstein's expert rebuttal testimony and report to again raise issues related to emergency plan adequacy and the potential for radiological and "psycho-social" impacts of a severe accident. Dr. Edelstein focuses on the adequacy of emergency planning at Sing Sing, (and, more specifically, the facility's ability to shelter-in-place and

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<sup>36</sup> See *id.*

<sup>37</sup> See *supra* notes 32-33.

evacuate),<sup>38</sup> lessons learned from the Fukushima accident in Japan,<sup>39</sup> and alleged non-nuclear emergency planning and evacuation issues associated with Hurricane Katrina.<sup>40</sup> Dr. Edelstein also challenges Entergy's and the NRC Staff's ability to independently evaluate relevant EJ issues, including his own work, given various alleged biases based on psycho-social theories.<sup>41</sup> For the following reasons, the Board should exclude portions of Dr. Edelstein's rebuttal testimony and report.

### **1. Dr. Edelstein Challenges the Adequacy of Emergency Plans**

As noted above, there is no doubt that the adequacy of emergency plans is outside the scope of CW-EC-3A and license renewal. Nonetheless, extensive portions of Dr. Edelstein's rebuttal testimony and report challenge the adequacy of existing Indian Point emergency plans. Specifically, Dr. Edelstein challenges the effectiveness of sheltering-in-place as a protective action and the appropriateness of evacuation plans for people without private vehicles.<sup>42</sup> In addition, Dr. Edelstein purports to show "the failure of both shelter in place and evacuation" under his Sing Sing prison "worst-case" analysis.<sup>43</sup> This testimony is outside the scope of CW-EC-3A because NEPA does not require a worst-case analysis<sup>44</sup> and because the adequacy of emergency planning is not subject to challenge in this proceeding.

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<sup>38</sup> Michael Edelstein, Rebuttal to Respondents to Testimony on the Environmental Justice Contention Report at 10, § III to 22, ¶ 14 ("Edelstein Rebuttal Report") (CLE000058).

<sup>39</sup> *Id.* at 23-24 (Section § V concerning Fukushima) (CLE000058).

<sup>40</sup> *Id.* at 22, ¶ 16 to 23, ¶ 24 (CLE000058).

<sup>41</sup> *Id.* at 5, ¶ D to 9, ¶ M; 27 (paragraph beginning at "What is striking . . .") (CLE000058).

<sup>42</sup> *See, e.g.,* Edelstein Rebuttal Test. at 2: A.5 (CLE000047); Edelstein Rebuttal Report at 10, § III to 22 ¶ 15 (CLE000058).

<sup>43</sup> *See* Edelstein Rebuttal Report at 22 (CLE000058); *see generally id.* at 10-22.

<sup>44</sup> *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC \_\_\_, slip op. at 24 (Feb. 9, 2012); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 334 (1990).

Dr. Edelstein's rebuttal testimony and report also extensively discuss purported emergency planning and evacuation problems associated with Hurricane Katrina and the Fukushima accident in Japan.<sup>45</sup> For example, citing a February 2012 Greenpeace report, entitled "Lessons from Fukushima" (CLE000050), Dr. Edelstein asserts that existing plans for sheltering-in-place will "not work in practice" and that evacuations "may fail for institutionalized populations."<sup>46</sup> Such evidence should be excluded because the underlying referenced documents and associated testimony are irrelevant.

## **2. Dr. Edelstein's Rebuttal Testimony and Report Address Non-EJ Populations That Are Beyond the Scope of CW-EC-3A**

Portions of Dr. Edelstein's rebuttal testimony and report are irrelevant for an additional reason. CW-EC-3A concerns the potential for disproportionately high, adverse impacts on *EJ populations* in the event of a severe accident.<sup>47</sup> Commission precedent defines EJ populations as *low-income and minority* communities.<sup>48</sup> As explained previously, an EJ evaluation does not involve looking at "vaguely defined, shifting 'subgroups'" within low-income and minority communities.<sup>49</sup> Dr. Edelstein's testimony does not account for this precedent and focuses on potential severe accident impacts on transportation-dependent populations,<sup>50</sup> the elderly and infirm,<sup>51</sup> and emergency responders.<sup>52</sup> As justification for this departure from Commission precedent and guidance, Dr. Edelstein cites the same NRC Staff member presentation discussed

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<sup>45</sup> See Edelstein Rebuttal Test. at A.10 to A.11 (CLE000047); Edelstein Rebuttal Report at 19-20; 22, ¶ 16 to 24 (CLE000058).

<sup>46</sup> Edelstein Rebuttal Report at 23, ¶ 3; 24 ¶ 5 (CLE000058).

<sup>47</sup> See *Indian Point*, LBP-08-13, 68 NRC at 200-01.

<sup>48</sup> *Hydro Res.*, CLI-01-4, 53 NRC at 64; *La. Energy Services*, CLI-98-3, 47 NRC at 100.

<sup>49</sup> *Private Fuel Storage*, CLI-02-20, 56 NRC at 155-56.

<sup>50</sup> See Edelstein Rebuttal Test. at 3: A.8, A.11 (CLE000047); Edelstein Rebuttal Report at 22, ¶ 15 (CLE000058).

<sup>51</sup> See Edelstein Rebuttal Test. at A.11 (CLE000047); Edelstein Rebuttal Report at 10, ¶ 5, 23-24, ¶ 3 (CLE000058).

<sup>52</sup> See Edelstein Rebuttal Report at 22, ¶ 14 (CLE000058).

above with respect to Ms. Greene’s testimony.<sup>53</sup> Because none of this testimony concerns impacts associated with severe accidents on EJ populations, as defined by governing Commission precedent, none of this evidence is relevant.

**3. Dr. Edelstein’s Statements Concerning Entergy’s and NRC Staff’s Psycho-Social Motives for the EJ Evaluations Are Irrelevant**

The Board should also exclude as irrelevant Dr. Edelstein’s psycho-social theories about why Entergy and NRC Staff have taken their respective positions on CW-EC-3A. In particular, Dr. Edelstein’s references to the “revolving door between the NRC and the nuclear industry,” “common culture of the industry,” and “group think” add nothing to understanding the potential for significant and disparate impacts to EJ populations—the only relevant issue within the scope of CW-EC-3A.<sup>54</sup> Likewise, his views on the “group heuristics,” the “fallacy of low probability,” “regulatory complacency,” the “fallacy of mitigation,” and “regulatory capture” are equally irrelevant.<sup>55</sup> Accordingly, Dr. Edelstein’s testimony identified in Attachment 1 should be excluded.<sup>56</sup>

**4. Appendix 1 to Dr. Edelstein’s Rebuttal Report Contains An Irrelevant Critique of Binding U.S. Supreme Court Precedent**

The Board also should exclude Exhibit CLE000059, which contains an excerpt from Dr. Edelstein’s 2004 book, entitled “Contaminated Communities: Coping with Residential Toxic Exposure.”<sup>57</sup> That exhibit contains a three-page criticism of the Supreme Court’s

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<sup>53</sup> See Edelstein Rebuttal Test. at A.9 (CLE000047).

<sup>54</sup> See Edelstein Rebuttal Report at 27 (CLE000058).

<sup>55</sup> See *id.* at 6-9.

<sup>56</sup> See July 6, 2011 Order at 57 (rejecting amendment to CW-EC-3 that focused on DSEIS commenter motives rather than substantive issues).

<sup>57</sup> Appendix 1, To Rebuttal Report of Michael Edelstein, *Excerpt from Contaminated Communities: Coping with Residential Toxic Exposure, 2nd Edition*. Boulder: Westview Press, 2004 (CLE000059) (“App. 1 to Rebuttal Report”).

*Metropolitan Edison* decision.<sup>58</sup> According to Dr. Edelstein, the Supreme Court's decision was "troublesome" and had a "chilling effect on subsequent opportunities to consider psycho-social impacts in NEPA review."<sup>59</sup> The Commission and the Board, however, are obligated to follow Supreme Court precedent. As such, Dr. Edelstein's criticism and disapproval of the *Metropolitan Edison* decision is irrelevant. Accordingly, Appendix 1 to Dr. Edelstein's Rebuttal Report (CLE000059) should be excluded from the record as irrelevant.

C. **Dr. Kanter's Rebuttal Testimony Should Be Excluded In Its Entirety Because He (1) Challenges the Adequacy of Emergency Plans, (2) Raises Issues Concerning Non-EJ Populations, and (3) Improperly Raises Irrelevant New Claims Concerning Environmental Impacts from Terrorist Attacks**

Clearwater offers a new witness, Dr. Andrew S. Kanter, President of the Board of Directors of Physicians for Social Responsibility ("PSR"), to testify as an expert on emergency planning issues, including the public health response to a nuclear accident.<sup>60</sup> As discussed below, the Board should exclude irrelevant portions of Dr. Kanter's testimony identified in Attachment 1.

1. **Dr. Kanter's Rebuttal Testimony Challenges the Adequacy of Emergency Plans**

As noted above, the adequacy of emergency plans is outside the scope of CW-EC-3A. Essentially all of Dr. Kanter's rebuttal testimony amounts to a challenge to existing Indian Point emergency plans. For example, Dr. Kanter asserts that "evacuation plans must take into account the need to relocate all affected populations within a contaminated zone for the long term,"<sup>61</sup> that "coordinating the relocation of tens of thousands of patients in a very short period of time, including the need for transportation, security, portable medical devices, etc., would be

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<sup>58</sup> See *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983).

<sup>59</sup> App. 1 to Rebuttal Report at 1, 3 (CLE000059).

<sup>60</sup> See Kanter Rebuttal Testimony at A.1 to A.2 (CLE000048).

<sup>61</sup> *Id.* at A.5.

impossible,” and that “procedures for allocating scare [sic] resources in the case of an incident such as an accident at Indian Point are not only unproven, but are unlikely to perform as expected during an actual accident.”<sup>62</sup> Dr. Kanter further asserts that Federal Emergency Management Agency (“FEMA”) “review of the evacuation plans and the associated drills are insufficient to ensure that the protection of the public’s health.”<sup>63</sup> Because the adequacy of existing emergency plans is not subject to challenge in this proceeding, none of this testimony is relevant. Accordingly, Dr. Kanter’s irrelevant testimony and the associated exhibits identified in Attachment 1 should be excluded.

## **2. Dr. Kanter’s Rebuttal Testimony Addresses Non-EJ Populations That Are Beyond the Scope of CW-EC-3A**

Most of Dr. Kanter’s rebuttal testimony is irrelevant for an additional reason. CW-EC-3A concerns the potential for disproportionately high, adverse impacts on *EJ populations* in the event of a severe accident.<sup>64</sup> Commission precedent defines EJ populations as *low-income and minority* communities.<sup>65</sup> As discussed previously, an EJ evaluation does not involve looking at “vaguely defined, shifting ‘subgroups’” within low-income and minority communities.<sup>66</sup> Dr. Kanter’s testimony does not account for this precedent and aside from a passing reference to minority populations and the economically disadvantaged having a higher burden of illness and reliance on health care facilities, focuses on potential severe accident impacts on transportation-dependent populations, the elderly and infirm, prisoners, and essentially all institutionalized

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at A.9.

<sup>64</sup> *See Indian Point*, LBP-08-13, 68 NRC at 200-01.

<sup>65</sup> *Hydro Res.*, CLI-01-4, 53 NRC at 64; *La. Energy Services*, CLI-98-3, 47 NRC at 100.

<sup>66</sup> *Private Fuel Storage*, CLI-02-20, 56 NRC at 155-56.

populations.<sup>67</sup> Because this testimony focuses on impacts associated with severe accidents on non-EJ populations, as defined by governing Commission precedent, none of this evidence is relevant.

### **3. Dr. Kanter's Rebuttal Testimony Inappropriately Presents New Terrorist Attack-Related Environmental Impact Claims**

The majority of Dr. Kanter's testimony relies on the 2006 PSR report entitled "The U.S. and Nuclear Terrorism Still Dangerously Unprepared."<sup>68</sup> Dr. Kanter further discusses nuclear reactor accidents caused by a "willful attack."<sup>69</sup>

As an initial matter, the Commission—and this Board—have consistently held that the NRC does not need to consider, as part of its environmental review, terrorist attacks on nuclear power plants.<sup>70</sup> Accordingly, Dr. Kanter's testimony discussing the PSR report and "willful attacks" is irrelevant and should be excluded.

Furthermore, Dr. Kanter's testimony discussing the PSR report should also be excluded because: (1) Clearwater failed to disclose the PSR report, contrary to 10 C.F.R. § 2.336(a); (2) Clearwater failed to offer the PSR report as an exhibit, contrary to the requirements of the Board's Scheduling Order;<sup>71</sup> and (3) Dr. Kanter's testimony about the PSR report constitutes a new argument impermissibly included for the first time in rebuttal. With respect to the latter,

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<sup>67</sup> See Kanter Rebuttal Test. at A.5, A.11 (CLE000048).

<sup>68</sup> *Id.* at A.5 & n.3 (CLE000048).

<sup>69</sup> *Id.* at A.9.

<sup>70</sup> See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007) (holding that impacts associated with terrorist attacks are "simply too far removed from the natural or expected consequences of agency action to require a study under NEPA."); *Indian Point*, LBP-08-13, 68 NRC at 143 ("[W]e are nonetheless bound by the Commission's ruling in *Oyster Creek* 'that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.'").

<sup>71</sup> See Scheduling Order at 14 ("The exhibits shall include all documents that the party or its witnesses refer to, use, or rely upon for their statements or position. If such documents are not attached, the Board will not consider them for any purpose in making findings of fact.").



Dr. Kanter's rebuttal testimony asserts, for the first time, that the 2006 PSR report and its discussion of a hypothetical attack on the Braidwood nuclear power plant is relevant to CW-EC-3A.<sup>72</sup> In particular, Dr. Kanter testifies about the Braidwood assessment that used the Hazard Prediction and Assessment Capability ("HPAC") model and then extrapolates the Braidwood results to Indian Point. Such testimony constitutes entirely new information that is not within the proper scope of a rebuttal filing and is prejudicial to Entergy and the NRC Staff.

Moreover, Clearwater makes no attempt to explain its belated reliance on Dr. Kanter or the PSR report. In fact, Clearwater does not offer a credible reason for its belated reliance on the PSR report given that it has existed for six years. Accordingly, the evidence identified in Attachment 1 should be excluded because the underlying report was not disclosed or included as an exhibit, and because Clearwater's associated testimony constitutes entirely new information that Entergy could not have reasonably anticipated.

**D. Portions of Clearwater's Rebuttal Position Statement Should Be Excluded and Accorded No Weight**

Clearwater discusses much of the preceding testimony and supporting evidence in its Rebuttal Position Statement.<sup>73</sup> That Statement is not evidence in this proceeding,<sup>74</sup> but may nevertheless be subject to a motion in limine or motion to strike.<sup>75</sup> Therefore, to the extent the Board grants this Motion and excludes evidence identified in Attachment 1, the associated

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<sup>72</sup> See Kanter Rebuttal Test. at 4-5 (CLE000048).

<sup>73</sup> Rebuttal Position Statement at 11-15, 22-28 (CLE000045).

<sup>74</sup> See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Hearing Directives) at 2 n.2 (Sept. 12, 2007) (unpublished). This Board has noted that a position statement is a party's legal interpretation of its evidence, not its actual evidence, and that the Board will use it inasmuch it is supported by the evidence proffered by that party. See March 6, 2012 Motion in Limine Order at 24.

<sup>75</sup> See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 1-2 (Aug. 9, 2007) (unpublished); *Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), Order (Rulings on Motions to Strike and Motions in Limine) at 2-3 (July 16, 2008) (unpublished).

discussions in the Rebuttal Position Statement should be excluded or accorded no weight in the Board's merits decision on CW-EC-3A.

#### **IV. CONCLUSION**

For the foregoing reasons, the Board should exclude the portions of Clearwater's rebuttal testimony and exhibits discussed above and identified in Attachment 1 to this Motion.

Respectfully submitted,

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Dated in Washington, D.C.  
this 30th day of July 2012

**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 30, 2012	

**MOTION CERTIFICATION**

Pursuant to 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he made a sincere effort to contact the other parties in this proceeding, 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 NRC Staff indicated that it supports Entergy's Motion and is filing its own motion in limine. Clearwater opposes the motion.

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**ENTERGY'S MOTION IN LIMINE FOR  
CW-EC-3A (ENVIRONMENTAL JUSTICE)  
ATTACHMENT 1**

Exclusion Chart

**Entergy Attachment 1 to Motion In Limine to Exclude Portions of Clearwater’s Rebuttal Testimony and Exhibits for Contention CW-EC-3A (Environmental Justice)**

Location of Information to Be Excluded	Basis for Exclusion
<b>CLE000046: Greene Testimony</b>	
Pages 2-7: Q4 through A20, exclude entirety.	This portion of the Greene Testimony challenges the adequacy of emergency plans.
Pages 1-2: Q3 & A3, exclude entirety.	This portion of the Greene Testimony addresses non-EJ populations that are beyond the scope of CW-EC-3A.
<b>CLE000047: Edelstein Testimony</b>	
Page 2: Q5 through A6, exclude entirety.	These portions of the Edelstein Testimony challenge the adequacy of emergency plans.
Page 3, Q8 & A8, exclude entirety.	
Pages 4-6: Q10 through A11, exclude entirety.	
Page 3: Q8 & A8, exclude entirety.	This portion of the Edelstein Testimony addresses non-EJ populations that are beyond the scope of CW-EC-3A.
Pages 3-4: Q9 & A9, exclude entirety.	
Pages 5-6: Q11 & A11, exclude entirety.	
<b>CLE000058: Edelstein Rebuttal Report</b>	
Pages 5-9: §§ II.D through II.M, exclude entirety.	These portions of the Edelstein Report present an irrelevant discussion of Entergy and NRC Staff psycho-social motives.
Page 27: exclude entire paragraph beginning, “What is striking . . .”	
Pages 10-24: §§ III, IV, and V, exclude entirety.	This portion of the Edelstein Report challenges the adequacy of emergency plans.
Page 10: § III.5 exclude entirety.	This portion of the Edelstein Report addresses non-EJ populations that are beyond the scope of CW-EC-3A.
Page 22: exclude entire section beginning, “Most obviously . . .” through section 15.	
Pages 23-24: § V, exclude entirety.	
<b>CLE000059: Edelstein Rebuttal Report, Appendix I</b>	
Exclude entirety.	This exhibit contains an irrelevant critique of binding U.S. Supreme Court precedent.
<b>CLE000048: Kanter Testimony</b>	
Exclude entirety.	The Kanter Testimony challenges the adequacy of emergency plans and addresses non-EJ populations that are beyond the scope of CW-EC-3A.
Pages 4-5: exclude entire paragraph beginning, “In an analysis . . .”	These portions of the Kanter Testimony improperly present new terrorist attack-

<b>Location of Information to Be Excluded</b>	<b>Basis for Exclusion</b>
Page 8: Q.9 & A.9, exclude entire sentence beginning, “Not only is it possible . . .”	related environmental impact claims associated with the 2006 PSR report, which Clearwater did not disclose or submit as an exhibit.
<b><i>CLE000050: Greenpeace Report, “Lessons from Fukushima” (February 2012)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans. <i>See</i> Edelstein Testimony at 5 (CLE000047); Edelstein Rebuttal Report at 8, paragraph L; 23, paragraph V.3 (CLE000058).
<b><i>CLE000051: Environmental Justice and the NRC: A Progression to Excellence (2012)</i></b>	
Exclude entirety.	Relied upon to expand the definition of EJ beyond NRC precedent and the scope of CW-EC-3A. <i>See</i> Greene Rebuttal Testimony at 2: A.3 (CLE000046).
<b><i>CLE000052: “Japanese earthquake takes heavy toll on ageing population” (The Guardian, March 17, 2011)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations (elderly). <i>See</i> Edelstein Testimony at 5 (CLE000047).
<b><i>CLE000053: “Panel Says Crisis Showed Facilities’ Terrorism Risks” (Wall Street Journal)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations (general hospital populations). <i>See</i> Edelstein Testimony at 6 (CLE000047).
<b><i>CLE000054: “AP Enterprise: Nuke Evaluation fatal for old, sick” (Associated Press, March 10, 2012)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations (sick and elderly). <i>See</i> Edelstein Testimony at 5 (CLE000047).
<b><i>CLE000055: “573 deaths ‘related to nuclear crisis’” (Daily Yomiuri, February 5, 2012)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations. <i>See</i> Edelstein Testimony at 6 (CLE000047).
<b><i>CLE000056: “An accident waiting to happen? Populations around U.S. nuclear plants have grown 450% since 1980” (Daily Mail, June 27, 2011)</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations (non-car owners). <i>See</i> Edelstein Testimony at 3 (CLE000047).
<b><i>CLE000057: Irwin Redlener, “Evacuation Planning: The Achilles Heel of Disaster</i></b>	

Location of Information to Be Excluded	Basis for Exclusion
<b><i>Readiness”</i></b>	
Exclude entirety.	Relied upon to challenge the adequacy of emergency plans and raise issues concerning non-EJ populations (general population, those with chronic illness, etc.). <i>See</i> Greene Testimony at 3-7 (CLE000046).
<b><i>CLE000045: Hudson River Sloop Clearwater, Inc. Rebuttal Statement Supporting Contention EC-3A Regarding Environmental Justice (June 28, 2012)</i></b>	
Pages 13-15: § IV.A, exclude entirety.	These portions of the Position Statement challenge the adequacy of emergency plans.
Pages 22-28, § V, exclude entirety.	
Pages 11-13: § III.B, exclude entirety.	This portion of the Position Statement raises issues regarding EJ definitions and methodology that are beyond the scope of CW-EC-3A and controlling precedent.

**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 30, 2012

**CERTIFICATE OF SERVICE**

I certify that on July 30, 2012, a copy of the “Entergy’s Motion in Limine to Exclude Portions of Clearwater’s Rebuttal Filings on Contention CW-EC-3A (Environmental Justice)” was served electronically via the Electronic Information Exchange on the following recipients.

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