

July 30, 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 MOTION IN LIMINE TO EXCLUDE CERTAIN
REBUTTAL EXHIBITS FILED BY THE STATE OF NEW YORK
CONCERNING CONTENTION NYS-5 (BURIED PIPES AND TANKS)

INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319, 2.323, 2.337, 2.1204, and the Atomic Safety and Licensing Board's ("Board") scheduling Order of July 1, 2010, and Order (Granting Unopposed Extension of Time) of May 16, 2012, the staff of the U.S. Nuclear Regulatory Commission ("Staff") files this Motion *in Limine* to exclude the following matters from the State of New York's ("New York") evidentiary filings of June 29, 2012 concerning Contention NYS-5 (Buried Pipes and Tanks):

1. Exhibit ("Ex.") NYS000400, Transcript of hearing held on July 23, 2008, in *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station); and
2. Exhibit NYS000401, Excerpt from Appendix B to the License Renewal Application for Grand Gulf Nuclear Station.
3. Exhibit NYS000402, Declaration of Janice A. Dean (June 29, 2012), attesting to the authenticity of the Ex. NYS000400 and NYS000401.

Significantly, none of these materials relates to the Indian Point license renewal application, and none of them are discussed in the testimony of New York's witness regarding this contention.

See Ex. NYS000399, "Pre-Filed Written Rebuttal Testimony of Dr. David J. Duquette Regarding

Contention NYS-5” (“Duquette Rebuttal Testimony”), *passim*. Rather, the exhibits are relied upon solely by Counsel for New York, to support various legal arguments in New York’s Revised Statement of Position (Ex. NYS000398).¹ The documents lack a proper sponsoring witness – and indeed, lack any sponsoring witness – and are neither reliable nor relevant and material to the Board’s consideration of the adequacy of the Indian Point license renewal application. Moreover, they do not constitute rebuttal evidence filed in response to any testimony presented by the other parties, but rather, relate to claims that could have been, but were not, presented in New York’s initial statement of position filed in December 2011. These three documents should therefore be excluded from the evidentiary record of this proceeding.²

DISCUSSION

I. Legal Standards Governing Motions in Limine

As this Board has previously recognized, 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

¹ See Exhibit NYS000398 (“State of New York’s Revised Statement of Position Regarding the Adequacy of Entergy’s Aging Management Program for Buried Pipes and Tanks (Contention NYS-5)” (“Revised SOP”), at 8 (discussing Ex. NYS000400); and 15 n.13 (discussing Ex. NYS000401).

² Similarly, the related portions of New York’s Revised SOP (see note 1, *supra*), should be disregarded as unreliable, irrelevant, immaterial and lacking any proper foundation.

Moreover, New York’s Revised SOP presents extensive arguments on entirely new issues, regarding the legal acceptability of licensee commitments (as distinct from the adequacy of those commitments), and the public’s right to a hearing on a license amendment as compared to a licensee commitment. See Ex. NYS000398 (Revised SOP) at 7-13. These issues are outside the scope of this contention as admitted, and are beyond the scope of any testimony that has been filed in the proceeding by Entergy, the Staff, or even New York itself (which only addressed enforcement (see NYS000399 at 19). Indeed, these arguments were not even raised in New York’s original SOP (Ex. NYS000163), filed in December 2011. New York’s introduction of these issues in its Revised SOP constitutes a belated and impermissible attempt to expand the scope of Contention NYS-5, without affording other parties any opportunity to address them. New York’s belated attempts to introduce these arguments in its Revised SOP should therefore be rejected in their entirety.

practicable.” Order (Granting in Part and Denying in Part Applicant’s Motions in Limine) (“Order”) (March 6, 2012), at 3, *citing* 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 written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and may “[r]estRICT irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments.” *Id.*, *citing* 10 C.F.R. § 2.319(d)-(e).

NRC hearings are limited to the scope of the admitted contentions. As the Board recognized in its Order of March 6, 2012, “the Commission has cautioned against allowing ‘distinctly new complaints to be added at will as litigation progresses, [and thereby] stretching the scope of admitted contentions beyond their reasonably inferred bounds.” *Id.* at 3-4, *citing* *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added by the Board).

In this regard, 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).³ 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

³ *Accord, Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 401 (2005); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), 2009 NRC LEXIS 13 (Feb. 23, 2009), at 6-7.

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, 75 NRC ___, ___

(Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).⁴

Further, for rebuttal testimony, the scope is more limited. In addition to being restricted to the matters raised in the contention, rebuttal testimony may be admitted only insofar as it is responsive to the other parties’ statements of position and evidentiary submissions. Thus, the Board has stated that “Intervenors should not revise their entire original statements of position but rather present only responsive arguments.”⁵ Moreover, rebuttal testimony may only

⁴ In addition, an expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. The proponent of the testimony bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

⁵ Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) at 1 (Apr. 18, 2012). *Accord, Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-15, 63 NRC 591, 620 (2006) (reciting the Board’s action striking portions of prefiled rebuttal testimony “that fell outside the scope of any admitted contention and/or the permissible scope of rebuttal testimony”).

address matters which the party could not have raised earlier; it may not raise matters for the first time that reasonably should have been, but were not raised in the party's case-in-chief.⁶

II. The Documents Are Not Relevant to the Indian Point License Renewal Application.

None of the three documents addressed in this Motion have any relevance or evidentiary value in assessing the adequacy of the Indian Point license renewal application ("LRA"). They should therefore be excluded from evidence. The first document, Ex. NYS000400, constitutes an excerpt from the July 23, 2008, hearing transcript in *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), in which Administrative Judge Karlin made certain remarks of a legal nature. In his remarks, Judge Karlin neither addressed the facts at issue in the Indian Point license renewal proceeding nor stated a legal ruling that has any precedential effect in this proceeding. While New York may well agree with Judge Karlin's remarks, those remarks have no evidentiary value in this proceeding. Indeed, New York's expert, Dr. Duquette, never cited this document in his testimony,⁷ and New York's only reason for seeking its admission is to support legal arguments

⁶ See, e.g., *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 655 (2009) ("Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement"); *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), 2007 NRC LEXIS 54 (April 17, 2007), at 9 ("Being in the nature of rebuttal, the response is not to advance any new affirmative claims or arguments that reasonably should have been, but were not, included in the party's previously-filed initial written statement"); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), 2006 NRC LEXIS 64 (March 1, 2006), at 6 ("Being in the nature of rebuttal, the response and rebuttal testimony are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously-filed initial written statement") *Rockwell International Corp. Rocketdyne Division* (Special Material License Number SNM-21), LBP-89-27, 30 NRC 265, (1989) (permitting rebuttal testimony "only with respect to new or surprise material" included in the opposing party's submittals).

⁷ See Ex. NYS000399, *passim*.

presented in its Revised Statement of Position.⁸ The *Vermont Yankee* transcript excerpts (Ex. NYS000400) should therefore be excluded from the evidentiary record in this proceeding.

Similarly, Ex. NYS000401 has no evidentiary bearing in this proceeding. This document is an excerpt from Appendix B to the License Renewal Application (“LRA”) for the Grand Gulf Nuclear Station. The document does not discuss the Indian Point LRA, was not cited by New York’s expert witness in his testimony (Ex. NYS000399), and has no evidentiary value in this proceeding. To the contrary, New York seeks to introduce this document to support an argument in its Revised Statement of Position that “certain nuclear plants” owned by Entergy (pointing to Grand Gulf) propose to protect buried piping in a different manner than is proposed for Indian Point.⁹ This assertion is irrelevant: Over 70 U.S. nuclear power plants have received renewed licenses; each plant site has unique site-specific soil conditions and piping, and the aging management programs (“AMPs”) for each plant must be evaluated for adequacy based upon the plant’s LRA and plant-specific considerations. Indeed, the manner in which Grand Gulf, or any other plant, has proposed to protect buried piping at its site is irrelevant to a determination whether Indian Point’s site-specific AMP for buried piping is adequate. In sum, Ex. NYS000401 is irrelevant and should be excluded from evidence.

⁸ See Ex. NYS000398 (“State of New York’s Revised Statement of Position Regarding the Adequacy of Entergy’s Aging Management Program for Buried Pipes and Tanks (Contention NYS-5)” (“Revised SOP”), at 8 (discussing Ex. NYS000400).

⁹ See Ex. NYS000398 (Revised SOP), at 15 n.13 (discussing Ex. NYS000401). In this regard, New York states (*id*):

Entergy’s reluctance to install cathodic protection for underground piping and tanks at Indian Point is curious given the company’s recent use of cathodic protection for components of certain nuclear plants owned by regulated Entergy subsidiaries. See, e.g., October 28, 2011 Grand Gulf License Renewal Application, Appendix B, at B-25 [] (NYS000401) (new cathodic protection system installed in December 2009).

Finally, the Declaration of New York Assistant Attorney General Janice Dean (Ex. NYS000402), attesting to the authenticity of the preceding two exhibits, is irrelevant and should be excluded from evidence. Ms. Dean's Declaration has no evidentiary value, and has no effect other than to attest to the authenticity of the preceding two exhibits. Like those two exhibits, Ms. Dean's Declaration does not relate to the Indian Point LRA and was not discussed in the testimony of New York's witness on this contention.¹⁰ Rather, this exhibit (like the preceding two exhibits), are relied upon solely by Counsel for New York, to support its legal arguments in New York's Revised Statement of Position (Ex. NYS000398).

III. The Documents Should Be Excluded for Other Reasons as Well.

In addition to lacking relevance, Exhibits NYS000400 and NYS000401 lack a proper sponsoring witness – and indeed, lack any sponsoring witness – who could explain the circumstances pertinent to each and defend New York's proposed use of the document in New York's Revised Statement of Position. Thus, New York has not proffered any witness who could testify as to whether (a) Administrative Judge Karlin's remarks have any applicability to Indian Point's AMP for buried piping, or (b) the soil conditions and piping at Grand Gulf are substantially similar to the circumstances present at Indian Point as well. In the absence of any such witnesses, the evidentiary value of these proposed exhibits is altogether lacking.

Finally, the three exhibits discussed herein do not constitute rebuttal evidence filed in response to any testimony presented by the other parties, but rather, relate to claims that could have been, but were not, presented in New York's initial statement of position filed in December

¹⁰ See Ex. NYS000399 (Duquette Rebuttal Testimony), *passim*.

2011. For this reason, too, the proposed exhibits should be excluded from the evidentiary record of this proceeding.¹¹

CONCLUSION

Proposed exhibits NYS000400, NYS000401 and NYS000402 do not relate to the Indian Point license renewal application, and are not discussed in the testimony of New York's witness regarding this contention. Rather, the exhibits are relied upon solely to support various legal arguments in New York's Revised Statement of Position (Ex. NYS000398). The documents are neither reliable nor relevant and material to the Board's consideration of the adequacy of the Indian Point LRA, and lack a proper sponsoring witness. Moreover, the documents do not constitute rebuttal evidence filed in response to any testimony presented by the other parties, but rather, relate to claims that could have been, but were not, presented in New York's initial statement of position filed in December 2011. These three documents should therefore be excluded from the evidentiary record of this proceeding.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 30th day of July 2012

¹¹ Similarly, the related portions of New York's Revised SOP (see note 1, *supra*), should be disregarded as unreliable, irrelevant, immaterial and lacking any proper foundation.

CERTIFICATION OF COUNSEL

Pursuant to 10 C.F.R. § 2.323(b), the undersigned attorney hereby certifies that he has made a sincere effort to contact the State of New York and Entergy Nuclear Operations, Inc., to resolve the issues raised in this Motion. Counsel for the Applicant has stated that the Applicant supports this motion; Counsel for New York stated that New York opposes the motion. Thus, Counsel's efforts to resolve these issues have been unsuccessful.

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Dated at Rockville, Maryland
this 30th day of July 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-LR/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that the foregoing "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE CERTAIN REBUTTAL EXHIBITS FILED BY THE STATE OF NEW YORK CONCERNING CONTENTION NYS-5 (BURIED PIPES AND TANKS)" dated July 30, 2012, 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 30th day of July, 2012.

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