

**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

**ENTERGY'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF
NEW YORK STATE'S REBUTTAL FILINGS ON CONTENTION NYS-16B**

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I. INTRODUCTION

On June 29, 2012, New York State (“NYS”) filed its revised statement of position, rebuttal testimony, and associated exhibits on Contention NYS-16B. The Contention challenges the adequacy of the future population estimate used in Entergy’s severe accident mitigation alternatives (“SAMA”) analysis for Indian Point Nuclear Generating Units 2 and 3 (“IP2” and “IP3”; collectively, Indian Point Energy Center, or “IPEC”).

In accordance with 10 C.F.R. §§ 2.1204, 2.319, 2.323, 2.337, the Atomic Safety and Licensing Board’s (“Board”) Scheduling Order of July 1, 2010, and subsequent Order dated May 16, 2012,¹ Entergy Nuclear Operations, Inc. (“Entergy”) hereby timely moves to exclude:

(1) portions of the Rebuttal Testimony of Dr. Stephen C. Sheppard, Ph.D. Regarding Contention NYS-16/16A/16B (“NYS-16B”) (June 29, 2012) (NYS000404) (“Sheppard Rebuttal Testimony”), and (2) related portions of the State of New York Revised Statement of Position [on] Contention NYS-16/16A/16B (“NYS-16B”) (NYS000403) (“NYS Revised Position Statement”). As discussed below, the portions of the Sheppard Rebuttal Testimony identified below and in Attachment 1 should be excluded from evidence pursuant to 10 C.F.R. §§ 2.319 and 2.337(a), or accorded no weight, because they: (1) are beyond the scope of the admitted contention and proper

¹ Licensing Board Order (Granting Unopposed Extension of Time) (May 16, 2012) (unpublished).

rebuttal testimony, and (2) lack the technical foundation required by 10 C.F.R. § 2.337(a) for expert opinion or testimony.

II. LEGAL STANDARDS

A. Scope of Rebuttal Testimony

10 C.F.R. § 2.1207 addresses the general process and schedule for submission of evidentiary presentations in hearings conducted pursuant to 10 C.F.R. Part 2, Subpart L. In particular, 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 or arguments that should have been, but were not, included in the party’s previously filed initial written statement.”²

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.”³ In *Seabrook*, the Commission more recently confirmed that “an admitted contention is defined by its bases,”⁴ and that licensing boards must specify each basis relied upon for admitting a contention.⁵

² *Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-22, 70 NRC 640, 655 (2009).

³ *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-101 (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)).

⁴ *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).

⁵ *Id.*

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.⁶ Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to testimony and exhibits that are outside the scope of the admitted contention or the proceeding,⁷ or that raise issues that were not properly presented in earlier pleadings.⁸

1. Expert Qualifications

An expert's opinion is admissible only if it is offered by an individual who has demonstrated his or her qualification to provide expert testimony on the specific technical subject at issue.⁹ An expert's opinion is also admissible "only if the factual basis for that opinion is adequately stated and explained in the affidavit."¹⁰ "A witness may qualify as an expert by

⁶ 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).

⁷ *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").

⁸ *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).").

⁹ *See Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), Licensing Board Order (Ruling on Motions to Strike and Motions in Limine) at 7-8 (July 16, 2008) (unpublished) ("Vermont Yankee Order") (granting in part motion to exclude opinion testimony proffered by an individual outside of demonstrated expertise); 10 C.F.R. § 2.319(d); *see also Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982) (upholding Licensing Board conclusion that witness lacked sufficient expertise to testify).

¹⁰ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 81 (2005) (citing *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990); *United States v. Various Slot*

knowledge, skill, experience, training, or education to testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”¹¹

An individual’s admission of lack of expertise in a particular topic is grounds for exclusion of any expert witness testimony on that topic.¹² Similarly, opinion testimony is only admissible if it is based on the “methods and procedures of science” rather than on “subjective belief or unsupported speculation.”¹³ When the qualifications of an expert witness are challenged, the party sponsoring the witness has the burden of demonstrating that the witness is qualified.¹⁴

2. Bases of Expert Opinion Testimony

An expert’s opinion is admissible only if the opinion would assist the trier of facts in understanding the evidence or to determine a fact in issue.¹⁵ Further, an expert’s opinion must be based not only on sufficient facts or data, but also on reliable principles and methods, which the witness must reliably apply to the facts of the case.¹⁶ Thus, “[a]n expert opinion that merely states a conclusion ... without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the

Machs. on Guam, 658 F.2d. 697, 700 (9th Cir. 1981)). Thus, Boards may look to federal cases and the Federal Rules of Evidence as sources of authority for evaluating the admissibility of expert witness testimony. *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2187 (Jan. 14, 2004) (“Although the Commission has not required the application of the Federal Rules of Evidence in NRC adjudicatory proceedings, presiding officers and Licensing Boards have always looked to the Federal Rules for guidance in appropriate circumstances.”).

¹¹ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27-28 (2004) (alteration in original omitted) (internal quotation marks omitted).

¹² *See, e.g., Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614-15 (7th Cir. 1993) (excluding expert testimony of a doctor who admitted that his theory of causation lay outside his field of expertise); *Centricut, LLC v. ESAB Group, Inc.*, 390 F.3d 1361, 1368 (Fed. Cir. 2004) (individual who admitted, based on his education and experience, that he was not an expert on relevant topic was not qualified to offer expert testimony on that topic).

¹³ *Savannah River*, LBP-05-4, 61 NRC at 98-99 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993)) (disqualifying expert for certain purposes).

¹⁴ *See Catawba*, CLI-04-21, 60 NRC at 27; *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-410, 5 NRC 1398, 1405 (1977).

¹⁵ *Savannah River*, LBP-05-4, 61 NRC at 80, 98-99 (citing *Daubert*, 509 U.S. at 589-90).

¹⁶ *Id.*

opinion.”¹⁷ An expert opinion that relies on subjective belief or unsupported speculation, rather than scientific methods and procedures, is entitled to no weight.¹⁸

III. ARGUMENT

As discussed below, the portions of the Sheppard Rebuttal Testimony identified below and in Attachment 1 should be excluded from evidence pursuant to 10 C.F.R. §§ 2.319 and 2.337(a), or accorded no weight, because they: (1) are beyond the scope of the admitted contention and rebuttal testimony, and (2) lack the technical foundation required by 10 C.F.R. § 2.337(a) for expert opinion or testimony.

A. **Dr. Sheppard’s Statement That Entergy’s Sensitivity Analysis Experts Should Have Accounted for “Deficiencies with Other Parameters” Is A New Claim That Is Beyond the Scope of the Admitted Contention and Rebuttal Testimony**

As described in their prefiled written testimony, Entergy experts Dr. Kevin O’Kula and Mr. Grant Teagarden performed a MACCS2 sensitivity analysis in which they increased Entergy’s 2035 population estimate for census undercount and commuters, making certain reasonable assumptions that are explained in their testimony.¹⁹ Entergy’s experts stated explicitly that they “performed a sensitivity case for the IP2 SAMA analysis to evaluate the potential impacts of the *population increase* posited by Dr. Sheppard in his report and testimony” in support of NYS-

¹⁷ *Seabrook*, CLI-12-05, slip op. at 24 n.117.

¹⁸ *Savannah River*, LBP-05-4, 61 NRC at 98-99 (citing Fed. R. Evid. 702); *Elcock v. Kmart Corp.*, 233 F.3d 734, 738, 745 (3d Cir. 2000) (holding that trial court erred by failing to hold a *Daubert* hearing to determine the reliability of psychologist’s testimony and admitting testimony of economist regarding lost future earnings because the testimony was based on assumptions wholly without foundation in the trial record); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 735 (1985) (“[W]here an asserted expert witness can supply no scientific basis for his statements (other than his ‘belief’) . . . a board would be remiss in giving such testimony any weight whatsoever”); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), 7 NRC 92, 126 (1978) (giving “little or no weight” to the evidence of an expert who was totally unfamiliar with the technical documents describing the facility in question and its surrounding environment).

¹⁹ Testimony of Entergy Witnesses Lori Potts, Kevin O’Kula, Grant Teagarden, and Jerry Riggs on Consolidated Contention NYS-16B (Severe Accident Mitigation Analysis) at 48-50 (Mar. 28, 2012) (“Entergy Testimony”) (ENT000003).

16B.²⁰ In response to the sensitivity analysis, however, NYS presents the following rebuttal testimony:

Q. NYS Consolidated Contention 12C challenges other MACCS2 input values. Has Entergy or NRC Staff demonstrated that an increased population, *combined with other site-specific values*, would not have a material effect on the SAMA analysis?

A. No. Neither Entergy nor NRC Staff have disclosed what would happen if the SAMA analysis were re-run, *taking both the underestimation of population and the deficiencies with other parameters into account*.²¹

This NYS rebuttal testimony should be excluded because it is neither relevant to admitted contention NYS-16B nor responsive to Entergy's prefiled testimony. Although both NYS-12C and NYS-16B relate to Entergy's SAMA analysis, the two contentions raise two distinct challenges—separately asserted by NYS and separately admitted by the Board. To Entergy's knowledge, NYS has not previously asserted that one contention must be viewed or analyzed in tandem with the other. In NYS's own words, NYS-16B alleges that the Staff's December 2010 final supplemental environmental impact statement ("FSEIS") for Indian Point is legally deficient "because it accepts a SAMA analysis predicated on inaccurate population estimates."²² In its current form, NYS-16B alleges no other underestimated inputs to Entergy's SAMA analysis.²³

Furthermore, as Dr. Sheppard acknowledges, Entergy's experts "increased the population input, but did not change any other parameters."²⁴ Nor should they have done so in addressing NYS-16B, which focuses solely on the adequacy of Entergy's year-2035 population estimate, as

²⁰ *Id.* at A87 (emphasis added).

²¹ Sheppard Rebuttal Test. at 36-37 (emphasis added).

²² State of New York Initial Statement of Position [on] Contention NYS-16/16A/16B ("NYS-16B") at 14 (Dec. 16, 2011) (NYS000206).

²³ NYS chose not to pursue the claim that the MACCS2 ATMOS air dispersion model used by Entergy to perform its SAMA analysis is being used beyond its range of validity and does not accurately predict the geographic dispersion of radionuclides released in a severe accident and, therefore, it is no longer at issue in this contention. *See* State of New York, Entergy Nuclear Operations, Inc., and NRC Staff Joint Stipulation at 2 (Jan. 23, 2012).

²⁴ Sheppard Rebuttal Test. at 36.

input to the MACCS2 code. Entergy's experts also addressed NYS's challenges to Entergy's MACCS2 decontamination cost inputs in NYS-12C, but they appropriately did so in a separate piece of testimony.²⁵

Accordingly, NYS's attempt to import other claims or issues into contention NYS-16B is improper, and the testimony in question should be excluded from evidence.

B. Dr. Sheppard's Testimony on Decontamination Cost Issues Should Be Excluded From Evidence Due to the Lack of an Adequate Technical Foundation

In his rebuttal testimony, Dr. Sheppard also testifies on issues that plainly are outside the scope of his self-described expertise. Specifically, he states that:

Halving the commuter population is problematic because it does not reflect the costs of an accident that occurs when the entire commuter population is present within the 50 mile zone. As I mentioned, commuters could be exposed to radiation or lose income as a result of interdiction. Any personal property commuters had in the region, such as automobiles, could be exposed to radiation, requiring decontamination. One important cost associated with a severe accident is the decontamination of property. It follows that the higher the building density, the more buildings there are to decontaminate. Commuters also have an impact on building density because if there are more workers in a region, more buildings will be required to house those workers. These extra buildings will need to be decontaminated in the event of a severe accident, increasing the costs of that accident. *See* Staff Test. at 41, A35 ("The cost of achieving the DF [decontamination factor] is input in terms of dollars per person (\$/person). By using a per person basis, this approach takes into account the site-specific high population density of New York City and the correspondingly high density of buildings.").²⁶

²⁵ *See* Testimony of Applicant Witnesses Lori Potts, Kevin O'Kula, and Grant Teagarden Concerning Consolidated Contention NYS-12C (Severe Accident Mitigation Alternatives Analysis) (Mar. 30, 2012) ("Entergy Testimony") (ENT000450).

²⁶ Sheppard Rebuttal Test. at 32-33. The testimony in question also arguably raises new issues beyond the scope of proper rebuttal testimony. Dr. Sheppard purports to respond to a particular assumption made by Entergy's expert in the context of their sensitivity analysis. Specifically, Entergy's experts reduced Dr. Sheppard's commuter estimate by 50 percent to account for the amount of time commuters would be expected to be within the 50-mile SAMA analysis region. *See* Entergy Test. at 48-49. This assumption is consistent with the fact that a SAMA analysis uses probabilistic methods and calculates mean annual consequences (as opposed to the consequences of a single radiological release event at a single moment in time) and, as such, examines numerous possible combinations of representative sets of radiological source terms, weather sequences, and exposed populations. *See id.* at 22, 24-25. Dr. Sheppard's detour into the issue of decontamination costs—the subject of another contention (NYS-12C) and an area beyond his expertise—is beyond the scope of proper rebuttal on this issue.

Dr. Sheppard, however, describes himself as economist who has “expertise in estimating populations” and who has “worked frequently with census and other demographic data.”²⁷ He further states that “I do not have experience in the nuclear field, using the MACCS or MACCS2 computer codes, or performing SAMA analyses,”²⁸ and that “[t]he technical details of the use of the MACCS2 model in the SAMA analysis are not within my expertise.”²⁹

Accordingly, insofar as Dr. Sheppard’s testimony relates to: (1) potential radiological exposure and contamination resulting from a severe accident, and (2) the MACCS2 code’s treatment of those processes or phenomena (including the decontamination factor), it should be excluded from evidence because it lacks a proper technical foundation. Alternatively, it should be accorded no weight by the Board in its merits ruling on NYS-16B.

C. Portions of New York State’s Revised Position Statement Should Be Excluded And Accorded No Weight

NYS discusses the preceding testimony in its Revised Position Statement.³⁰ The Statement is not evidence in this proceeding,³¹ but may nevertheless be subject to a motion in limine or motion to strike.³² Therefore, to the extent the Board grants this Motion and excludes the testimony identified in Attachment 1, the associated discussions in the Revised Position Statement should be either excluded or accorded no weight in the Board’s merits decision on NYS-12C.

²⁷ Sheppard Rebuttal Test. at 2.

²⁸ *Id.*

²⁹ *Id.* at 37.

³⁰ See NYS Revised Position Statement at 7, 13.

³¹ 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 Licensing Board Order (Granting in Part and Denying in Part Applicant’s Motion *in Limine*) at 24 (Mar. 6, 2012) (unpublished).

³² See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board 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), Licensing Board Order (Rulings on Motions to Strike and Motions in Limine) at 2-3 (July 16, 2008) (unpublished).

IV. CONCLUSION

For the foregoing reasons, the Board should exclude from the record the portions of the Sheppard Rebuttal Testimony (NYS000404) identified in Attachment 1 to this Motion. The Board also should exclude the associated discussion in the Revised Position Statement (NYS000403), or accord that discussion no weight, because it not supported by NYS's proffered evidence.

Respectfully submitted,

Signed (electronically) by Martin J. O'Neill

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Counsel for Entergy Nuclear Operations, Inc.

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

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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. NYS indicated that it opposes this Motion and that it will file an answer on the merits. The NRC Staff indicated that it does not oppose Entergy's Motion in Limine.

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**ENTERGY'S MOTION IN LIMINE FOR
NYS-16B
ATTACHMENT 1**

Exclusion Chart

**Entergy Attachment 1 to Entergy's Motion in Limine to Exclude Portions of Intervenor's
Pre-Filed Direct Testimony, Expert Report, Exhibits, and Statement of Position for
Contention NYS-16B (SAMA Analysis Population Estimate)**

Location of Information to Be Stricken	Basis for Exclusion
<i>NYS000404: Sheppard Rebuttal Testimony</i>	
Page 36, Line 21 through Page 37, Line 5: strike testimony (question and answer) in its entirety.	Testimony advances new claims beyond the scope of the admitted contention and the scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2).
Page 32, Line 10 through Page 33, Line 3: delete the testimony on Page 32, Line 10 beginning with "As I mentioned" through the testimony ending on Page 33, Line 3.	Testimony lacks a proper technical foundation and therefore, has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).
<i>NYS000403: NYS Revised Position Statement</i>	
Page 13: delete the following text: "First, Entergy improperly viewed two of the State's SAMA contentions (NYS- 16B and NYS-12C) in isolation. To determine what result increasing population has on PDR and OECR, Entergy would need to run the MACCS2 code with both sets of inputs, which it has not done."	Discussion advances new claims beyond the scope of the admitted contention and the scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2).
Page 7: delete the following text: "Additionally, the number of commuters contributes to decontamination costs because they increase building density. Sheppard Rebuttal Test. at 32-33; see Staff Test. at 41, A35 ("The cost of achieving the DF [decontamination factor] is input in terms of dollars per person (\$/person)). By using a per person basis, this approach takes into account the site-specific high population density of New York City and the correspondingly high density of buildings."). Commuters also have tangible property such as automobiles that could be contaminated in a severe accident. Sheppard Rebuttal Test. at 32."	Discussion is based on testimony that lacks a proper technical foundation and therefore, has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, a copy of “Entergy’s Motion in Limine to Exclude Portions of New York State’s Rebuttal Filings on Contention NYS-16B” was served electronically via the Electronic Information Exchange on the following recipients.

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