UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 9, 2012

STATE OF NEW YORK'S COMBINED ANSWER IN OPPOSITION TO ENTERGY'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF NEW YORK STATE'S REBUTTAL FILINGS ON CONTENTION NYS-12C AND NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE PRE-FILED REBUTTAL TESTIMONY AND REBUTTAL EXHIBITS FILED BY THE STATE OF NEW YORK CONCERNING CONSOLIDATED CONTENTION NYS-12C (SAMAS)

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In accordance with 10 C.F.R. § 2.323(c), the State of New York hereby submits this combined answer in opposition to both (1) Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on Contention NYS-12C[1] and (2) NRC Staff's Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Rebuttal Exhibits Filed by the State of New York Concerning Consolidated Contention NYS-12C (SAMAs),[2] both of which were filed on July 30, 2012.

INTRODUCTION

For this contention—which explains how the SAMA analysis for Indian Point relied upon significantly underestimated economic costs of a severe accident by using data developed for a site in rural Virginia (*i.e.*, Sample Problem A)—Entergy and Staff seek to exclude from the hearing record an NRC-commissioned study of the costs of a severe accident at Indian Point. This document was generated at the behest of Staff, has been given an NRC document designation, relates specifically to the decontamination costs of a severe accident at Indian Point, is contained in NRC files, and contradicts positions taken by Entergy and Staff in this proceeding. For these reasons, the Board should deny Entergy's and Staff's request to exclude this document from the hearing record.

As is described in both the State's Revised Statement of Position (NYS000419) ("NYS Revised SOP") and the Pre-filed Rebuttal Testimony of Dr. François Lemay of International Safety Research ("ISR") (NYS000420) ("Lemay Rebuttal Test."), in the course of developing a response to Entergy's and Staff's arguments on NYS-12C, the State's experts discovered this document, "NUREG/CR-5148 Property-Related Costs of Decontamination" (Feb. 1990)

[1] The term "NYS-12C" collectively refers to the State's admitted consolidated contentions 12, 12A, 12B, and 12C.

[2] The term "SAMAs" refers to Severe Accident Mitigation Alternatives.

(NYS000424), only becoming aware of its existence after reaching out to a former NRC-contractor via email. *See* NYS Revised SOP at 14-16; Lemay Rebuttal Test. at 26-28. Despite the Board's recent decision "encourage[ing] the parties to address the issues raised in New York's Rebuttal Testimony in their proposed questions for the Board to ask at the evidentiary hearing,"[3] both Entergy and Staff still seek to exclude NUREG/CR-5148 along with a May 2, 2012 email exchange between ISR and its author, Dr. J. Tawil (NYS000426), and related portions of the Pre-filed Rebuttal Testimony of Dr. François Lemay. Entergy also seeks to exclude related portions of the State of New York Revised Statement of Position on NYS-12C. Because this evidence is relevant, the proper subject of Rebuttal Testimony, and was timely disclosed, Entergy's and Staff's motions in limine should be denied. The Board should exercise its discretion to afford these documents weight as it sees fit at the hearing.

ARGUMENT

POINT I

THE STATE'S REBUTTAL DIRECTLY RESPONDS TO RECENT ENTERGY AND STAFF SUBMISSIONS, DOES NOT RAISE NEW CLAIMS, AND IS THEREFORE WITHIN THE SCOPE OF PROPER REBUTTAL TESTIMONY

Under 10 C.F.R. § 2.1207(a)(2), "[w]ritten responses and rebuttal testimony" should be "directed to the initial statements and testimony of other participants." Entergy incorrectly argues that the State has presented "new claims" including "entirely new information that both exceeds the proper scope of a rebuttal filing and is prejudicial to Entergy and the Staff." Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on

[3] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order (Denying Applicant's Motion for Leave to File Surrebuttal Testimony on NYS-12C) (Aug. 2, 2012) at 4 (unpublished).

Contention NYS-12C at 5-8 (July 30, 2012) ("Entergy's MIL").[4] Staff agrees. *See* NRC Staff's Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Rebuttal Exhibits Filed by the State of New York Concerning Consolidated Contention NYS-12C (SAMAs) at 7 (July 30, 2012) ("Staff's MIL"). Far from introducing "new claims," the State's Revised Statement of Position and Rebuttal Testimony respond directly to Entergy's and Staff's arguments that using "Sample Problem A" data, sourced from NUREG-1150, is reasonable under NEPA.

In its Initial Statement of Position and Pre-filed Testimony, the State argued that it was unreasonable under NEPA for Entergy and Staff to rely upon Sample Problem A values, developed for the Surry site in rural Virginia, instead of developing site-specific inputs to estimate the costs associated with a severe accident used in the SAMA analysis for Indian Point. *See generally* NYS Initial Statement of Position at 12-33 (NYS000240) ("NYS Initial SOP"). Staff's assertion that "NUREG-1150 . . . was cited extensively by New York in its direct testimony submitted in December 2011" (Staff's MIL at 5) is simply inaccurate.[5] In actuality,

[4] Entergy again misinterprets *Seabrook*'s holding. Entergy MIL at 3. As explained in more detail in the State's Revised Statement of Position (pp. 28-29), in the footnote relied upon by Entergy that "an admitted contention is defined by its bases," Entergy MIL at 3 (quoting *Seabrook* at 11, n.50), the Commission was emphasizing that the reach of a contention hinges upon its terms, coupled with its stated bases, and reminded boards to articulate the specific bases upon which they are relying when admitting contentions. *See NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, at 10-11, 75 N.R.C. __ slip op. (Mar. 8, 2012) ("*Seabrook*"). Thus, *Seabrook* involved whether the stated bases were adequately supported, not whether new bases could be added. *Id.* Even if the State was seeking to add new bases here, and it is not, *Seabrook* did not prohibit the addition of new bases to a contention if they are determined to be within the contention's reach. *Id.*

[5] Likewise, Staff's claim that "The direct testimony even provides Dr. Lemay's opinions as to why the authors of NUREG-1150 chose the Surry site for Sample Problem A almost twenty-two years ago" (Staff's MIL at 5 (citing Lemay Initial Test. at 21, line 472 – 22, line 480)) is also not accurate. Staff is confusing the NUREG-1150 authors with the MACCS code authors. As the State's Initial Testimony focused on Entergy's MACCS2 code inputs, Dr. Lemay explained the reason why Surry was chosen for use as Sample Problem A in the MACCS2 code: "Using the

the State only cited to NUREG-1150 as the source for the Surry data used for Sample Problem A, noting that the Surry site was one of "five commercial nuclear plants of different design to estimate the risks of a severe accident." *See* Pre-Filed Testimony of François J. Lemay at 21-23 (NYS000241) ("Lemay Initial Test.") ("NUREG-1150" appears only three times in the entire 71-page testimony); *see also* NYS Initial SOP at 19, n.13. Rather than focusing on NUREG-1150, the State's initial filings focused on the use of the MACCS2 code and "Entergy's failure to even attempt to develop site-specific cost estimates that take into account the extremely high population and building density of the area surrounding Indian Point." NYS Initial SOP at 2. The State's experts showed that, using any of a variety of methods for developing site-specific data would have resulted in costs up to seven times greater than Entergy's costs. *See, e.g.*, Lemay Initial Test. at 71.

In its Statement of Position and Pre-filed Testimony, Entergy argued that using Sample Problem A was reasonable because its values were sourced from NUREG-1150 and, thus, have "have a long-established and appropriate technical basis, are widely accepted within the PRA community, and continue to be used today in PRAs and SAMA analyses."[6] Entergy faulted the State for "not acknowledg[ing] the source and pedigree of the inputs used by Entergy." Entergy Test. at A76. The testimony submitted by Staff makes a similar claim.[7] Nowhere in Entergy's

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Surry reactor in Sample Problem A allowed *the authors of MACCS2* to test the food chain model because it is largely surrounded by farmland." Lemay Initial Test. at 22, lines 478-480 (emphasis added).

[6] Entergy's Statement of Position Regarding Consolidated Contention NYS-12C (Severe Accident Mitigation Alternatives Analysis) (Mar. 30, 2012) (ENT000449) ("Entergy SOP") at 29. *See also* Entergy SOP at 5; Testimony of Entergy Experts Lori Potts, Kevin O'Kula, and Grant Teagarden on NYS-12C (ENT000450) ("Entergy Test.") at A26, A35, A72, A76, A78, A160.

[7] *See* Testimony of NRC Staff Experts Nathan Bixler, S. Tina Gosh, Joseph A. Jones, and Donald Harrison Concerning NYS 12/16 (Mar. 30, 2012) (NRC000041) ("Staff Test.") at A39 ("NUREG-1150 …was subjected to an extensive peer review and public comment.").

License Renewal Application, Staff's FSEIS, or previous filings by Entergy and Staff in this proceeding did they raise this argument regarding NUREG-1150 and its pedigree. In fact, in all these documents NUREG-1150 was only mentioned once—and only in the FSEIS. *See* Appendix G of the FSEIS (NYS00133I) at G-23 ("Sample Problem A values were primarily developed for the Surry plant analysis in NUREG-1150 and represent best estimate information for that site and time.").

In researching Entergy's and NRC's litigation-generated pedigree argument, the State's experts traced back the history of NUREG-1150 by reviewing references cited therein as well as contemporaneous NRC documents in an attempt to find the ultimate source of the Sample Problem A values. Lemay Rebuttal Test. at 25-27. This additional research was not carried out in connection with the State's initial filings because the State had no reason to anticipate that Entergy or Staff would be relying on the pedigree of NUREG-1150 to support reliance on Sample Problem A. In its rebuttal research, the State's experts honed in on a document, "NUREG/CR-3413 Off-Site Consequences of Radiological Accidents: Methods, Costs and Schedules for Decontamination" (NYS000425), which is cited in NUREG-1150. NYS Revised SOP at 14; Lemay Rebuttal Test. at 26, 28. NUREG/CR-3413 describes a database and computer program called DECON developed by a NRC contractor to conduct a decontamination analysis of a large, radiologically contaminated area.[8] *Id.*

On the afternoon of May 1, 2012, ISR contacted one of NUREG/CR-3413's authors, Dr. J. Tawil, via email to inquire about the history of the DECON program and "what became of it"

[8] The State's experts learned that DECON was designed to be used with CRAC2, a predecessor to the MACCS2 code, and appears to be similar to CONDO. Lemay Rebuttal Test. at 26, 28. CONDO was one of the methodologies that ISR previously described that could be used to develop site-specific inputs (NYS000250), and was also one of the methodologies that Entergy and Staff criticized ISR for using. *Id.*

because ISR could not "find any use or mention of the DECON code past the mid eighties." May 2, 2012 Email Exchange between ISR and J. Tawil (NYS000426). Although ISR's email to Dr. Tawil did not mention Indian Point, the response Dr. Tawil provided at 8:22 a.m. the following morning revealed that he, at NRC's behest, had conducted a site-specific study at Indian Point. *Id.* Dr. Tawil wrote:

> I think the primary difficulty was that my last project for the NRC was to characterize the off-site consequences of reactor accidents . . . for three reactor sites, one of which was Indian Point . . . . I think the NRC was a little shocked at the magnitude of the off-site consequences of an SST-5 at Indian Point and decided not to publish the report.

Id. It was this email that prompted the State to go in search of a heretofore unknown site-specific study at Indian Point. NYS Revised SOP at 15; Lemay Rebuttal Test. at 27. At a minimum, the email is relevant because it shows how the State located NUREG/CR-5148.[9] The email was generated by ISR in formulating a response to Entergy's and Staff's arguments and is, thus, proper rebuttal testimony.

A site-specific analysis of severe accident mitigation alternatives is required under NEPA and NRC's regulations. *See Limerick Ecology Action, Inc. v. N.R.C.*, 869 F.2d 719, 729-31 (3d Cir. 1989) (holding that NEPA requires NRC to examine, on a site-specific basis, the environmental effects of significant accidents at nuclear power plants). In its revised SOP, the State argued that NUREG/CR-5148 shows 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. NYS Revised SOP at 15. Thus, NUREG/CR-5148 shows that a site-specific analysis is eminently possible and had been completed at NRC's behest in conjunction with NUREG/CR-5148. This

[9] The admissibility of the Tawil email is discussed in further detail below in Point III.

directly responds to and rebuts Entergy's and Staff's arguments that Sample Problem A from NUREG-1150 is the only reasonable data source, *i.e.*, with sufficient pedigree, to be used in a SAMA analysis no matter where the plant is located.

POINT II

ALTHOUGH STAFF FAILED TO DISCLOSE ITS OWN DOCUMENT STUDYING THE COSTS OF A SEVERE ACCIDENT AT INDIAN POINT, THE STATE'S DISCLOSURE OF NUREG/CR-5148 WAS TIMELY AND IT WAS PROPERLY INCLUDED WITH THE REBUTTAL TESTIMONY

Staff admits that it did not find—or review—NUREG/CR-5148.[10] The State hereby requests that the Board take judicial notice of the Staff's stipulation and concession on this point. Staff's argument that the document was "not in its possession or control" (Staff's MIL at 9) rings hollow. It was NRC who provided the document in response to a request under the Freedom of Information Act, preserved the document in its microfiche collection (Nos. 63686 through 63687), and placed it in the NRC Public Legacy Library. Even though ADAMS was introduced in 1999, "[t]he PDR [Public Legacy Library] in Washington, DC still keeps pre-ADAMS paper and microfiche records onsite and available to the public for reviewing." 64 Fed. Reg. 65,496 (Nov. 22, 1999). While New York found the document in a local Public Legacy Library microfiche collection, the identical document would be in the microfiche of the Public Legacy Library at NRC headquarters in Rockville, Maryland. The very fact that the Staff did not find or review NUREG/CR-5148 both confirms and underscores the inadequacy of the Staff's supposed "site-specific" SAMA analysis that requires a "hard look" under NEPA.

Staff's attempt to sanction its failure to locate and consider a case study it commissioned

[10] Staff states that "[t]he document at issue was not utilized in the Staff's review of the Indian Point license renewal application ("LRA") and was not in the possession of Staff members involved in the license renewal review of SAMAs for Indian Point." Staff's MIL at 8. Staff goes so far to argue that "even if the document was in the Staff's possession, the Staff would not have been obliged to disclose it, inasmuch as the document was not considered." *Id.*

of the consequences of severe accidents at Indian Point is unreasonable under NEPA. Staff cannot pretend the document does not exist because it is not readily available "either in the NRC's ADAMS system or in the files of Staff personnel."[11] NRC MIL at 9. If Staff had addressed the document, even in cursory fashion, the issue under NEPA would be whether Staff's consideration of the document was reasonable. Unfortunately, during the NEPA public comment process, the public did not have the benefit of even knowing the document existed. Ignoring a case study of the very plant Staff was tasked with reviewing—without even so much as mentioning the study in the FSEIS—is not sufficient to meet the goal of NEPA to inform agency decisionmaking. *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 147 (D.C. Cir.1985) ("NEPA's dual mission is thus to generate federal attention to environmental concerns and to reveal that federal consideration for public scrutiny"). On its face, NUREG/CR-5148 relates directly to severe accidents at Indian Point. By failing to even discuss this document in the FSEIS, Staff has deprived the public of its fundamental right under NEPA to be informed. *Id.* Thus, NUREG/CR-5148, and Dr. Lemay's references to the document, are not only relevant, but also the proper subject of rebuttal testimony.

Furthermore, Staff's statements in its motion in limine raise questions about Staff's approach to disclosure obligations. *See* Staff MIL at 8-9. Staff's disclosure obligations begin with 10 C.F.R. § 2.336(b) which provides in pertinent part that:

> NRC staff shall, within thirty (30) days of the issuance of the order granting a request for hearing or petition to intervene and without further order or request from any party, disclose . . .
>
> (3) All documents (including documents that provide support for, or opposition to,

[11] Although the State submitted several other exhibits that do not exist on ADAMS, but were originally stamped with microfiche numbers, Staff does not challenge the admissibility of any of these. *See* NYS000043 (log no. 1417, concerning NYS-8), NYS000330 (log no. 549, concerning NYS-26) and NYS000331 (log no. 331, concerning NYS-38).

> the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding;

There is no question Staff should have located, considered, and disclosed this document. *See generally* State of New York and Riverkeeper Motion to Compel Compliance with Disclosure Obligations by NRC Staff (Jan. 30, 2012) (ML12030A271) (discussing Staff's disclosure obligations in detail). It "provide[s] support for, or opposition to, the application or proposed action." 10 C.F.R. § 2.336(b)(3).

In contrast to Staff, the State provided an explanation of how and when it discovered NUREG/CR-5148 in its Revised Statement of Position, Rebuttal Testimony, during consultation with Entergy on its motion for sur-rebuttal, and in its answer opposing Entergy's motion for sur-rebuttal. In sum, after ISR showed the State its May 2, 2012 email exchange with Dr. Tawil, the State located a copy of the site-specific study that Dr. Tawil authored and referred to in his email: NUREG/CR-5148. NYS Revised SOP at 14. The State timely disclosed both the May 2, 2012 email exchange and NUREG/CR-5148 in its May 2012 disclosures—the same month the email exchange took place and NUREG/CR-5148 was discovered. If parties were prejudiced by the failure to disclose the document, it was New York and the public at large, not Entergy or Staff.

POINT III

BECAUSE THE BOARD CAN DETERMINE THE PROPER WEIGHT TO AFFORD THE STATE'S RELEVANT EVIDENCE, IT SHOULD NOT BE EXCLUDED

Throughout this proceeding, rather than exclude evidence, this Board has generally opted to "give all evidence its appropriate weight at evidentiary hearing in the context of evaluating the specific issue before [it]." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order (Granting in Part and Denying in Part Applicant's Motions in Limine) at 20 (Mar. 6, 2012) (unpublished); *see also id.* at 24. At best, Entergy's and

Staff's arguments about reliability, foundation, and hearsay concern the weight the Board should afford portions of the State's Rebuttal Testimony and exhibits, not whether that evidence should be excluded.

First, Entergy and Staff argue that NUREG/CR-5148 is draft and, thus, de facto unreliable—although they offer no proof that it is a draft other than the lack of a manuscript completion date or publication date. Entergy MIL at 8-11; Staff MIL at 10-12. There are no "draft" markings or any other "draft" designations on the document. On the other hand, the document bears a formal "NUREG/CR" number. "NUREG/CR" is a designation for "[d]ocumentation of technical, regulatory, or administrative information about NRC programs or activities prepared by a contractor."[12] It was NRC who provided the document in response to a request under the Freedom of Information Act, preserved the document in its microfiche collection, and placed in the NRC Public Legacy Library.

Even if the document is a draft, which neither Entergy nor Staff have conclusively shown, that is not sufficient grounds for excluding the document from the hearing record. Entergy's citation to *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 43 n.47 (1985), Entergy MIL at 4-5, is not relevant because the Appeal Board's comments were in the context of a party attempting to rely upon a draft document when a final version existed. The Appeal Board held that "[i]n the absence of a legitimate reason to doubt that [the document], as published, represents the staff's position—and Joint Intervenors have supplied none—the draft is not a particularly useful item on which to rely." *La. Power & Light Co.*, 22 N.R.C. at 43 n.47. This is not the case here. The other two cases Entergy cites are also irrelevant because they excluded working preliminary policy discussions on the basis that

[12] *See* NRC, Publications Prepared by NRC Contractors, http://www.nrc.gov/reading-rm/doc-collections/nuregs/contract/ (last viewed Aug. 8, 2012).

each "has no legal significance" because it was not finalized by the agency. Entergy MIL at 4-5, n.17 (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 N.R.C. 397, 416 (1976); *Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Unit 2), ALAB-209, 7 A.E.C. 971, 973 (1974)). This reasoning does not apply to NUREG/CR-5148, a technical document containing the objective results of a NRC-commissioned case study of Indian Point.[13] The Board can decide what weight to afford the study's contents at the hearing based on the record before it. *C.f. Seabrook* at 29 (Commission relied upon "a preliminary draft report by the Department of Energy that is in the record").

At a minimum, the document shows that NRC commissioned a site-specific study at Indian Point using a database that is similar to the CONDO database discussed by ISR, and rebuts the claim that Sample Problem A is the only set of inputs that can be used in a SAMA analysis. It is therefore admissible and should not be excluded.

Second, Entergy and Staff take issue with the Tawil email as unreliable hearsay (Entergy MIL at 10-11; Staff MIL at 11-12), but these arguments also go to the weight of the evidence, not its admissibility. Dr. Lemay cites the Tawil email to demonstrate, and disclose, that ISR contacted Dr. Tawil and that Dr. Tawil's unprompted response about a severe accident case study at Indian Point led to the discovery of NUREG/CR-5148. *See* Lemay Rebuttal Test. at 26-27. Dr. Lemay does not rely on Dr. Tawil's statements for any of ISR's conclusions. For these purposes, the document is not offered for the truth of the statements contained in Dr. Tawil's response and is not hearsay.

[13] Entergy also cites cases concerning Federal Rule of Evidence 803(8)(c), now Rule 803(8)(A)(iii), a hearsay exception which permits the introduction, "in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation." Entergy MIL 5, n.19. As is discussed in further detail below, hearsay is generally admissible in NRC proceedings so these cases are also not applicable.

Nonetheless, the email also expresses Dr. Tawil's understanding and view concerning the NRC's reaction to NUREG/CR-5148. While ISR did not rely on the email, the State submits that the email expresses Dr. Tawil's understanding, as the author of NUREG/CR-5148, and therefore is admissible as reliable evidence of Dr. Tawil's opinion. Even if the email is hearsay, NRC has implemented a "long established rule that hearsay is generally admissible in NRC proceedings." *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB–355, 4 N.R.C. 397, 411-12 (1976); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB–863, 25 N.R.C. 273, 279 (1987). Generally, hearsay evidence is only considered unreliable when the declarant is unknown and provides opinions that are relevant to the board's decision over disputed matters of import in the case. *See Tenn. Valley Auth.* (Hartsville Nuclear Plants 1A, 2A, 1B and 2B), ALAB–367, 5 N.R.C. 92, 121 (1977) (disregarding non-expert's citation to the opinion of an anonymous expert, holding that, "[e]xpert testimony in hearsay form from someone unknown is most unreliable").

In *Alabama Power Company*, the ASLB contrasted the inadmissible statements from anonymous experts on substantive matters at issue in *Tenn. Valley Auth.*, 5 N.R.C. 92 at 121, with hearsay statements by unidentified electricians that were not "expressions of 'expert' opinion," but rather, "factual statements by individuals, albeit currently unidentified, describing their knowledge." *Ala. Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), LBP–91–626, 1992 WL 111147 (N.R.C.), 2 (May 8, 1992). The ASLB held the unidentified electricians' statements admissible because "[t]hey do not require that the Board assess the expertise of these witnesses; rather, as with hearsay testimony generally, we need consider only the degree to which their statements can be considered truthful and accurate." *Id.*

So too here should Dr. Tawil's testimony be admissible, which was prepared for the NRC's Office of Nuclear Regulatory Research. Contrary to Staff's assertion that Dr. Tawil has

an "obvious lack of personal knowledge" (Staff MIL at 10), Dr. Tawil is an author of NUREG/CR-5148. He is informing ISR about a heretofore unknown case study at Indian Point. It is clear that he is expressing his own opinion as to why NRC never gave the document a publication date as his statement begins with "I think the NRC was a little shocked . . . ." *See* May 2, 2012 Email Exchange between ISR and J. Tawil (NYS000426). Thus, the email is admissible in this proceeding under NRC standards because it is reliable, relevant, material, and not repetitious under 10 C.F.R. § 2.337(a). The Board can determine what weight to afford Dr. Tawil's thoughts on NRC's motivations with respect to NUREG/CR-5148.

Taken to its logical conclusion, the thesis advanced by Staff that technical documents, particularly ones contracted for and published by NRC, can only be used in the hearing if the author of the document is called as a witness (NRC MIL at 11), would mean that no publicly available document could be introduced into evidence unless someone present physically appeared in this proceeding as a witness to attest to the accuracy of the underlying document. Such an outcome is absurd and legally unsupportable under the Federal Rules of Evidence and is contrary to Staff's desire to streamline proceedings. It would create chaos in the hearing process and would necessitate the addition of hundreds of witnesses.

In sum, it is of the utmost importance that the Board have a full record of all material and relevant evidence before it when rendering its relicensing decision. *See Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 N.R.C. 227, 230 (Appeal Board 1980) ("No conceivable good is served by making empty findings in the absence of essential evidence."). Therefore, the Board should decline Entergy and NRC's request to exclude the State's rebuttal evidence from the hearing record and instead use its power to afford the evidence proper weight at the hearing.

POINT IV

THE BOARD HAS MADE CLEAR THAT STATEMENTS OF POSITION ARE NOT EVIDENCE AND ARE NOT SUBJECT TO ADMISSIBILITY STANDARDS

This Board has already made clear on several occasions that "regarding … challenge[s] to … Initial Statement[s] of Position, this document is not evidence, but rather consists merely of attorney arguments. Any motion to strike "'testimony' in this document is inappropriate." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant's Motions in Limine) (Mar. 6, 2012) at 14; *see also id.* at 19 ("Statements of positions are not evidence. Thus, the admissibility standards of Section 2.337(a) do not apply and statements of positions are not subject to evidentiary challenge."); *id.* at 24 ("Finally, statements of position are a party's legal interpretation of its evidence, not its actual evidence, and we will use it inasmuch as it is supported by the evidence . . . Therefore, we will not exclude . . . portions of [a] Statement of Position."). As such, Entergy's motion to strike portions of the State's Revised Statement of Position should be denied.

CONCLUSION

For the above reasons, the State respectfully requests that the Board deny (1) Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on Contention NYS-12C, and (2) NRC Staff's Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Rebuttal Exhibits Filed by the State of New York Concerning Consolidated Contention NYS-12C (SAMAs).

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Dated: August 9, 2012

Certificate Pursuant to 10 C.F.R. § 2.323

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York participated in discussions initiated by Entergy Nuclear Operations, Inc. ("Entergy"), with Entergy and NRC Staff, concerning (1) Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on Contention NYS-12C and (2) NRC Staff's Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Rebuttal Exhibits Filed by the State of New York Concerning Consolidated Contention NYS-12C (SAMAs), both filed on July 30, 2012 in this matter, and has made a sincere effort to make themselves available to listen and respond to the Entergy and Staff, and to resolve the factual and legal issues raised in the motions. The State of New York's efforts to resolve the issues have been unsuccessful.

Signed (electronically) by

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August 9, 2012

UNITED STATES
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Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 9, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2012, copies of the State of New York's Answer in Opposition to Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on Contention NYS-12C and NRC Staff's Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Rebuttal Exhibits Filed by the State of New York Concerning Consolidated Contention NYS-12C (SAMAs) were served electronically via the Electronic Information Exchange on the following recipients:

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Dated at New York, New York
this 9th day of August 2012