

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Entergy Nuclear Generation Co. and)
Entergy Nuclear Operations, Inc.) Docket No. 50-239-LR
)
)
(Pilgrim Nuclear Power Station))

NRC STAFF'S RESPONSE
IN SUPPORT OF ENTERGY'S MOTION IN LIMINE

Pursuant to 10 C.F.R. § 2.323(c) and the December 3, 2010 Order of the Atomic Safety and Licensing Board ("Board") in this proceeding, the staff of the U.S. Nuclear Regulatory Commission ("Staff") responds to the January 13, 2011 Motion in Limine ("Motion") filed by Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. ("Entergy"). For the reasons set forth below the Staff supports Entergy's motion to treat Pilgrim Watch SAMA Remand Pre-filed Testimony ("PW Submission") as Pilgrim Watch's statement of position, and to exclude, in full or in part, Pilgrim Watch Exhibits PWA00001 through PWA00005, PWA00008 through PWA00009, PWA00011 through PWA00015, and PWA00019 through PWA00020.

BACKGROUND

Pursuant to the Commission's March 26, 2010 Memorandum and Order remanding a portion of Pilgrim Watch's ("PW") Contention 3, the Board re-framed Contention 3 to address whether the meteorological modeling in the Pilgrim SAMA analysis is adequate and reasonable to satisfy NEPA, and whether accounting for the meteorological patterns/issues of concern to Pilgrim Watch could, on its own, credibly alter the Pilgrim SAMA analysis conclusions on which SAMAs are cost-beneficial to implement.

September 23 Order at 1. The Board explained that if, and only if, this threshold question is resolved in PW's favor, then the proceeding will address the effect of evacuation and economic cost issues on Entergy's cost benefit conclusions. September 23 Order at 2-3 n.1.

On January 3, 2011, PW filed its SAMA Remand Pre-filed Testimony. PW stated that it would "not present any new evidence at the upcoming SAMA Remand Hearing and [would] rely solely on what has previously been presented."¹ And indeed, PW attached no written testimony by any fact or expert witness. PW's Submission was filed by PW's representative, Mary Lambert, who did not assert that she has personal knowledge of any facts with respect to Contention 3 and did not claim or demonstrate any expertise with respect to any technical matter involved in the contention.

On January 13, 2011, Entergy filed the instant Motion and asked that the Board exclude from evidence the PW Submission and certain PW exhibits. Entergy asserted that the PW Submission could not be considered as testimony because it was not sponsored by a qualified expert and that it should, instead, be treated as PW's statement of position. In addition, Entergy asserted that a number of PW's exhibits addressed issues outside the limited scope of this proceeding and/or were not properly supported and should, therefore, be excluded.

DISCUSSION

I. Legal Standard

Section 2.337 of 10 C.F.R. addresses the admissibility of evidence in NRC administrative proceedings such as the instant case. It provides that: "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of admissible documents will be segregated and excluded so far as is practicable."

¹ PW Submission at 2.

10 C.F.R. § 2.337(a). Pursuant to 10 C.F.R. § 2.319(d) and (e), licensing boards have the authority to strike or restrict materials that are irrelevant, immaterial, unreliable, duplicative, or cumulative.

Where the evidence consists of technical analyses, reliability is established when that evidence has “been vouched for by an expert.” *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 476-77 (1982) (upholding exclusion of evidence on the grounds that the evidence was not sponsored by an expert witness); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366-68 (1983); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 501 (1991). And when a party proffers a witness as an expert, that party has the burden of demonstrating that the witness is qualified to testify as an expert based on “knowledge, skill, experience, training, or education”. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CI-04-21, 60 NRC 21, 27 (2004). A witness’ opinion may be excluded if the witness is not properly qualified as an expert or the opinion would not assist the trier of fact in understanding the evidence. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983) (internal citations omitted); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-55, 20 NRC 1646 (1984) (no weight given to testimony in metallurgy or engineering where witnesses found not to be qualified as experts in those disciplines).

Whether or not evidence is relevant is determined by an examination of the issue to be decided in the proceeding. “Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-81-63, 14 NRC 1768, 1781 (1981).

II. Testimony and Exhibits that Warrant Exclusion

The Staff agrees with Entergy that the PW Submission and some of PW's exhibits should be rejected as evidence. The PW Submission and many of PW's exhibits fail to meet the reliability criterion for admissibility. In addition, portions of the submission, and several of the PW exhibits, address matters beyond the scope of remanded, re-framed Contention 3 and, thus, they do not meet the relevance criterion for admissibility.

Contention 3 is highly technical and is limited to an inquiry into whether the atmospheric transport model in Entergy's SAMA analysis is adequate and whether the concerns PW has raised with respect to meteorological patterns could alter the cost-benefit conclusions in the SAMA analysis. Accordingly, expert testimony regarding atmospheric transport modeling is required to establish the reliability of the analysis in the PW Submission. In the *McGuire* case, the Atomic Safety and Licensing Appeal Board explained that it upheld the exclusion of the unsponsored technical analysis because the analysis "manifestly is the type of evidence that calls for sponsorship by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents." *McGuire*, 15 NRC at 477. Like the unsponsored analysis in *McGuire*, the reliability of PW's unsponsored analysis has not been established; it does not meet the reliability criterion for admissibility and should, therefore, be excluded as evidence.

There is precedent, however, for considering the PW Submission as a statement of position or an opening statement at hearing. In *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-96-10, 43 NRC 231 (1996), a licensing board excluded the majority of the prepared testimony of the intervenor's representative on the grounds that the representative did not have personal knowledge of the factual matters and did not have the expertise to interpret the technical matters in the testimony. The representative was allowed to testify as to the portion of the matter for which she had personal knowledge; the

remainder was excluded as evidence. However, the board allowed the representative to read the testimony into the record as an opening statement, noting that “[a]lthough her opening statement would not have evidentiary status, it would be useful to alert the Board and the parties to the points [the intervenor] wishes to raise.” *Id.* at 232. Similarly, the PW Submission here is not supported by a witness with personal knowledge or an expert witness. While it does not qualify for evidentiary status, it could be considered as PW’s statement of position and for limited non-evidentiary purposes. *See Turkey Point*, 33 NRC at 501 (non-expert’s submission considered as argument, not evidence).

In order for evidence to be relevant and, therefore, admissible, it must address the issue presented by remanded, re-framed Contention 3. That issue is whether the atmospheric transport model in the Pilgrim SAMA analysis is sufficient and whether the PW’s proposed changes to the atmospheric transport model would change the results of the SAMA analysis. Evidence that goes to any matter outside the contention is not relevant and should be excluded. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 70 NRC ____ (Jan. 7, 2010) (slip op. at 13-15) (upholding exclusion of evidence outside of the scope of the contention); *Georgia Tech*, 43 NRC at 233 (intervenor’s representative was allowed to read opening statement into the record, but was not allowed to read into the record portions of her statement that addressed issues not relevant to the proceeding).²

² The Staff does not agree with Entergy’s assertion that PWA00012 and PWA00019 should be excluded for lack of relevance. Motion at 12. In its September 23 Order at Appendix A, page 2, the Board required that all parties include answers to a specific list of questions related to source terms in their pre-filed testimony. These documents appear to be responsive to the Board’s questions. However, the Staff respectfully submits that the discussion of source terms raises matters that are not required for a determination of Contention 3’s threshold question on atmospheric transport models. Thus, PW Exhibits PWA00012 and PWA00019 may be viewed as not material and not admissible as evidence under 10 C.F.R. § 2.337(a). Regardless whether these two exhibits are lacking in relevance or materiality, the Staff would exclude the exhibits for lack of reliability, as they are technical documents and not supported by any expert testimony.

Additionally, it should be noted that the Staff and, doubtlessly, the Commission, the Board, and Entergy presumed that PW would carry its burden to go forward with the presentation of direct testimony by qualified experts. The Commission's decision to remand, in part, Contention 3, is based on PW's claim that the Board improperly excluded PW's claims related to the adequacy of atmospheric dispersion modeling. PW's repeated claims that a variable trajectory model would more accurately identify additional SAMAs that are cost beneficial created an expectation that there would be a quantifiable and qualifiable presentation to support this position, an expectation that PW has failed to meet.

For the reasons set forth above, the Staff supports Entergy's Motion to exclude the following exhibits, or parts thereof, on the grounds that they are unreliable and/or lack relevance: Egan Declaration (PWA00001); Beyea Declaration and Report (PWA00002); Chanin Declaration and Blog (PWA00003 and PWA00004); Emergency Planning (PWA00005 and PWA00013); Economic Consequences and Cost Estimates (PWA00008, PWA00009, and PWA00015); Spengler and Keeler Report (PWA00011)³, MAAP Code-Lessons (PWA00012

³ Entergy cited an incorrect page number in PW Exhibit PWA00011. In its Motion, Entergy cited "Summary Findings 2 and 3 at pp. 1-2, Section 8.5 at p.31, and portions of Section 10.1 at pp. 37-38." Motion at 11. Section 8.5 is not located at page 31; it is located at page 35 of Exhibit PWA00011.

and PWA00019), and Generic Challenges to Probabilistic Modeling (PWA00014 and PWA00020).⁴

III. NRC Staff Exhibits NRC00003 Through NRC00007

In its Motion, Entergy voiced its concern that NRC Staff Exhibits NRC000003 through NRC000007 address issues that are beyond the scope of the proceeding and, for that reason, apparently considered moving to exclude them. Motion at 14-15. Entergy has not, however, moved to exclude them based on its understanding that the Staff is offering the exhibits for the limited purpose of showing that the Staff's expert witness, Nathan E. Bixler, is familiar with the issues in this proceeding and is qualified to testify with respect to them. Motion at 15. This is, indeed, the purpose of NRC Staff Exhibits NRC000003 through NRC000007. They are not being proffered as evidence of the facts, theories, analysis, or argument they contain but merely for the purpose of establishing the Staff witness' familiarity with them.

CONCLUSION

For the foregoing reasons, the Staff supports Entergy's Motion in Limine.

Respectfully Submitted,

/Signed Electronically By/

Beth N. Mizuno
Andrea' Z. Jones
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 24th day of January, 2011

⁴ Entergy identified one of PW's exhibits using an erroneous exhibit number. At page 14 of the Motion, Entergy mis-identifies NUREG/CR-6572, Rev. 1, Kalinin PRA, Procedure Guides for Probabilistic Risk Assessment as PW00015. The correct number for that exhibit is PW00020.

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In the Matter of)
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ENTERGY NUCLEAR OPERATIONS, INC.) Docket No. 50-293-LR
)
(Pilgrim Nuclear Power Station))
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Response in Support of Entergy's Motion In Limine" have been served upon the following by the Electronic Information Exchange, with courtesy copies sent by electronic mail, this 24th day of January, 2011:

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