

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	
	January 30, 2012

**APPLICANT’S MOTION IN LIMINE TO EXCLUDE PORTIONS OF
THE PREFILED TESTIMONY, REPORT, AND EXHIBITS FILED
BY NEW YORK STATE AND DR. STEPHEN SHEPPARD
IN SUPPORT OF CONSOLIDATED CONTENTION NYS-16B**

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I. INTRODUCTION

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 November 17, 2011,¹ Entergy Nuclear Operations, Inc. (“Entergy”) hereby moves to exclude from the hearing record certain evidence proffered by New York State (“NYS” or “the State”) on December 16, 2011, in support of Consolidated Contention NYS-16B. Specifically, Entergy seeks to exclude from the record: (1) portions of Dr. Stephen Sheppard’s prefiled written testimony;² (2) portions of Dr. Sheppard’s report;³ and (3) Exhibits NYS000212, NYS000213,

¹ Licensing Board Order (Granting Unopposed Motion by the State of New York and Riverkeeper, Inc. to Amend the Scheduling Order) at 1 (Nov. 17, 2011) (unpublished).

² Exh. NYS000207, Pre-Filed Written Testimony of Dr. Stephen Sheppard, Ph.D. Regarding Contention NYS-16/16A/16B (“NYS-16B”) (Dec. 16, 2011) (“Sheppard Testimony”).

³ Exh. NYS000209, Report of Dr. Stephen C. Sheppard, Ph.D. in Support of Contention NYS-16/16A/16B (“NYS-16B”) (“Sheppard Report”).

and NYS000214 in their entirety.⁴ Attachment 1 to this Motion identifies the specific evidence that should be excluded, including a description of the information and basis for exclusion.

NYS-16B challenges aspects of Entergy’s severe accident mitigation alternatives (“SAMA”) analysis for Indian Point. Significantly, the State has chosen not to pursue the core or fundamental thrust of that contention, *i.e.*, its challenge to Entergy’s use of the Gaussian air dispersion model in the MACCS2 computer code.⁵ Therefore, the State’s only remaining challenge in NYS-16B is to the 2035 population estimate used in Entergy’s SAMA analysis—a challenge that NYS has repeatedly relegated to footnotes in its pleadings.⁶

In an attempt to bolster that remaining challenge, NYS has raised an entirely new issue with a new expert in its prefiled testimony: Entergy’s alleged failure to account for “census undercount”—defined by Dr. Sheppard as the U.S. Census Bureau’s purported persistent undercount of portions of the population, particularly minority and low-income populations—in the data underlying its SAMA-related population estimate.⁷ The new issue is belatedly raised, beyond the scope of the admitted contention, and not reasonably inferred from the State’s prior pleadings. And it is beyond the scope of this proceeding. The U.S. Census Bureau, an agency

⁴ See Exh. NYS000212, J.G. Robinson, B. Ahmed, P.D. Gupta and K.A. Woodrow, “Estimation of Population Coverage in the 1990 United States Census Based on Demographic Analysis,” *Journal of the American Statistical Association*, Vol. 88, No. 423 (Sept. 1993); Exh. NYS000213, U.S. Census Monitoring Board Presidential Members, Final Report to Congress (Sept. 1, 2001); Exh. NYS000214, J.G. Robinson, ESCAP II: Demographic Analysis Results, Executive Steering Committee for A.C.E. Policy II, Report No. 1 (Oct. 13, 2001).

⁵ See State of New York, Entergy Nuclear Operations, Inc., and NRC Staff Joint Stipulation at 2 (“[T]he State has chosen not to pursue the claim that Entergy’s air dispersion model 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.”); Exh. NYS000206, State of New York Initial Statement of Position, Contention NYS-16/16A/16B at 6-7 n.6 (Dec. 16, 2011) (“NYS Statement of Position”).

⁶ Federal courts have found that arguments raised only in footnotes can be deemed waived. See, *e.g.*, *Hill v. Kemp*, 478 F.3d 1236, 1255 n.21 (10th Cir. 2007) (“We will not consider an argument raised in such a perfunctory manner.”); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1122 (10th Cir. 2004) (finding issue raised only in footnote before trial court deemed waived); *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) (citations omitted) (“We have repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived.”).

⁷ See Sheppard Testimony at 10.

within, and under the jurisdiction of, the Department of Commerce, is responsible for collecting and assessing the adequacy of census and other demographic data—not this Licensing Board.⁸

A key purpose of the contention rules is to provide notice to the other parties, so that they can adequately prepare a defense. In this case, Entergy had no inkling from the State’s pleadings that it would argue that U.S. census data are inherently flawed.⁹ To the contrary, the State *itself* previously relied on U.S. census data in *support* of its own position.¹⁰ The State’s argument is thus not mere elaboration on a previously-admitted issue. It is a distinctly new claim that NYS failed to plead, despite having multiple chances to do so over the last four years. Accordingly, all NYS testimony and materials related to the new issue are irrelevant and should be excluded from the evidentiary record pursuant to 10 C.F.R. §§ 2.319 and 2.337(a).

II. LEGAL STANDARDS

Nuclear Regulatory Commission (“NRC” or “Commission”) regulations governing the admissibility of evidence provide that “[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 practicable.”¹¹ Thus, pursuant to 10 C.F.R. § 2.319(d), the Board may “strike any portion of a written presentation or a response to a

⁸ Specifically, through the Census Act, 13 U.S.C. § 1 et seq., Congress has delegated to the Secretary of the Department of Commerce the responsibility to take “a decennial census of the population . . . in such form and content as he may determine. . . .” 13 U.S.C. § 141(a) (2011).

⁹ This complete lack of notice to the Board and other parties regarding the State’s new “census undercount” theory is especially troubling given that theory’s associated legal and factual complexities. The U.S. Census Bureau’s decennial census has constitutional underpinnings and is routinely used by federal agencies for many purposes, including assessments performed under the National Environmental Policy Act (“NEPA”).

¹⁰ See, e.g., New York State Notice of Intention to Participate and Petition to Intervene at 164 n.37 (Nov. 30, 2007) (“NYS Petition”) (citing U.S. Census Bureau, State and County QuickFacts, New York County, New York, available at <http://quickfacts.census.gov/qfd/states/36/36061.html>) (last accessed Jan. 30, 2012)) (“The United States Census estimates that in 2006 Manhattan’s population was 1,611,581, over 40,000 more than Entergy asserts would be at risk 29 years later.”), available at ADAMS Accession No. ML073400187.

¹¹ 10 C.F.R. § 2.337(a).

written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and under Section 2.319(e) the Board may restrict evidence or arguments for the same reasons.

Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to testimony and exhibits that are outside the admitted contention’s scope or that raise issues that were not properly presented in earlier pleadings.¹² Similarly, it may exclude testimony and supporting evidence that is outside the scope of this license renewal proceeding,¹³ or, in accordance with 10 C.F.R. § 2.335(a), evidence attacking the validity of NRC regulations.

Recent Commission decisions explicitly hold that Intervenors are not permitted to change the scope of a contention as admitted by the Board. In the *Vogtle* proceeding, the Commission upheld a Board ruling excluding testimony at hearing that strayed beyond the scope of the bases as pled and admitted, which “defined the scope of the . . . contention.”¹⁴ The Commission emphasized that the scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases.¹⁵

¹² See, e.g., *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”); *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) (granting in part motion to exclude evidence on topics outside scope of contention and license renewal proceeding); *La. Energy Servs., L.P.* (National Enrichment Facility), Licensing Board Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) at 4-10 (Jan. 21, 2005) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of the admitted contention, including topics raised and rejected at the pleadings stage).

¹³ See cases cited *supra* note 12.

¹⁴ *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 71 NRC 90, 101 (2010). Thus, to the extent Intervenors may seek to argue, based on *Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 147 (2006) and *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004), that it may freely add bases after the contention pleading stage, the Board should reject this argument. These rulings interpreted the contention admissibility rule, not the question of whether testimony at hearing that strayed beyond the stated bases of an admitted contention was admissible.

¹⁵ *Vogtle*, CLI-10-05, 71 NRC at 100.

Similarly, in the recent *Pilgrim* decision, the Commission reiterated that longstanding precedent requires a Board to look back at the bases to determine the scope of a contention, because the “reach of a contention *necessarily* hinges upon its terms *coupled* with its stated bases.”¹⁶ A key reason for this requirement is to provide notice to the opposing parties of the issues they will need to defend against.¹⁷ Because of this principle:

Intervenors therefore 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. Where warranted we allow for amendment of admitted contentions, but do not allow distinctly new complaints to be added at will as litigation progresses, stretching the scope of admitted contentions beyond their *reasonably inferred* bounds.¹⁸

Based on this standard, the Commission affirmed a Board decision to exclude allegations related to “health costs” from a contention challenging the input data on “economic consequences” in a SAMA evaluation, because the stated *bases* did not include such costs.¹⁹ The Commission stressed that “NRC adjudicatory proceedings would prove endless if parties were free . . . to introduce entirely new claims which they either originally opted not to make or which simply did not occur to them at the outset.”²⁰

III. ARGUMENT

Dr. Sheppard’s arguments concerning “census undercount” stray outside the scope of the admitted contention and constitute a distinctly new issue that NYS failed to assert in its earlier

¹⁶ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added) (citing *Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988)).

¹⁷ *See id.*

¹⁸ *Id.* at 308-309 (emphasis added) (citations omitted).

¹⁹ *See id.* at 309-10.

²⁰ *Id.* at 311 (quoting *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-05-28, 62 NRC 721, 727-28 (2005)).

pleadings—and which could not be “reasonably inferred” from those pleadings.²¹ The Board should therefore strike those portions of Dr. Sheppard’s prefiled testimony and report identified in Attachment 1 to this Motion. It also should strike supporting Exhibits NYS000212, NYS000213, and NYS000214 in their entirety.

A. The Board Should Strike Those Portions Of Dr. Sheppard’s Prefiled Written Testimony And Report That Raise The New Issue Of “Census Undercount”

As described above, an intervenor may not freely change the focus of an admitted contention at will, but is bound by the terms of the contention.²² To the extent Dr. Sheppard alleges that Entergy’s population estimate does not consider “census undercount,” his prefiled testimony and expert report violate this settled principle. Moreover, this new and untimely allegation deprives the other parties of the requisite notice as to what issues they will have to defend against or oppose.²³ Accordingly, the Board should exclude those materials from the evidentiary record.

The Commission has stated that when “an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”²⁴ NYS’s original and amended contentions challenged—again, in the form of a footnote—Entergy’s population estimate for the year 2035 (particularly for the New York City

²¹ *Id.* at 28.

²² *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citations omitted).

²³ *See, e.g., S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-08-2, 67 NRC 54, 78 (2008) (quoting *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 329 (2005), *aff’d*, CLI-05-19, 62 NRC 403, 413-14 (2005) (citation omitted) (“[T]he State failed at any point to put specifically in issue the concern it now expresses about reduced shielding. Perhaps the State believed that such an argument was evident from its overall presentation. But we hold that neither we nor the State’s opponents had notice of the need to address that theory.”).

²⁴ *McGuire*, CLI-02-28, 56 NRC at 379.

area), suggesting that the estimate seemed low in light of other available and more recent data.²⁵ However, those contentions never stated or implied that the 2000 U.S. Census data upon which that estimate rests are inherently flawed due to census undercount. Indeed, in all three iterations of its contentions—NYS-16, NYS-16A, and NYS-16B—NYS *itself* cited data from the U.S. Census Bureau as supporting information.²⁶

If NYS wished to challenge the adequacy of the population data used by Entergy as underestimating minority or low-income populations near Indian Point, then it should have made a particularized claim to that effect long ago. But the State’s original and amended contentions failed to identify, analyze, or otherwise discuss the issue of census undercount. Nor did those contentions identify that phenomenon as a cause of, or factor contributing to, Entergy’s alleged underestimation of the 2035 population. In short, the State’s newly-invented argument could not be reasonably inferred from the State’s prior pleadings on this contention.²⁷

Importantly, NYS’s new census undercount argument does not arise from new information or analyses previously unavailable to the State. And NYS does not assert otherwise. Dr. Sheppard, in fact, asserts that “[c]ensus undercount has been acknowledged for some time by the U.S. Census Bureau.”²⁸ Moreover, the documents he cites in support (NYS Exhibits 212, 213, and 214) were published in 1993 and 2001, long before this proceeding began. NYS could have raised its census undercount claim much earlier—and on multiple occasions—but failed to

²⁵ NYS Petition at 164 n.37; State of New York Contentions Concerning NRC Staff’s Draft Supplemental Environmental Impact Statement” at 10 n.4 (Feb. 27, 2009) (“Contention NYS-16A”) *available at* ADAMS Accession No. ML090690303; State of New York’s New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives at 8 n.3 (Mar. 11, 2010) (“Contention NYS-16B”) *available at* ADAMS Accession No. ML100780366.

²⁶ See NYS Petition at 164 n.37 (citing U.S. Census Bureau, State and County QuickFacts, New York County, New York, *available at* <http://quickfacts.census.gov/qfd/states/36/36061.html>); Contention NYS-16A at 10 n.4 (citing same website); Contention NYS-16B at 8 n.3 (citing same website).

²⁷ *Pilgrim*, CLI-10-11, 71 NRC at 310-11.

²⁸ Sheppard Testimony at 11, lines 4-5.

do so. For example, NYS could have raised its census undercount argument as late as December 2010, when the Staff issued its FSEIS and expressly relied on the very census data that NYS now alleges undercount minority populations.²⁹

NYS may not use the testimony or report of its expert to cure prior pleading deficiencies or to introduce new issues for hearing. Such a practice violates fundamental principles of fairness and one of the key purposes of the contention rule. As the Commission explained in *Oconee*: “[T]he rule’s requirement of detailed pleadings puts other parties in the proceeding on notice of the petitioners’ specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing.”³⁰ The State’s repeated relegation of its population-related argument to footnotes in its pleadings—coupled with its complete failure to identify the issue of census undercount in those same pleadings—fails to satisfy that standard.

Here, Entergy had no notice that NYS wished to raise or litigate the issue of census undercount until it was belatedly referenced in Dr. Sheppard’s testimony. Indeed, in the months preceding the submittal of that testimony, Entergy focused its hearing preparation efforts on explaining and defending the bases of its year 2035 population estimate vis-à-vis (1) other population data sets or sources specifically cited by NYS in its prior pleadings, and (2) other recent data sources that have become available since Entergy submitted its SAMA analysis over four years ago.

²⁹ See Exh. NYS001331, NUREG-1437, Supp. 38, Final Supplemental Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Vol. 3, App. G at G-24 to G-25 (Dec. 2010) (“FSEIS”) (describing Sandia’s independent assessment of the population data within a 50-mile radius of Indian Point using the SECPOP2000 computer program, which the FSEIS explicitly notes “is based on 2000 U.S. Census Bureau data”).

³⁰ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); see also *Private Fuel Storage*, CLI-05-19, 62 NRC at 413-14 (2005) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978) (holding that “[i]t was Utah’s burden to ‘structure their participation so that it is meaningful, so that it alerts the agency to [its] position and contentions’”).

For example, Entergy considered data available from the U.S. Census Bureau’s “State and County QuickFacts” website for New York County, and data from the New York City Department of City Planning. Both of those sources were cited by NYS in its own pleadings on NYS-16/16A/16B. Based on those pleadings, Entergy did not envision (nor could it have reasonably done so) any need to prepare testimony addressing the alleged undercounting of minority and low-income populations in data that NYS cites in support of its contention. Indeed, the State’s new argument is self-contradictory and turns its original contention on its head.

To be sure, this Board previously has observed that NRC regulations do not require a petitioner to submit all possible arguments for a contention “*as long as all are within the scope of what is admitted by the Board.*”³¹ Entergy respectfully submits that the contention admitted by the Board never contemplated hearings on alleged undercounting in U.S. Census Bureau data, which are routinely used by the federal government for a multitude of purposes and are the frequent subject of judicial notice.³² In this regard, Entergy also views the adequacy of U.S. Census Bureau data as beyond the scope of this proceeding.³³ By asserting the undercount issue at this late stage of the proceedings, the State has done much more than merely “elaborate” on a previously-admitted issue. It has injected an entirely new issue in a manner that prejudices the other parties. Accordingly, the Board should strike from evidence all arguments in Dr.

³¹ Licensing Board Memorandum and Order (Ruling on Motion for Summary Disposition of NYS-26/26A/Riverkeeper TC-1/1A (Metal Fatigue of Reactor Components) and Motion for Leave to File New Contention NYS-26B/Riverkeeper TC-1B) at 6 (Nov. 4, 2010) (emphasis added).

³² *Hollinger v. Home State Mut. Ins. Co.*, 654 F.3d 564, 571-72 (5th Cir. 2011) (stating that “United States census data is an appropriate and frequent subject of judicial notice” and taking judicial notice, based on U.S. Census Bureau statistics, regarding the relocation rates of Americans out of Texas) (citing cases).

³³ See note 8, *supra*. Cf. *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 NRC 1964, 1991 (1982) (“Under the circumstances it would be improper for this Board to entertain a collateral attack upon any action or inaction of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction.”).

Sheppard's prefiled testimony and report related to the issue of census undercount. The specific portions of those documents requiring exclusion are identified in Attachment 1 to this Motion.

B. The Board Should Strike Exhibits NYS000212, NYS000213, And NYS000214 In Their Entirety Because They Relate Solely To The Census Undercount Issue

As noted above, in his prefiled testimony and report, Dr. Sheppard relies on Exhibits NYS000212, NYS000213, and NYS000214 to support his census undercount allegations.³⁴ Those exhibits discuss undercounts in past census results, and NYS does not rely on them to support any other aspect of its remaining challenge to Entergy's 2035 population estimate.³⁵ Moreover, the very recent disclosure of these documents to Entergy only confirms the new nature of NYS's census undercount argument.³⁶ Therefore, for the reasons discussed in Section III.A above, the Board should exclude Exhibits NYS000212, NYS000213, and NYS000214 in their entirety. Those exhibits also are listed in Attachment 1 to this Motion.

C. Portions Of New York State's Statement Of Position Addressing Excluded Evidence Also Should Be Excluded And Accorded No Weight

NYS also discusses the preceding testimony and supporting evidence in its Statement of Position on NYS-16B.³⁷ Such statements are not evidence in this proceeding,³⁸ but are nevertheless subject to a motion in limine.³⁹ Therefore, to the extent the Board grants this

³⁴ See Sheppard Report at pages 4-5 n.6-11.

³⁵ Given NYS's decision not to pursue its challenge to the Gaussian air dispersion model in MACCS2, the only other remaining aspect of NYS's contention is its challenge to Entergy's estimate of transient populations; *i.e.*, its alleged failure to account for daily commuters entering and remaining within the 50-mile radius region around Indian Point. See Sheppard Testimony at 1, 3, 7, 10, 13-17.

³⁶ NYS disclosed Exhibit NYS000212 on December 16, 2011, the same day it filed its prefiled testimony on NYS-16B. NYS disclosed Exhibits NYS000213 and NYS000214 on October 3, 2011, only three months ago.

³⁷ See Exh. NYS000206, NYS Statement of Position at 1, 4, 5, 14, 15, and 19.

³⁸ See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Hearing Directives) at 2 n.2 (Sept. 12, 2007) (unpublished).

³⁹ 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).

Motion and excludes evidence identified in Attachment 1 to this Motion, the associated discussions in the Statement of Position should be excluded and accorded no weight in the Board's merits decision on NYS-16B.

IV. CONCLUSION

For the foregoing reasons, the Board should exclude from the evidentiary record the portions of Dr. Sheppard's prefiled testimony and report identified in Attachment 1 to this Motion, and also Exhibits NYS000212, NYS000213, and NYS000214 in their entirety. Those documents belatedly raise a new issue that exceeds the scope of the admitted contention and is thus irrelevant.

Respectfully submitted,

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

Entergy Attachment 1 to Applicant’s Motion in Limine to Exclude Portions of the Prefiled Testimony, Report, and Exhibits Filed by New York State and Dr. Stephen Sheppard in Support of Consolidated Contention NYS-16B

NYS Testimony and Evidence to be Stricken

Location of Information to Be Stricken	Basis for Exclusion
<i>NYS000207: Sheppard Testimony</i>	
Page 3, line 12, strike: “census undercount or”	Relates to new issue that is beyond the scope of NYS-16B
Page 5, lines 12-13, strike: “I am familiar with the body of scholarly work that discusses the census undercount and”	Relates to new issue that is beyond the scope of NYS-16B
Page 5, line 22, to page 6, line 1, strike: “First, it fails to account for census undercount, which is the undercounting of a portion of the population by the U.S. Census Bureau.”	Relates to new issue that is beyond the scope of NYS-16B
Page 9, line 23, to page 10, line 1, strike: “census undercount and”	Relates to new issue that is beyond the scope of NYS-16B
Page 10, line 8, strike: “accounts for census undercount or”	Relates to new issue that is beyond the scope of NYS-16B
Page 10, lines 15-23, to page 13, line 17, strike entire passage	Raises new issue that is beyond the scope of NYS-16B
Page 16, line 4, strike: “census undercount and”	Relates to new issue that is beyond the scope of NYS-16B
Page 16, line 7, strike: “census undercount and including”	Relates to new issue that is beyond the scope of NYS-16B
Page 17, lines 5-6, strike: “census undercount or”	Relates to new issue that is beyond the scope of NYS-16B
Page 17, line 13, strike: “that does not account for census undercount or”	Relates to new issue that is beyond the scope of NYS-16B
<i>NYS000208: Sheppard Report</i>	
Page 1, para. 2, strike: “First, by working from a base of census data the report fails to take into consideration the ‘undercount’ of minority population that has been well-documented and even accepted by the Census Bureau.”	Raises new issue that is beyond the scope of NYS-16B
Page 4, para. 1, strike: “First, an adjustment is required to compensate for the census ‘undercount’ of population.”	Raises new issue that is beyond the scope of NYS-16B
Pages 4-5, section “(1) Failure to consider census undercount,” strike entire section	Raises new issue that is beyond the scope of NYS-16B
Page 8, Table 1, strike “Undercount” column	Relates to new issue that is beyond the scope of NYS-16B

Location of Information to Be Stricken	Basis for Exclusion
<i>NYS000212: J.G. Robinson, B. Ahmed, P.D. Gupta and K.A. Woodrow, "Estimation of Population Coverage in the 1990 United States Census Based on Demographic Analysis," Journal of the American Statistical Association, Vol. 88, No. 423 (September 1993)</i>	
Strike entire exhibit	Relied upon by Dr. Sheppard for sole purpose of supporting new issue that is beyond the scope of NYS-16B
<i>NYS000213: U.S. Census Monitoring Board, Presidential Members Final Report to Congress (Sept. 1, 2001)</i>	
Strike entire exhibit	Relied upon by Dr. Sheppard for sole purpose of supporting new issue that is beyond the scope of NYS-16B
<i>NYS000214: J.G. Robinson, ESCAP II: Demographic Analysis Results, Executive Steering Committee for A.C.E. Policy II Report No. 1 (Oct. 13, 2001)</i>	
Strike entire exhibit	Relied upon by Dr. Sheppard for sole purpose of supporting new issue that is beyond the scope of NYS-16B

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	January 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. NYS indicated that it does not oppose Entergy's right to file this Motion in Limine and that it will file an answer. The NRC Staff indicated that it does not oppose Entergy's Motion in Limine and also will file an answer.

Signed (electronically) by Martin J. O'Neill

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**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))		
)	January 30, 2012	

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012, a copy of the “Applicant’s Motion in Limine to Exclude Portions of the Prefiled Testimony, Report, and Exhibits Filed by New York State and Dr. Stephen Sheppard in Support of Consolidated Contention NYS-16B” was served electronically via the Electronic Information Exchange on the following recipients:

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