

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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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 February 17, 2012
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**STATE OF NEW YORK'S ANSWER TO ENTERGY'S MOTION IN LIMINE TO
EXCLUDE PORTIONS OF PRE-FILED TESTIMONY AND EXHIBITS FOR
CONSOLIDATED CONTENTION NYS-16B**

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Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board’s July 1, 2010 Scheduling Order and subsequent Order dated November 17, 2011, the State of New York (“New York” or “the State”) submits this Answer to Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Testimony, Report, and Exhibits Filed by New York and Dr. Stephen Sheppard in Support of Consolidated Contention NYS-16/16A/16B (collectively “Consolidated Contention NYS-16B”).

INTRODUCTION

In accordance with the procedures outlined by NRC Regulations and this Board, the State submitted its prefiled testimony, expert report, exhibits, and Initial Statement of Position for Consolidated Contention NYS-16B in December 2011. These submissions provide supporting evidence proving the State’s contention that Entergy’s Severe Accident Mitigation Alternatives (“SAMA”) analysis and SAMA reanalysis, as accepted by NRC Staff, do not provide an accurate estimate of the costs of human exposure in the event of a severe accident because they underestimate the 2035 population within 50 miles of Indian Point. In his expert report, prefiled testimony, and exhibits, the State’s expert demonstrates that Entergy underestimated the 2035 population by approximately 1.2 million persons. Entergy, with the support of NRC Staff, has now asked the Board to exclude from the hearing record certain testimony statements, exhibits, and references in the State’s Initial Statement of Position for NYS-16B.¹

¹ 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 (Jan. 30, 2012) (“Entergy Motion”); NRC Staff’s Answer 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 (Feb. 9, 2012) (“NRC Staff Answer”).

The Board should deny this request for several reasons. First, motions in limine are typically used to exclude information that could prejudice a jury, but there is no such risk of prejudice in this proceeding before the Board if the Board waits until the hearing to render its decision based on a full record of relevant evidence. Second, Entergy and NRC Staff's arguments that the State's submissions are outside the scope of the admitted contention conflate the contention, bases, and supporting evidence. Contrary to Entergy and NRC Staff's assertions, the evidence on census undercount does not provide a new claim or an entirely new issue, but instead, merely provides evidentiary support for the basis of Consolidated Contention NYS-16B. Third, the plain language of the contention and its basis was enough for Entergy and NRC Staff to reasonably anticipate that the State would provide additional evidence of underestimated population. Finally, Entergy's claim that the evidence on census undercount is beyond the scope of the proceeding is a veiled attack on the merits of this evidence, and therefore, is not the proper subject of a motion in limine. For these reasons, the Board should reject Entergy's motion in its entirety.

LEGAL BACKGROUND AND STANDARDS

A. In a Relicensing Proceeding, the Board Must Admit All Relevant and Material Evidence to Ensure Its Decision Is Based Upon a Complete Record

Entergy's motion in limine, as supported by NRC Staff, boils down to a claim that portions of the State's prefiled submissions are irrelevant, immaterial, and "beyond the scope of the [contention] bases as pled and admitted"² NRC regulations do not, however, explicitly provide for motions in limine. Instead, the regulations discuss admissibility generally, specifying that "relevant, material, and reliable evidence which is not unduly repetitious" is

² Entergy Motion at 4.

admissible.³ Thus, Entergy’s argument that portions of the State’s expert testimony and reports are outside the scope of the admitted contentions is essentially an argument that the challenged testimony and reports concern issues that are irrelevant and immaterial to this adjudication.⁴

The concepts of relevance and materiality are “closely linked.”⁵ In making evidentiary determinations, NRC adjudicatory boards often look to the Federal Rules of Evidence for guidance, although they are not directly applicable to NRC proceedings.⁶ Federal Rule of Evidence 401 defines relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Whether evidence is material turns on whether “it concerns a fact that is of consequence to the outcome of the proceeding.”⁷

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. Excluding relevant and material evidence before the hearing does not serve this interest. As the Appeal Board held, “No conceivable good is served by making empty findings in the absence of essential evidence.”⁸ At this stage in the proceeding, other Licensing Boards have declined to exclude evidence.⁹ NRC

³ 10 C.F.R. § 2.337(a).

⁴ *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), Licensing Board Order, LBP 09-874-02-COL-BD01 at 2 (Jan. 17, 2012) (unpublished) (ML12017A200) (“*Calvert Cliffs 3*”).

⁵ *Id.* at 2.

⁶ *Southern California Edison Co., et al.* (San Onofre Nuclear Generating Station, Units 2 and 3), 17 N.R.C. 346, 365, n.32 (Appeal Board 1983).

⁷ *Calvert Cliffs 3* at 2.

⁸ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 N.R.C. 227, 230 (Appeal Board 1980)) (vacating Licensing Board’s finding as unsupported by the record and ordering a de novo consideration of the issues at an evidentiary hearing before the Appeal Board).

⁹ *See Calvert Cliffs 3* at 3.

Staff appropriately recognized that “the Board is capable of sorting through the testimony and evidence for scope and weight” once it has a full evidentiary record before it at the hearing.¹⁰ In this administrative proceeding, there is no danger of prejudice, as there would be in a jury trial, if the Board waits until the hearing to consider the evidence.¹¹

B. Entergy’s Motions in Limine Confuse Bases and Supporting Evidence

Entergy’s motions in limine are, to a large extent, based on a fundamental misunderstanding of two central concepts: bases and evidence.¹² It is the language of a contention and its bases that define the scope, not the “sufficient information [provided] to show that a genuine dispute exists”¹³ at the contention admissibility stage.¹⁴ The bases delineate the “reach” and “focus” of a contention.¹⁵ The “bases originally offered in support of a contention,

¹⁰ NRC Staff Answer at 1-2.

¹¹ *Calvert Cliffs 3* at 3 (“In administrative proceedings such as this, where no jury is involved, no such threat of prejudice is present, . . . there is accordingly no compelling need for a ruling on the materiality of challenged testimony before the hearing has begun.”). Should the Board chose to grant Entergy’s motion in limine, the State requests that any stricken or excluded evidence be preserved for appeal. *See Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 267 (S.D.N.Y. 2001).

¹² Compare 10 C.F.R. § 2.309(f)(1)(ii), with 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

¹³ 10 C.F.R. § 2.309(f)(1)(vi).

¹⁴ The regulatory history of what is now 10 C.F.R. § 2.309(f)(1) confirms that factual support for a contention and its bases is distinct from the bases themselves. The 1989 changes overturned prior case law that allowed contentions to be accepted without supporting evidence. *See* 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Ariz. Pub. Serv. Co.*, (Palo Verde Nuclear Generating Station, Units 1, 2, and 3) ALAB-91-19, 33 N.R.C. 397, 399 (1991). The new language added by the 1989 Amendments, 10 C.F.R. §§ 2.714(b)(2)(ii) and (iii), is essentially what now appears in 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). *See* 54 Fed. Reg. at 33,171. When the Commission adopted the current Part 2 regulations in 2004, it confirmed continuation of the distinctions established in the 1989 Regulations between contentions and bases on the one hand and supporting factual evidence on the other hand. 69 Fed. Reg. 2182, 2221, Changes to Adjudicatory Process (Jan. 14, 2004); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 N.R.C. 311, 325 (2009).

¹⁵ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 N.R.C. 388, 391 (2004). (characterizing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 379 (2002) and *Pub. Serv. Co. of New Hampshire* (Seabrook

together with the issue(s) stated in the contention itself, establish a sort of ‘envelope’ within which information will be considered to be within the ‘reach’ or ‘focus’ of a contention and therefore relevant in litigation of the contention.”¹⁶

As the proceeding progresses, the supporting evidence proffered increases and becomes more detailed. At the contention admissibility stage, “it is unnecessary for the petition to detail the evidence that will be offered in support of each contention.”¹⁷ Rather, the bases ensure the applicant and NRC staff “will know at least generally what they will have to defend against or oppose.”¹⁸ The Commission recognized that factual support is developed as the proceeding progresses.¹⁹ Therefore, “if in preparing for an evidentiary hearing on a contention, an intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would—even if not specifically stated in the original contention and bases—be relevant if it falls within the ‘envelope,’ ‘reach,’ or ‘focus’ of the contention when read with the original bases offered for it.”²⁰

Entergy’s conflation of bases and supporting evidence leads to its claim that the facts and opinions proffered by the State of New York’s experts are beyond the scope of the State’s

Station, Units 1 and 2), ALAB-899, 28 N.R.C. 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)).

¹⁶ *Id.*

¹⁷ *Vt. Yankee Nuclear Power Corp., LLC* (Vermont Yankee), LBP-90-6, 31 N.R.C. 85, 1990 WL 324407, *5 (ASLB Jan. 26, 1990) (*citing Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 A.E.C. 423, 426 (1973)).

¹⁸ *Vt. Yankee Nuclear Power Corp.*, 31 N.R.C. 85, 1990 WL 324407 at *5 (*citing Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20 (1974)).

¹⁹ *See* 54 Fed. Reg. at 33,171 (“The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.”).

²⁰ *Duke Energy Corp.*, 59 N.R.C. at 391.

admitted contentions. As will be described in more detail below, and is to be expected, the prefiled expert testimony and reports expand the evidence supporting the admitted contentions and their bases. The facts and opinions offered are still well within the scope of the admitted contentions, and should appropriately be admitted as evidence and considered by the Board at the hearing.

PROCEDURAL HISTORY

CONSOLIDATED CONTENTION NYS-16B AND ITS BASIS ASSERT THAT ENERGENCY'S SAMA ANALYSIS AND SAMA REANALYSIS, APPROVED BY NRC STAFF, PRESENT AN INACCURATE ESTIMATE OF THE COSTS OF HUMAN EXPOSURE ASSOCIATED WITH A SEVERE ACCIDENT AT INDIAN POINT BECAUSE THEY UNDERESTIMATE THE 2035 POPULATION

A. New York State Contention 16 Asserts that Entergy's SAMA Analysis for Indian Point Unit 2 and Unit 3 is Flawed Because it Will Not Present an Accurate Estimate of the Costs of Human Exposure

On November 30, 2007, the State submitted Contention NYS-16, which asserts that Entergy's SAMA analysis for Indian Point Unit 2 and Unit 3 is flawed because it "will not present an accurate estimate of the costs of human exposure."²¹ The basis of this claim is that "Entergy's projections of the 2035 population likely to be living within 50 miles of Indian Point are suspect and underestimate the potential exposed population."²² As required by the contention admissibility rules, the State offered supporting evidence, *i.e.*, "sufficient information to show that a genuine dispute exists,"²³ for the contention. The first piece of supporting evidence is Entergy's unexplained prediction that the population of Manhattan will decrease by over 40,000

²¹ New York State Notice of Intention to Participate and Petition to Intervene, Contention 16, at 163 (Nov. 30, 2007) (ML073400187) ("NYS Petition to Intervene").

²² *Id.* at 164 n.37.

²³ 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

persons between 2006 and 2035.²⁴ The second piece of supporting evidence is New York City's successful challenge to the Census Bureau's 2006 population estimates for New York City, which led the Census Bureau to upwardly adjust the 2006 population estimate by 36,100 persons.²⁵

Following oral argument, the Board admitted Contention 16 on July 31, 2008.²⁶ In admitting the contention, the Board found that the contention "questions Entergy's population projection for 2035, pointing out that the U.S. Census estimate of the population of Manhattan in 2006 is larger than Entergy's 2035 projection."²⁷ It admitted the contention "to the extent that it challenges whether the population projections used by Entergy are underestimated" and characterized the basis as "a question of model input data material to the making of accurate SAMA analyses."²⁸

B. New York State Contention 16A Asserts that NRC Staff's DSEIS Is Deficient Because It Improperly Accepts Entergy's SAMA Analysis Despite Its Inaccurate Estimate of the Costs of Human Exposure

In December 2008, NRC Staff released the Draft Supplemental Environmental Impact Statement ("DSEIS"), which failed to address any of the issues raised in Contention NYS-16 and accepted Entergy's SAMA analysis. After reviewing the DSEIS, the State submitted Contention

²⁴ NYS Petition to Intervene at 164 n. 37.

²⁵ *Id.*

²⁶ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) LBP-08-13, 68 N.R.C. 43, 110-113 (July 31, 2008) (ML082130436) ("July 31, 2008 Board Order").*

²⁷ *Id.* at 111.

²⁸ *Id.* at 112.

NYS-16A on February 27, 2009.²⁹ Contention NYS-16A asserts that the DSEIS improperly accepted Entergy's population dose estimates of radiation released in a severe accident despite the Licensing Board's admission of Contention NYS-16.³⁰ The basis of Contention NYS-16A is that "Entergy's projections of the 2035 population likely to be living within 50 miles of Indian Point are suspect and underestimate the potential exposed population."³¹ To demonstrate that the contention should be admitted, the State offered as supporting evidence Entergy's unexplained prediction that Manhattan's population will decline by over 50,000 persons between 2007 and 2035.³²

On June 16, 2009, the Board admitted Contention NYS-16A, stating, "to the degree that the Draft SEIS fails to address the issues raised by New York in NYS-16 as admitted by the Board, NYS-16A is within the scope of the proceeding and is admitted as such."³³

C. New York State Contention 16B Asserts that Entergy's December 2009 SAMA Reanalysis Does Not Present an Accurate Estimate of the Costs of Human Exposure

On December 14, 2009, Entergy submitted a revised SAMA analysis which used revised meteorological data.³⁴ On March 11, 2010, the State filed Amended Contention NYS-16B,

²⁹ State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement (Feb. 27, 2009) (ML090690303).

³⁰ *Id.* at 9-14.

³¹ *Id.* at 10 n. 4.

³² *Id.*

³³ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3) Order (Ruling on New York State's New and Amended Contentions)* at 6 (June 16, 2009) (ML091670435) ("June 16, 2009 Board Order").

³⁴ Entergy, NL-09-165, License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data (Dec. 14, 2009).

challenging Entergy's revised SAMA analysis.³⁵ In Contention NYS-16B, New York asserts that Entergy's SAMA Reanalysis will not present an accurate estimate of the costs of human exposure.³⁶ The basis of Contention NYS-16B is that "the December 2009 SAMA Reanalysis projections of the 2035 population likely to be living within 50 miles of Indian Point are suspect and underestimate the potential exposed population."³⁷ The supporting evidence put forth for this basis was: (1) Entergy's population estimate predicted an unexplained decline in Manhattan's population of over 60,000 persons between 2008 and 2035; (2) Entergy's population estimate did not adequately take into account tourists and daily commuters.³⁸

On June 30, 2010, the Board admitted Contention NYS-16B stating:

It is not clear that Entergy's December 2009 SAMA Reanalysis adds the infusion of tourists and commuters in New York City to the population used for its SAMA analysis—an absence that might underestimate the exposed population in a severe accident and, in turn, underestimate the benefit achieved in implementing a SAMA. As we said in discussing both NYS-16 and NYS-16A, the question "whether the population projections used by Entergy are underestimated" is admissible.³⁹

Thus, the Board recognized the State's ability to provide additional supporting evidence for the contention's basis that Entergy underestimated the 2035 population within 50 miles of Indian Point.

³⁵ State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Mar. 11, 2010) (ML100780366).

³⁶ *Id.* at 7-12.

³⁷ *Id.* at 8 n. 3.

³⁸ *Id.*

³⁹ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on the Admissibility of New York's New and Amended Contentions 12B, 16B, 35, and 36), LBP-10-13, 71 N.R.C. ___, at 14 (June 30, 2010) (ML101810344).*

ARGUMENT

I. DR. SHEPPARD'S REPORT AND TESTIMONY ON CENSUS UNDERCOUNT PROVIDE EVIDENTIARY SUPPORT FOR THE BASIS OF CONSOLIDATED CONTENTION NYS-16B

In Entergy's motion in limine and NRC Staff's Answer, Entergy and NRC Staff argue that census undercount constitutes a new, belatedly raised issue that is beyond the scope of the admitted contention. They argue that since census undercount was not specifically mentioned in the State's supporting evidence at the contention admissibility stage, it may not be included in the statement of position, expert report, or expert testimony. However, this argument conflates the basis and its supporting evidence, and runs counter to the NRC rules on contention admissibility, as well as Commission decisions regarding the scope of contentions.

The bases of a contention define its scope, and additional evidence, not previously mentioned in the contention or its bases, may be offered at an evidentiary hearing if it falls within the reach or focus of the contention when read with its bases.⁴⁰ The NRC rules on contention admissibility expect that the supporting evidence for a contention's basis will be developed between the contention admissibility and evidentiary hearing stages of the proceeding. At the contention admissibility stage, all that is required is "some" evidence that shows the existence of genuine dispute⁴¹—this is a lower burden than at later stages of the proceeding.⁴²

⁴⁰ *Duke Energy Corp.*, 59 N.R.C. at 391.

⁴¹ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 335 (1999) ("The intervenor must 'be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue.'" (*citing* 54 Fed. Reg. at 33,171)).

⁴² 54 Fed. Reg. at 33,168 ("[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion. At the summary disposition stage the parties will

Commission decisions have reflected this understanding of the contention admissibility requirements, finding that an intervenor may use the discovery process to develop its case and help prove an admitted contention.⁴³ Clearly, if an intervenor was required to submit all of its supporting evidence at the contention admissibility stage, there would be no need for it to submit a statement of position, expert report, or expert testimony at a later time. Similarly, if an intervenor was limited to the evidence presented at the contention admissibility stage, the discovery process would serve no purpose.

The scope of NYS-16B, defined by the contention and its basis, concerns the issue of whether or not Entergy underestimated the 2035 population likely to be exposed in the event of a severe accident at Indian Point, thereby presenting an inaccurate estimate of the costs of human exposure in its SAMA analysis. At this stage, New York is prohibited from asserting new bases that are outside the contention's scope. Therefore, it may not present arguments or evidence that problems other than the underestimation of population have caused the SAMA analyses to present an inaccurate estimate of the costs of human exposure. However, the State may present additional relevant evidence that goes toward proving the basis of the contention—*i.e.*, that

likely have completed discovery and *essentially will have developed the evidentiary support for their positions on a contention.*" (emphasis added)); *see also Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) ("Under our contention rule, Intervenor are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.").

⁴³ *See Duke Energy Corp.*, 49 N.R.C. at 335 ("[I]n quasi-formal adjudications like license renewal an intervenor may still use the discovery process to develop his case and help prove an admitted contention . . ."); and *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005) ("A petitioner does not have to prove its contention at the admissibility stage At the contention admissibility stage, a petitioner must provide 'some alleged fact or facts in support of its position.' This 'does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.'" (*citing* 54 Fed. Reg. at 33,170)).

Entergy underestimated the 2035 population at risk in the event of a severe accident at Indian Point.

The Board found that “the question ‘whether the population projections used by Entergy are underestimated’ is admissible.”⁴⁴ Thus, evidence that Entergy failed to account for census undercount in its 2035 population estimate clearly fits within the scope of Consolidated Contention NYS-16B because it is relevant to proving New York’s claim that the 2035 population was underestimated. Dr. Sheppard’s testimony shows that failing to adjust for census undercount caused Entergy to underestimate the 2035 population by 231,632 persons.⁴⁵ In presenting this evidence, New York has not changed the basis of the contention, but has simply developed the basis’s supporting evidence as it is expected to do.

Entergy and NRC Staff unsuccessfully raised similar objections to Contention NYS-16B, arguing that New York’s supporting evidence on Entergy’s failure to include tourists and commuters in the 2035 population constituted a new issue that was belatedly raised and, therefore, impermissibly late.⁴⁶ New York State countered that this evidence was not a new issue but “merely further factual support for the already-admitted basis that Entergy has ‘underestimated’ population projections.”⁴⁷ The Board agreed with New York in admitting

⁴⁴ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-10-13, at 14 (June 30, 2010) (ML101810344) (“June 30, 2010 Board Order”) (*citing* the June 16, 2009 Board Order at 6, which was quoting the July 31, 2008 Board Order at 112).

⁴⁵ Report of Dr. Stephen C. Sheppard, at 8 (December 16, 2011) (Exh. NYS000209).

⁴⁶ Applicant’s Answer to New York State’s New and Amended Contentions Concerning Entergy’s 2009 Revised SAMA Analysis, at 20 (Apr. 5, 2010) (ML101450328); NRC Staff’s Answer to State of New York’s New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternatives Reanalysis, at 12-13 (Apr. 5, 2010) (ML100960165).

⁴⁷ State of New York’s Combined Reply to Entergy and NRC Staff Answers to the State’s New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis, at 33 (April 12, 2010) (ML101160415).

Contention NYS-16B, finding that the “addition does not materially change the contention as admitted”⁴⁸ Furthermore, the Board stated, “New York was not required to present all of its supporting information in its petition to intervene; it must only supply an adequate basis for admission of the contention.”⁴⁹ Now, Entergy and NRC Staff are rehashing their previously unsuccessful argument, which attempts to artificially confine the scope of the contention by incorrectly asserting that the basis’s supporting evidence, rather than the basis itself, defines the scope of the contention.

II. THE CONTENTION AND ITS BASIS ALLOW ENTERGY AND NRC STAFF TO REASONABLY ANTICIPATE THAT NEW YORK WOULD LIKELY PROVIDE MORE EVIDENCE OF POPULATION UNDERESTIMATION

Entergy and NRC Staff claim that they had no prior notice that the State would include evidence on census undercount in its prefiled submissions. However, this assertion ignores the plain language of the contention and its bases—that Entergy’s SAMA analyses do not present an accurate estimate of the costs of human exposure because they underestimate the 2035 population. In fact, Contention 16 and its bases have not changed since the contention was first admitted. What has changed is the State providing additional evidence to support its contention. As discussed above, New York was not required to include all the supporting evidence for the contention at the admissibility stage.⁵⁰ The plain language of the contention and its basis was enough for Entergy and NRC Staff to reasonably anticipate that the State would provide additional evidence of underestimated population. By challenging Census Bureau data in its

⁴⁸ June 30, 2010 Board Order at 15.

⁴⁹ *Id.*

⁵⁰ *See, e.g., Vt. Yankee Nuclear Power Corp., LLC* (Vermont Yankee), LBP-90-6, 31 N.R.C. 85, 1990 WL 324407, *5 (ASLB Jan. 26, 1990) (“From the standpoint of basis, it is unnecessary for the petition to detail the evidence that will be offered in support of each contention.”).

initial filing in 2007, subsequently disclosing documents on census undercount, and providing detailed supporting evidence with its prefiled submissions, the State was disclosing supporting evidence at the proper times, as it became available.

Concern over the accuracy of Census Bureau data has been underlying the supporting evidence supplied by the State since it first petitioned the Board to admit Contention NYS-16. In its original Contention 16, filed on November 30, 2007, the State asserted that Entergy's population projections underestimated the potential exposed population, citing as evidence Entergy's prediction of population decline in Manhattan, and New York City's 2006 challenge to Census Bureau data. The State cited as evidence current Census Bureau data to show that Entergy's 2035 population projection for Manhattan predicted an unexplained population decline of over 40,000 persons. The State also offered as evidence data from the New York City Department of City Planning to show that, given the unreliability of Census Bureau data, the unexplained decline was actually more severe than Census Bureau data indicated. The New York City Department of Planning website, cited by the State, discussed the challenge brought by the City that led the Census Bureau to upwardly adjust its 2006 New York City population estimate by 36,100 persons. The State also mentioned this challenge, stating, "New York City contends that as of July 1, 2006 populations of Manhattan and the other four New York City Boroughs were even larger than the Census' estimates for 2006 and that the Census adopted the City's figures in September."⁵¹

After the State began working with Dr. Sheppard on Consolidated Contention NYS-16B, it began disclosing documents discussing census undercount. For example, on October 3, 2011,

⁵¹ NYS Petition to Intervene at 164 n. 37.

the State disclosed two documents that focused on census undercount. The State had retained Dr. Sheppard to address the population issues raised in Contention 16 and its basis, and it was this expert that made the State aware of these documents. The first document is the report of the Census Monitoring Board, which was tasked with monitoring and addressing census undercount in the 2000 Census.⁵² The second is a demographic analysis conducted by the Census Bureau to determine the rate of census undercount in the 2000 Census.⁵³ The timely disclosure of these documents over four months ago indicated that the State was looking into census undercount as potential supporting evidence.

In its answer to Entergy's motion in limine, NRC Staff states:

Since the beginning of this proceeding, Dr. Sheppard has been providing advice and support to NYS and its contentions. As such, NYS had an iron-clad obligation to identify Dr. Sheppard's concerns regarding the census undercount in NYS-16B or its supporting bases. However, Dr. Sheppard did not provide any supporting declaration regarding NYS-16B⁵⁴

Dr. Sheppard did not provide any declarations for Consolidated Contention NYS-16B because he was originally retained for Contention 17 only.⁵⁵ Although Dr. Sheppard provided a declaration

⁵² Exh. NYS000213.

⁵³ Exh. NYS000214.

⁵⁴ NRC Staff Answer at 6.

⁵⁵ See State of New York Initial Discovery Disclosures Pursuant to 10 C.F.R. § 2.336 (Jan. 30, 2009) (disclosing Dr. Sheppard as a witness for Contention 17 only).

in support of Contention 17 in the State’s Petition to Intervene in 2007,⁵⁶ he did not provide advice on Contention 16 until June 2010, after all three of the State’s filings for Contention 16.⁵⁷

Additionally, Entergy’s own disclosures make clear that it too was aware of census undercount. On November 7, 2011, Entergy disclosed a document from the New York City Department of Planning projecting the New York City population for the period from 2000 to 2030. Page 7 of this document contains a section on adjusting population estimates for census undercount, indicating that Entergy was aware of this supporting evidence prior to New York’s filing in late December 2011. In fact, in its motion in limine, Entergy acknowledges that it has considered data from the New York City Department of Planning—data which clearly discusses the undercount of the New York City population by the Census Bureau.⁵⁸

III. ENTERGY’S MOTION IN LIMINE IMPROPERLY RAISES CHALLENGES AS TO THE WEIGHT THE BOARD SHOULD AFFORD THE STATE’S SUPPORTING EVIDENCE OF CENSUS UNDERCOUNT

A. The Challenge Goes to the Merits of the Claim and Therefore is Not the Proper Subject of a Motion in Limine

Entergy cites 10 C.F.R. §§ 2.319(d) and (e) as providing the regulatory basis for its in limine motion. These provisions allow the presiding officer to, “on motion or on the presiding officer's own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative” and “restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments.” The

⁵⁶ See New York State Notice of Intention to Participate and Petition to Intervene and Supporting Declarations and Exhibits, Volume II of II, at PDF page 23 (Nov. 30, 2007) (ML073400193). See also State of New York Initial Discovery Disclosures Pursuant to 10 C.F.R. § 2.336 (Jan. 30, 2009) (disclosing Dr. Sheppard as a witness for Contention 17 only).

⁵⁷ See State of New York Supplemental Discovery Disclosures Pursuant to 10 C.F.R. § 2.336 (Jun. 30, 2010) (disclosing Dr. Sheppard as a witness for Contention 16 for the first time).

⁵⁸ Entergy Motion at 9.

purpose of a motion in limine, therefore, is to exclude irrelevant evidence from the record. As discussed above, however, the evidence concerning census undercount is relevant to the basis of Consolidated Contention NYS-16B because it provides support for New York’s claim that Entergy underestimated the 2035 population used in the SAMA analyses. Entergy’s claim that the census undercount evidence is beyond the scope of the proceeding does not actually challenge the relevancy of this evidence. Instead, it challenges the merits of the State’s National Environmental Policy Act (“NEPA”) claim because it calls on the Board to determine what NEPA requires of NRC Staff in its analysis of Entergy’s environmental report. This is an issue for the Board to rule on after the evidentiary hearing on the merits, not on a motion in limine.⁵⁹

In Consolidated Contention NYS-16B, the State argues that NRC Staff was required to take a “hard look” at the SAMA analyses, and that this includes examining the data relied upon by Entergy in those analyses. In its motion in limine, Entergy argues that NRC was not required to examine the Census Bureau data relied upon by Entergy because that is beyond NRC’s jurisdiction.⁶⁰ Taken to its logical conclusion, Entergy’s position would prevent governmental bodies from ensuring the accuracy of data relied upon in environmental impact statements, if that data was prepared by third parties—a proposition that turns NEPA on its head. Clearly, this disagreement goes to the merits of New York’s NEPA claim, not to the relevancy of the evidence, and therefore, is not the proper subject of a motion in limine.

⁵⁹*Vt. Yankee Nuclear Power Corp., LLC* (Vermont Yankee), LBP-90-6, 31 N.R.C. 85, 1990 WL 324407, *5 (ASLB Jan. 26, 1990) (“Furthermore, in examining the contentions and their bases, a licensing board should not reach the merits of the contentions. . . . The question of the contention's substance is for later resolution—either by way of 10 C.F.R. § 2.749 summary disposition prior to the evidentiary hearing “... or in the initial decision following the conclusion of such a hearing.” (citing *Alabama Power Company* (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974))).

⁶⁰ Entergy Motion at 2-3.

B. The Adequacy of Data Relied Upon by Entergy and NRC Staff is the Proper Subject of a NEPA Claim

Although the State does not believe this is the proper subject of a motion in limine, if the Board chooses to decide the issue, it should find that the adequacy of Census Bureau data relied upon by NRC Staff in an environmental impact statement is the proper subject of a NEPA claim.

In conducting a site-specific SAMA analysis, NEPA requires that NRC take a “hard look” at the potential environmental impacts of a severe accident, consider a reasonable range of alternatives, and provide a rational basis for rejecting alternatives that are decidedly cost-effective.⁶¹ According to the Board,

Entergy’s licenses cannot be renewed unless and until the NRC Staff reviews Entergy’s completed SAMA analyses and either incorporates the result of these reviews into the FSEIS or, in the alternative, modifies its FSEIS to provide a valid reason for recommending the renewal of the licenses before the analysis of potentially cost effective SAMAs is complete and for not requiring the implementation of cost-beneficial SAMAs.⁶²

NRC’s obligation to take the requisite “hard look” required under NEPA is not met if NRC relies on incorrect assumptions or data provided by a licensee because “accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”⁶³ Accordingly, NEPA requires that an EIS contain “high quality” information and “accurate scientific analysis,”⁶⁴ and furthermore obligates NRC Staff to “independently evaluate and be

⁶¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm’n*, 869 F.2d 719, 737 (3d Cir. 1989); and *see Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.* 419 U.S. 281, 285-86 (1974).

⁶² *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-11-17, at 17 (July 14, 2011) (ML111950712) (“July 14, 2011 Board Order”).

⁶³ *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964-65 (9th Cir. 2005); *see also* 40 C.F.R. § 1500.1(b).

⁶⁴ 40 C.F.R. § 1500.1(b); *Conservation Northwest v. Rey*, 674 F. Supp. 2d 1232, 1249 (W.D. Wash. 2009) (*citing Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003)).

responsible for the reliability of all information used in the draft environmental impact statement.”⁶⁵

Ultimately, the decision-maker—in this proceeding, NRC—must be able to use the NEPA analysis in evaluating a reasonable range of alternatives and providing a rational basis for its final decision.⁶⁶ If the NEPA analysis inadequately evaluates the available evidence and/or ignores relevant facts, as the FSEIS does in this case, then the decision-maker cannot have a rational basis for the ultimate decision.

NRC Staff has an obligation to rely on accurate data in the FSEIS. In environmental impact statements, governmental bodies often rely on data prepared by third parties. Such data must be subject to analysis by the government body approving its use or else NEPA requirements are not met. Whether or not the Census Bureau data relied upon by Entergy and NRC is accurate is an issue of fact to be determined at the evidentiary hearing stage of the proceeding.

Additionally, the case cited by Entergy for the proposition that the Board does not have the jurisdiction to resolve this matter is distinguishable.⁶⁷ In that case, the Board refused to determine the validity of a contract for a nuclear plant’s cooling water because the Board did not

⁶⁵ 10 C.F.R. § 51.70(b); *Native Ecosystems*, 418 F.3d at 964-65; *see also* 10 C.F.R. § 51.92(a); 40 C.F.R. § 1502.24 (Staff must ensure “the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.”).

⁶⁶ *See* 10 C.F.R. §§ 51.53(C)(3)(iii), 51.95(c)(4), and 51.103(a)(5). Thus, the Board concluded elsewhere in these proceedings that the “NRC would be acting arbitrarily and capriciously if it did not look at relevant data and sufficiently explain a rational nexus between the facts found in its review and the choice it makes as a result of that review.” July 14, 2011 Board Order at 11-12, *citing ShieldAlloy Metallurgical Corp. v. NRC*, 624 F.3d 489, 492-93 (D.C. Cir. 2010) (citations omitted).

⁶⁷ Entergy Motion at 9, *citing Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-82-117A, 16 N.R.C. 1964 (1982).

have jurisdiction to resolve pending federal litigation alleging that the contract contravened certain reclamation laws.⁶⁸ The case did not concern NRC Staff’s ability—indeed its responsibility under NEPA—to examine the accuracy of data prepared by third parties and relied upon in an environmental impact statement.

**THE BOARD SHOULD DECLINE TO STRIKE ALL OR PART OF THE STATE’S
INITIAL STATEMENT OF POSITION BECAUSE IT IS LEGAL ARGUMENT,
NOT EVIDENCE**

Entergy requests that the Board strike portions of the State’s Initial Statement of Position,⁶⁹ but the Board should decline to do so. As a recent Licensing Board decision acknowledged a “statement of position is just that: a statement of position, not evidence.”⁷⁰ Section 2.337(a)’s admissibility standards only apply to “evidence.”⁷¹ “Statements of position, like proposed findings of fact and conclusions of law, simply present the arguments of the parties as to what they think the evidence means and how the law should be applied to the evidence.”⁷² Thus, the Board need not decide whether to strike portions of a statement of position and should decline Entergy’s request to do so.

CONCLUSION

For the above reasons Entergy’s motion in limine, supported by NRC Staff, to exclude portions of the prefiled testimony, report, exhibits, and Initial Statement of Position filed by the State of New York in support of Consolidated Contention NYS-16B should be denied.

⁶⁸ *Id.* at 1990-91.

⁶⁹ Entergy Motion at 10-11.

⁷⁰ *Calvert Cliffs 3* at 5.

⁷¹ *Id.*

⁷² *Id.*

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Dated: February 17, 2012

10 C.F.R. § 2.323 Certification

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 has participated in discussions between Entergy Nuclear Operations, Inc. ("Entergy"), the movant, and NRC Staff, concerning Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Consolidated Contention NYS-16B, filed on January 30, 2012 in this matter, and has made a sincere effort to make themselves available to listen and respond to the movant and NRC 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

Janice A. Dean
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Dated: February 17, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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In re: Docket Nos. 50-247-LR and 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. February 17, 2012
-----x

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, copies of the State of New York's Answer to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Consolidated Contention NYS-16B was served electronically via the Electronic Information Exchange on the following recipients:

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