

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)	Docket Nos.
)	50-247-LR
Entergy Nuclear Operations, Inc.)	and 50-286-LR
(Indian Point Nuclear Generating)	
Units 2 and 3))	May 14, 2012
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**RIVERKEEPER, INC. RESPONSE IN SUPPORT OF STATE OF NEW YORK MOTION
TO STRIKE PORTIONS OF ENTERGY AND NRC STAFF WITNESS TESTIMONY**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Atomic Safety and Licensing Board’s (“ASLB”) July 1, 2010 Scheduling Order,¹ and the ASLB’s April 18, 2012 Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference),² Riverkeeper, Inc. (“Riverkeeper”) hereby submits this response in support of the State of New York’s Motion to Strike Portions of Entergy and NRC Staff Witness Testimony as Impermissible Under NRC Regulations, dated April 30, 2012 (hereinafter referred to as “New York State’s Motion to Strike”). New York State’s motion properly seeks the exclusion of testimony that constitutes impermissible legal arguments and conclusions, and should be granted.

II. APPLICABLE LEGAL STANDARD

Nuclear Regulatory Commission (“NRC”) regulations pertaining the admissibility of evidence at an adjudicatory hearing indicate that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible

¹ In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Scheduling Order (July 1, 2010), ¶ K.4.

² In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) (April 18, 2012), ¶ B (“If Intervenor’s file motions in limine on or before April 30, 2012, responses thereto will be deemed timely if filed on or before May 14, 2012”).

document will be segregated and excluded so far as is practicable.”³ In accordance therewith, the ASLB may “strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and restrict any evidence or arguments for the same reasons.⁴

As New York State’s Motion to Strike explains, lay witnesses cannot offer testimony that is legal in nature. While opinion testimony relating to the ultimate issue to be decided is not barred, any such testimony “may not usurp the role of the fact-finder, and an expert ‘may not give testimony stating ultimate legal conclusions.’”⁵ As New York’s State’s motion explicates, “experts may not invade the court’s province by testifying on issues of law,”⁶ and “[t]he meaning of federal regulation is a question of law, not a question of fact.”⁷

III. ARGUMENT

New York State’s Motion to Strike appropriately identifies testimony that impermissibly explains legal requirements, interprets “the meaning and applicability” of federal law, and draws legal conclusions; such testimony is not the proper subject of expert testimony, and should be stricken.⁸

Entergy has similarly offered this kind of impermissible testimony in relation to Riverkeeper and Clearwater’s Consolidated Contention RK-EC-3/CW-EC-1. For example,

³ 10 C.F.R. § 2.337(a).

⁴ 10 C.F.R. § 2.319(e).

⁵ *CIT Group/Business Credit, Inc. v. Graco Fishing and Rental Tools, Inc.*, 815 F. Supp.2d 673, 677 (S.D.N.Y. 2011) (quoting *In re Methyl Tertiary Butyl Ether (MTBE)* 2008 WL 197538 at *13) (S.D.N.Y. May 7, 2008); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp.2d 1037, 1042 (D. Ariz. 2005) (quoting *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988) (“[R]esolving doubtful questions of law is the distinct and exclusive province of the trial judge.”));

⁶ *In re Initial Public Offering Sec. Lit.*, 174 F. Supp.2d 61, 64 (S.D.N.Y. 2001) (citing *United States v. Leo*, 941 F.2d at 196-97).

⁷ *CFM Comms., LLC v. Mitts Telecasting Co.*, 424 F. Supp.2d 1229, 1234 (E.D. Cal. 2005); see New York State Motion to Strike at 5-6.

⁸ See *supra* Notes 5-7; New York State Motion to Strike at 6-11.

Question 44 in Entergy’s proffered testimony relating to RK-EC-3/CW-EC-1 states “[p]lease identify the NRC regulations implementing NEPA and briefly describe how those regulations apply to license renewal applications,” and Entergy’s witness, Carl J. Paperiello, a nuclear consultant (who provides “consultant services in the areas of health physics, fuel cycle and materials licensing, waste management, and decommissioning”) provides a lengthy answer.⁹ Mr. Paperiello’s testimony goes on to further explain NRC regulations, and the meaning of “significance” for purposes of the NEPA review conducted in the Indian Point license renewal proceeding.¹⁰ Similar to the portions of testimony identified in New York State’s Motion to Strike, such testimony “reads more like a legal brief than an expert opinion”¹¹ and is impermissible, as experts may not “opine on ‘what the law required’ or ‘testify as to the governing law.’”¹²

Furthermore, after essentially (and unnecessarily) repeating what Entergy stated in its Environmental Report pertaining to the license renewal of Indian Point, all of Entergy’s witnesses conclude that Entergy has “adequately and appropriately” characterized spent fuel pool leaks at Indian Point as “new, but not significant information”¹³ – a conclusion that relates to and depends upon the *legal* interpretation of concept of “significance.” Such a conclusion essentially constitutes an opinion as to the legal standard at issue, as opposed to an opinion grounded in the areas of expertise Entergy’s witnesses purport to be qualified to testify about. This is

⁹ Testimony of Entergy Witnesses Donald M. Mayer, Alan B. Cox, Thomas C. Esselman, Matthew J. Barvenik, Carl J. Paperiello, and F. Owen Hoffman Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (March 29, 2012), at 8-9, 23-25.

¹⁰ *Id.* at 25-27 (Questions and Answers 45, 46).

¹¹ *CFM Comms., LLC v. Mitts Telecasting Co.*, 424 F. Supp.2d 1229, 1234 (E.D. Cal. 2005).

¹² *Casper v. SMG*, 389 F. Supp.2d at 621 (*quoting United States v. Leo*, 941 F.2d at 196-97).

¹³ Testimony of Entergy Witnesses Donald M. Mayer, Alan B. Cox, Thomas C. Esselman, Matthew J. Barvenik, Carl J. Paperiello, and F. Owen Hoffman Regarding Consolidated Contention RK-EC-3/CW-EC-1 (Spent Fuel Pool Leaks) (March 29, 2012), at 90 (Answer 122).

inappropriate legal argument presented as expert testimony, that, like the testimony identified in New York State's Motion to Strike, should be afforded no weight.¹⁴

Entergy's practice of allowing its witnesses to proffer purely legal argument and draw conclusions of law is simply an unacceptable invasion of the tribunal's role in this proceeding.¹⁵

IV. CONCLUSION

For the foregoing reasons, the ASLB should grant New York State's Motion to Strike Portions of Entergy and NRC Staff Witness Testimony.

Respectfully submitted,

Signed (electronically) by Deborah Brancato

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¹⁴ *Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 510 (2d Cir. 1977); *Amergen Energy Comp, LLC* (Oyster Creek Nuclear Generating Station, Docket No. 50-0219-LR, ASLBP No. 06-844-01-LR, 2007 NRC LEXIS 120, *1 (Sept. 12, 2007) (explaining how licensing board chose to "refrain from actually expunging [any] irrelevant material from the record [r]ather, to the extent we conclude that material is irrelevant or otherwise inadmissible, we will accord it no weight).

¹⁵ *CIT Group/Business Credit, Inc. v. Graco Fishing and Rental Tools, Inc.*, 815 F. Supp.2d 673, 677 (S.D.N.Y. 2011) (quoting *In re Methyl Tertiary Butyl Ether (MTBE)* 2008 WL 197538 at *13) (S.D.N.Y. May 7, 2008); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp.2d 1037, 1042 (D. Ariz. 2005) (quoting *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988) ("[R]esolving doubtful questions of law is the distinct and exclusive province of the trial judge."); *In re Initial Public Offering Sec. Lit.*, 174 F. Supp.2d 61, 64 (S.D.N.Y. 2001) (citing *United States v. Leo*, 941 F.2d at 196-97); *CFM Comms., LLC v. Mitts Telecasting Co.*, 424 F. Supp.2d 1229, 1234 (E.D. Cal. 2005); see New York State Motion to Strike at 5-6.

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Certification Pursuant to 10 C.F.R. § 2.323(b)

Pursuant to the ASLB's July 1, 2010 Scheduling Order,¹ I certify that I am unaware of any attempt by the other parties to the proceeding to contact Riverkeeper regarding New York State's Motion in to Strike.

Signed (electronically) by Deborah Brancato

Deborah Brancato, Esq.

¹ In the Matter of Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-03-LR-BD01, Scheduling Order (July 1, 2010), ¶ G.7.

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CERTIFICATE OF SERVICE

I certify that on May 14, 2012, copies of Riverkeeper Inc.'s Response in Support of the State of New York's Motion to Strike Portions of Entergy and NRC Staff Witness Testimony as Impermissible Under NRC Regulations, were served on the following via NRC's Electronic Information Exchange:

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Signed (electronically) by Deborah Brancato

Deborah Brancato

May 14, 2012