

**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, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. July 23, 2012
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**STATE OF NEW YORK'S ANSWER IN OPPOSITION TO
ENERGY'S MOTION FOR LEAVE TO FILE SUR-REBUTTAL
TESTIMONY ON CONSOLIDATED CONTENTION NYS-12C**

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In accordance with 10 C.F.R. § 2.323(c), the State of New York State hereby submits this answer in opposition to Entergy's July 12, 2012 motion seeking leave to file written sur-rebuttal testimony by August 13, 2012, concerning the State's admitted consolidated contentions 12, 12A, 12B, and 12C (collectively "Consolidated Contention NYS-12C" or "NYS-12C").

INTRODUCTION

Throughout this proceeding the State has sought to ensure a transparent process where all relevant issues are addressed. At times, the State has had to seek this Board's assistance to require other parties disclose material to which the State, and the public, has a right.¹ Consistent with that commitment, the State notes that an alternative to Entergy's request exists: the matter could be addressed by the parties' witnesses at the evidentiary hearing.

As is explained in both the State's Revised Statement of Position (NYS000419) ("NYS Revised SOP") and the Pre-filed Rebuttal Testimony of Dr. François Lemay of International Safety Research ("ISR") (NYS000420) ("Lemay Rebuttal Test.") for NYS-12C, in the course of developing a response to Entergy and NRC Staff's arguments, the State's experts discovered a site-specific case study commissioned by the NRC to estimate the costs associated with a severe accident at Indian Point, "NUREG/CR-5148 Property-Related Costs of Decontamination" (Feb. 1990) (NYS000424). *See* NYS Revised SOP at 14-16; Lemay Rebuttal Test. at 26-28. Notably, Entergy and the federal government (including NRC Staff and the national laboratories) did not disclose this document.

Entergy now requests a lengthy opportunity to prepare and file sur-rebuttal pre-filed

¹ *See, e.g.*, State of New York Motion to Compel NRC Staff to Produce Documents Relied Upon in Staff's Final Supplemental Environmental Impact Statement (Apr. 22, 2011) (ML11132A149); State of New York's Motion to Compel NRC Staff to Produce the MACCS2 Code Absent a Fee in Compliance with the National Environmental Policy Act ("NEPA") and NRC Disclosure Regulations (Jan. 15, 2010) (ML100210550).

testimony to discuss NUREG/CR-5148 along with two other State exhibits: NUREG/CR-3413 (NYS000425) and a May 2, 2012 email exchange between ISR and Dr. J. Tawil, the author of NUREG/CR-5148 and NUREG/CR-3413 (NYS000426). The State, however, properly submitted those exhibits as rebuttal evidence in direct response to arguments in Entergy and NRC Staff's Statements of Position and Pre-filed Testimony on NYS-12C. The filing of additional pre-filed written testimony by Entergy and/or NRC Staff could require, at a minimum, an adjustment of the deadline to submit proposed cross-examination on this Track 1 contention, which is slated for the October 2012 hearing dates.² Entergy presents no credible argument to support such changes in the procedural schedule set by the Board because any issues related to the State's exhibits could be addressed at the hearing itself. If, however, the Board grants Entergy's motion, the State respectfully requests that it be afforded an equal amount of time to prepare pre-filed testimony to respond to Entergy and NRC Staff's additional filings.

ARGUMENT

A. The State Submitted NUREG/CR-3413, NUREG/CR-5148, and the May 2, 2012 Email Exchange In Direct Response to Entergy and NRC Staff's Statements of Position and Pre-filed Testimony

Entergy incorrectly argues that the State has presented "new arguments and evidence that expand the scope of the arguments set forth in their direct testimony, and to which Entergy has not had a fair opportunity to respond." Applicants' Motion for Leave to File Surrebuttal Test. on Consolidated Contention NYS-12C at 1 (Jul. 12, 2012) ("Entergy's Mot."). Instead, the State's Revised SOP and Rebuttal Testimony responds directly to Entergy and NRC Staff's arguments

² "NRC Staff counsel stated that the Staff does not oppose Entergy's Motion, and that if the Board grants the Motion, then the Staff would like to have the opportunity to file surrebuttal testimony and a revised position statement in response to New York's filing as well, should the Staff decide to do so, at the same time as Entergy." Applicants' Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C at 7 (Jul. 12, 2012) ("Entergy's Mot.).

that using NUREG-1150, and thus Sample Problem A, is reasonable under NEPA.

In its initial statement of position and pre-filed testimony, the State argued that it was unreasonable under NEPA for Entergy and NRC Staff to rely upon Sample Problem A values, developed for the Surry site in rural Virginia, instead of developing site-specific inputs to estimate the costs associate with a severe accident used in the SAMA analysis for Indian Point. *See generally* NYS Initial Statement of Position at 12-33 (NYS000240) (“NYS Initial SOP”). In its Statement of Position and Pre-filed Testimony, Entergy argued that using Sample Problem A was reasonable because its values were sourced from NUREG-1150 and, thus, have “have a long-established and appropriate technical basis, are widely accepted within the PRA community, and continue to be used today in PRAs and SAMA analyses.”³ Entergy faulted the State for “not acknowledg[ing] the source and pedigree of the inputs used by Entergy.” Entergy Test. at A76. The testimony submitted by NRC Staff makes a similar claim.⁴

In researching Entergy and NRC’s “pedigree” argument about NUREG-1150, the State’s experts honed in on a document, “NUREG/CR-3413 Off-Site Consequences of Radiological Accidents: Methods, Costs and Schedules for Decontamination” (NYS000425), which is cited in NUREG-1150. NYS Revised SOP at 14; Lemay Rebuttal Test. at 26, 28. NUREG/CR-3413 describes a database and computer program called DECON developed by an NRC contractor to conduct a decontamination analysis of a large, radiologically contaminated area.⁵ *Id.* ISR

³ Entergy’s Statement of Position Regarding Consolidated Contention NYS-12C (Severe Accident Mitigation Alternatives Analysis) (Mar. 30, 2012) (ENT000449) (“Entergy SOP”) at 29. *See also* Entergy SOP at 5; Testimony of Entergy Experts Lori Potts, Kevin O’Kula, and Grant Teagarden on NYS-12C (ENT000450) (“Entergy Test.”) at A26, A35, A72, A76, A78, A160.

⁴ *See* Testimony of NRC Staff Experts Nathan Bixler, S. Tina Gosh, Joseph A. Jones, and Donald Harrison Concerning NYS 12/16 (NRC000041) (“Staff Test.”) at A39 (“NUREG-1150 ... was subjected to an extensive peer review and public comment.”).

⁵ DECON was designed to be used with CRAC2, a predecessor to the MACCS2 code, and

contacted one of NUREG/CR-3413's authors, Dr. J. Tawil, via email on May 2, 2012. *Id.* The email exchange between Dr. Tawil and ISR revealed that NRC Staff conducted a site-specific study at Indian Point and was concerned about the results. Dr. Tawil wrote:

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

May 2, 2012 Email Exchange between ISR and J. Tawil (NYS000426) (emphasis added).⁶

In its revised SOP, the State argued that NUREG/CR-5148 shows that NRC has actually conducted a site-specific analysis of the decontamination costs associated with a severe accident at Indian Point, without using NUREG-1150 values, and, therefore, without relying upon Sample Problem A. NYS Revised SOP at 15. Thus, NUREG/CR-5148 shows that a site-specific analysis was not only required under NEPA and NRC's regulations, but eminently possible and had been completed in conjunction with NUREG/CR-5148. *See Limerick Ecology Action, Inc. v. N.R.C.*, 869 F.2d at 729-31 (3d Cir. 1989) (holding that NEPA requires NRC to examine, on a site-specific basis, the environmental effects of significant accidents at nuclear power plants). This directly responds to and rebuts Entergy and NRC Staff's arguments.

appears to be similar to CONDO, which was one of the methodologies that ISR previously described as one of several bases that could be used to calculate site-specific costs (NYS000250) and was also one of the methodologies that Entergy and NRC Staff criticized ISR for using. Lemay Rebuttal Test. at 26, 28.

⁶ Entergy states, in a footnote, that "[a]ny statements made by Dr. Tawil in e-mail communications with NYS's consultant are hearsay, the reliability of which has not been established by NYS." Entergy's Mot. at 4, n.17. Even if the email is hearsay, NRC has implemented a "long established rule that hearsay is generally admissible in NRC proceedings." *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 N.R.C. 397, 411-12 (1976); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 N.R.C. 273, 279 (1987). The email is admissible in this proceeding under NRC standards because it is reliable, relevant, material, and not repetitious under 10 C.F.R. § 2.337(a).

B. The State Timely Disclosed NUREG/CR-3413, NUREG/CR-5148, and the May 2, 2012 Email Exchange

Entergy's motion seeks to deflect questions about why it did not disclose the NUREG/CR-5148 Indian Point site-specific study by claiming that "[i]t is not clear why NYS did not disclose and rely on [NUREG/CR-5148] in its earlier submission" (Entergy Mot. at 4). Contrary to its apparent confusion, Entergy well knows that the State explained that it did not know of NUREG/CR-5148 until May 2012. The State provided an explanation of how and when it discovered NUREG/CR-5148 in its revised statement of position, rebuttal testimony, and even during consultation with Entergy on this very motion for sur-rebuttal—before Entergy presented it. In sum, after ISR showed the State its May 2, 2012 email exchange with Dr. Tawil, the State located a copy of the site-specific study that Dr. Tawil authored and referred to in his email: NUREG/CR-5148. NYS Revised SOP at 14. The State timely disclosed both the May 2, 2012 email exchange and NUREG/CR-5148 in its May 2012 disclosures—the same month the email exchange took place and NUREG/CR-5148 was discovered. NUREG/CR-3413 had been disclosed by the State back on March 31, 2011.

Entergy requested copy of NUREG/CR-5148 from the State on June 5, 2012, and the State sent Entergy copy of it, by CD, on June 7, 2012. Therefore, Entergy had a copy of NUREG/CR-5148 for at least 20 days before State submitted its revised statement of position and rebuttal testimony on June 29. Thus, Entergy seeks to have 65 days from the receipt of NUREG/CR-5148 in this proceeding and 45 days from the receipt of Dr. Lemay's pre-filed testimony to prepare additional testimony.

NRC has had the document for 22 years. NUREG/CR-5148 was requested and authorized by the NRC and funded by the U.S. taxpayers. It has a formal a "NUREG/CR" number and was preserved by NRC in its microfiche collection. Although the State's revised SOP identifies the document being "circulated in final draft form" (NYS Revised SOP at 14),

upon further examination it appears that the document is not a draft. There are no “draft” markings or any other designation to indicate that NUREG/CR-5148 is a draft. If any party is prejudiced by the late disclosure of this document, it is the State.

C. NUREG/CR-3413, NUREG/CR-5148, and the May 2, 2012 Email Exchange Can Be Addressed During the October 2012 Hearing

If the Board grants Entergy’s request that it have until August 13, 2012 to file sur-rebuttal testimony,⁷ fairness dictates that the State should be afforded a similar amount of time to file its own sur-rebuttal testimony to any additional testimony proffered by Entergy and NRC Staff. In addition, the August 29, 2012 deadline for cross-examination issue submissions may need to be extended. Affording the State an equal opportunity for sur-rebuttal is especially important because Entergy has indicated it will likely broaden the scope of the limited arguments the State raised with respect to NUREG/CR-5148 and “may include the methodology used by the [NUREG/CR-5148]’s authors and how they applied it to the Indian Point site; the interface with the CRAC2 code; the types of cost estimated; and how those cost types compare with the MACCS2-based offsite economic costs applied in a SAMA analysis.” Entergy’s Mot. 6. These topics go well beyond the State’s testimony and arguments on NUREG/CR-5148, which are summarized in A. above.

Because the States arguments with respect to NUREG/CR-5148 are limited to directly responding the Entergy and NRC Staff’s arguments, any relevant issues related to NUREG/CR-5148 can be adequately address at the hearing by Entergy submitting proposed cross-

⁷ As noted, Entergy’s proposed August 13 date for submission of pre-filed testimony is 65 days from when Entergy received NUREG/CR-5148 and 45 days from when Entergy received the Pre-filed Rebuttal Testimony of Dr. Lemay and the State’s Revised Statement of Position (June 29, 2012).

examination for the State’s witnesses.⁸ Entergy has failed to show why written sur-rebuttal is necessary and, therefore, its motion should be denied.

CONCLUSION

For the above reasons Entergy’s motion for leave to file sur-rebuttal testimony on Consolidated Contention NYS-12C should be denied. If, however, the Board grants Entergy’s motion, the State respectfully requests that it be afforded an equal amount of time to prepare pre-filed testimony to respond to Entergy and NRC Staff’s additional filings.

Respectfully submitted,

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Dated: July 23, 2012

⁸ In other contexts, boards have allowed live surrebuttal testimony at hearings. *See In the Matter of Louisiana Energy Servs., L.P.* (Nat’l Enrichment Facility), 63 N.R.C. 241, 270-271 (2006) (“[T]he Board and the parties agreed that the parties would litigate the issues raised by [an] amended contention . . . to the extent possible through oral testimony (in the form of redirect/surrebuttal and cross-examination) by their respective witnesses/witness panels scheduled to testify . . .”).

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

In accordance with the Board’s Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York participated in discussions initiated by Entergy Nuclear Operations, Inc. (“Entergy” or the “movant”), with the movant and NRC Staff, concerning Entergy’s Motion for Leave to File Sur-rebuttal Testimony on Consolidated Contention NYS-12C, filed on July 12, 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.

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July 23, 2012

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

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Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. July 23, 2012
-----x

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, copies of the State of New York's Answer to Entergy's Motion for Leave to File Sur-rebuttal Testimony on Consolidated Contention NYS-12C were served electronically via the Electronic Information Exchange on the following recipients:

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