

July 30, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE
PREFILED REBUTTAL TESTIMONY AND REBUTTAL EXHIBITS
FILED BY THE STATE OF NEW YORK CONCERNING
CONSOLIDATED CONTENTION NYS-12C (SAMAs)

INTRODUCTION

In accordance with 10 C.F.R. §§ 2.319, 2.323, 2.337, 2.1204, and the Atomic Safety and Licensing Board's ("Board") scheduling Order of July 1, 2010, and Order (Granting Unopposed Extension of Time) of May 16, 2012, the staff of the U.S. Nuclear Regulatory Commission ("Staff") files this Motion *in Limine* to exclude the following matters from the State of New York's ("New York") evidentiary filings of June 29, 2012 concerning Contention NYS-12C (SAMAs):

1. Exhibits ("Ex.") NYS000424A-NYS000424BB, "NUREG/CR-5148, PNL-6350, Property-Related Costs of Radiological Accidents (February 1990)" ("Dr. Tawil's Unpublished Report");
2. Exhibit NYS000426, Email from Dr. J. Tawil, President, Research Enterprises, Inc., to M. Labriola, International Safety Research, Inc. (May 2, 2012) ("Tawil Email"); and
3. Certain portions of Ex. NYS000420¹, "Pre-Filed Written Rebuttal Testimony of Dr. François J. Lemay Regarding Consolidated NYS-12-C (NYS-12/12-A/12-B/12-C)" ("Lemay Rebuttal Testimony"), that relate to the aforementioned exhibits.

¹ Dr. Lemay's rebuttal testimony, as submitted on June 29, 2012, is labeled incorrectly as Exhibit NYS000241, which is the same exhibit number as the original pre-filed written testimony submitted on December 21, 2011. However, the rebuttal testimony has been correctly identified as Exhibit NYS000420 on revised New York State's revised exhibit list. For consistency, we will refer to Dr. Lemay's rebuttal testimony as Ex. NYS000420.

These exhibits and portions of the Lemay Rebuttal Testimony should be excluded from the evidentiary hearing because the information is not reliable, relevant, or material to the findings that the Board must make.² Further, New York's proffer of Dr. Tawil's Report is not within the proper scope of rebuttal testimony. Moreover, New York should have proffered these materials six months earlier, in its case-in-chief; New York's late proffer of the materials in its rebuttal testimony unfairly deprives the Staff and other parties of a proper opportunity to address the documents.³ Finally, Dr. Tawil's speculation as to why his report was never published by the NRC, and Dr. Lemay's reliance on both the contents of Dr. Tawil's report and Dr. Tawil's unsupported speculation, are altogether unreliable. Accordingly, the Tawil Report, his E-mail message, and the related portions of Dr. Lemay's testimony should be excluded from evidence in the hearings on this contention.

DISCUSSION

I. Legal Standards Governing Motions in Limine

As this Board has previously recognized, in an evidentiary hearing, "[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." Order (Granting in Part and Denying in Part Applicant's Motions in Limine) ("Order") (March 6, 2012), at 3, *citing* 10 C.F.R. § 2.337(a). While the "strict rules of evidence do not apply to written submissions," the Board may "on motion or on the presiding officer's own

² In addition, portions of Ex. NYS000419, "State of New York Revised Statement of Position Consolidated Contention NYS-12-C" ("Revised Statement of Position") that relate to these evidentiary materials should be disregarded.

³ Entergy Nuclear Operations, Inc. ("Applicant") has similarly stated that it "has not had a fair opportunity to respond" to these materials. See "Applicant's Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C" ("Motion for Leave to File Surrebuttal") (July 12, 2012), at 1; see *also*, "State of New York's Answer in Opposition to Entergy's Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C" ("New York's Opposition") (July 23, 2012).

initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and may “[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments.” *Id.*, citing 10 C.F.R. § 2.319(d)-(e).

NRC hearings are limited to the scope of the admitted contentions. As the Board recognized in its Order of March 6, 2012, “the Commission has cautioned against allowing ‘distinctly new complaints to be added at will as litigation progresses, [and thereby] stretching the scope of admitted contentions beyond their reasonably inferred bounds.” *Id.* at 3-4, citing *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added by the Board).

In this regard, it is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board had properly excluded the intervenors’ testimony and exhibits that were outside the scope of the admitted contention).⁴ As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural

⁴ *Accord, Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-05-13, 61 NRC 385, 401 (2005); *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), 2009 NRC LEXIS 13 (Feb. 23, 2009), at 6-7;

rules on contentions are designed to ensure focused and fair proceedings.

Id. at 100-01 (internal footnotes omitted). Recently, the Commission emphasized:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-01, 75 NRC ___, ___ (Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).⁵

Further, for rebuttal testimony, the scope is more limited. In addition to being restricted to the matters raised in the contention, rebuttal testimony may be admitted only insofar as it is responsive to the other parties’ statements of position and evidentiary submissions. Thus, the Board has stated that “Intervenors should not revise their entire original statements of position but rather present only responsive arguments.”⁶ Moreover, rebuttal testimony may only address matters which the party could not have raised earlier; fundamental fairness requires

⁵ In addition, an expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. The proponent of the testimony bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

⁶ Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) at 1 (Apr. 18, 2012). *Accord, Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-15, 63 NRC 591, 620 (2006) (reciting the Board’s action striking portions of prefiled rebuttal testimony “that fell outside the scope of any admitted contention and/or the permissible scope of rebuttal testimony”).

that it may not raise matters for the first time that reasonably should have been, but were not raised in the party's case-in-chief.⁷

II. Dr. Tawil's Unpublished Report Is Not Properly Within the Scope of the Board's Instructions for Rebuttal Testimony

Dr. Lemay's testimony recounts how he discovered Dr. Tawil's unpublished report as he researched the "pedigree" of NUREG-1150. Ex. NYS000241 at 25-27. Significantly, NUREG-1150 – which served as the starting point for his recent search for documents – was cited extensively by New York in its direct testimony submitted in December 2011. Thus, Dr. Lemay's direct testimony complained that "there is very little data on actual severe reactor accidents in a hyper-urban area such as [New York City]."⁸ The direct testimony even provides Dr. Lemay's opinions as to why the authors of NUREG-1150 chose the Surry site for Sample Problem A almost twenty-two years ago.⁹ Further, Dr. Lemay's direct testimony goes through four slightly varying methodologies when analyzing his proposed alternative SAMA analyses.¹⁰

⁷ See, e.g., *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC 640, 655 (2009) ("Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement"); *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), 2007 NRC LEXIS 54 (April 17, 2007), at 9 ("Being in the nature of rebuttal, the response is not to advance any new affirmative claims or arguments that reasonably should have been, but were not, included in the party's previously-filed initial written statement"); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), 2006 NRC LEXIS 64 (March 1, 2006), at 6 ("Being in the nature of rebuttal, the response and rebuttal testimony are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously-filed initial written statement") *Rockwell International Corp. Rocketdyne Division* (Special Material License Number SNM-21), LBP-89-27, 30 NRC 265, (1989) (permitting rebuttal testimony "only with respect to new or surprise material" included in the opposing party's submittals).

⁸ "Pre-Filed Written Testimony of Dr. François J. Lemay," ("Lemay Testimony") (Ex. NYS000241) at p. 20 Ins. 432-434.

⁹ *Id.* at p. 21 ln. 472 – p. 22 ln. 480.

¹⁰ See, e.g., *id.* at p. 48 ln. 1002 – p. 49 ln. 1021.

At no time during Dr. Lemay's original testimony, however, did he mention or refer to Dr. Tawil's unpublished report or the DECON program.¹¹ Although Dr. Lemay explains that he did not discover the document until he conducted a search while preparing his rebuttal testimony, he fails to explain why he could not have conducted a search of documents cited in NUREG-1150 or the documents cited therein prior to filing his direct testimony more than six months ago, or why he waited until filing his rebuttal testimony to do so.

Moreover, it is clear from Dr. Lemay's Rebuttal Testimony that Dr. Tawil's unpublished report should have been raised as part of New York's case-in-chief and is not properly rebuttal testimony. In Dr. Lemay's Rebuttal Testimony, he states:

[W]hile researching the "pedigree" of NUREG-1150 we learned that in the 1980s NRC Staff contracted with Batelle Pacific Northwest Laboratory (PNL) to conduct a case study of the economic costs associated with severe accidents at [Indian Point]. This site-specific case study is described in Chapter 5 of "NUREG/CR-5148 Property-Related Costs of Decontamination, dated February 1990"¹²

It is important to note that Dr. Lemay's discussion of Dr. Tawil's unpublished report does not appear in the section of his testimony discussing the "pedigree" of NUREG-1150.¹³ Indeed, Dr. Lemay's testimony in this area does not even address any specific aspect of the testimony advanced by either Entergy or the Staff.¹⁴ To the contrary, Dr. Lemay cites and utilizes the

¹¹ DECON is apparently a software program developed by Dr. Tawil to estimate costs, specifically, "1) to provide estimates of the property-related costs of severe reactor accidents; and 2) to assist in site-restoration planning." Ex. NRC000424F at OAGI0001550_00123. It is important to note that estimating the cost of a severe reactor accident is distinct from estimating the risk from severe reactor accidents, which requires estimates of both the likelihood and consequences from each analyzed event.

¹² Lemay Rebuttal Testimony (Ex. NYS000420) at p. 25 Ins. 12-18.

¹³ See *id.* at p. 16 ln. 15 – p. 25 ln. 25; compare *id.* at p. 25 ln. 7 – p. 30 ln. 9.

¹⁴ See *id.*, *passim*.

Tawil Report as an affirmative point (rather than rebuttal), that should have been presented in his direct testimony. Thus, after presenting New York's arguments regarding the Staff's disclosures and Dr. Lemay's views regarding Dr. Tawil's unsupported speculation as to why the Staff decided not to publish Dr. Tawil's report in 1990,¹⁵ the only apparent purpose of the testimony on Dr. Tawil's unpublished report is to provide new arguments in support of Dr. Lemay's previous testimony on CONDO, and in no way addresses or rebuts the testimony filed by either Entergy or the Staff. As such, Dr. Lemay's testimony discussing Dr. Tawil's unpublished report,¹⁶ and the 500+ page report itself (Exs. NYS000424A-NYS000424BB)¹⁷ should be excluded.

Finally, the Staff submits that it was incumbent on New York to seek out this 20+ years old information in a timely manner, and to present this information in its direct testimony rather than waiting to fully investigate and develop its case at the last minute prior to filing its rebuttal testimony. New York's failure to conduct a "due diligence" search for allegedly relevant documents prior to filing its rebuttal testimony, and its late disclosure and proffer of this document now, has unfairly deprived the Staff (and other parties) of an opportunity to address the document in their own direct and rebuttal testimony, filed in March 2012. The document should therefore be excluded from evidence.

¹⁵ New York's arguments concerning the Staff's disclosures and the speculative nature of Dr. Tawil's E-mail message are discussed further *infra*.

¹⁶ Dr. Lemay's rebuttal testimony discussing Dr. Tawil's unpublished report begins on p. 25 In. 5 and continues through p. 30 In. 9.

¹⁷ Similarly, the Board should disregard the related portions of New York's Revised Statement of Position that discusses Dr. Tawil's unpublished report, beginning on p. 14 and continuing through p. 16.

III. New York's Arguments Regarding the Staff's Disclosure Obligations Is Not Relevant to the Issues Before the Board and Should Be Disregarded.

In its Revised Statement of Position, New York asserts that the Staff is somehow remiss for failing to disclose a 22-year old draft document prepared by an NRC contractor (Ex. NYS000424A-NYS000424BB) – which New York fails to show was known to or in the possession of any member of the NRC Staff.¹⁸ New York's latest attempt to contest the Staff's disclosures (even if it had any basis) is not relevant or material to the findings that Board must make regarding NYS-12C. New York states:

Moreover, NRC Staff's failure to disclose its own site specific study of the consequences of a severe accident at Indian Point violates not only NEPA, but also its disclosure obligations in this proceeding. The FSEIS did not reference this document, let alone provide an explanation why the NRC Staff chose not to use it, thus preventing decision makers and the public from considering it.¹⁹

First, the issue before the Board is whether the SAMA analysis performed for Indian Point was reasonable and not whether the Staff met its disclosure obligations under the regulations. The document at issue was not utilized in the Staff's review of the Indian Point license renewal application ("LRA") and was not in the possession of Staff members involved in the license renewal review of SAMAs for Indian Point. However, even if the document was in the Staff's possession, the Staff would not have been obliged to disclose it, inasmuch as the document was not considered in the Staff's review of the Indian Point LRA. As this Board recently emphasized, the Staff's disclosure obligations are different than the other parties'

¹⁸ During the parties' consultation on this motion, Counsel for New York informed Staff Counsel that New York obtained the document by searching microfiche files from the NRC's Local Public Document Room ("LPDR"). To the best of the Staff's knowledge, the document does not appear in the NRC's Agencywide Documents Access and Management System ("ADAMS"), and the Staff members involved in the Staff's review of the Indian Point license renewal application neither had a copy of the document nor were aware of the document before its disclosure by New York.

¹⁹ Revised Statement of Position at 16.

obligations.²⁰ In particular, the Board has ruled that “[g]enerically applicable documents or documents that the NRC Staff simply did not use in its review might be useful to other parties in this and other proceedings, but that does not bring such documents within the scope of Sections 2.336(b) and 2.1203(b).”²¹

Second, even assuming New York’s assertions regarding the scope of the Staff’s disclosures are correct, they do not extend to documents and information that are not within the Staff’s possession or control. It is clear from Dr. Lemay’s testimony that Dr. Tawil’s report was not easily located.²² After New York filed NYS000424A-424BB, the Staff searched for and was unable to locate the document, either in the NRC’s ADAMS system or in the files of Staff personnel who might reasonably be expected to have had possession of it. The Staff is under no obligation to produce documents that are not in its possession or control. To the contrary, as New York has candidly explained, it discovered the existence of this document upon belatedly reading a reference document that was cited in NUREG-1150 – upon which New York actually relied in its case-in-chief, and by then searching decades-old microfiche files from the NRC’s LPDR.²³ No showing has been made that the Staff was remiss in any manner regarding the disclosure of the document. Accordingly, even if New York’s arguments regarding the Staff’s disclosure obligations were relevant (which they are not), those arguments should be disregarded in their entirety.

²⁰ Order (Granting in Part and Denying in Part State of New York and Riverkeeper’s Motion to Compel) at 4 (Mar. 16, 2012).

²¹ *Id.* at 8.

²² See Lemay Rebuttal Testimony at p. 25 ln. 20 – p. 27 ln. 17.

²³ See n.18, *supra*.

IV. The Communications Between Dr. Tawil and Michael Labriola Lack A Proper Foundation.

New York submitted as an exhibit NYS000426, which purports to be an E-mail string between Michael Labriola and Dr. Jack J. Tawil.²⁴ Both New York's Revised Statement of Position and Dr. Lemay's testimony cite and quote from this E-mail string.²⁵ The document and the witnesses' references to it should be excluded from evidence. First, Dr. Tawil's E-mail message regarding his opinion as to why his draft report was not published by the NRC is speculative and unsupported by any facts or any qualified expert opinion. The Board and parties would be unfairly prejudiced by New York's failure to proffer Dr. Tawil as a witness, depriving other parties from having an opportunity to examine Dr. Tawil's unsupported opinion and obvious lack of personal knowledge as to why the NRC chose not to publish his report in 1990.²⁶ Indeed, it is clear from the face of Dr. Tawil's E-mail that he has no personal knowledge regarding the reasons underlying the NRC's decision to not publish his report as a NUREG; rather, the E-mail provides only unreliable speculation on the Staff's motives 22 years ago, regarding the acceptance or rejection of Dr. Tawil's views – which, in any event, is not material to the resolution of Contention NYS-12C. Since the subject of Dr. Tawil's E-mail (i.e., the reasons the NRC did not issue his draft report as a NUREG) is simply not relevant or material to

²⁴ Ex. NYS000426, Email from Dr. J. Tawil, President, Research Enterprises, Inc., to M. Labriola, International Safety Research, Inc. (May 2, 2012).

²⁵ See, e.g., Revised Statement of Position at 15; Lemay Rebuttal Testimony at p. 27 Ins. 3-12.

²⁶ *Georgia Institute of Technology* (Georgia Tech Research Reactor Atlanta, Georgia), LBP-96-10, 43 NRC 231, 232-33 (1996) (striking prepared testimony where the witness lacks personal knowledge of the matter in his testimony).

the findings that Board must make regarding NYS-12C, it and any related discussions in the Lemay Rebuttal Testimony should be excluded.²⁷

V. Dr. Lemay's Reliance on Dr. Tawil's Report and His Speculative Opinion Should Be Rejected As Unreliable.

In his rebuttal testimony, Dr. Lemay seeks to rely on Dr. Tawil's unpublished draft report, claiming that it represents a site-specific case study of the economic costs associated with severe accidents at the Indian Point site. Lemay Rebuttal Testimony (Ex. NYS000420) at 25. Significantly, however, New York and Dr. Lemay seek to rely not just on the fact that Dr. Tawil had conducted a site-specific study some 22 years ago, but rather, they apparently seek to rely on the methodology, findings and conclusions of that study. See *id.* at 27-29, and 40-41; New York's Statement of Position (Ex. NYS000419) at 14-16.²⁸ New York's and Dr. Lemay's attempt to introduce and rely upon the methodology, findings and conclusions of this lengthy and complex draft report (consisting of over 500 pages) lacks a proper sponsoring witness who could explain and defend the methodology, findings and conclusions in the report under questioning by the Board or cross-examination, and therefore lacks the necessary reliability that is required by 10 C.F.R. § 2.337(a).²⁹ Moreover, given the length, breadth and complexity of

²⁷ Similarly, all references to this matter in New York's Revised Statement of Position should be disregarded.

²⁸ Indeed, during consultations among the parties on this motion in limine, Counsel for New York declined to accept a compromise suggestion by the undersigned Staff Counsel, to limit the use of Dr. Tawil's draft report to show only that a site-specific study had been conducted for the Indian Point site. Absent such a limitation, the contents of the document, if admitted, would be available for use for any purpose, including the validity and merits of the report and the conclusions stated therein.

²⁹ Contrary to New York's apparent belief (see New York's Opposition, at 4 n.6), hearsay is not admissible in NRC proceedings if it is unreliable. See, e.g., *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982) (exhibits were properly excluded as unreliable in the absence of a proper sponsoring witness, where the exhibits consisted of "technical analyses, conclusions and opinions on various aspects of the matter of hydrogen generation and control in nuclear power reactors," which "manifestly is the type of evidence that calls for sponsorship by an (footnote continued)

this draft report, its admission would be highly prejudicial and could result in an unreliable record.³⁰ New York's untimely proffer of this report and the related evidence should therefore be rejected, and the report and the related evidence should be excluded.

CONCLUSION

Dr. Tawil's draft report, the related E-mail string, and Dr. Lemay's testimony concerning those documents do not constitute proper rebuttal. Further, because these exhibits and related portions of Dr. Lemay's rebuttal testimony could have been, but were not, raised in New York's case-in-chief, their late filing at this time requires that they be excluded. In addition, Dr. Tawil's speculation as to the reasons why the NRC did not publish his draft report over 20 years ago is unreliable, and is neither relevant nor material to the issues properly before the Board. Finally, New York's and Dr. Lemay's attempt to rely on Dr. Tawil's draft report, without a proper

expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents"). *Accord, Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 368 n.39 (1983) (finding that the applicant had failed to provide a proper sponsoring witness for its Final Safety Analysis Report ("FSAR"), but the board's admission of the FSAR was harmless error, given the board's limited reliance thereon). The Appeal Board further observed that "[j]udicial decisions have also recognized the need for a sponsoring witness to support the introduction of material that contains experts' studies and opinions," citing *Forward Communications Corp. v. United States*, 608 F.2d 485, 509-10 (Ct. Cl. 1979) (*per curiam*) (Fed. R. Evid. 803(6) hearsay exception for business records does not allow admission of appraisal report without a witness to sponsor its admission), and *Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086, 1096 (4th Cir. 1969), *cert. denied sub nom. Carter-Wallace, Inc. v. Finch*, 398 U.S. 938 (1970) (hearing examiner properly excluded unpublished scientific paper where the party offering the document did not call its author to sponsor its admission but sought instead to introduce it through testimony of the company vice-president). *Id.*

³⁰ As noted *supra*, at n.3, the Applicant has requested leave to file surrebuttal testimony if the report is not excluded from evidence – a request in which the Staff joined. See Applicant's Motion for Leave to File Surrebuttal, at 7. New York has filed an answer opposing that request, but seeks leave to file its own surrebuttal if the Applicant's motion is granted. See New York's Opposition, at 2, 6 and 7. All of this requested supplementation would have been unnecessary if New York had conducted a timely search and had identified this document prior to filing its case-in-chief in December 2011.

sponsoring witness, for all purposes, would be prejudicial to the Staff and other parties and could result in an unreliable record. Dr. Tawil's draft report and the evidence related to that report should therefore be excluded.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 30th day of July 2012

CERTIFICATION OF COUNSEL

Pursuant to 10 C.F.R. § 2.323(b), the undersigned attorney hereby certifies that he has made a sincere effort to contact the State of New York and Entergy Nuclear Operations, Inc., to resolve the issues raised in this Motion, and that his efforts to resolve these issues have been unsuccessful.

Respectfully submitted,

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this 30th day of July 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing “NRC STAFF’S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE PREFILED REBUTTAL TESTIMONY AND REBUTTAL EXHIBITS FILED BY THE STATE OF NEW YORK CONCERNING CONSOLIDATED CONTENTION NYS-12C (SAMAs)” dated July 30, 2012, in the above-captioned proceeding has been filed and served by Electronic Information Exchange (EIE), with copies to be served by the EIE system on the following persons, this 30th day of July, 2012.

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