UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

ENTERGY'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF NEW YORK STATE'S REBUTTAL FILINGS ON CONTENTION NYS-12C

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I. INTRODUCTION

On July 2, 2012, New York State ("NYS") filed its revised statement of position, rebuttal testimony, and associated exhibits on Contention NYS-12C. That contention challenges the adequacy of decontamination cost inputs used in Entergy's severe accident mitigation alternatives ("SAMA") analysis for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3"; collectively, Indian Point Energy Center, or "IPEC").

In accordance with 10 C.F.R. §§ 2.1204, 2.319, 2.323, 2.337, the Atomic Safety and Licensing Board's ("Board") Scheduling Order of July 1, 2010, and subsequent Order dated May 16, 2012,[1] Entergy Nuclear Operations, Inc. ("Entergy") hereby timely moves to exclude: (1) portions of the Pre-Filed Written Rebuttal Testimony of Dr. François J. Lemay Regarding Consolidated Contention NYS-12C (NYS-12/12A/12B/12C) (June 29, 2012) (NYS000420) ("Lemay Rebuttal Testimony"), (2) Exhibit NYS000424,[2] (3) Exhibit NYS000426,[3] and related portions of the State of New York Revised Statement of Position [on] Consolidated Contention

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1 Licensing Board Order (Granting Unopposed Extension of Time) (May 16, 2012) (unpublished).

2 Draft NUREG/CR-5148 (PNL-6350), Property-Related Costs of Radiological Accidents (Feb. 1990) (NYS00424A to BB) ("Draft NUREG/CR-5148").

3 E-mail from J. Tawil, Research Enter., Inc., to M. Labriola, Indep. Safety Research, Inc., "Re: The DECON Code from PNL" (May 2, 2012) (NYS000426) ("Tawil-ISR E-mail").

NYS-12C (NYS000419) ("NYS Revised Position Statement").[4] As set forth below, the NYS rebuttal testimony, statements, and exhibits identified in Attachment 1 should be excluded from evidence because they: (1) advance new claims or arguments that should have been, but were not, included in NYS's prefiled direct testimony and position statement; and (2) do not constitute reliable or relevant evidence under 10 C.F.R. § 2.337(a). The Board also should exclude the associated discussion in the Revised Position Statement, or accord that discussion no weight, because it is not supported by NYS's proffered evidence.

II. LEGAL STANDARDS

A. Scope of Rebuttal Testimony

10 C.F.R. § 2.1207 addresses the general process and schedule for submittal of evidentiary presentations in hearings conducted pursuant to 10 C.F.R. Part 2, Subpart L. Section 2.1207(a)(2) states that written responses and rebuttal testimony should be "directed to the initial statements and testimony of other participants." "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."[5]

B. Scope of the Admitted Contention

Recent Commission decisions confirm that intervenors are not permitted to use testimony to change the scope of a contention as admitted by the Board. For example, in *Vogtle*, the

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[4] On July 12, 2012, Entergy filed a Motion seeking leave from the Board to file written surrebuttal testimony and a revised position statement on NYS-12C in response to the same new NYS documents and arguments identified herein. *See* Applicant's Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C (July 12, 2012). However, Entergy expressly reserved its right to file a motion in limine related to NYS's rebuttal filings on NYS-12C. *See id.* at 1 n.3. The filing of both motions is appropriate in these circumstances. *See*, *e.g.*, *Rockwell Int'l Corp.* (Special Material License Number SNM-21), LBP-89-27, 30 NRC 265, 269 (1989) (noting that the applicant's rebuttal to the intervenors' rebuttal testimony "is only for new or surprise material presented by intervenors" and "may be accompanied by a motion to strike for failure to comply with the conditions imposed on rebuttal filings").

[5] *Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), LBP-09-22, 70 NRC 640, 655 (2009).

Commission upheld a Board ruling excluding testimony that strayed beyond the scope of the bases as pled and admitted, because those bases "defined the scope of the . . . contention."[6] In *Seabrook*, the Commission more recently confirmed that "an admitted contention is defined by its bases,"[7] and that licensing boards must specify each basis relied upon for admitting a contention.[8]

C. Admissibility of Evidence

NRC regulations governing the admissibility of evidence provide that only relevant, material, and reliable evidence will be admitted, and that material and irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.[9] Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to testimony and exhibits that are outside the scope of the admitted contention or the proceeding,[10] or that raise issues that were not properly presented in earlier pleadings.[11]

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6 *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-01 (2010); *see also Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (stating that intervenors "may not freely change the focus of an admitted contention at will to add a host of new issues and objections that could have been raised at the outset" because the Commission does "not allow distinctly new complaints to be added at will as litigation progresses" (internal quotation marks omitted)).

7 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, slip op. at 11 n.50 (Mar. 8, 2012) (emphasis added) (citation omitted).

8 *Id.*

9 10 C.F.R. § 2.337(a); *see also* 10 C.F.R. § 2.319(d) (stating that the presiding officer may strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative); *id.* § 2.319(e) (stating that the presiding officer may restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments).

10 *See S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Licensing Board Memorandum and Order (Ruling on In Limine Motions) at 3-7 (Jan. 26, 2009) (unpublished) (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Licensing Board Order (Ruling on Pending Matters and Addressing Preparation of Exhibits for Hearing) at 2 (Mar. 24, 2008) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of a license renewal proceeding, because such issues "do not relate to aging and/or because they are addressed as part of ongoing regulatory processes").

11 *See S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Licensing Board Memorandum and Order (Ruling on In Limine Motions) at 2-4 (Feb. 23, 2009) (unpublished) (granting applicant and Staff motions in limine to strike portions on intervenor rebuttal testimony on the ground that the stricken testimony was not relevant to the admitted contention or to the applicant's and Staff's prefiled direct testimony); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) ("New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).").

1. Bases of Expert Opinion Testimony

An expert's opinion is admissible only if the opinion would assist the trier of facts in understanding the evidence or to determine a fact in issue.[12] Further, an expert's opinion must be based not only on sufficient facts or data, but also on reliable principles and methods, which the witness must reliably apply to the facts of the case.[13] Thus, "[a]n expert opinion that merely states a conclusion . . . without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion."[14] An expert opinion that relies on subjective belief or unsupported speculation rather scientific methods and procedures is entitled to no weight.[15]

2. Reliance on Draft Reports

Expert opinions may be based on firsthand knowledge, evidence admitted at the hearing, and other facts or data, but that information must be of a type *reasonably* relied upon by experts in the particular field in forming opinions or inferences upon the subject.[16] As one Appeal Board observed, a "draft is not a particularly useful item on which to rely" because "a draft is just that—a working document."[17] "This is true whether the draft document is a technical or investigatory

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12 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-4, 61 NRC 71, 80, 98-99 (2005) (*citing Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-90 (1993)).

13 *Id.*

14 *Seabrook,* CLI-12-05, slip op. at 24 n.117.

15 *Savannah River,* LBP-05-4, 61 NRC at 98-99 (*citing* Fed. R. Evid. 702); *Elcock v. Kmart Corp*., 233 F.3d 734, 738, 745 (3d Cir. 2000) (holding that trial court erred by failing to hold a *Daubert* hearing to determine the reliability of psychologist's testimony and admitting testimony of economist regarding lost future earnings because the testimony was based on assumptions wholly without foundation in the trial record; *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 735 (1985) ("[W]here an asserted expert witness can supply no scientific basis for his statements (other than his 'belief') . . . a board would be remiss in giving such testimony any weight whatsoever"); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), LBP-78-4, 7 NRC 92, 126 (1978) (giving "little or no weight" to the evidence of an expert who was totally unfamiliar with the technical documents describing the facility in question and its surrounding environment).

16 *See* Fed. R. Evid. 703.

17 *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985) (finding that a draft document does not provide particularly useful support for a motion to reopen the record because a draft is a working document which may reasonably undergo several revisions before it is finalized); *cf. Duke Power Co.*

report, a litigant's brief, or a judge's decision."[18] The Appeal Board's statements are consistent with the manner in which the federal courts have construed and applied the Federal Rules of Evidence,[19] to which NRC licensing boards may look for guidance.[20]

III. ARGUMENT

The NYS rebuttal testimony, statements, and exhibits identified below and in Attachment 1 should be excluded from evidence because they: (1) advance new claims or arguments that should have been, but were not, included NYS's prefiled direct testimony and position statement; and (2) do not constitute reliable or relevant evidence under 10 C.F.R. § 2.337(a).

A. Draft NUREG/CR-5148, the Tawil-ISR E-mail and NYS's Related Arguments Should Be Excluded from Evidence Because They Are Used to Advance New Claims

In its rebuttal filings, NYS argues for the first time that, in the 1980s, the NRC commissioned a "site-specific case study" to estimate the costs associated with a severe accident at Indian Point, and that the Staff failed to disclose that study in connection with this proceeding.[21] NYS states that the NRC's "site-specific analysis" is described in Chapter 5 of Draft NUREG/CR-5148.[22] It further states that "[a]ccording to this 1990 document, the results of the Indian Point-

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(Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 416 (1976) (finding that a licensing board did not abuse its discretion in excluding a document from evidence as irrelevant because an NRC Staff working paper or draft report that is neither adopted nor sanctioned by the Commission has no legal significance for any NRC regulatory purpose) (*citing Consol. Edison Co. of N.Y.* (Indian Point Nuclear Generating Unit 2), ALAB-209, 7 AEC 971, 973 (1974) (finding an internal working draft of a Staff paper "has no legal significance for any AEC regulatory purpose")).

18 *Waterford*, ALAB-812, 22 NRC at 43 n.47

19 *See*, *e.g.*, *City of New York v. Pullman Inc.,* 662 F.2d 910, 914 (2d. Cir. 1981) (affirming the exclusion of an internal federal agency report because the report was subject to revision and review before it was finalized, it "did not satisfy the express requirement of the [Federal Rule of Evidence 803(8)(C)] that the proffered evidence must constitute the 'findings' of an agency official"); *Toole v. McClintock*, 999 F.2d 1430, 1434-35 (11th Cir. 1993) (reversing the admission of a Food and Drug Administration report under Rule 803(8)(c) because the report contained, by its own terms, only "proposed findings" still subject to revision and further study).

20 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001) (stating that although the Federal Rules of Evidence are not directly applicable to Commission proceedings, "NRC presiding officers often look to the rules for guidance").

21 NYS Revised Position Statement at 2, 14-15; *see also* Lemay Rebuttal Testimony at 25-29.

22 NYS Revised Position Statement at 14; Lemay Rebuttal Testimony at 25.

specific study were produced and circulated in final *draft* form, *but never published*."[23]

NYS first disclosed draft NUREG/CR-5148 on May 31, 2012, two months after Entergy filed its testimony on NYS-12C.[24] In its rebuttal filings, NYS argues for the first time that:

> The results of the study disclose 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. Thus, 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.[25]

These arguments and documents (Draft NUREG/CR-5148, the "final draft" case study purportedly mentioned therein, and the Tawil-ISR e-mail) constitute entirely new information that both exceeds the proper scope of a rebuttal filing and is prejudicial to Entergy and the Staff. Indeed, it is this fact that prompted Entergy's prior filing of a Motion seeking leave from the Board to submit surrebuttal testimony (*see* note 4, *supra*) on this new NYS argument.

NYS purports to explain its belated reliance on Draft NUREG/CR-5148 as follows:

> The State's experts discovered it *during their review of NUREG-1150*, which cites "NUREG/CR-3413 Off-Site Consequences of Radiological Accidents: Methods, Costs and Schedules for Decontamination" (NYS000425). 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. An email exchange between Dr. Tawil, one of the authors of NUREG/CR-3413, and ISR reveals that NRC Staff was concerned about the results of a site-specific study at Indian Point.
> . . . .
> The State's library located a copy of the site-specific study that Dr. Tawil was referencing: NUREG/CR-5148.[26]

But NYS's explanation does not pass muster. As an initial matter, NYS had ample reason

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[23] NYS Revised Position Statement at 14 (emphasis added).

[24] New York State Supplemental Disclosure Pursuant 10 C.F.R. 2.336(a)(2) (May 31, 2012) (ID No. 1553).

[25] NYS Revised Position Statement at 15.

[26] *Id.* at 14-15 (emphasis added) (footnote and citation omitted); *see also* Lemay Rebuttal Testimony at 26-27.

and opportunity to fully review NUREG-1150 in the several years leading up to the submittal of its prefiled direct testimony in December 2011. NYS, in fact, submitted all three volumes of NUREG-1150 as an exhibit to its direct testimony,[27] and Dr. Lemay discussed NUREG-1150 and its relationship to Sample Problem A in his testimony and report.[28] Indeed, NYS itself has described the "central issue" raised by NYS-12C as "whether it was reasonable for Entergy and NRC Staff to rely upon *Sample Problem A inputs* instead of developing site-specific inputs for Indian Point."[29] Given all that, NYS's explanation for its belated reliance on Draft NUREG/CR-5148 is simply not credible.

NYS cannot now tenably maintain—based on its "review of NUREG-1150"—that Entergy or the Staff should have relied upon Draft NUREG/CR-5148 or the now-retired DECON computer code discussed therein.[30] The intervenor has the initial "burden of going forward" and must provide sufficient evidence to support its claims.[31] That burden encompasses the intervenor's obligation to examine publicly-available information in support of its contention—including its own exhibits. NYS should not be permitted to reallocate that burden by suggesting that Entergy and the Staff should have identified, disclosed, and relied upon the unpublished Draft NUREG/CR-5148 even before NYS did.

In this same vein, Entergy could not have reasonably anticipated that NYS would rely upon the unpublished report or statements by a third party (Dr. Jack Tawil[32]) who has no prior connection

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27 *See* NYS00252A to C.

28 *See* Pre-Filed Testimony of François J. Lemay Regarding Consolidated NYS-12-C (NYS-12/12-A/12-B/12-C) at 21-22 (Dec. 21, 2011) (NYS000241); International Safety Research [("ISR")] Report 13014-01-01, Review of Indian Point Severe Accident Off Site Consequence Analysis at 7 (Dec. 21, 2011) (NYS000242).

29 NYS Revised Position Statement at 7 (emphasis added).

30 *See* NYS Revised Position Statement at 14, 15-16; Lemay Rebuttal Testimony at 28-29.

31 *AmerGen Energy Corp., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 269 (2009) (*quoting Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-123, 6 AEC 331, 345 (1973)).

32 Dr. Tawil's statements are discussed in Section III.B, *infra*.

to this proceeding.[33] Draft NUREG/CR-5148 is not a well known or widely available document, as it was never issued or published as a final report by the NRC. The NRC apparently released a copy of the draft, unpublished report to Purdue University in 1992, in response to a Freedom of Information Act ("FOIA") request.[34] Although this FOIA request appears in the NRC's Public Legacy Library,[35] counsel for Entergy could find no other record copy of this document on the NRC's website or on the Internet.[36]

In summary, Draft NUREG/CR-5148, the Tawil-ISR e-mail, and NYS's associated arguments and testimony constitute entirely new information, the use of which Entergy could not have reasonably anticipated when it prepared its prefiled direct testimony. Accordingly, it should be excluded from evidence or, in the alternative, given no weight.

B. Draft NUREG/CR-5148, the Tawil-ISR E-mail, and NYS's Related Arguments Should Be Excluded from Evidence Because NYS Has Not Established Their Reliability or Relevance, As Required by 10 C.F.R. § 2.337(a)

Draft NUREG/CR-5148 and the Tawil-ISR e-mail should be excluded from the record for the additional reason that NYS has not shown that they constitute reliable evidence. Contrary to NYS's own evolving views on the document's publication status, Draft NUREG/CR-5148 is just

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33 NYS states that "Donald P. Cleary, a former NRC Staff member and witness for Entergy on other contentions, is on the distribution list for this report [Draft NUREG-CR-5148]." NYS Revised Position Statement at 4 (*citing* NYS00424BB at 4). As NYS recognizes, Mr. Cleary is not an Entergy expert on either of NYS's SAMA contentions, which include NYS-12C. Mr. Cleary has had no reason or occasion to review the claims made in NYS-12C or the parties' related evidentiary submissions. *See* Declaration of Donald P. Cleary Related to Entergy's Motion in Limine on Contention NYS-12C, ¶ 2 (July 30, 2012) ("Cleary Decl.") (Attach. 2). Therefore, it is simply unreasonable to suggest that Entergy had notice of the existence of Draft NUREG-5148 by virtue of Mr. Cleary's apparent receipt of that document over 20 years ago.

34 *See* NRC Response to Freedom of Information Act (FOIA) Request, FOIA-92-171 (Requester: Suzanne Ward, Purdue University, Manager, Technical Information Service) (Apr. 20, 1992) (NYS00424A).

35 Accession No. 9210280325 (on microfiche at the NRC Public Document Room).

36 In fact, the document does not appear in the U.S. Department of Commerce's National Technical Information Service ("NTIS") database (http://www.ntis.gov), which is a vast repository of government-funded scientific, technical, engineering, and business-related information that includes over 2 million records, including NRC Staff (NUREG) and Contractor (NUREG/CR) reports.

that—an unpublished *draft*.[37] The document bears no indication (*e.g.*, manuscript completion date and publication date), as would be expected under standard NRC practice, that it was published as a final NRC report.[38] Nor is there any indication that it was ever reviewed or approved by the Staff in the form of a final NUREG/CR document; reviewed by the Staff as part of some other agency initiative; or, for that matter, subjected to any kind of peer review.[39] The document does not appear to be cited with any frequency in the technical literature or other sources.[40] In short, neither NYS nor its expert explains why Draft NUREG/CR-5148 is a reliable authority or may be reasonably relied upon by experts in the relevant field.[41] As discussed in Section II.C.2 above, NRC adjudicatory boards, like their judicial counterparts, have ruled that reliance on a draft report is unreasonable and problematic from an evidentiary standpoint, and that draft NRC reports or working papers have no legal significance for any NRC regulatory purpose.[42]

Dr. Lemay nonetheless asserts that the methodology used in Draft NUREG/CR-5148 "provides further support for using data to develop site-specific MACCS2 input values."[43] He does not explain, however, what that methodology is, why it is scientifically acceptable, or why it is

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37 *See* State of New York's Answer in Opposition to Entergy's Motion for Leave to File Sur-Rebuttal Testimony on Consolidated Contention NYS-12C at 5-6 (July 23, 2012) ("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."). NYS's revised position that NUREG/CR-5148 is a final NRC report is also directly contrary to its own evidence and statements of Dr. Tawil, one of the report's co-authors. *See* May 2, 2012 Email Exchange between ISR and J. Tawil (NYS000426) (the NRC "decided not to publish the report").

38 *See* Cleary Decl. ¶ 6 (July 30, 2012) (Attach. 2).

39 *Id*. Mr. Cleary was formerly employed as Senior Task Manager in the NRC's Office of Nuclear Regulatory Research. *Id.* ¶¶ 3, 6. To the best of Mr. Cleary's knowledge and recollection, the NRC Staff never completed a review of proposed NUREG/CR-5148 or approved its publication as a final NUREG/CR report. *Id.* ¶ 6.

40 *See* 31 Am. Jur. 2d *Expert and Opinion Evidence* § 25 (2012) ("The reliability of testimony can be established by showing general acceptance in the scientific community through proofs of expert testimony, scientific and legal writings, or judicial opinions.").

41 *See* Fed. R. Evid. 703; *U.S. v. Mulder*, 273 F.3d 91, 102 (2d Cir. 2001) ("[E]xpert witnesses can testify to opinions based on hearsay or other inadmissible evidence if experts in the field *reasonably rely* on such evidence in forming their opinions") (emphasis added)..

42 *See Waterford*, ALAB-812, 22 NRC at 43 n.47; *Catawba*, ALAB-355, 4 NRC at 416.

43 Lemay Rebuttal Testimony at 28.

relevant to a SAMA analysis.[44] Nor does Dr. Lemay provide any independent assessment of the self-described "detailed calculations performed by Dr. Tawil" in Draft NUREG/CR-5148.[45] Yet he cites those calculations approvingly.[46] Dr. Lemay has provided no basis for concluding that his opinion, insofar as it relies on the unpublished Draft NUREG/CR-5148, is based on sufficient facts, data, or reliable principles and methods.[47] Therefore, the pertinent testimony should be excluded from the record. It certainly should not be accorded any weight.

The Tawil-ISR e-mail should similarly be excluded from evidence as unreliable. In that e-mail, Dr. Tawil suggests, without any basis, that Draft NUREG/CR-5148 was not published as a final report because of its results.[48] He further states that the off-site consequences of a severe accident at Indian Point would be "much greater" than those resulting from the 1987 Chernobyl accident.[49] These statements are pure speculation without any technical analysis or support.

More fundamentally, as used by NYS in its rebuttal testimony and revised position statement, Dr. Tawil's e-mail communication with NYS's consultant (ISR) unquestionably is hearsay.[50] Hearsay is admissible in NRC administrative proceedings *only* when the hearsay is

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44 *See Daubert*, 509 U.S. at 592-93 (1993) (reliability is verified by assessing whether the reasoning or methodology underlying the evidence is scientifically valid); *Elcock*, 233 F.3d at 745 ("In cases involving scientific testimony, [the] inquiry into the reliability of scientific evidence . . . requires a determination as to its scientific validity") (citation omitted) (internal quotations marks omitted).

45 Lemay Rebuttal Testimony at 28.

46 *See id.* Specifically, Dr. Lemay states that the calculations in Draft NUREG/CR-5148 show that in urban areas, the cost of decontaminating building contents (1) can exceed the cost of decontamination of land and structures and (2) is labor intensive. *Id.*

47 *See Savannah River,* LBP-05-4, 61 NRC at 98-99.

48 Tawil-ISR E-mail at 1 ("I *think* the NRC was a little shocked at the magnitude of the off-site consequences of an SST-5 at Indian Point.") (emphasis added).

49 *Id.*

50 As defined in Federal Rule of Evidence 801, "hearsay" means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c).

shown to be *reliable* (as well as relevant and material) evidence.[51] NYS has not made any such showing here.[52] Furthermore, nothing in the Tawil-ISR e-mail—not the history of the DECON code, the NRC's imputed motive for not publishing Draft NUREG/CR-5148, or Dr. Tawil's discussion of Chernobyl—is relevant or material to the Board's finding as to "whether the [SAMA] analysis that was done is reasonable under NEPA."[53]

In summary, NYS has failed its basic duty as the proponent of the evidence in question because it has not shown that the evidence is reliable and relevant.

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

NYS discusses the preceding testimony and supporting evidence in its Revised Position Statement.[54] The Statement is not evidence in this proceeding,[55] but may nevertheless be subject to a motion in limine or motion to strike.[56] Therefore, to the extent the Board grants this Motion and excludes evidence identified in Attachment 1, the associated discussions in the Revised Position Statement should be excluded or accorded no weight in the Board's merits decision on NYS-12C, because it not supported by NYS's proffered evidence.

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51 *Oncology Servs. Corp.*, LBP-93-20, 38 NRC 130, 135 n.2 (1993) (*citing Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-668, 15 NRC 450, 477 (1982)).

52 The other parties and the Board know nothing about Dr. Tawil's professional credentials, affiliations, or relationship with NYS and ISR. He is neither a consultant nor an expert witness for NYS and, presumably, will not be available at the hearing for examination by the Board or the parties. *See Limerick*, ALAB-819, 22 NRC at 718 (stating that hearsay is admissible in administrative proceedings "providing its reliability can be determined—usually through questioning of the witness giving the hearsay").

53 *Seabrook*, CLI-12-05, slip op. at 28-29; *see also FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC __, slip op. at 17-18 (Mar. 27, 2012).

54 *See* NYS Revised Statement of Position at 14-16.

55 *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Hearing Directives) at 2 n.2 (Sept. 12, 2007) (unpublished). This Board has noted that a position statement is a party's legal interpretation of its evidence, not its actual evidence, and that the Board will use it inasmuch it is supported by the evidence proffered by that party. *See* Licensing Board Order (Granting in Part and Denying in Part Applicant's Motion *in Limine*) at 24 (Mar. 6, 2012) (unpublished).

56 *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 1-2 (Aug. 9, 2007) (unpublished); *Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), Licensing Board Order (Rulings on Motions to Strike and Motions in Limine) at 2-3 (July 16, 2008) (unpublished).

IV. CONCLUSION

For the foregoing reasons, the Board should exclude from the record the portions of the Lemay Rebuttal Testimony (NYS000420), NYS Revised Position Statement (NYS000419), as well as Exhibits NYS000424 and NYS000426, as described in Attachment 1.

Signed (electronically) by Martin J. O'Neill

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Counsel for Entergy Nuclear Operations, Inc.

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

MOTION CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and he certifies that his efforts have been unsuccessful. NYS indicated that it opposes this Motion and that it will file an answer on the merits. The NRC Staff indicated that it supports Entergy's Motion and is filing its own Motion in Limine.

Signed (electronically) by Martin J. O'Neill

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ENTERGY'S MOTION IN LIMINE FOR NYS-12C
ATTACHMENT 1

Exclusion Chart

Entergy Attachment 1 to Entergy's Motion in Limine to Exclude Portions of Intervenors' Pre-Filed Direct Testimony, Expert Report, Exhibits, and Statement of Position for Contention NYS-12C (SAMA Analysis Decontamination Costs)

Location of Information to Be Stricken	Basis for Exclusion
NYS000420: Lemay Rebuttal Testimony	
Page 25, Line 12 through Page 28, Line 21: strike testimony in its entirety.	Testimony advances new claims beyond the proper scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2). Testimony has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).
Page 29, Lines 4-5: strike "and the NUREG/CR-5148 IP site-specific case study commissioned by NRC".	Refers to new exhibit that is used to advance new claims beyond the proper scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2), and that has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).
NYS00424A to BB: Draft NUREG/CR-5148 (PNL-6350), "Property-Related Costs of Radiological Accidents" (Feb. 1990) (NYS00424A to BB)	
Strike entire exhibit	Exhibit is used to advance new claims beyond the proper scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2). Exhibit has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).
NYS000426: E-mail from J. Tawil, Research Enterprises, Inc., to M. Labriola, Independent Safety Research, Inc., "Re: The DECON Code from PNL" (May 2, 2012)	
Strike entire exhibit	Exhibit is used to advance new claims beyond the proper scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2). As used by NYS, the exhibit is hearsay and has not been shown to constitute reliable evidence under 10 C.F.R. § 2.337(a).
NYS000419: State of New York Revised Statement of Position [on] Consolidated Contention NYS-12C	
Pages 14-16: delete the *entire* section entitled "POINT II – IT WAS UNREASONABLE TO RELY UPON SAMPLE PROBLEM A BECAUSE NRC HAS CONDUCTED A SITE-SPECIFIC ANALYSIS AT INDIAN POINT".	Discussion advances new claims beyond the proper scope of rebuttal testimony, contrary to 10 C.F.R. § 2.1207(a)(2), and relies on exhibits and expert opinion that have not been shown to be reliable under 10 C.F.R. § 2.337(a).

ENTERGY'S MOTION IN LIMINE FOR NYS-12C
ATTACHMENT 2

Declaration of Donald P. Cleary Related to
Entergy's Motion in Limine on Contention NYS-12C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DECLARATION OF DONALD P. CLEARY RELATED TO ENTERGY'S MOTION IN LIMINE ON CONTENTION NYS-12C

Donald P. Cleary states as follows under penalties of perjury:

1. My name is Donald P. Cleary. I am an Environmental Safety Consultant with Talisman International, LLC. I have been retained by Entergy Nuclear Operations Inc. ("Entergy") as an expert in connection with the adjudication of several contentions in this proceeding, including New York State ("NYS") contentions NYS-17B and NYS-37, as well as Clearwater ("CW") contention CW-EC-3A. I provided testimony on each of those contentions in March 2012.

2. I have not been retained by Entergy as an expert in connection with contention NYS-12C or prepared any testimony on that contention, which concerns Entergy's severe accident mitigation alternatives ("SAMA") analysis for Indian Point Energy Center ("IPEC").

3. My professional and educational qualifications are summarized in my *curriculum vitae* (EN000133). Relevant here, I was a member of the U.S. Nuclear Regulatory Commission ("NRC") regulatory staff ("NRC Staff") from 1973 to 2001. I served a portion of my NRC tenure as Senior Task Manager in the Office of Nuclear Regulatory Research.

4. Counsel for Entergy asked me to review a limited portion of NYS's Revised Position Statement on contention NYS-12C, because it refers specifically to me in my capacity as a former NRC Staff member. The Revised Position Statement states, in relevant part:

> But, in the 1980s, NRC commissioned a site-specific case study to estimate the costs associated with a severe accident at Indian Point that it failed to disclose in the FSEIS or this proceeding. The NRC's site-specific analysis is described in Chapter 5 of "NUREG/CR-5148 Property-Related Costs of Decontamination," dated February 1990. NYS000424. Donald P. Cleary, a former NRC Staff member and witness for Entergy on other contentions, is on the distribution list for this report.

State of New York Revised Statement of Position [on] Consolidated Contention NYS-12C at 14 (NYS000419) ("NYS Revised Position Statement").

5. At the request of counsel, I also briefly reviewed the copy of the report labeled "NUREG/CR-5148" (NYS000424), as submitted by NYS, and confirmed that I was on the distribution list appended to the end of that report.

6. Upon reviewing the report, I recalled its transmittal to the NRC in or around 1990, when I was employed in the NRC's Office of Nuclear Regulatory Research. To the best of my knowledge and recollection, the NRC Staff never completed a review of proposed NUREG/CR-5148 or approved its publication as a final NUREG/CR report. Consistent with this recollection, the copy of proposed NUREG/CR-5148 submitted by NYS does not include the manuscript completion date or the publication date in the front matter of the report. It is standard NRC practice to include those dates in the front matter of final NUREG series reports published by the agency.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 30, 2012.

Executed in accord with 10 C.F.R. § 2.304(d)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, a copy of "Entergy's Motion in Limine to Exclude Portions of New York State's Rebuttal Filings on Contention NYS-12C," including Attachment 1 (Exclusion Chart) and Attachment 2 (Declaration of Donald P. Cleary Related to Entergy's Motion in Limine on Contention NYS-12C), was served electronically via the Electronic Information Exchange on the following recipients.

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