

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman  
Dr. Michael F. Kennedy  
Dr. Richard E. Wardwell

In the Matter of

ENERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-247-LR and 50-286-LR

ASLBP No. 07-858-03-LR-BD01

August 2, 2012

ORDER

(Denying Applicant's Motion for Leave to File Surrebuttal Testimony on NYS-12C)

Entergy Nuclear Operations, Inc. (Applicant) has moved to file surrebuttal testimony concerning New York State Consolidated Contention NYS-12C (NYS-12C).<sup>1</sup> In support of this motion, Applicant argues that New York State (New York) presented, in its revised statement of position and rebuttal testimony on NYS-12C, "new arguments and evidence that expand the scope of the arguments set forth in [its] direct testimony[.]" to which Applicant "has not had a fair opportunity to respond."<sup>2</sup>

Specifically, Applicant contends that New York argues for the first time in its revised statement of position and rebuttal testimony on NYS-12-C 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 NRC Staff failed to disclose that study in connection with this proceeding."<sup>3</sup> Applicant further asserts

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<sup>1</sup> See Applicants' Motion for Leave to File Surrebuttal Testimony on Consolidated Contention NYS-12C (July 12, 2012) at 1.

<sup>2</sup> Id.

<sup>3</sup> Id. at 2.

that, according to New York, “the NRC’s ‘site-specific analysis’ is described in Chapter 5 of draft NUREG/CR-5148 (PNL-6350), ‘Property-Related Costs of Radiological Accidents’ (Feb. 1990),” and that this draft NUREG -- though never made final or published -- was released to Purdue University in 1992 in response to a Freedom of Information Act (FOIA) request.<sup>4</sup>

Applicant states that “[a]lthough this FOIA request appears in the NRC’s ADAMS Public Legacy Library, [Applicant] could find no other record copy of this [draft NUREG] on the NRC’s website or on the Internet in general.”<sup>5</sup> In fact, according to the Applicant, this draft NUREG does not even appear on the U.S. Department of Commerce’s National Technical Information Service database, which houses over two million government records, including NUREG Reports.<sup>6</sup>

Nevertheless, according to Applicant, New York located this draft NUREG and disclosed it on May 31, 2012, one month before New York filed its rebuttal testimony.<sup>7</sup> New York then relied on this document for the first time in its revised statement of position and rebuttal testimony, according to Applicant, to argue 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.”<sup>8</sup>

Applicant argues that New York’s new assertions are “directly relevant and material to the parties’ positions[,]” and therefore Applicant should be granted the opportunity to file surrebuttal testimony, on or before August 13, 2012, to respond.<sup>9</sup> Applicant represents that the NRC Staff (Staff) does not oppose this motion.<sup>10</sup> Moreover, according to Applicant, the Staff would like the option to file

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<sup>4</sup> Id. at 2–3.

<sup>5</sup> Id. at 3.

<sup>6</sup> See id.

<sup>7</sup> See id.

<sup>8</sup> Id. at 4.

<sup>9</sup> Id. at 4–5.

<sup>10</sup> Id. at 7.

its own surrebuttal testimony in response to New York's revised Statement of Position and rebuttal testimony regarding NYS-12C.<sup>11</sup>

New York opposes this motion.<sup>12</sup> First, New York argues that it properly submitted the exhibits and rebuttal testimony in question in "direct response to arguments in [Applicant's] and the . . . Staff's Statements of Position and Pre-filed Testimony on NYS-12C."<sup>13</sup> Specifically, New York argues that it did not "present[] 'new arguments and evidence that expand the scope of the arguments set forth in [its] direct testimony[.]'"<sup>14</sup> Instead, New York contends that its "[revised Statement of Position] and Rebuttal Testimony[, which highlight draft NUREG/CR-5148,] responds directly to Entergy and [the] Staff's arguments that using NUREG-1150, and thus Sample Problem A, is reasonable under NEPA."<sup>15</sup>

New York also notes that an alternative to Applicant's requested relief exists: the issues raised in the instant motion "could be addressed by the parties' witnesses at the evidentiary hearing."<sup>16</sup> Based on these arguments, New York requests that Applicant's motion be denied.

If, however, the Board does grant the instant motion, New York argues that "fairness dictates that [it] should be afforded [an opportunity] to file its own sur-rebuttal testimony to any additional testimony proffered by [Applicant] and [the] Staff."<sup>17</sup> New York notes, however, that allowing the submittal of two additional rounds of testimony on NYS-12C may require the Board to extend pre-hearing deadlines, such as the August 29, 2012, deadline for proposed questions.<sup>18</sup>

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<sup>11</sup> Id.

<sup>12</sup> 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 (July 23, 2012) at 7.

<sup>13</sup> Id. at 2.

<sup>14</sup> Id.

<sup>15</sup> Id. at 2–3.

<sup>16</sup> Id. at 1.

<sup>17</sup> Id. at 6.

<sup>18</sup> See id.

The Board agrees with New York that the issues raised in this motion can be handled at the evidentiary hearing. Moreover, the Board finds that the submission of two additional rounds of testimony on NYS-12C will have the prejudicial effect of delaying the evidentiary hearing scheduled to commence on October 15, 2012, at least as it relates to NYS-12C.

Therefore, we DENY Applicant's motion for leave to file surrebuttal testimony on NYS-12C. That being so, we encourage the parties to address the issues raised in New York's rebuttal testimony in their proposed questions for the Board to ask at the evidentiary hearing, which are due no later than Wednesday, August 29, 2012.<sup>19</sup>

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Lawrence G. McDade, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 2, 2012

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<sup>19</sup> See Licensing Board Order (Memorializing Items Discussed During the July 9, 2012, Status Conference) (July 12, 2012) at 2 (unpublished).

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NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER** (Denying Applicant's Motion for Leave to File Surrebuttal Testimony on NYS-12C) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]  
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Dated at Rockville, Maryland  
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