

**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. August 9, 2012  
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**STATE OF NEW YORK AND RIVERKEEPER'S  
ANSWER IN OPPOSITION TO  
ENTERGY'S MOTION TO STRIKE PORTIONS OF INTERVENORS'  
REVISED STATEMENT OF POSITION AND MOTION IN LIMINE TO  
EXCLUDE PORTIONS OF THE PRE-FILED REBUTTAL TESTIMONY AND  
EXHIBITS FOR CONSOLIDATED CONTENTION NYS-26B/RK-TC-1B**

Office of the Attorney General  
for the State of New York  
The Capitol  
State Street  
Albany, New York 12224

Riverkeeper, Inc.  
20 Secor Road  
Ossining, New York 10562

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In accordance with 10 C.F.R. § 2.323(c), the State of New York State and Riverkeeper hereby submit this joint answer in opposition to Entergy's July 30, 2012 Motion to Strike Portions of Intervenors' Revised Statement of Position for Consolidated Contention NYS-26B/RK-TC-1B.

## **INTRODUCTION**

On July 30, 2012, Counsel for Entergy filed a motion to strike portions of the State and Riverkeeper's Revised Statement of Position for Contention NYS-26B/RK-TC-1B (Metal Fatigue) (NYS000439) ("Revised SOP") and to exclude portions of the Prefiled Rebuttal Testimony of Dr. Joram Hopenfeld Regarding Contention NYS-26B/RK-TC-1B – Metal Fatigue (June 28, 2012) (RIV000114) ("Hopenfeld Rebuttal"), and several supporting exhibits thereto.<sup>1</sup> Entergy contends that the State and Riverkeeper's argument that commitments made by license renewal applicants are generally unenforceable and are not properly monitored by the Nuclear Regulatory Commission ("NRC") is outside the scope of the contention and should be stricken. *See* Entergy's Motion to Strike Portions of Intervenors' Revised Statement of Position for Contention NYS-26B/RK-TC-1B (Metal Fatigue) at 5-7 (July 30, 2012) ("Entergy's Mot."). Entergy further asserts that Dr. Hopenfeld's rebuttal testimony, and various supporting exhibits thereto, are outside the scope of the contention and the proceeding. *See* Entergy's Mot. at 9-15. This motion is without merit and should be denied.

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<sup>1</sup> NRC Staff did not file an in limine motion in response to the State and Riverkeeper's June 2012 evidentiary submissions supporting Consolidated Contention NYS-26B/RK-TC-1B.

## ARGUMENT

### POINT I

#### **THE BOARD HAS MADE CLEAR THAT STATEMENTS OF POSITION ARE NOT EVIDENCE AND ARE NOT SUBJECT TO ADMISSIBILITY STANDARDS**

This Board has already made clear that “regarding ... challenge[s] to ... Initial Statement[s] of Position, this document is not evidence, but rather consists merely of attorney arguments. Any motion to strike “testimony” in this document is inappropriate.” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant’s Motions in Limine) (Mar. 6, 2012)(“Board Order”) at 14; *see also id.* at 19 (“Statements of positions are not evidence. Thus, the admissibility standards of Section 2.337(a) do not apply and statements of positions are not subject to evidentiary challenge.”); *id.* at 24 (“Finally, statements of position are a party’s legal interpretation of its evidence, not its actual evidence, and we will use it inasmuch as it is supported by the evidence . . . Therefore, we will not exclude . . . portions of [a] Statement of Position.”). As such, Entergy’s motion to strike portions of the State and Riverkeeper’s Revised Statement of Position should be denied.

### POINT II

#### **THE STATE AND RIVERKEEPER’S ARGUMENT REGARDING LICENSEE COMMITMENTS RESPONDS TO RECENT ENTERGY STATEMENTS AND, THUS, IS A PROPER WRITTEN RESPONSE WITHIN THE SCOPE OF THE CONTENTION**

Under 10 C.F.R. § 2.1207(a)(2), “[w]ritten responses and rebuttal testimony” should be “directed to the initial statements and testimony of other participants.” The State and Riverkeeper’s discussion of licensee commitments in the Revised Statement of Position does just that. The heart of this contention is a challenge to the adequacy of Entergy’s plan to manage the

effects of metal fatigue during the requested extended license terms.<sup>2</sup> In response to the State and Riverkeeper’s arguments, Entergy’s Statement of Position raised the issue of licensee commitments by explaining that “licensee commitments are a well established and essential mechanism for ensuring that licensees implement their [aging management programs] in a timely and effective manner.” Entergy’s Statement of Position Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue) at 22 (Mar. 29, 2012) (ENT000182); *see also id.* at 22-24. Additionally, Entergy listed various commitments it has allegedly undertaken in an attempt to demonstrate that it “has done considerably more than merely provide, in its LRA, a bare assertion that it will comply with GALL.” *Id.* at 48 (internal citation and quotation omitted). The Revised Statement of Position directly responds to Entergy’s assertions: “New York and Riverkeeper have substantial concerns over whether Entergy’s commitments concerning metal fatigue of the reactor coolant systems and reactor coolant pressure boundaries are enforceable in an NRC administrative enforcement proceeding or in a federal court action.” Revised SOP at 30. This is a proper response to Entergy’s arguments.

Entergy’s citation to *Progress Energy Fla., Inc.* (Levy County Nuclear Power Plant, Units 1 & 2), Initial Scheduling Order, LBP-09-22, 70 N.R.C. 640, 655, slip op. at 7 (Aug. 27, 2009) for the proposition that “[b]eing in the nature of rebuttal, the response . . . [is] 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” is misleading and inapposite. First, this citation is merely to a scheduling order setting out deadlines for various submissions during an ASLB proceeding; it contains no analysis of challenged rebuttal testimony. LBP-09-22, slip op

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<sup>2</sup> *See* State of New York’s and Riverkeeper’s Motion for Leave to File a New and Amended Contention Concerning the August 9, 2010 Entergy Reanalysis of Metal Fatigue (Sept. 9, 2010) ML102670665.

at 7. Second, the Board in *Progress Energy* also stated that “[t]he written response should be in the nature of a response brief that identifies the *legal* and factual *weaknesses* in an opponent’s position . . . .” *Id.* at 17 (emphasis added). Here, the State and Riverkeeper are doing just that: responding to legal weaknesses in Entergy’s arguments, which Entergy raised within the scope of this contention.

The State and Riverkeeper further note that Consolidated Contention NYS-26B/RK-TC-1B questioned whether Entergy’s proposed aging management program and the scope of associated commitments would be sufficient for the purposes of 10 C.F.R. § 54.21(c)(1)(iii). *See, e.g.*, Petitioners State of New York and Riverkeeper, Inc. New and Amended Contention Concerning Metal Fatigue, New York State 26-B/Riverkeeper TC-1B, at ¶¶ 14, 19-20, 26-27, 32-33, 36 (Sept. 9, 2010) (included in ML102670665 (public and redacted version)).

Accordingly, the Board should deny Entergy’s motion to strike the State and Riverkeeper’s Revised Statement of Position.

### POINT III

#### **DR. HOPENFELD’S TESTIMONY RELATING TO INDIAN POINT INLET AND OUTLET REACTOR VESSEL NOZZLES IS ENTIRELY APPROPRIATE AND WITHIN THE SCOPE OF CONTENTION NYS-26B/RK-TC-1B AND THE PROCEEDING**

Once again, Entergy improperly characterizes portions of Dr. Hopenfeld’s testimony as constituting an improper challenge to “original design basis CUF calculations for the reactor vessel inlet and outlet nozzles.” Entergy’s Mot. at 9-14. Entergy’s repetitious arguments continue to be unavailing. Entergy again fails to acknowledge that Dr. Hopenfeld’s testimony relates to the adequacy of Entergy’s metal fatigue assessment pertaining to the proposed extended operating term. As such, the testimony cited in Entergy’s motion is neither an improper critique of the current licensing basis (CLB), nor a newly-raised issue.

Though Entergy complains that Dr. Hopenfeld's rebuttal testimony questions the validity of CLB CUF calculations, the testimony Entergy objects to responds directly to Entergy's witnesses' testimony, which disputes Dr. Hopenfeld's discussion of the adequacy of heat transfer analysis conducted in relation to the inlet and outlet reactor vessel nozzles. *See* Testimony of Entergy Witnesses Nelson F. Azevedo, Alan B. Cox, Jack R. Stosnider, Robert E. Nickell, and Mark A. Gray Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue), March 29, 2012 (ENT000183) ("Entergy's Testimony") at A142-A145. As discussed above, this is the purpose of rebuttal testimony.

Furthermore, Dr. Hopenfeld's responsive testimony explicitly explains how his critique of Entergy's metal fatigue assessment at Indian Point did not directly dispute any CLB CUFs; rather, any discussion of the CLB CUF calculations and heat transfer analysis performed for such calculations served only to criticize Entergy's assessment pertaining to the aging effects of metal fatigue during the proposed extended operating periods. *See* Hopenfeld Rebuttal at 23-27. Dr. Hopenfeld's testimony simply elaborates upon Dr. Hopenfeld's initial position, in light of Entergy's attempt to rationalize its failure to account for the effects of cladding in its assessment of metal fatigue. *See id.* Thus, the rebuttal testimony Entergy now objects to discussing CLB CUFs is entirely relevant and appropriate. For the same reasons explained in response to Entergy's earlier motion in limine relating to Riverkeeper and Dr. Hopenfeld's initial testimony, Entergy's position continues to be wrong. *See* Riverkeeper, Inc. Opposition to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony, Expert Report, Exhibits, and Statement of Position for Contention NYS-26B/RK-TC-1B (Metal Fatigue) (February 17, 2012) at 10-13 ("Riverkeeper Opposition to Entergy's Motion in Limine (Feb. 17, 2012)"); *see also* Declaration of Joram Hopenfeld in Support of Riverkeeper's Opposition to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Direct Testimony, Expert Report, Exhibits, and Statement of

Position for Contention NYS-26B/RK-TC-1B (Metal Fatigue) (February 17, 2012), at ¶¶ 19-21.

Indeed, the ASLB has already explicitly agreed that “Riverkeeper’s testimony and corresponding evidentiary submission on this Contention does not challenge any of the design basis CUF calculations,” and that the “specific CLB analyses define current practices” and “are an appropriate subject for review in this license renewal proceeding. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant’s Motions in Limine) (March 6, 2012), at 15-16, (unpublished) ML12066A170 (“ASLB March 6, 2012 Order”). Although Entergy claims that the “heat transfer coefficient Entergy used and the effects of cladding in the ASME Code stress and fatigue analysis do not relate to the application of the  $F_{en}$ ,” (Entergy’s Mot. at 13) this is highly disputed, as evidenced by Dr. Hopenfeld’s testimony. Thus, as the ASLB has already explained,

The degree of the relevance between the CLB analyses and those proposed in the Applicant’s AMP *is a merits question* that can only be determined by weighing all the evidence on this topic. Resolution of this question will be best served after all the testimony has been filed and this issue is probed during the adjudicatory hearing.

*See* ASLB March 6, 2012 Order at 16 (emphasis added).

In sum, Dr. Hopenfeld’s rebuttal testimony does not alter Dr. Hopenfeld or Riverkeeper’s previously stated positions with respect to the inadequacy of Entergy’s metal fatigue assessments, and Entergy’s various assertions that Riverkeeper and Dr. Hopenfeld have provided contradictory positions is unfounded. Dr. Hopenfeld’s rebuttal testimony does not present information that somehow warrants a reconsideration of Entergy’s objection to his discussion of the Indian Point reactor vessel inlet and outlet nozzles.

In addition, Entergy’s assertions that Dr. Hopenfeld’s discussion of Entergy’s fatigue assessment relating to the reactor vessel inlet and outlet nozzles is outside the scope of Contention NYS-26B/RK-TC-1B, are similarly baseless. *See* Entergy’s Mot. at 13-14. Dr.



Hopenfeld's rebuttal testimony does not raise any "new issue" that is purportedly outside the admitted bases of Contention NYS-26B/RK-TC-1B. *Id.* Indeed, Dr. Hopenfeld's testimony falls comfortably within the "reasonably inferred bounds" of the admitted bases of the contention. *See* Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010). That is, Contention NYS-26B/RK-TC-1B, *as admitted*, includes various criticisms pertaining to Entergy's failure to demonstrate an adequate program to manage metal fatigue during the proposed period of extended operation, and not *only* Entergy's 2010 "refined" fatigue analysis. *See, e.g.* Declaration of Dr. Joram Hopenfeld in Support of Petitioners State of New York and Riverkeeper, Inc.'s New and Revised Contention Concerning Metal Fatigue (Sept. 9, 2010), at ¶¶ 16-21. Indeed, from the inception of the contention, Dr. Hopenfeld has criticized Entergy's failure to *expand* the scope of components subject to additional fatigue analyses, such as the reactor vessel inlet and outlet nozzles. *See, e.g.,* Riverkeeper, Inc.'s Request for Hearing and Petition to Intervene in the License Renewal Proceedings for the Indian Point Nuclear Power Plant (November 30, 2007), at 11, 14 ML073410093; *see also* Prefiled Written Testimony of Dr. Joram Hopenfeld Regarding Riverkeeper Contention TC-1B – Metal Fatigue (December 20, 2012) (RIV000034), at 4, 20-22; Hopenfeld Rebuttal at 27.

Thus, Entergy's reference to a decision in the *Seabrook* proceeding (Entergy Mot. at 14 (citing CLI-12-05)) is clearly not dispositive in this case, since Dr. Hopenfeld's discussion of Entergy's inadequate metal fatigue analysis relating to the reactor vessel inlet and outlet nozzles at Indian Point is squarely within the scope of the admitted contention. Notably, Entergy's position is entirely based upon the misconception that Dr. Hopenfeld's testimony is tantamount to an inappropriate challenge to CLB CUFs (*see* Entergy's Mot. at 14); as explained in earlier briefing as well as above, this is not the case. *See* Riverkeeper Opposition to Entergy's Motion

in Limine (Feb. 17, 2012) at 10-13; *see supra* pp.4-6.

#### POINT IV

##### **ENTERGY'S OBJECTION TO VARIOUS EXHIBITS PROFFERED IN SUPPORT OF DR. HOPENFELD'S TESTIMONY LACKS MERIT**

Entergy asserts that Riverkeeper Exhibits RIV000103, RIV000104, RIV000105, and RIV000106, which Riverkeeper has designated as relevant to Contention NYS-26B/RK-TC-1B, have “no apparent nexus to the issues admitted for hearing,” and argue that they “should be excluded from the record as irrelevant.” Entergy’s Mot. at 14-15. Entergy similarly disputed the relevance of these exhibits in its earlier Motion in Limine to Exclude Portions of Intervenors’ Prefiled Direct Testimony, Expert Report, Statement of Position, and Exhibits for Contention NYS-38/RK-TC-5 (Safety Commitments), dated, July 6, 2012. For the same reasons discussed in the State and Riverkeeper’s Joint Answer to Entergy’s motion in limine related to Contention NYS-38/RK-TC-5, Entergy’s objection is without merit and must be rejected.

In particular, at various junctures in this proceeding, Entergy has lodged sweeping criticisms about the ability of Dr. Hopfenfeld to provide expert testimony in relation to the aging phenomenon of metal fatigue. In its Motion in Limine concerning Intervenors’ initial hearing submissions related to Contention NYS-26B/RK-TC-1B, Entergy claimed that “Riverkeeper has not carried its burden of demonstrating that Dr. Hopfenfeld holds any specialized knowledge in the field of metal fatigue analysis, such that he can assist the Board in understanding the evidence.” Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Direct Testimony, Expert Report, Exhibits, and Statement of Position for Contention NYS-26B/RK-TC-1B (Metal Fatigue) (January 30, 2012), at 7. Entergy also asserted that Dr. Hopfenfeld’s *curriculum vitae* did not show that he had “ever performed a fatigue analysis of reactor components comparable to Westinghouse’s analysis, or that he had any experience on fatigue issues when he was a member of the NRC Staff,” and that “[h]is publications and patents are similarly silent on fatigue

analysis-related issues.” *Id.*

Subsequently, in Entergy’s initial Statement of Position relating to Contention NYS-26B/RK-TC-1B, Entergy once again took issue with Dr. Hopfenfeld’s expertise on metal fatigue issues. Entergy again claimed that Dr. Hopfenfeld held no specialized knowledge in the field of metal fatigue, and argued that, as a result, the Board “should accord little or no weight to” his testimony. Entergy’s Statement of Position Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue) (March 29, 2012) (ENT000182), at 28-29, ML12089A240. The exhibits Entergy now objects to speak to the ample expertise held by Dr. Hopfenfeld pertaining to relevant metal fatigue issues, in direct response to Entergy’s baseless claims to the contrary. In light of Entergy vehement and repeated attempts to refute Dr. Hopfenfeld’s credibility and expertise, information demonstrating his ability to testify to such issues is highly relevant to Contention NYS-26B/RK-TC-1B.

There is simply no basis for Entergy’s claim that there is “no apparent nexus” between the exhibits identified as relevant to NYS-26B/RK-TC-1B, and the admitted contention. To the contrary, Dr. Hopfenfeld’s rebuttal testimony specifically responds to *Entergy’s* allegations regarding an alleged lack of “specialized knowledge” in relevant issues and explains how the relevant supporting documents relate to and demonstrate his expertise in metal fatigue related issues. *See* Hopfenfeld Rebuttal at 4-7.

So, as Dr. Hopfenfeld explains, Exhibit RIV000103 (J. Hopfenfeld et al., *Small Sodium to Gas Leak Behavior in Relation to LMFBR Leak Detection*, Int’l Conference on Liquid Metal Tech. (May 1976)) relates to the effects of the leak environment on *fatigue* crack growth in sodium; similarly, Exhibits RIV000104 (Memorandum from S. Collins (RES) to W. Travers (EDO), “Steam Generator Action Plan Revision to Address Differing Professional Opinion on Steam Generator Tube Integrity (WITS ITEM 200100026)” (May 11, 2001)) and RIV000105

(NUREG-1740, Voltage-Based Alternative Repair Criteria, A Report to the Advisory Committee on Reactor Safeguards by the Ad Hoc Subcommittee on a Differing Professional Opinion (Mar. 2001)) relate to steam generator degradation issues that Dr. Hopenfeld was extensively involved in, including crack detection, and, as explained in Dr. Hopenfeld's testimony, the subject of these documents, including "crack formation and detection" is "directly related to fatigue analysis and fatigue management;" lastly, RIV000106 (Associated Press, *Nuke inspectors focus on 'unusual' wear on tubes*, Fox News.com (Feb. 3, 2012)), also relates to and demonstrates Dr. Hopenfeld's experience, familiarity, and expertise with tube degradation issues, which, once again, relate to metal fatigue. *See* Hopenfeld Rebuttal at 4-7.

In sum, the exhibits which Entergy objects to were offered to, in fact, elucidate the relevant experience and expertise that Dr. Hopenfeld holds with respect to metal fatigue related issues, and squarely supports Dr. Hopenfeld's rebuttal testimony on Contention NYS-26B/RK-TC-1B. Entergy's attempt to exclude these exhibits is, thus, completely unfounded, especially in light of Entergy's position relating to Dr. Hopenfeld's expertise on such issues.

The ASLB should, therefore, deny Entergy's request to exclude Riverkeeper Exhibits RIV000103, RIV000104, RIV000105, and RIV000106. Exclusion is particularly improper since the ASLB is well suited to afford the weight it deems necessary to such exhibits.<sup>3</sup>

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<sup>3</sup> *See Amergen Energy Comp, LLC* (Oyster Creek Nuclear Generating Station, 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"); *Amergen Energy Comp., LLC*, (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification), August 9, 2007, at 2, ADAMS ML072210832; *Nuclear Innovation North America, LLC*, (South Texas Project Units 3 and 4), Order (Ruling on Motions in Limine), July 14, 2011, at 3, ADAMS ML11195A093.

**CONCLUSION**

For the above-stated reasons, the State of New York and Riverkeeper respectfully request that the Board deny Entergy’s Motion to Strike and Exclude the State and Riverkeeper’s recent submissions in support of Combined Contention NYS-26B/RK-TC-1B.

Respectfully submitted,

***Signed (electronically) by***

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John J. Sipos  
Kathryn M. Liberatore  
Assistant Attorneys General  
Office of the Attorney General  
for the State of New York  
The Capitol  
Albany, New York 12227  
(518) 402-2251

***Signed (electronically) by***

---

Deborah Brancato  
Staff Attorney  
Riverkeeper, Inc.  
20 Secor Road  
Ossining, NY 10562  
(914) 478-4501

Dated: August 9, 2012

**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 certify that counsel for the State of New York and Riverkeeper participated in discussions initiated by Entergy Nuclear Operations, Inc. ("Entergy" or the "movant"), with the movant and NRC Staff, concerning Entergy's Motion to Strike Portions of Intervenor's Revised Statement of Position and Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Exhibits for Contention NYS-26B/RK-TC-1B (Metal Fatigue), filed on July 30, 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 and Riverkeeper's efforts to resolve the issues have been unsuccessful.

***Signed (electronically) by***

---

Janice A. Dean  
Kathryn M. Liberatore  
Assistant Attorneys General  
Office of the Attorney General  
for the State of New York  
The Capitol  
Albany, New York 12227  
(212) 416-8459

***Signed (electronically) by***

---

Deborah Brancato  
Staff Attorney  
Riverkeeper, Inc.  
20 Secor Road  
Ossining, NY 10562  
(914) 478-4501

August 9, 2012

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

-----x  
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. August 9, 2012  
-----x

**CERTIFICATE OF SERVICE**

I hereby certify that on August 9, 2012, copies of the State of New York's Answer to Entergy's July 30, 2012 Motion to Strike Portions of Intervenors' Revised Statement of Position and Motion in Limine to Exclude Portions of the Pre-filed Rebuttal Testimony and Exhibits for Contention NYS-26B/RK-TC-1B (Metal Fatigue) were served electronically via the Electronic Information Exchange on the following recipients:

Lawrence G. McDade, Chair  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738  
Lawrence.McDade@nrc.gov

Michael F. Kennedy  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738  
Michael.Kennedy@nrc.gov

Richard E. Wardwell  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738  
Richard.Wardwell@nrc.gov

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738

Shelbie Lewman, Esq. Law Clerk  
Anne Siarnacki, Esq., Law Clerk  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738  
Shelbie.Lewman@nrc.gov  
Anne.Siarnacki@nrc.gov

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Mailstop 16 G4  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
ocaamail@nrc.gov

Office of the Secretary  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mailstop 3 F23  
Two White Flint North  
11545 Rockville Pike  
Rockville, MD 20852-2738  
hearingdocket@nrc.gov

Sherwin E. Turk, Esq.  
David E. Roth, Esq.  
Beth N. Mizuno, Esq.  
Brian G. Harris, Esq.  
Anita Ghosh, Esq.  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mailstop 15 D21  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
sherwin.turk@nrc.gov  
david.roth@nrc.gov  
beth.mizuno@nrc.gov  
brian.harris@nrc.gov  
anita.ghosh@nrc.gov

Kathryn M. Sutton, Esq.  
Paul M. Bessette, Esq.  
Jonathan Rund, Esq.  
Raphael Kuyler, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
ksutton@morganlewis.com  
pbessette@morganlewis.com  
jrund@morganlewis.com  
rkuyler@morganlewis.com

Martin J. O'Neill, Esq.  
Morgan, Lewis & Bockius LLP  
Suite 4000  
1000 Louisiana Street  
Houston, TX 77002  
martin.o'neill@morganlewis.com

Elise N. Zoli, Esq.  
Goodwin Procter, LLP  
Exchange Place  
53 State Street  
Boston, MA 02109  
ezoli@goodwinprocter.com

William C. Dennis, Esq.  
Assistant General Counsel  
Entergy Nuclear Operations, Inc.  
440 Hamilton Avenue  
White Plains, NY 10601  
wdennis@entergy.com

Robert D. Snook, Esq.  
Assistant Attorney General  
Office of the Attorney General  
State of Connecticut  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
robert.snook@ct.gov



Melissa-Jean Rotini, Esq.  
Assistant County Attorney  
Office of the Westchester County Attorney  
Michaelian Office Building  
148 Martine Avenue, 6th Floor  
White Plains, NY 10601  
MJR1@westchestergov.com

Daniel E. O'Neill, Mayor  
James Seirmarco, M.S.  
Village of Buchanan  
Municipal Building  
236 Tate Avenue  
Buchanan, NY 10511-1298  
vob@bestweb.net

Daniel Riesel, Esq.  
Thomas F. Wood, Esq.  
Victoria S. Treanor, Esq.  
Sive, Paget & Riesel, P.C.  
460 Park Avenue  
New York, NY 10022  
driesel@sprlaw.com  
vtreanor@sprlaw.com

Michael J. Delaney, Esq.  
Director  
Energy Regulatory Affairs  
NYC Department of Environmental  
Protection  
59-17 Junction Boulevard  
Flushing, NY 11373  
(718) 595-3982  
mdelaney@dep.nyc.gov

Manna Jo Greene, Director  
Karla Raimundi, Environmental Justice  
Associate  
Stephen Filler, Esq., Board Member  
Hudson River Sloop Clearwater, Inc.  
724 Wolcott Avenue  
Beacon, NY 12508  
Mannajo@clearwater.org  
karla@clearwater.org  
stephenfiller@gmail.com

Phillip Musegaas, Esq.  
Deborah Brancato, Esq.  
Riverkeeper, Inc.  
20 Secor Road  
Ossining, NY 10562  
phillip@riverkeeper.org  
dbrancato@riverkeeper.org

*Signed (electronically) by*

---

Kathryn M. Liberatore  
Assistant Attorney General  
State of New York  
(212) 416-8482

Dated at New York, New York  
this 9th day of August 2012