

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

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))	
<hr/>)	Date: August 9, 2012

**CLEARWATER’S ANSWER IN OPPOSITION TO ENTERGY’S
MOTION IN LIMINE TO EXCLUDE PORTIONS OF
CLEARWATER’S REBUTTAL TESTIMONY ON CONTENTION CW-EC-3A**

PRELIMINARY STATEMENT

Once again, Entergy Nuclear Operations, Inc. (“Entergy”) and the Staff of the Nuclear Regulatory Commission (the “NRC Staff” or “Staff”) have moved to exclude portions of the Rebuttal Statement and rebuttal testimony submitted on behalf of Hudson Sloop Clearwater, Inc. (“Clearwater”) on June 28, 2012. At root, both Entergy and the NRC Staff submitted voluminous testimony about Emergency Planning, while seeking to exclude much of Clearwater’s rebuttal to this very testimony. Even if emergency planning were outside the scope of the hearing, which it is not, under the “open door” doctrine, Clearwater would be allowed to rebut this testimony.¹ Having decided to confront the emergency planning issue head on, instead of regarding it as mitigation, the Staff and Entergy cannot

¹ See *Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir.2005) (“When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible.”).

now complain that Clearwater has directly rebutted this testimony. As it has on at least two previous occasions, the Atomic Safety and Licensing Board (the “Board”) should reject this attempt to use a Motion in Limine to remove a material dispute between experts. Moreover, Motion in Limine practice before the Board is generally disfavored because the evidentiary rules are more relaxed than in Federal Court, there is no jury to protect, and the Board is qualified and accustomed to weigh the evidence presented appropriately.²

ARGUMENT

I. General Legal Standards on Reliability and Materiality of Evidence

Boards have broad discretion over evidentiary issues and may strike argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence to prevent delays or reduce the size of the record. 10 CFR § 2.333(b); *Pa’ina Hawaii* (Materials License Application) CLI-10-18, 2010 WL 2753784 at *8 (“[A] licensing board normally has considerable discretion in making evidentiary rulings.”) quoting *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). Importantly, however, “strict rules of evidence do not apply to written submissions.” 10 CFR § 2.319(d).

The reliability of evidence is generally tested at hearing and dealt with by according the testimony appropriate weight. For example, hearsay evidence is generally admissible. *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 366 (1983); *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411-12 (1976); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 490, 501 n.67 (1985); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC

² “Licensing Boards are accustomed to weighing evidence, including expert testimony, and determining its relevance to the issues presented.” *Amergen Energy LLC* (Oyster Creek Generating Station), Memorandum and Order (Ruling on Motions in Limine and for Clarification) at 2 (Aug. 9, 2007).

273, 279 (1987). The validity and sufficiency of any "hearsay" information upon which they are based generally is a matter to be tested in the context of an evidentiary hearing in which the Staff must provide adequate probative evidence to carry its burden of proof. *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 31 (1994).

Because there is no jury and the Board will not be confused or misled by immaterial evidence, a determination on materiality is not an ironclad requirement prior to admitting testimony and exhibits. NUREG-0386, NRC Staff Practice and Procedure Digest, H 81 (2005). Determinations of materiality may therefore be safely left to a later date without prejudicing the interests of any party. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979). In order for expert testimony to be admissible, it need only (1) assist the trier of fact, and (2) be rendered by a properly qualified witness. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983). See Fed. R. Evid. 702; *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1602 (1985).

Finally, the fact that a witness is employed by a party, or paid by a party, goes only to the persuasiveness or weight that should be accorded the expert's testimony, not to its admissibility. *Waterford, supra*, 17 NRC at 1091; *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-85-39, 22 NRC 755, 756 (1985).

II. The Scope of the Environmental Justice Contention Includes Institutionalized and Transport-dependent Environmental Justice Populations

The Board has accurately recognized the scope of the Environmental Justice ("EJ") contention. The amended contention stated, "Entergy's environmental report and the Final

Supplemental Environmental Impact Statement contain seriously flawed environmental justice analyses that do not adequately assess the impacts of relicensing Indian Point on the minority, low-income and disabled populations in the area surrounding Indian Point.” *In the Matter of Entergy Nuclear Operations*. (Indian Point Nuclear Generating Units 2 and 3), Order Ruling on Motions to for Leave to File New and Amended Contentions, ASLBP No. 07-858-03-LR-BD01, 60 (July 6, 2011); As the Board noted, “[t]hese populations *include* not only the Sing Sing prisoners mentioned by the Board in LBP-08-13, but also other *EJ populations within 50 miles of Indian Point in pre-schools, nursing homes, shelters, hospitals, and minority and low-income residents in the region who lack access to private transportation.*” *Id.* at 56 (emphasis added). The Board therefore recognized that the basis for the contention covered these areas. Confirming that this is correct, the Board rejected Entergy’s prior assertions that the scope of the EJ contention is limited to institutional EJ populations. *In the Matter of Entergy Nuclear Operations* (Indian Point Nuclear Generating Units 2 and 3), Order Granting in Part and Denying in Part Applicant’s Motions in Limine, ASLBP No. 07-858-03-LR-BD01, 32 (March 6, 2012). In addition the Board rejected Entergy’s assertion that evidence related to the Katrina and Fukushima disasters was irrelevant, stating:

We cannot say without ruling on the merits that proffered evidence relating to non-nuclear severe accidents, the events at Fukushima, or certain populations around Indian Point are irrelevant to the question whether the NRC Staff’s EJ analysis was sufficient. Nor can we decide at this time that Clearwater’s witnesses lack the specified qualifications and first-hand knowledge to testify on these matters.

In the Matter of Entergy Nuclear Operations (Indian Point Nuclear Generating Units 2 and 3), Order Granting in Part and Denying in Part Applicant’s Motions in Limine, ASLBP No. 07-858-03-LR-BD01, 35 (March 6, 2012).

III. The Contention Challenges the Adequacy of the Analysis of Disproportionate Impacts and the Mitigation Thereof

Despite repeated attempts by the Board to explain the nature of the contention, Entergy still clings to the notion that Clearwater may not discuss emergency planning as part of its evidence on the EJ contention. In fact, as the Board has recognized, Clearwater is raising a NEPA issue about the analysis of disproportionate impacts and their mitigation. When first admitting the contention the Board found that the contention does not challenge the validity of the emergency plans, rather it challenged the sufficiency of the analysis of disproportionate impacts in the environmental report:

Both Entergy and the NRC Staff attempt to dismiss this contention as an “emergency planning issue” which is outside the scope of a license renewal proceeding. . . . However, Clearwater EC-3 is a Part 51 Environmental Contention brought under NEPA. It is not a Part 54 Safety Contention based on emergency planning. Clearwater has not contended that Entergy’s emergency plan is deficient. Rather the Petitioner has contended that Entergy’s ER is deficient because it does not supply sufficient information from which the Commission may properly consider, and publicly disclose, environmental factors that may cause harm to minority and low-income populations that would be “disproportionate to that suffered by the general population.” We agree.

In the Matter of Entergy Nuclear Operations (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 202 (2008). In admitting the amended contention, the Board not only rejected the argument regarding emergency planning once again, it also recognized that the contention extended to the adequacy of the mitigation of disparate impacts. *In the Matter of Entergy Nuclear Operations (Indian Point Nuclear Generating Units 2 and 3), ASLBP No. 07-858-03-LR-BD01, 56 (2011).*

The Board’s decisions are based upon the requirements of NEPA itself and on NRC guidance. For example, the Commission requires the NRC Staff “(1) [t]o identify and assess

environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. *Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions*, 69 Fed. Reg. 52,040, 52,048 (August 24, 2004). This EJ impacts assessment must include consideration of the effects of severe accidents. *See* Clearwater Initial Statement of Position, Ex. CLE000003 at 10-11; 14-15. As discussed above, the Board has already recognized that evidence regarding the Katrina and Fukushima disasters is potentially relevant. Indeed, if the Staff's assessment of EJ impacts is to be the required "hard look" under NEPA, it must take account of the extent to which the emergency plans alter these impacts.

Thus, evidence showing that severe accidents would cause disproportionate impacts upon EJ populations within 50 miles of Indian Point in prisons, pre-schools, nursing homes, shelters, hospitals, and on minority and low-income residents in the region who lack access to private transportation is directly relevant to the contention. This evidence must necessarily consider the effectiveness of the emergency plans, not to determine if they meet safety standards, but to determine whether they mitigate or exacerbate EJ impacts.³ Finally, having determined what significant EJ impacts remain, the staff is obliged to determine whether any feasible additional mitigation is possible. *See* Clearwater Initial Statement of Position, Ex. CLE000003 at 14-16.

IV. Entergy's Latest Motion in Limine is Without Merit

First, Entergy alleges that a new ruling from the Commission could change the Board's approach to the EJ contention. Entergy Motion in Limine re: EC-3A, dated July 30th, 2012) ("Entergy Rebuttal MIL") at 5. This is incorrect because the case is neither new nor

³ The single case that Entergy cites to the contrary on this point is irrelevant because it concerned issues that had been addressed in the generic environmental impact statement, not EJ issues that are beyond the scope of that analysis. *See EJ MIL* at 6 n. 30.

on-point. The case cited by Entergy was decided in 2010, before either of the Board's two latest rulings regarding the scope of the contention cited above. Second, that case only holds that the issue of whether accurate real time modeling of population exposure during an emergency would be cost-justified is beyond the scope of the Severe Accident Mitigation Analysis ("SAMA"). Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 302 (2010). That has no relevance to the EJ contention, which concerns the disproportionate effects on vulnerable populations.

Entergy then complains that Clearwater's rebuttal deals with non-EJ populations. Entergy Rebuttal MIL at 6. However, this material is necessary to illustrate why disproportionate impacts would be experienced by the EJ communities at issue. In the final analysis, EJ analysis is a comparative analysis looking at how impacts on EJ populations differ. It therefore requires consideration of both EJ populations and non-EJ populations. Entergy then attacks a quotation from an NRC Staff presentation on EJ analysis. *Id.* at 8. It suggests that Clearwater is seeking to expand the scope of the EJ analysis, when in fact this evidence is offered to show that the NRC Staff have been very inconsistent about how EJ analyses should be conducted and what is required by the Commission's policy and precedent. Incredibly, Entergy then complains that Clearwater's testimony discusses populations in precisely the areas that the Board has twice ruled are within the scope of the EJ contention. *Id.* at 9.

Entergy next erroneously suggests that how the NRC has carried out EJ analyses at other reactor sites is not relevant to this proceeding. *Id.* In fact, evidence showing that the NRC Staff's interpretation of the regulations has been inconsistent and that the EJ analysis for Indian Point is markedly less thorough than the analyses at other facilities is directly relevant to this proceeding. Finally, Entergy asserts without support that the EJ analysis described by the Staff "is contrary to established Commission precedent and guidance." *Id.*

This amounts to a tacit admission that the EJ analysis at Indian Point is less thorough than that described in the presentation. At the hearing, the Board will have the advantage of questioning the Staff on why the EJ analyses for different projects have been carried out inconsistently. There is simply no justification for requesting premature adjudication of this issue through a Motion in Limine. The Board should therefore wait to decide this issue until it has full information and can consider the whole record.

With regard to the testimony of Dr. Michael Edelstein, Entergy complains that he discusses the Fukushima and Katrina disasters and he challenges the effectiveness of the shelter-in-place approach. *Id. at* 10-11. As discussed above, the Board has already explicitly ruled that testimony about the Fukushima and Katrina disasters should not be excluded from the hearing. In addition, the testimony of NRC and Entergy confirmed that they rely heavily on shelter in place as a strategy to mitigate EJ impacts. If shelter-in-place is less effective than anticipated, EJ impacts would be even more disproportionate. Thus, the testimony about the effectiveness of the shelter-in-place approach is directly relevant to the EJ contention.

Finally, Entergy complains about Dr. Edelstein's opinions on why the NRC has failed to carry out an adequate analysis here, but why it refuses to recognize this. *Id. at* 12. This testimony goes to the weight of NRC Staff testimony about the adequacy of the EJ analysis and is therefore relevant.

With regard to the testimony of Dr. Andrew Kanter, Entergy complains that he goes beyond the scope of the hearing. Notably, all the substantive questions asked of him asked him to respond to testimony offered by Entergy or the NRC. Clearwater believes all of his testimony is within the scope of the hearing because emergency planning could affect EJ impacts and could also form one type of mitigation for EJ impacts. Moreover, even if his rebuttal is responding to out of scope testimony offered by NRC and Entergy, it should be admitted because it would be unfair and misleading to the public to allow NRC and Entergy

testimony to go un rebutted. This potential for unfairness is recognized in the open door doctrine. *See Tanberg v. Sholtis*, 401 F.3d 1151, 1166 (10th Cir.2005) (“When a party opens the door to a topic, the admission of rebuttal evidence on that topic becomes permissible.”). In this respect the NRC Staff is correct when it suggests that “rebuttal testimony may be admitted only insofar as it is responsive to the other parties’ statements of position and evidentiary submissions,” NRC Staff Rebuttal MIL at 4, but the Staff fails to note that if the responsive testimony strays beyond the scope of the contention, the rebuttal may also do so.

Finally, Entergy complains about a lack of disclosure of a Physicians for Social Responsibility report entitled “The US and Nuclear Terrorism Still Dangerously Unprepared.” This issue is a red-herring because the report is available on the open internet at <http://www.psr.org/assets/pdfs/us-and-nuclear-terrorism.pdf> and because the testimony was prepared after the last date for disclosure. Finally, to cure any possible violation of Board orders, which was entirely inadvertent, the report is attached to this filing as Exhibit CLE000060.

Entergy’s last effort is to seek to exclude portions of Clearwater’s Rebuttal Statement of Position. In addition to being without merit, this request is pointless because Clearwater will reformulate its position in its post-hearing brief in accordance with the testimony introduced at the hearing.

V. The NRC Staff’s Latest Motion in Limine is Without Merit

Like Entergy, the Staff presented much responsive evidence on Emergency Planning and, like Entergy, the Staff complains that Clearwater has rebutted this testimony. NRC Staff Rebuttal MIL at 5. As discussed above, these issues are within the scope of the hearing, and even if they were not, Clearwater should be permitted to rebut out of scope testimony offered by Entergy and the NRC Staff. Ironically, the Staff also

complains about Clearwater's submission of an NRC Staff presentation regarding EJ analysis at another reactor. *Id.* at 7. Like Entergy, the Staff fails to realize that this presentation is offered to show that the NRC's interpretation and implementation of its requirements for EJ analyses have been very inconsistent. It is therefore directly relevant because it will assist the Board in deciding how the EJ policies should be interpreted.

The Staff then complains about Ms. Greene's summary of Dr. Redlener's talk as irrelevant and unreliable. *Id.* at 9. This is incorrect, because Dr. Redlener made the point that EJ populations would be much more adversely affected than the general population and he is a nationally-recognized expert in the field of emergency planning. The summary of Dr. Redlener's talk offered by Clearwater is therefore relevant and reliable. It also addresses the responsive testimony because it shows that the assertions that EJ populations would not be disproportionately affected by a nuclear accident are incorrect.

Contrary to the Board's repeated rulings, summarized above, the NRC Staff asserts that the impacts to the elderly and the infirm during the Fukushima disaster are out of scope and irrelevant. *Id.* at 10. The Staff appears to forget that these populations are explicitly included in the admitted contention and that the Board already found that Fukushima-related testimony is relevant and admissible. The Staff also makes the same objections as Entergy regarding other elements of Dr. Edelstein's testimony and is incorrect for the same reasons.

Finally, the only objection that the Staff has to the testimony of Dr. Kanter is that he should not have discussed post-Fukushima remarks by the NRC's former chair about the need for evacuation up to 50 miles. *Id.* at 12. Contrary to the Staff's assertions, this

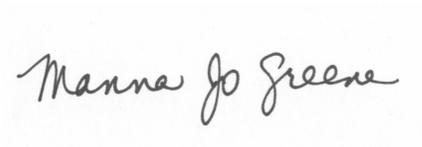
is relevant to the EJ contention because it confirms that the new EJ assessment should cover at least the EJ population within 50 miles.

CONCLUSION

For the foregoing reasons, Entergy and the NRC Staff Motions in Limine regarding Clearwater's rebuttal testimony about the EJ contention should be denied in their entirety.

Respectfully submitted,

/s

A handwritten signature in cursive script that reads "Manna Jo Greene". The signature is written in black ink on a light-colored background.

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