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)	)	
	)	November 28, 2012

ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S MOTION TO SUPPLEMENT THE RECORD WITH NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(b) and the Atomic Safety and Licensing Board's ("Board") November 9, 2012 Order (Granting Clearwater's Motion for Extension of Time), Entergy Nuclear Operations, Inc. ("Entergy") files this Answer opposing Hudson River Sloop Clearwater, Inc.'s ("Clearwater") Motion to Supplement the Record with Relevant New Information that Became Apparent After Hurricane Sandy ("Motion"), dated November 14, 2012. Clearwater proposes to "supplement" the hearing record for its environmental justice ("EJ") contention, CW-EC-3A, with eleven news articles about events related to Hurricane Sandy, which recently struck the New York metropolitan area.

The Motion should be rejected for several reasons. First, Clearwater never attempts to satisfy its burden as the movant to justify the admission of these belated exhibits. Rather than showing in its Motion why the new proposed exhibits are relevant or admissible in this license renewal proceeding, Clearwater sidesteps this obligation and, instead, asks for the opportunity to reply to any relevance and scope objections that may be proffered by Entergy or the NRC Staff.[1]

[1] Motion at 10 n.12.

By doing so, Clearwater seeks to avoid its basic burden as the movant and turn the normal motion briefing process on its head. This clever maneuver is especially troubling in that Clearwater also announces, in the Motion, its intention to continue to supplement the record with similar news articles on Hurricane Sandy, as it sees fit, on an ongoing basis.[2] The Board should reject Clearwater's effort to self-create a post-hearing, *ad hoc* supplementation right in which it need not satisfy its basic pleading burdens under 10 C.F.R. §§ 2.323 and 2.337. Rather, the Board should deny the Motion and affirmatively close the record on CW-EC-3A.

Even if the Board were to excuse Clearwater's procedural default and overlook its self-acknowledged failure to demonstrate relevance, on the merits, none of Clearwater's new exhibits are admissible under 10 C.F.R. § 2.337. Thus, the Board should reject them under 10 C.F.R. § 2.319. The issues Clearwater seeks to raise regarding Hurricane Sandy generally have nothing to do with Indian Point or license renewal. The proposed new exhibits relate to challenges faced by all local and state governments in the face of an extraordinary *natural* disaster, experienced along the northeast coast of the United States from Maryland to New England. Such events are not relevant to Indian Point's license renewal or CW-EC-3A because: (1) they raise emergency planning and other issues that are outside the scope of the National Environmental Policy Act ("NEPA") analysis in this proceeding and this contention; (2) Clearwater assumes, without basis, that the flooding and loss-of-power impacts of a hurricane are comparable to the environmental impacts of a severe accident; and (3) the new exhibits relate, in many instances, such as with

[2] *Id*. at 3 ("Clearwater intends to offer further testimony while the record remains open."). Two days ago, on November 26, 2012, Clearwater filed a "Notice of Supplemental Exhibits to Motion to Supplement the Record with Relevant New Information that Became Apparent After Hurricane Sandy," ("November 26 Motion"), attaching four more exhibits, designated CLE000072 through CLE000075. While Entergy has not yet had the opportunity to fully review these new exhibits, it appears that they are subject to the same objections as Clearwater's earlier exhibits regarding Hurricane Sandy, and should be rejected on the bases set forth in this Answer. Pursuant to 10 C.F.R. § 2.323(c), Entergy reserves its right to file a response to Clearwater's November 26 Motion by December 6, 2012, and to file responses to any future motions to "supplement" the record.

respect to alleged deficiencies in "shelter-in-place" plans, to storm incidents that involved populations that are not EJ populations under Commission precedent.

The new exhibits are also duplicative, cumulative, and unduly repetitious. Their admission now threatens to unnecessarily extend and further complicate this proceeding and prejudice Entergy in the process. Clearwater's fundamental claim—that "the most vulnerable suffer most in times of severe stress,"[3]—has already been made through other evidence admitted prior to the hearing. That evidence, having been earlier submitted, provided all parties with the opportunity to review and respond to it. Now that the hearing on this contention has been held, it would be wasteful and inequitable to admit this new evidence and force the other parties to this proceeding to respond. Indeed, a fair response opportunity would require allowing the parties and their expert witnesses sufficient time and opportunity to explore the incidents described, determine the accuracy of the attached press accounts, and develop responsive materials for the Board's consideration. Such an extraordinary step, which would even further delay the proceedings on this contention, is unwarranted given the irrelevance of the materials presented to this license renewal proceeding.

Accordingly, Entergy respectfully requests the Board deny the Motion (including Clearwater's anticipatory request to reply to Entergy's Answer). Furthermore, to preclude further such efforts as contemplated by Clearwater, Entergy respectfully requests that the Board formally state that the record is closed on this contention and all other contentions where oral hearings have been completed, thereby applying the well-established reopening standards to all future movants—including Entergy—who may seek to "supplement" the record after the end of

[3] Motion at 4.

the hearing.[4] In the alternative, if the Board admits one or more of the new exhibits, then to avoid prejudice to Entergy from this new material, Entergy respectfully requests that it be given thirty days after the completion of the Track 1 oral hearings (or thirty days after the Board's ruling on Clearwater's Motion, whichever is later) to submit written responsive evidence.

II. BACKGROUND

CW-EC-3A alleges that Entergy's Environmental Report ("ER") and the NRC Staff's Final Supplemental Environmental Impact Statement ("FSEIS") contain flawed EJ analyses that fail to address alleged disparate severe accident impacts on EJ populations near Indian Point.[5] In admitting the original version of CW-EC-3A, the Board made clear it was *not* admitting a contention claiming that Indian Point emergency plans are deficient.[6] This restriction is dictated by Commission regulations and case law and is wholly consistent with the Board's emphasis on the limited scope of license renewal.[7] Specifically, this Board rejected several contentions challenging the adequacy of emergency preparedness and evacuation planning, explaining that

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[4] Arguably, now that the hearing on CW-EC-3A is complete, the record is already closed for this contention. *Cf. Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), Licensing Board Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) at 2-4 (June 4, 2008) (unpublished) (finding that the completion of hearings effectively closed the record on a contention without a "formal[]" closure by the Board), *aff'd on other grounds*, CLI-10-14, 71 NRC 449, 467-71 (2008). Therefore, the Board could find that the record on CW-EC-3A is already closed, and apply the reopening standards to Clearwater's Motion. Under those standards, the Motion must be denied because Clearwater failed to provide a supporting affidavit, showing, with particularity, why the reopening criteria are met. *See* 10 C.F.R. § 2.326(b). The Motion should also be rejected for failure to raise a significant environmental issue and failure to demonstrate that a materially different result would be likely if the new exhibits were considered. *See id*. § 2.326(a). The Commission's generic conclusion, in 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1, that the environmental impacts from severe accidents are small for all plants, is not subject to challenge in this proceeding. CW-EC-3A, which focuses on the impacts of severe accidents, therefore simply does not raise a significant environmental issue. None of the new exhibits are relevant to CW-EC-3, so their admission cannot lead to a materially different result in this proceeding. None of the cases Clearwater cites on page 11 of the Motion can cure these significant deficiencies under the reopening standards.

[5] *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 200-01 (2008); Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56, 60 (July 6, 2011) (unpublished) ("July 6, 2011 Order").

[6] *See Indian Point*, LBP-08-13, 68 NRC at 201.

[7] *See id.* at 149-150, 188.

"the NRC Regulation dealing with emergency plans, 10 C.F.R. § 50.47(a)(1)(i), provides that no finding relating to emergency planning is necessary for issuance of a renewed nuclear power reactor operating license" and thus, "*[t]his language places consideration of emergency plans outside the scope of this proceeding*."[8]

Since the Board's original ruling on contention admissibility in this proceeding, the Commission has confirmed that it is impermissible to use a license renewal NEPA contention to circumvent the bar against challenges to emergency plans in license renewal proceedings.[9] The Commission's *Pilgrim* decision, therefore, bars Clearwater from using a NEPA-based EJ contention as a back door to litigate arguments that fundamentally rest on claims about the adequacy of emergency planning—which is what Clearwater is attempting to do in this Motion, as with CW-EC-3A as a whole. Accordingly, the scope of Clearwater's NEPA Contention CW-EC-3A properly excludes challenges to existing emergency plans.

Likewise, as this Board has recognized, the EJ analysis itself is a limited one. The Commission's 2004 Environmental Justice Policy Statement emphasizes that the focus of an environmental justice review is "identifying and weighing *disproportionately significant and adverse environmental* impacts on *minority and low-income populations* that may be different from the impacts on the general population."[10] The Board recognized this population-specific

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8 *Id.* at 149 (emphasis added) (rejecting proposed contention NYS-29); *see also id.* at 165-66 (rejecting proposed contention Connecticut EC-2).

9 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 302 (2010) (ruling that witness statements on "the issue of emergency planning – the need to provide accurate, 'real time' projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated" are beyond the scope of a license renewal severe accident mitigation alternatives NEPA review).

10 Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047 (Aug. 24, 2001) (ENT000260) (emphasis added) ("NRC EJ Policy Statement").

focus when it admitted CW-EC-3.[11] The EJ inquiry, therefore, is not an inquiry into non-environmental effects, environmental impacts of minor significance, or disproportionate impacts on groups other than minority or low-income populations.

Notwithstanding these principles, three weeks after the hearing on CW-EC-3A, Clearwater now proposes to introduce anecdotal information from eleven newspaper articles as new exhibits purportedly showing how Hurricane Sandy had a disparate impact on EJ populations, such as the "elderly, and the disabled, as well as those in prisons, hospitals and nursing homes."[12] According to Clearwater, these articles show that the storm had a disproportionate effect on alleged EJ populations within fifty miles of Indian Point,[13] that the shelter-in-place approach "backfired" at a nursing home and at certain hospitals,[14] that Asian immigrant populations were disproportionately affected due to lack of access to native language media during the storm,[15] that an allegedly low-income neighborhood in Staten Island became a "deathtrap,"[16] and that low-income people in the Far Rockaway section of Queens were disproportionately affected.[17]

Entergy has raised objections to similar inadmissible evidence proffered by Clearwater in the past. For example, because extensive portions of Clearwater's pre-filed direct testimony challenged emergency plan adequacy and addressed non-EJ populations, Entergy filed a motion

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11 *See Indian Point*, LBP-08-13, 68 NRC at 199 (*citing* NRC EJ Policy Statement, 69 Fed. Reg. at 52,047).

12 Motion at 2.

13 *See id*. at 3-4.

14 *See id*. at 4-8.

15 *See id*. at 8.

16 *See id*. at 9.

17 *See id*.

in limine seeking to exclude such testimony.[18] While the Board denied Entergy's motion, it did not alter its previous holdings that emergency plan challenges and issues concerning non-EJ populations are outside the scope of CW-EC-3A and this proceeding. In particular, the Board explained that it would, at the hearing, distinguish the relevant from the irrelevant.[19] Specifically, the Board stated:

> At evidentiary hearing, the Board is capable of distinguishing between disparaging comments against Indian Point's emergency plans and Clearwater's witnesses' descriptions of how certain EJ populations will be adversely harmed by a severe accident compared to the general population. To the extent any populations that Clearwater's witnesses describe do not fit within the definition of an EJ population and are not necessary to an EJ analysis, we will discount the weight of such evidence in ruling on the merits of the FSEIS's EJ analysis.[20]

Thus, Clearwater mischaracterizes the procedural history when it states that "the Board has repeatedly over-ruled these objections [*i.e.*, the Staff's and Entergy's objections on scope and relevance] at the contention admission stage . . . and in response to Entergy Motions in Limine . . ."[21] As shown above, the Board has not overruled Entergy's objections, but instead held that it need not, at the pre-hearing stage, closely parse the relevant from the irrelevant material given its capacity to do so at the then-pending evidentiary hearing.[22] Further, Clearwater's apparent belief that the adequacy of the Indian Point emergency plans are somehow relevant to the scope of this

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18 Entergy's Motion in Limine to Exclude Portions of Clearwater's Pre-Filed Testimony and Exhibits for Contention CW-EC-3A (Environmental Justice) (Jan. 30, 2012), *available at* ADAMS Accession No. ML12030A200.

19 *See* Licensing Board Order (Granting in Part and Denying in Part Applicant's Motion in Limine) at 34-35 (Mar. 6, 2012) (unpublished) ("March 6, 2012 Motion in Limine Order").

20 *Id.* at 35.

21 Motion at 10 n.12.

22 Similarly, although the Board also denied an Entergy motion *in limine* directed at parts of Clearwater's rebuttal filings, the Board did so at the hearing itself, without written explanation*, i.e.*, without receding from its earlier rationale. *See* Official Transcript of Proceedings, Indian Point Units 2 and 3 License Renewal ("Tr.") at 1266 (Oct. 15, 2012) (Judge McDade).

proceeding cannot be reconciled with the binding regulations which state that no finding relating to emergency planning is necessary for issuance of a renewed license.[23]

Of course, that hearing has now been held. Thus, the question of whether or not newly-proffered post-hearing evidence is relevant or duplicative can no longer be postponed on such a basis. After more than five years, the Board should adhere to a course leading to the completion of litigation on this contention and exclude Clearwater's new evidence. If the new evidence is admitted, then fundamental fairness and avoiding improper prejudice requires that Entergy be afforded a subsequent opportunity to offer its own responsive evidence, within a reasonable period of time after the Board's ruling.[24]

III. CLEARWATER'S NEW EVIDENCE IS INADMISSIBLE

A. Admissibility of Evidence

NRC regulations governing evidence admissibility provide that only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.[25] Because only relevant and material evidence is admissible, the Board may exclude or accord no weight to testimony

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[23] *See* 10 C.F.R. § 50.47(a)(1)(i).

[24] *See Hous. Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979) ("the cardinal rule, so far as fairness is concerned, is that each side must be heard").

[25] 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").

and exhibits that are outside the scope of the admitted contention or the proceeding.[26] Similarly, the Board may exclude evidence that is duplicative or cumulative.[27]

The Board has not formally stated that the record is closed on CW-EC-3A and the other Track 1 contentions. But as a general matter, the reopening standards in 10 C.F.R. § 2.326 serve as a guidepost for how a Board should approach matters once a hearing has concluded and serve as a reminder that the Commission, through its rules, has recognized that there is an interest in achieving finality. Thus, the reopening rules elevate the burden on the movant to lay a proper foundation for new claims after the end of the hearing.[28] As the Commission has explained, "[o]bviously, 'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings."[29] Similarly, now that the hearing has been held, there is a greater need to enforce the admissibility rules, to avoid undermining the value of the completed hearing and wasting the resources already expended by the Board and the parties. At a minimum, the Board should firmly apply the admissibility standards of Section 2.337 and exclude new proffered evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.

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[26] *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").

[27] *See* 10 C.F.R. § 2.319(d), (e).

[28] *See*, *e.g.*, *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 668 (2008), *aff'd*, *N.J. Env't'l Fed'n v. NRC*, 645 F.3d 220 (3rd Cir. 2011); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005) ("*PFS*") (*citing Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 554-55 (1978)).

[29] *PFS*, CLI-05-12, 61 NRC at 350 n.18.

B. The NEPA EJ Analysis for License Renewal Is Not a Vehicle to Litigate the Adequacy of Emergency Plans or Other Non-Environmental Issues

The scope of CW-EC-3A, as with any contention, is limited to issues within the scope of the hearing and within the scope of the issues pled by the intervenor and admitted by the Board. Intervenors are not permitted to use testimony to expand the scope of a contention and its bases, as pled and admitted. For example, in *Vogtle*, the 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."[30]

That Clearwater's primary purpose in CW-EC-3A is to challenge the adequacy of the Indian Point emergency plans was made abundantly clear during the recent hearings on this contention.[31] Thus, there is no longer any doubt that Clearwater is attempting to litigate issues excluded by the Commission's regulations from the scope of this proceeding. Similarly, the purpose of Clearwater's new exhibits is to yet again challenge the adequacy of the Indian Point emergency plans. As Clearwater states, it submitted the new exhibits in order to argue that the "thesis" that emergency planning will mitigate the effects of an accident is wrong, because the regulations are often not enforced or serve to increase disparate impacts.[32] Clearwater's intent could not be clearer, but the scope of the hearing and the scope of this contention exclude litigation over the adequacy of emergency plans. As discussed in Section II, above, Commission regulations and binding precedent confirm the unwavering principle that Clearwater may not use

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30 *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-01 (2010); *see also Pilgrim*, CLI-10-11, 71 NRC at 309 (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); *see also NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC __, slip op. at 11 n.50 (Mar. 8, 2012) ("an admitted contention is defined by its bases") (citation omitted).

31 *See*, *e.g.*, Tr. at 2795 (Oct. 23, 2012) (Dr. Edelstein) (emphasizing concerns regarding the adequacy of emergency plans for institutional populations).

32 *See* Motion at 2-3. In any event, there is no such "thesis."

the NEPA analysis in this proceeding as a back door attack on Entergy's emergency plans, such as the questions of "whether, when, and where particular population groups may need to be evacuated."[33] At the contention admissibility stage and at the hearing, the Board, therefore, properly excluded emergency planning issues from the scope of this contention.[34] Clearwater's new exhibits once again impermissibly raise these issues.

More generally, NEPA cannot be used as the vehicle to raise all manner of unrelated, non-environmental issues (however compelling or concerning from a societal perspective), including the effects of natural disasters unrelated to the proposed action, and social challenges as persistent poverty, discrimination[35] or criminal conduct by incarcerated individuals.[36] Yet that is what Clearwater seeks to do here with its new materials. For example, Clearwater now seems to suggest that relevant EJ effects for Indian Point license renewal include any disruption to the routine electric power delivery, at any hospital throughout the New York City metropolitan area, even where patients received all necessary services.[37] But well-settled case law confirms that

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33 *Pilgrim*, CLI-10-11, 71 NRC at 302; *see also* 10 C.F.R. § 50.47(a)(1)(i) ("No finding under this section [Emergency plans] is necessary for issuance of a renewed nuclear power operating license."); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 561 (2005) ("Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application.").

34 *See Indian Point*, LBP-08-13, 68 NRC at 201; *see also* Tr. at 2735 (Oct. 23, 2012) (Judge McDade) ("this isn't a challenge to the evacuation plan"); *id*. at 2870.

35 *See* NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,045 (ENT000260) ("NEPA is not the appropriate context in which to assess racial motivation and fairness or equity issues.").

36 *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129 (2007), *aff'd N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009) (the Commission specifically excludes from NEPA consideration any "intentional malevolent acts" or actions of "third-party miscreants.") (*citing Duke Energy Corp.* (McGuire Nuclear Energy Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 365 (2002); *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002)).

37 *See* Motion at 7 ("[s]taff had to hand pump oxygen to critically ill patients . . . . The 25-story hospital was on partial backup power . . . . no patient died in any storm-related accident") (citations and quotations omitted).

such non-environmental issues are beyond the scope of NEPA,[38] and there are good reasons why the Courts and the Commission have consistently declined to expand NEPA's scope.[39] Nor, similarly, is the NEPA evaluation of a proposed action an opportunity to evaluate the consequences of a third party's failure to follow regulations or other legal requirements.[40]

Implicitly recognizing this problem with the admissibility of its proposed new post-hearing exhibits—and various other reasons why the documents are inadmissible, as detailed throughout this Answer—Clearwater seeks to unilaterally excuse itself from its obligation to demonstrate the proposed documents' relevance to an admissible contention. Despite acknowledging the potential that its evidence would be met with a relevance objection, Clearwater chose, instead, to default on its pleading obligation. Clearwater requests, "[i]f the Staff and Entergy choose to extensively brief this issue," that it be given "an opportunity to reply."[41] Thus, while Entergy's relevance objections are grounded in well-established law,

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38 *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983) (holding that psychological health damage is not cognizable under NEPA because such issues are too far removed from any effect on the physical environment).

39 *See* NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,045 (ENT000260) ("were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, 'available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.'") (*quoting La. Energy Servs.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102-03 (1998) (*quoting Metro. Edison*, 460 U.S. at 776)).

40 *Compare* As Storm Raged, 15 Fled New Jersey Halfway House (Nov. 11, 2012) (CLE000070) (describing the escape of fifteen inmates from a New Jersey halfway house during the storm) *with S. C. Elec. & Gas Co. & S. C. Pub. Serv. Auth. (also referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-01, 71 NRC 1, 14 n.66 (2010) (third-party criminal conduct, combined with the failure of government agencies specifically charged with preventing the crime "results in a chain of causation too attenuated to require NEPA review") (*citing N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d at 132). In addition, CLE000070 also states that since 2005, roughly 5,200 inmates have escaped from New Jersey halfway houses, strongly suggesting that the escape of fifteen inmates during Hurricane Sandy was part of a larger problem unrelated to the storm.

41 Motion at 10 n.12.

Clearwater has simply ignored its fundamental obligation to demonstrate the legal basis for admitting the new exhibits contemporaneous with their being offered.[42]

Accordingly, the new exhibits should be rejected as irrelevant as they serve only to further Clearwater's impermissible effort to expand the NEPA analysis into a wide-ranging inquiry into the adequacy of emergency planning and to address various social problems unrelated to the physical environment or not specifically connected to license renewal.

C. Clearwater's New Evidence Is Irrelevant Because It Assumes Without Basis that the Environmental Impacts of a Hurricane and a Reactor Accident Are the Same

As described in all of Clearwater's new proposed exhibits, the most significant direct effects of Hurricane Sandy on the New York metropolitan area appear to have been flooding of low-lying areas and associated electrical power losses.[43] Clearwater offers no evidence to show that a severe reactor accident at Indian Point would cause similar impacts, and common sense suggests that the impacts of a reactor accident would be quite different. Thus, while Clearwater's exhibits focus on the storm's impacts and its severity, all of this evidence is irrelevant and inadmissible.

One glaring example of the problem in Clearwater's effort to analogize the effects of Hurricane Sandy to a hypothetical severe reactor accident is Clearwater's attempt to introduce how shelter-in-place efforts "backfired" at a nursing home in Queens and three New York City hospitals.[44] As Clearwater's exhibits show, the primary reasons why shelter-in-place efforts

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[42] As explained in Section IV.B, *infra*, Clearwater has established no basis for any further opportunity to rehabilitate its patently deficient Motion.

[43] *See generally* Exhs. CLE000061, After Hurricane Sandy, Understanding a Disaster's Worst Impacts Q&A (Nov. 11, 2012) through CLE000071, Ruins, Rumors and Resilience in Rockaway (Nov. 4, 2012) (all discussing flooding and most discussing the associated loss of electrical power).

[44] *See* Motion at 4-8 (*citing* Hospital Evacuations for Future Storms (Nov. 6, 2012) (CLE000062), In Hurricane's Wake, Decision Not to Evacuate Hospital Raises Questions (Nov. 1, 2012) (CLE000065), Nursing Home is Faulted Over Care After Storm (Nov. 9, 2012) (CLE000067), and Why Do Hospital Generators Keep Failing? (Oct. 31, 2012) (CLE000069)).

"backfired" were the storm's direct impacts on the facilities: flooding and the loss of electrical power.[45] Such events reveal no deficiency in shelter-in-place planning as a contingency for a nuclear reactor accident, which involves the release of radiation, not widespread flooding and loss of electrical power.[46]

Clearwater also argues that an alert declared at the Oyster Creek plant in New Jersey shows that "combined natural disasters and nuclear emergencies are reasonably foreseeable" and therefore must be studied under NEPA.[47] But the admitted contention here focuses on the effects of a severe accident.[48] The declaration of an alert is not a severe accident, is not comparable to a severe accident, and has no environmental impact whatsoever.[49] To the extent Clearwater wishes to challenge the scope of severe accident assumptions and analyses, that challenge is far beyond the scope of this contention and this proceeding.[50] Thus, the proffered information has no relevance to understanding events that might be hypothesized as to Indian Point.

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45 *See, e.g.,* CLE000067 at 1 ("Promenade's generator was on the ground floor, which quickly filled with swirling Atlantic brine at high tide on Oct. 29"); CLE000062 at 1 ("Bellevue Hospital Center, the city's flagship public hospital, and nearby NYU Langone Medical Center, a leading private institution, had become flooded and lost their primary power when the storm hit"). The problems with the lack of food and supplies at the Promenade nursing home are addressed in Section III.D, *infra*.

46 *See* Testimony of Entergy Witnesses Donald P. Cleary, Jerry L. Riggs, and Michael J. Slobodien Regarding Contention CW-EC-3A (Environmental Justice) at A52 (Mar. 29, 2012) ("Entergy's EJ Test.") (ENT000258) (*citing* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants at 5-115 (NYS00131C) ("GEIS")). At the hearing, the Board recognized that the focus of this contention is on question of potential disproportionate radiation exposure. *See* Tr. at 2870 (Oct. 23, 2012) (Judge McDade) ("rather, [we are] talking about the lack of analysis presented for the disproportional increase in exposure of radiation to the EJ population").

47 Motion at 1 (*citing* Oyster Creek Nuclear Alert: As Floodwaters Fall, More Questions Arise (Nov. 1, 2012) (CLE000068)).

48 *See Indian Point*, LBP-08-13, 68 NRC at 200-201.

49 *See* CLE000068 at 1 ("An Alert is the second category on the NRC's four-point emergency scale."); NRC News Release, NRC Continues to Monitor Hurricane Sandy; Alert Declared at Oyster Creek Plant; No Plants Shut Down Due to Storm (Oct. 29, 2012) at 1 ("All plants remain in a safe condition") (Attachment 1 to this Answer).

50 *See* 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1 (showing the Commission's generic conclusion that the environmental impacts from severe accidents are small for all plants).

Accordingly, given the lack of a demonstrated connection between the events of Hurricane Sandy and any alleged deficiency in the license renewal NEPA analysis of the impact of severe accidents on EJ populations, Clearwater's new exhibits on Hurricane Sandy are irrelevant and inadmissible.

D. Clearwater's Exhibits Showing Alleged Deficiencies in Shelter-in-Place and Emergency Plans Are Irrelevant for Multiple Additional Reasons

As shown in Section II, the EJ inquiry is a narrow one, focused on significant and adverse environmental impacts that may fall disproportionately on minority and low-income populations. Clearwater's Motion, however, yet again relies upon Clearwater's own unprecedented and essentially unlimited definition for EJ populations: the elderly, the disabled, and anyone in prisons, hospitals, or nursing homes.[51] The Commission, however, has repeatedly rejected the view that its NEPA analyses require a "broad-ranging review of racial or economic discrimination."[52]

Thus, the events at three area hospitals described in Exhibits CLE000062, CLE000065, and CLE000069 are irrelevant to the EJ analysis.[53] Clearwater first asserts without evidence that two of the three hospitals are public hospitals "serving a disproportionately high number of the environmental justice population."[54] More significantly, Clearwater's exhibits show that the third affected hospital is a private hospital—the New York University Langone Medical Center ("NYU Langone")—which indisputably does not serve a predominately EJ population. Given

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51 *See*, *e.g.*, Motion at 2.

52 NRC Environmental Justice Policy Statement, 69 Fed. Reg. at 52,048 (ENT000260); *see also Claiborne*, CLI-98-3, 47 NRC at 101; *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 155-56 (2002) (holding that an EJ evaluation does not involve looking at "vaguely defined, shifting 'subgroups'" within low-income and minority communities "because the potential universe of aggrieved individuals and groups is . . . 'virtually infinite, limited only by one's imagination.'").

53 *See* Section III.C, *supra* (showing that the same set of exhibits is irrelevant because the flooding and loss-of-electrical power impacts of the storm are different from the impacts of a severe reactor accident).

54 Motion at 7.

that NYU Langone faced the same problems caused by flooding and loss of power as the two public hospitals, Clearwater's own evidence shows no disproportionate impact on any EJ population. Thus, Clearwater's own exhibits are irrelevant on their face.

Likewise, the unfortunate events at the Queens nursing home described in Exhibit CLE000067 are irrelevant to the EJ analysis. Nursing home populations, in general, simply are not EJ populations.[55] While Clearwater asserts that the specific events discussed in Exhibit CLE000067 suggest a disparate impact on low-income populations, Clearwater offers no evidence to support such a conclusion. Again, even if one assumes, without evidence, that the affected nursing home served a predominately low-income population, Clearwater's own exhibit states that other "nursing homes, even those much better prepared than Promenade, suffered crushing damage from the storm . . . ."[56] Thus, there is no evidence of a *disproportionate* effect on any EJ population.

Exhibit CLE000063 suffers from similar problems. According to Clearwater's Motion, it shows that there was a "Low-Income" Staten Island neighborhood located in an area prone to flooding, where the lives of eight residents were lost.[57] Nowhere in CLE000063, however, is the community where these tragic events took place described as "low-income." Instead, the New York Times describes the Midland Beach community as a "small, low-slung neighborhood of

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[55] Clearwater has argued that the Board has somehow endorsed Clearwater's wide-ranging definition of EJ populations. *See* Clearwater's Answer In Opposition to Entergy's Motion in Limine to Exclude Portions of Clearwater's Rebuttal Testimony on Contention CW-EC-3A at 4 (Aug. 9, 2012) ("As the Board noted, '[EJ] 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*.' . . . . The Board therefore recognized that the basis for the contention covered these areas.") (*citing* Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56 (July 6, 2011) (unpublished)) (emphasis added by Clearwater). This argument is highly misleading, because the quoted material is merely the Board's recitation of Clearwater's position, not the Board's endorsement of that position.

[56] CLE000067 at 2.

[57] Motion at 9.

one-story bungalows and newer two- and three-story houses,"[58] where, people have long been drawn "for the quietude, affordable real estate, and proximity to the water."[59] The neighborhood has become more diverse in the past few decades,[60] but there is no evidence that it is predominately a minority or low-income community. As Clearwater also notes, all eight residents who died were over 55 and one was disabled.[61] While the events are clearly tragic, the accepted criteria for identifying EJ populations do not include age or disability. Thus, Exhibit CLE000063 is irrelevant to CW-EC-3A on its face.

In addition, both the Queens nursing home events described in CLE000067 and the Midland Beach events described in CLE000063 involved the failure, by the nursing home management and individuals, to heed evacuation orders. As CLE000063 states, the Midland Beach victims ignored mandatory evacuation warnings—a misdemeanor offense punishable by up to ninety days in jail.[62] CLE000067 suggests that the Promenade nursing home management may have violated emergency planning orders by failing to add staff for the storm and failing to stock enough food and medical supplies, and otherwise may have violated state regulations.[63] As previously noted, however, third-party criminal conduct, combined with government agencies specifically charged with preventing the crime but failing to do so, "results in a chain of causation too attenuated to require NEPA review."[64]

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58 How a Beach Community Became a Death Trap (Nov. 10, 2012) (CLE000063) at 1.

59 *Id*. at 3.

60 *Id*.

61 Motion at 9.

62 CLE000063 at 9.

63 *See* CLE000067 at 1-3.

64 *Summer*, CLI-10-01, 71 NRC at 14 n.66 (*citing N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d at 132). Similarly, Exhibit CLE000064, In Hurricane's Wake, Ethnic Media are a Lifeline to Immigrants (Oct. 31, 2012) is irrelevant, in that Clearwater fails to draw any connection between the alleged problems in publishing print editions of Asian-language newspapers, and disproportionately significant and adverse environmental impacts

The anecdotal incidents that Clearwater puts forward are also irrelevant because they generally occurred in areas sufficiently far from Indian Point as to be subject to different planning and oversight than those nearer to Indian Point. The federal government has stringent oversight processes for radiological emergency planning which apply only to state and local emergency planning within the plume exposure planning zones of NRC-regulated nuclear power plants.[65] Outside of these zones, FEMA does not inspect state and local oversight of emergency planning compliance. Thus, to the extent there were emergency planning failures at the Promenade nursing home, while not relevant to this license renewal proceeding, they are also not instructive about what would be expected at facilities subject to a different, more exacting, emergency planning regulatory regime. Contrary to Clearwater's arguments, Exhibit CLE000067 therefore provides no evidence suggesting that "regulations are not often enforced" in the context of radiological emergency planning.[66]

Accordingly, exhibits CLE000062, CLE000063, CLE000065, CLE000067, and CLE000069 are irrelevant because they describe events that did not affect EJ populations, as they have been defined by the Commission. With respect to Exhibits CLE000067 and CLE000063, the problems they describe as having been experienced during Hurricane Sandy resulted from illegal conduct, failures to follow evacuation orders and other requirements, and

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on the readers of those newspapers. Nor does Clearwater explain why a severe accident at Indian Point would impact the printing of Asian-language newspapers in a similar manner.

[65] *See* Federal Emergency Management Agency ("FEMA"), Radiological Emergency Preparedness Program Manual (Oct. 2011) at II-72 to II-73 (ENT000295) (showing FEMA standards for its inspection of state and local organization protective measures for radiological emergencies, including plans for precautionary actions for individuals with disabilities or in institutions such as schools, hospitals, and nursing homes).

[66] Motion at 2.

potential State failures to inspect and enforce its regulations, none of which need be considered under NEPA. None of these exhibits should be admitted.[67]

E. Clearwater's New Exhibits Are Duplicative, Cumulative, and Unduly Repetitious

There is also nothing new in Clearwater's proposed exhibits. As Clearwater states, they are primarily proffered to "supplement" the record with anecdotal evidence from Hurricane Sandy. As demonstrated above, their relevance is premised on the faulty assumption that emergency planning issues are within the scope of this proceeding and that essentially any newspaper article that Clearwater identifies, discussing disruptions suffered from the storm at institutional settings or involving sympathetic populations are sufficiently relevant to contention CW-EC-3A that the record must be supplemented—even though the hearing is over.

Thus, the new evidence is not only irrelevant, but duplicative and unduly repetitive. The claims Clearwater raises through the new exhibits have already been amply made in the admitted Clearwater Exhibits.[68] The New York metropolitan area has now, tragically for many, suffered a severe natural disaster. But Clearwater's articles on Hurricane Sandy provide no *new* information on the reasonably foreseeable environmental impacts of a severe accident at Indian Point.[69] By offering this repetitive evidence—and threatening to offer more repetitive evidence—Clearwater's Motion essentially asks that this hearing continue indefinitely so it can

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67 In addition, as explained in Section III.C, *supra*, the same set of exhibits also should not be admitted because Clearwater assumes, without basis, that the same problems associated with sheltering-in-place during a hurricane would arise following a reactor accident requiring evacuation.

68 *See*, *e.g.*, ACLU National Prison Project, Abandoned and Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina (Aug. 2006) (CLE000044); Morris-Suzuki, Boilley, McNeill, and Gundersen, Greenpeace: Lessons from Fukushima (Feb. 2012) (CLE000050); Clearwater Petition to Intervene at 38-39 (Dec. 10, 2007) (CLE000043) ("very large numbers of minority community members – millions in fact – are at risk of adverse health, and the consequences of accident or terrorist attack, due to their proximity to Indian Point.").

69 *See* Section III.C, *supra*.

submit selected news reports on Hurricane Sandy or other disasters, to make the same points again and again.[70]

The Board should therefore deny Clearwater's Motion because the new exhibits are duplicative, cumulative, and unduly repetitious, and therefore inadmissible under 10 C.F.R. §§ 2.319 and 2.337. It must do so in order to protect the record from what is apparently only the first in a series of new filings on issues that, to the extent they may have any relevance at all, have been fully briefed and considered at the hearing.

F. In the Alternative, If the Board Admits the New Exhibits, then Entergy Must be Afforded an Opportunity to Respond

The admission of Clearwater's new exhibits without affording Entergy an opportunity to respond would be prejudicial to Entergy.[71] Entergy's threshold objection, as set forth in this Answer, is that this new, post-hearing evidence is inadmissible, and Entergy respectfully submits that the Board should rule on the admissibility question before setting any schedule for Entergy and the NRC Staff to respond on the merits to the submitted materials. Entergy and the NRC Staff have the burden of proof and therefore must be given a final opportunity to address any new admitted evidence.[72] To that end, in the event that the Board admits one or more of the new exhibits, Entergy requests that the Board set a deadline of thirty days after the completion of the

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70 *See* Motion at 3 ("Clearwater intends to offer further testimony while the record remains open."); *see also generally* November 26 Motion. Clearwater also proposes a novel and unprecedented standard that would allow the essentially unlimited introduction of new evidence after the end of the hearing. *See id*. at 10. The Board should reject this attempt by Clearwater to rewrite the Rules of Practice by eliminating the admissibility of evidence standards in 10 C.F.R. § 2.337(a) and replacing them with certain now-superseded rules governing late-filed contentions. *Cf. Oyster Creek*, CLI-08-28, 68 NRC at 673-74 (2008), *aff'd*, *N.J. Env't'l Fed'n v. NRC*, 645 F.3d at 220 (rejecting an argument that the summary disposition standards in Section 2.710 should be used to reinterpret the rule governing motions to reopen the record in Section 2.326 and lower the bar for motions to reopen). On the contrary, given that the hearing on CW-EC-3 is complete, the Board should adopt a higher standard for the introduction of late evidence—not the lower standard that Clearwater suggests.

71 *See Allens Creek*, ALAB-565, 10 NRC at 524.

72 *See* 10 C.F.R. § 2.324 ("The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.").

Track 1 oral hearings (or thirty days after the Board's ruling on Clearwater's Motion, whichever is later) to file any responsive evidence or further argument.[73]

If the Board admits the one or more of the new exhibits, Entergy will show that nothing in Clearwater's new exhibits undermines the EJ analysis in Entergy's ER or the NRC's FSEIS, as supplemented by the record evidence submitted by the parties. To this end, Entergy anticipates that its re-direct testimony and supporting exhibits will show that:

(1) None of Clearwater's new exhibits suggest any deficiency in the EJ analysis presented in the ER and FSEIS, and in particular, the conclusion that there are no significant and adverse disproportionate environmental impacts on EJ populations due to severe accidents, because the impacts of severe accidents are SMALL.[74] Hurricane Sandy provides no evidence to change this conclusion. There were no environmental impacts caused by any nuclear power plant during the storm and, in general, the nuclear industry's response to Hurricane Sandy was robust.[75]

(2) Clearwater's new exhibits focus, to a large extent, on non-EJ populations and failures to comply with legal obligations, neither of which need to be considered in the NEPA EJ analysis.

(3) Widespread flooding combined with loss of power are not foreseeable environmental impacts of a severe reactor accident.

(4) The problems experienced in sheltering-in-place in buildings located in low-lying areas during Hurricane Sandy cannot be compared to sheltering-in-place during a severe reactor accident.

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[73] *See* Tr. at 2692 (setting a deadline of thirty days for the filing of responsive testimony on a new exhibit filed on the eve of the hearing).

[74] *See* Entergy EJ Test. at A52 (*citing* GEIS at 5-115 (NYS00131C)).

[75] *See*, *e.g.*, Nuclear Plants Get Through the Storm with Little Trouble (Oct. 30, 2012) (Attachment 2 to this Answer) ("The nuclear reactors in Hurricane Sandy's path mostly handled the storm well – better than other parts of the region's electric system.").

(5) Far from being the disaster portrayed by Clearwater, the events at NYU Langone represent a story of successful emergency actions in the face of extreme adversity.[76]

(6) Hurricane Sandy negatively affected broad populations throughout the New York metropolitan area, including non-EJ populations, so there is no clear evidence of a disproportionately significant and adverse environmental impact, contrary to Clearwater's selective anecdotal evidence.

IV. CLEARWATER'S ADDITIONAL DEMANDS SHOULD BE REJECTED

A. The Board Should Formally Close the Record to Cut Off Future Duplicative and Cumulative Filings and Establish Certainty in the Hearing Process

As previously noted, Clearwater states its intent to continue to supplement the record.[77] In effect, Clearwater interprets the lack of an affirmative Board statement that the record is closed to be an open invitation to submit new evidence, without any need to demonstrate the relevance of that evidence.[78] If the Board were to acquiesce to this process, it would allow Clearwater to undermine the utility of the hearing that has already been held at considerable expense to all of the parties, including the NRC (both Board and Staff). Clearwater's proposed process is also contrary to the Commission's well-established rule that the burden of introducing late-filed evidence after the hearing is held is appropriately an elevated one—not a reduced one.[79]

This already-protracted proceeding cannot move into its next phase without definitively closing the record. Specifically, 10 C.F.R. § 2.1209 does not contemplate the submission of proposed findings of fact and conclusions of law until the "close of the hearing," *i.e.*, until after

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[76] *See*, *e.g.*, Superstorm Sandy and Hospital Heroics (Oct. 31 2012) (Attachment 3 to this Answer).

[77] Motion at 3.

[78] *See infra* § III.E.

[79] *Cf. Oyster Creek*, CLI-08-28, 68 NRC at 668-69.

the record is closed.[80] It would also serve no practical purpose to submit proposed findings to the Board while the record is still in flux. To avoid these problems, Entergy respectfully suggests that the Board should affirmatively state that the record is closed on all contentions where hearings have been completed.[81] This could be done at the close of the scheduled December hearings with respect to all Track 1 contentions. Now that Clearwater has made good on its threat to submit even more new exhibits, however, the Board may wish take this step even sooner.

B. Clearwater's Request for a Reply Would Reverse the Normal Process for Briefing Motions and Should Be Denied

Clearwater's final maneuver is an attempt to overturn the pleading process entirely. During consultations prior to the filing of the Motion, both Entergy and the NRC Staff explained, in detail, their objections to the new exhibits on the grounds of scope and relevance. As previously noted, Clearwater acknowledges these objections, but instead of briefing the issues as part of its initial submission has requested an opportunity to file what would be a procedurally prohibited reply.[82] This approach would, if accepted, absolve Clearwater of any burden to show that its new evidence was relevant and should be admitted, turning standard motion practice on its head.

Under 10 C.F.R. § 2.323(c), a moving party has no right to reply, except when permission is granted based *only* on compelling circumstances, such as "where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave

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80 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-08-9, 67 NRC 353, 355 (2008); *see also* Licensing Board Order (Scheduling Order) at 19 (July 1, 2010) (unpublished) ("All parties shall submit proposed Findings of Fact and Conclusions of Law within sixty (60) days after the *close of the evidentiary hearing*") (emphasis added).

81 The only exception to the closure of the record would be the responsive filings of Entergy and the NRC Staff, in the event the Motion is granted in whole or in part.

82 *See* Motion at 10 n.12.

to reply." As is clear from the Motion, Clearwater was well aware of Entergy's and the Staff's objections, yet deliberately chose not to brief the issue of whether its new exhibits were actually within the scope of CW-EC-3A. Thus, Clearwater should have reasonably anticipated Entergy's objections on admissibility in this Answer. There is no basis for a reply.[83]

[83] Entergy reserves the right to file an answer to any motion that Clearwater may file, seeking leave to reply. To the extent the Board may interpret Clearwater's request for a reply, in footnote 12, to be a *de facto* motion for leave to file a reply, the motion must be rejected for lack of consultation, because Clearwater did not consult with Entergy on such a request. *See* 10 C.F.R. § 2.323(b).

V. CONCLUSION

For the reasons set forth above, the Board should deny the Motion because the new exhibits are irrelevant and unduly repetitious and deny Clearwater's anticipatory request for a reply. In the alternative, in the event that the Board admits one or more of the new exhibits, then Entergy respectfully requests that the Board set a deadline of thirty days after the completion of the Track 1 oral hearings (or thirty days after the Board's ruling on Clearwater's Motion, whichever is later) for the filing of any responsive evidence by Entergy or the NRC Staff. At the upcoming oral hearings in December, Entergy respectfully suggests that the Board should affirmatively state that the record is closed on this contention and all other contentions that have been heard in their entireties.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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Dated in Washington, D.C.
this 28th day of November 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)	)	
	)	November 28, 2012

MOTION CERTIFICATION

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that his efforts to resolve the issues have been unsuccessful.

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

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ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S MOTION TO SUPPLEMENT THE RECORD WITH NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY

ATTACHMENTS

ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S MOTION TO SUPPLEMENT THE RECORD WITH NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY

ATTACHMENT 1

NRC News Release, NRC Continues to Monitor Hurricane Sandy; Alert Declared at Oyster Creek Plant; No Plants Shut Down Due to Storm (Oct. 29, 2012)

NRC NEWS

U.S. NUCLEAR REGULATORY COMMISSION
Office of Public Affairs, Region I
2100 Renaissance Blvd., King of Prussia, Pa. 19406-2713
E-mail: opa1@nrc.gov
Site: www.nrc.gov
Blog: http://public-blog.nrc-gateway.gov

No. I-12-042
Contact: Diane Screnci, (610) 337-5330
Neil Sheehan, (610) 337-5331

Oct. 29, 2012 9 p.m.
Email: opa1.resource@nrc.gov

NRC CONTINUES TO MONITOR HURRICANE SANDY; ALERT DECLARED AT OYSTER CREEK PLANT; NO PLANTS SHUT DOWN DUE TO THE STORM

The U.S. Nuclear Regulatory Commission is continuing to monitor impacts from Hurricane Sandy on nuclear power plants in the Northeastern United States, including an Alert declared at the Oyster Creek nuclear power plant in New Jersey. The plant, currently in a regularly scheduled outage, declared the Alert at approximately 8:45 p.m. EDT due to water exceeding certain high water level criteria in the plant's water intake structure.

An Alert is the second lowest of four NRC action levels. The Alert was preceded by an Unusual Event, declared at approximately 7 p.m. EDT when the water level first reached a minimum high water level criteria. Water level is rising in the intake structure due to a combination of a rising tide, wind direction and storm surge. It is anticipated water levels will begin to abate within the next several hours.

As of 9 p.m. EDT Monday, no plants had to shut down as a result of the storm although several plants were already out of service for regularly scheduled refueling and maintenance outages. All plants remain in a safe condition, with emergency equipment available if needed and NRC inspectors on-site.

The NRC has inspectors providing around the clock coverage at all of the plants that could experience effects of the storm. These include: Oyster Creek, in Lacey Township, N.J.; Salem and Hope Creek, in Hancocks Bridge, N.J.; Calvert Cliffs, in Lusby, Md.; Limerick, in Limerick Township, Pa.; Peach Bottom, in Delta, Pa.; Three Mile Island, in Middletown, Pa.; Susquehanna, in Salem Township, Pa.; Indian Point, in Buchanan, N.Y.; and Millstone, in Waterford, Conn. Those inspectors will independently verify that operators are following relevant procedures to ensure plant safety before, during and after the storm.

In addition, the NRC is monitoring the storm from its emergency response centers.

Nuclear power plant procedures require that the facilities shut down under certain severe weather conditions. The plants' emergency diesel generators are available if off-site power is lost during the storm. Also, all plants have flood protection above the predicted storm surge, and key components and systems are housed in watertight buildings capable of withstanding hurricane-force winds and flooding.

The NRC will continue to track Hurricane Sandy using the resources of all federal agencies and several weather forecasting services. The agency will also continue to communicate on storm-related developments with other federal and state agencies.

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ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S MOTION TO SUPPLEMENT THE RECORD WITH NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY

ATTACHMENT 2

Nuclear Plants Get Through the Storm with Little Trouble (Oct. 30, 2012)

Green

A Blog About Energy and the Environment

Business October 30, 2012, 6:39 pm22 Comments

Nuclear Plants Get Through the Storm With Little Trouble

By MATTHEW L. WALD

European Pressphoto AgencyThe Oyster Creek nuclear plant in New Jersey, seen here in an undated photo provided by its owner, Exelon Corporation, was put on alert after the storm.

Business

The nuclear reactors in Hurricane Sandy's path mostly handled the storm well — better than other parts of the region's electric system.

But one reactor, on the New Jersey coast, declared a low-level emergency because rising water threatened to submerge pumps it uses to pull in cooling water.

That plant, Oyster Creek, in Toms River, about 60 miles east of Philadelphia, had shut a week earlier for refueling, but still had cooling requirements, especially for its spent fuel pool, where fuel used decades ago is stored; that fuel must be kept submerged, and continues to generate waste heat.

Oyster Creek declared an alert, the second lowest on the four-step emergency scale established by the Nuclear Regulatory Commission, on Monday night. If the operators had been forced to turn off the water-intake pumps, they might have had to use fire hoses to add water to the pool, to make up for evaporation as it heated up.

According to the Nuclear Regulatory Commission, without any cooling, the pool would have taken about 25 hours to reach the boiling point, giving the operators time to implement an alternate cooling method.

Neil Sheehan, a spokesman for the commission, said that the operators of the plant, which is owned by Exelon, had moved a portable pump into the threatened building in case the regular pump had been submerged, but they had not had to use it. In a statement, David Tillman, a spokesman for Exelon, the plant's owner, said that no water had flooded into the plant and that "all safety and backup systems operated fully and reliably."

The reactor's operators hoped to exit the alert status on Tuesday.

The number of alerts declared at plants around the country is usually a handful a year. According to the N.R.C. definition, an alert means "events are in process or have occurred which involve an actual or potential substantial degradation of the level of safety of the plant." Radiation releases, if any, are expected to be a small fraction of the level that would require action offsite, according to the definition.

In Buchanan, N.Y., Indian Point 3 shut down at 10:41 on Monday night because of a disturbance on the high-voltage grid, but Indian Point 2 continued running. Upstate, Nine Mile Point 1 automatically shut down when the flow of power into the plant failed; Nine Mile Point 2 also felt the disturbance but its emergency diesel generators started up and it kept running, Mr. Sheehan said. Nuclear plants deliver huge quantities of electricity to the grid, but they run some of their equipment on power drawn from the grid, so that if they shut down suddenly, their equipment is still powered.

Three reactors reduced power, partly at the urging of the regional grid operators, who said that if one of the plants had failed suddenly at full power, the loss would destabilize the system. Those were Millstone 3, in Waterford, Conn., and Limerick 1 and 2, in the Pennsylvania town of the same name, northwest of Philadelphia.

Some reactors also reported that some of their emergency sirens had been knocked out by the storm.

The NRC said it would continue to monitor the affected plants.

ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S MOTION TO SUPPLEMENT THE RECORD WITH NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY

ATTACHMENT 3

Superstorm Sandy and Hospital Heroics (Oct. 31 2012)

Superstorm Sandy and hospital heroics

By Dr. Marc Siegel

Published October 31, 2012 | FoxNews.com

By Monday, in anticipation of Hurricane Sandy, over two hundred patients were discharged or transferred from my hospital NYU Langone Medical Center and the Emergency Room was closed. The patients who remained there were all on the upper floors, well out of range for any potential floodwaters.

I wondered at the time whether this precaution would end up being an overreaction since during our previous experience with Hurricane Irene, the hospital had been evacuated and flood waters had not come anywhere near us.

Boy was I ever wrong. By Monday night, surge waters reached close to 13 feet and the Medical Center's basement was flooded, damaging several back-up generators. When the power went out the hospital had no back-up, an instant emergency for all patients (over 300) who remained.
A command center was immediately set up in the lobby with senior officials from the NYPD, FDNY, paramedics, and the hospital's senior physician and nursing leadership.

Though there was certainly a potential for a Public Relations disaster, the next several hours instead became a road map for coolness and mobilization under pressure that can be instructive for any hospital facing a similar circumstance.

I spoke with Dr. Andrew Brotman, Vice Dean for Clinical Affairs, who was part of the command team. He told me that ramps were quickly constructed to literally slide the patients down the stairwell from the upper floors (as high as 15) to the lobby. Triage was key, which means that the sickest patients were brought down first. Many of the respirator patients had battery-operated respirators, but 4 tiny infants were successfully brought down using Ambu-bags to physically breathe air into their lungs.

Once in the lobby, plans were quickly made to transfer these patients to other hospitals, including Mt. Sinai, Cornell, Sloan Kettering Memorial, and St. Luke's. Two of my own patients were transferred and did well. Dr. Brotman told me that NYU's own medical and surgical residents went along with the patients to work at the receiving hospital and ensure continuity of care. All the transfers were successful, and none of these patients died. By late morning Tuesday, our hospital was emptied of all patients.

With no power restoration in sight, it is likely that these patients will continue to receive their care at the hospitals who received them.

What lessons can be learned here, beyond the obvious need for surge walls or levies around the city and emergency generators on higher floors? (Even with working emergency power, neighboring Bellevue Hospital is today transferring 500 patients because we still don't have power in lower and midtown Manhattan).

We can certainly learn from the teamwork here; the interdisciplinary heroics exhibited by police, firemen, emergency health workers, nurses and physicians in a way that was reminiscent of 9/11.

New York has shown itself as a city where rescue workers work together well. We can also learn that in the era of Electronic Medical Records, back-up paper charts remain crucial in the event that power is lost.

Finally, we much not overlook the need to protect our hospitals from disasters. We need them the most when citizens are flooded, sent out of their homes, or forced to live without power. During Hurricane Katrina, in addition to drownings, 11% died from heart disease and 25 % from injuries.

We need to protect our hospitals, to protect them like the fortresses they are, so that they will be there for us when we need them the most.

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)	)	November 28, 2012

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Entergy's Answer Opposing Hudson River Sloop Clearwater, Inc's Motion to Supplement the Record with New Information that Became Apparent After Hurricane Sandy" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Raphael P. Kuyler

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