

November 28, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO "HUDSON RIVER SLOOP CLEARWATER, INC.'S
MOTION TO SUPPLEMENT THE RECORD WITH RELEVANT NEW
INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff" or "NRC Staff") hereby files its answer to Hudson River Sloop Clearwater, Inc.'s ("Clearwater") "Motion to Supplement the Record with Relevant New Information That Became Apparent After Hurricane Sandy" (Nov. 14, 2012) ("Motion"). Clearwater requests that the Atomic Safety and Licensing Board ("Board") supplement the hearing record on Contention CW-EC-3A¹ with eleven news articles allegedly demonstrating that "Hurricane Sandy had a disparate impact on environmental justice populations[.]"² Clearwater claims that these articles illustrate that disasters, including hurricanes, floods, earthquakes and nuclear accidents, can have "disparate impacts" on EJ populations.³ In its Motion, Clearwater further stated that it will

¹ Clearwater's Contention CW-EC-3A ("Contention") alleges that the NRC Staff's discussion of impacts to environmental justice ("EJ") populations in its Final Supplemental Environmental Impact Statement ("FSEIS") prepared under the National Environmental Policy Act ("NEPA") is flawed because it does not adequately assess the impacts of relicensing Indian Point Nuclear Generating Unit Nos. 2 and 3 ("IP2" and "IP3") on minority, low-income, and disabled populations in the area surrounding the facility.

² Motion at 2.

³ *Id.* at 1-2.

continue to supply the Board with additional analysis of the events of Hurricane Sandy⁴ – and, indeed, on November 26, 2012, Clearwater filed yet another set of newspaper articles which it seeks to have admitted into evidence.⁵

As discussed more fully below, the Staff opposes Clearwater's motion to introduce these 11 newspaper articles as evidence in the proceeding, on the grounds that:

(1) Evidentiary hearings on Contention CW-EC-3A have concluded, and Clearwater has not established sufficient cause to require reopening the record on this contention;⁶

(2) Clearwater has not proffered any witnesses who could testify and be questioned by the Board (and parties) on the matters addressed in these articles, and no rebuttal witnesses are present who can address these matters;

(3) It is well established in NRC case law that newspaper articles do not provide reliable evidence to support an Initial Decision;

(4) The articles do not address either the impacts of an emergency at IP2/IP3, the impacts to EJ populations that may be affected by license renewal of IP2/IP3, or any "disparate" impacts to such populations, and they therefore fail to provide relevant and material information on this contention;

(5) To the extent that the articles discuss difficulties encountered in implementing an evacuation during a disaster, the articles present information that is cumulative to other evidence proffered by Clearwater during the evidentiary hearing in October 2012; and

(6) Inasmuch as Clearwater previously could have presented articles concerning evacuation difficulties during other hurricanes and disasters that have occurred in the past, its attempt to introduce such articles now is untimely.

For all of these reasons, Clearwater's Motion should be denied.

⁴ Motion at 3-4.

⁵ See Hudson River Sloop Clearwater, Inc.'s Notice of Supplemental Exhibits to Motion to Supplement the Record with Relevant New Information that Became Apparent after Hurricane Sandy (Nov. 26, 2012) ("November 26 Motion").

⁶ As discussed below, where a party seeks to submit new evidence after the hearing, NRC caselaw establishes that it must meet the stringent standards for reopening the record, currently set forth in 10 C.F.R. § 2.326. As discussed below, because Clearwater's proposed evidence is irrelevant, immaterial and, at best, cumulative in nature, Clearwater cannot meet the reopening standards.

BACKGROUND

This proceeding concerns the license renewal application (“LRA”) filed by Entergy Nuclear Operations, Inc. (“Entergy” or “Applicant”) on April 23, 2007, in which Entergy requested that the operating licenses for IP2 and IP3 be renewed for an additional period of 20 years.⁷ On December 10, 2007, Clearwater filed a petition to intervene, which included Contention EC-3.⁸ On July 31, 2008, the Board re-framed and admitted the contention, with limitations.⁹ The Board further amended the contention on July 6, 2011, to include a challenge to the Staff’s discussion of EJ impacts in the Final Supplemental Environmental Impact Statement (“FSEIS”).¹⁰ As admitted and amended, Contention CW-EC-3A now states as follows:

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.

Evidentiary hearings on the Contention were held, and concluded, on October 23, 2012. In its Motion, Clearwater requests the opportunity to submit further evidence based on the recent events of Hurricane Sandy.

⁷ Letter from Fred Dacimo, Site Vice President (Entergy) to NRC Document Control Desk (April 23, 2007) (Agencywide Documents Access and Management System (“ADAMS”) Accession No. ML071210108), as supplemented by letters dated May 3 and June 21, 2007 (ADAMS Accession Nos. ML071280700 and ML071800318).

⁸ Hudson River Sloop Clearwater, Inc.’s Petition to Intervene and Request for Hearing (Dec. 10, 2007), at 31-55.

⁹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 219 (July 31, 2008).

¹⁰ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), “Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions)” (July 6, 2011) (unpublished), slip op. at 52-60.

DISCUSSION

I. Clearwater Fails to Meet the Standards for Reopening the Record

A. The Reopening Standards Should Be Applied when an Intervenor Attempts to Submit New Evidence after the Close of Testimony on the Affected Contention

Evidentiary hearings on this contention were held on October 23, 2012, and have now concluded. Each of the parties presented its direct testimony and supporting evidentiary materials regarding the contention, as well as rebuttal testimony addressing the testimony and evidentiary materials filed by the other parties. At the conclusion of the Board's and parties' questions, all of the 14 witnesses who appeared in Tarrytown, NY to testify on this contention were excused.¹¹ In sum, all evidentiary proceedings on the contention have concluded.

Clearwater's filing of numerous additional proposed exhibits simply comes too late, and would require a reopening of the record on this contention (a) to allow it to be addressed by a proper sponsoring witness who could stand for questioning by the Board and parties, and (b) to allow opposing parties to present witnesses who could confront the evidence, if necessary.

It is entirely proper that Clearwater be required to satisfy the reopening standards before these newly proffered materials are admitted into evidence. In a 2008 judicial decision involving the *Pilgrim* license renewal proceeding, the First Circuit issued an order to stay the "close of hearings" two days before the Board held an evidentiary hearing on the only admitted contention.¹² In interpreting the First Circuit's order, the Commission held that while the proceeding as a whole must remain open, the Board should close the evidentiary record on the admitted contention.¹³ In doing so, the Commission implicitly recognized that once a hearing on

¹¹ Tr. 2918.

¹² See *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-9, 67 NRC 353, 354 (2008). The purpose of the stay was to allow the Commonwealth of Massachusetts to retain its right to participate in the proceeding as an interested State under 10 C.F.R. § 2.315(c). *Id.*

¹³ *Id.* at 356 ("[W]e direct the Board to close the evidentiary record on Pilgrim Watch Contention 1, per its usual course, and proceed with its new schedule for the submission of proposed findings of fact and conclusions of law.").

a particular contention had concluded, there was no reason for its evidentiary record to remain open even if the proceeding as a whole remains ongoing. Subsequently, the Board held that the intervenor's attempt to add evidence to the record should be analyzed under the reopening standard.¹⁴ The Board explained:

In its first motion, Pilgrim Watch requests in the alternative that the Board reopen the hearing on Contention 1, and we indeed find it appropriate to analyze the issues raised by Pilgrim Watch in its motions under the requirements of 10 C.F.R. § 2.326, regarding motions to reopen. We note in taking this approach that we have not prior to this date formally closed the record with regard to Contention 1. However, while there might theoretically be valid grounds to keep a record open after a hearing (based, for example, on matters arising at the hearing such that parties are specifically permitted to submit additional evidence after the hearing), and while there is also currently pending in this matter a "Motion Requesting the Record Be Held Open," the former has not occurred with regard to Contention 1 in this proceeding, and the latter relates not to Contention 1 but effectively to a newly submitted contention with regard to which the parties are submitting arguments separate and apart from the issues presented in the motions at issue herein. . . . Pilgrim Watch's approach that we treat its motions as a request to reopen the record with regard to Contention 1 is the proper course to follow at this time.¹⁵

In accordance with this approach, the Staff submits that parties must not be allowed to continually submit evidence regarding a contention on which testimony has already been taken, after hearings on that contention have concluded. Rather, the evidentiary record on a contention that has already been heard should be kept open only for matters "arising at the hearing" where "parties are specifically permitted to submit additional evidence after the hearing." For matters which were not held open at hearing, administrative efficiency requires that the record on that contention be considered closed to the receipt of new evidentiary

¹⁴ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), "Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1)," slip op. at 2 (Jun. 4, 2008).

¹⁵ *Id.* at 2-3 (emphasis added; footnote omitted).

materials, unless the movant demonstrates that the information is significant and otherwise meets the other standards for reopening.

This result is particularly applicable in this proceeding, where the record will not formally close until hearings have concluded on all Track 2 and other late-filed contentions – possibly requiring that the record be held open for another year or more. Unless the reopening standards are applied, upon submitting new evidence the parties could continually proffer new evidence for all contentions on which hearings have ended, requiring the repeated resumption of hearings on those contentions, in order to allow other parties to confront that evidence. Indeed, Clearwater has already filed two motions to admit additional evidence on this contention, and appears ready to continue its attempts to supplement the record in the future.¹⁶ This result would render nugatory any efficiency gained by the Board's scheduling Orders, in which it scheduled hearings on all Track 1 contentions, which the parties had agreed were ready for hearing.

In the instant proceeding, the Board has already taken testimony and concluded hearings on Contention CW-EC-3A. Further, the Board has requested that the parties propose a schedule for filing proposed findings of fact and conclusions of law on this and all other Track 1 contentions, and it is expected that such filings will be due in March 2012. Clearwater's new evidence does not pertain to a matter as to which the Board had specifically permitted the submittal of additional evidence. Moreover, although there will be further hearings on other contentions, and the evidentiary record for the Indian Point proceeding as a whole remains open, the time for submitting new evidence on this contention has ended. Accordingly, Clearwater should not be allowed to submit new evidence regarding this contention, unless it meets the standards for reopening.

¹⁶ Clearwater filed a second Motion to supplement the record with additional exhibits on this Contention on November 26, 2012. See November 26 Motion at 1. Moreover, Clearwater has stated that it will continue to supply the Board with such purported evidence as (and whenever) it becomes available. See Motion at 3-4; November 26 Motion at 1.

B. The Standards for Reopening the Record

Section 2.326(a) of the Commission's regulations set forth the reopening standards, stating as follows:

(a) A motion to reopen a closed proceeding to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.¹⁷

Additionally, the motion "must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the [reopening] criteria of [section 2.326(a)] have been satisfied."¹⁸ These affidavits "must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised."¹⁹

The Commission has held that a motion to reopen "must be set forth with a degree of particularity in excess of the basis and specificity requirements . . . for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence."²⁰ Therefore, the information supporting the motion must satisfy the Commission's admissibility standards for evidence in 10 C.F.R. § 2.337(a); it must be "relevant, material, and reliable."²¹ The Commission has previously held that "[t]he burden of satisfying the reopening

¹⁷ 10 C.F.R. § 2.326(a).

¹⁸ 10 C.F.R. § 2.326(b).

¹⁹ *Id.*

²⁰ *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-86-1, 23 NRC 1, 3 (1986).

²¹ *Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-08-12, 68 NRC 5, 16 (2008).

requirements is a heavy one, and proponents of a reopening motion bear the burden of meeting all of [these] requirements.”²²

C. Clearwater Fails to Address or Meet the Standards for Reopening

As discussed below, Clearwater does not demonstrate that it meets any of the reopening criteria of § 2.326(a). Therefore, its Motion should be denied.

1. Timeliness

Under 10 C.F.R. § 2.326(a)(1), a motion to reopen a closed record “must be timely.” Clearwater’s Motion was submitted shortly after the events of Hurricane Sandy. However, the timeliness standards under 10 C.F.R. § 2.309(c)(1), require that new information upon which the filing is based is “materially different from information previously available.” Clearwater’s Motion is not timely because the articles relate to impacts from hurricanes, flooding, and earthquakes which do not provide any materially different support for the Contention than that previously submitted into evidence by Clearwater.²³ Moreover, Clearwater even admits that “the evidence previously submitted concerning the disasters at Fukushima and during Hurricane Katrina was somewhat similar.”²⁴ Finally, numerous other disasters have occurred in U.S. history, all of which may well have involved difficulties of the sort described in Clearwater’s proffered newspaper articles; no reason appears why Clearwater could not have searched for and

²² *Oyster Creek*, CLI-09-7, 69 NRC at 287 (citations omitted, alteration in original).

²³ Clearwater previously submitted numerous exhibits relating to the impacts on purported EJ populations from events such as hurricanes, flooding, and earthquakes. See, e.g., Exhibits CLE00012A, CLE00012B, CLE00012C, CLE000022, CLE000044, CLE000050, CLE000052, CLE000053, CLE000054, CLE000055, and CLE000058.

²⁴ Motion at 10. Clearwater asserts that “the new information presented here is even more relevant because it shows that the mere presence of regulations without adequate site-specific study of follow up can actually increase disparate impact, rather than reducing it.” *Id.* Yet, none of the articles make this point; rather, this claim represents nothing more than Clearwater’s interpretation. Indeed, the articles themselves provide no new or materially different information directly relevant to the Contention.

presented such articles sooner, rather than waiting until Hurricane Sandy occurred in 2012. Accordingly, Clearwater does not meet the reopening criteria of 10 C.F.R. § 2.326(a)(1).²⁵

2. Significance

A motion to reopen must address a “significant safety or environmental issue.”²⁶ The Appeal Board has stated that a magazine article which “reports certain facts . . . that are not really in dispute, but fails to explain their significance vis-à-vis the safe operation of the plant” is insufficient to support reopening the record.²⁷ Likewise, the Appeal Board found insufficient a newspaper article reporting on alarming levels of cancer found in children residing near nuclear plants because it made no reference to the contention at issue—whether there was “a synergistic relationship between low levels of radiation and chemical pollutants and a possible link to the reportedly higher cancer levels.”²⁸

Clearwater’s Motion contests the adequacy of Entergy’s and the Staff’s EJ analyses in their environmental review documents, but the articles Clearwater submits do not back up that assertion. Not one of the articles even mentions Indian Point or discusses the potential for disproportionate impacts to EJ populations in the event of a radiological accident at Indian Point.

²⁵ Section 2.326(a)(1) provides an exception to this rule when the motion to reopen raises “an exceptionally grave issue.” The Commission “anticipates that this exception will be granted rarely and only in truly extraordinary circumstances.” Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986). Moreover, the Commission has found that an exceptionally grave issue is one that calls “into question the safety of the licensed activity.” *Hydro Resources, Inc.*, CLI-00-12, 52 NRC 1, 5 (2000). Clearwater, however, does not raise an exceptionally grave issue because none of the 11 articles even mention Indian Point or the potential for disproportionate effects on EJ populations in the event of a radiological emergency at Indian Point.

²⁶ 10 C.F.R. § 2.326(a)(2). “[W]hen a motion to reopen is untimely, the § 2.326(a)(1) ‘exceptionally grave’ test supplants the § 2.326(a)(2) ‘significant safety or environmental issue’ test.” *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC at 225 n.44. As discussed above, Clearwater’s claims do not meet the timeliness criteria of the reopening standards nor does Clearwater raise an “exceptionally grave” issue. Therefore, these portions of the Motion do not meet the requirements of 10 C.F.R. § 2.326(a)(2). Nevertheless, Clearwater still does not allege a significant issue under section 2.326(a)(2).

²⁷ *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-753, 18 NRC 1321, 1325 (1983).

²⁸ *Id.* at 1330.

As the Appeal Board held in *Waterford*, it is not enough for an intervenor to submit a number of articles and in its Motion attempt to create a relationship between the articles and its contention. Rather, the articles must themselves address the substantive issues raised by the contention—i.e., the alleged potential for disproportionate impacts to EJ populations due to a severe accident at Indian Point. Because the articles do not even remotely address the matters at issue in this Contention, Clearwater cannot show the significance required for reopening the record.

3. Materially Different Result

Under 10 C.F.R. § 2.326(a)(3), a motion to reopen a closed record “must *demonstrate* that a materially different result would be or would have been *likely* had the newly proffered evidence been considered initially.”²⁹ Nowhere in its Motion, however, does Clearwater suggest that consideration of these 11 new articles in evidence would lead to a materially different outcome. In fact, Clearwater candidly observed that this evidence is similar to evidence previously submitted “concerning the disasters at Fukushima and during Hurricane Katrina.”³⁰ Additionally, as discussed above, the articles are unrelated to Indian Point and provide no new insights into potential disproportionate impacts on EJ populations from a radiological emergency at Indian Point. Rather, Clearwater’s Motion supplies a tenuous strand of inferences, unsupported by expert testimony, in an attempt to connect the articles to its Contention. Thus, Clearwater has not met the third prong of the reopening standards.

²⁹ 10 C.F.R. § 2.326(a)(3) (emphasis added). While “the quality of evidence presented for reopening must be at least of a level sufficient to withstand a motion for summary disposition, [the Commission has also] made clear that the reopening standard requires more.” *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC ___, ___ (Mar. 30, 2012) (slip op. at 25). Under that standard, “The evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding.” *Id.*

³⁰ Motion at 11.

4. Affidavit

Finally, under 10 C.F.R. § 2.326(b), a petitioner seeking to reopen a closed record must support the request with an affidavit from an expert. In that affidavit, “Each of the criteria [of 10 C.F.R. § 2.326(a)] must be separately addressed, with a specific explanation of why it has been met.”³¹ Clearwater supplies no such affidavit, nor does it meaningfully address the reopening standards. Rather, Clearwater provides a smattering of older cases setting forth some elements of the reopening criteria, without actually addressing how its Motion meets any portion of the reopening standards.³²

In sum, Clearwater has not established sufficient cause to require reopening the record on this contention. Its Motion should therefore be denied.

II. Clearwater’s Unilateral Proffer of These 11 Articles Fails to Provide a Reliable Evidentiary Record upon which the Board’s Decision Could Be Based

Even if the Board were to view the record as remaining open on this Contention, Clearwater’s Motion must be denied in the absence of a reopening of the record. The fundamental purpose of evidence is to provide a basis for the Board’s decision on the merits. To that end, other parties must have an opportunity to confront Clearwater’s proffered evidence, and the Board must be able to examine the evidence and any sponsoring witness who is knowledgeable about the alleged facts reported therein, at an evidentiary hearing. Here, Clearwater has not proffered any witnesses who could testify and be questioned by the Board (and parties) on the matters addressed in these 11 articles. Further, no rebuttal witnesses are present before the Board who might be able to address these matters. Thus, allowing Clearwater to add evidence to the record when there is no longer an opportunity for the Board and parties to weigh the merits of that evidence through an evidentiary hearing is fundamentally unfair to the Staff and other parties to this proceeding.

³¹ 10 C.F.R. § 2.326(b).

³² See Motion at 11.

Moreover, this Board previously held that evidence similar to this must be examined at hearing in order for the Board to assess its relevance, and that other parties must be afforded an opportunity to confront that evidence. Thus, in ruling upon a January 2012 motion *in limine* filed by Entergy to exclude portions of the testimony and exhibits that Clearwater had submitted in support of its Contention, the Board explained:

We cannot say without ruling on the merits that proffered evidence relating to nonnuclear 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. . . . We will probe the reliability and the strength of the methodology of Clearwater's witnesses' testimony and reports through the evidentiary hearing, rather than at this time. Entergy and the NRC Staff will also have the opportunity to respond, on the merits, to Clearwater's evidence.³³

The same result applies here: the Board cannot, without prejudicing the parties, admit evidence concerning events during Hurricane Sandy (a non-nuclear disaster) as being relevant to this Contention, unless it requires Clearwater to proffer a proper sponsoring witness and allows other parties a reasonable opportunity to confront that evidence in rebuttal testimony. Therefore, Clearwater's proffered submission of these 11 newspaper articles should be excluded from evidence.

III. Even if the Record Were Not Deemed to be Closed, NRC Case Law Establishes that News Articles Do Not Constitute Reliable Evidence to Support an Initial Decision

Even if the record were not closed on this Contention, NRC case law establishes that news articles do not provide reliable evidence to support an initial decision.³⁴ Here, Clearwater

³³ "Order (Granting in Part and Denying in Part Applicant's Motions *in Limine*)," at 35 (Mar. 6, 2012).

³⁴ See, e.g., *Associated Electric Cooperative, Inc.* (Black Fox Station, Units 1 and 2), ALAB-498, 8 NRC 315, ___ (1978) (rejecting newspaper articles as sufficient support for the admission of a contention, in part because "[t]o begin with, we have no way of knowing whether the newspaper account of what transpired is accurate . . ."). *Accord Illinois Power Co.* (Clinton Power Station, Units 1 and 2), LBP-75-59, 2 NRC 579, 588 (1975), *aff'd on other grounds*, ALAB-340, 4 NRC 27 (1976) ("The ultimate test of a witness's qualification is whether his knowledge of the matter in relation to which his opinion is sought is such that it probably will aid the trier of the question to determine the truth. Where such

has not proffered the authors of the articles, any of the persons cited therein, or any other persons who may have knowledge of the matters discussed therein, as witnesses. As a result, the Board and parties have no opportunity to examine such persons concerning the articles. Absent an opportunity to question such persons, there is no assurance that the articles are reliable or that other relevant information might exist that should be considered.

Further, as discussed above, the Appeal Board found insufficient a magazine article which “reports certain facts . . . that are not really in dispute, but fails to explain their significance vis-à-vis the safe operation of the plant.”³⁵ Similarly, the Appeal Board found insufficient a newspaper article reporting on alarming levels of cancer found in children residing near nuclear plants because it made no reference to the contention at issue—whether there was “a synergistic relationship between low levels of radiation and chemical pollutants and a possible link to the reportedly higher cancer levels.”³⁶ Moreover, the Appeal Board reiterated its criticism of intervenors’ reliance on newspaper articles on subjects with no ostensible connection to the facility, stating that “[s]uch material simply does not provide a legitimate basis on which we can make an evidentiary finding or reopen a record.”³⁷

Clearwater’s Motion asserts that Entergy’s and the Staff’s EJ analyses are inadequate, but none of Clearwater’s proffered news articles support that assertion. None of the 11 articles mention Indian Point nor do the articles discuss the potential for a *nuclear* disaster to have disproportionate impacts on EJ populations. Further, none of the articles addresses emergency planning at U.S. nuclear plants or potential disparate impacts to EJ populations in the event of

knowledge is based upon newspaper and magazine articles, there is little if any assurance that the source upon which opinion is based is reliable.”).

³⁵ *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-753, 18 NRC 1321, 1325 (1983).

³⁶ *Id.* at 1330.

³⁷ *Id.* at 1330 n.16 (*citing Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, ALAB-732, 17 NRC 1076, 1089 (1983)).

an emergency at Indian Point. As the *Waterford* Appeal Board has held, it is not sufficient for an intervenor to submit news articles and attempt to create a relationship between the articles and its contention. Rather, the articles must themselves address the substantive issues raised by the Contention—the potential for disproportionate impacts to EJ populations in the vicinity of Indian Point due to a nuclear disaster. Moreover, as discussed above, Clearwater fails to provide any witness who can testify on the articles. Accordingly, because these 11 articles do not provide reliable evidence to support an initial decision, especially in the absence of a proper sponsoring witness,³⁸ Clearwater’s submission should not be admitted into evidence.

IV. Even if the Record Were Not Closed, Clearwater’s Evidence is Inadmissible because it is Irrelevant, Immaterial, Cumulative, and Unduly Repetitious

Should the Board decide that Clearwater need not meet the reopening standards, it should still find Clearwater’s evidentiary supplement inadmissible. Thus, 10 C.F.R. § 2.337 provides that “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted” to a hearing. Clearwater’s evidence is not relevant to the admitted Contention, and much of it is outside its scope. The articles do not address the impacts of a radiological emergency at IP2 or IP3, the impacts to EJ populations that may be affected by license renewal of IP2 or IP3, or any “disparate” impacts to such populations; they therefore fail to provide relevant and material information on this contention. Moreover, to the extent that the articles discuss difficulties encountered in implementing an evacuation during a disaster, the articles present information that is cumulative to other evidence proffered by Clearwater during the evidentiary hearing in October 2012.

³⁸ See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-891, 27 NRC 341,351 (1988) (vacating and remanding the Board’s decision that relied upon a memorandum of a telephone conversation that was proffered without a proper sponsoring witness); cf. *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982) (technical analyses, conclusions and opinions require a proper sponsoring witness “who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents”).

Significantly, the articles which Clearwater wishes to admit into evidence are irrelevant to the Contention. First, as noted above, Hurricane Sandy was a non-nuclear event. Many of the articles focus on the impacts of coastal flooding on low income communities, which are different from the potential radiation dose or other health impacts that may be experienced by EJ populations in the event of a severe accident at Indian Point or other nuclear power plant.³⁹ Second, many of the articles discuss the impacts of the storm on non-EJ populations including the elderly and hospital populations in general.⁴⁰ Clearwater has not shown that the patients at these hospitals predominantly come from EJ populations. Moreover, the Board has previously limited the scope of the Contention to include only certain specified populations; the Board did not identify the elderly as affected EJ populations within the scope of this contention.⁴¹ Third, some of the articles attribute the impacts on coastal residents to their failure to comply with mandatory evacuation orders, not to EJ concerns.⁴² Finally, the only article which discusses Hurricane Sandy's impacts on nuclear power plants relates to Oyster Creek, not Indian Point, and has nothing to do with disproportionate impacts to EJ populations, or the impacts of protective action recommendations in a radiological emergency.⁴³

Further, the articles raise issues that are well beyond the scope of this contention. While some of the articles discuss evacuation, sheltering in place, and the successes and failures of

³⁹ See, e.g., CLE000061, CLE000063.

⁴⁰ See, e.g., CLE000061, CLE000062, CLE000065, CLE000067, and CLE000069.

⁴¹ The Board has previously ruled that Contention CW-EC-3A, as admitted, applies to low-income, minority, disabled, and incarcerated populations as well as "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." See Board Order (Granting in Part and Denying in Part Applicant's Motions in Limine) at 32 (March 6, 2012); Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) at 56 (July 6, 2011).

⁴² See, e.g., CLE000063.

⁴³ See CLE000068.

those methods during the rains and flooding brought on by the hurricane,⁴⁴ they do not establish any reason to believe that similar difficulties would arise during a potential radiological emergency at Indian Point; these allegations are therefore outside the scope of the contention.⁴⁵ Lastly, some of the articles address effects on areas and populations outside of the 10 or 50 mile emergency planning zones around Indian Point, which are outside the scope of the contention.⁴⁶

In sum, the articles that Clearwater wishes to submit into evidence have nothing to do with the impacts on EJ populations within the vicinity of IP2 and IP3 in the event of a radiological emergency at Indian Point. The fact that the Motion makes an unsubstantiated attempt to tie the flooding caused by Hurricane Sandy to the potential effects of a disaster at Indian Point does not cure this deficiency.

An evaluation of each of the articles proffered by Clearwater, set forth below, supports this conclusion, and demonstrates why each individual article should not be admitted.

A. CLE000061 – After Hurricane Sandy Understanding a Disaster

This article should not be admitted because it is neither relevant nor material to impacts from a radiological emergency at Indian Point. The article focuses on the impacts to populations purportedly vulnerable to natural disasters (hurricanes, coastal flooding) including non-EJ populations such as the elderly. Moreover, this article is cumulative to evidence previously submitted by Clearwater in that the article reiterates many of Clearwater's previous points about impacts to low income populations from lack of car ownership and dependence on public transportation.⁴⁷

⁴⁴ See, e.g., CLE000062, CLE000063, CLE000065, and CLE000069.

⁴⁵ Further, the Commission has determined that "the adequacy of existing emergency plans need not be considered anew as part of issuing a renewed operating license." Final Rule; Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991).

⁴⁶ See, e.g., CLE000063, CLE000070.

⁴⁷ See, e.g., Exhibits CLE000007, CLE000009, CLE000010, CLE000022, and CLE000041.

B. CLE000062 – Hospital Evacuations for Future Storms; CLE000065 – In Hurricane's Wake, Decision Not to Evacuate; CLE000069 – Why Do Hospital Generators Keep Failing?

These three articles focus on emergency preparedness issues at hospitals after Hurricane Sandy and should not be admitted for lack of relevance, materiality, and scope. The articles question the evacuation decisions of New York City and State officials with respect to hospitals during a generalized power outage and massive flooding, which is irrelevant to the factors that would be considered during a radiological emergency. Moreover, these articles are neither relevant nor material to the impacts from a radiological emergency at Indian Point and impermissibly challenge an out-of-scope issue (adequacy of the emergency preparedness plans). Additionally, Clearwater has not demonstrated that the patients in these hospitals are predominantly from environmental justice populations. Moreover, no disproportionate impact was shown— even though the hospitals were not evacuated (and were flooded and lost power during the storm), one article states that “All the patients were safely evacuated this time.”⁴⁸ Finally, these articles are cumulative to evidence submitted by Clearwater regarding difficulties encountered in implementing an evacuation during a disaster.⁴⁹

C. CLE000063 – How a Beach Community Became a Death Trap

This article should not be admitted because it is irrelevant, immaterial, and falls outside the scope of this contention. The article is irrelevant and immaterial because it focuses on the devastating impacts of coastal flooding to a flood-prone, beach community following a hurricane. The article does not describe potential radiation dose impacts or other health impacts to EJ populations in the event of a severe accident at Indian Point or any other nuclear power plant. Moreover, the article discusses impacts to mostly non-EJ populations (its focus is on eight victims who were “mostly elderly” and one victim who was disabled). Additionally, the

⁴⁸ CLE000062.

⁴⁹ See, e.g., Exhibits CLE000005, CLE000010, CLE000050, CLE000052, and CLE000054.

article attributes many of the deaths to emergency preparedness issues that are unrelated to radiological impacts to EJ populations;⁵⁰ further, the article focuses on impacts to a low-lying community in Staten Island, which is not within the 10-mile or 50-mile EPZ around Indian Point. Finally, this article should not be admitted because it challenges the adequacy of the affected communities' response to the hurricane (refusal to obey mandatory evacuation orders, broadcasting emergency warnings, evacuation boats, etc.), which many people may feel they can "weather" without evacuating, which has not been shown to be similar to their likely response in the event of a radiological emergency.

D. CLE000064 – Hurricane and Ethnic Media

This article focuses on Bangladeshi and Chinese immigrants in New York and New Jersey and their ability to get emergency preparedness information during Hurricane Sandy. No showing has been made that similar difficulties exist in the area surrounding Indian Point, where information brochures and instructions are issued in multiple languages, in accordance with established nuclear power plant emergency preparedness requirements. This article should not be admitted into evidence for lack of relevance, materiality, and scope. Additionally, these articles are cumulative to other evidence submitted by Clearwater regarding difficulties encountered by non-English speakers during a disaster.⁵¹

E. CLE000066 – Nat Geo Timeline

This article contains a timeline of the Hurricane Sandy's course. The article is not relevant to any of the issues involved with this Contention, and therefore should not be admitted.

⁵⁰ "Still, it is not at all certain that such a measure, or even the police's going door to door, would have made a difference. Like most of the neighborhood's residents, the victims ignored numerous orders to evacuate, a decision that underscores an independent streak that runs deep on Staten Island." Exhibit CLE000063 at 2.

⁵¹ See, e.g., Exhibit CLE000008.

F. CLE000067 – Nursing Home is Faulted Over Care

This article discusses emergency preparedness for nursing homes; it should not be admitted because it falls outside the scope of this Contention, lacks relevance, and is cumulative. This article is outside the scope of this contention because Clearwater seeks to impermissibly challenge emergency preparedness and New York's decision not to evacuate nursing homes before the storm. Moreover, the article lacks relevance in that it discusses sheltering-in-place for a hurricane or flood, which has not been shown to be similar to a sheltering-in-place protective action for a radiological emergency. During a radiological emergency, sheltering is used to minimize dose, and public officials take into account different factors to ensure public health and safety. No showing has been made that the factors involved in a decision to recommend shelter-in-place during a hurricane has any bearing on a decision to recommend shelter-in-place during a radiological emergency. Moreover, to the extent that this article asserts disproportionate impacts to nursing home patients, it is cumulative to other testimony and exhibits that Clearwater had filed previously.⁵²

G. CLE000068 – Oyster Creek Nuclear Alert

This article should not be admitted because it is irrelevant and immaterial. The article discusses an alert at Oyster Creek following Hurricane Sandy and makes no mention of Indian Point. Additionally, there was no radiological release or severe accident at Oyster Creek, and no recommendation was made to take some sort of protective action due to the occurrence of a radiological emergency. Moreover, the article makes no mention of any disproportionately high or adverse impacts to EJ populations.

H. CLE000070 – As Storm Raged, 15 Fled New Jersey Halfway House

This article should not be admitted for lack of relevance. This article focuses on an incident at a halfway house. A halfway house is not a prison, and is certainly not a maximum security prison such as Sing Sing. Moreover, the half way house is located in New Jersey, not

⁵² See, e.g., Exhibits CLE000006, CLE000010, CLE000050, CLE000052, and CLE000054.

within the 10 or 50 mile EPZ of Indian Point; and no showing has been made that the halfway house residents' reactions to a hurricane have any relevance to the reactions that prison inmates at Sing Sing (or any other prison) might have in the event of a radiological emergency at Indian Point.

I. CLE000071 – Ruins Rumors and Resilience in Rockaway

This article should not be admitted because it is neither relevant nor material to any impacts that might result from a radiological emergency at Indian Point. Moreover, the article is cumulative in that it merely reiterates Clearwater's previous evidence suggesting that low-income and minority populations are generally disadvantaged during a disaster because they have lesser financial means.⁵³

V. Clearwater's Proffer is Untimely.

While Clearwater seeks the admission of articles concerning evacuation difficulties during Hurricane Sandy, no reason appears why it could not have acted sooner, by proffering newspaper articles or other evidence regarding previous disasters in U.S. history. Clearwater's failure to search for such articles or evidence in a more timely fashion requires that its motion to introduce such articles now, after all hearings on this contention have concluded, be denied as untimely.

CONCLUSION

Clearwater's Motion represents Clearwater's first attempt, in what may well be a repeated series of attempts, to introduce new evidence into the evidentiary record on a contention for which hearings have concluded.⁵⁴ Administrative efficiency requires that Clearwater's Motion be denied for failing to satisfy the standards for reopening and failure to

⁵³ See, e.g., Exhibits CLE000007, CLE000010, CLE000022, and CLE000041.

⁵⁴ Indeed, if Clearwater is allowed to introduce these materials into evidence without meeting the reopening standards and without proffering a proper sponsoring witness, hearings on these contentions may be delayed indefinitely, as all parties may then seek to move the admission of new evidence on any contention for which hearings have concluded – thus rendering nugatory the Board's completion of witness examination and conclusion of hearings on those contentions.

proffer a proper sponsoring witness. Moreover, the proffered “evidence” is irrelevant, immaterial, and unreliable – and, at best, is cumulative to other evidence that Clearwater has previously submitted. For these and other reasons set forth above, Clearwater’s Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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CERTIFICATION OF COUNSEL

Counsel for the Staff certifies that she has made a sincere effort to make herself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that her efforts to resolve the issues have been unsuccessful.

Respectfully submitted,

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Dated at Rockville, Maryland
this 28th day of November 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO "HUDSON RIVER SLOOP CLEARWATER, INC.'S MOTION TO SUPPLEMENT THE RECORD WITH RELEVANT NEW INFORMATION THAT BECAME APPARENT AFTER HURRICANE SANDY," dated November 28, 2012, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 28th day of November, 2012.

/Signed (electronically) by/

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