

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Units 2 and 3)

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

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

December 5, 2012

ORDER

(Denying Clearwater's Motion to Supplement the Record)

On November 14, 2012, Hudson River Sloop Clearwater, Inc. (Clearwater) filed a motion to supplement the record with eleven exhibits, largely describing the effects of Hurricane Sandy on environmental justice populations in the New York metropolitan area.¹ On November 26, 2012, Clearwater filed a "notice of supplemental exhibits," which urged the Board to admit four additional exhibits discussing the impacts of Hurricane Sandy.² Clearwater argues this evidence is new, different, and highly relevant, and should be admitted in support of its contention CW-EC-3A.³

¹ Hudson River Sloop Clearwater, Inc.'s Motion to Supplement the Record with Relevant New Information that Became Apparent after Hurricane Sandy (Nov. 14, 2012) [hereinafter Clearwater Motion].

² 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) [hereinafter Supplemental Notice].

³ Clearwater Motion at 9-10; Supplemental Notice at 2.

Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff object to the admission of Clearwater's recent filings.⁴ The NRC Staff argues that the reopening standard of 10 C.F.R. § 2.326(a) should apply to Clearwater's exhibits or, in the alternative, that Clearwater's exhibits are unreliable, irrelevant, and immaterial.⁵ Entergy argues that Clearwater has failed to meet its burden under 10 C.F.R. §§ 2.323 and 2.337. In addition, Entergy requests that the Board deny Clearwater's request to file an additional response brief and additional related exhibits, and close the record on CW-EC-3A (and all other contentions on which the Board has collected oral testimony) to prevent additional filings.⁶

Clearwater's initial motion is deficient in several regards. First, Clearwater encourages the Board to apply the standards of the former 10 C.F.R. § 2.309(f)(2)(i)-(iii) to the admission to its proffered evidence.⁷ On the other hand, Entergy and the Staff encourage the Board to apply the reopening standards of 10 C.F.R. § 2.326(a).⁸ Both suggestions are misguided in several respects. Section 2.309(f)(2)(i)-(iii), as cited by Clearwater, is no longer in effect, as that section was amended on September 4, 2012 by the Commission and pertained to contention admissibility.⁹ Since the Board has not closed the record, and is not prepared to do so at this

⁴ See Entergy's Answer Opposing Hudson River Sloop Clearwater's Motion to Supplement the Record with New Information that Became Apparent After Hurricane Sandy (Nov. 28, 2012) [hereinafter Entergy Answer]; NRC Staff's Answer to "Hudson River Sloop Clearwater, Inc.'s Motion to Supplement the Record with Relevant New Information that Became Apparent Hurricane Sandy" (Nov. 28, 2012) [hereinafter NRC Staff Answer]. Entergy also made a separate filing opposing Clearwater's Supplemental Notice. See Entergy's Answer Opposing Hudson River Sloop Clearwater's Second Motion to Supplement the Record (Nov. 30, 2012).

⁵ NRC Staff Answer at 4-6, 11-16.

⁶ Entergy Answer at 2-3.

⁷ Clearwater Motion at 10.

⁸ Entergy Answer at 4 n.4; NRC Staff Answer at 4-6.

⁹ Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562 (Aug. 3, 2012). See also Licensing Board Order (Concerning Recent Changes to 10 C.F.R. Part 2) (Aug. 8, 2012) at 1-2 (unpublished) (holding implementation of the new rules, as to scheduling issues, in abeyance in this case).

time, the reopening standards do not apply to Clearwater's proffered exhibits. Instead, the Board finds that 10 C.F.R. § 2.337(a) is the relevant standard, and therefore, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted."¹⁰ In applying this standard, the Board finds that the documents submitted by Clearwater dealing with an unrelated weather event are immaterial and not relevant to the reasonableness of the NRC Staff's environmental justice review of Indian Point, Units 2 and 3.

As a side note, Clearwater's initial motion also fails under 10 C.F.R. § 2.323(b), which requires that the Board reject a motion "if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."¹¹ The Board has cautioned many times about the importance of consultation under this provision,¹² and without such certification, the motion must be denied. Clearwater's supplemental notice indicates that consultation with the Staff and Entergy was attempted, but it appears that the other parties to the proceeding were not consulted, as required by the regulation.¹³ In addition, the statement on consultation in the supplemental notice fails to meet the requirements of 10 C.F.R. § 2.323(b).¹⁴

¹⁰ 10 C.F.R. § 2.337(a).

¹¹ Id. § 2.323(b). While it appears that some consultation occurred, it is unclear whether this consultation occurred in relation to Clearwater's November 8, 2012 motion for an extension of time or during consultation on this motion. See Clearwater Motion at 2 n.2, 10 n.12. Regardless, neither footnote is clear or contains the information required by 10 C.F.R. § 2.323(b).

¹² Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) (Feb. 4, 2009) at 3 (unpublished); Licensing Board Order (Denying New York's Motion in Limine and Holding Riverkeeper's Motion in Limine in Abeyance) (June 1, 2012) at 5-6 (unpublished); Licensing Board Order (Denying New York State's Motion to Supplement) (June 6, 2012) at 3 (unpublished).

¹³ Supplemental Notice at 2.

¹⁴ Id.

Exhibits CLE000061 through CLE000075 are not admitted. Exhibit Lists CLER50001 and CLER60001 are marked for identification but are not received in evidence. The next exhibit list for Clearwater, if needed, would be CLER70001. In addition, the Board denies as moot Entergy's requests for additional filings on this matter, as well as Clearwater's request to file an additional response and a continued ability to make filings related to Hurricane Sandy. In addition, Entergy's request to close the record on certain contentions is denied at this time.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 5, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Denying Clearwater's Motion to Supplement the Record) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 50-247-LR and 50-286-LR
ORDER (Denying Clearwater's Motion to Supplement the Record)

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Docket Nos. 50-247-LR and 50-286-LR
ORDER (Denying Clearwater's Motion to Supplement the Record)

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[Original signed by Nancy Greathead]
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Dated at Rockville, Maryland
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