

January 7, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE
PREFILED REBUTTAL TESTIMONY FILED BY RIVERKEEPER
CONCERNING CONTENTION NYS-38/RK-TC-5

INTRODUCTION

In accordance with the Atomic Safety and Licensing Board's (Board's) Order (Granting Unopposed Motion for Extension of Time), at 2 (September 28, 2012) (unpublished), the staff of the U.S. Nuclear Regulatory Commission (Staff) files this Motion *in Limine* to exclude two new lines of evidence first introduced in Riverkeeper, Inc.'s (Riverkeeper's) Exhibit RIV000134 (Prefiled Rebuttal Testimony of Dr. Joram Hopenfeld Regarding Contention NYS-38/RK-TC-5) (November 9, 2012) (non-publicly available) (Hopenfeld Rebuttal).¹

Specifically, in his rebuttal testimony, Dr. Hopenfeld impermissibly introduced statements, for the first time, concerning flow accelerated corrosion (FAC) – none of which constitute proper rebuttal. Additionally, his rebuttal testimony introduced new arguments concerning wall thickness measurements for performing cumulative usage factor (CUF) and environmentally-adjusted CUF (CUF_{en}) calculations. When Riverkeeper introduced these discussions for the first time in Dr. Hopenfeld's Rebuttal, it unfairly deprived the Staff and other

¹ The initial testimony is RIV000102, Pre-filed Testimony of Dr. Joram Hopenfeld In Support of NYS-38/RK-TC-5, (June 19, 2012) (ADAMS Accession No. ML12171A559) (Hopenfeld Initial).

parties of a proper opportunity to address the new issues raised in his testimony. Accordingly, the specified portions of Dr. Hopfenfeld's Rebuttal should be excluded from evidence in the hearings on this contention.

DISCUSSION

A. Legal Standards Governing Motions in Limine

As this Board has previously recognized, in an evidentiary hearing, “[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” Order (Granting in Part and Denying in Part Applicant’s Motions in Limine), at 3 (March 6, 2012) (unpublished) (*citing* 10 C.F.R. § 2.337(a)). While the “strict rules of evidence do not apply to written submissions,” the Board may “on motion or on the presiding officer’s own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and may “[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments.” *Id.*, (*citing* 10 C.F.R. § 2.319(d)-(e)).

NRC hearings are limited to the scope of the admitted contentions. As the Board recognized in its Order of March 6, 2012, “the Commission has cautioned against allowing ‘distinctly new complaints to be added at will as litigation progresses, [and thereby] stretching the scope of admitted contentions beyond their reasonably inferred bounds.’” *Id.* at 3-4, *citing Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added by the Board).

In this regard, it is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010)

(agreeing with the Staff that the licensing board had properly excluded the intervenors' testimony and exhibits that were outside the scope of the admitted contention). As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

Id. at 100-01 (internal footnotes omitted). Recently, the Commission emphasized:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-01, 75 NRC ___, ___ (Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).²

Further, for rebuttal testimony, the scope is more limited. In addition to being restricted to the matters raised in the contention, rebuttal testimony may be admitted only insofar as it is

² In addition, an expert opinion is only admissible if the witness is competent to give an expert opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. The proponent of the testimony bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

responsive to the other parties' statements of position and evidentiary submissions.³ Thus, the Board has stated that "Intervenors should not revise their entire original statements of position but rather present only responsive arguments."⁴ Moreover, rebuttal testimony may only address matters which the party could not have raised earlier; fundamental fairness requires that it may not raise matters for the first time that reasonably should have been, but were not raised in the party's case-in-chief.⁵

B. Dr. Hopenfeld's Rebuttal Concerning FAC is Beyond the Scope of other Parties' Direct Testimony and Must Be Stricken

Dr. Hopenfeld's rebuttal testimony introduces a new assertion that consideration should be given for FAC when assessing metal fatigue. Specifically, Dr. Hopenfeld introduces discussion of the synergetic effects of stress corrosion cracking (SCC) and FAC on metal fatigue. Hopenfeld Rebuttal at page 6, lines 15-17, and page 11, lines 10 and 15. This consideration of FAC was not previously identified in Dr. Hopenfeld's initial testimony dated June 19, 2012 (Exhibit RIV000102). Indeed, the term "flow accelerated corrosion" is absent

³ Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, ___ NRC __, __ (Dec. 22, 2011) (slip op. at 10) ("We have long held that a reply may not contain new information that was not raised in either the petition or answers, but we have not precluded arguments that respond to the petition or answers, whether they are offered in rebuttal or in support.")

⁴ Order (Memorializing Items Discussed at April 16, 2012 Pre-Hearing Conference) at 1 (Apr. 18, 2012) (unpublished). *Accord, Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-15, 63 NRC 591, 620 (2006) (reciting the Board's action striking portions of prefiled rebuttal testimony "that fell outside the scope of any admitted contention and/or the permissible scope of rebuttal testimony").

⁵ See, e.g., *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2)(Initial Scheduling Order), LBP-09-22, 70 NRC 640, 655 (2009) ("Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement"); *Rockwell International Corp. Rocketdyne Division* (Special Material License Number SNM-1), LBP-89-27, 30 NRC 265, 269 (1989) (permitting rebuttal testimony "only with respect to new or surprise material" included in the opposing party's submittals).

from Dr. Hopenfeld's pre-filed testimony, and Riverkeeper fails to show where the issue was raised in the Staff's or Applicant's testimony; thus it is improper for Dr. Hopenfeld insert an issue concerning FAC in his rebuttal testimony. See Indian Point Units 2 and 3, CLI-11-14, ___ NRC at ___ (slip op. at 10). Similarly, Dr. Hopenfeld's discussion of the selection of components without existing CUFs also introduces new concerns over treatment of FAC when assessing metal fatigue. See Hopenfeld Rebuttal (Exhibit RIV000134) at 14, line 15, through page 15, line 21. While it is true that in his initial testimony, Dr. Hopenfeld included statements regarding erosion and wall thinning, the statements there concern Dr. Hopenfeld's experience and qualifications, and do not address the adequacy of Entergy's license renewal application based on any aspects of FAC. See Hopenfeld Initial Testimony (Exhibit RIV000102) at 1 (describing the witness' experience in erosion) and *id.* at 3 (describing his experience with wall thinning). Furthermore, the single mention of wall thickness in his testimony (*id.* at 12) is not used in any discussion of FAC. Therefore, these new discussions and concerns over FAC should be struck.⁶

Last, Dr. Hopenfeld makes assertions that CUFens are based on incorrect component dimensions (Hopenfeld Rebuttal (RIV000134) at 14), and describes concerns with using wall thickness measurements from recent inspections to perform CUF and CUFen calculations. See Hopenfeld Rebuttal at page 12, line 5 through page 14, line 13. Although Dr. Hopenfeld states that his testimony is derived from other exhibits (*id.* at 12 n. 33), the issue Dr. Hopenfeld now raises is new; previously, neither Dr. Hopenfeld nor any other party had raised this issue; therefore these lines should be stricken. Indeed, Dr. Hopenfeld acknowledges that his concern

⁶ The Staff notes that the sentence beginning with "Importantly, Entergy's witnesses" at Hopenfeld Rebuttal (Exhibit RIV000134) (proprietary) on page 14 lines 22-23 is acceptable for rebuttal since it addresses the testimony filed by the Applicant, and that sentence therefore need not be stricken.

grew in part from testimony on other contention(s) during the evidentiary hearings on Indian Point held during October of 2012, rather than being rebuttal to the initial testimony on this contention filed by other parties. See *id.* at 12. Accordingly, the new concern over what wall thickness is used during calculations must be stricken. See Indian Point Units 2 and 3, CLI-11-14, ___ NRC at ___ (slip op. at 10).

CONCLUSION

Dr. Hopenfeld's rebuttal testimony exceeds the scope of direct testimony by introducing, for the first time, new topics on the synergistic effects of FAC, as well as how to use wall thickness measurements when making calculations of CUF and CUFen. Accordingly, the Board should strike these new topics from his testimony.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 7th day of January 2013

CERTIFICATION OF COUNSEL

Pursuant to 10 C.F.R. § 2.323(b), the undersigned attorney hereby certifies that he has made a sincere effort to contact Riverkeeper and the other parties to resolve the issues raised in this Motion. Although the parties participated in several teleconferences and e-mail exchanges, the parties' efforts to resolve these issues have been unsuccessful.

Respectfully submitted,

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Dated at Rockville, Maryland
this 7th day of January 2013

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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/286-LR
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF THE PREFILED REBUTTAL TESTIMONY FILED BY RIVERKEEPER CONCERNING CONTENTION NYS-38/RK-TC-5" dated January 7, 2013, has been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 7th day of January, 2013.

/Signed (electronically) by/

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Signed: January 7, 2013.