

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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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)	)	

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January 7, 2013

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**ENTERGY'S MOTION TO STRIKE PORTIONS OF INTERVENORS' REVISED  
STATEMENT OF POSITION AND MOTION IN LIMINE TO EXCLUDE PORTIONS  
OF THE PRE-FILED REBUTTAL TESTIMONY AND EXHIBITS FOR CONTENTION  
NYS-38/RK-TC-5 (SAFETY COMMITMENTS)**

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**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.1204, 2.319, 2.323, 2.337, and in accordance with the Atomic Safety and Licensing Board’s (“Board”) Scheduling Order of July 1, 2010 (“Scheduling Order”), and subsequent Order dated September 28, 2012,<sup>1</sup> Entergy Nuclear Operations, Inc. (“Entergy”) hereby timely moves to: (1) exclude portions of the Pre-filed Written Rebuttal Testimony of Dr. Richard T. Lahey, Jr.<sup>2</sup> and Dr. Joram Hopenfeld<sup>3</sup> Regarding Contention NYS-38/RK-TC-5 from the record; (2) strike portions of the State of New York (“NYS”) and Riverkeeper, Inc. (“Riverkeeper”) Revised Statement of Position in Support of Joint Contention NYS-38/RK-TC-5;<sup>4</sup> and (3) exclude other supporting exhibits from the record.

The scope of Contention NYS-38/RK-TC-5 is necessarily restricted to issues within the limited scope of this license renewal proceeding and to the specific bases pled by the Intervenor and admitted by the Board. For this license renewal proceeding, pursuant to 10 C.F.R. § 54.29,

<sup>1</sup> Licensing Board Order (Granting Unopposed Motion for Extension of Time) (Sept. 28, 2012) (unpublished).

<sup>2</sup> (Nov. 9, 2012) (NYS000453) (“Lahey Reb. Test.”).

<sup>3</sup> (Nov. 9, 2012) (RIV000134) (“Hopenfeld Reb. Test.”).

<sup>4</sup> (Nov. 9, 2012) (NYS000451) (“Revised SOP”).

the scope of safety issues under consideration is limited to identifying those actions necessary to maintain the current licensing basis (“CLB”) during the period of extended operation. For this contention, the admitted bases challenge specific Entergy commitments addressed by the NRC Staff in its August 2011 Supplemental Safety Evaluation Report (“SSER”).<sup>5</sup>

Despite the long-established scope of this proceeding and contention, Intervenors’ rebuttal submissions include evidence and argument on numerous out-of-scope topics. First, Intervenors’ rebuttal testimony raises general objections to the use of engineering judgment in the preparation of environmentally-assisted fatigue (“EAF”) evaluations—arguments that Intervenors’ witnesses acknowledge are unrelated to the SSER commitments challenged in this contention, but instead relate to the separate metal fatigue contention, NYS-26B/RK-TC-1B. Second, Dr. Hopenfeld argues that Entergy should expand the scope of its Fatigue Monitoring Program (“FMP”) to cover locations where there is no CLB fatigue analysis, thereby challenging the adequacy of the CLB, which is outside the scope of this proceeding. Finally, the Revised SOP introduces a new argument requesting that the Board adopt a novel interpretation of the Commission’s regulations regarding “no significant hazards considerations” in 10 C.F.R. Part 50. This new issue is outside the Board’s jurisdiction and the scope of this contention for multiple reasons.

## **II. ADMISSIBILITY OF EVIDENCE**

10 C.F.R. § 2.337(a), the regulation governing the admissibility of evidence, provides that “[o]nly relevant, material, and reliable evidence . . . will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is

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<sup>5</sup> Licensing Board Order (Denying Entergy’s Motion in Limine Seeking to Exclude Portions of Intervenors’ Direct Evidence Addressing Contention NYS-38/RK-TC-5) at 3 (Aug. 16, 2012) (unpublished) (“Aug. 16 Order”) (holding that the contention alleges “that there is insufficient information in Entergy’s recent commitments that were addressed in the SSER”) (citation and internal quotation omitted).

practicable.” Thus, pursuant to 10 C.F.R. § 2.319(d), the Board may “strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative,” and under Section 2.319(e) the Board may restrict evidence or arguments for the same reasons.

Because only relevant and material evidence is admissible, the Board may exclude testimony and exhibits that are outside the admitted scope of a contention or that introduce new bases for a contention.<sup>6</sup> Similarly, it may exclude testimony and supporting evidence that is outside the scope of this license renewal proceeding.<sup>7</sup>

Recent Commission decisions confirm that intervenors are not permitted to change the scope of a contention as admitted by the Board. 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.”<sup>8</sup> Similarly, in *Pilgrim*, the Commission reiterated that longstanding precedent requires a Board to reexamine the bases to determine the scope of a contention because the “reach of a contention necessarily hinges upon its terms *coupled with* its stated bases.”<sup>9</sup> A key reason for this requirement is to provide notice to the opposing parties of the issues they will need to defend against. Thus, Intervenor “may not freely change the focus of an admitted contention at will to add a host of new issues

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<sup>6</sup> See, e.g., Licensing Board Order (Denying Clearwater’s Motion to Supplement the Record) (Dec. 5, 2012) (unpublished).

<sup>7</sup> See, e.g., *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 process”).

<sup>8</sup> *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100-01 (2010).

<sup>9</sup> *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis in original) (citing *Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 & 2), ALAB-899, 28 NRC 93, 97 (1988)).

and objections that could have been raised at the outset. . . . [We] do not allow distinctly new complaints to be added at will as litigation progresses.”<sup>10</sup>

Intervenors’ have previously argued that the limitation of contentions to the specific bases pled and admitted would “plunge NRC proceedings into the abyss of common law pleading technicalities” that existed before the modernization of the Federal Rules of Civil Procedure (“FRCP”).<sup>11</sup> This proceeding, however, is governed by the Rules of Practice in 10 C.F.R. Part 2, not the FRCP. That is not an oversight—the Rules of Practice represent a carefully-considered and well-settled approach to the unique types of matters implicated in proceedings such as this one. The application of those well-settled rules does not result in an “abyss.” Intervenors do not—and cannot—challenge the binding decisions in *Palisades* (CLI-06-17), *Vogtle* (CLI-10-5), *Pilgrim* (CLI-10-11), and *Seabrook* (CLI-12-05),<sup>12</sup> which forbid the consideration of evidence that strays beyond the specific bases of a contention, as *pled and admitted*.

### **III. ARGUMENT**

As discussed below, the portions of Intervenors’ testimony identified in Attachment 1, Table A, and the exhibits identified in Attachment 1, Table B should be excluded from the evidentiary record as they stray well beyond the specific bases of the contention, as pled and

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<sup>10</sup> *Id.* (citation and internal quotation marks omitted); see also Licensing Board Order (Granting in Part and Denying in Part Applicant’s Motions in Limine) at 3-4, 6-7, 10, 23, 28-29 (Mar. 6, 2012) (unpublished) (“March 6 Order”).

<sup>11</sup> State of New York and Riverkeeper’s Joint Answer to Energy’s Motion in Limine to Exclude Portions of Intervenors’ Prefiled Direct Testimony, Expert Report, Statement of Position, and Exhibits for Contention NYS-38/RK-TC-5 at 8 (July 16, 2012) (“Joint Answer to Motion in Limine on NYS-38/RK-TC-5”) (not publicly available on ADAMS).

<sup>12</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC \_\_\_, slip op. at 11 n.50 (Mar. 8, 2012).

admitted. In addition, the portions of Intervenor's Revised SOP identified in Attachment 1, Table C should be stricken.<sup>13</sup>

**A. The Scope of this Contention Is Limited to the Specific Bases Pled By Intervenor and Admitted By the Board**

In contention NYS-38/RK-TC-5, Intervenor's allege that, rather than presenting aging management programs ("AMPs") for review by the NRC Staff, Board, and parties, Entergy has instead made vague commitments to develop full AMPs at a later date.<sup>14</sup> As pled and admitted, the contention is supported by four bases, each related to specific commitments that Entergy has made in support of its License Renewal Application ("LRA").<sup>15</sup>

Thus, Intervenor's pleadings and the Board's Orders have long-defined and limited the scope of the admitted contention. Intervenor's pre-filed rebuttal testimony and associated submittals, however, impermissibly raise a variety of topics outside these bounds. As demonstrated below, the portions of Intervenor's filings that raise such issues should be stricken.

**B. Testimony Expressing General Concerns About the Use of Engineering Judgment in Fatigue Calculations Is Outside the Scope of This Contention**

Pursuant to 10 C.F.R. §§ 2.319(d) and 2.337(a), the Board should exclude those portions of Dr. Lahey's and Dr. Hopfenfeld's testimony that raise general concerns about the use of engineering judgment in fatigue calculations and that are not limited to challenging "Entergy's

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<sup>13</sup> This Board has noted that a position statement is a party's legal interpretation of its evidence, not its actual evidence, and that the Board will use it inasmuch as it is supported by the evidence proffered by that party. See March 6 Order at 24. Nevertheless, portions of a position statement that raise excluded issues and arguments may be stricken. See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 2 (Aug. 9, 2007) (unpublished).

<sup>14</sup> See State of New York and Riverkeeper's New Joint Contention NYS-38/RK-TC-5 at 1, 3 (Sept. 30, 2011) ("Contention NYS-38/RK-TC-5"), available at ADAMS Accession No. ML11273A196.

<sup>15</sup> See Licensing Board Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5) at 10 & 10-11 n.47 (Nov. 10, 2011) (unpublished) ("Order Admitting NYS-38/RK-TC-5") (citing Contention NYS-38/RK-TC-5 at 1-3); see also Licensing Board Order (Denying NRC Staff's Motion for Partial Reconsideration and State of New York/Riverkeeper's Cross-Motion to NRC Staff's Motion for Reconsideration) at 3 & n.7 (Apr. 23, 2012) (unpublished) ("April 23, 2012 Order") ("[u]nder the umbrella of this general contention, the Intervenor's have proffered several specific bases in support of their allegations").

*Commitments*—delineated in the SSER.”<sup>16</sup> Such claims were admittedly not part of the original contention and thus are irrelevant to this contention as pled and admitted by the Board.

In Commitment 44, to address a generic issue of NRC Staff concern, Entergy agreed to include a written explanation and justification of any “user intervention” in the analyses conducted using the WESTEMSTM software, “Design CUF” module.<sup>17</sup> “User intervention,” as that term is used in Commitment 44 and as Entergy explained many months before Intervenors’ filed their direct testimony on this contention, is a specific adjustment made at a particular step in the WESTEMSTM fatigue analysis process, where redundant stress peaks and valleys are removed, so they are not double-counted.<sup>18</sup> Entergy also testified that user intervention was not used in any Westinghouse fatigue analyses prepared in support of Indian Point’s license renewal.<sup>19</sup> Thus, Commitment 44—as originally challenged by NYS and Riverkeeper—does not address the general use of engineering judgment in fatigue calculations, but a particular step in the fatigue analysis process in WESTEMSTM. In their direct testimony, Intervenors ignored these undisputed facts.

In rebuttal, again without disputing the facts presented by Entergy’s witnesses, Intervenors’ witnesses acknowledge for the first time that their concerns are not actually focused on the issue of “user intervention,” as that term is used in Commitment 44, but are instead general concerns about “the implications of the modeling assumptions implicit in WESTEMS

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<sup>16</sup> Aug. 16 Order at 3 (emphasis added); *see also id.* (holding that the contention includes the “claim that there is insufficient information in Entergy’s recent commitments that were addressed in the SSER”) (citation and internal quotation omitted).

<sup>17</sup> *See* Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Strosnider, Robert E. Nickell, and Mark A. Gray Regarding Contention NYS-38/RK-TC-5 (Safety Commitments) at A115 (Mar. 29, 2012) (“Entergy’s Safety Commitments Test.”) (ENT000521).

<sup>18</sup> *See* Testimony of Entergy Witnesses Nelson F. Azevedo, Alan B. Cox, Jack R. Strosnider, Robert E. Nickell, and Mark A. Gray Regarding Contention NYS-26B/RK-TC-1B (Metal Fatigue) at A69 (Mar. 29, 2012) (“Entergy’s Metal Fatigue Test.”) (ENT000183).

<sup>19</sup> *See id.* at A70 (ENT000183); *see also* Entergy’s Safety Commitments Test. at A114-A131 (ENT000521).

and the various ways the code user can influence the results.”<sup>20</sup> These issues, however, are not the subject of Commitment 44, and it is far too late to expand the scope of this contention now.<sup>21</sup>

Accordingly, because Intervenor witnesses acknowledge that their claims regarding “user intervention” are unrelated to the commitments addressed in the SSER,<sup>22</sup> Intervenor’s testimony on Commitment 44—both direct and rebuttal—is in fact unauthorized sur-rebuttal testimony on NYS-26B/RK-TC-1B, the metal fatigue contention, and therefore prejudicial to Entergy.<sup>23</sup>

**C. Testimony Arguing that the Scope of EAF Analyses Should be Expanded Beyond the CLB Fatigue Analysis Locations Is Outside the Scope of This Proceeding and Contention**

The Board should exclude the portions of Dr. Hopenfeld’s testimony where he argues that the scope of EAF analyses should be expanded, to include other primary plant components and balance-of-plant (secondary system) components that do not have existing CLB cumulative usage factors (“CUF”) analyses. This testimony is—plainly—a direct challenge to the adequacy of the CLB, and is therefore outside the scope of this license renewal proceeding. It should be excluded as irrelevant under 10 C.F.R. §§ 2.319(d) and 2.337(a).

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<sup>20</sup> Lahey Reb. Test. at 15 (NYS000453); *see also* Hopenfeld Reb. Test. at 26 (RIV000134) (“By focusing attention on the ‘peaks and valleys,’ Entergy’s witnesses deflect from fact that [sic] the analyst must make many other judgments . . . .”). Of course, it is not Entergy that “focused” attention on “peaks and valleys.” The Intervenor did so by proffering this particular issue as a basis for this contention.

<sup>21</sup> Intervenor may argue that the Board has previously characterized this contention as a broad one. This response is irrelevant. First, as explained above, no contention is so broad as to include bases not pled and admitted. Second, there has been no previous dispute over the scope of this contention in light of Intervenor’s new admissions in their rebuttal testimony.

<sup>22</sup> *Pilgrim*, CLI-10-11, 71 NRC at 309 (holding that intervenors may not freely change the focus of an admitted contention at will).

<sup>23</sup> *See* Licensing Board Order (Denying Applicant’s Motion for Leave to File Surrebuttal Testimony on NYS-12C) (Aug. 2, 2012) (unpublished).

The scope of a license renewal proceeding under 10 C.F.R. Part 54 is limited by design.<sup>24</sup> The adequacy of the NRC’s current-term, ongoing regulatory oversight processes is the fundamental starting point and is not open to question.<sup>25</sup> As the Commission explained in the seminal *Turkey Point* decision over a decade ago, it is not “necessary or appropriate to throw open the full gamut of provisions in a plant’s current licensing basis to re-analysis during the license renewal review.”<sup>26</sup> As is relevant here, the FMP is intended to address the fatigue usage time-limited aging analyses (“TLAAs”) that are part of the CLB for Indian Point Units 2 and 3. As specified in 10 C.F.R. §§ 54.3(a), 54.21(c), and 54.29(a), the FMP does so by managing the effects of aging due to fatigue for those components—not by creating new TLAAs that are not part of the CLB. Thus, the Part 54 regulations are crystal clear that this is not the appropriate forum to question the adequacy of the CLB.<sup>27</sup>

Despite this clear prohibition, Dr. Hopenfeld asserts that “Entergy’s intent to limit the scope of component selection to ‘all plant components with a CLB [CUF] fatigue analysis’ is unacceptable.”<sup>28</sup> Instead, Dr. Hopenfeld would have Entergy, as part of license renewal,

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<sup>24</sup> See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-11-11, 74 NRC \_\_\_, slip op. at 10 (Oct. 12, 2011) (“license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity”) (citations and internal quotations omitted); *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC 481, 489 (2010) (describing the Commission’s “long-standing position that license renewal proceedings should be limited in scope”).

<sup>25</sup> See Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,473 (May 8, 1995) (NYS000016) (“The regulatory process is the means by which the Commission continually assesses the adequacy of and compliance with the CLB.”).

<sup>26</sup> *Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 9 (2001).

<sup>27</sup> Dr. Hopenfeld’s claim that industry recommendations require an expanded scope of EAF reviews when any calculated fatigue usage factor exceeds unity, Hopenfeld Reb. Test. at 19 (RIV000134), is incorrect for multiple reasons. His interpretation of the “industry recommendations” is at odds with binding legal precedent. See *Entergy Nuclear Vt. Yankee, L.L.C.* (Vt. Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 21 n.99 (2010) (“The ASME Code allows performance of a more detailed analysis as a way to demonstrate code compliance.”); see also Entergy’s Metal Fatigue Test. at A90-91 (ENT000183). In any event, no guidance document can trump the regulations in Part 54, which exclude any reconsideration of the adequacy of the CLB in this proceeding. See, e.g., *Int’l Uranium (USA) Corp.*, CLI-00-51, 51 NRC 9, 19 (2000).

<sup>28</sup> Hopenfeld Reb. Test. at 6 (RIV000134) (quoting Entergy’s Safety Commitments Test. at A47 (ENT000521)).

“consider all plant components, not only those with existing CUFs” as the starting point for its FMP.<sup>29</sup> By arguing that the CLB should be reconsidered, and the scope of ASME Code CUF fatigue evaluations should be broadly expanded to include a re-evaluation of fatigue usage for the entire plant, Intervenor’s arguments far exceed the permissible scope of this license renewal proceeding.

Not only that, Dr. Hopenfeld extends his arguments to the point of breaking when he contends that the FMP—which considers the effects of the *reactor coolant* environment on fatigue usage for reactor coolant pressure boundary components<sup>30</sup>—should be used to manage aging of “balance-of-plant” components. Most significantly, Dr. Hopenfeld asserts for the first time that Entergy should calculate environmentally-assisted fatigue usage factors (“CUF<sub>ens</sub>”) for balance-of-plant components.<sup>31</sup> Such components, of course, do not experience the reactor coolant environment, and the effects of fatigue on such components are addressed through separate TLAAAs that ensure compliance with the American National Standards Institute Code, Section B31.1.<sup>32</sup> These TLAAAs are separate from the FMP and are unchallenged in this contention.<sup>33</sup> By seeking to extend the scope of the EAF analyses conducted under the FMP to cover secondary plant components, Intervenor impermissibly stray even farther from the defined scope of this proceeding and contention.

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<sup>29</sup> *Id.*

<sup>30</sup> NUREG-1801, Vol. 2, Rev. 1, Generic Aging Lessons Learned (GALL) Report Tabulation of Results, Section X.M1, “Metal Fatigue of the Reactor Coolant Pressure Boundary,” at X M-1 to -2 (Sept. 2005) (NYS00146C).

<sup>31</sup> Hopenfeld Reb. Test. at 12, 14 (RIV000134).

<sup>32</sup> See Testimony of Entergy Witnesses Ian D. Mew, Alan B. Cox, Nelson F. Azevedo, Jeffrey S. Horowitz, and Robert M. Aleksick Regarding Contention RK-TC-2 (Flow-Accelerated Corrosion) at A144 (Oct. 12, 2012) (ENTR00029) (*citing* NUREG/CR-6260, Application of NUREG/CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components at 2-1 (NYS000355)).

<sup>33</sup> See Indian Point Energy Center License Renewal Application at § 4.3.2 (Non-Class 1 Fatigue) (Apr. 2007) (ENT000015B).

Accordingly, Dr. Hopenfeld's claims that Entergy must reconsider the Indian Point CLB as part of its FMP, along with his new claim that Entergy should perform CUF<sub>en</sub> analyses for secondary plant components, are outside the scope of this proceeding and contention, and they should be excluded as irrelevant.

**D. Intervenor's New Argument Regarding the Interpretation of Commission Regulations on No Significant Hazards Consideration Issues Raises Legal Issues that Are Outside the Scope of This Proceeding and Contention**

Finally, the Board should strike the portions of Intervenor's Revised SOP that request a legal interpretation of the term "no significant hazards consideration," as that phrase is used in 10 C.F.R. §§ 50.91(a) and 50.92, which are longstanding regulations governing the license amendment process for operating reactors. Any interpretation of these regulations is irrelevant to the question of the adequacy of Entergy's LRA under Part 54. Intervenor's argument effectively requests an advisory opinion from the Board on legal issues that are outside the Board's jurisdiction and immaterial to the resolution of any contested issue. This claim is also an entirely new argument and outside the scope of the admitted contention. Intervenor's arguments, therefore, should be stricken.

In the past, Intervenor has argued that the details of Entergy's AMPs must be incorporated as license conditions into the Indian Point renewed operating license, such that no aspect of the AMPs can be changed in the future without an opportunity for a hearing on any proposed license amendment.<sup>34</sup> Now extending this claim even further, Intervenor argues that because Entergy relies upon the "details and commitments" in its LRA to meet the requirements of Part 54, "then any proposed modification in those details and commitments must necessarily

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<sup>34</sup> See Revised SOP at 10-12 (NYS000451); see also State of New York and Riverkeeper Initial Statement of Position in Support of Joint Contention NYS-38/RK-TC-5 (June 19, 2012) at 36-38 (NYS000371).

involve a ‘significant hazards consideration’ . . . .”<sup>35</sup> Intervenors further argue that any future Entergy or NRC Staff conclusion that a commitment change does not involve a significant hazard would be erroneous.<sup>36</sup> If adopted, this unsupported and unprecedented theory<sup>37</sup> would prevent the NRC Staff from approving amendments to license renewal-related license conditions at Indian Point, or presumably any other nuclear plant with a renewed operating license, without affording intervenors an opportunity to request a hearing to be held *prior to the issuance of the amendment*.<sup>38</sup> In short, Intervenors are asking the Board for nothing less than an override of the express legal and regulatory framework applicable to the oversight of civilian nuclear power reactors in this country.

As a threshold matter, the Board lacks jurisdiction to consider such claims. Under 10 C.F.R. § 50.58(b)(6), “no significant hazards considerations” determinations, commonly referred to as “Sholly Amendment” determinations, are the exclusive province of the NRC Staff rather than any Board. Section 50.58(b)(6) has long been held to be a jurisdictional bar to intervenor challenges to Sholly Amendment determinations.<sup>39</sup> Thus, Intervenors’ regulatory

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<sup>35</sup> Revised SOP at 13 (NYS000451).

<sup>36</sup> *See id.* at 13 n.5 (emphasis in original).

<sup>37</sup> Contrary to Intervenors’ arguments, the Commission has defined the term “No Significant Hazards Consideration” to refer only to changes that could *reduce* safety. *See* 10 C.F.R. § 50.92(c). This interpretation is consistent with the legislative history of the Sholly Amendment. *See* Final Procedures and Standards on No Significant Hazards Considerations, 51 Fed. Reg. 7744, 7748 (Mar. 6, 1986).

<sup>38</sup> Under 10 C.F.R. §§ 50.91 and 50.92, the Commission is only authorized “to issue immediately effective reactor license amendments, ‘in advance of the holding and completing of any required hearing,’ upon a ‘no significant hazards consideration’ determination.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 117 (2001) (*quoting* Atomic Energy Act § 189a (2)(A), 42 U.S.C. § 2239(a)(2)(A)). An intervenor may still request a hearing on a license amendment with no significant hazards consideration, but in such cases the Staff need not await the resolution of the hearing before it issues the requested license amendment. *See* Final Procedures and Standards on No Significant Hazards Considerations, 51 Fed. Reg. at 7747.

<sup>39</sup> *See, e.g., Shearon Harris*, CLI-01-7, 53 NRC at 118 (holding that any Intervenor challenges on this topic will be summarily rejected: “Our regulations provide that ‘[n]o petition or other request for review of or hearing on the staff’s no significant hazards consideration determination will be entertained by the Commission.’ . . . The regulations are quite clear in this regard.”) (*quoting* 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990) (“The issue of whether the proposed

interpretation argument must be summarily dismissed by the Board for lack of subject matter jurisdiction.

This new argument is also outside the scope of the proceeding. Intervenors' argument relates exclusively to license amendment requests under Part 50.<sup>40</sup> The question in this proceeding is whether Entergy's LRA meets the requirements of Part 54.<sup>41</sup> Thus, any interpretation of the Sholly Amendment regulations is outside the scope of and immaterial to this license renewal proceeding.<sup>42</sup>

Finally, the new argument is outside the scope of the contention NYS-38/RK-TC-5. Nowhere in Intervenors' previous filings on NYS-38/RK-TC-5 have Intervenors raised any argument about the interpretation of the Sholly Amendment regulations. To raise this entirely novel argument for the first time in the Revised SOP is inappropriate and prejudicial.<sup>43</sup>

Accordingly, the Board should reject Intervenors' request for an advisory opinion interpreting the Sholly Amendment regulations, and the argument on this point should be stricken.

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amendment does or does not involve a significant hazards consideration is not litigable in any hearing") (*citing Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 4-5 (1986), *rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 495-96 (1989).

<sup>40</sup> See 10 C.F.R. §§ 50.58(b)(6), 50.91, 50.92.

<sup>41</sup> See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 66 (2008).

<sup>42</sup> See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999) (holding that a dispute "is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'") (*quoting* Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

<sup>43</sup> See *La. Energy Servs, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, (1998) ("Agency adjudications require advance notice of claims and a reasonable opportunity to rebut them. . . . Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions . . .") (*citing Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264–65 (1987) (plurality opinion of Marshall, J.); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553–54 (1978); *Seabrook*, ALAB-899, 28 NRC at 97 & n.11, *petition for review denied sub nom. Commonwealth of Mass. v. NRC*, 924 F.2d 311, 332–33 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991)).

**IV. CONCLUSION**

For the foregoing reasons, the Board should exclude from the record the portions of Intervenor's rebuttal testimony and exhibits identified in Attachment 1. It should also strike the portions of the Intervenor's Revised SOP identified in Attachment 1.

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*Counsel for Entergy Nuclear Operations, Inc.*

Dated in Washington, D.C.  
this 7th day of January 2013

**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)	)	
	)	January 7, 2013

**MOTION CERTIFICATION**

Pursuant to 10 C.F.R. § 2.323(b), counsel for Entergy certifies that he made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this Motion, and to resolve those issues, and he certifies that his efforts have been unsuccessful. The NRC Staff does not object to this Motion. NYS and Riverkeeper do not agree to the relief requested in this Motion. During the consultation process, the parties resolved a dispute over the reliability of the descriptions of a trade press article cited in Intervenors’ Revised SOP: Steven Dolley, *DOE plan coordinates R&D on extending LWR lifetimes*, Nucleonics Week (Feb. 9, 2012). Intervenors agreed to file an unopposed motion to admit this article as an exhibit by Wednesday, January 9. In return, Entergy agreed not to pursue its concerns related to that issue in this Motion.

*Signed (electronically) by Raphael P. Kuyler*

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**ENTERGY'S MOTION TO STRIKE PORTIONS OF INTERVENORS' REVISED  
STATEMENT OF POSITION AND MOTION IN LIMINE TO EXCLUDE PORTIONS  
OF THE PRE-FILED REBUTTAL TESTIMONY AND EXHIBITS FOR CONTENTION  
NYS-38/RK-TC-5 (SAFETY COMMITMENTS)**

**ATTACHMENTS**

<b>Attachment</b>	<b>No.</b>
Exclusion Chart.....	1

**ENTERGY'S MOTION TO STRIKE PORTIONS OF  
INTERVENORS' REVISED STATEMENT OF  
POSITION AND MOTION IN LIMINE TO  
EXCLUDE PORTIONS OF THE PRE-FILED  
REBUTTAL TESTIMONY AND EXHIBITS FOR  
CONTENTION NYS-38/RK-TC-5 (SAFETY  
COMMITMENTS)**

**ATTACHMENT 1**

Exclusion Chart

**Entergy Attachment 1 to Entergy’s Motion to Strike Portions of the Statement of Position and Motion in Limine to Exclude Portions Pre-Filed Rebuttal Testimony and Exhibits for Contention NYS-35/RK TC-5 (Safety Commitments)**

**Exclusion Chart**

**Table A – Portions of Prefiled Testimony to Be Excluded from Evidentiary Record**

<b>Location of Information to Be Stricken</b>	<b>Basis for Exclusion</b>
<b>Dr. Lahey’s Direct Testimony (Exh. NYS000374)</b>	
Page 24, line 2, through page 29, line 2.	Irrelevant. Raises general concerns about the use of engineering judgment in fatigue calculations that are outside the scope of this contention.
<b>Dr. Lahey’s Rebuttal Testimony (Exh. NYS000453)</b>	
Pages 14-17 (Section (2), titled “Limiting Primary Pressure Boundary Components”).	Irrelevant. Raises general concerns about the use of engineering judgment in fatigue calculations that are outside the scope of this contention.
<b>Dr. Hopenfeld’s Direct Testimony (Exh. RIV000102)</b>	
Page 15, line 14, though page 16, line 2.	Irrelevant. Raises general concerns about the use of engineering judgment in fatigue calculations that are outside the scope of this contention.
<b>Dr. Hopenfeld’s Rebuttal Testimony (Exh. RIV000134)</b>	
Pages 25, line 13, through page 27, line 29.	Irrelevant. Raises general concerns about the use of engineering judgment in fatigue calculations that are outside the scope of this contention.
Page 6, line 7, starting with “Entergy’s intent to limit . . .” through page 6, line 22, ending with “exist.”	Irrelevant. Argues that the scope of fatigue analyses should be expanded beyond CLB locations.
Page 9, line 25, starting with “Entergy refuses to acknowledge . . .” through page 10, line 4.	Irrelevant. Argues that the scope of fatigue analyses should be expanded beyond CLB locations.
Page 12, line 5, through page 15, line 21.	Irrelevant. Argues that the scope of fatigue analyses should be expanded beyond CLB locations.
Page 9, line 25, starting with “Entergy refuses to acknowledge . . .” through page 10, line 4.	Irrelevant. Argues that CUF <sub>en</sub> calculations should be performed for secondary plant components not subject to the reactor coolant environment.
Page 12, line 5, through page 15, line 21.	Irrelevant. Argues that CUF <sub>en</sub> calculations should be performed for secondary plant components not subject to the reactor coolant environment.

**Table B – Exhibits to Be Stricken**

<b>Location of Information to Be Stricken</b>	<b>Basis for Exclusion</b>
RIV000130, Entergy Ultrasonic Examination Report, IPEC00020853	Irrelevant with respect to NYS-38/RK-TC-5. Exhibit is introduced for this contention to support inadmissible arguments.
RIV000132, Excerpt of IP3, RO13 FAC Inspection Report (2005), IP00044076	Irrelevant with respect to NYS-38/RK-TC-5. Exhibit is introduced for this contention to support inadmissible arguments.
RIV000133, Excerpt of IP3, RO15 FAC Inspection Report (2009), IPEC00213685	Irrelevant with respect to NYS-38/RK-TC-5. Exhibit is introduced for this contention to support inadmissible arguments.
RIV000135, Entergy Ultrasonic Examination Reports, IPEC00020933	Irrelevant. Exhibit is introduced to support inadmissible arguments.
RIV000136, New York Power Authority Ultrasonic Examination Report, Report No.: 99UT155, IPEC00021837	Irrelevant. Exhibit is introduced to support inadmissible arguments.
RIV000137, New York Power Authority Ultrasonic Examination Report, Report No.: 99UT251, IPEC00021885	Irrelevant. Exhibit is introduced to support inadmissible arguments.
RIV000138, J.S. Kim & J.S. Seo, Development of Engineering Formulae for Stress Concentration Factors of Local Wall Thinning in CANDU Feeder Pipe Under Pressure, Proceedings of the ASME 2011 Pressure Vessels & Piping Division Conference, PVP2011, July 17-21, 2011, Baltimore, Maryland, USA, PVP2011-57930	Irrelevant. Exhibit is introduced to support inadmissible arguments.
RIV000139, M.J. Jhung, Fatigue Analysis of a Reactor Pressure Vessel For SMART, Nuclear Engineering and Technology, Vol. 44, No. 6 (August 2012)	Irrelevant. Exhibit is introduced to support inadmissible arguments.

**Table C – Portions of Revised Statement of Position to Be Stricken**

<b>Location of Information to Be Stricken</b>	<b>Basis for Exclusion</b>
<b>State of New York &amp; Riverkeeper, Inc. Revised Statement of Position in Support of Joint Contention NYS-38/RK-TC-5 (Exh. NYS000451)</b>	
Page 12, starting with “The Commission Regulations provide Entergy . . .” through page 13, ending with “in determining the adequacy of the AMP” and associated footnotes.	Irrelevant, immaterial, and the Board lacks jurisdiction. Impermissibly requests a Board interpretation of Part 50 regulations that are excluded from consideration in this proceeding for multiple reasons.