UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	November 22, 2013

ENTERGY'S ANSWER OPPOSING HUDSON RIVER SLOOP CLEARWATER'S REQUEST FOR THE BOARD TO TAKE JUDICIAL NOTICE OF A RECENT JUDICIAL FINDING

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") files this Answer opposing Hudson River Sloop Clearwater, Inc.'s ("Clearwater") Request for the Board to Take Judicial Notice of a Recent Judicial Finding ("Motion"), dated November 15, 2013.[1] Clearwater requests that the Atomic Safety and Licensing Board ("Board") take judicial notice of certain selected statements from an appealable decision by the U.S. District Court for the Southern District of New York in an unrelated court proceeding[2] challenging the City of New York's emergency management and preparedness plans under the Americans With Disabilities Act ("ADA").[3]

Once again, Clearwater seeks to divert this license renewal proceeding into an investigation of topics far beyond the narrow scope of the environmental justice ("EJ") issues

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1 Although Clearwater styles its pleading as a "request," the certification for this pleading characterizes it as a motion. *See* Motion at 4. Accordingly, Entergy is responding to it as such. *See* 10 C.F.R. § 2.323(c) (stating that answers to motions must be filed within 10 days after service of a written motion).

2 *Brooklyn Ctr. for Indep. of the Disabled* v. *Bloomberg*, 11 Civ. 6690 (S.D.N.Y. Nov. 7, 2013).

3 Clearwater, in its certification, mischaracterizes Entergy's position on judicial notice. *See* Motion at 4. Entergy does not pose a "blanket objection" to judicial notice. Instead—as was clearly communicated to Clearwater several times—Entergy opposes the use of judicial notice *in this instance* for the reasons set forth in this answer.

admitted for litigation. Clearwater persists in doing so despite the fact that the Board, just a few months ago, firmly rejected Clearwater's prior attempt to introduce these same irrelevant issues into this proceeding.[4] As repeatedly demonstrated by Entergy, the Nuclear Regulatory Commission ("NRC") Staff, rulings by this Board, and confirmed by governing Commission precedent, issues involving non-EJ populations and emergency planning and evacuation are outside the scope this proceeding.

Further, Clearwater's attempt to skirt binding Board and Commission precedent and governing regulations by seeking "judicial notice" must fail. Apart from the fact that all of the cited information is substantively outside the scope of this proceeding, Clearwater utterly fails to comply with the requirements for valid judicial notice as a matter of process or procedure. Far from identifying facts not subject to reasonable dispute, Clearwater instead hopes to convince the Board to adopt thirty-five statements, disputable facts and opinions by one judge on a different matter in an unrelated proceeding in which Entergy and the NRC were not parties—all in violation of the well-settled principles of judicial notice and collateral estoppel. Accordingly, the Board should deny the Motion.

II. BACKGROUND

Contention CW-EC-3A alleges that the NRC Staff's Final Supplemental Environmental Impact Statement ("FSEIS") contains flawed EJ analyses that fail to address alleged disparate severe accident impacts on EJ populations near Indian Point.[5] In admitting CW-EC-3A, the

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[4] *See* Licensing Board Order (Granting New York's Motion, Denying Clearwater's Motion, and Denying CZMA Motions) at 2 (June 12, 2013) (unpublished).

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

Board made clear it was *not* admitting a contention claiming that Indian Point emergency plans are deficient.[6] This restriction is necessarily dictated by Commission regulations and case law.[7]

Likewise, an EJ analysis itself is a limited one. The Commission's 2004 Environmental Justice Policy Statement restricts the focus of an EJ review to "identifying and weighing disproportionately significant and adverse environmental impacts on minority and low-income populations that may be different from the impacts on the general population."[8] The EJ inquiry, therefore, is not an inquiry into potential disproportionate impacts on any groups other than minority or low-income populations.[9]

Clearwater has repeatedly and unsuccessfully sought to introduce evidence on these very same excluded topics. Most pertinently, in May 2013, Clearwater attempted to supplement the record with a pleading from a U.S. attorney filed in the very same case that is the subject of Clearwater's latest Motion.[10] In June 2013, the Board firmly rejected Clearwater's motion,

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

7 *See id.* (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 561 (2005)); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 302 (2010) (ruling that witness statements on "the issue of emergency planning – the need to provide accurate, 'real time' projections of the location and duration of potential public exposures to determine whether, when, and where particular population groups may need to be evacuated" are beyond the scope of a license renewal severe accident mitigation alternatives National Environmental Policy Act ("NEPA") review); *see also Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001) ("Emergency planning, therefore, is one of the safety issues that need not be re-examined within the context of license renewal.").

8 Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047 (Aug. 24, 2004) ("NRC Environmental Justice Policy Statement") (ENT000260); *see also* Council on Environmental Quality, Environmental Justice Guidance under the National Environmental Policy Act at 1 (1997) (ENT000266) (describing the EJ analysis in similar fashion).

9 In support of its motion, Clearwater quotes its amended contention, which states that the FSEIS does not adequately assess the impacts of relicensing on "minority, low-income and *disabled* populations." *See* Motion at 1 (citing July 6, 2011 Order at 60) (emphasis added by Clearwater). But in admitting the original CW-EC-3, the Board did not include impacts on disabled populations in the scope of admitted issues. *See Indian Point*, LBP-08-13, 68 NRC at 196, 201. The Board's later restatement of the contention does not and cannot expand the category of EJ populations as defined by the Commission. *See Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 64 (2001) (limiting the EJ review to impacts on "minority populations and low-income populations").

10 *See* Hudson River Sloop Clearwater, Inc.'s Motion for Leave to File One Additional Exhibit Related to Contention EC-3A (Environmental Justice) at 2 (May 17, 2013) ("May 2013 Motion").

finding that its submittal was "not relevant to the reasonableness of the NRC Staff's environmental justice review of Indian Point, Units 2 and 3."[11]

Notwithstanding that directly-relevant decision, more than a year after the hearing on CW-EC-3, and six months after the submission of reply findings of fact and conclusions of law, Clearwater now seeks to introduce the court's decision in the very same proceeding that was the subject of the Board's June 2013 Order. Moreover, Clearwater seeks to raise points that are essentially identical in substance to the issues previously raised and rejected by the Board as inadmissible.

III. JUDICIAL NOTICE IS NOT WARRANTED

A. The U.S. District Court Decision Is Irrelevant and Immaterial

In a different order rejecting a different Clearwater motion to supplement the record to include various press reports regarding impacts of Hurricane Sandy, in December 2012 the Board ruled that only relevant, material, and reliable evidence that is not unduly repetitious will be admitted post-hearing.[12] In this proceeding, the Board has already issued an order that documents related to the adequacy of New York City's emergency plans and the city's compliance with the ADA are not relevant to the matters at issue in this proceeding.[13] The Board's determination applies equally to the decision in *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg* ("*BCID*"), because it is wholly unrelated to the purported radiological impacts of a severe accident on EJ populations at issue in Clearwater's contention.[14]

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[11] Licensing Board Order (Granting New York's Motions, Denying Clearwater's Motion, and Denying CZMA Motions) at 2 (June 12, 2013) (unpublished) ("June 12, 2013 Order").

[12] Licensing Board Order (Denying Clearwater's Motion to Supplement the Record) at 3-4 (Dec. 5, 2012) ("Dec. 5, 2012 Order") (unpublished). This is consistent with 10 C.F.R. § 2.337, which governs the admissibility of evidence at hearing, and also provides standards for when a presiding officer in an NRC proceeding may take judicial notice, as explained in Section III.B, below.

[13] *See* June 12, 2013 Order at 2.

[14] *Indian Point*, LBP-08-13, 68 NRC at 200.

In fact, the *BCID* decision has no bearing on the matters at issue in this license renewal proceeding. Rather, the decision pertains to the ADA—a statute unrelated to license renewal as governed by the Atomic Energy Act ("AEA") and the National Environmental Policy Act ("NEPA"). Moreover, the *BCID* decision is irrelevant to the EJ analysis. Commission precedent and policy clearly establish that the purpose of an EJ evaluation is to consider disproportionately high and adverse impacts on *low-income* and *minority* populations.[15] Disabled individuals, the subject of *BCID* decision, are not EJ population groups notwithstanding Clearwater's unsupported attempts to include them.[16]

Clearwater's Motion also, yet again, raises excluded emergency planning issues.[17] It is well settled—and not subject to debate—that emergency planning issues are outside the scope of this license renewal proceeding.[18] In admitting the original version of CW-EC-3A, the Board made clear that "consideration of emergency plans [are] outside the scope of this proceeding."[19] For this additional reason, the *BCID* decision is inadmissible.[20]

B. Judicial Notice is Improper as a Matter of Process and Procedure

Clearwater's request for judicial notice suffers from several deficiencies apart from its substantive irrelevance to this proceeding. Namely, Clearwater misapplies the standards for

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15 *See Hydro Res.*, CLI-01-4, 53 NRC at 64; *La. Energy Servs. L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998); NRC Environmental Justice Policy Statement at 52,040 (ENT000260); LIC-203, Rev. 2, Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues, App. C, at C-3 (Feb. 17, 2009) (ENT000264).

16 *See supra note* 8. Clearwater once again asserts that disabled individuals are poor, *see* Motion at 2, but provides no NRC or other precedent to support the argument that the scope of an EJ analysis can be expanded through bootstrapping in this fashion.

17 *See* Motion at 2 ("[Clearwater] has therefore extracted the specific facts listed in Appendix A because they relate directly to the ability of New York City's *evacuation plans* to be effective for disabled people.") (emphasis added).

18 *See*, *e.g.*, *Pilgrim*, CLI-10-11, 71 NRC at 302.

19 *Indian Point*, LBP-08-13, 68 NRC at 149 (rejecting proposed contention NYS-29); *see also id*. at 165-66 (rejecting proposed contention Connecticut EC-2).

20 10 C.F.R. § 2337(a).

when judicial notice is warranted as a matter of procedure. As discussed further below, neither the principle of judicial notice, nor that of collateral estoppel, supports Clearwater's Motion.

Clearwater claims that "a court may take judicial notice of an order of another court for the limited purpose of noticing the undisputed facts therein."[21] But the *Lone Star* case that Clearwater relies on contains a much narrower ruling: generally, a court may take judicial notice of a document from another proceeding solely for the purpose of "establish[ing] the fact of such litigation and related filings" and not for its contents, which remain "subject to reasonable dispute."[22] Such judicial notice would serve no purpose in this instance, as the existence of the *BCID* litigation is not disputed or relevant to this proceeding.

Under 10 C.F.R. § 2.337(f)(1), the Commission or Board may take notice of any fact of which a court of the United States may take judicial notice. The Federal Rules of Evidence, in turn, allow courts to take judicial notice of a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.[23] Clearwater, however, is not seeking to supplement the record with facts that cannot reasonably be disputed. Instead, Clearwater identifies thirty-five statements, disputable facts and opinions from the district court's opinion in BCID.[24] Most, if not all, of these statements simply cannot be characterized as facts "not subject to reasonable dispute."[25]

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21 Motion at 2 (citing *Kay v. Lone Star Fund v. (U.S.), L. P.*, 453 B.R. 645, 664-65 (N.D.Tex. 2001)). It is worth noting that the court in *Lone Star* was discussing court documents (*i.e.*, pleadings, affidavits, and depositions) and *not* decisions. *See Lone Star*, 453 B.R. at 664-66.

22 *Lone Star*, 453 B.R. at 664-65.

23 Fed. R. Evid. 201.

24 *See generally* Motion, App. A.

25 *See*, *e.g.*, Motion, App. A, Fact 4 ("Most of the City's public transportation, however, is inaccessible to people with disabilities."); *id*., Fact 26 ("Most glaringly, apart from the [Homebound Evacuation Operation], the City has no plan whatsoever for evacuating people with disabilities from multi-story buildings. The evidence at trial showed, however, that many people with disabilities cannot evacuate multi-story buildings on their own, particularly if a power outage has rendered elevators inoperable.").

Clearwater cites no precedent for a Board—or any tribunal—taking judicial notice of numerous statements from an opinion in an unrelated proceeding. Thus, Clearwater's request that the Board take judicial notice of these statements must be denied.

Clearwater's request also must be barred under doctrine of collateral estoppel—a principle that allows a party to preclude litigation of an issue that would otherwise be in dispute based on a previous decision.[26] Collateral estoppel does not apply when "the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate the issue in the earlier case."[27] Although Clearwater wishes to bind Entergy and the NRC Staff to the cited statements in the District Court opinion, neither Entergy nor the NRC Staff were parties to the *BCID* proceeding. Accordingly, Clearwater's motion should be denied for this additional reason.

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[26] *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.").

[27] *See e.g.*, *Allen*, 449 U.S. at 95; *see also Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 n.3 (1982) (citing *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 527–530 (1945)) (stating that notice of information from another proceeding is only permissible where "the parties to the two proceedings are identical, there was an opportunity for rebuttal, and no party is prejudiced by reliance on the information").

IV. CONCLUSION

For the reasons set forth above, the Board should deny the Motion because the proposed material is irrelevant, relates to matters outside the scope of this proceeding, and is not the proper subject for judicial notice.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 22nd day of November 2013

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MOTION CERTIFICATION

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

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

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Entergy Answer Opposing Hudson River Sloop Clearwater Request for the Board to Take Judicial Notice of a Recent Judicial Finding" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Lance A. Escher

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