November 25, 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-LR/286-LR
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	

NRC STAFF'S ANSWER IN OPPOSITION TO "HUDSON RIVER SLOOP CLEARWATER, INC.'S REQUEST FOR THE BOARD TO TAKE JUDICIAL NOTICE OF A RECENT JUDICIAL FINDING"

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 opposing Hudson River Sloop Clearwater, Inc.'s ("Clearwater") motion requesting that the Atomic Safety and Licensing Board ("Board") take judicial notice of certain findings of fact contained in *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, No. 11 Civ. 6690 (S.D.N.Y. Nov. 9, 2013) ("*Brooklyn Ctr.*"), regarding the adequacy of New York City's emergency preparedness plans under the Americans with Disabilities Act ("ADA"), in support of its Contention EC-3A (Environmental Justice) ("Contention CW-EC-3A").[1] As discussed more fully below, the Staff opposes Clearwater's Motion on the grounds that the specified facts do not meet the legal standards for judicial notice or collateral estoppel, are barred by this Board's June 12, 2013 ruling regarding an exhibit on the exact

[1] Hudson River Sloop Clearwater, Inc.'s Request for the Board to Take Judicial Notice of a Recent Judicial Finding (Nov. 15, 2013) ("Motion").

same issue,[2] and are otherwise irrelevant, immaterial, and concern issues that fall outside the scope of this proceeding. Accordingly, Clearwater's Motion should be denied.

LEGAL STANDARDS

In accordance with 10 C.F.R. § 2.337(f)(1), a board may take official notice "[1] of any fact of which a court of the United States may take judicial notice or [2] of any technical or scientific fact within the knowledge of the Commission as an expert body." Rule 201 of the Federal Rules of Evidence ("Rule 201") permits judicial notice of any fact "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[3] Similarly, the Commission has stated that it may take judicial notice of "a matter beyond reasonable controversy" and one that is "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."[4]

Several federal courts of appeals including the Second Circuit have generally held that even though a court may take judicial notice of a document filed in another court to establish the fact of such litigation and related filings, a court cannot take judicial notice of the factual findings of another court.[5] Factual findings are not subject to judicial notice because (1) such findings do

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

[3] Fed. R. Evid. 201.

[4] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61, 74-75 (1991).

[5] *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc*., 969 F.2d 1384, 1388-89 (2d Cir.1992); *Holloway v. A.L. Lockhart*, 813 F.2d 874, 878-79 (8th Cir.1987); *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir.1994). The Fifth and Seventh Circuits adopted similar, but not identical rules in that the courts declined (or in the case of the Fifth Circuit failed to reach whether it was necessary) to adopt a per se rule against taking judicial notice of an adjudicative fact in a court record. *See Taylor v. Charter Medical Corp.*, 162 F.3d 827, 829-832 (5th Cir. 1998) (finding that that "a court cannot (at least as a general matter) take judicial notice of a judgment for other, broader purposes" than for the limited purpose of taking notice of the judicial act itself); *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 n.6 ("We agree that courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed.

not constitute facts "not subject to reasonable dispute" within the meaning of Rule 201; and (2) "were [it] permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous."[6]

Collateral estoppel precludes the re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction in a proceeding involving the same parties.[7] Collateral estoppel requires the presence of at least four elements in order to be given effect: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) there was a valid and final judgment in the prior action; and (4) the determination was essential to the prior judgment.[8] In addition, the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation.[9] Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties.[10] Due process prohibits the use of collateral estoppel in these instances because the party has never been afforded the opportunity to present its evidence and arguments on the claim.[11] Importantly, where the legal standards of two statutes are significantly different, the decision of issues under

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However, it is conceivable that a finding of fact may satisfy the indisputability requirement of Fed. R. Evid. 201(b).").

[6] *Taylor*, 162 F.3d at 830 (citing *Jones*, 29 F.3d at 1553; *Lib. Mut. Ins*., 969 F.2d at 1388-89; *Holloway*, 813 F.2d at 879); *See also General Electric*, 128 F.3d at 1083.

[7] *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557, 561 (1977) (citing *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB–182, 7 AEC 210, 212–13, remanded on other grounds, CLI–74–12, 7 AEC 203 (1974)).

[8] *David Geisen*, CLI-10-23, 72 NRC 210, 249 (2010); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd*, ALAB-575, 11 NRC 14 (1980)).

[9] *David Geisen*, CLI-10-23, 72 NRC at 249; *Commonwealth Edison Co*. (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-11, 21 NRC 609, 620 (1985), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986); *Carolina Power and Light Co.* (Shearon Harris Nuclear Plant), ALAB-837, 23 NRC 525, 536 (1986).

[10] *See Philadelphia Elec. Co*. (Peach Bottom Station, Units 2 & 3), ALAB-640, 13 NRC 487, 543 (1981).

[11] *General Elec.*, 128 F.3d at 1083 (citing *Blonder–Tongue Lab., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

one statute does not give rise to collateral estoppel in litigation of similar issues under a different statute.[12]

DISCUSSION

In its Motion, Clearwater asks the Board to take judicial notice of 35 findings of fact contained in the *Brooklyn Ctr.* judicial opinion regarding the adequacy of New York City's emergency preparedness plans under the ADA because they "relate directly to the ability of New York City's evacuation plans to be effective for disabled people."[13] Clearwater further asserts that these facts are relevant because "the contention alleges among other things that the NRC Staff failed to identify the potential for disparate impact on disabled people should an accident at Indian Point necessitate evacuation of New York City."[14] Clearwater's Motion should be denied because the specified facts do not meet the legal standards for judicial notice or collateral estoppel, are barred by this Board's June 12, 2013 ruling regarding an exhibit on the exact same issue, and are irrelevant, immaterial, and concern issues outside the scope of this proceeding.

1. The Specified Facts Do Not Meet the Standards for Judicial Notice

In its Motion, Clearwater asserts that a court may take judicial notice of an order of another court for the limited purpose of noticing the undisputed facts therein.[15] However, as several federal courts including the Second Circuit (and the legal precedent cited by Clearwater itself note), while a court may take judicial notice of a document filed in another court to establish the fact of such litigation and related filings, a court generally cannot take judicial

[12] *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB–560, 10 NRC 265, 363 (1979) (citing *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922); *In re Yarn Processing Patent Validity Litigation*, 498 F.2d 271, 278–79 (5th Cir. 1974); *Tipler v. E.I. duPont de Nemours & Co.*, 443 F.2d 125, 128–29 (6th Cir. 1971); *Pacific Seafarers, Inc. v. Pacific Far East Line*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969)).

[13] Motion at 2.

[14] *Id.*

[15] *Id.*

notice of the factual findings of another court.[16] Here, Clearwater is not asking the Board to simply take judicial notice of the existence of a document in a separate proceeding or of undisputed facts from an order of another court. Clearwater is asking the Board to take notice of 35 findings of fact made by the U.S. District Court in the Southern District of New York in a separate proceeding. These factual findings do not constitute facts "not subject to reasonable dispute" and are therefore inappropriate for judicial notice.[17] Accordingly, Clearwater's request should be denied.

Clearwater also attempts to impermissibly renew its request that the Board take judicial notice of U.S. Census Bureau statistics purporting to confirm a correlation between low-income status and disability.[18] On May 17, 2013, Clearwater requested that the Board take judicial notice of this same correlation.[19] The Board denied Clearwater's motion.[20] Moreover, in its response to Clearwater's previous motion, the Staff demonstrated that the correlation Clearwater has presented for consideration of judicial notice is not "a matter beyond reasonable controversy" and is not a proper issue for judicial notice.[21] Therefore, Clearwater's Motion should be denied.

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[16] *Kay v. Lone Star Fund v. (U.S.), L.P.*, 453 B.R. 645, 664 (N.D. Tex. 2011); *Liberty Mut. Ins. Co.*, 969 F.2d at 1388-89 (2d Cir.1992); *Holloway*, 813 F.2d at 878-79; *Jones*, 29 F.3d at 1553. *See also Taylor*, 162 F.3d at 829-30.

[17] *Taylor*, 162 F.3d at 830 (citing *Jones*, 29 F.3d at 1553; *Lib. Mut. Ins.*, 969 F.2d at 1388-89; *Holloway*, 813 F.2d at 879); *See also General Electric*, 128 F.3d at 1083.

[18] Motion at 2.

[19] Hudson River Sloop Clearwater, Inc.'s Motion for Leave to File One Additional Exhibit Related to Contention EC-3A (Environmental Justice) (May 17, 2013) ("May 17th Motion").

[20] June 12th Order, at 2.

[21] *See* NRC Staff's Answer in Opposition to "Hudson River Sloop Clearwater, Inc.'s Motion for Leave to File One Additional Exhibit Related to Contention EC-3A (Environmental justice) (May 28, 2013), at 4-5. As the Staff testified, persons who are disabled do not constitute a distinct EJ population and are not required to be addressed as such in the Staff's environmental justice assessment. Staff Testimony on CW-EC-3A (Ex. NRC000063) at 20-21. Thus, Executive Order 12898 and NRC guidance documents including the Commission's EJ Policy Statement direct the Staff to only consider individuals who are low-income and/or part of a minority group in the Staff's EJ assessment. Staff Testimony on CW-EC-3A (Ex. NRC000063) at 20-21; Tr. at 2744.

2. The Specified Facts Do Not Meet the Standards for Collateral Estoppel

To the extent that Clearwater's Motion attempts to assert that the doctrine of collateral estoppel should be applied to the Staff, Clearwater's Motion should be rejected. Collateral estoppel requires the presence of at least four elements in order to be given effect: (1) the issue sought to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) there was a valid and final judgment in the prior action; and (4) the determination was essential to the prior judgment.[22] However, collateral estoppel is not applicable here because the issues to be precluded are not the same as those in the *Brooklyn Ctr.* opinion. The legal standards at issue in the *Brooklyn Ctr.* opinion are the ADA and its implementing regulations which are significantly different from the applicable legal standards in Contention CW-EC-3A, which are the National Environmental Policy Act ("NEPA") and the Commission's regulations implementing NEPA. Therefore, the *Brooklyn Ctr.* opinion regarding adequacy of the New York City emergency plans as it relates to disabled individuals under the ADA does not give rise to collateral estoppel in this proceeding regarding the Staff's environmental review under NEPA of potential disproportionately high and adverse impacts to environmental justice populations within 50 miles of Indian Point.[23] Additionally, the party against whom the doctrine of collateral estoppel is asserted must have been a party or in privity with a party to the earlier litigation.[24] Participants in a proceeding cannot be held bound by the record adduced in another proceeding to which they were not parties.[25] Here, neither the Staff

[22] *David Geisen*, CLI-10-23, 72 NRC at 249; *South Texas Project*, LBP-79-27, 10 NRC at 566.

[23] *Davis-Besse*, ALAB–560, 10 NRC at 363.

[24] *David Geisen*, CLI-10-23, 72 NRC at 249; *Braidwood*, LBP-85-11, 21 NRC at 620; *Shearon Harris*, ALAB-837, 23 NRC at 536.

[25] *See Peach Bottom*, ALAB-640, 13 NRC at 543.

nor the applicant was a party or was in privity with a party in the *Brooklyn Ctr.* federal district court proceeding.[26] Accordingly, Clearwater's Motion should be denied.

3. The Board's June 12, 2013 Ruling Bars Clearwater's Request

On May 17, 2013, Clearwater moved for leave to file an additional exhibit, specifically, a "Statement of Interest" regarding the adequacy of New York City's emergency preparedness plans and potential impacts to disabled individuals under the ADA.[27] On June 12, 2013, this Board denied Clearwater's motion, finding that the "Statement of Interest by the United States of America is not relevant to the reasonableness of the NRC Staff's environmental justice review of Indian Point, Units 2 and 3."[28] Clearwater's Motion impermissibly seeks to have this Board reconsider its denial of Clearwater's previous motion. The Statement of Interest was a proffered exhibit filed in the exact same federal district court proceeding as the *Brooklyn Ctr.* judicial opinion at issue in Clearwater's current Motion and related to the exact same issues. Thus, the issues and facts of which Clearwater now seeks judicial notice are no different than the issues already rejected by this Board. Moreover, Clearwater has not explained how any of this information is different from its previous request with the exception of appearing in the U.S. District Court's findings of fact. Nothing presented in Clearwater's current Motion would suggest that this Board's previous ruling on this issue made an error of law or fact. Therefore, the Board's June 12, 2013 ruling is controlling and bars Clearwater's request regarding facts related to these exact same issues.

[26] The parties in the New York Proceeding were, as listed in the judicial opinion provided by Clearwater: Brooklyn Center for Independence of the Disabled, Center for Independence of the Disabled, New York, Gregory D. Bell, Tania Morales, and Michael R. Bloomberg in his official capacity as Mayor of the City of New York. Motion, Appendix B, at 1.

[27] May 17th Motion.

[28] June 12th Order at 2.

4. The Specified Facts Are Otherwise Irrelevant, Immaterial, and Out of Scope

Finally, the specified facts are neither relevant nor material to Contention CW-EC-3A. The specified facts that Clearwater asks the Board to take judicial notice of relate to the adequacy of New York City's emergency preparedness plans under the ADA. However, these facts do not discuss any disproportionately high and adverse impacts to environmental justice ("EJ") populations in the event of a severe accident at Indian Point Nuclear Generating Units 2 and 3 ("Indian Point") or any impacts to EJ populations that may be caused by license renewal of Indian Point. Moreover, persons who are disabled do not constitute a distinct EJ population and are not required to be addressed as such in the Staff's environmental justice assessment.[29] Further, none of the specified facts mention the Indian Point onsite or offsite emergency plans. Moreover, to the extent the specified facts discuss the adequacy of emergency planning measures in New York City and their compliance with the ADA, these facts are irrelevant in that these issues fall outside the scope of this license renewal proceeding.[30] Additionally, inasmuch as the specified facts relate to the adequacy of the New York City emergency plans during coastal storms such as Hurricane Sandy, these facts, as the Board has previously ruled, are neither material nor relevant to the reasonableness of the Staff's environmental justice review of Indian Point.[31] For these reasons, Clearwater's Motion should be denied.

[29] Staff Testimony on CW-EC-3A (Ex. NRC000063) at 20-21.

[30] 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).

[31] *See* Order (Denying Clearwater's Motion to Supplement the Record) (Dec. 5, 2012) (unpublished) ("[T]he Board finds that the documents submitted by Clearwater dealing with an unrelated weather event [(Hurricane Sandy)] are immaterial and not relevant to the reasonableness of the NRC Staff's environmental justice review of Indian Point, Units 2 and 3.").

CONCLUSION

For the reasons discussed above, Clearwater's motion should be denied because the 35 findings of fact Clearwater specifies do not meet the legal standards for judicial notice or collateral estoppel, are barred by the Board's June 12, 2013 ruling regarding an exhibit on the exact same issue, and are otherwise irrelevant, immaterial, and relate to issues outside the scope of this license renewal proceeding.

Respectfully submitted,

/Signed (electronically) by/

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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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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR/286-LR
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(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 IN OPPOSITION TO 'HUDSON RIVER SLOOP CLEARWATER, INC.'S REQUEST FOR THE BOARD TO TAKE JUDICIAL NOTICE OF A RECENT JUDICIAL FINDING,'" dated November 25, 2013, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above captioned proceeding, this 25th day of November, 2013.

/Signed (electronically) by/

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