

October 5, 2015

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 TO STATE OF NEW YORK MOTION FOR LEAVE TO
FILE TWO NRC DOCUMENTS AS ADDITIONAL
EXHIBITS ALONG WITH PRE-FILED SUPPLEMENTAL TESTIMONY

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the "State of New York Motion for Leave to File Two NRC Documents as Additional Exhibits Along with Pre-Filed Supplemental Testimony," ("New York's Motion") filed by the State of New York ("New York"), on September 23, 2015.

New York's motion seeks to introduce three new exhibits, consisting of two documents and supplemental testimony from Dr. Richard T. Lahey. The first proposed exhibit, Ex. NYS000574, is NUREG/CR-7184, ANL-12/56, "Crack Growth Rate and Fracture Toughness Tests on Irradiated Cast Stainless Steels" ("NUREG/CR-7184"). The second proposed exhibit, Ex. NYS000575, is NUREG/CR-7185, ANL-14/10, "Effects of Thermal Aging and Neutron Irradiation on Crack Growth Rate and Fracture Toughness of Cast Stainless Steels and Austenitic Stainless Steel Weld" ("NUREG/CR-7185"). The third exhibit, Ex. NYS000576 (Dr. Lahey's Supplemental Testimony), consists Dr. Lahey's proposed supplemental testimony discussing NYS000574 and NYS000575.

In its Motion, New York asserts that it only recently identified the two NUREG/CR documents because Entergy disclosed them in its August and September 2015 logs of potentially relevant documents; that New York approached the other parties as soon as its

witness identified them as relevant; and that it then timely filed its motion. New York's Motion at 2-4. New York also states that the documents "are not 'redundant'" contrary to the position expressed by the Staff during consultations on the Motion. New York's Motion at 6. New York further claims that it could not have acted sooner due to the timing of the disclosures, the unavailability of its witness, and the amount of work involved in responding the Entergy and Staff's testimony, statements of position, and exhibits. New York's Motion at 7-8.

The Staff respectfully submits that New York's Motion should be denied, because (1) the exhibits and the information contained therein are redundant and cumulative to the information already presented to Board through the pre-filed testimony and exhibits previously filed in this proceeding; (2) the documents were publically available significantly prior to Entergy's listing them in its disclosure log; and (3) New York should have been able to address these issues in a timely manner earlier, inasmuch as New York's witness states that the allegedly new information only confirms his previous testimony and he was aware of earlier versions of its most recent proposed exhibits. Thus, New York's Motion should be denied.

BACKGROUND

This proceeding concerns the license renewal application ("LRA") submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") for Indian Point Nuclear Generating Units 2 and 3 ("IP2" and "IP3") on April 23, 2007. A Notice of Opportunity for Hearing on the application was published in the Federal Register on August 1, 2007 and on November 30, 2007, New York filed its petition for leave to intervene in the proceeding.¹ On July 31, 2008, the Board issued its

¹ See "New York State Notice of Intention to Participate and Petition to Intervene" (Nov. 30, 2007).

decision in LBP-08-13, in which it, *inter alia*, granted New York's petition to intervene and admitted many of its contentions.²

On November 6, 2014, the Staff issued Supplement 2 to the Safety Evaluation Report ("SER") related to license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3").³ Therein, the Staff, *inter alia*, presented its evaluation of the IP2/IP3 Reactor Vessel Internals ("RVI") Aging Management Program and Inspection Plan ("AMP"). New York and Riverkeeper, Inc. sought leave to supplement the bases for Contentions NYS-25 and NYS-38/RK TC-5) to address the new information; on March 31, 2015, the Board granted those motions.⁴

In accordance with the Board's Revised Scheduling Order of December 9, 2014,⁵ as modified on May 27, 2015,⁶ New York and Riverkeeper filed revised statements of position, written testimony with affidavits, and exhibits on June 9, 2015; Entergy and the Staff filed their new or revised statements of position, written testimony with affidavits, and exhibits on August 10, 2015. On September 9, 2015, New York and Riverkeeper filed rebuttal testimony, exhibits and revised statements of position. Two weeks later, on September 23, 2015, New

² *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

³ "Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3, Supplement 2," NUREG-1930, Supp. 2 (Nov. 2014) ("SER Supplement 2") (ADAMS Accession No. ML14310A803) (Ex. NYS000507).

⁴ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Memorandum and Order (Granting Motions for Leave to File Amendments to Contentions NYS-25 and NYS-38/ RK-TC-5)" (Mar. 31, 2015).

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Revised Scheduling Order" (Dec. 9, 2014), at 2.

⁶ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Granting New York's Motion for an Eight-Day Extension of the Filing Deadline)" (May 27, 2015).

York filed its motion seeking to introduce three new exhibits.⁷ Evidentiary hearings are scheduled to be held just six weeks from now, commencing on November 16, 2015.⁸

DISCUSSION

I. The Proposed Exhibits Should Be Rejected

New York's legal arguments in support of admitting the proposed exhibit raise four issues. First, New York argues that it should be allowed to proffer Exs. NYS000574 and NYS000575 because they are relevant to the proposed contention. Second, New York asserts that without these two reports, the Board would not be able to develop a sound hearing record. Third, New York asserts that no prejudice or delay in the proceeding would occur by the admission of the proposed exhibits. Fourth, New York asserts that it pursued its motion in a timely manner.

The Staff respectfully submits that the Board should reject New York's request to file the three new proposed exhibits. As set forth below, (1) the proposed exhibits are redundant and cumulative; (2) the information proposed by the parties through the previously filed exhibits and testimony are sufficient to create an adequate record for the hearing; and (3) New York's filing is inexcusably late.

⁷ Meanwhile, the parties are busy preparing for the upcoming evidentiary hearings on Track 2 contentions. In accordance with the Board's Revised Scheduling Order, Entergy filed a motion to strike portions of New York's rebuttal testimony on September 21, 2015; answers to Entergy's motion are due October 1, 2015. In addition, proposed Board questions, motions for leave to conduct cross-examination, and cross examination plans are due by October 9, 2015 Revised Scheduling Order (Dec. 9, 2014) at 2-3.

⁸ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Notice of Hearing" (Apr. 23, 2015).

A. The Proposed Exhibits are Redundant and Cumulative to the Previously Submitted Testimony and Exhibits

New York's proposed new exhibits and supplemental testimony are redundant and cumulative to the testimony and exhibits already filed in this proceeding. Neither New York's Motion nor Dr. Lahey's Proposed Supplemental Testimony provides any explanation of how NUREG/CR-7184 and NUREG/CR-7185 are different from or provide any non-cumulative information beyond the exhibits and testimony already submitted in this proceeding. As New York admits, Ex. NYS000488A and NYS000488B are an earlier version of NUREG/CR-7184, i.e., New York's proposed exhibit NYS000574. New York's Motion at 3-4; Dr. Lahey's Supplemental Testimony at 7-8.⁹ New York and its witness both acknowledge that they addressed this document in their earlier testimony. New York's Motion at 3-4; Dr. Lahey's Supplemental Testimony at 7-8. New York's Motion asserts without support that NYS000574 (NUREG/CR-7184), is not redundant. New York's Motion at 6. Yet, Dr. Lahey's Supplemental Testimony is essentially silent as to any changes in NUREG/CR-7184 from its previously submitted exhibit NYS000488A and B. See Dr. Lahey's Supplemental Testimony at 7-8. Dr. Lahey states that "It appears that Argonne National Laboratory and the USNRC have subsequently made some edits and republished the document" *Id.* However, Dr. Lahey and New York remain silent as to what these edits were and how they are material to the contentions or Dr. Lahey's testimony in this proceeding. In fact, an examination of NYS000574 (NUREG/CR-7184) reveals that this document is redundant to the previous exhibits and its admission would not add meaningful or non-cumulative information to the record before the Board.

⁹ Dr. Lahey's Supplemental Testimony appears to confuse NYS000575 and NYS000574 at times. See Dr. Lahey's Supplemental Testimony at 2, 6-7.

Similarly, New York's Motion and Dr. Lahey's Supplemental Testimony do not show anything new in Ex. NYS000575 (NUREG/CR-7185). Dr. Lahey states: "this report ... contains information that I have not seen in previous USNRC reports." Dr. Lahey's Supplemental Testimony at 6. Yet, Dr. Lahey does not specify any information that he has not seen in other reports. See *id.* Moreover, New York's witness confirms that NYS000575 provides information that is consistent with his previous testimony and, thus, is redundant and cumulative to the existing record before the Board.¹⁰ See *id.* at 4.

In sum, Dr. Lahey's Supplemental Testimony states that the two exhibits, NYS000574 and NYS000575, support his previously submitted testimony, but does not indicate any manner in which they provide new information that was not available in other, previously filed exhibits. Dr. Lahey's Supplemental Testimony at 4-7. As such, these exhibits do not add information to the existing record before the Board.

Since New York's proposed additional exhibits are redundant and cumulative of the information already pending before the Board, the NUREG/CR reports (Exs. NYS000574 and NYS000575) and Dr. Lahey's additional testimony (Ex. NYS000576) should not be admitted into evidence in this proceeding.

¹⁰ Dr. Lahey and New York seem to place some emphasis on the fact that these documents have been published as NUREGs; they fail to note, however, that these are contractor-generated reports. While Dr. Lahey attempts to explain the NRC's role and responsibility for NUREG/CR-7184 and NUREG/CR-7185, New York and Dr. Lahey misunderstand the NRC's role in publishing NUREG/CR reports. In this regard, the Staff's witnesses provided an explanation during hearings on the Track 1 contentions regarding the different types of NUREGs. As they explained, a NUREG with the CR designation is a contractor-generated report and does not represent the work of the Staff. Transcript at 2199.

B. The Record Will be Sufficiently Complete Without New York's Proposed Additional Exhibits

New York asserts that its proposed exhibits are necessary for developing a full and complete record for a relicensing decision. New York's Motion at 5. New York argues that the contractor produced NUREG documents will help the Board "to [d]etermine the [r]eliability of the [e]vidence [p]resented by Staff and Entergy." *Id.* New York appears to raise this reliability argument because neither Entergy nor the Staff introduced NYS000574 or NYS000575. *Id.* at 2. New York then renews its previous claims regarding the Staff's disclosure obligations. *Id.* at 2 n. 1.

These assertions are unavailing. First, New York's own witness admits that information contained in NYS000574 and NYS000575 are redundant and cumulative of his previously submitted testimony. Dr. Lahey's Supplemental Testimony at 3. According to New York's witness, the record presented to the Board is complete. Thus, there is no reason that these exhibits need to be added at this late time.

New York's reliability argument is also unavailing. Entergy and the Staff were scheduled to file initial and rebuttal testimony, statement of positions, and exhibits on August 10, 2015. NUREG/CR-7185 (NYS000575) was publicly released on July 22, 2015, just twelve working days prior to Entergy's and the Staff's required filing.¹¹ Moreover, as Dr. Lahey states, NUREG/CR-7185 is redundant to his testimony,¹² which the Staff addressed in its testimony, and there was therefore no need to address that document in the Staff's testimony. Similarly, NUREG/CR-7184 (NYS000574) was made publicly available July 21, 2015. The Staff's

¹¹ Significantly, New York had more than a month to address these documents in its rebuttal testimony after they were made publicly available.

¹² See Dr. Lahey's Supplemental Testimony at 3-5.

witnesses discussed the earlier version of that report (Ex. NYS000488A-B) in their pre-filed testimony. See, e.g., NRC000197 at 169-172. Inasmuch as New York had already filed an earlier version of NUREG/CR-7184 (Ex. NYS000488A-B) which the Staff addressed in its testimony, there was no reason to refer to the later iteration of that document in the Staff's filings.

Finally New York raises an argument that has been repeatedly rejected by the Board in this proceeding regarding the Staff's disclosures.¹³ For example, the Board specifically addressed the scope of the Staff's discovery obligations in its Order of March 16, 2012, where the Board explained that the scope of the Staff's disclosure obligations is not unlimited. In rejecting claims that the Staff had failed to disclose other documents that were unrelated to its review of the Indian Point LRA, the Board held as follows:

Generically applicable documents or documents that the NRC Staff simply did not use in its review might be useful to other parties in this and other proceedings, but that does not bring such documents within the scope of Sections 2.336(b) and 2.1203(b). Nevertheless, simply because such documents are not legally required to be placed into a proceeding's hearing file does not mean that they are hidden from public view. On the contrary, the NRC provides multiple avenues for litigants to access its generically applicable materials and reports, including its website, ADAMS, and its Public Document Room. Moreover, in this proceeding the NRC Staff appears to have acted in a professional spirit of cooperation to assist the Intervenors in reviewing such materials.¹⁴

¹³ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Granting in Part and Denying in Part State of New York and Riverkeeper's Motion to Compel)" (March 16, 2012), at 8-9.

¹⁴ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Granting in Part and Denying in Part State of New York and Riverkeeper's Motion to Compel)" (March 16, 2012), at 8-9.

The same explanation applies to these NUREG/CR documents, neither of which was used in the Staff's review of the IP2/IP3 license renewal application.

In sum, the Staff was under no duty to disclose either NUREG/CR-7184 or NUREG/CR-7185, because these documents were not used in the Staff's review of the Indian Point license renewal application.¹⁵ Thus, the issue of whether the Staff disclosed these documents is immaterial to whether the documents should be admitted at this late date.

C. New York's Request to File the Proposed New Exhibits is Late

New York proffers several reasons for its failure to include these documents with its rebuttal filing, essentially pointing to its workload in responding to the Staff's and Entergy's filings. New York's Motion at 3. Further, New York suggests that the commencement of its 10-day period for filing new exhibits should be triggered not by the date NUREG/CR-7184 and NUREG/CR-7185 became available, but by the date its witness recognized the importance of those documents. New York's Motion at 7-8. This assertion is incorrect. If NUREG/CR-7184 was important for its case, New York and its witness should have recognized its importance immediately, since they cited to and discussed an earlier version of the document. See New York's Motion at 3-4. Thus, New York did not act in a timely manner to add these additional exhibits and testimony when it filed its rebuttal evidence.

New York argues that good cause exists for the filing of Dr. Lahey's Supplemental Testimony, in that the documents are important to its case. New York's Motion at 8-9. The supplemental testimony, however, merely indicates that the documents support Dr. Lahey's previous testimony. Thus, no harm would occur to New York if the testimony and exhibits were not admitted to this proceeding.

¹⁵ *Id.*

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that New York's request to add these late-filed exhibits and supplemental testimony should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 5th day of October 2015

CERTIFICATION OF COUNSEL

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9), and 10 C.F.R. § 2.323(b), the undersigned Counsel hereby 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.

Respectfully submitted,

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Dated at Rockville, Maryland
this 5th day of October 2015

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO STATE OF NEW YORK MOTION FOR LEAVE TO FILE TWO NRC DOCUMENTS AS ADDITIONAL EXHIBITS ALONG WITH PRE-FILED SUPPLEMENTAL TESTIMONY," dated October 5, 2015, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 5th day of October 2015.

/Signed (electronically) by/

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