

**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 and
(Indian Point Nuclear Generating Units 2 and 3))	50-286-LR
	October 5, 2015

**ENTERGY’S ANSWER OPPOSING NEW YORK’S MOTION FOR LEAVE TO
FILE ADDITIONAL HEARING EXHIBITS AND SUPPLEMENTAL TESTIMONY**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. (“Entergy”) hereby opposes New York State’s (“New York” or “NYS”) September 23, 2015 Motion for leave to file two additional hearing exhibits and supplemental testimony by one of its witnesses, Dr. Richard Lahey, Jr.¹ Specifically, New York submits two publicly-available NRC reports (NUREG/CR-7184 and NUREG/CR-7185) that were published in final form over two months ago, and eight pages of supplemental testimony purportedly based on those documents.² For the reasons set forth below, the Atomic Safety and Licensing Board (“Board”) should deny New York’s Motion on the grounds that the newly-proffered exhibits and testimony are untimely, duplicative, and irrelevant.

¹ See State of New York Motion For Leave to File Two NRC Documents as Additional Exhibits Along With Pre-Filed Supplemental Testimony (Sept. 23, 2015) (“Motion”); Pre-Filed Supplemental Testimony of Dr. Richard T. Lahey, Jr. Regarding Contentions NYS-25, NYS-26B/RK-TC-1B, and NYS-38/RK-TC-5 (Sept. 23, 2015) (NYS000576) (“Lahey Supplemental Testimony”).

² See NUREG/CR-7184, ANL-12/56, “Crack Growth Rate and Fracture Toughness Tests on Irradiated Cast Stainless Steels” (July 2015) (NYS000574) (“NUREG/CR-7184”); 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 Welds” (July 2015) (NYS000575) (“NUREG/CR-7185”).

Contrary to its claims, New York has not shown good cause for its belated filing or established a proper foundation for the admission of the new documents into evidence.

In the alternative and in the interest of fairness, if the Board admits the proffered exhibits and supplemental testimony, then Entergy respectfully requests the opportunity to submit responsive supplemental pre-filed testimony within two weeks of the Board's order admitting the new exhibits. That supplemental testimony would respond and be limited to new arguments included in the Lahey Supplemental Testimony.

II. ARGUMENT

A. The Newly-Proffered Exhibits Are Untimely

At the outset of its Motion, New York “acknowledges that Entergy disclosed the documents in August and September and that the State did not include the reports in its recent submission of pre-filed exhibits on September 9.”³ That concession alone is significant. But New York fails to acknowledge another equally important fact: the two NUREG/CR reports in question have been publicly available since July 2015—approximately two months before New York filed its rebuttal testimony on September 9, 2015. In fact, as counsel for Entergy noted during the parties’ Section 2.323 consultations: “These documents have been available on ADAMS since July [2015]. While [Entergy] listed them on [its] September 1st disclosures, as publicly available documents, NYS or [Riverkeeper] could have found them on ADAMS, as [Entergy] did.”⁴ As Entergy counsel further noted, New York and Riverkeeper had notice of the documents at issue no later than September 1, 2015.⁵ NRC Staff counsel similarly noted that

³ Motion at 2.

⁴ E-mail from Paul Bessette, Counsel for Entergy, to John Sipos, Counsel for New York State, “Subject: RE: State of New York – § 2.323 Consultation Request” (Tuesday, September 15, 2015 at 11:21 AM ET).

⁵ *Id.*

“[t]hese documents have been available for a considerable time.”⁶ Yet, New York claims that the instant Motion—filed on over three weeks later on September 23, 2015—is timely.⁷

New York further concedes that “ideally it should have presented the reports as part of its September 9 supplemental submissions.”⁸ But it did not do so, due to an “oversight.”⁹ In a nutshell, its excuse is this: New York and Dr. Lahey were busy on matters related (and unrelated) to this proceeding. Specifically, New York states that “the State and Riverkeeper were diligently working preparing to meet the September 9 deadline for submission of supplemental pre-filed testimony and exhibits,” and that “[t]owards the end of the intervenors’ 30-day reply period, the State’s expert witness on Contentions NYS-25 and 26B was essentially unavailable from September 7 – 10 due to another commitment.”¹⁰ New York’s argument falls flat. Indeed, New York should know that the exigencies and burdens associated with litigation do not justify dilatory evidentiary submissions, particularly those which Entergy and the NRC Staff have no opportunity to counter through responsive evidentiary filings of their own.¹¹ And such burdens are not unique to New York.

⁶ E-mail from Brian Harris, Counsel for NRC Staff, to John Sipos, Counsel for New York State, “Subject: RE: State of New York – § 2.323 Consultation Request” (Tuesday, September 15, 2015 at 2:50 PM ET).

⁷ This claim is inconsistent with New York’s recent and repeated criticisms of Westinghouse for its alleged failure to comply with the 10-day time limitation in 10 C.F.R. § 2.323(a)(2) in connection with its motion to appear specially in this proceeding. *See, e.g.*, State of New York Petition Pursuant to 10 C.F.R. § 2.341 for Commission Interlocutory Review of the July 20, 2015 Atomic Safety and Licensing Board Order Denying New York Motion to Withdraw Proprietary Designations at 5-6, 15-16 (Aug. 14, 2015).

⁸ Motion at 7.

⁹ *Id.*

¹⁰ *Id.* at 3.

¹¹ As noted above, in the event the Board grants New York’s Motion in whole or in part, Entergy requests an appropriate opportunity to submit responsive supplemental pre-filed testimony.

B. New York Has Failed to Explain How NUREG/CR-7184 (NYS000574) Differs from the Previous Version of that Document (NYS000482) and Why It Does Not Constitute Duplicative or Cumulative Evidence

With respect to NUREG/CR-7184, New York states that “it appears that this NRC document is a final report of an earlier ‘revised manuscript’ that the State previously submitted (as Exhibit 488A-B) and that Dr. Lahey referred to in his previous testimony (*e.g.*, NYS000482). Lahey Sept. 23 Test. at 7-8.”¹² If, in fact, that is the case, then the document appears to constitute duplicative and cumulative evidence—not “essential” evidence as claimed by New York¹³—and should be rejected by the Board as such.¹⁴ In addition, Dr. Lahey states in his supplemental testimony that “[i]t appears that Argonne National Laboratory and the USNRC have subsequently made some edits and republished the document, which is now NYS000574.”¹⁵ It is unclear from New York’s Motion and Dr. Lahey’s supplemental testimony whether the edits are administrative or substantive in nature. The burden of making that determination should fall on New York, as the proponent of the new exhibit, not on the Board or other parties.¹⁶ In any event, Dr. Lahey certainly identifies nothing new or different about the information in the republished document that could theoretically justify his “supplemental” testimony on it.

¹² Motion at 3-4.

¹³ *Id.* at 5 (quoting *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980)).

¹⁴ See 10 C.F.R. § 2.319(e) (noting the Board’s authority to “[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments”); 10 C.F.R. § 2.337(a) (“Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted.”).

¹⁵ Lahey Supplemental Testimony at 7-8 (NYS000576) (emphasis added).

¹⁶ In this regard, if New York can identify the relevant edits and assure the Board and parties that NYS000482 and NYS000574 are substantively identical, then Entergy would not object to the substitution of the newer version of the document for the previous version as a purely administrative matter. New York did not, however, raise this issue during consultations or assert this to be the case in its Motion.

C. **New York Has Failed to Establish the Relevance and Materiality of NUREG/CR-7185 (NYS000575) to Indian Point and Thus Any of the Admitted Contentions**

New York also fails to explain, with sufficient clarity and specificity, how NUREG/CR-7185 constitutes new, relevant and material evidence, as required by 10 C.F.R. §2.337. New York claims that NUREG/CR-7185 contains relevant information because it reportedly states, among other things, that cast austenitic stainless steel (“CASS”) welds “may” experience thermal embrittlement that “may” decrease ductility, fracture toughness, and impact strength, and that “possible” synergies occur between thermal embrittlement and irradiation embrittlement.¹⁷

New York and Dr. Lahey further assert that NUREG/CR-7185 “is significant and contains information that has not been included in previous NRC reports.”¹⁸ But they fail to explain how the information in NUREG/CR-7185 is new or otherwise not available in other, previously-filed exhibits. Indeed, Dr. Lahey claims that NUREG/CR-7185 provides information that is consistent with his previous testimony, thus underscoring that the exhibit is redundant and cumulative to other evidence and not necessary for a full and complete hearing record.¹⁹

In addition, New York and Dr. Lahey fail to explain how the allegedly new information in NUREG/CR-7185 is relevant to Indian Point Units 2 and 3 or the specific claims made in its admitted contentions. Indeed, aside from the caption, New York’s Motion contains no reference to Indian Point and the plant-specific reactor vessel components and materials at issue. Dr. Lahey’s supplemental testimony similarly fails to “connect the dots” and establish the relevance of NUREG/CR-7185. Dr. Lahey simply lists general statements from NUREG/CR-7185 about various embrittlement and cracking phenomena without explaining specifically how they

¹⁷ Motion at 4.

¹⁸ *Id.* See also Lahey Supplemental Testimony at 6 (NYS000576).

¹⁹ See Lahey Supplemental Testimony at 3, 5 (NYS000576).

allegedly “support [his] concerns, opinions, and testimony.”²⁰ Thus, New York also has not established the relevance or materiality of NUREG/CR-7185, and thus has not laid a proper foundation for the admission of that document and Dr. Lahey’s related testimony into evidence.

Furthermore, the relevance and materiality of NUREG/CR-7185 to the specific Indian Point reactor vessel internals (“RVIs”) in question is not clear on the face of the report. For example, one of NUREG/CR-7185’s overarching conclusions is that “[a]n evaluation of the NRC screening criteria established to determine the susceptibility of CASS materials to thermal aging embrittlement indicates that the existing criteria are valid, except those for CF-8M materials.”²¹ As Entergy’s experts have noted, “[t]he IPEC RVIs, however, do not include CF-8M materials.”²² Additionally, NUREG/CR-7185 states that “[t]his report provides technical data and microstructural analysis as function of ferrite composition on the fracture toughness of both irradiated and unirradiated thermally aged and unaged CASS components.”²³ New York and Dr. Lahey make no attempt to explain how the specific data and conclusions presented in NUREG/CR-7185 apply, if at all, to the Indian Point RVIs in view of the low delta ferrite composition of those RVIs, as explained by Entergy and the NRC Staff in their testimony.²⁴

²⁰ See *id.* at 3-5 (NYS000576).

²¹ NUREG/CR-7185 at 117 (NYS000575) (emphasis added).

²² Testimony of Entergy Witnesses Nelson F. Azevedo, Robert J. Dolansky, Alan B. Cox, Jack R. Strosnider, Timothy J. Griesbach, Randy G. Lott, and Mark A. Gray Regarding Contention NYS-25 (Embrittlement) at 117 (A178) (Aug. 10, 2015) (ENT000616) (“Entergy NYS-25 Testimony”) (emphasis added). For example, the CASS lower support column caps are all low-molybdenum, low-ferrite CF-8 material, which is different from the high-molybdenum CF-8M materials mentioned above in connection with NUREG/CR-7185. See NUREG-1930, Safety Evaluation Report Related to the License Renewal of Indian Point Nuclear Generating Plant, Units 2 and 3, Supplement 2, at 3-44 (July 2015) (NYS000507) (“SER Supplement 2”) (stating that “the IP2 and IP3 column caps are not susceptible to [thermal embrittlement] because the column caps are low molybdenum material (Type CF8) and all have ferrite content less than or equal to 20 percent”).

²³ NUREG/CR-7185 at v (NYS000575) (emphasis added). See also Entergy NYS-25 Testimony at 61 (A105) (“The ferrite phase is critical in determining the mechanical properties and corrosion resistance of CASS materials.”).

²⁴ See, e.g., Entergy NYS-25 Testimony at 62 (A105) (“The IP2 and IP3 LSCCs [lower support column caps] are not made of high delta ferrite materials, so there is no concern about a potential transition from ductile to brittle behavior for these CASS components.”); NRC Staff Testimony of Dr. Allan Hiser, Jeffrey Poehler, and Gary Stevens on NYS-25 and NYS-38/RK-TC-5 at 106 (A188) (NRC000197) (“Entergy addressed this effect by

In summary, New York has failed to establish the relevance and probative value of NUREG/CR-7185, the relevance and materiality of which vis-à-vis the Indian Point plants is not clear on the document's face.²⁵ Accordingly, the Board also should deny New York's Motion on these grounds.²⁶

III. CONCLUSION

For the foregoing reasons, the Board should deny New York's Motion in its entirety. New York has not established good cause for its belated filing or a proper foundation for the admission of Exhibits NYS000574, NYS000575, and NYS000576 into evidence. In the alternative, if the Board admits the proffered exhibits and supplemental testimony, then Entergy respectfully requests the opportunity to submit responsive supplemental pre-filed testimony within two weeks of the Board's order admitting the proposed new exhibits.

Respectfully submitted,

William B. Glew, Jr., Esq.
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3360
E-mail: wglew@entergy.com

Signed (electronically) by Paul M. Bessette
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O' Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5738
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.
this 5th day of October 2015

using NRC guidance on screening of CASS material to identify that the ferrite content is low enough to exclude thermal embrittlement as a potential synergistic contributor to embrittlement with irradiation embrittlement.”).

²⁵ See, e.g., Licensing Board Order (Denying Clearwater's Motion to Supplement the Record) at 3 (Dec. 5, 2012) (unpublished) (denying motion to add new exhibits that were immaterial and not relevant).

²⁶ See 10 C.F.R. §§ 2.319(e), 2.337(a).

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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’s Answer Opposing New York’s Motion for Leave to File Additional Hearing Exhibits and Supplemental Testimony” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Martin J. O’Neill
Martin J. O’Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
E-mail: martin.o’neill@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.