

**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
ENERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	November 15, 2015

**ENERGY'S ANSWER OPPOSING NEW YORK'S
MOTION FOR LEAVE TO FILE FIVE HEARING EXHIBITS**

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Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. (“Entergy”) hereby opposes the Motion for Leave to File Five Hearing Exhibits (“Motion”) filed by New York State (“New York”) on November 13, 2015. The Board should deny the Motion because it improperly seeks to augment New York’s prefiled testimony in an untimely fashion, without good cause. All of the new materials New York proffers could and should have been introduced long ago, and its introduction at the eve of the hearing is prejudicial to Entergy, whose experts will have insufficient time to review this new information.

More than five months after the deadline for new or revised prefiled direct testimony, more than two months after the deadline for pre-filed rebuttal testimony, after multiple rounds of testimony from New York on each of the Track 2 contentions, and on the Friday night (after business hours) before the start of the evidentiary hearing on Monday, New York now seeks to introduce five new documents into evidence.¹ The documents consist of two technical documents that have been available since June 2014 and August 2007, respectively, concerning primary water stress corrosion cracking (“PWSCC”) in Alloy 690 and other materials

¹ In fact, during consultation on the Motion, counsel for New York was unable to confirm that these would be the final filings from New York prior to Monday’s hearing.

(“Technical Documents”),² and three figures developed by New York’s witnesses to supplement their testimony on various topics (“Supplemental Figures”).³ Now, on the eve of the hearing, these new exhibits—which are not based on new information⁴ and are not necessary to correct or update the record in this proceeding—are simply untimely.⁵

New York states that Dr. Duquette recently identified the Technical Documents as materials he intends to reference in his presentation at the hearing. However, as the Board specified at the pre-hearing conference on November 5, 2015, the requested presentations are not “an opportunity to introduce new exhibits that could have and should have been presented earlier.”⁶ New York does not argue, nor could they, that the Technical Documents contain information that was unavailable as of the deadline for pre-filed rebuttal testimony. New York’s claim that their witness “only recently discovered”⁷ these documents, presumably due to belated hearing preparations, is insufficient to establish “good cause” for springing complex technical documents on the other parties at the last possible moment. New York’s attempt to analogize to

² P.L. Andresen, A. Ahluwalia, *et al.*, “PWSCC of Alloys 690, 52 and 152,” 13th International Conference on Environmental Degradation of Materials in Nuclear Power Systems, Whistler, British Columbia (Aug. 2007) (NYS000580); A. Ahluwalia, “Alloy 690/52/152 PWSCC Testing,” EPRI Technical Exchange Meeting on Materials, NRC (June 2014) (NYS000581).

³ R.T. Lahey, “Figure – Developing Length for a Thermal Boundary Layer” (Nov. 2015) (NYS000577); R.T. Lahey, “Figure – The Effect of Nodalization on Convective Temperature Transients” (Nov. 2015) (NYS000578); D. Duquette, “Steam Generator Materials of Construction and Chromium Content” (Nov. 2015) (NYS000579).

⁴ Notably, the new exhibits proffered in the Motion are entirely unrelated to those proffered by Entergy on November 11, 2015, and to the topics addressed in Entergy’s October 29 supplemental testimony. *See* Entergy’s Unopposed Motion for Leave to File New and Revised Hearing Exhibits (Nov. 11, 2015); Supplemental Testimony of Entergy Witnesses Nelson F. Azevedo, Timothy J. Griesbach, and Randy G. Lott Regarding Contentions NYS-25 (Reactor Vessel Internals AMP), NYS-26B/RK-TC-1B (Metal Fatigue), and NYS-38/RK-TC-5 (Safety Commitments) (ENT000722).

⁵ *Cf. id.* (seeking—without opposition—to provide the most recent revisions of certain Westinghouse calculations and reports, and related conforming changes to testimony, which were necessary to update the record in this proceeding with complete and accurate information and were issued by Westinghouse mere days before the motion was filed). These changes were limited to updating exhibit numbers and to a small number of conforming changes essential to ensure Entergy’s testimony was accurate, primarily in light of the updated documents.

⁶ Tr. at 4732.

⁷ Motion at 1.

other motions to file additional exhibits is simply inapt—unlike the instant Motion, the motions cited by New York⁸ proffered exhibits necessary to *update or correct* information already in the record. New York does not make any similar claim here. Accordingly, the Technical Documents are untimely and New York has not shown good cause for their late submission.

As to the Supplemental Figures, New York also does not claim that they are based on information that was unavailable as of the deadline for pre-filed rebuttal testimony.⁹ New York notes that its experts, apparently, only recently conducted an “in-depth review of the testimony, pleadings and exhibits,” and decided to create the Supplemental Figures, which New York speculates would allow their witnesses “to provide full and meaningful responses to the Board’s questions.”¹⁰ During consultations, the NRC Staff suggested that such documents could be submitted as hearing demonstratives (not exhibits to be admitted as part of the official record), but New York rejected the Staff’s proposal noting only that it preferred the documents become part of the record of the proceeding.

Ultimately, New York’s purported “good cause” is inconsistent with the Board’s direction that new charts and graphs would only be introduced at this late stage if: (a) the Board asks a specific question at the hearing, and (b) the Board deems the existing written testimony, or the oral presentation at the hearing, insufficient to answer the Board’s question.¹¹ Entergy and NRC Staff have complied with the Board’s direction, with the understanding that it fairly applied to all parties. New York, however, apparently believes otherwise. In the end, New York has not

⁸ Motion at 8-9.

⁹ In fact, during consultation on the Motion, New York could not explain *what* these figures were based on—other than Dr. Lahey’s experience—let alone describe why this information was previously unavailable.

¹⁰ Motion at 2. Although, during consultation, counsel for New York was unable to explain what testimony the Supplemental Figures supported and what specific purposes the figures will serve, noting that he would “not play twenty questions” about the new documents.

¹¹ *See* Tr. at 4732.

shown good cause for its untimely submission of the Supplemental Figures, which are not based on new information, and are not necessary to update or correct the record in this proceeding. New York's request is in essence a premature and unauthorized attempt to place demonstratives, which have not been requested by the Board, into the record as exhibits.

New York's interpretation of "good cause"—which would apparently allow its experts to draft new figures and "discover" new exhibits at their leisure—would render the testimony submission deadlines in the Board's scheduling orders meaningless. This cannot be a proper interpretation of the orders, or of the "good cause" standard, and New York should not be granted any special privileges in this regard. New York cites the *Diablo Canyon* proceeding for the premise that "essential evidence" should be included in the record.¹² Yet, New York does not claim that any of the five proposed exhibits are "essential"—to the contrary, New York concedes that none of the documents "raises any issue that has not already been addressed."¹³ Thus, the documents cannot reasonably be considered "essential."

Finally, one of the five documents proffered by New York was introduced to the other parties for the first time mere hours before filing the Motion. Specifically, as shown in Attachment 1, New York consulted with the parties regarding proposed exhibit NYS000579 for the first time at 10:21 AM on Friday, November 13, 2015. Practically speaking, the parties' representatives and witnesses are en route to Tarrytown, and are unable to meaningfully review or comment on the proffered document. Accordingly, New York's attempt to repackage Dr. Duquette's testimony with this new supplement particularly prejudices the other parties. Indeed,

¹² Motion at 6-7 (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980)).

¹³ Motion at 5, 7.

the introduction of all of New York's new materials at this late hour is prejudicial to Entergy because its witnesses have had a very limited opportunity to review the documents.

For the foregoing reasons, the Board should deny New York's Motion.

Respectfully submitted,

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Executed in Accord with 10 C.F.R. § 2.304(d)
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Counsel for Entergy Nuclear Operations, Inc.

Dated in Washington, D.C.
this 15th day of November 2015

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ANSWER CERTIFICATION

Pursuant to ¶ G.7 of the Atomic Safety and Licensing Board's July 1, 2010 Scheduling Order, 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.

Signed electronically by Raphael P. Kuyler

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ATTACHMENTS

Attachment	No.
E-mail from J. Sipos to R. Kuyler <i>et al.</i> , “RE: § 2.323 Consultation” (Nov. 11, 2015 10:21 AM).....	1

**ENTERGY'S ANSWER OPPOSING NEW YORK'S
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ATTACHMENT 1

E-mail from J. Sipos to R. Kuyler *et al.*, "RE: § 2.323
Consultation" (Nov. 11, 2015 10:21 AM)

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I hereby certify that, on this date, copies of “Entergy’s Answer Opposing New York’s Motion for Leave to File Five Hearing Exhibits” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Ryan K. Lighty
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