

February 16, 2016

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 SIX DOCUMENTS AS ADDITIONAL EXHIBITS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its Answer to the "State of New York Motion for Leave to File Six Documents as Additional Exhibits" ("Motion") filed by the State of New York ("New York") on February 5, 2016. In its Motion, New York seeks the admission of six documents it states are related to Contentions NYS-25, NYS-26B/RK-TC-1B, and NYS-38/RK-TC-5, as follows: (1) four documents that appear to be Westinghouse "WCAP" flaw disposition analyses,¹ (2) a technical

¹ These are:

(1) WCAP-17941-P, Rev. 1, "Indian Point Units 2 and 3 Inspection Response Plan for Aging Management of MRP-227-A Primary and Expansion Components" ("WCAP-17941" or "Inspection Response Plan") (proposed Ex. NYS000583);

(2) WCAP-17949-P, Rev. 0, "Background and Technical Basis Supporting Engineering Flaw Acceptance Criteria for Indian Point Unit 2 Reactor Vessel Internals MRP-227-A Primary and Expansion Components" ("WCAP-17949" or "Flaw Acceptance Criteria for IP2") (proposed Ex. NYS000584);

(3) WCAP-17951-P, Rev. 0, "Background and Technical Basis Supporting Engineering Flaw Acceptance Criteria for Indian Point Unit 3 Reactor Vessel Internals MRP-227-A Primary and Expansion Components" ("WCAP-17951" or "Flaw Acceptance Criteria for IP3") (proposed NYS000585); and

(4) WCAP-18048-P, Rev. 0, "Determination of Acceptable Baffle-Former Bolting for Indian Point Units 2 and 3" ("WCAP-18048" or "Indian Point Baffle-Former Bolting Analysis") (proposed NYS000586).

paper on irradiation-assisted stress corrosion crack (“IASCC”) growth rates,² and (3) an NRC Staff inspection report concerning Entergy Nuclear Operations, Inc.’s (“Entergy” or “Applicant”) implementation of its license renewal commitments for Indian Point Unit 3 (“IP3”).³

While the Staff does not oppose the admission of the NRC Region I IP3 Inspection Report,⁴ the Staff submits that the State’s request to admit the five other exhibits should be denied, in that the Motion (a) fails to demonstrate the materiality of the four WCAP reports, (b) fails to demonstrate the reliability of the Eason Paper or the timeliness of its proffer of that document, (c) fails to present a proper sponsoring witness for the documents, and (d) fails to afford other parties any meaningful opportunity to evaluate and present their views on the reliability, significance and effect, if any, of the documents. Accordingly, New York’s request to admit these five documents should be denied.

² Eason, E.D. and R. Pathania, “Disposition Curves for Irradiation-Assisted Stress Corrosion Cracking of Austenitic Stainless Steels in Light Water Reactor Environments,” published in the Proceedings of the ASME 2015 Pressure Vessels and Piping Conference (“Eason Paper”) (proposed Ex. NYS000587).

³ Letter from Mel Gray (NRC Region I) to Lawrence Coyle (Entergy), “Indian Point Nuclear Generating Unit 3 - License Renewal Inspection Report 05000286/2015011” (Nov. 19, 2015) (ADAMS Accession No. ML15323A026) (“IP3 Inspection Report”) (proposed Ex. NYS000588).

⁴ New York incorrectly states that the Staff opposes the admission of the IP3 Inspection Report (Motion at 1). To the contrary, the Staff has informed the State that it does not oppose the admission of that document. See Motion, Attachment 2 (E-Mail Thread), at [unnumbered], at [unnumbered] 10 (Jan. 21, 2016, 2:33 PM).

BACKGROUND

Litigation of these contentions commenced over seven years ago. The Board admitted Contentions NYS-25, NYS-26/26A, and RK-TC-1/TC-1A for litigation on July 31, 2008;⁵ Contention NYS-26B/RK-TC-1B was admitted on November 4, 2010,⁶ and Contention NYS-38/RK-TC-5 was admitted on November 10, 2011.⁷ Hearings on these contentions were deferred to “Track 2” of the proceeding,⁸ and were later rescheduled following the Staff’s issuance of Supplement 2 to its Safety Evaluation Report (“SER”) and the admission of revisions to Contentions NYS-25 and NYS-38/RK-TC-5.⁹

The parties filed detailed written testimony, statements of position, and hundreds of exhibits concerning these contentions prior to the commencement of hearings. Evidentiary hearings were then held on November 16-19, 2015, during which the Board engaged in extensive and thorough questioning of the parties’ many witnesses.¹⁰ At the conclusion of those proceedings, the Board declared that “[t]his evidentiary hearing on the Track 2 contentions is

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 129-40, 166-72 (2008); *see also* “Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions)” (July 6, 2011), slip op. at 19-28 (amending the bases for Contention NYS-25).

⁶ “Memorandum and Order (Ruling on Summary Disposition of NYS-26/26A/Riverkeeper TC-1/1A (Metal Fatigue of Reactor Components) and Motion for Leave to File New Contention NYS-26B/Riverkeeper TC-1B)” (Nov. 4, 2010).

⁷ “Memorandum and Order (Admitting New Contention NYS-38/RK-TC-5)” (Nov. 10, 2011).

⁸ *See* (1) “Order (Evidentiary Hearing Administrative Matters)” (Sept. 14, 2012) (Contentions NYS-26B/ RC-TC-1B and NYS-38/RK-TC-5); (2) “Notice of Hearing (Application for License Renewal)” (June 8, 2012), at 5-6 and n. 14; (3) “Order (Granting NRC Staff’s Unopposed Time Extension Motion and Directing the Filing of Status Updates)” (Feb. 16, 2012) (Contention NYS-25); and (4) “Order” (Dec. 14, 2011) (Contention NYS-38/ RK-TC-5).

⁹ *See* (1) “Revised Scheduling Order” (Dec. 9, 2014), at 2-3; (2) “Memorandum and Order (Granting Motions for Leave to File Amendments to Contentions NYS-25 and NYS-38/RK-TC-5)” (Mar. 31, 2015); and (3) “Notice of Hearing (Scheduling Track 2 Hearings)” (Apr. 23, 2015).

¹⁰ *See* Official Transcript of Proceedings, Tr. 4,755-5,894 (Nov. 16-19, 2015).

now closed”¹¹ – although the Board later indicated that it has not yet formally closed the evidentiary record.¹² In accordance with the schedule adopted by the Board on December 7, 2015, proposed findings of fact and conclusions of law are due to be filed on February 29, 2016, and reply findings of fact and conclusions of law are due March 30, 2016.¹³

On January 20, 2016, two months after the conclusion of evidentiary hearings, Counsel for New York informed Counsel for Entergy and Staff that it was contemplating filing a motion for leave to admit nine additional documents as exhibits in the proceeding; those documents included the IP3 Inspection Report, and eight other documents that are not the subject of the instant Motion.¹⁴ Subsequently, New York presented a list of 12 other documents it sought to have admitted as exhibits, including the Eason Paper, the four WCAP analyses that are addressed in the instant Motion, and seven other documents. Thereafter, New York narrowed its request to seek the admission of only (a) the four WCAP Reports, (b) the Eason Paper, and (c) the IP3 Inspection Report.¹⁵ Consultations between the parties failed to resolve New York’s revised request for admission of these additional proposed exhibits, and on February 5, 2016, New York filed the instant Motion.

¹¹ Tr. 5,894 (Nov. 19, 2015).

¹² See “Order (Adopting Jointly Proposed Transcript Corrections; Rejecting the State of New York’s Proposed Corrections)” (Feb. 3, 2016), at 2 (allowing New York to file a motion to correct the record to include its proposed transcript corrections, and noting that “the evidentiary record for Track 2 contentions is not being closed at this juncture. An order closing the evidentiary record for Track 2 contentions will issue at a later date.”).

¹³ “Order (Setting Post-Hearing Briefing Schedule)” (Dec. 7, 2015).

¹⁴ See Motion, Attachment 2 (E-Mail Thread), at [unnumbered] 12-13 (Jan. 20, 2016 21 PM).

¹⁵ See *id.*, at [unnumbered] 3 (Feb. 4, 2016, 3:37 PM).

ARGUMENT

I. Applicable Legal Standards

In accordance with 10 C.F.R. § 2.337(a) (and its predecessor, former § 2.743(c)),¹⁶ the admission of an exhibit into the record of a proceeding must satisfy four distinct elements:

Only relevant, material and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

Thus, evidence must be (a) “relevant,” (b) “material,” (c) “reliable,” and (d) “not unduly repetitious” to be admitted; all four of these criteria must be satisfied for evidence to be admissible.¹⁷

In accordance with established case law, evidence will meet the “relevance” standard if it “relates” or “pertains” to a contested issue in the proceeding; in contrast, evidence, even if relevant, will meet the “materiality” standard only if it could affect the outcome of the Board’s consideration of a contested issue, *i.e.*, whether it has a tendency to influence, or is capable of influencing the tribunal in making a necessary determination, or tends to make a necessary finding more or less probable.¹⁸ The Board in *Midland* explained these requirements as follows:

¹⁶ The NRC’s Rules of Practice were revised and reorganized in 2004. See Final Rule, “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004). No substantive changes were made to the provisions governing the admissibility of evidence. See *id.* at 2208-09; compare 10 C.F.R. § 2.337(a) (2015) with 10 C.F.R. § 2.743(c) (2004).

¹⁷ See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-950, 33 NRC 492, 501 (1991) (the Commission’s rules “impose a general requirement on all evidentiary submissions that, in order for them to be admissible, they must be ‘relevant, material, and reliable.’ 10 C.F.R. § 2.743(c) (emphasis added [by the Appeal Board]).” Accord, *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 477 (1982).

¹⁸ See *Consumers Power Co.* (Midland Plant, Units 1 & 2), LBP-81-63, 14 NRC 1768, 1780-81 (1981), citing *Weinstock v. United States*, 231 F.2d 699, 701-02 (D.C. Cir. 1956). In *Weinstock*, the court explained, “[t]o be ‘relevant’ means to relate to the issue. To be ‘material’ means to have probative weight, *i.e.*, reasonably likely to influence the tribunal in making a determination required to be made.” *Id.*, 231 F.2d at 701.

The Commission's Rules of Practice provide that '[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable' (10 CFR § 2.743(c)). The courts have had occasion to analyze the distinctions involved in defining these concepts. Thus it has been stated:

“‘Material’ when used in respect to evidence is often confused with ‘relevant’, but the two terms have wholly different meanings. To be ‘relevant’ means to relate to the issue. To be ‘material’ means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. Professor Wigmore depicts with some acerbity the difference between relevancy and materiality, ‘the inaccuracy of our usage’ of the terms, and ‘the harmfulness of this inveterate error.’ Materiality, he maintains, is a matter of substantive law and does not involve the law of evidence. He does not include ‘materiality’ in the topics treated in his volumes on Evidence.’²⁴ (Footnotes omitted).

Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-81-63, 14 NRC 1768, 1781 (1981).¹⁹

In sum, in accordance with 10 C.F.R. § 2.337(c) and established case law, it is not sufficient for a party to propose the admission of a “relevant” document; rather, the document must also be shown to be both “reliable” and “material” to the Board’s consideration of an issue, and it must not be unduly repetitious of other evidence in the record.

In addition, although not strictly applicable here,²⁰ where the evidentiary record of a proceeding has closed, a party seeking the admission of an additional exhibit must meet the

¹⁹ As the Board noted, under the Federal Rules of Evidence, there is no separate requirement that evidence be material; instead, the requirement for materiality appears to be subsumed in the definition of relevance. *Midland*, LBP-81-63, 14 NRC at 1781-82; see FRE Rule 401, “Definition of Relevant Evidence” (“Relevant” evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

²⁰ As discussed *supra* at 3-4 and n.11, the Board closed the evidentiary hearings on Track 2 contentions on November 19, 2015, but has not yet closed the evidentiary record.

standards governing reopening set forth in 10 C.F.R. § 2.326²¹ in addition to meeting the admissibility criteria of § 2.337. In this regard, the proponent of a motion to reopen a closed record bears a heavy burden.²² The party must demonstrate (1) that its motion was timely filed, (2) that it concerns a significant environmental matter, and (3) that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.²³ Further, a motion to reopen the record must be supported by an affidavit by a competent witness, demonstrating that the motion should be granted.²⁴ Mere allegations and conclusory assertions are insufficient.²⁵ Further, the affidavits must demonstrate that each of the

²¹ The Staff notes that the Board declined to apply the criteria governing a reopening of the record, in addressing a motion by Hudson Sloop Clearwater, Inc. (“Clearwater”) to admit new exhibits following the conclusion of “Track 1” hearings but prior to the closing of the evidentiary record; instead, the Board excluded the documents as irrelevant and immaterial. See “Order (Denying Clearwater’s Motion to Supplement the Record)” (Dec. 5, 2012), slip op. at 3. The Staff notes, as it did in its response to Clearwater’s motion, that the Board in another proceeding had applied the reopening criteria in somewhat similar circumstances. See “NRC Staff’s Answer to [Clearwater’s] Motion to Supplement the Record with Relevant New Information that Became Apparent after Hurricane Sandy” (Nov. 28, 2012), at 4-5, citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), “Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1)” (Jun. 4, 2008), slip op. at 2.

²² *Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 675 (2008).

²³ 10 C.F.R. § 2.326(a).

²⁴ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-94-9, 39 NRC 122, 123-24 (1994).

²⁵ The regulations prescribe, in part, as follows:

Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b) (emphasis added).

admissibility standards has been satisfied, and must provide sufficient admissible evidence such that it could withstand summary disposition.²⁶ Mere speculation or unsupported conclusions, even by an expert, are insufficient.²⁷

II. New York's Motion Fails to Satisfy the Standards for Admissibility.

A. The WCAP Reports Have Not Been Shown to Be Material.

New York seeks the admission of four WCAP Reports which it asserts relate to Contentions NYS-25, NYS-26B and NYS-38, challenging the license renewal of Indian Point Units 2 and 3. These documents are (a) WCAP-17941-P, Rev. 1, "Indian Point Units 2 and 3 Inspection Response Plan for Aging Management of MRP-227-A Primary and Expansion Components" ("WCAP-17941" or "Inspection Response Plan") (proposed Ex. NYS000583); (b) WCAP-17949-P, Rev. 0, "Background and Technical Basis Supporting Engineering Flaw Acceptance Criteria for Indian Point Unit 2 Reactor Vessel Internals MRP-227-A Primary and Expansion Components" ("WCAP-17949" or "Flaw Acceptance Criteria for IP2") (proposed Ex. NYS000584); (c) WCAP-17951-P, Rev. 0, "Background and Technical Basis Supporting Engineering Flaw Acceptance Criteria for Indian Point Unit 3 Reactor Vessel Internals MRP-227-A Primary and Expansion Components" ("WCAP-17951" or "Flaw Acceptance Criteria for IP3") (proposed Ex. NYS000585); and (d) WCAP-18048-P, Rev. 0, "Determination of Acceptable Baffle-Former Bolting for Indian Point Units 2 and 3" ("WCAP-18048" or "Indian Point Baffle-Former Bolting Analysis") (proposed Ex. NYS000586).

²⁶ *South Carolina Electric & Gas Co.* (Virgil C. Summer Station, Unit 1) LBP-82-84, 16 NRC 1183, 1186 (1982) (citing Vermont Yankee Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138. 6 AEC 520, 523 (1973)).

²⁷ *Amergen Energy Co., Inc.* (Oyster Creek Nuclear Generation Station), LBP-08-12, 68 NRC 5, 22, aff'd CLI-08-28, 68 NRC 658 (2008).

The four WCAP Reports were not submitted to the Staff for review as part of the Applicant's license renewal application ("LRA") or subsequent submittals, and do not appear to have been in the Staff's possession prior to New York's filing of the documents as attachments to its Motion. Based on the Staff's brief cursory review of the WCAP Reports (which comprise a total of 1,200 pages),²⁸ these WCAP Reports appear to constitute "shelf analyses" prepared by Westinghouse Electric Co. for use by the Applicant in determining how to disposition flaws that may be found during inspections performed under its aging management plan ("AMP") for IP2 and IP3 reactor vessel internals. The WCAP Reports do not appear to establish or alter the Applicant's AMP flaw acceptance criteria; rather, they appear to provide information as to how those flaws may properly be dispositioned in implementing the AMP and its corrective action requirements. As such, while these documents may be relevant to the Applicant's AMP for reactor vessel internals, they do not appear to be material to the Board's consideration of the adequacy of the AMP. Indeed, while the State addresses the relevance of these four documents, its Motion fails to provide any information whatsoever regarding the documents' materiality or show how these documents could affect the Board's decision in this proceeding.²⁹

²⁸ WCAP-17941-P (Inspection Response Plan) (proposed Ex. NYS000583) is 535 pages; WCAP-17949-P (Flaw Acceptance Criteria for IP2) (proposed Ex. NYS000584) is 272 pages; WCAP-17951-P (Flaw Acceptance Criteria for IP3) (proposed Ex. NYS000585) is 272 pages; and WCAP-18048-P (Indian Point Baffle-Former Bolting Analysis) (proposed Ex. NYS000586) is 121 pages.

²⁹ See Motion at 6-8. Similarly, during consultations on the State's proposed motion, Counsel for New York asserted that "each of the identified documents is relevant to the State's contentions" and "discloses relevant information that the State believes is material to the issues in this proceeding and important for inclusion in the record." Motion, Attachment 2 (E-Mail Thread), at [unnumbered] 3 (Feb. 4, 2016, 3:37 PM). When Staff Counsel asked Counsel for New York to explain why the documents are material to the Board's decision or could affect the outcome of the decision (*id.* at [unnumbered] 2 (Feb. 4, 2016, 5:04 PM)), Counsel for New York addressed the purported materiality of the Eason Paper but did not address the materiality of any other document. See *id.* at [unnumbered] 1 (Feb. 5, 2016, 2:58 PM).

Further, the State's late filing of these documents as proposed exhibits effectively deprives the Staff of any meaningful opportunity to review and understand the contents of these documents. In view of the substantial length and technical complexity of the documents, it is difficult to fully ascertain, in the time available, what the documents contain, how the documents might be used in proposed findings of fact and conclusions of law, or whether other parties' use and interpretation of the documents is appropriate. As such, the admission of these documents as exhibits, without affording the Staff or other parties a meaningful opportunity to first examine and address the documents with expert testimony, would create an unfair advantage to the State and may well result in prejudice to other parties.³⁰

For all the above reasons, the State's request to admit the four WCAP Reports into evidence should be denied.

B. The Eason Paper Has Not Been Shown to Be Reliable or Timely.

New York seeks to admit the Eason Paper as an exhibit in the proceeding, describing it as "a technical paper entitled "Disposition Curves for Irradiation-Assisted Stress Corrosion Cracking of Austenitic Stainless Steels in Light Water Reactor Environments," authored by E.D. Eason and R. Pathania, and published in the Proceedings of the ASME 2015 Pressure Vessels and Piping Conference."³¹ New York asserts that the Eason Paper is "self-authenticating" and

³⁰ The Staff expressed this concern to the State during consultations on its proposed Motion, but to no avail. Staff Counsel observed that if a motion were filed, the Staff would "probably need to have our experts examine" the documents, would need copies of them, and "might need to present expert opinion on the relevance and effect of the documents. Frankly, I also don't see how that could happen at this late date, as we are all busy writing proposed findings of fact and are due to file just 25 days from today." See Motion, Attachment 2 (E-Mail thread) at [unnumbered] 2 (Feb. 4, 2016, 5:04 PM) and 1 (Feb. 5, 2016, 2:58 PM). The State offered no response to the Staff's concerns. See *id.*, *passim*.

³¹ Motion at 3 (emphasis added).

is not cumulative of any other evidence in the record,³² and that the Eason Paper is both relevant and material to the issues raised in Contention NYS-25, asserting as follows:

A recent paper by Eason and Pathania (proposed NYS000587), suggests that the crack growth rates used by Entergy for these Primary and Expansion [Reactor Vessel Internals] components are inappropriate and non-conservative. The paper, which discusses data analyzed from over 800 IASCC crack growth rate data points, presents new PWR primary water disposition curves that are more appropriate to the operating conditions at IP2 and IP3 than the BWR disposition curves contained in MRP-227-A. Specifically, the proposed Eason exhibit presents a new PWR primary water disposition curve “which is about a factor of 5.6 higher than the [] MRP-227-A curve.” See Eason paper, at 4, Fig. 3. The Eason paper goes on to state that, at an operating temperature of 330°C and does [sic] of ~14 dpa or higher, “[t]he effect of the higher irradiated yield stress would be to shift the disposition curve upward on Fig. 3 by the factor $(970/700)^{2.547} = 2.3$.” *Id.* at 5.

Further, New York asserts that:

The Eason paper presents essential evidence on PWR primary water disposition curves, [redaction], and which suggest that cracks may propagate and grow in critical RVI components more quickly than accounted for under Entergy’s AMP for RVIs.³³

While New York addresses the purported relevance and materiality of the Eason Paper, it is altogether silent with respect to the reliability of the document. In this regard, New York states only that “[e]ach of the six documents bears the hallmarks of reliability and authenticity, and should be received into evidence in this proceeding. The information contained in these six documents is relevant, material, and reliable, and not unduly repetitious of other evidence in the record.”³⁴ New York, however, offers nothing to support its claim that the Eason Paper is “reliable” such that the Board may reasonably rely upon it in its decision.

³² *Id.* at 4.

³³ *Id.* at 11.

³⁴ *Id.* at 13.

In effect, New York asserts that because the Eason Paper is self-authenticating – i.e., the Paper appears to be what it says it is (a paper presented at a July 2015 conference held by the American Society of Mechanical Engineers (“ASME”)) – it therefore must be deemed “reliable.” New York would have this Board conclude that the NRC can reasonably rely on this highly technical paper because it was presented at an ASME conference – without any basis for knowing whether the document’s statements and conclusions are reliable. In so arguing, the State disregards the well-established principle that the admission of technical documents into evidence requires a proper sponsoring witness, who is familiar with the document and who can attest to its reliability. In this regard, the Atomic Safety and Licensing Appeal Board has held as follows:

The other excluded exhibits . . . consist of technical analyses, conclusions and opinions on various aspects of the matter of hydrogen generation and control in nuclear power reactors. This manifestly is the type of evidence that calls for sponsorship by an expert who can be examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents. *Cf. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2)*, ALAB-78, 5 AEC 319, 332-33 (1972) (citing *Dolcin v. FTC*, 219 F.2d 742, 748 (D.C. Cir. 1954), *certiorari denied*, 348 U.S. 981 (1955)).⁵³

⁵³ These documents are not unlike the reports of the Advisory Committee on Reactor Safeguards. These cannot be admitted into evidence for the truth of the matter stated therein because ACRS members are generally not subject to examination as witnesses. *Arkansas Power and Light Co. (Arkansas Nuclear One Unit 2)*, ALAB-94, 6 AEC 25, 32 (1973).

Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982).³⁵

³⁵ *Cf. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, ALAB-950, 33 NRC 492, 501 (1991) (under 10 C.F.R. § 2.743(c), “[f]or evidence on highly technical subjects (such as the response of reactor vessel materials to neutron irradiation and temperature variables) to be considered “reliable” and thus admissible, the proponent thereof must show her or his qualifications to sponsor and discuss such evidence.”)

Contrary to these fundamental requirements, the State has presented no information to demonstrate the quality or reliability of the studies or analyses performed in support of the Paper's conclusions, such that the Board may reasonably rely upon that Paper in its decision. New York did not present the testimony or affidavit of any expert, asserting that the witness or affiant is familiar with the document and can attest to its reliability, choosing instead to rest upon its attorneys' non-expert interpretation of the documents. Nor has New York shown any other basis for finding the Paper to be reliable, such as showing that the Paper was peer reviewed, was reviewed by the Electric Power Research Institute ("EPRI") (whose guidance in MRP-227A is addressed in the Paper), or was reviewed and approved by the NRC Staff.³⁶ Instead, based solely on the opinion of its attorneys, New York asserted that "the documents can be used by the parties without the need for any additional testimony from the witnesses."³⁷ In sum, New York's Motion failed to demonstrate the reliability of the Eason Paper, and its request to admit the Eason Paper as an exhibit in this proceeding should therefore be denied.

Finally, New York has not shown that its motion to admit the Eason Paper was timely. The Eason Paper appears to have been presented at an ASME conference held on July 19-23, 2015, in Boston, MA – some four months prior to the commencement of hearings on these contentions. New York claims that it only discovered the Paper recently, that the Paper "was likely not available to the public until November 2015," and that it is attempting to learn when the Paper actually became available to the public.³⁸ These assertions, however, fail to satisfy its

³⁶ As the Staff informed Counsel for New York, the Staff was not in possession of the Eason Paper and the Paper did not appear to have been submitted to the NRC prior to New York's filing of its Motion. See Motion, at 3 and 10; Attachment 2 (E-Mail Thread), at [unnumbered] 4 (Feb. 3, 2016, 5:38 PM) and 2 (Feb. 4, 2016, 5:04 PM).

³⁷ Motion at 4.

³⁸ *Id.* at 3.

burden, as the Motion's proponent, to demonstrate that it could not have discovered the Eason Paper sooner or that its Motion is timely.³⁹ Moreover, even accepting New York's claim that the document was "likely" not available until November 2015 – and disregarding the fact that its experts might have been able to attend the ASME conference and to review the document in July 2015 – New York has failed to demonstrate that its Motion is timely.⁴⁰ Indeed, if New York had filed the document as an exhibit in November 2015, the parties might have been able to review and confront it prior to the conclusion of hearings. In sum, New York has not demonstrated that its motion to admit this document is timely.

CONCLUSION

New York's Motion fails to satisfy the Commission's well-established requirements governing the admissibility of evidence. Further, its Motion fails to provide a proper sponsoring witness for any of the documents, and it would deprive the Staff of the opportunity to properly review the documents and to proffer expert testimony with respect thereto. For these and other reasons set forth above, New York's Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 16th day of February, 2016

³⁹ See 10 C.F.R. § 2.323(a)(2) (motions); *cf.* 10 C.F.R. § 2.326(a)(1) (motions to reopen).

⁴⁰ 10 C.F.R. § 2.323(a)(2) (motions must be filed within 10 days).

CERTIFICATION OF COUNSEL

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.

Signed Electronically by

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Dated at Rockville, Maryland
this 16th day of February, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247/286-LR
)
(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 SIX DOCUMENTS AS ADDITIONAL EXHIBITS,'" dated February 16, 2016, been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above- captioned proceeding, this 16th day of February, 2016.

/Signed (electronically) by/

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