

February 9, 2012

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 SUPPORT OF ENTERGY'S MOTION IN LIMINE
TO EXCLUDE PORTIONS OF PRE-FILED TESTIMONY AND EXHIBITS
FOR CONTENTION NYS-37 (ENERGY ALTERNATIVES)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c) and the February 1, 2012 Order of the Atomic Safety and Licensing Board ("Board"),¹ the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith files its answer in support of Entergy Nuclear Operations, Inc.'s ("Entergy") Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) ("Motion"). The Motion is consistent with the Board's July 6, 2011 ruling on Contention NYS-37.² In addition, the Motion is consistent with the history of the regulation governing the license renewal environmental review. For these reasons, the Motion should be granted.

DISCUSSION

A. Legal Standards Governing Motions in Limine.

In an evidentiary hearing, "[o]nly relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will

¹ Order (Setting Dates for Responsive Pleadings to Entergy's Motions in Limine) (February 1, 2012) at 1 (unpublished).

² Licensing Board Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011) at 35 (unpublished) ("July 6 Order").

be segregated and excluded so far as is practicable.” 10 C.F.R. § 2.337(a). While the “strict rules of evidence do not apply to written submissions,” the Board may “on motion or on the presiding officer’s own initiative, strike any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative.”

10 C.F.R. § 2.319(d). *See also* 10 C.F.R. § 2.319(e).

NRC hearings are limited to the scope of the admitted contentions. It is well established that if an intervenor proffers testimony or evidence outside the scope of the admitted contentions, it will be excluded. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board had properly excluded the intervenors’ testimony and exhibits that were outside the scope of the admitted contention). As the Commission explained:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

Id., 71 NRC at 100-01 (internal footnotes omitted). Recently, the Commission emphasized:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-01, __ NRC __ (Feb. 9, 2012) (slip op. at 22-23) (internal citations omitted).

Further, an expert opinion is only admissible if the witness is competent to give an expert

opinion and adequately states and explains the factual basis for the expert opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). An admissible expert opinion must be “based upon sufficient facts or data to be the product of reliable principles and methods that the witness applied to the facts of the case.” *Id.* at 80. In addition, a party bears the burden of demonstrating that its witness is qualified to serve as an expert. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Id.* at 27-28 (internal quotation marks omitted, alteration in original).

B. The Pre-Filed Testimony and Exhibits Address an Issue that Is Beyond the Scope of this Proceeding.

The Motion seeks to strike those portions of the pre-filed testimony, exhibits, and Statement of Position that Intervenor New York State (“NYS”) filed in support of its Contention NYS-37 that address the need for power from Indian Point. These documents support NYS’s assertion that Entergy’s license renewal application and the Staff’s Draft and Final Supplemental Environmental Impact Statements are deficient for failing to address the need for the continued operation of the Indian Point nuclear power plant. They support the proposition that there is no need for the power that the plant generates either directly or in support of grid reliability. However, this Board has previously ruled that the portions of Contention NYS-37 that address the need for the power are precluded by Commission regulations and beyond the scope of this proceeding and, for those reasons, limited the contention.³ The Motion, which seeks to strike portions of NYS’ submissions consistent with the Board’s ruling and Commission regulations, should therefore be granted.

³ July 6 Order at 35, *see also*, Memorandum and Order (Granting Entergy’s Request for Clarification) (August 10, 2011) at 6 (unpublished).

C. The Regulation's History Provides Further Support for the Motion in Limine.

The Motion is also supported by the regulatory history of the regulation governing the environmental review for license renewal. That regulation provides that license renewal environmental impact statements are "not required to include discussion of need for power". 10 C.F.R. § 51.95(c)(2). The regulatory history that accompanied the promulgation of 10 C.F.R. § 51.95(c) shows that the Commission considered and rejected a requirement that environmental impact statements for license renewal include an analysis of need for power.

NYS submitted comments on the rulemaking, specifically on the issue of how to address the issue of need for power in the regulatory scheme.⁴ NYS proposed that the Commission's "relicensing decisions should make reference to State determinations on the issues of need for generating capacity and alternative energy sources, and should defer to and be guided by those State determinations to the maximum degree possible pursuant to [the National Environmental Policy Act ("NEPA")] ".⁵ NYS also proposed that the Commission make need for power a site-specific determination, rather than a generic determination, and that the Commission state that its analysis of need for power was solely for the purpose of fulfilling its obligations under the NEPA and did not preclude states from making their own determinations regarding need for power.⁶

The Commission explicitly declined to adopt NYS's approach. The Commission rejected NYS's proposal that need for power be analyzed and that the Commission should be guided by, and defer to, state determinations on the question.⁷ Instead of adopting NYS's proposal that

⁴ Environmental Review for Renewal of Operating Licenses, Supplemental Proposed Rulemaking, 59 Fed. Reg. 37742, 37725 (July 25, 1994).

⁵ *Id.*

⁶ *Id.*

⁷ Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28467, 28471-72 (June 5 1996); see *also* 59 Fed. Reg. at 37725.

focused on need for power, the Commission excised the issue of need for power from the license renewal process, stating: “the NRC will neither perform analyses of the need for power nor draw any conclusions about the need for generating capacity in a license renewal review.”⁸

To the extent that NYS seeks to introduce documents and arguments for the purpose of injecting the issue of need for power into this license renewal proceeding, the regulatory history makes clear that was an approach that the Commission considered and rejected when it promulgated the license renewal environmental regulation in 10 C.F.R. § 51.95(c). Thus, those exhibits, testimony and portions of NYS Statement of Position that Entergy has identified as addressing the need for power should be stricken and Entergy’s Motion in Limine should be granted.

CONCLUSION

For the foregoing reasons, Entergy’s Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) should be granted.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 9th day of February, 2012

⁸ 61 Fed. Reg. at 28472.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff's Answer in Support of Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) in the above-captioned proceeding have been served on the following by Electronic Information Exchange this 9th day of February, 2012.

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Dated at Rockville, Maryland
this 9th day of February, 2012