

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/50-286-LR
)	
(Indian Point Nuclear Generating)	
Units 2 and 3))	

NRC STAFF'S RESPONSE IN SUPPORT OF
ENTERGY'S MOTION IN LIMINE ON CONTENTION
CW-EC-3A (ENVIRONMENTAL JUSTICE)

Pursuant to 10 C.F.R. § 2.323(c) and the February 1, 2012 Order of the Atomic Safety and Licensing Board (Board) in this proceeding, the staff of the U.S. Nuclear Regulatory Commission (Staff) responds to the January 30, 2012 Motion in Limine (Motion) filed by Entergy Nuclear Operations, Inc. (Entergy) to exclude portions of pre-filed testimony and exhibits submitted by Hudson River Sloop Clearwater, Inc. (Clearwater) in support of Contention CW-EC-3A. For the reasons set forth below, the Staff fully supports Entergy's motion to exclude portions of Clearwater's testimony and exhibits. Accordingly, the Staff submits that the Board should exclude, in full or in part, the testimony and exhibits challenged in Entergy's motion, for the reasons and to the extent set forth therein.

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 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).

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. Entergy's Motion in Limine

The Staff agrees with Entergy that the only relevant and remaining issue for Contention CW-EC-3A as admitted by the Board, “is whether—under NEPA—the FSEIS and the ER sufficiently analyze any disproportionate environmental impact on minority and low-income populations in nearby institutions in the event of a severe accident.” Motion at 5-6. Thus, the Staff agrees with Entergy’s view that the portions of Clearwater’s pre-filed testimony and exhibits that Entergy seeks to exclude from the hearing record should be excluded, on the grounds that this evidence is unreliable, lacks relevance, is beyond the scope of Contention CW-EC-3A, and/or contains testimony from an unqualified expert witness.

Additionally, as this Board has explicitly recognized, “the adequacy of emergency planning is outside the scope of license renewal proceedings.”¹ Moreover, in the Statement of Consideration for the rulemaking on license renewal, the Commission concluded that “the adequacy of existing emergency preparedness plans need not be considered anew as part of issuing a renewed operating license.” 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991). Rather, the adequacy of emergency planning is a safety issue that is evaluated by the Commission on an ongoing basis as part of its oversight of operating reactors under 10 C.F.R. Part 50.²

¹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13, 71 NRC 673, 687 (2010) (“we reaffirm that . . .” citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43, 149-50 (2008)); *cf. id.*, LBP-08-13, 68 NRC at 201.

² To ensure that a licensee’s emergency preparedness plan remains adequate to protect the health and safety of the public, the NRC requires: (1) a detailed annual review of the facility’s emergency preparedness plan by persons who have no direct responsibility for its implementation, (2) an evaluation of the continued adequacy of applicable and appropriate communication and working relationships with State and local governments, and (3) performance of an annual exercise of the licensee’s emergency preparedness plans evaluated by the NRC against definitive performance criteria. 56 Fed. Reg. at 64,966. Offsite emergency preparedness plans are also subject to review and evaluation by the Federal Emergency Management Agency (FEMA), and the effectiveness of those plans is evaluated biennially by FEMA and the NRC in comprehensive emergency preparedness exercises. See 10 C.F.R. § 50.47(a)(2); 10 C.F.R. Part 50, Appendix E, § IV.F.2. The Commission’s requirements in 10 C.F.R. Part 50 ensure continued adequacy of emergency preparedness in light of changes in site characteristics (continued. . .)

Accordingly, the Staff agrees with Entergy that to the extent Clearwater's testimony and exhibits challenge the adequacy of existing emergency plans, these items should be excluded from the hearing record.

The Staff's review of Clearwater's proposed testimony and exhibits leads it to conclude that much of that material (a) represents a challenge to the sufficiency of offsite emergency preparedness plans for the Indian Point facility, which is beyond the scope of a license renewal proceeding and irrelevant to the issues in this proceeding, and/or (b) lacks a proper sponsoring witness with the requisite expertise to present that evidence. Accordingly, for the reasons set forth above and in Entergy's motion, the Staff supports Entergy's motion to exclude the testimony and exhibits, or parts thereof, challenged in Entergy's motion on the grounds that this evidence is unreliable, lacks relevance, is beyond the scope of Contention CW-EC-3A, and/or is testimony from an unqualified expert witness.

CONCLUSION

For the foregoing reasons, the Staff supports Entergy's Motion in Limine to exclude portions of Clearwater's pre-filed testimony and exhibits for Contention CW-EC-3A.

Respectfully submitted,

/Signed (electronically) by/

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(. . .continued)

that may occur during the term of the existing operating license, such as transportation systems and demographics. 56 Fed. Reg. at 64,966. Thus, the NRC has determined that "the current requirements, including continuing update requirements for emergency planning, provide reasonable assurance that an acceptable level of emergency preparedness exists at any operating reactor at any time in its operating lifetime." *Id.* at 64,966-64,967.

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

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I hereby certify that copies of the foregoing NRC Staff's Response to Entergy's Motion in Limine on Contention CW-EC-3A (Environmental Justice), have been served upon the following persons by Electronic Information Exchange this 9th day of February, 2012:

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