UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE
ATOMIC SAFETY AND LICENSING BOARD

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 January 17, 2012

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

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's July 1, 2010 Scheduling Order and subsequent Orders dated November 17, 2011 and February 1, 2012, the State of New York submits this Answer to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 and NRC Staff's filing in support of the motion.

DISCUSSION

On January 30, 2012, Entergy Nuclear Operations, Inc. ("Entergy") filed a motion in limine to exclude from the hearing record certain testimony statements, exhibits, and references in the State of New York's Initial Statement of Position on Combined Contention NYS-9-33-37 ("Contention 37") challenging the Nuclear Regulatory Commission Staff's Draft and Final Supplemental Environmental Impact Statement ("DSEIS" and "FSEIS" respectively). Entergy's Motion in Limine to Exclude Portions of the Pre-filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) (Jan. 30, 2012) ("Entergy's Motion"). At that time, NRC Staff did not file a motion in limine in response to the State's pre-filed submissions on this contention, which concerns Staff's review pursuant to the National Environmental Policy Act ("NEPA"). Staff subsequently did file an answer in support of Entergy's Motion. 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) (Feb. 9, 2012) ("NRC Staff Answer").

Entergy again seeks to litigate an issue already addressed twice by this Board, whether or not the State's contention can challenge statements regarding the need for power contained in the DSEIS and FSEIS as part of the no-action alternative as incomplete. As the State has successfully argued in the past, and for the reasons stated below, the State's inclusion of

arguments pertaining to statements made in the DSEIS and FSEIS are within the scope of Contention 37.

Entergy's motion over-simplifies and mischaracterizes the State's contention, which addresses the nuances of the no-action alternative as it relates to issues already raised in the FSEIS. Contrary to Entergy's characterization, the State in its pre-filed testimony has not changed or expanded the scope of its consolidated contentions. Entergy asserts that the State's contention argues that Indian Point's power is not currently needed. Support for that proposition cannot be found in the State's contention. Likewise, NRC Staff mischaracterizes the State's contention when stating that it asserts "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."[1] Since the admission of Contention NYS-9, through the admission of Contention NYS-33 and the consolidation of both of these with Contention NYS-37, the contention has challenged, first in Entergy's Environmental Report, then in the DSEIS, and now in the FSEIS, the inadequate evaluation of the no-action alternative. The State's expert testimony speaks to that argument and nothing more. Accordingly, the ASLB should deny Entergy's motion on Contention NYS-37.

LEGAL BACKGROUND AND STANDARDS

In a Relicensing Proceeding, Motions in Limine Are Unnecessary Because No Jury Is Involved and the Board Must Ensure Its Decision Is Based Upon a Complete Record

Entergy's motion in limine, as supported by NRC Staff, boils down to a claim that portions of the State's pre-filed submissions are beyond the scope of the contention because they

[1] NRC Staff Answer at 3. Staff also misunderstands and misapplies the no-action alternative required by NEPA, and CEQ and NRC regulations and the regulatory history that led to the 1996 GEIS. NRC Staff Answer at 4.

discuss replacing Indian Point's capacity with alternative generation, purchased power or demand reduction strategies and are allegedly barred by 10 C.F.R. § 51.95(c)(2) because they impermissibly discuss the "need for power." NRC regulations do not, however, explicitly provide for motions in limine. Instead, the regulations discuss admissibility generally, specifying that "relevant, material, and reliable evidence which is not unduly repetitious" is admissible.[2] Thus, Entergy's argument that portions of the State's expert testimony and exhibits are outside the scope of the admitted contentions is essentially an argument that the challenged testimony and exhibits concerns issues that are immaterial to this adjudication.[3]

But Entergy's motion in limine, as supported by NRC Staff, is unnecessary. In a recent decision, a Licensing Board recognized that the purpose of a motion in limine is to "obtain a ruling in advance of trial, or at least outside of the presence of the jury."[4] However, "[i]n administrative proceedings such as this, where no jury is involved, no such threat of prejudice is present, . . . there is accordingly no compelling need for a ruling on the materiality of challenged testimony before the hearing has begun."[5]

Additionally, it is of the utmost importance that the Board have a full record before it when rendering decisions. Excluding evidence before the hearing does not serve this interest. As the Appeal Board held, "No conceivable good is served by making empty findings in the absence of essential evidence."[6] At this stage in the proceeding, the Board should decline to

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[2] 10 C.F.R. § 2.337(a).

[3] *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), Licensing Board Order, LBP 09-874-02-COL-BD01 at 2 (Jan. 17, 2012) (unpublished) (ML12017A200) ("*Calvert Cliffs 3*").

[4] *Id.* at 3.

[5] *Id.*

[6] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 N.R.C 227, 230 (1980)) (vacating Licensing Board's finding as unsupported by the record and

exclude evidence.[7] Once the Board has a full evidentiary record, the Board can consider the scope and weight of the evidence before it. *Id.*

ARGUMENT

THE GEIS FOR LICENSE RENEWAL REQUIRES THE NRC STAFF TO DISCUSS REPLACEMENT POWER AND DEMAND-SIDE MANAGEMENT IN ITS ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE NO-ACTION ALTERNATIVE AND THE STATE'S PRE-FILED TESTIMONY AND EXHIBITS PROPERLY RESPONDED TO STAFF'S STATEMENTS IN THAT ANALYSIS

Entergy's Motion in Limine moves to strike testimony and exhibits that address issues that are at the heart of the environmental impact analysis of the no-action alternative that NEPA requires. Indeed, the GEIS for nuclear power plant license renewals directs NRC to perform the analysis that Entergy suggests was not required by 10 C.F.R. § 51.95(c)(2):

> [T]he no-action alternative is denial of a renewed license. Denial of a renewed license as a power generating capability may lead to a variety of potential outcomes. In some cases, denial may lead to the selection of other electric generating sources to meet energy demands as determined by appropriate state and utility officials. In other cases, denial may lead to conservation measures and/or decisions to import power. In addition, denial may result in a combination of these different outcomes. *Therefore, the environmental impacts of such resulting alternatives would be included as the environmental impacts of the no-action alternative.*

Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS"), NUREG-1437, Volume 1, Section 8.2, "Environmental Impacts of the No-Action Alternative" (May 1996) (emphasis added). Entergy's motion must therefore be denied.

The Board admitted Contention NYS-37 to the extent that it alleged additional deficiencies in the FSEIS related to Staff's failure to discuss information published after the DSEIS "that is material to understanding the environmental impact of the no-action alternative."

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ordering a de novo consideration of the issues at an evidentiary hearing before the Appeal Board).

[7] *See Calvert Cliffs 3* at 3.

Entergy Nuclear Operations, Inc. (Indian Point Units 2 and 3) Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) (July 6, 2011) ("ASLB Memorandum and Order Admitting Contention NYS-37") at 34. As the Board noted, the State alleged that the NRC had ignored information included in supporting declarations from David Schlissel, Peter Lanzalotta, and Peter Bradford. *Id*.

Now, Entergy moves to strike substantial sections of the pre-filed testimony of Schlissel, Lanzalotta, and Bradford.[8] Those sections of testimony contain much of the same information that was contained in their earlier supporting declarations which the Board relied upon in admitting Contention NYS-37.[9] According to Entergy, these sections of testimony are outside the contention's scope because they discuss "the need for power" in violation of 10 C.F.R. § 51.95(c)(2). Entergy is wrong. As set forth below, 10 C.F.R. § 51.95(c)(2) does not relieve the Staff of analyzing, in the no-action alternative, methods of replacing the power from a nuclear power plant seeking relicensing because the environmental impacts of those methods is at the heart of the analysis.[10]

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[8] Entergy also seeks to strike certain statements in the Statement of Position. Entergy's Motion at 10. Its attempt must be rejected. Statements of Position are not evidence, and the admissibility standards of section 2.337(a) do not apply to them. Therefore, the Board need not rule on the admissibility of statements of position because they will not be admitted as evidence. *Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3), Licensing Board Order, LBP 09-874-02-COL-BD01 at 5-6 (Jan. 17, 2012) (unpublished).

[9] A comparison of the sections of testimony that Entergy seeks to strike and similar sections in the Schlissel, Lanzalotta and Bradford declarations in support of Contention NYS-37 accompanies this filing as Attachment A.

[10] Entergy cites in support of its position the Commission's statement in promulgating the rule that "for license renewal, the issues of need for power and utility economics should be reserved for State and utility officials to decide." Entergy's Motion at 6, n.25, *citing* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. at 28,472, 28,484 (June 5, 1996). The Federal Register notices make clear, however, that the phrase "need for power" referred to traditional determinations by a state regulatory agency, that the construction or operation of a specific electric generation facility was justified by a need for power. 59 Fed. Reg. 37724, 37725 (July 24, 1994); 61 Fed. Reg. 2847, 28467, 28471-72 (June

NEPA Obligates Staff to Address the Environmental Impacts of Methods of Replacing the Generating Capacity of Indian Point

Under NEPA, NRC Staff is required to analyze the environmental impacts of the no-action alternative of denying Entergy's application for a renewal license for Indian Point Units 2 and 3. Because the no-action alternative may require replacing some or all of the energy generated by Indian Point or by reducing the demand for its energy, Staff cannot analyze the no-action environmental impacts without assessing scenarios involving replacement power or demand reduction. *See* GEIS at section 8.2, *supra.*

That is what Staff attempted in the FSEIS. It discussed replacing Indian Point's generating capacity with new or repowered generating facilities, or by purchasing electricity from existing generating facilities or by reducing the need for Indian Point's capacity through demand reduction measures such as conservation or energy efficiency and analyzed the environmental impacts of these different power replacement methods. *See* FSEIS at 8-1, 8-28-29, 8-30, 8-37-39, 8-40-46, 8-59-60, 8-67, 8-71-72. Although the State challenges the adequacy and sufficiency of Staff's no-action analysis, and in particular Staff's insistence that new or repowered natural gas generation must be constructed to replace some part of Indian Point's capacity, Staff's discussion of these issues does not implicate 10 C.F.R. § 51.95(c)(2) and neither does the State's responsive testimony and exhibits, which it is surely entitled to submit in response to Staff's analysis.

The selections of expert testimony that Entergy moves to strike address the same issues discussed by Staff in the FSEIS—whether the electricity generated by Indian Point can be

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5, 1996). This statement does not address the required analysis of the environmental impacts of the no-action alternative under NEPA but simply clarifies that the NRC will not grant or deny a renewal license based on NRC's determination of whether or not the power is needed. It does not relieve Staff of its obligation, described below, of doing a thorough no-action environmental impact analysis.

replaced or the demand for it reduced if Indian Point's license is not renewed—and they are all within the scope of Contention NYS-37 as admitted by the Board. *See* Schlissel:16:8-17, 33:3-6, 34:22 - 35:04, 35:16-19, 36:16 - 37:03, 39:01 - 46:14, 47:13 - 48:12; Bradford: 5:07-12, 10:01-03, 10:06-09, 10:12-13, 16:02-10; 26:02-12, 31:01 - 32:14.[11] This is not a "broad ranged inquiry" into the general need for power that the Board held would be precluded by Commission regulations (ASLB Memorandum and Order Admitting Contention NYS-37 at 35) but a focused analysis of replacing Indian Point's capacity through alternative sources, purchased power, and demand reduction programs such as conservation and efficiency. Indeed, if Entergy's extreme reading of 10 C.F.R. § 51.95(c)(2) were accepted, the environmental impacts of the no-action alternative would always be severely overstated if reductions in demand through conservation or substitution of Indian Point's generation with renewable sources could not be considered because they reduce the "need for power" from Indian Point.

Entergy's complaints about the sections of expert testimony that question whether there is a need to replace *all* of Indian Point generating capacity are equally unavailing. *See* Schlissel 7:11-16, 11:06-16, 12:12-17, 17:20-18:21, 19:07- 20:02; Bradford: 9:21-22, 11:13-14:22; Lanzalotta: 12:20-14:2. To determine the environmental impacts of the no-action alternative, NRC Staff must make some assessment of how much of Indian Point's capacity must be replaced – the less capacity that needs to be replaced, the more likely that environmentally more benign renewable power sources and demand reduction programs will be sufficient to replace it. NRC Staff, however, simply assumed that all of Indian Point's approximately 2200 MW capacity would need to be replaced (FSEIS at 8-27) and did no assessment of the accuracy of

[11] The cited sections discuss methods of replacing all of Indian Point's roughly 2200 MW capacity. *See e.g.* Schlissel: 34:22-35:04 ("My 2007 Synapse Report concluded that energy efficiency and renewable resources together have sufficient technical and economic potential to replace the approximately 2200 MW of capacity from Indian Point Units 2 and 3").

that assumption, despite more recent information provided by the State's experts that undermine it.[12] Because it is hard to understand how Staff could perform a no-action alternative environmental impact analysis without discussing how much power might need to be replaced, it is also hard to see how 10 C.F.R. § 51.95(c)(2) could be interpreted to relieve Staff of a critical part of the analysis.

In sum, in order for NRC Staff to evaluate the likely environmental impact of the no-action alternative, it must make some judgments about the likely scenarios that will evolve if Indian Point is not relicensed. Staff attempts to do that in the FSEIS by making assumptions that it does not and cannot support and ignores recent information provided by the State's expert witnesses that raise serious questions about the accuracy of Staff's assessment of the likely no-action consequences.

Staff's reliance on outdated information about current electricity demand, and the amount that can be satisfied by renewable resources or displaced by demand side management ("DSM") such as conservation and efficiency results in an exaggeration of the environmental impacts of the no-action alternative. In effect, there is no dispute between Staff and the State that 2200MW of electricity will not be delivered to New York customers if Indian Point is not relicensed.

There is no dispute between NRC Staff and the State's experts that some of that 2200MW will not need to be generated elsewhere and will be met either by DSM or existing generating sources. There is, however, a dispute about the accuracy of Staff's assessment of the ability of reduced demand, renewable resources and DSM to replace the electricity generated by

[12] Staff's assumption leads to a scenario in which a natural gas fired plant will be constructed or an older plant repowered with natural gas to replace some of Indian Point's capacity, which in Staff's view could result in some "small to moderate" air impacts from the no-action alternative that differ from the "small" air impacts from the relicensing of Indian Point. FSEIS at 9-09, Table 9-1, Option 2.

Indian Point. For example, if the FSEIS understates the contribution from renewable resources, or from DSM, which it does, then it overstates the need for additional gas fired generation which will have adverse air impacts that DSM and renewable sources will not. Then, the environmental impacts of the no-action alternative may appear larger than the environmental impacts from relicensing Indian Point.

The State's pre-filed testimony goes to the heart of the no-action analysis. It provides recent information that challenges Staff's assumed no-action consequences and demonstrates that the environmental impacts of the no-action alternative will likely be less than the operation of Indian Point for an additional 20 years.

By Discussing Methods of Replacing Indian Point's Capacity And Reductions in the Demand for Electricity in New York State, Staff Opened the Door to the Expert Testimony Entergy Challenges

Even if Staff were not required under 10 C.F.R. § 51.95(c)(2) to discuss the need for power from Indian Point, by including such a discussion in the FSEIS, Staff has opened the door and the State must have an opportunity to address its assumptions. Indeed, in the FSEIS, Staff agrees with some of the State's expert testimony that Entergy seeks to strike about New York State's reduced need for power. For example, at page 8-42 of the FSEIS, Staff notes that in 2005:

> NYSERDA estimated that its energy efficiency programs *had reduced peak energy demands in New York by 860 MW(e)* [and NYSERDA] further forecasted that the technical potential of its efficiency programs in New York would result in a cumulative 3800 MW(e)-reduction of peak load by 2012 and 7400 MW(e) by 2022 (emphasis added).

Staff also concluded that:

> In addition to the currently anticipated peak load reductions resulting from the NYSERDA energy efficiency initiatives, additional conservation measures and demand-side investments in energy efficiency, demand response, and combined

> heat and power facilities *could significantly offset peak demand Statewide (*emphasis added). FSEIS at 8-42.

See the following sections of testimony that address the same issue: Schlissel:17:20-18:21, 19:07-20:02, 20:21-21:12; Lanzalotta:12:09-13:02.

Although Staff acknowledges New York State's success in reducing demand through conservation and efficiency, it ignores that success in assuming that all of Indian Point's capacity will need to be replaced. This disconnect between facts and assumptions forms much of the basis for Contention NYS-37 and the State is entitled to the opportunity to contradict Staff's assumptions.

The door was similarly opened to the testimony about "grid reliability and stability" (Lanzalotta: 15:04-19:21) that Entergy challenges at Point III(c) of its Motion in Limine. Entergy's Motion at 9-10. In the FSEIS, Staff specifically raises the possibility that, even if the renewal license is denied, Indian Point 2 and 3 must continue to operate as non-nuclear generators to maintain the "smooth operation of the transmission grid." FSEIS at 8-22. Although Staff may not have been required to discuss this issue, it did so in the FSEIS and the State cannot be precluded from addressing Staff's discussion once Staff opened the door.

CONCLUSION

Entergy seeks to exclude from this proceeding relevant and critical testimony about the environmental impacts of the no-action alternative which is required by the GEIS and properly within the scope of the proceeding. Its motion in limine must be denied**.**

Signed (electronically) by

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Dated: February 17, 2011

10 C.F.R. § 2.323 Certification

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned counsel hereby certifies that counsel for the State of New York has participated in discussions between Entergy Nuclear Operations, Inc. ("Entergy"), the movant, and NRC Staff, concerning Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-12, filed on January 30, 2012 in this matter, and has made a sincere effort to make themselves available to listen and respond to the movant and NRC Staff, and to resolve the factual and legal issues raised in the motions. The State of New York's efforts to resolve the issues have been unsuccessful.

Signed (electronically) by

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Janice A. Dean
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Dated: February 17, 2012

Attachment A

Witness	**Pre-Filed Testimony (December 2011)**	**Declaration in Support of Contention NYS-37 (February 2011)**
Peter Lanzalotta	12:09-14:09	¶¶ 12-13
	15:04-19:21	¶¶ 14-20
David Schlissel	17:20-18:21	¶19
	19:07-20:02	¶¶ 19-20
	20:21-20:06	¶21
	21:07-21:12	¶22
	31:16-37:03	¶32
	39:01-39:07	¶36
	41:14-42:02	¶37
	42:03-42:10	¶40
	44:16-45:22	¶41
	45:01-45:07	¶42
	45:08-45:12	¶43
	45:12-45:22	¶¶ 46-47
	47:03-48:12	¶49
Peter Bradford	11:17-11:19	¶5(f)
	12:20-13:03	¶8(a)
	10:01-10:03	¶8(b)
	10:06-10:07	¶8(d)
	09:10-09:11	¶8(e)
	10:12-10:13	¶8(f)
	16:02-16:10	¶8(g)
	11:17-12:14	¶15(b)

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, copies of the State of New York's Answer to Entergy's Motion in Limine to Exclude Portions of Pre-Filed Testimony and Exhibits for Contention NYS-37 (Energy Alternatives) were served electronically via the Electronic Information Exchange on the following recipients:

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Dated at New York, New York
this 17th day of February 2012