

**UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD**

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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,	DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and	
Entergy Nuclear Operations, Inc.	February 17, 2012
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**STATE OF NEW YORK'S ANSWER TO ENTERGY'S MOTION IN LIMINE TO
EXCLUDE PORTIONS OF PRE-FILED TESTIMONY AND EXHIBITS FOR
CONSOLIDATED CONTENTION NYS-12C**

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

TABLE OF CONTENTS

LEGAL BACKGROUND AND STANDARDS.....	2
A. In a Relicensing Proceeding, the Board Must Admit All Relevant and Material Evidence to Ensure Its Decision Is Based Upon a Complete Record.....	2
B. Entergy’s Motions in Limine Confuse Bases and Supporting Evidence	4
PROCEDURAL BACKGROUND.....	6
CONSOLIDATED NYS-12C AND ITS BASES ASSERT THAT ENTERGY AND NRC STAFF UNDERESTIMATED THE ECONOMIC COSTS ASSOCIATED WITH A SEVERE ACCIDENT AT INDIAN POINT FOR THE SAMA ANALYSIS	6
A. New York State Contention 12 Asserts that Entergy’s Flawed SAMA Analysis Relies Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point.....	6
B. New York State Contentions 12A and 12B Assert that Entergy’s SAMA Analysis, NRC Staff’s DSEIS, and Entergy’s 2009 SAMA Reanalysis Are Deficient Because they All Rely Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point	8
C. New York State Contention 12C Asserts that Entergy’s SAMA Analysis, NRC Staff’s DSEIS, Entergy’s 2009 SAMA Reanalysis, and NRC Staff’s FSEIS All Rely Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point In Violation of the APA, NEPA, CEQ Regulations, and NRC Regulations.....	9
ARGUMENT.....	12
DR. LEMAY’S PRE-FILED TESTIMONY, ISR’S REPORT, AND EXHIBITS ARE WITHIN THE SCOPE OF CONSOLIDATED NYS-12C AS ADMITTED BY THE BOARD AND SHOULD NOT BE STRICKEN.....	12
A. In Admitting Consolidated NYS-12C, this Board Recognized that Expert Reports Are Supporting Evidence, and that Technical Information Regarding the MACCS2 Inputs Is Appropriately Addressed at the Evidentiary Hearing Stage of this Proceeding	12
B. The Scope of Consolidated NYS-12C and its Bases Includes All of the CHRONC Input Parameters Discussed in ISR’s Expert Report and Dr. Lemay’s Testimony.....	14
1. ISR’s Evaluation of MACCS2 Inputs Associated with Economic Costs Was Properly within the Scope of Consolidated NYS-12C	14

2.	CDNFRM Is Not the Only MACCS2 Input Related to Decontamination and Cleanup Costs; Rather the Inputs to the CHRONC Module Are Interrelated, Relevant, Material, and Admissible.....	15
4.	ISR Provided a Table Showing Other Reactor Input Values To Support Its Conclusion that Entergy’s Input Parameters to the MACCS2 Code Were Not Site-Specific, Which Is within the Scope of the Contention.....	19
C.	While the Scope of the Contention Is Not Defined or Limited to Supporting Evidence Provided at the Contention Admissibility Stage, the ISR Report, Dr. Lemay’s Testimony, and Exhibits Expand upon that Evidence	20

ISR’S MODIFICATIONS TO THE MACCS2 CODE WERE PROPER AND SHOULD NOT BE STRICKEN.....	21
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THE BOARD SHOULD DECLINE TO STRIKE ALL OR PART OF THE STATE’S INITIAL STATEMENT OF POSITION BECAUSE IT IS LEGAL ARGUMENT, NOT EVIDENCE	24
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CONCLUSION	25
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Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's July 1, 2010 Scheduling Order and subsequent Order dated November 17, 2011, the State of New York submits this Answer to Entergy's Motion in Limine to Exclude Portions of the Pre-Filed Testimony, Report, and Exhibits for New York's admitted consolidated contentions NYS-12, 12A, 12B, and 12C (collectively "Consolidated NYS-12C") filed on January 30, 2012; and Nuclear Regulatory Commission ("NRC") Staff's answer in support of Entergy's motion in limine filed on February 10, 2012.

INTRODUCTION

In accordance with the procedures outlined by NRC Regulations and this Board, the State submitted its pre-filed testimony, expert report, exhibits, and Initial Statement of Position for admitted Consolidated NYS-12C in December 2011. These submissions provide supporting evidence proving the State's contention that Entergy's Severe Accident Mitigation Alternatives ("SAMA") analysis, as accepted by NRC Staff, relied upon significantly underestimated economic costs associated with a severe accident at Indian Point and therefore violated the National Environmental Policy Act ("NEPA"). Entergy used the MELCOR Accident Consequence Code Systems 2 ("MACCS2") computer code to calculate these economic costs. In their expert report, pre-filed testimony, and exhibits, the State's retained experts demonstrate that if a reasonable range of site-specific MACCS2 code inputs is substituted for Entergy's inputs, the costs associated with a severe accident increase by a factor of four to seven. Now, Entergy, with the support of NRC Staff, has asked the Board to exclude from the hearing record certain testimony statements, exhibits, and references in the State's Initial Statement of Position for Consolidated NYS-12C.

The Board should deny this request for several reasons. As an initial matter, motions in limine are typically used to exclude information that could prejudice a jury, but there is no such risk of prejudice in this proceeding before the Board. The Board can wait until the hearing to render its decision based on a full record of relevant evidence. Moreover, Entergy's arguments that the State's submissions are outside the scope conflate the separate concepts of contention, bases, and supporting evidence. ISR's report, Dr. Lemay's testimony, and the exhibits fall squarely within the "envelope" or scope of Consolidated NYS-12C and its bases. In admitting the contention, this Board recognized that expert reports are supporting evidence, and that technical information regarding the MACCS2 inputs is appropriately addressed at the evidentiary hearing stage of this proceeding. Furthermore, CDNFRM is not the only MACCS2 input value related to economic costs, but all the CHRONC input parameters in ISR's report relate to decontamination and cleanup costs. Thus, they are within the scope of the contention and should not be excluded. Lastly, ISR's modifications to the MACCS2 code were two minor changes that allowed ISR to enter site-specific inputs for Indian Point. Neither of these changes modified the algorithms used by MACCS2. The changes were not improper, but were necessary to conduct the site-specific analysis presented by the State's experts. The modest modifications are entirely consistent with NEPA, its implementing regulations, and NRC regulations. Accordingly, they should not be stricken.

LEGAL BACKGROUND AND STANDARDS

A. In a Relicensing Proceeding, the Board Must Admit All Relevant and Material Evidence to 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 irrelevant, immaterial, and "beyond the scope of

the [contention] bases as pled and admitted”¹ NRC regulations do not 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 reports are outside the scope of the admitted contentions is essentially an argument that the challenged testimony and reports concern issues that are irrelevant and immaterial to this adjudication.³

The concepts of relevance and materiality are “closely linked.”⁴ In making evidentiary determinations, NRC adjudicatory boards often look to the Federal Rules of Evidence for guidance although they are not directly applicable to NRC proceedings.⁵ Federal Rule of Evidence 401 defines relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Whether evidence is material turns on whether “it concerns a fact that is of consequence to the outcome of the proceeding.”⁶

It is of the utmost importance that the Board have a full record of all material and relevant evidence before it when rendering its relicensing decision. Excluding relevant and material evidence before the hearing does not serve this interest. As the Appeal Board held, “No

¹ Applicant’s Motion in Limine to Exclude Portions of the Pre-filed Testimony, Report, and Exhibits Filed By New York State and Dr. François Lemay In Support of Consolidated Contention NYS-12C, at 3 (Jan. 30, 2012) (“Entergy’s Motion”).

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.*

⁵ *Southern California Edison Co., et al.* (San Onofre Nuclear Generating Station, Units 2 and 3), 17 N.R.C. 346, 365, n.32 (Appeal Board 1983).

⁶ *Calvert Cliffs 3* at 2.

conceivable good is served by making empty findings in the absence of essential evidence.”⁷ At this stage in the proceeding, other Licensing Boards have declined to exclude evidence.⁸ NRC Staff appropriately recognized that “the Board is capable of sorting through the testimony and evidence for scope and weight” once it has a full evidentiary record before it at the hearing.⁹ In this administrative proceeding, there is no danger of prejudice, as there would be in a jury trial, if the Board waits until the hearing to consider the evidence.¹⁰

B. Entergy’s Motions in Limine Confuse Bases and Supporting Evidence

Entergy’s motions in limine are, to a large extent, based on a fundamental misunderstanding of two central concepts: bases and evidence.¹¹ It is the language of a contention and its bases that define the scope, not the “sufficient information [provided] to show that a genuine dispute exists”¹² at the contention admissibility stage.¹³ The bases delineate the

⁷ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 N.R.C. 227, 230 (Appeal Board 1980)) (vacating Licensing Board’s finding as unsupported by the record and ordering a de novo consideration of the issues at an evidentiary hearing before the Appeal Board).

⁸ *See Calvert Cliffs 3* at 3.

⁹ NRC Staff’s Answer to Applicant’s Motion in Limine to Exclude Portions of the Pre-filed Testimony, Report, and Exhibits Filed by NYS and Dr. Francois Lemay in Support of Consolidated Contention NYS-12C (Feb. 9, 2012) (“NRC Staff Answer”) at 5.

¹⁰ *Calvert Cliffs 3* at 3 (“In 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.”). Should the Board chose to grant Entergy’s motion in limine, the State requests that any stricken or excluded evidence be preserved for appeal. *See Silivanch v. Celebrity Cruises, Inc.*, 171 F. Supp. 2d 241, 267 (S.D.N.Y. 2001).

¹¹ Compare 10 C.F.R. § 2.309(f)(1)(ii), with 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

¹² 10 C.F.R. §§ 2.309(f)(1)(vi).

¹³ The regulatory history of what is now 10 C.F.R. § 2.309(f)(1) confirms that factual support for a contention and its bases is distinct from the bases themselves. The 1989 changes overturned prior case law that allowed contentions to be accepted without supporting evidence. *See* 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *Ariz. Pub. Serv. Co.*, (Palo Verde Nuclear Generating Station, Units 1, 2, and 3) ALAB-91-19, 33 N.R.C. 397, 399 (1991). The new

“reach” and “focus” of a contention.¹⁴ The “bases originally offered in support of a contention, together with the issue(s) stated in the contention itself, establish a sort of ‘envelope’ within which information will be considered to be within the ‘reach’ or ‘focus’ of a contention and therefore relevant in litigation of the contention.”¹⁵

As the proceeding progresses, the supporting evidence proffered increases and becomes more detailed. At the contention admissibility stage, “it is unnecessary for the petition to detail the evidence that will be offered in support of each contention.”¹⁶ Rather, the bases ensure the applicant and NRC staff “will know at least generally what they will have to defend against or oppose.”¹⁷ The Commission recognized that factual support is developed as the proceeding progresses.¹⁸ Therefore, “if in preparing for an evidentiary hearing on a contention, an

language added by the 1989 Amendments, 10 C.F.R. §§ 2.714(b)(2)(ii) and (iii), is essentially what now appears in 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). See 54 Fed. Reg. at 33,171. When the Commission adopted the current Part 2 regulations in 2004, it confirmed continuation of the distinctions established in the 1989 Regulations between contentions and bases on the one hand and supporting factual evidence on the other hand. 69 Fed. Reg. 2182, 2221, Changes to Adjudicatory Process (January 14, 2004); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 N.R.C. 311, 325 (2009).

¹⁴ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-12, 59 N.R.C. 388, 391 (2004). (characterizing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 379 (2002) and *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 N.R.C. 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991)).

¹⁵ *Id.*

¹⁶ *Vt. Yankee Nuclear Power Corp., LLC* (Vermont Yankee), LBP-90-6, 31 N.R.C. 85, 1990 WL 324407, *5 (ASLB Jan. 26, 1990) (citing *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 A.E.C. 423, 426 (1973)).

¹⁷ *Vt. Yankee Nuclear Power Corp.*, 31 N.R.C. 85, 1990 WL 324407 at *5 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20 (1974)).

¹⁸ See 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (“The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to

intervenor becomes aware of information that it may wish to present as evidence in the hearing, such information would—even if not specifically stated in the original contention and bases—be relevant if it falls within the ‘envelope,’ ‘reach,’ or ‘focus’ of the contention when read with the original bases offered for it.”¹⁹

Entergy’s conflation of bases and supporting evidence leads to its claim that the facts and opinions proffered by the State of New York’s experts are beyond the scope of the State’s admitted contentions. As will be described in more detail below and is to be expected, the pre-filed expert testimony and reports expand the evidence supporting the admitted contentions and their bases. The facts and opinions offered are still well within the scope of the admitted contentions, and should appropriately be admitted as evidence and considered by the Board at the hearing.

PROCEDURAL BACKGROUND

CONSOLIDATED NYS-12C AND ITS BASES ASSERT THAT ENTERGY AND NRC STAFF UNDERESTIMATED THE ECONOMIC COSTS ASSOCIATED WITH A SEVERE ACCIDENT AT INDIAN POINT FOR THE SAMA ANALYSIS

A. New York State Contention 12 Asserts that Entergy’s Flawed SAMA Analysis Relies Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point

On November 30, 2007, the State submitted Contention 12, which asserted that Entergy had not, in its Environmental Report, accurately modeled the cleanup and decontamination costs for a severe accident in the area surrounding Indian Point, which includes the New York City Metropolitan Area.²⁰ Contention 12 asserted:

withstand a summary disposition motion.”).

¹⁹ *Duke Energy Corp.*, 59 N.R.C. at 391.

²⁰ Nov. 30, 2007 NYS Intervention Petition at 140-45.

Entergy's severe accident mitigation alternatives (SAMA) for Indian Point 2 and Indian Point 3 does not accurately reflect decontamination and clean up costs associated with a severe accident in the New York Metropolitan Area and, therefore, Entergy's SAMA Analysis underestimates the cost of a severe accident in violation of 10 C.F.R. § 51.53(c)(3)(ii)(L).²¹

The bases for Contention 12 were that Entergy's SAMA analysis depends upon an accurate calculation of severe accident costs, but Entergy's use of the MACCS2 code did not provide an accurate calculation of those costs.²² The State's bases explained that Entergy's use of the MACCS2 code does not take into account costs associated with decontaminating an urban/suburban area such as the area within the 50-mile Emergency Planning Zone for Indian Point.²³ Additionally, the State's bases asserted that the MACCS2 code's calculation of cleanup costs did not accurately take into account the characteristics of the particles likely to be released from a nuclear power plant accident.²⁴ This results in an underestimation of the decontamination and cleanup costs.²⁵ The last basis stated that the analytical framework in a Sandia National Laboratories ("Sandia") study called *Site Restoration*²⁶ as well as recent studies examining the cost consequences in the New York metropolitan area should be taken into consideration.²⁷

Following oral argument, the Board admitted Contention NYS-12 on July 31, 2008.²⁸ In admitting the contention, the Board found that "the contention challenges the cost data for

²¹ *Id.* at 140.

²² *Id.*

²³ *Id.* at 141.

²⁴ *Id.* at 140-141.

²⁵ *Id.* at 141.

²⁶ D. Chanin and W. Murfin, *Site Restoration: Estimation of Attributable Costs from Plutonium-Dispersal Accidents*, SAND96-0957, Unlimited Release, UC-502, (May 1996) (Exh. NYS000249).

²⁷ *Id.* at 140-42.

²⁸ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) LBP-08-13

decontamination and cleanup used by MACCS2.”²⁹ In Contention 12, the State “is questioning whether ‘specific inputs’ and ‘assumptions’ made in [the] MACCS2 SAMA analyses are correct for the area surrounding Indian Point.”³⁰ Contention 12 mirrors the State’s scoping comments.³¹

B. New York State Contentions 12A and 12B Assert that Entergy’s SAMA Analysis, NRC Staff’s DSEIS, and Entergy’s 2009 SAMA Reanalysis Are Deficient Because they All Rely Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point

In December 2008, NRC Staff released the Draft Supplemental Environmental Impact Statement (“DSEIS”), which failed to address any of the issues raised in Contention NYS-12 and accepted Entergy’s severe accident cost estimates. After reviewing the DSEIS, the State submitted Contention 12A on February 27, 2009.³² The bases for Contention 12A were the same as the bases for Contention 12, but updated in light of NRC’s publication of the DSEIS.³³

at 64, 68 N.R.C. 43 (July 31, 2008) (ML082130436) (“Intervention Order”).

²⁹ *Id.*

³⁰ *Id.*

³¹ For example, in its scoping comments, the State asserted that, “as part of its analysis, the NRC should [consider] . . . the densely populated and developed New York City area, incorporate the region’s property values, and ensure that the resulting financial costs are expressed in present value”. NYS Supplemental Comments Regarding Scope of NEPA Analysis Application for Relicensure by Entergy Nuclear Indian Point LLCs for Operating Licenses Nos. DPR-26 and DPR-64, at 2-4 (Nov. 30, 2007) (ML073600658).

³² State of New York Contentions Concerning NRC Staff’s DSEIS (February 27, 2009) (ML090690303) (“Feb. 27, 2009 NYS-12A”).

³³ *Id.*

Contention 12A mirrors the State's comments on the DSEIS.³⁴ The Board admitted Contention NYS-12A on June 16, 2009, and consolidated it with Contention NYS-12.³⁵

On December 14, 2009, Entergy submitted a revised SAMA analysis which used revised meteorological data.³⁶ On March 11, 2010, the State filed Amended Contention 12B, challenging Entergy's revised SAMA analysis.³⁷ The bases for Contention 12B were the same as the bases for Contentions 12 and 12A, but updated in light of Entergy's 2009 SAMA reanalysis.³⁸ On June 30, 2010, the Board admitted Contention NYS-12B, and consolidated it with Contentions NYS-12/12A.³⁹

C. New York State Contention 12C Asserts that Entergy's SAMA Analysis, NRC Staff's DSEIS, Entergy's 2009 SAMA Reanalysis, and NRC Staff's FSEIS All Rely Upon An Underestimation of the Economic Costs Associated With a Severe Accident At Indian Point In Violation of the APA, NEPA, CEQ Regulations, and NRC Regulations

On December 3, 2011, NRC Staff released its Final Supplemental Environmental Impact Statement ("FSEIS"), which was the first time NRC Staff addressed the State's concern that the

³⁴ For example, the State's DSEIS comments asserted that "as part of its analysis, the NRC should [consider] . . . the densely populated and developed New York City area, incorporate the region's property values, and ensure that the resulting financial costs are expressed in present value" Comments Submitted by the NYS Office of the Attorney General on the DSEIS Prepared by Staff on the NRC for the Renewal of the Operating Licenses for Indian Point Units 2 and 3, at 43-47 (Mar. 18, 2009) (ML090771328) (Exh. NYS000134).

³⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Order (Ruling on NYS's New and Amended Contentions) (June 16, 2009) (ML091670435).

³⁶ Entergy, NL-09-165, SAMA Reanalysis (Dec. 14, 2009).

³⁷ NYS Motion for Leave to File New and Amended Contentions Concerning the Dec. 2009 Reanalysis of SAMA (Mar. 11, 2010) (ML100780366) ("Mar. 11, 2010 NYS-12B").

³⁸ *Id.*

³⁹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on the Admissibility of New York's New and Amended Contentions 12B, 16B, 35, and 36), LBP-10-13 at 9-10, 71 N.R.C. __ (June 30, 2010) (ML101810344).

economic costs of a severe accident at Indian Point have been significantly underestimated.⁴⁰ On February 3, 2011, the State filed Amended Contention NYS-12C, with the same bases as for 12, 12A, and 12B, but updated in light of NRC Staff's acknowledgement of and partial (yet deficient) response to the issues raised by the State in 12, 12A, and 12B.⁴¹

The State's bases asserted that Entergy's use of the MACCS2 code relies on "inaccurate and inapplicable data input" and underestimates severe accident costs by failing to account for the "densely populated and developed New York City metropolitan area" and the particles dispersed from a nuclear power plant accident.⁴² In Contention 12C, the State also noted that the FSEIS relied on undisclosed and unidentified work from Sandia, consultants to NRC Staff.⁴³ In support of contention admissibility, the State submitted a report of David Chanin who stated "Among other things, the FSEIS is deficient because it uses unrealistically optimistic (i.e., low) input values for the economic cost model in the CHRONC module of the MACCS2 computer program that Entergy used in its various license renewal submissions from 2007 through 2009."⁴⁴

After spending several months repeatedly and unsuccessfully requesting the documents detailing work performed by Sandia and another lab as part of NRC Staff's NEPA review and

⁴⁰ See FSEIS Appendix G, § G.2.3, pp. G-22 – G-25 (Exh. NYS00133I).

⁴¹ NYS Motion for Leave to File New and Amended Contention 12C Concerning NRC Staff's Dec. 2010 FSEIS and the Underestimation of Decontamination and Clean Up Costs Associated with a Severe Reactor Accident in the New York Metropolitan Area (Feb. 3, 2011) (ML110680212) ("Feb. 3, 2011 NYS-12C").

⁴² *Id.* at Contention 12C, 5-7.

⁴³ *Id.* at Contention 12C, 7.

⁴⁴ D. Chanin, *Errors and Omissions in NRC Staff's Economic Cost Estimates of Severe Accident Mitigation Alternatives Analysis Contained in December 2010 Indian Point Final Supplemental Environmental Impact Statement (FSEIS)*, NUREG-1437, Supplement 38 (Feb. 3, 2011) ("Feb. 3, 2011 Chanin Report").

FSEIS determinations, the State filed a motion to compel on April 22, 2011.⁴⁵ On May 25, 2011 the State reached an agreement with NRC Staff, whereby NRC Staff produced some documents in response to the State's motion to compel.⁴⁶

On July 6, 2011, the Board admitted Contention NYS-12C and consolidated it with NYS-12/12A/12B as Consolidated NYS-12C.⁴⁷ The Board reiterated "the basic allegation found in the consolidated contention that NYS-12C [sought] to amend – namely, that Entergy's and NRC Staff's use of the MACCS2 code leads to an underestimation of the cleanup costs from a severe accident" and characterized it as the "overarching aspect of this contention"⁴⁸ The Board also recognized the difference between the bases for the contention and the supporting evidence:

As we read it, NYS-12C arises from the NRC Staff's FSEIS, which explicitly attempts to resolve concerns raised in NYS-12/12A/12B. ***The expert analyses brought in NYS-12C are not the underlying basis giving rise to the contention but are tools used by New York to attempt to refute the validity of the NRC Staff's analysis.*** The basis of the contention pursuant to Section 2.309(f)(1)(ii) is that the NRC Staff's analysis in the FSEIS underestimates severe accident cleanup costs due to use of the MACCS2 code. Therefore, the contention is based on new information, the FSEIS, and is not "late filed."⁴⁹

Thus, the Board recognized the State's ability to bring forth expert analysis as evidence to support the contention which challenges the estimate of the economic costs associated with a severe accident at Indian Point used in the SAMA analysis.

⁴⁵ State of New York Motion to Compel NRC Staff to Produce Documents Relied Upon in Staff's FSEIS (Apr. 22, 2011) (ML11132A149).

⁴⁶ See May 25, 2011 letter from NRC Staff to the Board (ML11146A077) and May 25, 2011 letter from NRC Staff to New York State (ML11146A058).

⁴⁷ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions) 8-9 (July 6, 2011) (ML111870344) ("NYS-12C Order").

⁴⁸ *Id.* at 7-8.

⁴⁹ *Id.* at 8 (emphasis added).

ARGUMENT

DR. LEMAY’S PRE-FILED TESTIMONY, ISR’S REPORT, AND EXHIBITS ARE WITHIN THE SCOPE OF CONSOLIDATED NYS-12C AS ADMITTED BY THE BOARD AND SHOULD NOT BE STRICKEN

A. In Admitting Consolidated NYS-12C, this Board Recognized that Expert Reports Are Supporting Evidence, and that Technical Information Regarding the MACCS2 Inputs Is Appropriately Addressed at the Evidentiary Hearing Stage of this Proceeding

Neither the contention itself, the bases, nor the supporting evidence was ever limited to a single MACCS2 input parameter—CDNFRM (cost of decontamination, nonfarm)—as Entergy now argues. Entergy’s attempt, as supported by NRC Staff, to artificially confine the scope of Consolidated NYS-12C ignores that the Board has consistently recognized “the basic allegation” of the contention—namely, that Entergy’s and NRC Staff’s use of the MACCS2 code leads to an underestimation of the cleanup costs from a severe accident.”⁵⁰

As this Board recognized, the State did not and did not need to identify any input parameters, even CDNFRM, by name in its contention in order to present evidence on input parameters at the hearing: “While NYS has not pointed to specific incorrect inputs or assumptions made by Entergy in its SAMA analysis, to be able to do so would require an unreasonable degree of familiarity with MACCS2 on the part of NYS.”⁵¹ Additionally, this Board recognized that specific inputs need not be disclosed at the contention admissibility stage: “Questions raised in this contention relating to cleanup and decontamination costs based on the validity of assumptions used with the code should appropriately be resolved at the hearing.”⁵² Now that the State has done just that—pointed to specific inputs in its disclosed expert report and

⁵⁰ NYS-12C Order at 7-8.

⁵¹ Intervention Order at 64.

testimony in anticipation of the hearing—Entergy and NRC Staff’s attempt to stop the State in its tracks with its motion in limine should fail.

In admitting Contention NYS-12C, the Board recognized that the expert report submitted therewith was supporting evidence: “The expert analyses brought in NYS-12C are not the underlying basis giving rise to the contention but are tools used by New York to attempt to refute the validity of the NRC Staff’s analysis.”⁵³ So too here. The ISR Report, Dr. Lemay’s testimony, and the exhibits are relevant and material tools used by the State to prove the merits of its contention as set for in the contention and its bases. For Contention 12C, “[t]he basis of the contention pursuant to Section 2.309(f)(1)(ii) is that the NRC Staff’s analysis in the FSEIS underestimates severe accident cleanup costs due to use of the MACCS2 code.”⁵⁴

The information the State disclosed as its pre-trial submissions is supporting evidence submitted at the proper time that fits squarely within the bases of the contention. Following Entergy and NRC Staff’s arguments—that Intervenor, and only Intervenor, must fully disclose not only the bases for its contentions, but all the supporting evidence prior to filing its testimony—to their logical end would essentially require the State to put forth all of its supporting evidence at the contention admissibility stage. Such a proposition is untenable and at odds with the very structure of this proceeding.

There is no issue here of adequate notice because there is no requirement that Entergy or NRC Staff be able to anticipate every piece of supporting evidence the State will proffer. As described above, the State provided more than enough information at the contention

⁵² *Id.* at 64-65.

⁵³ NYS-12C Order at 8.

⁵⁴ *Id.*

admissibility stage such that Entergy and NRC could anticipate generally, the arguments the State would make at the evidentiary hearing stage of the proceeding.⁵⁵ Entergy and NRC Staff have not provided any persuasive reasoning as to why the Board should exclude relevant and material evidence that fits within the “envelope” of the contention and bases.

B. The Scope of Consolidated NYS-12C and its Bases Includes All of the CHRONC Input Parameters Discussed in ISR’s Expert Report and Dr. Lemay’s Testimony

1. ISR’s Evaluation of MACCS2 Inputs Associated with Economic Costs Was Properly within the Scope of Consolidated NYS-12C

In an effort to improperly confine the scope of Consolidated NYS-12C, Entergy chooses its words carefully. Entergy argues the State “has confirmed that it is challenging the *nonfarm decontamination cost inputs*,” (Entergy Motion at 5 (emphasis added)) when the actual language of the contention is that the State is challenging the SAMA analysis as “not accurately reflect[ing] decontamination and cleanup costs associated with a severe accident in the New York Metropolitan Area” and “underestimate[ing] the cost of a severe accident.”⁵⁶ Beginning in the State’s petition to intervene filed in 2007, the reach and focus of Consolidated NYS-12C has always been an underestimation of the decontamination and cleanup costs associated with a severe accident, not individual inputs. Nowhere do the State’s pleadings for Consolidated NYS-12C discuss CDNFRM by name or explicitly limit the scope of the contention to “nonfarm decontamination cost inputs.” Instead, the contention and basis use broader terms to describe the

⁵⁵ See *Vt. Yankee Nuclear Power Corp.*, 31 N.R.C. 85, 1990 WL 324407 at *5 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB–216, 8 A.E.C. 13, 20 (1974)).

⁵⁶ Nov. 30, 2007 NYS Intervention Petition.

challenge, referencing “decontamination” costs, “economic” costs, and “cleanup” costs, all associated with a severe accident at Indian Point.⁵⁷

In connection with Consolidated NYS-12C, ISR examined the central issue of the contention: whether and to what extent the economic costs of a severe accident at Indian Point were underestimated in the SAMA analysis approved by NRC Staff.⁵⁸ In its analysis, ISR determined that the SAMA analysis’ cost-benefit evaluation uses the per year economic cost of a severe accident, called offsite economic cost risk (“OECR”).⁵⁹ ISR focused its efforts on the CHRONC module of the MACCS2 code, which contains all the input parameters used to calculate decontamination and cleanup costs used in its SAMA analysis.⁶⁰ Focusing on the CHRONC inputs did not expand the scope, but rather provided further, more detailed supporting evidence for New York’s contention that Entergy and NRC Staff underestimated decontamination and cleanup costs. This evidence proving the merits of the State’s contention in preparation for the evidentiary hearing should not be stricken.

2. CDNFRM Is Not the Only MACCS2 Input Related to Decontamination and Cleanup Costs; Rather the Inputs to the CHRONC Module Are Interrelated, Relevant, Material, and Admissible

The MACCS2 code is simply not set up such that a single input represents decontamination and cleanup costs associated with a severe accident. As explained in the ISR Report and Dr. Lemay’s testimony, the MACCS2 code relies on user-defined inputs to its

⁵⁷ Nov. 30, 2007 NYS Intervention Petition at 140-42; Feb. 27, 2009 NYS-12A at 2-5; Mar. 11, 2010 NYS-12B at 1-3; Feb. 3, 2011 NYS-12C, Contention 12C at 3-8.

⁵⁸ ISR, *Review of Indian Point Severe Accident Off Site Consequence Analysis* (Dec. 21, 2011) (“ISR Report”) (Exh. NYS000242); Pre-Filed Testimony of François J. Lemay (“Lemay Testimony”) (Exh. NYS000241).

⁵⁹ ISR Report at iii, x, 9; Lemay Testimony at 24-26. OECR is an actuarial assessment of the cost that takes into account the low frequency of severe accidents. ISR Report at x.

CHRONC module to calculate decontamination and cleanup costs. The interrelated inputs discussed by ISR and Dr. Lemay are relevant and material to showing the underestimation of economic costs associated with a severe accident.

Entergy's focus on CDNFRM indicates a misunderstanding of how the MACCS2 code operates to calculate decontamination and cleanup costs. In fact, the calculation begins with the user's selecting decontamination factors ("DF") to input.⁶¹ The DF input represents how much radiation is removed from an area during decontamination.⁶² Typically, the user selects two DFs, one for light and one for heavy decontamination.⁶³ For CDNFRM and TIMDEC, MACCS2 requires two inputs, one for each DF selected.⁶⁴

To calculate decontamination and cleanup costs following a severe accident, the time required to decontaminate following a severe accident, TIMDEC, is necessary and, therefore, falls within the "envelope" of the contention's bases. Another parameter, value of nonfarm wealth ("VALWNF"), is also necessary to calculate decontamination and cleanup costs. VALWNF includes all nonfarm public and private property that would be unusable if the region was rendered either temporarily or permanently uninhabitable.⁶⁵ In MACCS2, if the cost to decontaminate property, based on inputs CDNFRM, TIMDEC, and others, exceeds the VALWNF, the code condemns the buildings instead of decontaminating and the VALWNF is

⁶⁰ ISR Report at 2; Lemay Testimony at 14.

⁶¹ ISR Report at 11-12; Lemay Testimony at 17-19. DF is defined in MACCS2 as the dose from contamination before clean-up divided by the dose from contamination after cleanup. *Id.* For a DF of 3, 67% of the contamination would need to be removed; a DF of 15 means 93.3%. *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ ISR Report at 12, 13, 24; Lemay Testimony at 30, 51-52.

⁶⁵ ISR Report at 25-26; Lemay Testimony at 55-60.

added to the cost of the accident.⁶⁶ Since VALWNF acts as a limit on decontaminating, ISR would not have been able to accurately assess decontamination and cleanup costs without it. Such an important parameter is well within the focus and reach of the contention. Likewise, the ISR report and Dr. Lemay's testimony describes in detail how the remainder of the parameters Entergy argues are outside the scope of the contention are necessary to the MACCS2 code's calculation of decontamination and cleanup costs. These parameters are all supporting evidence falling within the contention's "envelope" or scope, and should not be excluded.

Entergy relies heavily on the Commission's March 2010 ruling in *Pilgrim*, but that ruling is not analogous to the situation here.⁶⁷ In the *Pilgrim* decision cited by Entergy, the Licensing Board had admitted intervenor Pilgrim Watch's contention that, in relevant part, challenged the applicant's SAMA analysis for "failure to account for 'the loss of economic activity in Plymouth County.'" The contention claimed that the SAMA analysis took the "assessed value" of property, but did not include the "business value" or "fact that the building is an ongoing business with inventory equipment and income generation capability."⁶⁸ The contention argued that "the economic costs analysis 'should include loss of economic infrastructure and tourism.'"⁶⁹ After the Board admitted Pilgrim Watch's contention, Entergy moved for summary disposition.

Pilgrim Watch responded to Entergy's motion for summary disposition with arguments focusing on medical costs and ecological restoration difficulty, claiming

Entergy had not accounted for "health costs" such as such as "medical costs, loss of productivity and costs associated with disability, psychological effects, loss of

⁶⁶ ISR Report at 22-23; Lemay Testimony at 55.

⁶⁷ *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, at 29 (2010) ("*Pilgrim*") (quoting Pilgrim Watch's petition to intervene).

⁶⁸ *Id.*

⁶⁹ *Id.*

well-being or changes in quality of life such as grief, pain, and changed social functioning, Pilgrim Watch also argued that the analysis underestimated cancer mortality risk, failed to include health costs other than cancer mortality, failed to base health costs on new cancer coefficients, and assigned an insufficient dollar value per person-rem. It further claimed that the analysis failed to account for the “difficulty of conducting ecological restoration” at a coastal and wetlands location and that porous surfaces are more difficult to decontaminate, stressing that the Pilgrim coastal area has buildings made of wood, brick and concrete.⁷⁰

Given that Pilgrim Watch’s contention by its terms challenged the loss of economic activity in Plymouth County, the Licensing Board, as affirmed by the Commission, found that health costs and ecological restoration costs were outside the scope of Pilgrim Watch’s contention.⁷¹

In *Pilgrim*, the contention and its bases alleged the SAMA analysis wholly failed to take loss of economic activity in Plymouth County, including business value of property and loss of tourism, into account. In order to add health costs and ecological restoration costs, the Board would have needed to expand the scope of the contention. The Board and the Commission decided to draw a line and limit the contention to its terms as admitted, which concerned the loss of economic activity and inventory in Plymouth County.

For Indian Point, the focus of Consolidated NYS-12C has remained the same since the State’s initial pleading: the SAMA analysis relies on an underestimation of decontamination and cleanup costs following a severe accident. The State’s contention here has consistently been broad based. To calculate these costs, the MACCS2 code uses an input for nonfarm decontamination cost (CDNFRM) in combination with the time of decontamination (TIMDEC), the value of nonfarm wealth (VALWNF), and the other input parameters identified in ISR’s

⁷⁰ *Id.* at 29-30 (quoting Pilgrim Watch’s Summary Disposition Motion).

⁷¹ *Id.* at 30-31.

report. Unlike in *Pilgrim*, here the State is providing pre-filed evidence supporting the contention and bases as admitted by the Board and it should not be stricken.

4. ISR Provided a Table Showing Other Reactor Input Values To Support Its Conclusion that Entergy's Input Parameters to the MACCS2 Code Were Not Site-Specific, Which Is within the Scope of the Contention

Entergy takes issue with a table ISR provided listing publicly-available inputs from other nuclear power plants.⁷² This table was not offered as a criticism of the “broader nuclear industry” as stated by Entergy, but simply to illustrate the fact that Entergy’s input values for Indian Point are not site-specific, but match Sample Problem A values used in numerous other plants. One of ISR’s central conclusions is that Entergy did not use site-specific inputs, but adopted almost all of the CHRONC inputs from Sample Problem A, a collection of example MACCS2 input parameters, developed initially for analysis of the Surry reactor in rural Virginia.⁷³ The Sample Problem A inputs were not intended to be used as a default or substitute for site-specific inputs, although Entergy, NRC Staff, and other appears to be using it that way.⁷⁴ By showing inputs from other plants, ISR illustrates that Entergy’s inputs are not site-specific because they are being used by other applicants in locales very different from the New York City Metropolitan Area.⁷⁵ The table is within the scope of the contention and should not be stricken.

⁷² Entergy’s Motion at 8.

⁷³ ISR Report at 7-8, 30-32; Lemay Testimony at 9-10, 21-23, 62-63, 69-71. The “Sample Problem A” values were derived from the Surry facility and discussed in NUREG-1150, *Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants* (Dec. 1990). The input parameters were based on the guidance provided in NUREG-1150. *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

C. While the Scope of the Contention Is Not Defined or Limited to Supporting Evidence Provided at the Contention Admissibility Stage, the ISR Report, Dr. Lemay’s Testimony, and Exhibits Expand upon that Evidence

As discussed in the Legal Background and Standards section above, the bases ensure the applicant and NRC staff “will know at least generally what they will have to defend against or oppose.”⁷⁶ Supporting evidence does not define the scope of a contention. Still, it is useful to note that the supporting evidence disclosed in the States pre-filed submissions builds upon supporting evidence previously disclosed at the contention admissibility stage in filling in the detailed evidentiary support for the contention. The CHRONC module, for example, is discussed in the February 3, 2011 Report of David Chanin submitted in support of NYS-12C.⁷⁷

While ISR’s discussion and analysis concerning TIMDEC evaluates evidence that became available since NYS-12C was admitted, namely the timing of decontamination work following the Fukushima Daiichi nuclear disaster;⁷⁸ ISR also builds and expands upon timing issues raised in *Site Restoration*, which New York cited in both its bases and supporting evidence for Consolidated NYS-12C. *See, e.g., Site Restoration* at vii, 5-9 (explaining why “the time between the occurrence of and accident and the initiation of decontamination activities” is “[a] crucial parameter in remediation” and the effect on the *Site Restoration* study); viii, 5-5, 7-1 (explaining that “[t]he duration of time that might elapse before decontamination is highly uncertain” and that delay “could be problematic, and might entail the demolition of some or all structures” or even acquisition of structures); ix, 5-1 (examining both extended and expedited

⁷⁶ *Vt. Yankee Nuclear Power Corp.*, 31 N.R.C. 85, 1990 WL 324407 at *5 (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB–216, 8 AEC 13, 20 (1974)).

⁷⁷ Feb. 3, 2011 Chanin Report.

⁷⁸ ISR Report at 24-25; Lemay Testimony at 52-55.

response actions because decontamination “could be very costly and require a long period of time”); 4-2 (discussing “short-term, ‘removal actions,’ and long-term measures, ‘remediation’”). *Site Restoration* also discusses other costs relevant to cleanup.⁷⁹ With respect to DF, the supporting evidence the State provided at the contention admissibility stage discussed issues related to decontamination factors, and ISR’s analysis builds upon this previously-disclosed supporting evidence.⁸⁰

In sum, ISR’s report, Dr. Lemay’s testimony, and the exhibits fall squarely within the “envelope” or scope of Consolidated NYS-12C. In admitting Consolidated NYS-12C, this Board recognized that expert reports are supporting evidence, and that technical information regarding the MACCS2 inputs is appropriately addressed at the evidentiary hearing stage of this proceeding. CDNFRM is not the only relevant MACCS2 input; rather all the CHRONC input parameters in ISR’s report relate to decontamination and cleanup costs and are within the scope of the contention.

ISR’S MODIFICATIONS TO THE MACCS2 CODE WERE PROPER AND SHOULD NOT BE STRICKEN

Entergy accuses Dr. Lemay of “rewriting the MACCS2 source code” and seeks to strike portions of Dr. Lemay’s testimony and the ISR Report that rely on source code modifications.⁸¹ The two modifications, however, simply increased the maximum input values the code would accept for CDNFRM and TIMDEC, as described in the ISR report:

⁷⁹ See *Site Restoration* at F-7 (relocation costs and time), F-8 (compensation to businesses for loss of income and employment).

⁸⁰ Feb. 3, 2011 Chanin Report.

⁸¹ Entergy’s Motion at 15.

Modification 1: The MACCS2 code restricts decontamination costs (CDNFRM) to a maximum of \$100,000/person; therefore, ISR modified the source code to allow for the greater decontamination costs proposed here.⁸²

Modification 2: The MACCS2 code restricts the decontamination time input to a maximum of one year; therefore, ISR modified the source code to allow for greater decontamination times.⁸³

As Dr. Lemay explains in the declaration accompanying this Answer, “[t]he MACCS2 code distributed by NRC includes an executable form of the code, along with the source code and test files. . . . [to] allow[] the analysts to scrutinize the calculation models and to make modifications when changes that had not been anticipated by the code designers become necessary.”⁸⁴ These two changes ISR made were out of necessity so that it could calculate economic costs using the proper, site-specific input values appropriate for Indian Point’s unique location. The changes were “simple and obvious for an experienced nuclear analyst.”⁸⁵

For the parameter CDNFRM, the range for the nonfarm decontamination cost for all decontamination levels is coded to be between \$1/person to \$100,000/person.⁸⁶ In order to determine the overall costs as a result of ISR’s proposed ranges of CDNFRM, ISR modified the source code to increase the upper bound of CDNFRM to \$2,000,000/person.⁸⁷ The change ISR made is shown in red below.⁸⁸

⁸² ISR Report at 22.

⁸³ *Id.* at 24.

⁸⁴ Decl. of Dr. Francois Lemay in Support of Answer (Feb. 17, 2010) ¶ 9, attached hereto (“Feb. 17, 2012 Lemay Declaration”).

⁸⁵ *Id.* ¶ 10.

⁸⁶ ISR Report at 22; Feb. 17, 2012 Lemay Declaration ¶ 12.

⁸⁷ Feb. 17, 2012 Lemay Declaration ¶ 12.

⁸⁸ *Id.*

File	Source code
<i>from originally</i>	
MACCS2.FOR	CALL RGETN ('CHCDNFRM001', 0, CDNFRM, LVLDEC, 1.0, 1.E5, \$ RANGE, FOUND, 'INCHRN', 'CDNFRM')
<i>changed to</i>	
MACCS2-ISR.FOR	CALL RGETN ('CHCDNFRM001', 0, CDNFRM, LVLDEC, 1.0, 2.E6, \$ RANGE, FOUND, 'INCHRN', 'CDNFRM')

For TIMDEC, the range for the decontamination time for all decontamination levels is coded to be between 1.0E-6 seconds to 3.16E+7 seconds (1 year).⁸⁹ In order to determine the overall costs as a result of ISR's proposed ranges of TIMDEC, ISR modified the source code to increase the upper bound of TIMDEC to 6.31152E+9 seconds (200 years).⁹⁰ The change ISR made is shown in red below.⁹¹

File	Source code
<i>from originally</i>	
MACCS2.FOR	CALL RGETN ('CHTIMDEC001', 0, TIMDEC, LVLDEC, 1.E-6, 3.16E7, \$ RANGE, FOUND, 'INCHRN', 'TIMDEC')
<i>changed to</i>	
MACCS2-ISR.FOR	CALL RGETN ('CHTIMDEC001', 0, TIMDEC, LVLDEC, 1.E-6, 6.31152E9, \$ RANGE, FOUND, 'INCHRN', 'TIMDEC')

These are the only two modifications ISR made to the code and do not amount to a "rewriting" of the code.⁹² Neither of these changes modified the algorithms used by MACCS2 and the changes were disclosed in ISR's expert report.⁹³ Moreover, Dr. Lemay's two modest changes to the code are not a challenge to the MACCS2 source code itself. These changes were necessary so that the MACCS2 code could be used to estimate site-specific decontamination and cleanup costs at Indian Point. The changes do not constitute a challenge to a regulation. NRC's Part 51 NEPA regulations provide for the analysis of alternatives to mitigate the environmental

⁸⁹ ISR Report at 24; Feb. 17, 2012 Lemay Declaration ¶ 13.

⁹⁰ Feb. 17, 2012 Lemay Declaration ¶ 13.

⁹¹ *Id.*

⁹² Entergy's Motion at 15; Feb. 17, 2012 Lemay Declaration ¶ 14.

impacts of a severe accident. 10 C.F.R. § 51.53(c)(3)(ii)(L). NRC Staff and Entergy have elected to use MACCS Edition 2 Version 1.13.1 as part of their attempts to present their views and what they claim are site-specific environmental impacts of severe accidents and alternatives to mitigate the impacts of such accidents. The APA-promulgated Part 51 regulations do not specify the use of a specific edition or version of the MACCS code. The 1996 GEIS for license renewal and the Part 51 regulations do envision a site-specific analysis of severe accidents based on accurate site-specific inputs, and it was therefore entirely appropriate for ISR to modify the code so that it could analyze the inputs that Dr. Lemay determined were appropriate for the Indian Point site. The Board should not strike portions of Dr. Lemay's testimony and the ISR Report that rely on source code modifications.

**THE BOARD SHOULD DECLINE TO STRIKE ALL OR PART OF THE STATE'S
INITIAL STATEMENT OF POSITION BECAUSE IT IS LEGAL ARGUMENT, NOT
EVIDENCE**

Entergy requests that the Board strike portions of the State's Initial Statement of Position,⁹⁴ but the Board should decline to do so. As a recent Licensing Board decision acknowledged a "statement of position is just that: a statement of position, not evidence."⁹⁵ Section 2.337(a)'s admissibility standards only apply to "evidence."⁹⁶ Thus, the Board need not strike portions of a statement of position and should decline Entergy's request to do so.

⁹³ *Id.* ¶ 15.

⁹⁴ Entergy's Mot. at 16.

⁹⁵ *Calvert Cliffs 3* at 5.

⁹⁶ *Id.*

CONCLUSION

For the above reasons Entergy's motion in limine, supported by NRC Staff, to exclude portions of the pre-filed testimony, report, exhibits, and Initial Statement of Position filed by New York State in support of Consolidated NYS-12C should be denied.

Respectfully submitted,

Kathryn M. Liberatore
Assistant Attorney General

Signed (electronically) by

John J. Sipos
Assistant Attorney General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12227
(518) 402-2251

Dated: February 17, 2012

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

Janice A. Dean
Assistant Attorney General
State of New York
Dated: February 17, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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In re:

Docket Nos. 50-247-LR and 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

February 17, 2012
-----X

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 Consolidated Contention NYS-12C along with a supporting Declaration of Dr. Francois Lemay was served electronically via the Electronic Information Exchange on the following recipients:

Lawrence G. McDade, Chair
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Lawrence.McDade@nrc.gov

Richard E. Wardwell
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Richard.Wardwell@nrc.gov

Kaye D. Lathrop
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
190 Cedar Lane E.
Ridgway, CO 81432
Kaye.Lathrop@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Josh Kirstein, Esq. Law Clerk
Anne Siarnacki, Esq.
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike

Rockville, MD 20852-2738
Josh.Kirstein@nrc.gov
Anne.Siarnacki@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mailstop 16 G4
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
ocaamail@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mailstop 3 F23
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
hearingdocket@nrc.gov

Sherwin E. Turk, Esq.
David E. Roth, Esq.
Beth N. Mizuno, Esq.
Brian G. Harris, Esq.
Anita Ghosh, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mailstop 15 D21
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
sherwin.turk@nrc.gov
david.roth@nrc.gov
beth.mizuno@nrc.gov
brian.harris@nrc.gov
anita.ghosh@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

ksutton@morganlewis.com
pbessette@morganlewis.com

Martin J. O'Neill, Esq.
Morgan, Lewis & Bockius LLP
Suite 4000
1000 Louisiana Street
Houston, TX 77002
martin.o'neill@morganlewis.com

Elise N. Zoli, Esq.
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
ezoli@goodwinprocter.com

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
wdennis@entergy.com

Robert D. Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
robert.snook@ct.gov

Melissa-Jean Rotini, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
MJR1@westchestergov.com

Daniel E. O'Neill, Mayor
James Seirmarco, M.S.
Village of Buchanan

Municipal Building
236 Tate Avenue
Buchanan, NY 10511-1298
vob@bestweb.net

Daniel Riesel, Esq.
Thomas F. Wood, Esq.
Victoria Shiah, Esq.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driesel@sprlaw.com
vshiah@sprlaw.com

Michael J. Delaney, Esq.
Director
Energy Regulatory Affairs
NYC Department of Environmental
Protection
59-17 Junction Boulevard
Flushing, NY 11373

(718) 595-3982
mdelaney@dep.nyc.gov

Manna Jo Greene, Director
Karla Raimundi, Environmental Justice
Associate
Stephen Filler, Esq., Board Member
Hudson River Sloop Clearwater, Inc.
724 Wolcott Avenue
Beacon, NY 12508
Mannajo@clearwater.org
karla@clearwater.org
stephenfiller@gmail.com

Phillip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
phillip@riverkeeper.org
dbrancato@riverkeeper.org

Signed (electronically) by

Janice A. Dean
Assistant Attorney General
State of New York

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