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UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY LICENSING BOARD

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 August 21, 2008

THE STATE OF NEW YORK'S RESPONSE TO THE BOARD'S QUESTION CONCERNING HEARING PROCEDURES AND MOTION THAT THE BOARD APPLY SUBPART "G" DISCOVERY PROCEDURES TO CERTAIN ADMITTED CONTENTIONS

Pursuant to the Atomic Safety and Licensing Board's July 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) ASLB 08-13 ("Board Order"), the State of New York submits this motion with respect to the issue of the choice of hearing procedures to be used in this proceeding. The Board, in its Order, instructed "New York State, Riverkeeper and Clearwater [to], no later than, August 21, 2008, indicate, for each admitted contention, whether each Party wishes to proceed pursuant to Subpart G or Subpart L." The Board also required parties to "indicate why the contention proponent believes a particular Subpart is more appropriate." Board Order, at 227.

At the outset, the State of New York wishes to emphasize the importance that the determination of applicable hearing procedure will have for the people of the State of New York. The issues surrounding the relicensing of the Indian Point power plants are critical to the future

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of the Hudson Valley and to the millions who live in the region, including the 20 million people who live within a 50-mile radius of the plants. Indeed, no other operating power reactor site in the Nation has so many people living within 50 miles. The admitted contentions must be addressed in an open, thorough, and comprehensive public process, such as that authorized by Subpart G, to ensure the State's access to a full inquiry into the factual bases for Entergy's and Staff's positions, both through discovery and, the State anticipates, at a hearing.

Two sets of procedures can apply: the informal procedures set forth in 10 C.F.R. Part 2, Subpart L and the formal procedures set forth in 10 C.F.R. Part 2, Subpart G. While the State of New York recognizes that three of its admitted contentions could proceed through the application of the Subpart L hearing procedures, the State submits that complexity and breadth of issues involved in the remaining eight admitted contentions warrant application of Subpart G at least for discovery procedures (although as discussed below, it is probably too early in the process to definitely decide which Subpart G procedures should be used and for which aspect of the contentions). Given the breadth of documents and information required to fully evaluate eight of the State's contentions as well as evidence that Entergy and/or Staff have not been fully forthcoming in disclosing documents relevant to these contentions in this proceeding or other proceedings application of Subpart G or at least some of its discovery procedures, is required. As to the evidentiary hearing itself, the State of New York respectfully submits that it is premature at this time – before witnesses have been designated – to request authorization to conduct cross-examination. Nevertheless, the State reserves the right to return to the Board to request such authorization.

The following Table identifies the Contention and the Subpart that the State submits

should be used for resolution of that Contention:

State of New York
Selection of Hearing Procedures - Subpart G or L

NYS Admitted Contention	Subpart G or Subpart L Procedures
#5 - Inadequate AMP for Corrosion or Leaks in Buried Systems, Structures, & Components	G
#6 - No Specific AMP for Inaccessible Medium-voltage Cables and Wiring	G
#7 - No Specific AMP for Inaccessible Low-voltage Cables and Wiring	G
#8 - No AMP for Electrical Transformers	G
#9 - ER Fails to Evaluate Energy Conservation as an Alternative	L
#12 - SAMA Does Not Accurately Reflect Decontamination & Cleanup Costs	G
#16 - SAMA Air Dispersion Model Does Not Accurately Estimate Costs of Human Exposure	G
#17 - ER Fails to Analyze Adverse Impact of Off-site Land Use	L
#24 - Inadequate AMP for Containment Structures Based on Updated Water/Cement ratio	L
#25 - Inadequate AMP for Embrittlement of RPV and Associated Internals	G
#26 - Inadequate AMP for Metal Fatigue	G

I. In This Proceeding, NRC Regulations Afford the State of New York the Right to Utilize Formal Subpart G's Discovery Tools for Certain of the Admitted Contentions.

A. Basic Statutory and Regulatory Scheme

Three statutory provisions address the choice of hearing procedures: 42 U.S.C. §§ 2021(l) and 2231 and 5 U.S.C. § 556. Four NRC regulations also address the choice of hearing procedures: 10 C.F.R. §§ 2.309(g), 2.310(d), 2.336(f) and, to the extent Subpart L applies to this

proceeding, § 2.1204(b)(3). The underlying rationale behind all of these provisions is that the procedures to be used in an NRC licensing hearing that is governed by the provisions of 42 U.S.C. § 2239(a), which require a hearing in "any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit . . . upon the request of any person whose interest may be affected by the proceeding . . .," shall be those procedures that have been shown to be necessary for "resolution of material issues of fact which may be best determined through the use of the identified procedures." 10 C.F.R. § 2.309(g). *See also* 10 C.F.R. § 2.1204(b)(3) (cross-examination allowed under Subpart L where it is shown that it is "necessary to ensure the development of an adequate record for decision").

According to the provisions of 10 C.F.R. § 2.336(f) the mandatory disclosure requirements of § 2.336 are "the sole discovery permitted for NRC proceedings [under 10 C.F.R. Part 2] unless there is further provision for discovery under the specific subpart under which the hearing will be conducted." The choice of hearing procedure is governed by 10 C.F.R. § 2.309(g), entitled "Selection of hearing procedures." The provisions of 10 C.F.R. § 2.310(a) provide that a relicensing proceeding "*may* be conducted under the procedures of subpart L" (emphasis added) but do not mandate such use and in § 2.310(d) set forth one way in which a Subpart G proceeding might be justified.

As the Board's Order recognizes, the application of Subpart G or Subpart L is done on a contention-by-contention basis. *See* Board Order at 227 (July 31, 2008). In addition, application of the individual procedures in Subpart G – interrogatories, requests for document production, requests for admissions, depositions and cross-examination – are separately justified for each contention. *See* 10 C.F.R. § 2.309(g) ("the request/petition must demonstrate, by reference to the

contention and the bases provided and *the specific procedures in subpart G* of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the *identified procedures*" (emphasis added)).

Although Subpart G includes a number of adjudicatory procedures and provides the sole basis for use of such procedures,[1] application of Subpart G to a contention may be justified on the basis of the likely need for only one of those procedures. Under § 2.309(g), use of Subpart G is required whenever it can be shown that, as to any of the Subpart G procedures, "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." That does not mean that all Subpart G procedures are available with regard to the contention. Subparts C and G provide wide discretion to the ASLB to determine whether and to what extent discovery tools identified in Subpart G may be used by any party. *See* 10 C.F.R, §§ 2.319(f),(g),(k),(q), and (r), and 2.705(a), and (b)(2).

Thus, New York State submits that the regulations create a two-step process. Step one, set forth in § 2.309(g), is to demonstrate that it is reasonable to anticipate that the use of one or more Subpart G procedures will be required for certain contentions. Once the Board accepts that analysis, as the State of New York submits that it should as to eight of the State's admitted contentions, it will still be necessary for the party seeking to use a particular Subpart G procedure to justify its use with regard to a particular contention. This would mean, of course, that even if

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[1] 10 C.F.R. § 2.336(e)(1) specifically provides that among the sanctions available against a party for its "continuing unexcused failure to make the disclosures required" is the "use of the discovery provisions in subpart G." However, as noted *infra*, there are many instances in which full compliance with the requirements of § 2.336 may still leave substantial gaps in the available information needed to establish material facts to develop an adequate record for certain New York State contentions in this proceeding or where it will not be possible to demonstrate that the § 2.336 disclosures are not complete.

New York State were to satisfy the Board that Subpart G was warranted for a particular contention, all parties, including the Staff and Entergy, as well as New York State, would be required to obtain permission from the Board to use Subpart G procedures each time a procedure was proposed to be used as to a particular contention. In this way the Board would control the use of each procedure and assure that its use (1) would not unduly delay the hearing, (2) would involve the use of a procedure that was best to obtain the necessary information, and (3) would serve the goal of developing an adequate record. As discussed, *infra,* one of the principle goals of discovery, if conducted properly, is to reduce hearing time and make the entire process more efficient.

B. Criteria For Selecting Hearing Subpart

The regulations' plain language permits formal subpart G discovery in this case, for certain contentions, because, as discussed *infra*, the use of some of the discovery procedures available under Subpart G will be the best way to obtain the information needed to resolve material issues of fact related to certain State of New York Contentions. The standard to be used in deciding whether Subpart G should be used in a particular proceeding is set forth in § 2.309(g) and unequivocally identifies a functional test, drawn from the Administrative Procedure Act (*see* discussion *infra* of 5 U.S.C. § 556). The touchstone for deciding on the use of Subpart G is whether "resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures." Under § 2.309(g) a petitioner "must demonstrate by reference to the contention and the bases provided and the specific procedures" that this test is met in order to proceed under Subpart G.

An alternative way of obtaining Subpart G status is set forth in § 2.310(d) which applies

an different, and perhaps more lenient, test than § 2.309(g), and includes additional alternative tests which are uniquely relevant only to the use of cross-examination but of no relevance to whether requests for admissions, interrogatories, depositions or document production requests should be allowed. Thus, § 2.310(d) is not really relevant here since, as seen *infra*, the State of New York meets the test in § 2.309(g) as to the Contentions of concern and thus need not address the standard in § 2.310(d). However, because the ASLB in *In the Matter of Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station),* 60 N.R.C. 686, 694-95, Docket No. 50-271-OLA, LBP-04-31 (December 16, 2004) ruled, not only that (1) the only test for Subpart G use is that contained in § 2.310(d), but also (2) that the section requires a showing that the credibility of witness or the witnesses intent or motive must be shown to be at issue, it is necessary to examine § 2.310(d) to see why, the State respectfully submits, the Vermont Yankee Board was in error.[2]

As noted *supra*, § 2.310(a) does not mandate the use of Subpart L in relicensing proceedings but merely says that this Board *may* use that Subpart unless it finds that standard in § 2.310(d) has been met. Another ASLB, addressing the issue of hearing procedure choice in a license renewal proceeding, emphasized the discretion afforded the hearing board in deciding

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[2] The Vermont Yankee Board concluded that § 2.309(g) "simply specifies how to submit a request for a particular hearing procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d)." With due respect to that Board, no fair reading of the language of § 2.309(g) supports the proposition that it is simply a procedural regulation describing "how" to submit a request for Subpart G proceedings. A more logical interpretation is that because the focus on much of the controversy about the proposed new regulations was on the use of cross-examination, the Commission was focused on cross-examination when it wrote the test in § 2.310(d) and did not consider the instances in which other Subpart G procedures might be needed even though the credibility of a witness or the intent of a party were not at issue. *See* 69 Fed. Reg. 2182, 2205 and 2222 (where the Commission's discussion of the issue is focused on cross-examination and not discovery procedures).

whether to use the procedures of Subpart L. *In the Matter of Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station),* 64 N.R.C. 131, 204, Docket No. 50-271-LR, LBP-06-20 (Sept. 22, 2006) ("If a specific hearing procedure is not mandated, the plain language of 10 C.F.R. § 2.310(a) uses the term 'may' in describing our options in selecting the appropriate hearing procedures. The use of the permissive 'may' instead of the mandatory 'shall' indicates that even if a petitioner fails to demonstrate that Subpart G procedures are required, the Board 'may' still find that the use of Subpart G procedures is more appropriate than the use of Subpart L procedures for a given contention"). If, a party meets the provisions of § 2.309(g) for use of Subpart G procedures, then the Board would have no basis to exercise the discretion granted to it under § 2.310(a). In addition, if § 2.310(d) were properly applied in this case, the use of Subpart G procedures would be even more obvious.

Under § 2.310(d) the test is whether the ASLB finds that "resolution of the contention or contested matter [1] necessitates resolution of issues of material fact relating to the occurrence of a past activity, [2] where the credibility of an eyewitness may reasonably be expected to be at issue, and/or [3] issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" (brackets added). The plain reading of this test is that a Subpart G proceeding is to be granted if any one of the three enumerated standards is met.

As written, by using commas to separate each of the three phrases as well as the conjunctive "and/or" phrase between the second and third phrase, the § 2.310(d) establishes three separate standards that can be read either disjunctively or conjunctively. As a general rule of statutory construction, the use of a conjunctive, such as "or" before the last term in a series, indicates that each term in the series is intended to be read in the disjunctive and given separate

meaning. *See United States v. Urban*, 140 F.3d 229, 231 (3d Cir.1998). In addition, the use of the commas, along with the use of "and/or", signals that each phrase is to be read separately. Basic grammar principles do not allow for any other reading of the text. Strunk and White, *The Elements of Style*, 3d edition, at p. 2 ("In a series of three or more terms with a single conjunction, use a comma after each term except the last...This comma is often referred to as the "serial" comma."); *The Chicago Manual of Style Online*, 15th edition, at § 6.19 ("Items in a series are normally separated by commas....When a conjunction joins the last two elements in a series, a comma—known as the serial or series comma or the Oxford comma—should appear before the conjunction. Chicago strongly recommends this widely practiced usage, blessed by Fowler and other authorities..., since it prevents ambiguity."). Thus, on its face, the plain meaning of § 2.310(d) is that three separate tests are established and either all three tests have to be met or any one of them can be met.[3]

In bypassing the plain text of the regulation, the Vermont Yankee uprate Board also eschewed a second rule of construction: when a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S.Ct. 1942 (2000); *Hughes Aircraft Co. v. Jacobson*, 119 S.Ct. 755 (1999) (in any case of statutory construction, a court's analysis begins with the language of the statute, and where the statutory language provides a clear answer, *it ends there as well*). Instead, following the

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[3] As written § 2.310(d) is not a model of clarity as to the criteria for tests 2 and 3, particularly test 3 which appears to have dropped a verb between "eyewitness" and "material." All that merely underscores why if, as here, the standard for a Subpart G hearing set forth in § 2.309(g) has been met, the Board should use its discretion to disregard the § 2.310(d) option.

arguments of Entergy and NRC Staff, the Vermont Yankee uprate Board reached its conclusion "based primarily on the parallel structure of the regulation." 60 N.R.C. at 694. Although bereft of additional textual analysis, it would appear that the holding required extensive – but unstated – editing of the regulatory text. Indeed, to arrive at that conclusion, one would have to first eliminate the two commas between the three clause, next insert the word "and" between "activity" and "where", and finally limit the "and/or" conjunction only to the second and third clauses. Since the Commission has emphasized on many occasions that the provisions of Part 2 are "strict by design" and are to be strictly construed, there is no authority to tinker with the words of the regulations. In addition, the Atomic Energy Act and the Administrative Procedure Act[4] establish precise procedures for the amendment of NRC regulations, and Energy, NRC Staff, administrative tribunals, and/or the Commissioners lack the power to use a blue pencil to add or remove text from the regulations without complying with those procedures. If Energy or NRC Staff believe that §§ 2.309(g) and 2.310(d) as written should not be applied to this case, they can use the provisions of § 2.335 to make their argument for a waiver of the regulations. Absent such a showing, this Board should interpret the regulations in a manner that follows the regulation as written, makes sense of all the words, and comports with the Commission's goal in adopting the regulations.

The Statement of Consideration accompanying the 2004 Part 2 amendments contains statements that support State of New York's view that § 2.309(g) provides the standard to be used for selecting Subpart G and that § 2.310(d) has a more limited role. The ALB panel in Oyster Creek referred to this regulatory history when it addressed the choice of procedures issue.

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[4]*See* 42 U.S.C. § 2239, 5 U.S.C. § 553.

In the Matter of Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station) Docket No. 50-0219 LR, Memorandum and Order (Denying NIRS's Motion to Apply Subpart G Procedures) June 5, 2006 slip op. at 2-3. In that decision, the Oyster Creek ALB panel recognized that the standard set forth in § 2.310(d) was primarily intended by the Commission to be tied to a claim for the right to cross-examine. *Id.* at 3. The ALB quoted from the Statement of Consideration which accompanied the 2004 Part 2 amendments, where, in adopting the current test in § 2.310(d), the Commission offered the following extended discussion of its reasoning in adopting the language in that section, showing clearly, that it was focused on the portion of Subpart G that relates to cross-examination when it developed the standards in § 2.310(d), not on discovery:

> Rather, the Commission agrees with the thrust of the commenters opposing this criterion that, inasmuch as neither the AEA nor the APA require the use of the procedures provided in Subpart G, they should be utilized only where the application of such procedures are necessary to reach a correct, fair and expeditious resolution of such matters. *In the Commission's view, the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination which challenges their recollection or perception of factual occurrences.* This also appears to be the position of several citizen group commenters, judging by the reasons given for their opposition to greater use of Subpart L procedures. *Hence, the Commission focused on criteria to identify those contested matters for which an oral hearing with right of cross-examination would appear to be necessary for a fair and expeditious resolution of the contested matters.* Common sense, as well as case law, lead the Commission to conclude that oral hearings with right of cross-examination are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event." See *Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (DC Cir. 1997), citing *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (DC Cir.1992).

69 Fed. Reg. 2182, 2205 (footnote omitted, emphasis added).

Another reason why the test under § 2.310(d) should not be applied to a request for Subpart G discovery procedures is that the test, as interpreted by the Vermont Yankee and Oyster Creek ASLBs, is focused on witness credibility and intent, thus creating substantial opportunity for delay in the proceeding. For example, at this early stage in the proceeding where the provisions of § 2.309(g) are intended to be applied, it is not possible to even know the names of the witnesses, much less their proposed testimony. Thus, it would be impossible for the Board or the parties to intelligently address whether "credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter [are involved]," until after the mandatory disclosures required by § 2.336 and the final witness lists were submitted. The ALB in Vermont Yankee recognized this dilemma and chose to postpone a final decision on whether to use the Subpart G procedures until after the final witness list was submitted. *See In the Matter of Energy Nuclear Vermont Yankee L.L.C. and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)* 2005 NRC LEXIS 23, Docket No. 50-271 LR, Initial Scheduling Order, February 1, 2005 slip op. at 3 (ML 050330176).

The problem with the Vermont Yankee approach, which was necessitated by the earlier decision of that ALB interpreting § 2.310(d) to require a showing on credibility and/or intent as a prerequisite to a Subpart G hearing, is that if the required showing were made at the time of the filing of the final witness list, the full panoply of discovery procedures would be available for the first time and their use at that time would almost certainly cause delay in the hearing procedure, thus defeating the most significant justification offered by the Commission for adopting the 2004

rule changes as they relate to discovery. *See* 69 Fed. Reg. at 2194 (" The Commission believes that the tiered approach to discovery set forth in the proposed rule represents a significant enhancement to the Commission's existing adjudicatory procedures, and has the potential to significantly reduce the delays and resources expended by all parties in discovery").

Thus, reading the literal language of the relevant regulatory sections and applying the policy considerations that underlay the Commission's adoption of the 2004 amendments to Part 2, State of New York submits that if a determination is to be made at this time on whether to use Subpart G or Subpart L, the relevant test is that specified in § 2.309(g). A decision to proceed under Subpart G is not an endorsement of the use of any particular Subpart G procedure. To obtain the use of any Subpart G procedure, the party seeking its use must demonstrate that the particular instance "necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures" (10 C.F.R. § 2.309(g)).

C. Formal Subpart G's Discovery Tools Also Promote Judicial Economy

Using Subpart G procedures in the manner urged by State of New York, *e.g.*, requiring that use of each of the discovery procedures in Subpart G must be justified by the party seeking its use and that the Board, using its broad discretion, may limit the use of a particular discovery tool by, for example, placing a limit on the number of interrogatories, requests for admissions or document production requests or by placing time limits on depositions, will allow discovery to be used as intended in the Federal Rules of Civil Procedure (FRCP), which is to shorten the hearing by discovering and clarifying facts and pinning down the position of parties.

When the Commission adopted the 2004 amendments to 10 C.F.R. Part 2, it specifically noted that it was drawing upon the Federal Rules of Civil Procedure. 69 Fed. Reg. 2128, 2194

("The mandatory disclosure provisions, which were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, have been tailored to reflect the nature and requirements of NRC proceedings"). Significantly, when Congress implemented the 1993 Amendments to the FRCP it did not abolish the right to other discovery procedures such as interrogatories, depositions, requests for document production and admissions. Rather, it strengthened the power of Courts to control the use of those procedures while continuing the procedures, which, when they were adopted, were intended to improve the efficiency of the process. *See e.g.*:

> Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.

Fed. R. Civ. P. 36, 1970 Advisory Committee's Note.

Depositions can make the entire process more efficient by assuring that the information provided by the opposing party is offered by the persons who have the most knowledge, not merely the persons who the opposing party wants to offer:

> The testimony of a Rule 30(b)(6) witness is binding on the entity and goes beyond the individual's personal knowledge. A corporation has an affirmative duty to produce a representative who can answer questions that are within the scope of the matters described in the notice. *In Bracco Diagnostics Inc. v. Amersham Health Inc.*, C.A. No. 03-6025(SRC), 2005 U.S. Dist. LEXIS 26854, at *3 (D.N.J.2005) (citations omitted), the Court succinctly summarized the benefits of a Rule 30(b)(6) deposition:
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> A 30(b)(6) deposition more efficiently produces the most appropriate party for questioning, curbs the elusive behavior of corporate agents who, one after another, know nothing about facts clearly available within the organization and suggest someone else has the requested knowledge, and reduces the number of depositions for which an organization's counsel must prepare agents and employees.

Harris v. New Jersey 2007 WL 2416429, 2 (D.N.J. 2007)(footnote omitted).

As one Court noted, in chiding the parties for failing to work cooperatively to allow depositions to proceed "any eventual trial of this case will undoubtedly be more efficient if the depositions at issue go forward." *Landeen v. Phonebillit, Inc.* 2007 WL 2902212, 2 (S.D. Ind. 2007).

In addition, Courts have recognized that mandatory disclosures similar to those provided under 10 C.F.R. § 2.336, are often insufficient to meet the legitimate goals of the opposing parties and that additional discovery will be required:

> Plaintiff has requested more specific information in response to the request that each person listed in the Supplement to Attachment "A" to Defendants' Initial Disclosures (Motion to Compel, Exhibit D) be identified and a summary of the discoverable information possessed by each provided. The defendants have provided the identification information for the persons listed, but the summary of the information possessed by that person is often couched in generalizations such as, "... has information concerning certain matters alleged in the pleadings, including Tinley's business practices." The court finds this level of response to be inadequate. The plaintiff is entitled to a more complete factual summary of the individual's alleged knowledge about the issues relevant to this case and the basis for such knowledge. The plaintiff is entitled to enough basic information to allow him to determine, for instance, why the individual is placed on the defendants' list of initial disclosure in the first instance. If the defendants more fully describe the information possessed by the person listed, the plaintiff can more readily cull his list of necessary potential interviews or depositions and therefore save time and expense in trial preparation. Given that the defendants chose to include the person in their initial disclosures, the defendants are already knowledgeable about, at least, the general nature of the prospective witness's potential testimonial knowledge.

Tinley v. Poly-Triplex Technologies, Inc., 2008 WL 732590, 2 (D.Colo. 2008). A request for a

further specification of information following § 2.336 disclosures is not clearly contemplated by Subpart L or § 2.336 but it would be readily available under Subpart G.

The judicial recognition of the valuable assistance and improved efficiency associated with the proper use of pretrial discovery is also endorsed by administrative law judges also. In discussing formal hearings under the APA, the Manual for Administrative Law Judges notes that "if [the] exchange of evidence is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced." Manual for Administrative Law Judges ("ALJ Manual"), at 56.

As the Court in *CAN* did, with much less expertise available to it *(CAN,* 391 F.3d at 353), this Board can take judicial notice of the time wasted at evidentiary hearings while the ALB attempts to determine precisely what each witness is claiming, or what commitments have been made by the applicant. *See* Transcript, *In the Matter of Energy Nuclear Vermont Yankee L.L.C. and Energy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station)*, Docket No. 50-271-OLA, LBP-04-31 (July 24, 2008), ML072100169, at 1498-1505, 1522-1659. Allowing carefully controlled discovery, at a time when limits on the time for discovery have already been set to avoid delay for the start of the evidentiary hearing, will undoubtedly allow the hearings to be more focused and proceed more efficiently.

D. The Interplay of NRC Regulations and the Administrative Procedure Act

The State of New York's view of the regulatory requirements is consistent with and dictated by certain controlling statutory provisions. Pursuant to the Atomic Energy Act the NRC is required to follow the mandates of the Administrative Procedure Act. 42 U.S.C. § 2231. The Administrative Procedure Act, 5 U.S.C. §§ 551 *et. seq.* provides the minimum obligations that an

agency must meet when it provides an opportunity for a hearing, as the NRC does pursuant to the mandate of 42 U.S.C. § 2239(a). In *CAN v. NRC*, 391 F.3d 338 (1st Cir. 2004) the Court upheld the NRC procedures for licensing hearings that are applicable to this proceeding insofar as the provisions related to discovery rights and cross-examination.

The ruling in *CAN* regarding the interplay between the APA and the AEA, plus the Commission's representation to the Court about the meaning of its own regulations, provides conclusive support for the proposition that the only proper interpretation of the Commission regulations is that § 2.309(g) sets the standard for when Subpart G is to be used. Even if § 2.310(d) is an alternative test for application of Subpart G rights, *CAN* provides support for the view that under that regulation a Subpart G proceeding is authorized "where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity. . ." In *CAN* the Commission argued that its procedure for allowing the use of cross-examination was wholly consistent with the mandate of the APA. It cited to the language in § 2.1204(b)(3) to support this proposition and the *CAN* court agreed that the cited language meets the APA standard. In reaching that conclusion the *CAN* court made the following ruling:

> The APA does require that cross-examination be available when "required for a full and true disclosure of the facts." *Id.* If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. Should the agency's administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against future challenges.

CAN v. NRC, 391 F.3d at 354. Thus, the *CAN* decision supports the proposition that cross-examination rights, regardless of the Subpart of the regulations that is being applied, "must be

allowed in appropriate instances," and those appropriate instances are where it is "required for a full and true disclosure of the facts." *Id.*

However, if § 2.310(d) is interpreted to require either that "the credibility of an eyewitness may reasonably be expected to be at issue" or that "issues of motive or intent of the party or eyewitness material to the resolution of the contested matter" must also be shown to get a Subpart G proceeding, then the barrier to the right of cross-examination under Subpart G would be higher than the *CAN* decision established or than the Commission represented to the Court when it provided its own interpretation of the these regulations.

In sum, the only reading of 10 C.F.R. Part 2 that is consistent with the regulations as written, consistent with the NRC's representations made to the First Circuit, and consistent with the ruling in *CAN*, is that a party is entitled to obtain a Subpart G hearing on any contention for which it can demonstrate, pursuant to § 2.309(g), that it is likely "that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."

II. Certain Contentions Submitted by the State of New York Should Proceed Through Discovery Pursuant to the Subpart G Discovery Procedures

As previously discussed, the State of New York is entitled to a Subpart G proceeding for any contention for which it can demonstrate that it meets the requirements of § 2.309(g) or the first test in § 2.310(d). However, at this early stage of the proceeding it may not be possible to demonstrate conclusively that the standards are met, particularly the standard under § 2.309(g). Thus, should the Board conclude that the showing required to obtain Subpart G status has not been made at this time, the State of New York respectfully requests the Board defer any final

ruling on this matter and allow the State of New York to file supplemental briefing in support of its request for Subpart G status until 30 days after the initial disclosures have been made pursuant to § 2.336 by both Energy and NRC Staff.

The use of discovery procedures specified in Subpart G, particularly requests for admissions, will provide an extremely efficient method to ascertain precisely what actions Energy is committed to taking to meet its obligations under Part 54. Efforts to evade taking a definitive position with such equivocating phrases as "will generally comply with" or "is based upon" will be exposed early and Energy will be compelled to provide precise answer to precise questions. While similar inquiries can be taken at the evidentiary hearing, it will be far more efficient for all the parties, and particularly the Board, if the hearings are able to focus on the actual choices made by Energy and not on first trying to determine what choices it has made.

As with any good pre-trial practice, depositions can be used to fully discover all the relevant facts that lay behind a position adopted by a party. Without depositions, the evidentiary hearings are themselves part discovery and part cross-examination. If the discovery - i.e. the uncovering of all relevant facts - is carried out during depositions, the hearing will be able to focus on the one procedure that is appropriate for hearings - i.e. cross-examining the witnesses based upon the already established facts, not uncovering the facts.

This license renewal hearing involves more contentions and more complex contentions than any previous license renewal proceeding. If, as the State of New York has suggested, the Board imposes strict guidelines -- after allowing the parties to propose their own procedural controls, and possibly to propose a joint case management plan, as contemplated by § 2.329 -- to control pre-hearing discovery, the Board can assure itself that the time devoted to the hearings

themselves will be spent as efficiently as possible. Traditionally, the items that control the commencement of the hearings are publication by the Staff of the SER and FEIS and the ACRS review. So long as Subpart G discovery is conducted within that time frame, it will not add any time to the ultimate resolution of the case and by speeding up the hearing itself and the focus of the parties on the issues of concern, will actually expedite the final resolution of the proceeding.

A. NYS Contentions 5, 6, and 7

In admitting the State of New York Contentions 5, 6 and 7 regarding buried piping and inaccessible electrical cables, the Board concluded:

> the Board admits NYS-5 to the extent that it pertains to the adequacy of Entergy's AMP for buried pipes, tanks, and transfer canals that contain radioactive fluid which meet 10 C.F.R. § 54.4(a) criteria. The questions to be addressed at hearing include, inter alia, whether, and to what extent, inspections of buried SSCs containing radioactive fluids, a leak prevention program, and monitoring to detect future excursions, are needed as part of Entergy's AMP for these components.
>
> ***
>
> While we accept at face value Entergy's representation that it fully intends to develop an AMP consistent with the GALL Report, that commitment does not demonstrate, now, that the effects of aging will be adequately managed.

LBP 08-13 at 34, 41. Energy is obligated under 10 C.F.R. § 2.336(a)(2)(I) to either produce a copy or a description of "all documents and data compilations in the possession, custody, or control [of Energy] that are relevant to the contentions." As the Board recognized in its Order, the issue for resolution in Contentions 5, 6 and 7 is whether inspections, leak prevention programs and monitoring proposed by Energy are sufficient to meets its obligations for license renewal. Step one in the process of resolving this issue is a full identification, by location, design, function and accessibility of all the buried pipes, tanks, and transfer canals that contain

radioactive fluid and relevant inaccessible electrical cables which meet 10 C.F.R. § 54.4(a) criteria. Only by knowing where each of these critical components are located, how it is buried or why it is inaccessible, what natural forces it may be subjected to, how difficult it will be to detect a leak occurring from that pipe or damage to the electrical cable and similar specific details, will it be possible to determine whether the plan provided by Energy will be effective.

If there were a readily ascertainable CLB for both Indian Point units, presumably the document production under § 2.336 by Energy could be thorough and all the relevant information about pipes and inaccessible cables would be provided. However, in light of the questions and answers provided by Staff and Energy during the hearings on contention admissibility, there is serious doubt that the CLB is easily ascertainable. Under these circumstances, the judicious use of depositions, particularly a deposition modeled on FRCP Rule 30(b)(6) which gathers information from the "person most knowledgeable" about the particular system, is essential to either ascertain where the relevant documentation is, whether it is up to date as required by 10 C.F.R. § 50.74, or whether the relevant documentation cannot be located.

Beyond the limited information contained in the LRA, Energy should possess or have access to substantially more documentation, as part of its current licensing basis, that more precisely and completely identifies all the buried pipes, tanks, and transfer canals and should have similar details for the inaccessible electrical cables that are the subject of the contentions. However, since it did not provide this information as part of its LRA, did not identify with any specificity what programs it will implement to address these and other issues in its LRA, there is reason to be concerned that when Energy makes its § 2.336 disclosures they will be far from complete. Of course, if Entergy's initial disclosures are complete and thorough, no additional

discovery will be needed to ascertain which pipes, tanks, transfer canals and inaccessible electrical cables are at issue and the relevant details about them. Whether Energy will offer any actual aging management plans for the inaccessible cables and the extent of its disclosure of such plans now, is also an as yet unanswered question. However, past history suggests that a full disclosure of all relevant documents may not occur, at least not in a timely manner.

For example, in the Pilgrim license renewal proceeding, Energy produced, for the first time on January 8, 2008, a corporate document, that had an effective date of November 9, 2007, which had presumably been in existence for some time prior to its effective date. This production was in conjunction with filing its Statement of Position regarding Pilgrim Watch's admitted Contention related to buried piping. See *Buried Piping and Tanks Inspection Program and Monitoring Program* ("BPTIMP")(submitted by Energy in the matter of Pilgrim Nuclear Power Station License Renewal in Entergy's Initial Statement of Position, Exhibit 5, posted January 8, 2008, and docketed January 9, 2008 (ADAMS ML080160268)). This disclosure, at least two and half months after the document had come into existence and at a critical time in the hearing when the intervenor was formulating its prefiled testimony, is hardly in compliance with the requirements of § 2.336(a)(2)(I). In addition, Pilgrim Watch could not know of the existence of the document and thus could not avail itself of the provisions of § 2.336(e) to seek sanctions for the failure to produce a document the existence of which was unknown to it. However, a properly conducted deposition of the person with the most knowledge about buried piping inspection programs would have quickly disclosed the existence of either the document or the program that was developing the document. Of equal importance to the document itself would be the underlying documents that formed the basis for Entergy's decision to provide an enhanced

program for inspections of buried piping, none of which were apparently produced in the Pilgrim proceeding.[5] Despite this history of a lack of diligence and timeliness in making document disclosures, it would be inappropriate for the State of New York to seek to obtain expanded discovery in this proceeding based solely on Entergy's record in other proceedings. Energy is entitled to the benefit of the doubt and until it is has made its initial disclosures and any appropriate supplements it is not possible to determine whether additional discovery will be needed here. Nonetheless, under the Commission rules and this Board's Order, now is the time for the State of New York to make its case for the use of Subpart G procedures. As noted, the State of New York does not believe this will give it the automatic right to use any discovery procedure, but once this Contention has been accepted under Subpart G, the State of New York can, if the nature of Entergy's § 2.336 disclosures warrant, seek to use additional discovery procedures to assure the "full and true disclosure of the facts." Although the State of New York submits that as of today it is not possible to make a full case for why a particular discovery procedure is needed, there is already sufficient evidence, discussed in this pleading, that it is

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[5] Although Entergy vigorously opposed admission of Contention 5 on buried pipes, it did not disclose to the Board that at the same time it was opposing admission of the Contention, it had commissioned an Independent Safety Evaluation (ISE) which was looking, in part, at the issue of buried pipes. The ISE concluded that "the protective wrapping/insulation [on feedwater piping] most likely was not installed as required by design specification, causing the corrosion of the piping" and "a comprehensive investigation of the nature and rate of wall corrosion had not been done in 1998 when wall thinning of the auxiliary steam piping was first detected, and by 2007 the piping condition was sufficiently degraded as to preclude effective investigation of the leak source." ISE Report at 50. The Report went on to state that "...the vulnerability remains for future tritiated steam leaks in the remaining 275 linear feet ... of Unit 2 auxiliary feedwater piping." *Id.* at 51. Moreover, the Report noted that identification and location of buried pipes can be "sometimes difficult in older plants" (id. at 50) and the ISE's first recommendation to Entergy was to identify all buried pipes. *Id.*, Appendix 3, p. 50. The ISE based its conclusion on a review of documents made available to it by Energy. Given past practice, it is unlikely Energy will be producing a similarly comprehensive set of documents pursuant to § 2.336.

extremely likely that the discovery procedures in Subpart G will, in specific instances, provide the best mechanism to resolve disputed issues of fact that are material to resolution of specific contentions.

Although for a different reason, a request for cross-examination of witnesses is even less ripe for presentation at this time. It is not possible to determine whether cross-examination is warranted, in part because there is no way to determine whether a particular witness needs to be cross-examined to test either veracity or intent until such time as witnesses and their testimony are identified. As the Board recognized in its Prehearing Scheduling Order in the Vermont Yankee License Renewal Proceeding, the earliest that a request for cross-examination can be made is a reasonable time after the witness for whom cross-examination is sought has been identified. *In the Matter of Vermont Yankee Nuclear Power Station*, Docket No. 50-271-LR, Initial Scheduling Order, Nov. 17, 2006 slip op. at 6. No witnesses have been identified by any party and the earliest such disclosures will occur will be after the initial disclosures required by § 2.336(a)(1). Therefore, the State of New York reserves its rights to seek Subpart G cross-examination authority at a later date.

B. NYS Contention 8

For reasons similar to those raised for Contention 5, 6, and 7, the State of New York has reason to believe that initial disclosures related to Contention 8 may not be complete. Contention 8 alleges, *inter alia*, that the failure to manage properly the aging of electrical transformers could result in loss of emergency power to the 480 volt safety equipment and 6.9kV busses, including all station blackout loads and may result in accidents beyond the Design Basis Accidents resulting in exposures to the public exceeding 10 C.F.R. § 100 limits. *See* New York State

Petition to Intervene at 104. On March 12, 2008, after the State of New York completed its oral arguments to this Board, the NRC published its Proposed License Renewal Interim Staff Guidance LR–ISG–2008–01: Staff Guidance Regarding the Station Blackout Rule. See Proposed License Renewal Interim Staff Guidance LR–ISG–2008–01: Staff Guidance Regarding the Station Blackout Rule (10 CFR 50.63); Associated With License Renewal Applications, 73 Fed. Reg. 13258 (Mar. 12, 2008). This guidance supports New York State's Contention 8. However, at no time during the consideration of Contention 8 did Staff acknowledge that this document was being prepared within the NRC and continued to insist that there was no merit to the claims made in Contention 8. Given this notable omission, there is little reason to believe that when NRC Staff produces documents pursuant to § 2.336 it will make a full a complete disclosure of "[a]ll documents (including documents that provide . . . opposition to, the application". 10 C.F.R. § 2.336(b)(3). The fact that Staff has asserted it believes it has the right to discard documents that are within the scope of the disclosure requirements in § 2.336(b)(3), *see* July 21, 2008 NRC Staff Opposition to New York State Motion to Preserve Documents, underscores the fact that Staff disclosures under § 2.336(b)(3) are not likely to be complete. The use of a quick deposition of the relevant Staff member who is addressing the merits of these issues will quickly disclose whether other documents exist that have not been produced.

C. NYS Contention 12

This contention concerns the clear up and decontamination costs associated with a significant accident. *See* New York State Petition to Intervene at 140-145. The State of New York submits that a discussion of NYS Contention 12 that does not include production of NRC documents related to (1) the SAND 96-0957 Report, *Site Restoration: Estimation of Attributable*

Costs From Plutonium-Dispersal Accidents (May 1996); and (2) economic costs associated with a potential accident at or near a dry cask storage facility located near Skull Valley, Utah, and any analysis of reports or testimony of M. Resnikoff regarding accidents associated with the Skull Valley site and/or the transportation of nuclear material to that site would be incomplete. As part of discovery in this proceeding, the State of New York seeks all documents within NRC's possession analyzing: (1) the SAND 96-0957 Report or (2) economic costs associated with a potential accident at or near the Skull Valley facility and any analysis of reports or testimony of M. Resnikoff regarding accidents associated with the Skull Valley site and/or the transportation of nuclear material to that site. It is anticipated that such NRC documents will analyze the factual and theoretical underpinnings of the Sandia Report and the Skull Valley analyses; such NRC documents may be material to resolution of NYS Contention 12. If such documents are not included as part of the NRC Staff's disclosure, the State of New York anticipates returning to the Board and requesting the application of Subpart G to further discovery on this contention.

In addition, the State of New York notes that in the recent Pilgrim license renewal proceeding, it appears that Entergy produced scores of pages of a print out of a computer run of a SAMA analysis. However, from the face of the document, it is difficult to identify the assumptions Entergy used in the analysis. For purposes of illustration, the State has appended a five page excerpt of the print out (*see* Appendix A hereto). Without interrogatories, notices to admit, and/or a deposition, it would be difficult to interpret the inputs and assumptions used by Entergy or its consultants. This need for Subpart G discovery procedures would also hold true for Contention 16.

D. NYS Contention 16

In opposing admissibility of this Contention on the basis that there was no substantive support for it, Staff and Energy failed to acknowledge in their pleadings to the Board the existence of at least one governmental study which support the State of New York's Contention 16. Contention 16 alleged that Entergy's assertion in its Severe Accident Mitigation Alternatives (SAMA) Analysis that it "conservatively" estimated the population dose of radiation in a severe accident is unsupported because the air dispersion model it used will not accurately predict the dispersion of radionuclides, or resulting human exposure, in the event of a severe accident. *See* New York State Petition to Intervene at 163-67. As the State of New York noted in its reply, Staff and Energy failed to disclose or reference a 1999 federal government study which raised the same concerns about the air dispersion model at issue that the State's expert, Dr. Bruce Egan, did. *See Directory of Atmospheric Transport and Diffusion Consequence Assessment Models,* Office of the Federal Coordinator for Meteorology, FCM-13-1999 (March 1999), *available at* www.ofcm.gov/atd_dir/pdf/maccs2.pdf. When coupled with the many examples discussed above regarding other substantive issues where neither Staff nor Energy were candid in filing their oppositions to the State of New York's Petition to Intervene and where they failed to disclose documents that would undercut their opposition to the Petition, there is every reason to believe that without the benefit of discovery, particularly discovery where witnesses are placed under oath and interrogatories, where answers are required to be filed under oath, there will not be a full and complete disclosure of all the relevant information. The provisions of § 2.336 and its virtually unenforceable obligation to produce all relevant documents - particularly where the existence of the documents is not known or readily knowable by intervenors - are not the best

way to find or resolve the material facts in dispute with regard to this or any of the other Contentions for which the State of New York seeks Subpart G proceedings.

E. NYS Contention 25

Contention 25 addresses the significant aging management problem of embrittlement of the reactor pressure vessel ("RPV") and associated internals. The State of New York believes that this issue has not been raised in a relicensing proceeding to date, and so the parties have no prior history upon which to draw a conclusion that the initial disclosures required under § 2.336 would be adequate to provide the necessary information for the State's experts to review and prepare for the adjudicatory hearing.

In fact, the opposite is true. Contention 25 raises exceedingly complex, technical issues that have likely been reviewed by third parties, *e.g.*, EPRI and NEI, and relevant documents from those organizations may be claimed by Energy to not be within the "possession, custody, or control" of the Applicant here. 10 C.F.R. § 2.336(2)(I); *see* above discussion of this issue as applied to pipe corrosion. Conversely, if this significant, technical aging management issue has not been reviewed by third parties, that, too, would provide relevant and important information to the State of New York and the Board. The Subpart G procedures would provide those answers. Because § 2.336 only provides for document production, questions such as how or why something was done to address an issue are not answered until the hearings or possible in prefiled direct testimony. For such an exceedingly complex aging management issue, it is far more efficient to get to the root of the "how" and the "why" long before prefiled testimony is filed and the evidentiary hearings begin.

Entergy's LRA failed to include an adequate aging management plan to monitor and

manage the effects of aging due to embrittlement of the reactor pressure vessels and the associated internals. The LRA also did not include an evaluation of Time Limited Aging Analysis ("TLAA") as required by 10 C.F.R. 54.21(c). Entergy's LRA does not indicate if Energy performed any age-related accident analyses, if it even took embrittlement into account when assessing the effect of transient loads, or if it considered how embrittled RPVs would respond in the case of a design basis accident loss of coolant ("DBA LOCA") event. Energy may well have this information, and assuming, *arguendo*, that it would provide that information pursuant to the general disclosures under § 2.336, the reasons why it did not include this information in the LRA would never be ascertained under the § 2.336 disclosures or by application of the Subpart L procedures. Additionally, it may be that Energy never conducted tests and analyses that would have provided this key safety information. In either event (whether it did or did not conduct those tests and analyses), the paucity of information in the LRA goes directly to the issue of motive and intent, thus making application of the Subpart G procedures appropriate, pursuant to 2.310(d).

F. Consolidated NYS Contention 26/26A & Riverkeeper Contention TC-1/TC-1A

Consolidated Contention NYS 26 and Riverkeeper TC-1 addresses the aging management issue of metal fatigue. In contrast to Contention 25, this contention has been litigated in other proceedings, *e.g.*, Vermont Yankee. The issue was also raised in the relicensing proceedings for Oyster Creek and Pilgrim, though the contentions in those cases did not garner an adjudicatory hearing. Moreover, in the Indian Point relicensing matter, as in Vermont Yankee, metal fatigue has undergone a metamorphosis – by the Applicant's design. In both relicensing proceedings, the Applicant amended its LRA in response to the petitions in which metal fatigue was raised as

a contention. The Applicant's LRA amendments in both proceedings prompted the petitioners to submit revised or supplemental contentions.

As was apparent by the ALB panel's questioning of Entergy's experts at the Vermont Yankee adjudicatory hearing, the motives of the Applicant in approaching metal fatigue in its LRA and LRA Amendments became relevant, but were not illuminated by the general disclosures in § 2.336. Having had that information prior to the adjudicatory hearing would have been far more efficient. Given this history – of *this* issue with *this* Applicant – the general disclosure provisions would not provide the information necessary to efficiently and adequately adjudicate this issue, both for the petitioners and the Board.

Resolution of the metal fatigue contention necessitates resolution of issues of material fact relating to Entergy's past activity and to issues of Entergy's motive or intent in submitting LRA Amendment 2. Among the issues to be explored are what CUF/FEN calculations Energy performed, what assumptions it used, when it performed those calculations, how – if at all – it accounted for environmental factors, what data it has that it has not submitted to the NRC, why Energy changed its position in LRA Amendment 2, any new assumptions that it used, the details of its professed corrective action. The general disclosures and Subpart L procedures are simply not designed to explore these issues, which exist given Energy's history of handling the metal fatigue issue at Indian Point and other plants.

III. The State of New York Reserves it Ability to Invoke 42 U.S.C. § 2021(l) to Secure its Right to Cross-Examine Witnesses in Connection with NRC-Issued Licenses for Activities within the State

As previously noted by the State of New York, the Atomic Energy Act itself grants the

states, but not other entities, a right to present evidence, interrogate witness, and advise the Commission about federally licensed atomic energy activities that take place within a state. *See* NYS November 30, 2007 Petition at 19-22; March 11, 2008 Oral Argument, Tr. at 493. Although Applicant and the Staff point to NRC regulations that establish some criteria on the extent to which a State has rights to participate once a hearing has been established (*see* 10 C.F.R. § 2.315 (c)), they do not and cannot dispute the fact that 42 U.S.C. § 2021(l) compels the NRC to "afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application" for any licensing amendment authorizing operation of a nuclear reactor whether or not a hearing is to be held.

However, the State of New York respectfully submits that it is premature to decide this issue at this juncture. First, as already noted, it is not possible at this time to determine whether any cross-examination by a party is warranted since final witness lists have not been produced and topics to be addressed have not been identified for each of those witnesses. In addition, in its capacity as a party, the State of New York possesses the opportunity to seek the right to cross-examine and if, as urged above, the standard for cross-examination, whether the contention is considered under Subpart G or L, is the standard established by the APA and endorsed by the Commission and the Court in *CAN*, the State of New York may obtain all the rights it possesses under 42 U.S.C. § 2021(l) without having to invoke that authority or press the issue in this proceeding. In the interest of efficiency, the State of New York will not press this right at this time, but reserves the right to do so if, and when, it becomes necessary to assure a "full and true disclosure of the facts."

Conclusion

For the reasons outlined above, the State of New York respectfully requests that the Board apply the provisions of Subpart G to State of New York Contentions 5, 6, 7, 8, 12, 16, and 25 and consolidated contention NYS 26/26A and Riverkeeper TC-1/TC-1A.

Respectfully submitted,

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Janice A. Dean
John J. Sipos
Assistant Attorneys General
Office of the Attorney General
for the State of New York
The Capitol
Albany, New York 12224
(518) 402-2251
john.sipos@oag.state.ny.us

Joan Leary Matthews
Senior Counsel for Special Projects
New York State Department of
Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, NY 12223-5500
(518) 402-9190
jlmatthe@gw.dec.state.ny.us

John L. Parker
Region 3 Attorney
New York State Department of
Environmental Conservation
Region 3 Headquarters
21 South Putt Corners Road
New Paltz, NY 12561-1620
(845) 256-3037
jlparker@gw.dec.state.ny.us

Consultation with Parties Pursuant to 10 C.F.R. § 2.323

Prior to filing this motion, on Monday, August 21, 2008, Assistant Attorney General John Sipos contacted Paul Bessette, Esq., counsel to Entergy, and Sherwin Turk, Esq., counsel to the NRC Staff, and inquired whether Entergy or NRC Staff objected to a motion that this Atomic Safety and Licensing Board apply Subpart G procedures to this license renewal proceeding. Both Mr. Bessette and Mr. Turk expressed no opposition to the State's ability to file the motion, but did oppose the application of Subpart G to this proceeding.

John J. Sipos

APPENDIX A

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00 01 01 00	233	125	224	69	28	27	240	150	222	65	28	44
00 01 01 01	229	126	226	67	29	20	233	152	219	68	28	38
00 01 01 02	239	141	228	82	29	15	242	164	219	85	29	31
00 01 01 03	250	145	244	79	29	17	255	171	223	78	29	33
00 01 01 04	257	129	243	64	30	15	263	161	228	69	30	33
00 01 01 05	238	143	229	83	30	17	242	163	219	85	30	30
00 01 01 06	235	135	228	84	30	14	235	167	221	74	31	30
00 01 01 07	228	147	225	86	32	9	226	179	212	76	32	22
00 01 01 08	216	103	216	62	35	3	215	148	201	58	35	15
00 01 01 09	209	69	208	52	38	-5	210	111	196	54	39	-17
00 01 01 10	216	82	224	68	41	-9	209	124	207	75	41	-27
00 01 01 11	212	106	218	83	43	-11	207	133	203	80	43	-24
00 01 01 12	209	119	210	90	45	-10	215	161	214	90	46	-20
00 01 01 13	214	159	217	118	47	-10	214	197	212	107	47	-17
00 01 01 14	212	145	209	104	46	-10	211	162	208	90	46	-17
00 01 01 15	215	121	216	89	45	-7	216	159	213	78	45	-11
00 01 01 16	217	120	219	75	41	-4	219	164	212	71	41	-4
00 01 01 17	214	125	208	67	40	0	212	174	203	63	39	4
00 01 01 18	203	146	197	82	40	2	205	200	193	75	40	10
00 01 01 19	208	148	204	80	41	2	208	200	198	75	40	10
00 01 01 20	212	144	203	83	41	4	209	209	198	70	40	17
00 01 01 21	212	140	207	84	42	6	211	208	197	68	41	20
00 01 01 22	217	136	211	80	42	3	216	198	203	64	41	17
00 01 01 23	216	131	212	74	43	4	216	195	201	63	42	17
00 01 02 00	224	154	221	92	43	5	221	212	205	71	42	18
00 01 02 01	221	173	220	105	43	4	218	212	204	77	42	15
00 01 02 02	218	180	212	104	43	6	212	213	203	83	42	16
00 01 02 03	214	187	208	105	43	9	209	225	200	90	42	20
00 01 02 04	218	181	218	109	44	8	215	221	204	89	43	26
00 01 02 05	221	169	219	108	45	3	214	200	209	80	44	15
00 01 02 06	214	166	214	100	46	3	209	194	203	77	45	8
00 01 02 07	202	177	202	101	46	7	198	194	193	83	46	8
00 01 02 08	198	178	200	105	48	2	194	190	192	86	47	-2
00 01 02 09	192	159	195	107	49	-4	190	181	186	82	48	-4
00 01 02 10	195	156	196	100	51	-4	193	179	187	85	50	-5
00 01 02 11	199	133	197	91	52	-7	197	161	188	82	52	-11
00 01 02 12	195	131	199	92	55	-7	197	167	192	88	55	-15
00 01 02 13	202	162	198	116	57	-7	203	187	196	103	57	-14
00 01 02 14	200	159	199	115	57	-8	201	173	191	91	57	-15
00 01 02 15	197	166	198	117	56	-8	198	190	189	102	56	-12
00 01 02 16	196	176	193	125	54	-7	194	203	190	109	54	-6
00 01 02 17	198	159	193	104	53	-4	196	183	189	92	53	-3
00 01 02 18	197	148	189	106	53	-2	196	195	187	99	53	-3
00 01 02 19	203	172	192	118	53	-2	203	198	196	99	53	-6
00 01 02 20	200	155	195	100	54	-3	203	194	194	89	53	-7
00 01 02 21	200	184	193	124	54	-3	201	210	192	95	53	-6
00 01 02 22	212	188	199	131	55	-2	211	238	202	113	54	-6
00 01 02 23	214	195	211	125	56	-2	214	263	209	121	55	-5

00 01 03 00	216	193	207	125	56	-2	215	263	206	123	55	-5
00 01 03 01	212	209	207	144	56	-3	212	258	206	123	55	-5
00 01 03 02	214	207	200	138	55	-3	213	268	204	131	54	-5
00 01 03 03	214	212	213	143	55	-3	212	270	204	124	54	-5
00 01 03 04	208	208	206	146	55	-3	210	266	200	126	54	-5
00 01 03 05	210	188	207	126	54	-4	212	245	204	114	53	-6
00 01 03 06	208	180	205	117	53	-3	209	242	199	115	52	-5
00 01 03 07	215	180	210	118	54	-2	218	232	206	105	54	-3
00 01 03 08	212	159	207	107	56	-4	216	205	206	92	56	-7
00 01 03 09	213	125	203	84	56	-6	216	168	204	74	56	-12
00 01 03 10	223	89	220	62	57	-8	222	121	219	57	57	-17
00 01 03 11	233	112	228	81	59	-12	232	135	231	71	60	-27
00 01 03 12	224	92	220	70	60	-10	225	110	224	58	60	-22
00 01 03 13	223	75	217	63	63	-11	222	86	218	55	63	-27
00 01 03 14	227	37	223	35	63	-12	228	53	215	38	63	-27
00 01 03 15	240	59	222	41	59	5	251	71	211	53	58	10
00 01 03 16	10	16	231	5	55	31	357	42	307	12	55	19
00 01 03 17	28	26	321	18	56	7	22	54	16	19	56	-2
00 01 03 18	47	46	27	31	52	-6	44	103	38	39	52	-18
00 01 03 19	79	54	87	26	48	-7	65	153	84	51	50	-30
00 01 03 20	89	51	87	44	46	0	74	164	84	52	50	-37
00 01 03 21	110	67	112	39	46	-4	87	148	90	65	50	-50
00 01 03 22	115	106	111	60	45	-4	94	169	91	83	50	-54
00 01 03 23	116	105	107	60	45	-5	97	157	92	69	49	-45
00 01 04 00	125	165	117	77	45	-5	104	173	99	78	47	-30
00 01 04 01	131	164	121	88	44	-6	109	203	107	94	46	-19
00 01 04 02	139	137	127	74	44	-6	116	196	113	89	45	-8
00 01 04 03	153	111	142	64	44	-3	132	159	140	55	45	8
00 01 04 04	168	48	178	17	46	-1	160	71	184	21	47	8
00 01 04 05	244	57	246	31	45	0	228	70	247	44	45	19
00 01 04 06	270	64	271	35	44	0	248	78	266	41	45	14
00 01 04 07	206	50	262	17	45	23	199	87	245	33	46	27
00 01 04 08	195	32	239	24	46	22	196	84	234	27	46	34
00 01 04 09	191	98	163	50	51	22	195	138	153	54	52	34
00 01 04 10	202	169	201	119	57	-4	203	209	196	105	57	11
00 01 04 11	204	197	206	136	58	-6	206	249	199	126	59	10
00 01 04 12	203	225	203	150	59	-4	205	247	197	123	59	7
00 01 04 13	201	232	201	165	59	-4	203	288	196	146	60	7
00 01 04 14	201	253	200	170	59	-4	201	309	195	160	60	5
00 01 04 15	201	281	202	167	60	-4	201	304	195	156	60	-1
00 01 04 16	201	281	205	186	60	-5	201	304	195	153	59	-2
00 01 04 17	200	289	201	179	59	-5	198	325	195	164	59	-2
00 01 04 18	199	292	201	202	59	-5	198	301	194	154	59	-3
00 01 04 19	201	262	203	189	59	-5	200	276	194	141	59	-4
00 01 04 20	197	267	202	189	59	-5	195	291	189	146	59	-1
00 01 04 21	197	281	201	205	60	-3	196	317	193	166	59	9
00 01 04 22	262	93	270	66	57	-5	255	123	257	52	58	4
00 01 04 23	312	97	313	56	50	-1	304	145	302	41	51	7
00 01 05 00	324	106	320	64	49	0	313	149	301	43	49	9

00 01 05 01	302	140	298	90	47	-2	292	194	280	61	47	8
00 01 05 02	272	107	276	71	45	-7	269	164	260	64	46	-3
00 01 05 03	274	154	276	104	41	-8	270	214	263	87	42	-7
00 01 05 04	280	170	283	125	39	-6	275	226	269	94	40	-13
00 01 05 05	287	183	285	131	39	-6	281	254	271	96	40	-14
00 01 05 06	286	183	287	128	38	-7	281	257	273	101	39	-13
00 01 05 07	283	169	284	121	37	-8	278	243	269	98	38	-17
00 01 05 08	287	194	285	134	36	-8	281	260	272	107	37	-20
00 01 05 09	295	178	292	134	37	-10	287	256	278	95	39	-36
00 01 05 10	307	224	305	161	37	-14	298	314	294	116	37	-30
00 01 05 11	317	254	318	186	36	-14	306	316	302	115	37	-28
00 01 05 12	313	269	313	199	36	-14	308	333	304	123	36	-26
00 01 05 13	322	263	322	205	36	-14	310	300	307	101	36	-22
00 01 05 14	309	198	311	148	36	-12	300	263	294	98	36	-21
00 01 05 15	303	196	304	134	35	-10	296	279	287	103	35	-15
00 01 05 16	304	178	300	119	33	-6	296	276	290	101	33	-4
00 01 05 17	321	198	321	151	33	-8	314	220	309	83	32	-3
00 01 05 18	333	178	333	152	32	-10	318	186	313	69	31	-2
00 01 05 19	329	194	328	162	31	-10	320	216	317	81	30	-4
00 01 05 20	331	239	330	205	30	-12	322	266	319	95	30	-6
00 01 05 21	338	229	337	211	29	-13	333	248	331	88	28	-7
00 01 05 22	336	234	336	210	27	-13	328	254	326	90	27	-8
00 01 05 23	327	221	323	181	26	-13	323	234	318	89	26	-7
00 01 06 00	351	147	349	126	26	-12	339	165	345	61	25	-4
00 01 06 01	348	112	346	99	25	-10	337	130	339	51	25	-2
00 01 06 02	333	111	327	95	25	-9	322	133	315	52	24	-2
00 01 06 03	315	106	312	86	24	-7	312	132	300	56	24	-3
00 01 06 04	306	94	301	74	23	-6	308	130	286	51	24	-3
00 01 06 05	284	83	267	58	20	3	289	112	257	46	22	-2
00 01 06 06	276	78	261	38	19	5	286	96	246	42	20	17
00 01 06 07	274	81	254	39	19	8	9999	9999	9999	9999	9999	9999
00 01 06 08	9999	9999	9999	9999	9999	9999	294	79	259	39	27	-36
00 01 06 09	317	27	327	28	26	-7	304	49	296	34	30	-48
00 01 06 10	111	35	90	31	30	-4	98	58	78	37	34	-52
00 01 06 11	9999	9999	9999	9999	9999	9999	9999	9999	9999	9999	9999	9999
00 01 06 12	137	78	136	64	33	-10	158	88	156	53	37	-42
00 01 06 13	196	93	197	70	35	-12	184	107	186	69	36	-23
00 01 06 14	177	77	181	58	36	-14	170	89	176	49	37	-29
00 01 06 15	175	76	186	54	35	-9	171	88	169	47	36	-17
00 01 06 16	161	67	167	30	32	6	154	114	163	41	32	10
00 01 06 17	157	72	165	19	29	19	149	135	155	40	31	19
00 01 06 18	149	95	153	35	30	21	140	149	144	46	31	19
00 01 06 19	145	97	145	51	34	4	137	139	136	51	34	2
00 01 06 20	142	91	143	52	36	-2	137	135	139	52	37	-6
00 01 06 21	142	87	134	43	36	-3	134	129	133	43	37	-5
00 01 06 22	144	82	147	36	36	3	135	132	143	38	36	14
00 01 06 23	173	66	184	29	36	5	164	101	187	32	37	15
00 01 07 00	198	101	205	46	38	18	192	122	194	45	38	28
00 01 07 01	203	81	187	42	39	19	205	103	185	27	39	22

00 01 07 02	229	62	209	28	37	17	234	114	207	24	37	30
00 01 07 03	231	71	206	32	36	18	236	118	207	27	35	34
00 01 07 04	215	72	194	39	36	19	218	105	198	29	36	27
00 01 07 05	192	109	187	59	35	29	194	123	174	43	35	36
00 01 07 06	193	105	184	59	36	21	196	118	173	40	36	23
00 01 07 07	186	134	183	70	37	18	186	121	175	43	37	13
00 01 07 08	185	114	177	58	38	5	186	115	168	46	40	-2
00 01 07 09	175	98	162	55	39	-1	177	127	164	52	41	-12
00 01 07 10	183	64	163	37	41	-6	191	98	182	49	43	-18
00 01 07 11	212	71	213	59	44	-8	216	104	208	62	44	-19
00 01 07 12	220	83	223	64	45	-10	224	112	218	59	45	-22
00 01 07 13	221	124	221	84	45	-8	222	154	219	81	45	-16
00 01 07 14	233	116	230	81	46	-8	231	146	229	69	46	-16
00 01 07 15	244	115	244	75	45	-6	240	150	240	63	45	-13
00 01 07 16	267	125	268	80	43	-2	262	185	259	74	44	-4
00 01 07 17	282	150	283	101	43	-5	277	224	268	84	43	-7
00 01 07 18	286	150	285	95	41	-3	281	222	273	82	42	-4
00 01 07 19	288	198	286	125	41	-6	282	281	272	105	41	-10
00 01 07 20	276	151	279	99	38	-5	271	209	266	86	38	-8
00 01 07 21	274	147	273	96	35	-5	271	199	263	82	36	-6
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00 01 07 23	282	178	281	122	33	-5	278	259	268	103	34	-6
00 01 08 00	268	148	272	95	31	-5	266	223	259	93	33	-5
00 01 08 01	273	149	277	99	31	-5	271	222	263	87	32	-3
00 01 08 02	275	138	273	85	30	-4	273	195	263	80	32	-5
00 01 08 03	274	118	268	66	29	-3	274	170	257	68	30	-3
00 01 08 04	278	114	271	75	28	-1	278	177	262	67	30	-1
00 01 08 05	286	123	282	84	29	-4	282	181	270	68	30	-6
00 01 08 06	287	119	284	76	28	-4	283	168	268	66	30	-8
00 01 08 07	271	81	258	49	28	-7	274	129	253	52	30	-11
00 01 08 08	246	61	234	42	29	-11	249	101	233	47	32	-34
00 01 08 09	278	85	280	63	31	-6	271	113	268	63	35	-55
00 01 08 10	282	74	291	61	33	-7	277	113	277	62	35	-50
00 01 08 11	282	75	283	63	34	-9	274	108	270	58	37	-48
00 01 08 12	291	80	304	69	35	-10	283	130	287	65	37	-38
00 01 08 13	286	70	294	57	36	-9	274	101	278	57	37	-32
00 01 08 14	260	59	268	50	37	-15	254	73	257	49	38	-31
00 01 08 15	222	62	220	44	37	-12	220	74	211	41	37	-20
00 01 08 16	208	64	205	36	33	9	207	77	195	28	33	16
00 01 08 17	209	75	193	39	31	9	212	114	184	32	30	26
00 01 08 18	207	99	201	52	30	7	207	141	194	47	30	15
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00 01 08 20	221	118	222	68	30	1	216	175	218	62	30	9
00 01 08 21	226	148	228	95	30	0	220	196	220	73	30	3
00 01 08 22	216	188	219	119	31	0	213	212	212	82	31	3
00 01 08 23	216	203	211	130	32	-2	212	241	205	99	32	0
00 01 09 00	210	188	209	114	33	-2	208	218	202	93	33	-2
00 01 09 01	210	158	208	99	34	-2	210	200	203	80	34	-2
00 01 09 02	205	148	203	88	35	-2	206	189	196	76	35	-3

00 01 09 03	211	135	208	85	35	-2	212	173	204	71	35	-4
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00 01 09 05	211	137	209	86	37	-1	213	185	207	77	37	-2
00 01 09 06	205	153	201	101	37	-1	208	200	199	81	37	-3
00 01 09 07	208	164	205	108	38	-3	210	216	200	92	38	-4
00 01 09 08	214	147	214	99	39	-3	214	184	208	78	40	-10
00 01 09 09	215	162	216	117	43	-8	216	194	210	100	44	-23
00 01 09 10	232	136	233	99	46	-11	229	161	227	90	47	-26
00 01 09 11	227	139	226	107	48	-12	229	158	224	92	49	-28
00 01 09 12	233	126	235	93	50	-13	235	155	235	86	50	-30
00 01 09 13	225	89	225	75	50	-10	222	123	214	68	50	-18
00 01 09 14	232	87	226	62	50	-8	227	115	220	57	50	-13
00 01 09 15	195	83	194	57	49	-9	195	100	190	55	49	-15
00 01 09 16	205	111	205	65	44	-3	202	126	197	54	44	-3
00 01 09 17	215	142	211	79	42	3	211	166	204	63	42	7
00 01 09 18	264	89	269	57	42	1	255	107	260	41	41	3
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00 01 09 20	294	14	203	13	40	23	293	40	247	16	41	11
00 01 09 21	324	17	218	11	39	32	320	46	257	13	41	14
00 01 09 22	0	24	274	3	39	30	1	62	333	10	42	8
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00 01 10 01	72	45	106	5	40	15	61	99	72	33	43	-3
00 01 10 02	102	38	134	20	41	9	79	101	98	41	44	-20
00 01 10 03	117	46	146	21	40	7	95	89	99	33	43	-7
00 01 10 04	82	25	97	11	40	7	78	86	77	35	44	-23
00 01 10 05	77	48	77	24	41	0	68	108	67	43	43	-14
00 01 10 06	90	30	109	14	41	2	76	93	89	35	44	-23
00 01 10 07	120	53	140	21	41	0	101	87	114	28	44	-24
00 01 10 08	114	105	110	50	42	-4	98	135	101	58	46	-43
00 01 10 09	124	131	114	69	43	-6	105	149	102	72	47	-46
00 01 10 10	124	142	116	63	43	-9	107	155	107	73	46	-39
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00 01 10 12	142	144	128	86	44	-9	122	180	118	76	46	-29
00 01 10 13	133	154	119	87	44	-9	114	186	110	86	47	-31
00 01 10 14	127	189	119	88	43	-8	108	203	109	89	46	-31
00 01 10 15	129	222	122	105	43	-6	111	247	112	107	45	-16
00 01 10 16	124	271	116	130	43	-5	107	271	108	110	45	-3
00 01 10 17	141	214	129	128	46	-4	117	266	116	113	47	8
00 01 10 18	136	226	136	144	49	-3	125	287	125	119	50	18
00 01 10 19	173	200	170	133	54	0	171	250	165	110	55	28
00 01 10 20	210	209	209	140	55	0	212	254	207	128	56	20
00 01 10 21	225	198	223	139	53	1	226	272	221	126	54	3
00 01 10 22	251	204	248	138	52	0	247	293	246	128	52	-4
00 01 10 23	238	169	235	106	50	-1	236	228	231	106	50	-3
00 01 11 00	228	151	223	94	48	0	228	201	222	93	48	-1
00 01 11 01	230	159	228	104	48	-1	229	216	222	96	48	-3
00 01 11 02	235	172	229	106	47	-1	233	234	230	101	47	-3
00 01 11 03	223	161	222	109	46	-1	225	219	219	95	46	-1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

ENTERGY NUCLEAR INDIAN POINT 2, LLC,
ENTERGY NUCLEAR INDIAN POINT 3, LLC, and
ENTERGY NUCLEAR OPERATIONS, INC.

INDIAN POINT NUCLEAR GENERATING UNITS 2 & 3

Regarding the Renewal of Facility Operating Licenses
No. DPR-26 and No. DPR-64 for an Additional 20-year Period

Docket Nos.
50-247-LR & 50-286-LR

ASLBP No.
07-858-03-LR-BD01

**CONSOLIDATED CONTENTION OF
PETITIONERS STATE OF NEW YORK (No. 26/26-A)
AND RIVERKEEPER, INC. (TC-1/TC1-A) – METAL FATIGUE
AND
DESIGNATION OF THE STATE OF NEW YORK AS
LEAD LITIGATOR FOR THIS CONSOLIDATED CONTENTION**

Introduction & Background

Petitioners State of New York (New York) and Riverkeeper, Inc. (Riverkeeper), submit this consolidated contention pursuant to the July 31, 2008, Memorandum and Order of the Atomic Safety and Licensing Board (ASLB) (Ruling on Petitions to Intervene and Requests for Hearing) in the above captioned license renewal proceeding.

On April 23, 2007, Entergy filed its License Renewal Application (LRA) for the two operating reactors at Indian Point (IP2 and IP3). On November 30, 2007, New York and Riverkeeper filed Petitions to Intervene in which both Petitioners included the issue of metal fatigue as an aging management contention. New York's and Riverkeeper's petitions included

metal fatigue as Contention 26 and TC-1, respectively.[1]

On January 22, 2008, along with its Answer to these two petitions, Entergy submitted an amendment to its original LRA. This LRA amendment was denominated as "LRA Amendment 2." Both New York and Riverkeeper filed supplemental or amended contentions in response to LRA Amendment 2 – these contentions were labeled Contention 26-A and TC-1A, respectively.[2]

On July 31, 2008, the ASLB panel admitted New York State Contention 26/26-A and Riverkeeper, Inc. Contention TC-1/TC-1A and directed the two Petitioners "to confer and submit a draft of the Consolidated Contention for the Board's consideration within 21 days of [the] Order." ASLB Mem. & Order at 226-27, 228. As directed by the ASLB panel, the following constitutes the parties' consolidated contention on the aging management issue of metal fatigue.

Designation of the State of New York as Lead Litigator

In its July 31, 2008, Memorandum an Order, the ASLB Panel directed New York and Riverkeeper to advise the Board as to which of the two parties would take the lead in litigating this consolidated contention. The parties have conferred and now advise the Board that the State of New York will take the lead in litigating this consolidated contention.

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[1] New York State Contention 26 was set forth in its Notice of Intention to Participate and Petition to Intervene, filed with the NRC on November 30, 2007 (ML073400187). Riverkeeper TC-1 was set forth in its Request for Hearing and Petition to Intervene, filed with the NRC on November 30, 2007 (ML073410093). These documents as well as the associated replies that New York and Riverkeeper filed (ML080600444 and ML080560247, respectively) are incorporated by reference in this consolidated contention.

[2] New York State Supplemental Contention 26-A was filed with the NRC on April 7, 2008 (ML081750691). Riverkeeper TC-1A was set forth in its Request for Admission of Amended Contention 6, filed with the NRC on March 5, 2008 (ML080840441). These documents as well as the associated replies that New York and Riverkeeper filed (ML081280606 and ML081280335, respectively) are incorporated by reference in this consolidated contention.

Consolidated Contention

New York State 26/26-A & Riverkeeper TC-1/TC-1A (Metal Fatigue)

ENTERGY'S LICENSE RENEWAL APPLICATION DOES NOT INCLUDE AN ADEQUATE PLAN TO MONITOR AND MANAGE THE EFFECTS OF AGING DUE TO METAL FATIGUE ON KEY REACTOR COMPONENTS .

A. Specific Statement of the Issue of Law or Fact to Be Raised or Controverted

Entergy's LRA and LRA Amendment 2 fail to include adequate time limited aging analyses (TLAAs) of reactor components for metal fatigue required by 10 C.F.R. § 54.21(c)(1)(i) and (ii), and fail to include an adequate plan to monitor and manage the effects of aging due to metal fatigue on key reactor components that are subject to an aging management review required by 10 C.F.R. §§ 54.21(a)(3) and 54.21(c)(1)(iii).

Specifically, Entergy has failed to satisfy the requirements of section 54.21(c)(1) in several ways:

- NRC regulations require adequate and thorough TLAAs now – as part of the license renewal application review process – and those TLAAs cannot be deferred until after a renewal license is granted;
- Entergy's TLAAs for a number of components subject to the license renewal regulations listed in Tables 4.3-3 through 4.3-12 are incomplete because they omit consideration – through the application of "Fen factors" – of the exacerbating effects of environmental conditions on the fatigue of metal components, contrary to NRC regulations and guidance;
- Entergy has inappropriately limited the number of reactor components that must undergo a TLAA, by both failing to broaden its TLAA analysis beyond the universe of the representative components identified in Tables 4.3-13 and 4.3-14 of its original LRA, and by eliminating, in its LRA Amendment 2, its commitment to evaluate cumulative use factors (CUFs) for locations specified in NUREG/CR-6260;

- Entergy's promised and future "refinement" in LRA Amendment 2 of the CUF analysis for some key reactor components does not and cannot constitute a valid corrective action under NRC regulations; and

- the correlation between Entergy's future "refinement" of the CUF analysis and its commitment to repair and replace key components as part of its "Fatigue Monitoring Plan" is unacceptably vague, in violation of 10 C.F.R.§ 54.21(c)(1)(iii).

B. Brief Explanation of the Basis for the Contention

This consolidated contention is supported by NRC regulations, NRC regulatory guidance, and the two Declarations of Richard T. Lahey, Jr., submitted with New York's Petition on November 30, 2007 ("Lahey Decl. I"), and with New York's Supplemental Contention 26A on April 7, 2008 ("Lahey Decl. II"), and the two Declarations of Joram Hopenfeld, Ph.D., dated November 28, 2007 ("Hopenfeld Decl. I") (submitted with Riverkeeper's Petition on November 30, 2007), and dated March 4, 2008 ("Hopenfeld Decl. II") (submitted with Riverkeeper's Amended Contention TC-1 on March 5, 2008). These experts have reviewed Entergy's initial LRA and LRA Amendment 2, as well as applicable NRC regulations and relevant NRC and industry guidance. Dr. Lahey's and Dr. Hopenfeld's declarations and citations to NRC regulations, guidance, and any other supporting materials referenced in New York's 26/26A and Riverkeeper's TC/TC-1 contentions, are incorporated here as support for this consolidated contention.

<u>NRC Regulations</u>

NRC regulations require an applicant to provide in the license renewal application an evaluation of TLAAs and show that those analyses "remain valid for the period of extended operation" and have been "projected to the end of the period of extended operation." 10 C.F.R. §

54.21(c)(1)(i), (ii).[3] If those TLAAs demonstrate that corrective action is necessary, the Applicant goes to the next step of demonstrating, also in the license renewal application, that the corrective action will occur through the adequate management of the effects of aging on the intended function for the period of extended operation. 10 C.F.R. § 54.21 (c)(1)(iii).

Metal Fatigue and CUF

Aging effects on intended functions of nuclear power plant equipment include fatigue or "cyclic stress" of metal parts due to repeated stresses during plant operation. Material composition, strain rate, temperature, and local water chemistry are some of the factors that contribute to fatigue of metal parts. Equipment failures from fatigue may result in small leaks, which, if not detected in time, could result in a pipe rupture. Fatigue can also create small cracks that propagate and cause a given component to malfunction and/or break up and form loose parts, which would interfere with the safe operation of a plant. Such failures may occur during steady

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[3] The full text of section 54.21(c)(1) reads as follows:

54.21 Contents of application--technical information.
Each application must contain the following information:
* * *
(c) An evaluation of time-limited aging analyses.

(1) A list of time-limited aging analyses, as defined in § 54.3, must be provided. The applicant shall demonstrate that--

(i) The analyses remain valid for the period of extended operation;

(ii) The analyses have been projected to the end of the period of extended operation; or

(iii) The effects of aging on the intended function(s) will be adequately managed for the period of extended operation.

* * *
10 C.F.R. § 54.21(c)(1).

state or during anticipated or unanticipated transients and may have serious consequences to public health and safety.

For example, if one of the feed water distribution nozzles (J-tubes) were to fail from fatigue, pieces from the broken nozzle could be lodged between steam generator tubes, causing the tubes to rupture and leading to a potential core melt. Components that are susceptible to fatigue, therefore, must, as required by NRC regulations, have a planned management program to ensure that the plant functions efficiently and safely.

The cumulative use factor (CUF) plays a key role in TLAAs. "A common figure of merit used to appraise the possibility of fatigue failure is the cumulative usage factor (CUF), which is the ratio of the number of cycles experienced by a structure or component divided by the number of allowable cycles for that structure or component. At a nuclear power plant, the maximum number of cycles that should be experienced by any structure or component should always result in a CUF of less than 1.0. In other words, the number of actual cycles experienced should always be less than the number of allowable cycles." Lahey Decl. I ¶ 20.

NRC Regulatory Guidance for TLAAs

The NRC provides guidance for the conduct of TLAAs in NUREG-1800, Rev. 1, *Standard Review Plan for Renewal Applications for Nuclear Power Plants* (SRP). According to Section 4.3.1.1 of the SRP, metal components may be designed or analyzed based on requirements in the American Society of Metal Engineers (ASME) Boiler and Pressure Vessel Code or the American National Standards Institute (ANSI) guidance. "A[n] [ASME] Section III Class I fatigue analysis requires the calculation of the CUF, based on the fatigue properties of the materials and the expected fatigue service of the component." SRP § 4.3.1.1. In order to be acceptable, a CUF value must be less than or equal to 1.0. *Id.* The factors considered in the

fatigue analysis must include "the effects of coolant environment on component fatigue life." *Id.*, § 4.3.1.2. Those components with a CUF greater than 1.0 are deemed likely to develop cracks and must therefore be subjected to further analysis and management under 10 C.F.R. § 54.21(c)(1)(iii).

NUREG-1801, Rev. 1, *Generic Aging Lessons Learned (GALL) Report* (2005) ("NUREG-1801") also provides guidance for the preparation of TLAAs.[4] NUREG-1801 advises that a license renewal applicant may comply with the regulations by addressing "the effects of the coolant environment on component fatigue life by assessing the impacts of the reactor coolant environment on a sample of critical components for the plant." *Id.*, Vol. 2 at X M-1. Examples of critical components are identified in NUREG/CR-6260, *Application of NUREG/CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components* (1995). The sample of critical components "can be evaluated by applying environmental life correction factors to the existing ASME Code fatigue analyses." NUREG-1801, Vol. 2 at X M-1.

If these components are found not to comply with the acceptance criteria (*i.e.*, CUF less than 1.0), "corrective actions" must be taken, which "include a review of additional affected reactor coolant pressure boundary locations." *Id.* at X M-2. As explained further in industry guidance document MRP-47:

> The locations evaluated in NUREG/CR-6260 [2] for the appropriate vendor/vintage plant should be evaluated on a plant-unique basis. For cases where acceptable fatigue results are demonstrated for these locations for 60 years of plant operation including environmental effects, additional evaluation or locations need not be considered. However, plant-unique evaluations may show that some of the NUREG/CR-6260 [2] locations do not remain within allowable limits for 60 years of plant operation when environmental effects are considered.

[4] NUREG-1801 is referenced with approval in Regulatory Guide 1.188, Rev. 1, *Standard Format and Content for Applications to Renew Nuclear Power Plant Operating Licenses* (2005) ("Reg. Guide 1.188").

> In this situation, plant specific evaluations should expand the sampling of locations accordingly to include other locations where high usage factors might be a concern.

MRP-47, Revision 1, Electric Power Research Institute, *Materials Reliability Program: Guidelines for Addressing Fatigue Environmental Effects in a License Renewal Application* at 3-4 (2005) ("MRP-47").

NRC Regulatory Guidance for Aging Management Programs

A license applicant that is unable to demonstrate in its TLAAs that CUFs are less than 1.0 must develop and submit a methodology to manage fatigue so that public health and safety during the life extension period will be maintained at least at the current level. NUREG-1801 states that the requirements of 10 C.F.R. Part 50 Appendix B set forth "acceptable" corrective actions for components that are subject to aging management. The Part 50 corrective actions are as follows:

> Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformance are promptly identified and corrected. In the case of significant conditions adverse to quality, the measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition. The identification of the significant condition adverse to quality, the cause of the condition, and the corrective action shall be documented and reported to appropriate levels of management.

10 C.F.R. Part 50, Appendix B, Section XVI.

Based on the NRC regulations and guidance, in Dr. Hopenfeld's professional opinion, an aging management program should (a) provide a reliable method for detecting cracks in pressure systems; (b) provide for a thorough assessment of the component's condition (which may include stress analysis); and (c) contain criteria for deciding whether the component should be repaired or replaced or merely monitored. If monitoring is selected, the frequency of monitoring must be

clearly specified, as required by ASME Section XI, Appendix L (1998).[5]

Here, Entergy has failed to satisfy the NRC's regulatory two-step process of (1) first performing adequate TLAAs to address metal fatigue and (2) then demonstrating that it has an adequate aging management plan for those key reactor components that the TLAAs showed will suffer from the effects of metal fatigue.

The Applicant's Initial LRA (April 23, 2007)

Section 4.3 of the Applicant's initial LRA discusses Entergy's time-limited aging analyses ("TLAA") for metal fatigue at IP2 and IP3, and Entergy's asserted compliance with the requirements of 10 C.F.R. § 54.21(c)(1).

The data that Entergy provided in Tables 4.3-13 (IP2) and 4.3-14 (IP3) of the initial LRA indicated that four key reactor components will have a greater potential for cracking due to metal fatigue during the period of extended plant operation for each reactor, which will terminate in 2033 and 2035. Entergy's data for these four components are summarized as follows:

Component	**Plant**	**Environmentally Adjusted CUF (Entergy's data)**	**Amount of exceedence of 1.0 CUF criterion**
Pressurizer surge line piping	IP2	9.21	nearly 10 times
Pressurizer surge line piping	IP3	9.21	nearly 10 times
Reactor coolant system (RCS) piping charging system nozzle	IP2	15.20	over 15 times
Pressurizer surge line nozzles	IP3	2.35	more than double

Data stated in Tables 4.3-13 and 4.3-14 indicate that the requirements of 10 C.F.R. § 54.21(c)(1)(i) and (ii) are not satisfied because on their face they demonstrate that these components will exceed the CUF during extended operation. This would then require Entergy to

[5] Appendix L is currently being revised.

demonstrate that it will adequately manage these aging effects, pursuant to section 54.21(c)(1)(iii).

To satisfy section 54.21(c)(1)(iii) – that "the effect of aging on the intended functions(s) will be adequately managed for the period of extended operation" – Entergy stated in its initial LRA that it will implement one or more of the following:

> (1) Refine the fatigue analyses to determine valid CUFs less than 1 when accounting for the effects of reactor water environment. This includes applying the appropriate Fen factors to valid CUFs determined in accordance with one of the following.
>
> For locations, including NUREG/CR-6260 locations, with existing fatigue analysis valid for the period of extended operation, use the existing CUF to determine the environmentally adjusted CUF.
>
> More limiting IPEC-specific locations with a valid CUF may be added in addition to the NUREG/ CR-6260 locations. In particular, the pressurizer lower shell will be reviewed to ensure the surge nozzle remains the limited component.
>
> Representative CUF values from other plants, adjusted to or enveloping the IPEC plant-specific external loads may be used if demonstrated applicable to IPEC.
>
> An analysis using an NRC-approved version of the ASME code or NRC-approved alternative (e.g., NRC approved code case) may be performed to determine a valid CUF.
>
> (2) Manage the effects of aging due to fatigue at the affected locations by an inspection program that has been reviewed and approved by the NRC (e.g., periodic nondestructive examination of the affected locations at inspection intervals to be determined by a method acceptable to the NRC).
>
> (3) Repair or replace the affected locations before exceeding a CUF of 1.0.

LRA at 4.3-22 (April 23, 2007).

Thus, Entergy selected three options in the initial LRA to manage the effects of aging on those components that it showed already exceeded CUF of 1.0: (1) further refine the CUF analyses (though when it would do this was unspecified) to account for environmental effects (i.e., by applying Fen factors); (2) manage the aging effects by an inspection program, or (3)

repair or replace the components before they exceed CUF of 1.0.

LRA Amendment 2 (January 22, 2008)

On January 22, 2008, nine months after the Applicant submitted its initial LRA, and after New York and Riverkeeper filed their Petitions raising a contention based on Entergy's failure to adequately account for metal fatigue as an aging management issue, Entergy submitted LRA Amendment 2. In this LRA Amendment, Entergy

- abandoned its proposal to conduct inspections as an aging management response to key reactor components that have will a CUF of greater than 1.0 during extended operations;
- retained its proposal to perform a "refined fatigue analyses" to account for the effects of reactor water environment – only this time it will perform those analyses "*at least two years prior to entering the period of extended operation,*" and *not* in the context of this license renewal proceeding; and
- failed to provide any details of its plan to repair or replace the key reactor components that it now knows – and has so informed the NRC in its initial LRA – will exceed the 1.0 CUF measurements during extended operations, and has merely "committed" to repairing or replacing affected components before they exceed CUF of 1.0.

New York's and Riverkeeper's Criticism of the Applicant's Initial LRA

New York and Riverkeeper demonstrated in Contention 26 and TC-1, respectively, that Entergy's proposals in the initial LRA were incomplete, vague, and indefinite as to timing of actions.

First, Entergy failed to broaden its TLAA analysis beyond the scope of the representative components identified in Tables 4.3-13 and 4.3-14 to identify other components whose CUF may be greater than 1.0.

Second, Entergy's list of components with CUFs of less than 1.0 in Tables 4.3 -13 and 4.3-14 is incomplete, because Entergy's methods and assumptions for identifying those components are unrealistic and inadequate in several key respects:

- Based on data in NUREG/CR-6909, *Effect of LWR Coolant Environment on Fatigue Life of Reactor Materials, Final Report* (February 2007), Dr. Hopenfeld believes that Entergy used an unrealistically low number of 2.45 for an environmental correction factor ("Fen"). In Dr. Hopenfeld's expert judgment, a Fen of 17 would be more consistent with the data in NUREG/CR-6909;

- Entergy inappropriately used the "CUF of Record," i.e., the CUF for 40 years in Tables 4.3-13 & 4.3-14 of the LRA. But the regulations and regulatory guides required Entergy to project the number of cycles to 60 years. 10 C.F.R. 54.21(c)(1)(ii), MRP-47 at 3-4; and

- Entergy claimed that it did not calculate several NUREG-CR/6260 limiting locations because they were designed to ANSI B3.1.1, and therefore the CUFs were not available for the IP plant. LRA at Tables 4.3-13 and 4.3-14. But Entergy could and should have substituted, at a minimum, the unavailable data with generic CUF values from NUREG-CR/6260, *Application of NUREG-CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components* (NRC: 1995).

Third, for a number of other components subject to the license renewal regulations, which are listed in Tables 4.3-3 through 4.3-12, Entergy failed to perform complete TLAAs. These TLAAs were incomplete because they omitted consideration of the exacerbating effects of environmental conditions on the fatigue of metal components. In essence, those tables are based on the assumption that the listed components operate in air alone, while in fact these components operate in very harsh environments that include water and steam, which are known to reduce fatigue life. In Dr. Hopenfeld's professional opinion, based on Fens that have been reported in the literature regarding component fatigue, it would be reasonable to apply a representative correction factor of seventeen to the CUFs in Tables 4.3-3 through 4.3-12. *See* NUREG/CR-6909 and Makoto Higuchi, *Revised Proposal of Fatigue Life Correction Factor Fen for Carbon and Low Alloy Steels in LWR Water Environments,* Transactions of the ASME, Vol. 1126 at 436-38 (November 2004). Applying a factor of seventeen shows that the CUF of many components in those tables would exceed 8.5. Thus, Entergy's TLAAs for the components in Tables 4.3-3 –

4.3-12 violate 10 C.F.R. § 54.21(c)(1)(i)-(ii) and NRC guidance because they do not take into account environmental factors.

Fourth, Entergy's proposal to further refine its fatigue analysis to lower the predicted CUFs to less than 1.0 suggested that it was using analytical techniques that lend themselves to arbitrary adjustments. Valid scientific techniques do not support adjustments to obtain a predetermined outcome – responding to alarming test results by changing the test is absurd. Moreover, application of the Fen factors to account for environmental conditions, as Dr. Hopenfeld asserts is necessary, would increase the number of components with a CUF equal to or greater than 1.0.

Fifth, Entergy's "plan to develop a plan" to manage fatigue at affected locations is too vague and indefinite to evaluate. Entergy's statement that it will "repair or replace" affected components is also an impermissibly vague "plan to develop a plan." Additionally, an adequate program to identify other components at risk of metal fatigue would include a monitoring plan with a clear inspection schedule. However, Entergy did not commit to this approach in its LRA. A plan to obtain NRC's future approval of a yet-to-be-determined program does not constitute an adequate aging management plan consistent with the intent of 10 C.F.R. §§ 54.21(c)(1) and 54.21(a)(3).

In sum, Entergy failed to demonstrate in its initial LRA that it had conducted appropriate and accurate TLAAs, that the TLAAs for metal fatigue will remain valid for the entire period of extended operation, or that the "effects of aging on the intended functions will be adequately managed for the period of extended operation." 10 C.F.R. §§ 54.21(c)(1), 54.21(a)(3).

New York's and Riverkeeper's Criticism of the Applicant's LRA Amendment 2

LRA Amendment 2 fails to address the basic premise of New York's and Riverkeeper's metal fatigue contention: that Entergy has not conducted proper and accurate TLAAs and has failed to submit an adequate aging plan for metal fatigue, as it is required to do pursuant to 50 C.F.R. § 54.21(c)(1)(iii). If anything, LRA Amendment 2 further moves Entergy away from compliance with section 54.21(c)(1) and 54.21(a)(3). Entergy's approach in LRA Amendment 2 is unreasonable and inadequate for the following reasons.

First, Entergy's continued proposal of a "more refined" reanalysis of the most fatigued-limited components in IP2 and IP3 raises more questions than answers. Entergy apparently expects that these new analyses will demonstrate that all of the most limiting CUFs are <1.0, and it appears that only if this is not so does Entergy propose to replace the most fatigue-limited components. Lahey Decl. II ¶ 5. Nowhere does Entergy explain why it is likely that CUFs that are now above 1.0 are likely to be less than 1.0 when re-calculated. *See* Riverkeeper's Hearing Request at 13, Riverkeeper's Reply to Entergy's and NRC Staff's Responses to Hearing Request and Petition to Intervene at 5 (February 15, 2008) ("Riverkeeper's Reply"). Importantly for this proceeding before the ASLB, Entergy fails to address the legal requirement that the LRA application itself is required to demonstrate that CUFs for representative components are less than 1.0, not that it is possible that results of future re-calculations may be less than 1.0. *See* Riverkeeper's Hearing Request at 12, Riverkeeper's Reply at 6.

Second, Entergy does not provide any details on the analytical method and analysis approach it proposes to use. These details are critical since, depending on the calculational method to be used, e.g., a multidimensional FEM code, and the assumptions made, an applicant can obtain almost any answer that it wishes. Lahey Decl. II ¶ 7. Additionally, Entergy does not

indicate how its new calculational method will be benchmarked to assure its validity. Id., ¶ 8. In other words, since Entergy has not provided any data that will be used to benchmark, neither New York nor the NRC can be assured that it is representative data and that the calculational method will be properly assessed. Id.

Given that some of the most fatigue-limited components are key parts of the primary system's pressure boundary, this vagueness in Entergy's proposed "refined analysis" is unacceptable. Id. The proposed methodology, where such important calculations that are not part of the LRA are performed at some unknown point following approval of the renewal application, simply does not demonstrate that the Applicant has met its legal obligations to satisfy the required elements of 10 C.F.R. § 54.21(c)(1)(iii). Lahey Decl. II ¶ 8.

Third, Entergy fails to address NRC guidance requiring that if CUFs for representative components in the license renewal application are more than 1.0, the applicant must evaluate all components that are subject to the effects of aging. *See* Riverkeeper's Hearing Request at 14-15, citing NUREG-1801, Rev. 1, *Generic Aging Lessons Learned Report,* Vol. 2 at X M-1 – X- M-2 (2005) ("Gall Report"); Electric Power Research Institute, *Material Reliability Program: Guidelines for Addressing Fatigue Environmental Effects in a License Renewal Application* Revision 1, at 3-4 (2005) ("MRP-47").

Instead, Entergy's LRA Amendment 2 limits the recalculation of CUFs to locations specified in Tables 4.3-13 and 4.3.14, rather than including the six representative locations identified in NUREG/CR-6260, *Application of NUREG-CR-5999 Interim Fatigue Curves to Selected Nuclear Power Plant Components* (February 1995) ("NUREG/CR-6260"). LRA Amendment 2, Attachment 1 at 1. The changes to the LRA are marked in Amendment 2 as follows:

> For locations in LRA Table 4.3-13 (IP 2) and 4.3-13 (IP 3)~~, including NUREG/CR-6260 locations~~, with existing fatigue analysis valid for the period of extended operation, use the existing CUF~~ to determine the environmentally adjusted CUF~~.

LRA Amendment 2, Attachment 1 at 1. Thus, for five locations for which Entergy now lacks plant-specific CUFs – the RCS piping safety injection nozzle and RHR Class 1 piping at IP2 (Table 4.3-13) and the RCS piping charging system nozzle, RCS piping safety injection nozzle, and RHR Class 1 piping at IP3 (Table 4-3-14) – Entergy proposes to drop its commitment to calculate CUFs at any time in the future.

By deleting from the LRA a commitment to evaluate CUFs for all six NUREG/CR-6260 locations, Entergy fails to satisfy NRC guidance and regulations for managing aging components. As discussed in Riverkeeper's Hearing Request at 10-11, NUREG/CR-6260 lists examples of critical locations that should be evaluated in aging analyses. These components were selected "to give a representative overview of components that had higher CUFs and/or were important from a risk perspective." NUREG/CR-6260 at 4-1. For this reason, the GALL Report requires that an "acceptable" aging management program must perform fatigue calculations for all six NUREG/CR-6260 locations. *Id.* at X M-1.

Failing to calculate CUFs for any one of the NUREG/CR-6260 locations would be inconsistent with the GALL Report, and therefore would also demonstrate that Entergy had failed to satisfy NRC safety regulations. *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991), citing *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-852, 24 NRC 532, 544-45 (1986) (recognizing that because regulatory guides reflect the "considered judgment of Staff and offer insight on what is needed to satisfy a regulation," they constitute "evidence of legitimate means for complying with regulatory requirements.") Entergy's failure to perform a TLAA on other components means that the

breadth of the problem has not been presented by the Applicant in this proceeding – and it is Entergy's burden to provide that information.

Finally, instead of providing concrete and verifiable details on its corrective action option of repair or replacement, Entergy merely includes a vague description of its proposed "corrective actions":

> The program requires corrective actions including repair or replacement of affected components before fatigue usage calculations determine the CUF exceeds 1.0. Specific corrective actions are implemented in accordance with the IPEC corrective action program. Repair or replacement of the affected component(s), if necessary, will be in accordance with established plant procedures governing repair and replacement activities. These established procedures are governed by Entergy's 10 CFR 50 Appendix B QA program and meet the applicable repair or replacement requirements of the ASME Code Section XI.

LRA Amendment 2, Attachment 1 at 2. Not only is this "corrective action" proposal exceedingly vague, but since Entergy does not believe that any components will exceed the 1.0 CUF once it recalculates those figures, any corrective action will occur, if at all, during extended operation, and not before. Lahey Decl. II ¶ 10. Plainly stated, the vagueness of this proposed corrective action cannot be fairly and adequately evaluated now.

In conclusion, what Entergy now proposes in LRA Amendment 2 on metal fatigue merely confirms the validity of New York Contention 26/26-A and Riverkeeper TC-1/TC1A, their relevance to aging management and license renewal, and the seriousness of the issues raised in this now consolidated contention. *See* Id., ¶ 11. Entergy's attempts in LRA Amendment 2 to avoid its initial analysis and defer any real analysis outside of the glare of this license renewal proceeding runs afoul of NRC regulations and guidance.

C. The Issue Raised Is within the Scope of the Proceeding

New York and Riverkeeper have raised a contention that Entergy's LRA does not contain an adequate aging management plan for key systems, structures, and components that will suffer

the effects of metal fatigue, contrary to the requirements of 10 C.F.R. § 54.21(c)(1). Specifically, and as discussed more fully above, the Applicant's own data that it submitted in its initial LRA demonstrated that (a) the pressurizer surge line piping for IP2 and IP3, (b) the reactor coolant system piping charging system nozzle for IP2, and (c) the pressurizer surge line nozzle for IP3 have exceeded the applicable CUF criterion of 1.0 and thus are at a higher risk for cracking and failure due to metal fatigue. The Applicant's subsequent attempt to address this patent aging problem in LRA Amendment 2 fails to remove this issue from contention.

Moreover, in both the LRA and LRA Amendment 2, the Applicant improperly, and contrary to its legal obligations set forth for the license renewal process, limited the universe of components for which it would conduct a TLAA. And, for all components, the Applicant did not perform TLAAs based on environmental (Fen) factors.

Thus, because the issue of metal fatigue of plant systems requires appropriate TLAAs and an aging management plan as contemplated by section 54.4, this contention is within the scope of this license renewal proceeding.

D. The Issue Raised Is Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The issue of metal fatigue is material to this relicensing proceeding because, if the petitioners are correct in their contention, the NRC must make certain findings to protect the public health and safety, and the environment, and either deny the license renewal, or impose significant modifications on the applicant's operations. The petitioners have demonstrated above that metal fatigue is a significant safety and public health issue. Inadequate management of the effects of metal fatigue on key reactor components could lead to cracks in these components, which could result in a breaking away of parts through the system, if not ultimate failure of the component.

E. Concise Statement of the Facts or Expert Opinion Supporting the Issue and on Which Petitioner Intends to Rely at the Hearing

As more fully demonstrated in "B" above and incorporated by reference here, both Dr. Lahey and Dr. Hopenfeld have opined that Entergy's approach in the LRA and LRA Amendment 2 does not adequately address the increased potential for cracks in components, which can lead to ultimate catastrophic failure. This potential catastrophic failure could occur during steady state, or more likely during anticipated or unanticipated transients. These experts have based their opinions upon Entergy's own submissions, their review of NRC regulations, NRC and industry guidance, and their extensive professional experience.

F. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact

New York and Riverkeeper have provided sufficient information that a genuine dispute exists with the applicant on the material issue of the facts of whether Entergy has submitted an adequate plan for managing the effects of aging caused by material fatigue on key reactor components.

As demonstrated above, Entergy believes (1) that it need not provide CUF calculations as threshold values to then assess the need for an AMP; (2) that later calculations would qualify as "corrective action," instead of being a necessary first step in the TLAA; and (3) that it need not specify what it plans to do to adequately manage the key reactor components that will suffer the effects of metal fatigue during extended operations.

As demonstrated above, New York and Riverkeeper plainly dispute Entergy's on these material issues of fact and law. In admitting this contention, the Board agreed with the Petitioners. *See* Mem. & Order at 116.

In sum, Entergy and the Petitioners have expressed fundamental and key differences regarding what is required to comply with certain aspects of the Part 54 license renewal

requirements before the ASLB and the NRC decide a license renewal application.

Albany, New York
August 21, 2008

Respectfully submitted,

State of New York

ALEXANDER B. GRANNIS
Commissioner
New York State Department
of Environmental Conservation

ANDREW M. CUOMO
Attorney General for the State of New York

JOAN LEARY MATTHEWS
Senior Counsel for Special Projects
New York State Department
of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-5500
(518) 402-9190
jlmatthe@gw.dec.state.ny.us

JOHN J. SIPOS
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 402-2251
john.sipos@oag.state.ny.us

JOHN L. PARKER
Region 3 Attorney
New York State Department
of Environmental Conservation
Region 3 Headquarters
21 South Putt Corners Road
New Paltz, NY 12561-1620
(845) 256-3037
jlparker@gw.dec.state.ny.us

JANICE A. DEAN
Assistant Attorney General
Office of the Attorney General
120 Broadway
New York, NY
(212) 416-8459
janice.dean@oag.state.ny.us

Riverkeeper, Inc.

DIANE CURRAN
Harmon, Curran Spielberg, & Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(202) 328-6918
dcurran@harmoncurran.com

PHILLIP MUSEGAAS
Staff Attorney
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
(914) 478-4501 (ext 224)
phillip@riverkeeper.org

UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY 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 August 21, 2008

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CERTIFICATE OF SERVICE

I certify that on August 21, 2008, the following two documents:

(1) the Consolidated Contention of Petitioners State of New York (No. 26/26-A) and Riverkeeper, Inc. (TC-1/TC-1A) - Metal Fatigue and Designation of the State of New York as Lead Litigator for this Consolidated Contention; and

(2) the State of New York's Response to the Board's Question Concerning Hearing Procedures and Motion that Board Apply Subpart "G" Discovery Procedures to Certain Admitted Contentions

were served on the following judges, law clerks, offices, organizations, attorneys, parties, and/or petitioners via e-mail and U.S. Mail at the e-mail and street addresses that follow:

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

Zachary S. Kahn, Esq.
Law Clerk
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
Zachary.Kahn@nrc.gov

Marcia Carpentier, Esq.
Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mailstop 3 E2B
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738
Marcia.Carpentier@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.
Marcia J. Simon, Esq.
Beth N. Mizuno, Esq.
Jessica A. Bielecki, 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
set@nrc.gov
der@nrc.gov
jessica.bielecki@nrc.gov
bnm1@nrc.gov
marcia.simon@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Martin J. O'Neill, Esq.
Mauri T. Lemoncelli, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
ksutton@morganlewis.com
pbessette@morganlewis.com
martin.o'neill@morganlewis.com
mlemoncelli@morganlewis.com
cadams@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@po.state.ct.us

Justin D. Pruyne, Esq.
Assistant County Attorney
Office of the Westchester County Attorney
Michaelian Office Building
148 Martine Avenue, 6th Floor
White Plains, NY 10601
jdp3@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.
Jessica Steinberg, J.D.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
driesel@sprlaw.com
jsteinberg@sprlaw.com

Michael J. Delaney, Esq.
Vice President - Energy Department
New York City Economic Development
Corporation (NYCEDC)
110 William Street
New York, NY 10038
mdelaney@nycedc.com

Arthur J. Kremer, Chairman
New York Affordable Reliable Electricity Alliance
(AREA)
347 Fifth Avenue, Suite 508
New York, NY 10016
kremer@area-alliance.org
ajkremer@rmfpc.com

Manna Jo Greene, Director
Hudson River Sloop Clearwater, Inc.
112 Little Market St.
Poughkeepsie, NY 12601
Mannajo@clearwater.org

Stephen Filler, Esq.
Board Member
Hudson River Sloop Clearwater, Inc.
Suite 222
303 South Broadway
Tarrytown, NY 10591
sfiller@nylawline.com

Susan H. Shapiro, Esq.
Weschester Citizen's Awareness Network
(WestCan), Citizens Awareness Network
(CAN),etc.
21 Perlman Drive
Spring Valley, NY 10977
mbs@ourrocklandoffice.com

Nancy Burton
147 Cross Highway
Redding Ridge, CT 06876
NancyBurtonCT@aol.com

Richard L. Brodsky, Esq.
Assemblyman
Suite 205
5 West Main Street
Elmsford, NY 10523
brodskr@assembly.state.ny.us
richardbrodsky@msn.com

Sarah L. Wagner, Esq.
Room 422
Legislative Office Building
Albany, NY 12248
sarahwagneresq@gmail.com

John LeKay
FUSE USA
351 Dyckman Street
Peekskill, NY 10566
fuse_usa@yahoo.com

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
Suite 600
1726 M Street, NW
Washington, DC 20036
dcurran@harmoncurran.com

Phillip Musegaas, Esq.
Victor Tafur, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
phillip@riverkeeper.org
vtafur@riverkeeper.org

Executed on:

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Albany, New York

John J. Sipos
Office of the Attorney General
State of New York
State Capitol
New York, New York 12224-0341
John.Sipos@oag.state.ny.us