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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	

APPLICANT'S ANSWER TO INTERVENORS' REQUESTS FOR THE APPLICATION OF SUBPART G PROCEDURES TO CERTAIN ADMITTED CONTENTIONS

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I. INTRODUCTION

On July 31, 2008, this Atomic Safety and Licensing Board ("Board" or "ASLB") granted the requests for hearing of three petitioners, the State of New York ("New York"), Riverkeeper, Inc. ("Riverkeeper"), and Hudson Riverkeeper Sloop Clearwater ("Clearwater"),[1] challenging certain aspects of the application of Entergy Nuclear Operations, Inc. ("Entergy") for the renewal of the operating licenses for Indian Point Energy Center ("IPEC") Units 2 and 3, in Buchanan, New York. In admitting certain of the contentions proffered by the aforementioned parties, the Board indicated that it "must determine, under 10 C.F.R. § 2.310, the type of hearing procedures to be used for each admitted contention."[2]

Accordingly, in its July 31 Order, the Board directed New York, Riverkeeper and Clearwater to file, no later than August 21, 2008, motions indicating, "for each admitted contention, whether each party wishes to proceed pursuant to Subpart G or Subpart L."[3] The Board also required those parties to indicate why they believe Subpart G or Subpart L is more appropriate with respect to each

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1 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC __ (slip op. July 31, 2008) ("LBP-08-13" or "July 31 Order").

2 *Id.* at 227.

3 *Id.*

of their sponsored contentions. The Board also authorized the Nuclear Regulatory Commission ("NRC") Staff and Entergy to respond to the intervenors' motions no later than September 15, 2008.[4]

New York, Riverkeeper, and Clearwater each filed their respective motions on August 21, 2008.[5] As discussed herein, each party asked the Board to apply Subpart G procedures to certain admitted contentions. Pursuant to the Board's July.31 Order, Entergy hereby files this consolidated answer to the motions of New York, Riverkeeper, and Clearwater.

For the reasons set forth below, Entergy respectively submits that the Board should deny all three motions. Under 10 C.F.R. Part 2, Subpart L constitutes the default hearing track for power reactor licensing matters, including license renewal proceedings conducted under 10 C.F.R. Part 54. None of the intervenors has made the requisite showing, under 10 C.F.R. § 2.310(d), that the formal procedures of Subpart G must be applied to any of its admitted contentions. Specifically, none of the intervenors has identified a contention that: (1) involves an issue of material fact concerning the occurrence of a past activity, and where the credibility of an *eyewitness* may reasonably be expected to be at issue; or (2) involves an issue where the motive or intent of a party or *eyewitness* is material to the resolution of the contested matter. As the *Oyster Creek* Board noted, license renewal proceedings "ordinarily will be conducted under the Subpart L informal hearing procedures," unless the presiding officer finds "by order" that one or both of the foregoing criteria have been met.[6]

Indeed, the contentions for which the intervenors seek Subpart G procedures are almost exclusively technical contentions involving issues that are likely to be resolved through the use of expert witness testimony—*not* eyewitness testimony where issues of witness credibility, motive, or

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[4] *See id.*

[5] *See* "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"(Aug. 21, 2008) ("New York Motion"); "Riverkeeper, Inc.'s Request to the Atomic Safety and Licensing Board Regarding the Use of Subpart G and L Hearing Procedures for Admitted Contentions" (Aug. 21, 2008) ("Riverkeeper Motion"); "Hudson River Clearwater, Inc.'s Response to the Board's Request Concerning Discovery" (Aug. 21, 2008) ("Clearwater Motion").

[6] *See* 10 C.F.R. § 2.310(d); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), Licensing Board Memorandum and Order, Docket No. 50-0219 (Denying NIRS's Motion to Apply Subpart G Procedures) at 2-3 (unpublished) (June 5, 2006) ("Oyster Creek Order Denying Subpart G Procedures")

intent may arise. This is a critical distinction that should weigh heavily in the Board's evaluation of the admitted contentions against the criteria contained in Section 2.310(d). As discussed further below, in issuing Section 2.310(d), the Commission emphasized the narrow focus of that regulation on "eyewitnesses," stating unequivocally that it does not apply to "expert witnesses who have no first-hand knowledge of the disputed event/facts."[7] To the extent that the intervenors seek to call into question the integrity of Entergy or the NRC Staff, their generalized and unsupported allegations do not suffice to show that the resolution of any specific contention will involves issues relating to the credibility, intent, or motive of an *eyewitness*. In short, absent any issues involving eyewitness credibility, intent, or motive, the use of Subpart G procedures would be wholly unsupported by the text of Section 2.310(d) and its regulatory history.

As shown below, the intervenors seek to take this proceeding on a lengthy detour—back to a bygone era of "protracted, costly proceedings"[8]—by transforming it into an unduly complex and burdensome trial-like process; one led not by the Board, but by the New York Attorney General's office. As is all too clear from New York's Motion, the intervenors' intention is not to make this proceeding more efficient; it is the exact opposite. Indeed, the intervenors' requests are nothing short of an all-out assault on the procedural framework created by the Commission's 2004 revisions to its Part 2 rules. The clear intent of those revisions was a more efficient hearing process that relies primarily on the use of more-informal hearing procedures, particularly those contained in Subpart L. The intervenors' attempt to transform this proceeding into a mostly formal, Subpart G proceeding runs directly counter to the Commission's goals of achieving more-expedited case processing, reduced resource burdens on the parties, and a greater role for the presiding officer in developing the hearing record.

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7 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2222 (Jan. 14, 2004) (discussing the distinction between "eyewitness" and "expert" testimony and providing illustrative examples of disputes to which the criteria of 10 C.F.R. § 2.310(d) do and do not apply).

8 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2182 (Jan. 14, 2004).

Finally, the intervenors, without question, seek to undermine these goals by requesting the broad-scale use of Subpart G procedures in this proceeding, absent any supporting basis. Entergy respectfully submits that granting the intervenors' sweeping requests for the application of formal Subpart G procedures may have adverse implications for pending and future NRC licensing proceedings that are presumptively governed by Subpart L. Specifically, by granting the intervenors' requests here, the Board would effectively lower the bar for the use of Subpart G procedures in future proceedings that, while perhaps not being as publicly visible as this proceeding, would be subject to the same hearing-procedure selection criteria. Looking forward, the Board's actions here could precipitate an unwarranted departure from the Commission's stated intent to avoid the use of trial-type procedures, particularly with respect to technical issues, however novel or complex, that do not involve eyewitness testimony on disputed facts or events.

II. REGULATORY BACKGROUND

On January 14, 2004, the NRC substantially amended 10 C.F.R. Part 2, its Rules of Practice on adjudicatory hearings, "to make the NRC's hearing process more effective and efficient."[9] In so doing, the Commission continued its efforts "to move away from the trial-type, adversarial format to resolve technical disputes."[10] The Commission believes that, "in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures . . . is not essential to the development of an adequate hearing record."[11]

As part of this effort to streamline the hearing process, the Commission adopted 10 C.F.R. § 2.310, which revised Part 2 to no longer require formal hearings under Subpart G for proceedings involving the "grant, renewal, licensee-initiated amendment, or termination of licenses or permits for

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[9] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2182.

[10] *Id.*

[11] *Id.*

nuclear power reactors."[12] Such proceedings "ordinarily" are conducted under the Subpart L informal hearing procedures, unless the presiding officer "by order" finds that:

> [R]esolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the 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.[13]

As discussed further below, the language in the 2004 amendments and the Commission's accompanying Statement of Considerations make clear that 10 C.F.R. § 2.310(d) only warrants a Subpart G hearing in *two* circumstances: (1) where the contention involves an issue of material fact concerning the occurrence of a past activity, and the credibility of an eyewitness may reasonably be expected to be at issue; or (2) where the contention involves an issue where the motive or intent of a party or eyewitness is material to the resolution of the contested matter.[14]

III. ARGUMENT

This section contains four principal parts. Part A addresses the numerous generic arguments advanced by New York in support of its claim that it is entitled to a Subpart G hearing with full discovery and cross-examination on eight of its admitted contentions. Part B addresses the contention-specific arguments presented by New York in support of its request for Subpart G procedures. Part C addresses Riverkeeper's arguments that certain Subpart G hearing and discovery procedures should be used to resolve its admitted contentions. Finally, Part D addresses Clearwater's position with respect to the Board's selection of hearing procedures on its admitted contentions.

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[12] 10 C.F.R. § 2.310(d).

[13] *Id.* § 2.310(d)

[14] *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2222; *see also Entergy Nuclear Vt. Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694 (2004) (concluding that "10 C.F.R. § 2.310(d) provides only two criteria *entitling* a petitioner to a Subpart G process") (emphasis added); Oyster Creek Order Denying Subpart G Procedures at 2-3 (stating that reactor licensing proceedings "ordinarily will be conducted under the Subpart L informal hearing procedures" absent the two circumstances identified in Section 2.310(d)).

A. None of New York's Arguments Justify the Use of Subpart G Procedures

1. The Use of Subpart G Procedures is Not Warranted Here Absent a Finding That the Proceeding Involves One of the Exceptions Identified in 10 C.F.R. § 2.310

In asking the Board to apply formal Subpart G procedures to eight of its admitted contentions, New York makes much of the unremarkable fact that 10 C.F.R. § 2.310(a) states that many NRC hearings "*may* be conducted under the procedures of Subpart L."[15] New York contends that the Commission's use of the permissive "may," as opposed to the mandatory "shall," reflects the discretion afforded the Board in deciding whether to use the procedures of Subpart L.[16] New York further asserts that "Subparts C and G provide wide discretion to the ASLB to determine whether and to what extent [the] discovery tools identified in Subpart G may be used by any party."[17]

At the outset, Entergy respectfully submits that the Board's discretion in *selecting hearing procedures* is not as "wide" as New York suggests. In enacting 10 C.F.R. § 2.310, the Commission was unambiguously clear that "formal, on-the-record hearings using the full panoply of Subpart G procedures and cross-examination" are limited to "certain narrowly prescribed areas."[18] As the Commission further explained, "[s]ubject to four *exceptions*, hearings *will* be conducted using more informal procedures,"[19] principally those contained in Subpart L. The four exceptions are: (1) licensing of uranium enrichment facilities; (2) initial authorization of the construction of a HLW geologic repository, and initial issuance of a license to receive and possess HLW at a HLW geologic repository; (3) enforcement matters; and (4) parts of nuclear power plant licensing proceedings where the presiding officer by order finds that resolution of an admitted contention necessitates resolution of: (a) issues of material fact relating to the occurrence of a past activity, where the credibility of an

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15 New York Motion at 4, 7-8 (quoting 10 C.F.R. § 2.309(a)) (emphasis in original).

16 *Id.* at 8.

17 *Id.* at 5.

18 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2192.

19 *Id.* at 2191 (emphasis added).

eyewitness may reasonably be expected to be at issue, and/or (b) issues of motive or intent of the party or eyewitness material to the resolution of a contested factual matter.[20]

Accordingly, the Commission further stated that "Sub-part L procedures *would be* used in nuclear power plant licensing proceedings for the resolution of contentions which do not meet the criteria in section 2.310(d) for use of Subpart G hearing procedures."[21] Such proceedings include hearings on "power reactor license renewal applications under Part 54."[22] Subpart L is thus the default hearing track for such proceedings.[23]

Clearly, this license renewal proceeding does not meet any of the first three exceptions described above. Only the fourth exception, set forth in 10 C.F.R. § 2.310(d), could *potentially* apply here. As demonstrated below, because New York has not shown the existence of either of the circumstances identified in 10 C.F.R. § 2.310(d), its request for Subpart G procedures must be rejected as contrary to the Commission's clear intent. New York has provided no justification—legal or factual—to deviate from the presumptive norm; *i.e.*, the use of Subpart L hearing procedures in this proceeding. As discussed herein, New York fails even to apply the correct legal test for evaluating the potential applicability of Subpart G procedures. In view of New York's failure to meet its burden under Section 2.310(d), the Board should decline New York's invitation to transform this Subpart L proceeding into a full-blown trial, replete with depositions, interrogatories, and other unnecessarily formal procedures. New York has offered no legitimate basis for introducing that level

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[20] *Id.*; *see also* 10 C.F.R. § 2.310(b)-(d), (f).

[21] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2205-06 (emphasis added).

[22] *Id.* at 2206.

[23] *See id.* at 2206, 2222 ("Subpart L procedures will be used, as a general matter, for hearings on . . . power reactor license renewal applications under Part 54."); *see also id.* at 2193 ("[M]ost adjudications would be conducted under the hearing procedures in Subpart L, unless one of the more specialized hearing tracks in Subparts G, K, M, or N, apply."); *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 204 (2006) ("[W]e acknowledge the Commission's statement that, unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings 'ordinarily' should be used.") (quoting Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2222); *Vermont Yankee*, LBP-04-31, 60 NRC at 706 ("[W]e are loathe to conclude that the new Subpart L procedures, so preferred by the Commission, should not be applied here.").

of complexity into this proceeding, which would be unprecedented in the license renewal context or any other proceedings subject to Subpart L since the Commission revised its hearing rules in 2004.

Importantly, the Licensing Boards in the *Vermont Yankee* power uprate proceeding and the *Oyster Creek* and *Vermont Yankee* license renewal proceedings—which, like this proceeding, involved very technical contentions—concluded that Subpart L procedures were appropriate for resolving the admitted contentions.[24] In objecting to the *Vermont Yankee* power uprate Board's ruling in particular, New York states that another ASLB "emphasized the discretion afforded the hearing board in deciding whether to use the procedures of Subpart L."[25] New York further alludes to the *Vermont Yankee* license renewal Board, which, in response to NRC Staff and applicant arguments, opined that where a petitioner fails to meet its burden under 10 C.F.R. § 2.310(d), the Board, as a matter of discretion, could "still find that the use of Subpart G procedures is more appropriate than the use of Subpart L procedures for a given contention."[26] New York neglects to mention, however, that the same Board found that Subpart L procedures "ordinarily" must be used, and that the *Vermont Yankee* license renewal proceeding was no exception to the general rule.[27] Specifically, the *Vermont Yankee* license renewal Board concluded that Subpart L procedures were appropriate in that case because the Board found "no particular reason why the additional discovery mechanisms of Subpart G [were] necessary for the full and fair disclosure of the facts," and no "reason why the moderate limits on cross-examination under a Subpart L proceeding would hinder the development of an adequate record."[28]

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24 *See Vermont Yankee*, LBP-04-31, 60 NRC at 698-706; Oyster Creek Order Denying Subpart G Procedures at 3-8; *Vermont Yankee*, LBP-06-20, 64 NRC at 202-04.

25 New York Motion at 7-8.

26 *Vermont Yankee*, LBP-06-20, 64 NRC at 204.

27 *Id.*

28 *Id.* Similarly, while the *Vermont Yankee* power uprate Board also stated that "the Board, in its sound discretion, must determine the type of hearing procedures most appropriate for the specific contentions before it," it similarly found "no particular reason why the additional discovery mechanisms of Subpart G [were] necessary for the full and fair disclosure of facts." *Vermont Yankee*, LBP-04-31, 60 NRC at 706. Indeed, the Board emphasized that it was "loathe

2. *10 C.F.R. § 2.310(d) Sets Forth the Operative Test for Determining Whether Subpart G Procedures Are Required to Resolve a Particular Contention*

The mainstay of New York's request for a predominately formal hearing is its spurious claim that 10 C.F.R. § 2.309(g) "provides the standard to be used for selecting Subpart G [procedures] and that § 2.310(d) has a more limited role."[29] New York argues as follows:

> 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. 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.[30]

Instead of focusing on 10 C.F.R. § 2.310(d)—the relevant and controlling regulation—New York states that:

> An alternative way of obtaining Subpart G status is set forth in § 2.310(d) which applies an [sic] 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 . . . 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).[31]

New York's reasoning is specious and in conflict with the relevant regulations, their regulatory history, and NRC case law applying those regulations. Section 2.310(a) states unequivocally that, absent any of the exceptions identified in paragraphs (b) through (h) of the same

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to conclude that the new Subpart L procedures, *so preferred by the Commission,* should not be applied here." *Id.* (emphasis added).

29 New York Motion at 10.

30 *Id.* at 6.

31 *Id.* at 6-7.

regulation, license renewal proceedings "may be conducted under the procedures of Subpart L."[32] As discussed above, any ambiguity potentially arising from the Commission's use of the word "may" in Section 2.310(a) was removed by the Commission's preamble to the 2004 revisions to 10 C.F.R. Part 2. There, the Commission indicated in no uncertain terms that Subpart L is the default hearing track, and that Section 2.310 contains the operative test for identifying those limited circumstances in which the formal procedures of Subpart G are required:

> Section 2.310 of the final rule sets forth the criteria to be applied by the Commission, a presiding officer, or an Atomic Safety and Licensing Board in determining the hearing procedures to be utilized in the proceeding. Unless otherwise provided in § 2.310, proceedings involving hearings on the grant, *renewal*, licensee-initiated amendment or termination of licenses and permits subject to 10 CFR Parts 30, 32 through 35, 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72 must ordinarily use Subpart L procedures. Thus, Subpart L procedures will be used, as a general matter, for hearings on . . . nuclear power reactor license renewal applications under Part 54 [].[33]

New York offers no reason to conclude that Section 2.309(g) contains any criteria for evaluating the applicability of Subpart G procedures to a given contention. Section 2.309(g), in fact, explicitly directs petitioners to consult the provisions of Section 2.310(d), stating that "[a] request for hearing and/or petition for leave to intervene may . . . also address the selection of hearing procedures, *taking into account the provisions of § 2.310*."[34] Pursuant to Section 2.309(g), if a petitioner "relies upon § 2.310(d)," then the petitioner must demonstrate, by reference to the contention and the bases provided and the specific procedures in Subpart G, "that resolution of the contention necessitates resolution of material issues of fact which may be best determined through

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[32] 10 C.F.R. § 2.310(a); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2206 ("Paragraph (a) [of 10 C.F.R. § 2.310] states the general rule that, unless otherwise determined through the application of paragraphs (b) through (h), the listed proceedings [which include license renewal] are to be conducted under Subpart L.").

[33] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2222 (emphasis added); *see also* Oyster Creek Order Denying Subpart G Procedures at 3 (stating that "the language in the 2004 amendments and the Commission's Statement of Considerations accompanying them make clear that 10 C.F.R. § 2.310(d) only requires a Subpart G hearing in two circumstances") (citing *Vermont Yankee*, LBP-04-31, 60 NRC at 694)).

[34] 10 C.F.R. § 2.309(g) (emphasis added).

the use of the identified procedures."[35] Notably, this Board has described its duty to select appropriate hearing procedures as arising "under 10 C.F.R. § 2.310."[36]

Thus, there is no basis for New York's claim that "§ 2.309(g) provides the standard to be used for selecting Subpart G and that § 2.310(d) has a more limited role."[37] As New York recognizes, the Board in the *Vermont Yankee* power uprate proceeding rejected a similar argument, concluding that "10 C.F.R. § 2.309(g) simply specifies *how* to submit a request for a particular procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d)."[38] The Board's conclusion is entirely consistent with the regulatory history, which indicates that the Commission included Section 2.309(g) so that petitioners "would not later be heard to complain in any appeal of the hearing procedure selection ruling."[39] Any assertion that Section 2.309(g) contains an independent legal standard unquestionably lacks merit.

3. *10 C.F.R. § 2.310 Addresses Both Discovery and Hearing Procedures—It is Not Concerned Solely With the Availability of Cross-Examination at Hearing*

Recognizing that the *Vermont Yankee* power uprate Board's ruling directly contradicts its position, New York now avers that "the *Vermont Yankee* Board was in error."[40] In criticizing the *Vermont Yankee* Board's decision, New York asserts that "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."[41] New York hypothesizes that the NRC was focused on cross-examination when it developed Section 2.310(d), and therefore "did not consider the instances in which other Subpart G procedures might be needed even though the credibility of a

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35 *Id.*

36 LBP-08-13, slip op. at 227.

37 New York Motion at 10.

38 *Vermont Yankee*, LBP-04-31, 60 NRC at 695 n.7 (emphasis added).

39 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2203, 2221.

40 New York Motion at 7.

41 *Id.* 7 n.2.

witness or the intent of a party were not at issue."[42] New York also claims that the Board presiding over the *Oyster Creek* license renewal proceeding "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."[43]

New York's interpretation of Section 2.310(d), however, conflicts with the Commission's explanation of that same regulation, as set forth in the regulatory history. With regard to power reactor licensing proceedings, the Commission indicated that Subpart G procedures, which it stated include "formal discovery procedures *and* cross-examination at hearing,"[44] are to be applied *only* when the "narrowly-prescribed" circumstances described in Section 2.310(d) are present.[45]

Furthermore, the regulatory history evinces no Commission intent to permit the use of formal discovery procedures for a contention that does not meet one or both of the criteria contained in Section 2.310(d). Indeed, the Commission emphasized that "[t]he [mandatory disclosures] required by § 2.336 constitute[] the totality of the discovery that may be obtained in informal proceedings."[46] Also, in describing the "tiered approach to discovery" established by the current regulations, the Commission—contrary to New York's suggestion—identified a clear and direct nexus between the use of Subpart G procedures and the criteria of Section 2.310(d):

> A third tier of discovery is provided for proceedings governed by the hearing procedures in Subpart G, in which "traditional" discovery tools such as interrogatories, depositions, subpoenas and admissions may be used, as a supplement to the required mandatory disclosures. These discovery tools may be useful in gaining information necessary to adequately prepare for hearing, *in seeking to gain specific information*

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42 *Id.*

43 *Id.* at 11 (citing Oyster Creek Order Denying Subpart G Procedures at 2-3).

44 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2196 (emphasis added). To adopt New York's interpretation would require the Board to read the word "and" out of the foregoing Commission statement. Clearly, the Commission's interpretation of its own regulations should be accorded deference by this Board.

45 *Id.* at 2192.

46 *Id.* at 2225.

from eyewitnesses or persons who have direct knowledge about events or incidents directly bearing on motive or intent.[47]

Thus, New York's reliance on the *Oyster Creek* ruling is misplaced. The *Oyster Creek* Board, quoting the 2004 Statement of Considerations and a D.C. Circuit opinion, simply observed that the two alternative criteria for evaluating the need for Subpart G procedures "are consistent with judicial case law, which recognizes that a formal evidentiary hearing . . . is 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.'"[48] In so doing, the Board noted that a formal evidentiary hearing typically "includes the right to cross-examine witnesses."[49] At no point did the Board suggest that Section 2.310(d) exclusively "is tied to a claim for the right to cross-examine," as New York erroneously claims.

In summary, the *Vermont Yankee* Board was correct, New York's position is unfounded. Section 2.309(g) in no way modifies or supplants the criteria in 10 C.F.R. § 2.310(d). It merely advises petitioners like New York that they may "address the selection of hearing procedures" in their petitions, "taking into account" the specific criteria set forth in Section 2.310. Moreover, Section 2.310(d) governs *both* discovery procedures and cross-examination procedures—it is not limited to one or the other.

4. New York's Interpretation of 10 C.F.R. § 2.310(d) is Flawed and Inconsistent With That of the Commission and Other Licensing Boards

Although New York argues that Section 2.309(g) contains the operative legal standard for evaluating the applicability of Subpart G procedures, it also seeks to create a fallback position. Ignoring its previous assertion that "Section 2.310(d) is not really relevant here,"[50] New York incongruously states that "proper" application of Section 2.310(d) makes the use of Subpart G

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47 *Id.* at 2195 (emphasis added).

48 Oyster Creek Order Denying Subpart G Procedures at 3 (quoting *Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997)).

49 *Id.*

50 New York Motion at 7.

procedures "even more obvious."[51] In support of its argument, New York subjects the language of Section 2.310(d) to an obfuscating semantical analysis.[52]

The end result of that analysis is the erroneous conclusion that "the plain meaning of § 2.310 is that *three* separate tests are established and either all three tests have to be met or any one of them can be met."[53] New York contends that Subpart G procedures are warranted if the contention at issue involves either: (1) issues of material fact relating to the occurrence of a past activity; (2) a situation where the credibility of an eyewitness may reasonably be expected to be an issue; or (3) issues of motive or intent of the party or eyewitness may reasonably be expected to be at issue.[54]

This Board should reject this specious reasoning, as the *Vermont Yankee* Board did when confronted with similar arguments in the 2004 power uprate proceeding. As that Board explained:

> [] 10 C.F.R. § 2.310(d) provides only two criteria entitling a petitioner to a Subpart G process and that the first criterion combines two elements, requiring that a contention necessitate resolution of "a dispute of material fact concerning the occurrence of a past activity" *and* that "the credibility of an eyewitness may reasonably be expected to be an issue" in resolving that dispute. This conclusion is based primarily on the parallel structure of the regulation, which specifies that Subpart G procedures will be used where resolution of the contention "necessitates resolution of *issues* of material fact relating to the occurrence of a past activity, where the 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." In addition, if the two elements of the first criterion were read as independent criteria, the scope of the section 2.310(d) could be so broadly expanded as to subsume most of the general rule. Recognizing that the regulation is not without ambiguity, any doubt about the validity of our interpretation is resolved by the Commission's contemporaneous interpretation in the Statement of Considerations.[55]

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[51] *Id.* at 8.

[52] *See id.* at 8-10.

[53] *Id.* at 9.

[54] *Id.* at 8.

[55] *Vermont Yankee*, LBP-04-31, 60 NRC at 694-95 (citing Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2222).

The *Vermont Yankee* Board cited page 2222 of the *Federal Register* notice containing the 2004 Statement of Considerations. New York erroneously claims that the 2004 preamble "supports" its position, and disregards this critical and dispositive discussion in the regulatory history. There, the Commission explained—in unambiguous terms—that Section 2.310(d) contains only *two* "alternative" criteria for determining whether Subpart G procedures should be used in a proceeding.[56] Specifically, to trigger the use of Subpart G procedures, the contention at issue must require resolution of: (1) issues of material fact relating to the occurrence of a past activity, where the credibility of an *eyewitness* may reasonably be expected to be at issue, *and/or* (2) issues of motive or intent of a *party or eyewitness* material to the resolution of the contested matter.[57] The Commission (like the *Vermont Yankee* Board) further explained that "[t]he first criterion contains two elements" (*i.e.*, it is a single criterion with two elements, not two independent criteria).[58] In short, the foregoing discussion makes clear that it is *New York's* interpretation of 10 C.F.R. § 2.310(d) that is inconsistent with the "plain text" and the Commission's own interpretation of that regulation.

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[56] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2222.

[57] *Id.* Significantly, in discussing the 10 C.F.R. § 2.310(d) criteria, the Commission emphasized the narrow focus of that provision on fact witnesses (*i.e.*, "eyewitnesses"). In this regard, the Commission noted that the first criterion does *not* include:

> [T]he testimony of any expert witness who has no first hand knowledge of the activity, inasmuch as the expert is simply providing an opinion based upon the testimony of others, and cross-examination in particular of the expert witness is not necessary to evaluate the weight to be given to his or her opinion.

Id. Nor does the first criterion include "disputes between parties over the qualifications and professional 'credibility' of expert witnesses who have no first-hand knowledge of the disputed event/facts." *Id.* Finally, in regard to the second criterion, the Commission noted that "disputes over the motive or intent of an expert witness who was not an eyewitness are not relevant in determining whether to apply Subpart G procedures." *Id.* Such disputes do not bear on "whether the contested application meets NRC requirements" and can be resolved through written filings and oral examination by the Board. *Id.*

[58] *Id.*

5. *Neither the Administrative Procedure Act ("APA") Nor the First Circuit's CAN Decision Supports New York's Claim That the Board Must Require the Use of Subpart G Procedures*

New York also looks to the APA, particularly the First Circuit's discussion of that statute in *Citizens Awareness Network, Inc. v. United States*,[59] to support its request for the use of Subpart G procedures. New York claims that the *CAN* decision provides "conclusive support" for its argument that "Section 2.309(g) sets the standard for when Subpart G is to be used."[60] It further asserts that, even if Section 2.310(d) contains the operative test (which it does) for choosing appropriate hearing procedures, New York's request for Subpart G procedures is still warranted in light of the Court's holding in *CAN*.[61] New York argues that by declining to apply Subpart G procedures, this Board would create a "barrier to the right of cross-examination" that is prohibited by the *CAN* ruling.[62]

New York's APA-based argument is predicated on a misreading of the First Circuit's decision. First, the First Circuit's *CAN* decision does *not* contain a *single* reference to 10 C.F.R. § 2.309(g). This omission is not surprising—indeed, it is quite understandable—given that Section 2.309(g) does not contain the decisional criteria by which the Board evaluates the potential applicability of Subpart G procedures to an admitted contention. As explained at length above, those criteria are contained in Section 2.310(d). In fact, the First Circuit explicitly identified those criteria, and in doing so, cited 10 C.F.R. § 2.310.[63]

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59 391 F.3d 338 (2004) ("CAN").

60 New York Motion at 17.

61 *Id.*

62 *Id.* at 18.

63 *See CAN*, 391 F.3d at 345 n.3. The First Circuit stated that:

> The new rules still provide for the use of subpart G procedures for, *inter alia*, reactor licensing hearings if the presiding officer finds that the "contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness [are] material to the resolution of the contested matter. 10 C.F.R. § 2.310.

Second, in relying on the *CAN* decision, New York unwarily conflates two disparate issues: (1) the Board's determination of *hearing procedures* under 10 C.F.R. § 2.310(d), and (2) the Board's ability to authorize *cross-examination by the parties in Subpart L proceedings* under 10 C.F.R. § 2.1204(b)(3) "if [it] determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision."[64] In the *CAN* proceeding, the NRC represented to the court that the availability of cross-examination under Section 2.1204(b)(3) "is *equivalent* to the APA's provision for such cross examination 'as may be required for a full and true disclosure of the facts,' for on-the-record adjudicatory hearings under 5 U.S.C. § 556(d)."[65] The Commission further stated that "Subpart L, though using somewhat different language, provides as much access to cross-examination as the APA."[66] On this basis, the First Circuit held that the Subpart L regulations did not violate a petitioner's right to cross-examine witnesses under the APA and were valid.[67]

In discussing the *CAN* decision, the *Vermont Yankee* Board elaborated on the disparate functions of Sections 2.310(d) and 2.1204(b):

> [C]ross-examination under 10 C.F.R. § 2.1204(b)(3) is not restricted to those situations described in 10 C.F.R. § 2.310(d), *e.g.*, issues concerning a past activity where the credibility of an eyewitness may reasonably be expected to be at issue. Where needed for a full and true disclosure of the facts, cross-examination under Subpart L can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision. This includes, for example, the cross-

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64 10 C.F.R. § 2.1204(b)(3). As the Board noted in the *Vermont Yankee* power uprate proceeding:

> The purposes of 10 C.F.R. §§ 2.310(d) and 2.1204(b)(3) are entirely different. The former helps determine which type of proceeding should be used. The latter assumes that Subpart L rules apply and allows the presiding officer to authorize cross-examination where needed.

Vermont Yankee, LBP-04-31, 60 NRC at 710 n.31.

65 *Vermont Yankee*, LBP-04-31, 60 NRC at 709 (quoting Brief for the Federal Respondents at 19, CAN v. United States, Nos. 04-1145 and 04-1359 (Consolidated) (1st Cir. July 14, 2004)). *See also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2188 (stating the Commission's belief that 10 C.F.R. § 2.1204(b) "strikes an appropriate balance in the use of cross-examination, and is consistent with the requirements of the [APA], which does not require cross-examination for on-the-record proceedings unless necessary for a 'fair and true disclosure of the facts.'").

66 *Vermont Yankee*, LBP-04-31, 60 NRC at 709 (quoting Brief for the Federal Respondents at 46, CAN v. United States, Nos. 04-1145 and 04-1359 (Consolidated) (1st Cir. July 14, 2004)).

67 *CAN*, 391 F.3d at 351, 353-54 (finding the Commission's limitations on the availability of cross-examination by the parties to be neither *ultra vires* nor arbitrary and capricious).

> examination of experts and their opinions, where it is needed to establish an adequate record to resolve a conflict in expert opinions and/or to determine whether a party is able to carry its burden of proof because our decisions often hinge upon our evaluation of competing expert opinions, technical and scientific facts, which become central elements of our findings of fact.[68]

The key point of this discussion is that, contrary to New York's claim, the Board's selection of hearing procedures based on the two alternative criteria contained in 10 C.F.R. § 2.310(d) does not contravene either the APA or the *CAN* decision. As the First Circuit explained, the APA does *not* provide an "absolute right of cross-examination," even in on-the-record hearings.[69] Rather, it "affords a right only to such cross-examination as may be necessary for a full and fair adjudication of the facts."[70] The Court agreed with the NRC that 10 C.F.R. § 2.1204 provides an appropriate mechanism, in that it allows for supplemental cross-examination by the parties when the Board determines that it is required for a full and fair disclosure and adequate record of competing technical and scientific evidence and testimony.[71] In short, Section 2.310(d) poses no impermissible "barrier to the right of cross-examination," as New York incorrectly posits.

6. The Number or Complexity of Admitted Contentions Does Not Warrant the Use of Subpart G Procedures in this Proceeding

New York also suggests that the "complexity and breadth" of issues raised in its eight admitted technical contentions warrant the use of Subpart G's formal procedures.[72] In particular, New York states that "[t]his license renewal hearing involves more contentions and more complex

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[68] *Vermont Yankee*, LBP-04-31, 60 NRC at 710-11.

[69] *CAN*, 391 F.3d at 351.

[70] *Id.*

[71] On a related note, in Section III of its Motion, New York reserves its "right" or ability" to invoke Section 274(l) of the Atomic Entergy Act, 42 U.S.C. § 2021(l), which states that the Commission "shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application." *See* New York Motion at 30-31. In view of the First Circuit's decision, this request appears to be superfluous. The *Vermont Yankee* power uprate Board considered this issue, and found that the use of Subpart L rules, which permit the Board to allow supplemental cross-examination when necessary to ensure the development of an adequate record, is consistent with a State's statutory right under 42 U.S.C. § 2021(l). *See Vermont Yankee*, LBP-04-31, 60 NRC at 708-11.

[72] New York Motion at 2.

contentions than any previous license renewal proceeding."[73] New York, however, *again* overlooks key portions of the regulatory history associated with the Commission's 2004 revisions to the Part 2 hearing procedures that contravene its position.

Specifically, the NRC's 2001 proposed rule included a "numerous/complex issues" criterion in Section 2.310.[74] Upon further consideration, however, the Commission decided to exclude such a criterion from the 2004 final rule, concluding that "the complexity and number of issues in nuclear power plant licensing proceedings may not, per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters."[75] Rather, the Commission explained, "it is the nature of the disputed matters themselves that most directly and significantly bears on whether the techniques of formal hearings . . . are appropriate."[76] As discussed in Section III.B, *infra*, the primarily technical issues raised by New York are *not* of the nature requiring application of formal Subpart G procedures. Nonetheless, New York seeks to make the proceeding *more* complex by requesting extensive use of Subpart G procedures.

Additionally, the Board is well-equipped to deal with such complex matters, being comprised of three administrative judges who bring substantial experience and expertise in technical and legal matters. The Board has "primary responsibility to examine witnesses in Subpart L proceedings, and its three judges therefore "must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues."[77] As such, the Commission found that cross-examination by the parties is "best used to resolve issues where 'motive, intent, or credibility [of an eyewitness] are

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[73] *Id.* at 19.

[74] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2196, 2204-05.

[75] *Id.* at 2196. Based upon its review of the regulatory history, the *Vermont Yankee* Board concluded that "[t]he complexity of an issue thus does not automatically trigger a Subpart G hearing under 10 C.F.R. § 2.310(d)." *Vermont Yankee*, LBP-04-31, 60 NRC at 696. In a similar vein, the *Vermont Yankee* Board concluded that a "high degree of public interest" in a proceeding does not dictate a Subpart G hearing. The Board noted that such a criterion "is administratively impractical, as all petitioners would likely assert that their nuclear power plant licensing proceeding is of high public interest, and this Board is neither suited nor inclined to attempt to assess the quantum of public interest." *Id.* at 697 n.13.

[76] *Id.*

[77] *Vermont Yankee*, LBP-04-31, 60 NRC at 697.

at issue, or if there is a dispute over the occurrence of a past event;'" *i.e.*, under the discrete circumstances identified in Section 2.310(d).[78] In this same vein, formal discovery procedures are not necessary absent a clear need to acquire "specific information from eyewitnesses or persons who have direct knowledge about events or incidents directly bearing on motive or intent."[79]

7. The Board's Hearing Procedure Ruling Need Not Await the Parties' Identification of Their Respective Witnesses

New York also argues that Section 2.310(d) should not be applied to a request for Subpart G discovery procedures because its application would create "substantial opportunity for delay in this proceeding."[80] Specifically, it asserts that the Board cannot "intelligently" apply the criteria set forth in Section 2.310(d) until after mandatory disclosures are completed and final witness lists are submitted.[81] New York further contends, however, that delaying the required showing under Section 2.310(d) until the time of filing of the final witness lists would delay the availability of the full panoply of discovery procedures and, hence, delay the overall proceeding.[82] New York claims that the *Vermont Yankee* power uprate Board "recognized this dilemma and chose to postpone a final decision on whether to use Subpart G procedures until after the final witness list was submitted."[83] New York's suggested solution to this purported procedural catch-22 is, not surprisingly, the immediate institution of formal discovery procedures, as *purportedly* permitted by Section 2.309(g).

Again, New York's argument finds no support in the regulations themselves, the regulatory history, or NRC adjudicatory precedent. Section 2.309(g) directs petitioners to address the selection of hearing procedures in their initial intervention petitions (not at some later point in the proceeding), to facilitate the Board's identification of the hearing procedures to be used, as required by 10 C.F.R.

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78 69 Fed. Reg. at 2205.

79 *Id.* at 2195.

80 New York Motion at 12.

81 *Id.*

82 *Id.* at 12-13.

83 *Id.* at 12.

§ 2.310(d). Section 2.310(d), in turn, states that the Board will identify the applicable hearing procedures "[u]pon a determination that a request for hearing/petition to intervene should be granted." Section 2.310(d) does *not* direct the Board to defer selection of the hearing procedures until either the start or completion of mandatory disclosures (which include the identification of the parties' anticipated expert witnesses). The regulatory history reinforces this conclusion.[84] Moreover, as a practical matter, the precise nature of the admitted contested issues (which are largely of a technical stripe) is now known. Thus, it is both reasonable and sensible for the Board to make its hearing-procedure determination now.

New York's reference to the *Vermont Yankee* power uprate proceeding is misleading, in that New York inaccurately describes the procedural history of that case. Contrary to New York's representation, the Board in *Vermont Yankee* did *not* defer its decision on the applicable hearing procedures until submittal of the final witness lists. Rather, in its November 22, 2004, Memorandum and Order granting certain hearing requests, the Board instructed the admitted parties to hold mandatory disclosure activities in abeyance until the Board issued its ruling on hearing procedures.[85] The Board issued that ruling less than a month later on December 16, 2004, finding that Subpart L procedures were the most appropriate for the four admitted contentions.[86] The Board, however, indicated that it might revisit the matter if, at some later stage in the proceeding (*e.g.*, upon witnesses

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[84] Specifically, the 2004 Statement of Considerations described the intended process as follows:

> When it is determined that a hearing should be held, the Commission, presiding officer, or Licensing Board would next examine the nature of the action that is the subject of the hearing and the contentions admitted for litigation, apply the criteria in subpart C to determine the specific procedures/subpart that should be used for the adjudication, and issue an order for hearing designating the procedures/subpart to be used for the remainder of the proceeding. *The hearing activities would then proceed under the designated subpart, i.e.*, Subpart G to be used for the most formal hearings, Subpart L for more informal hearings, Subpart M for license transfer cases, Subpart N for an expedited "fast track" hearing.

Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2191 (emphasis added).

[85] *Entergy Nuclear Vt. Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 578 (2004).

[86] *Vermont Yankee*, LBP-04-31, 60 NRC at 704-06.

identification), a party submitted a motion pursuant to Section 2.310(d), arguing that the credibility of an eyewitness as to a material past activity reasonably may be expected to be in issue.[87]

The February 1, 2005, Initial Scheduling Order cited by New York merely reflects the decision of the *Vermont Yankee* Board to incorporate specific deadlines for the filing of any such motions subsequent to the parties' identification of their respective witnesses.[88] Thus, the Board did not, as New York wrongly suggests, await the parties' identification of witnesses before determining the applicable hearing procedures.

8. Contrary to New York's Claim, the Use of Subpart G Procedures Is Not Likely to Improve the Efficiency of the Hearing Process, and Is Inconsistent With The Commission's Stated Objectives in Revising 10 C.F.R. Part 2

New York further contends that using Subpart G procedures will "promote judicial economy" and "shorten the hearing" by fostering discovery and clarification of facts and "pinning down the position of the parties."[89] For example, New York claims that "[d]epositions 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."[90] New York also notes the Commission's decision to model its mandatory disclosure requirements on provisions contained in Rule 26 of the Federal Rules of Civil Procedure ("FRCP").[91] According to New York, however, "[c]ourts 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 is required.[92]

New York's arguments contradict one of the major rationales articulated by the Commission for the 2004 revisions to its hearing rules. Specifically, the Commission concluded that the

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87 *Id.* at 703.

88 *Entergy Nuclear Vt. Yankee, L.L.C.* (Vermont Yankee Nuclear Power Station), Licensing Board Initial Scheduling Order, Docket No. 50-271, at 3 (unpublished) (Feb. 1, 2005).

89 New York Motion at 13.

90 *Id.* at 14.

91 *Id.* at 13-14.

92 *Id.* at 15.

mandatory disclosure of information relevant to a contested matter, together with the hearing file and/or electronic docket, "should *reduce or avoid the need* to draft often-complex discovery requests such as interrogatories, prepare for time-consuming and costly depositions, and engage in extended litigation over the responsiveness of a party to a discovery request."[93] Thus, the Commission viewed formal discovery procedures as doing anything but making NRC hearings more efficient.

Although the Commission borrowed from the provisions of FRCP 26 to develop its mandatory disclosure regulations, as New York notes, it "tailored" those provisions "to reflect the nature and requirements of NRC proceedings."[94] The Commission distinguished NRC proceedings from judicial trial court proceedings involving private parties, "where information is not publicly disclosed nor ordinarily available to all parties."[95] Most NRC proceedings, by contrast, concern license applications or enforcement actions, in which relevant documentation between the NRC and the applicant or affected party is public and placed into the hearing file and/or electronic docket.[96]

The regulatory history reflects the Commission's clear intent to increase the efficiency of the NRC hearing process by *moving away from* the routine use of formal adjudicatory procedures:

> Commission experience suggested that in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures in subpart G is not essential to the development of an adequate hearing record; *yet all too frequently their use resulted in protracted, costly proceedings.* The Commission adopted more informal procedures with the goals of reducing the burden of litigation costs, and enhancing the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record beyond the initial submissions of the parties.[97]

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93 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2194 (emphasis added).

94 New York Motion at 14 (quoting Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2194).

95 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2195.

96 *Id.*

97 *Id.* at 2182 (emphasis added). Notably, in affirming the Commission's 2004 revisions to Part 2, the First Circuit observed that "[d]iscovery, especially in complex matters, is both time-consuming and costly." *CAN*, 391 F.3d at 353. The court further stated that it cannot "reasonably be questioned that the replacement of discovery with mandatory disclosure will make reactor licensing hearings faster and less expensive." *Id.*

The Commission rejected the argument, advanced by commenters on the Part 2 rulemaking, that expanded use of Subpart L procedures would be "more burdensome and expensive."[98] It stated that "Subpart L strikes the appropriate balance between public confidence in the Commission's hearing process, and the need to expeditiously resolve contested matters."[99] The Commission also envisioned that few NRC proceedings would involve either: (1) factual disputes for which the expanded panoply of discovery procedures in Subpart G are necessary, or (2) matters where the credibility of eyewitnesses is an issue with respect to either the occurrence of a material past event, or the motive or intent of a party, such that cross-examination is an appropriate tool for issue resolution.[100] The Commission emphasized the presiding officer's role in "efficiently oversee[ing] the development of evidence relevant to the resolution of the contested matter in the hearing."[101]

In view of the above, it is clear that the Commission has sought to make its hearing process more efficient by making the discovery process less formal—not more formal. New York offers no reason for this Board to question, or depart from, the substantive policy determinations underlying the Commission's decision to rely principally on the more-informal procedures of Subpart L. New York's aim in seeking unnecessary, formal discovery procedures generally reserved for trials clearly is not to expedite this proceeding. The Attorney General's public pledge to fight the renewal of the IPEC operating licenses "tooth and nail" suggests exactly the opposite.[102] Indeed, as discussed further below, the sheer number and nature of putative, unauthorized discovery requests that New

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98 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2213.

99 *Id.*

100 *Id.*

101 *Id.*

102 *See* Press Release, "Statement from Attorney General Andrew M. Cuomo in Response to Today's NRC Ruling on Indian Point" (July 31, 2008).

> However, [the Board's ruling] represents only the first step in a long journey—a journey in which we expect Entergy and even the NRC's own staff to oppose us at every step along the road. My office is prepared to fight tooth and nail against the relicensing of Indian Point, as well as the federal government's pitiful enforcement of nuclear safety issues.

York presents in its contention-specific arguments reveals that New York seeks to delay this proceeding by embarking on a "fishing expedition" that is likely unprecedented in NRC proceedings.

B. New York Has Not Demonstrated That Any of the Admitted Contentions For Which It Seeks Subpart G Procedures Meet Either of the Decision Criteria in Section 2.310(d)

Despite its lengthy (albeit misdirected) discussion of the criteria for determining when Subpart G procedures are required to resolve a particular contention, New York gives short shrift to those criteria in its contention-specific arguments. Nowhere in its contention-by-contention analysis does New York attempt to directly apply the two alternative criteria of 10 C.F.R. § 2.310(d). In short, New York makes no bona fide effort to demonstrate that *any* of its admitted contentions involve issues where the motive, intent, or credibility of an eyewitness is at issue, such that the use of Subpart G procedures is warranted.

In addition, each of the contentions identified by New York as candidates for Subpart G hearings involves technical issues (*e.g.*, containment concrete integrity, reactor pressure vessel embrittlement, metal fatigue). In fact, six of the eight contentions identified by New York as warranting Subpart G procedures relate to the adequacy of aging management programs ("AMPs") in the IPEC license renewal application ("LRA"). The other two contentions relate to the adequacy of Entergy's severe accident mitigation alternative ("SAMA") analysis, a highly technical matter. Thus, these contentions involve clearly technical issues for which Subpart G procedures are not required.

It is unclear—and New York offers no elucidation—as to how any of the eight identified contentions are likely to involve eyewitness testimony, much less issues of credibility, motive, or intent. Rather, such issues are "example[s] of [] classic technical disagreement[s] that would be resolved through the use of expert witnesses."[103] The fact that expert witnesses may testify as to the validity of various technical assumptions and calculations does not render them "eyewitnesses" for purposes of 10 C.F.R. § 2.310(d) (*see* note 57, *supra;* 69 Fed. Reg. at 2222). Unless such experts

[103] Oyster Creek Order Denying Subpart G Procedures at 7.

"are also testifying as fact eyewitnesses with first-hand knowledge of a material and disputed past activity, Subpart G procedures are not dictated under 10 C.F.R. § 2.310(d)."[104] As shown below, New York makes no showing that the resolution of any of the admitted technical contentions will involve, or are even likely to involve, eyewitness testimony.

Finally, as discussed below, many of New York's contention-specific arguments are premised on the specious allegation that Entergy and the NRC Staff have not been entirely candid to date, and accordingly cannot be trusted to make "a full and complete disclosure of all relevant information."[105] The relevance of such unsupported allegations to the criteria of 10 C.F.R. § 2.310(d) is not apparent. As the Board concluded in *Vermont Yankee*, "generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives do not satisfy the 'credibility' or 'motive' elements of either criterion of 10 C.F.R. § 2.310(d)."[106] Moreover, if a party fails, without excuse, to comply with its disclosure obligations, the Board will impose appropriate sanctions, which may include the use of Subpart G discovery procedures.[107]

For these reasons alone, the Board should find that New York has not justified the use of Subpart G procedures relative to the eight identified contentions. Nonetheless, Entergy now turns to New York's additional, contention-specific arguments. As shown below, rather than addressing the criteria in Section 2.310(d), New York seeks to impugn the integrity of Entergy and the NRC Staff; identifies *hypothetical* discovery disputes; and makes premature, unauthorized, arguably unreasonable discovery requests. Moreover, New York appears to imply that if Entergy and the

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[104] *Vermont Yankee*, LBP-04-31, 60 NRC at 700 (citing 69 Fed. Reg. at 2222); *see also* Oyster Creek Order Denying Subpart G Procedures at 7 ("To the extent that disagreements exist among competing expert witnesses, they are properly resolved via Subpart L procedures.").

[105] New York Motion at 27.

[106] *Vermont Yankee*, LBP-04-31, 60 NRC at 700; *cf.* Oyster Creek Order Denying Subpart G Procedures at 5-6 ("[T]he standard in 10 C.F.R. § 2.310(d) for a Subpart G hearing is not satisfied simply because a party [purportedly] has made a misstatement or a misrepresentation regarding an incident that has some general nexus to issues in the proceeding.").

[107] *See Vermont Yankee*, LBP-04-31, 60 NRC at 698; (citing 10 C.F.R. § 2.336(e)); *see also* Oyster Creek Order Denying Subpart G Procedures at 6.

NRC Staff do not agree with New York's anticipated discovery requests (no matter how unreasonable), they will have failed to meet their disclosure obligations. New York, however, loses sight of the fact this Board is the appropriate arbiter of discovery disputes, that such disputes are not uncommon in complex proceedings, and that such disputes may be resolved without resort to Subpart G procedures.

1. NYS Contentions 5, 6, and 7

Contention 5 alleges that IPEC lacks an adequate AMP for buried SSCs that convey radioactively-contaminated water or other fluids. Contentions 6 and 7 allege that IPEC lacks adequate AMPs for non-EQ inaccessible medium-voltage and low-voltage cables. New York claims that resolution of these contentions requires "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."[108] New York argues that "full identification" is unlikely, however, in view of: (1) its alleged inability to ascertain the CLB for IPEC Units 2 and 3;[109] (2) the alleged incompleteness of the LRA; (3) Entergy's alleged "lack of diligence and timeliness in making document disclosures," as purportedly manifested in the *Pilgrim* license renewal proceeding; and (4) Entergy's decision to commission an Independent Safety Examination that included, *inter alia*, consideration of buried piping issues.[110]

Although Entergy disputes each of New York's allegations, their veracity is irrelevant for present purposes. New York's attempts to challenge the completeness of the LRA or impugn Entergy's credibility do not establish the need for Subpart G procedures under 10 C.F.R. § 2.310(d). Section 2.310(d) requires New York to show that the alleged facts or incidents concern an issue of material fact where the motive, intent, or credibility of an eyewitness is at issue. New

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[108] New York Motion at 20-21.

[109] As the Board found in its July 31 Order, "the CLB for Indian Point is, in fact, ascertainable by following the definition provided in 10 C.F.R. § 54.3(a)." LBP-08-13, slip op. at 19.

[110] New York Motion at 21-23.

York has not made such a showing. There is no indication why the *technical* data New York claims are necessary for resolution of the contentions (*i.e.*, the location, design, function of pipes, cables etc.) require use of Subpart G discovery procedures, or how contention resolution would be "facilitated by a trial-type hearing."[111]

2. NYS Contention 8

Contention 8 alleges that the LRA does not include an AMP for each electrical transformer whose proper function is important to plant safety. In seeking a Subpart G hearing on this contention, New York makes two arguments. First, New York claims that the NRC Staff should have disclosed its preparation of a particular interim guidance document prior to its publication of that document.[112] Second, New York asserts that the Staff "believes it has the right to discard documents that are within the scope of the disclosure requirements in § 2.336(b)(3)."[113] Based on these statements, New York claims that the Staff's future disclosures under Section 2.336(b)(3) "are not likely to be complete."[114]

Neither of New York's arguments establishes that formal Subpart G procedures are necessary to allow New York to build and litigate its case. In particular, New York fails to explain why it believes the cited Staff guidance document is relevant to Contention 8, why the Staff allegedly was obligated to disclose the document's existence *before* the admission of the contention, and why the document (if relevant) would not be disclosed during the mandatory disclosure period. Furthermore, and most importantly, New York does not provide *any* basis for concluding that NRC witnesses (fact or expert) would not be credible. As noted above, generalized and unsupported criticisms concerning

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[111] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2205.

[112] New York Motion at 25 (citing 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, Solicitation of Public Comment, 73 Fed. Reg. 13258 (Mar. 12, 2008)).

[113] New York Motion at 25.

[114] *Id.*

the tactics or motives of the parties do not satisfy the "credibility" or "motive" elements of either criterion of Section 2.310(d).[115]

More fundamentally, New York does not explain why the resolution of Contention 8—a narrow technical contention—would require a trial-type hearing. The Board admitted Contention 8 "to the extent that it questions the need for an AMP for safety-related electrical transformers that are required for compliance with 10 C.F.R. §§ 50.48 and 50.63."[116] The Board indicated that, "[i]n addressing this contention, [it] will require, *inter alia*, representations from the parties to help [it] determine whether transformers are more similar to the included, or to the excluded, component examples [listed in 10 C.F.R. § 54.21(a)(1)(i).]."[117] It is not readily apparent how the Board's resolution of this contention is likely to involve the credibility of eyewitnesses with respect to either the occurrence of a material past event, or the motive or intent of a party or eyewitness.

3. NYS Contention 12

NYS Contention 12 alleges that the Entergy's SAMA analyses for IPEC do not accurately reflect the decontamination and clean-up costs associated with a severe accident. Providing a preview of one of its various overbroad and unfounded discovery requests, New York asserts that it "seeks all documents within NRC's possession" relating to a May 1996 report prepared by Sandia National Laboratories and certain analyses associated with the licensing proceeding for a proposed dry cask spent fuel storage facility near Skull Valley, Utah.[118] According to New York, such documents "may" be material to the resolution of NYS Contention 12.[119] Referring to the *Pilgrim*

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115 *See Vermont Yankee*, LBP-04-30, 60 NRC at 700.

116 LBP-08-13, slip op. at 45.

117 *Id.*

118 New York Motion at 25-26.

119 *Id.* at 26.

license renewal proceeding, New York also asserts that, without formal discovery, it may be difficult to interpret computer modeling inputs and assumptions used by Entergy or its consultants.[120]

Here, again, New York fails to explain, with specific reference to the criteria of 10 C.F.R. § 2.310(d), why Subpart G procedures are necessary to resolve Contention 12, which, in the Board's words, is focused on "whether 'specific inputs' and 'assumptions' made in [Entergy's] MACCS2 SAMA analyses are correct for the area surrounding Indian Point."[121] New York provides no reason to believe that the information it seeks, if relevant to this contention, cannot be obtained through the Subpart L mandatory disclosure process, or that the factual and technical issues in dispute necessitate cross-examination by the parties beyond the examination of witnesses by the Board, as informed by the parties' suggested questions.[122] As one court put it, there is a "fail[ure] to explain how such procedures will significantly advance the accuracy of an adjudicative process in which the issues typically do not require determinations of witness credibility but turn instead upon *technical data and policy judgments*."[123] In short, it is clear that the concerns stated by New York relate more to the proper scope of the NRC Staff's and Entergy's future mandatory disclosure obligations than to issues of eyewitness credibility, motive, or intent under 10 C.F.R. § 2.310(d).

4. NYS Contention 16

NYS Contention 16 alleges that Entergy's SAMA analyses for IPEC Units 2 and 2 are inadequate because they are based on inaccurate population dose estimates. New York's sole basis for seeking a Subpart G hearing on this contention is its claim that "Staff and Entergy 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."[124] New York apparently

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120 *Id.*

121 LBP-08-13, slip op. at 64.

122 *See* 10 C.F.R. § 2.1207(a)(3)

123 *Chem. Waste Mgmt., Inc. v. EPA*, 873 F. 2d 1477, 1484 (D.C. Cir. 1989) (emphasis added).

124 New York Motion at 27.

assumes that: (i) the Staff and Entergy were aware of the document at issue, and (ii) that those parties were under some obligation to "disclose or reference" the document, even prior to the Board's ruling on contention admissibility or the start of the mandatory disclosure period. Based on this assumption, New York concludes that "there is every reason to believe that without the benefit of [Subpart G] discovery . . . there will not be a full and complete disclosure of all relevant information."[125]

Even assuming, *arguendo*, that New York's premise is true, it fails to establish any basis for the conduct of a Subpart G hearing on Contention 16. Again, New York furnishes no reason to believe that either Entergy or the Staff will act in derogation of their respective mandatory disclosure obligations—and the Board should not simply presume that this will be the case.[126] As the Applicant, Entergy "bears the burden of proof in any licensing hearing, and it will have every incentive to proffer sufficient information to allow the [Board] to reach a reasoned decision."[127] Insofar as New York argues otherwise here, it *prematurely* raises a *hypothetical* discovery dispute based on Entergy's and the Staff's presumed lack of candor. It does not provide any basis under 10 C.F.R. § 2.310(d) for the use of Subpart G procedures.[128]

Like SAMA Contention 12, Contention 16 raises discrete technical issues that lend themselves to resolution via a Subpart L hearing. Specifically, as admitted, Contention 12 challenges whether: (i) population projections used by Entergy are too low, (ii) the ATMOS module of MACCS2 code is being used beyond its range of validity, and (iii) use of the ATMOS module leads to non-conservative geographical distribution of radioactive dose within a 50-mile radius of IPEC.

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[125] *Id.*

[126] *See Vermont Yankee*, LBP-04-31, 60 NRC at 698 (stating that the Board "will not presume that a party will not comply with its duty to disclose 'all documents . . . relevant to the contentions'") (quoting 10 C.F.R.§ 2.336(a)(2)(i)).

[127] *CAN*, 391 F.3d at 350 (internal citation omitted).

[128] *Cf.* Oyster Creek Order Denying Subpart G Procedures at 6 (NRC regulations "do not contemplate that a single alleged discovery dispute will give rise to the imposition of a Subpart G hearing procedure as a sanction.")

Contrary to Section 2.310(d), New York does not show that resolution of these issues will involve eyewitness credibility, motive, or intent.

5. NYS Contention 25

NYS Contention 25 alleges that Entergy's LRA lacks an adequate AMP for managing the effects of embrittlement of the reactor pressure vessels and associated internals. New York asserts that, because Contention 25 raises purportedly novel and "exceedingly complex, technical issues," it is important to understand the extent to which third parties (*e.g.*, EPRI and NEI) have reviewed those issues.[129] In this regard, New York states that Entergy may seek to eschew potential disclosure obligations by claiming that records developed and/or held by those third parties are not within its "possession, custody, or control."[130] New York also states that the LRA fails to include an adequate AMP and age-related accident analyses.[131]

Again, New York's argument amounts to nothing more than a hypothetical discovery dispute that *might* arise in the future. It concerns the potential scope of Entergy's disclosure obligations. It is not related to the credibility, motive, or intent of any eyewitness—the relevant criteria under Section 2.310(d). By New York's own acknowledgment, Contention 25 involves "complex, technical issues;"[132] *i.e.*, the types of issues that the Commission considers to be susceptible to resolution by a technical fact finder (the Board in this case) using Subpart L procedures.

Furthermore, New York fails to explain how the alleged "paucity of information in the LRA goes directly to the issue of motive and intent, thus making application of the Subpart G procedures appropriate."[133] This statement is a *non sequitur*. New York argues, in effect, that because the LRA does not meet New York's expectations (by allegedly failing to include information that New York

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[129] New York Motion at 28.

[130] *Id.*

[131] *Id.* at 28-29.

[132] *Id.* at 28.

[133] *Id.* at 29.

believes it should contain), Entergy has acted (or will act) in bad faith by not disclosing that information to New York. Putting aside the obvious flaws in this logic, the adequacy of the LRA is a matter for adjudication, and does not bear on the Board's selection of hearing procedures. New York has not met its burden under 10 C.F.R. § 2.310(d) with respect to Contention 16.

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

This consolidated contention alleges that the LRA lacks an adequate AMP for metal fatigue under 10 C.F.R. § 54.21(c)(1)(iii). New York claims that Subpart G procedures are warranted because "[r]esolution 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."[134] This argument lacks merit, in that it fails to explain how resolution of this contention is likely to involve issues relating to credibility, motive, or intent of an *eyewitness*. Whatever "metamorphosis" Entergy's licensing strategy purportedly has undergone, it is not enough to trigger a Subpart G hearing. Certainly, Entergy's decision to submit LRA Amendment 2 (NewYork's principal grievance) is not a matter requiring the use of formal Subpart G procedures.[135]

New York notes that a hearing on this contention likely will involve consideration of the "CUF/FEN calculations Entergy performed, what assumptions it used, when it performed the calculations," among other things.[136] In this regard, the parties may submit written testimony of expert witnesses relating to the assumptions used and the calculations performed. And, as provided by the regulations, such testimony is subject to examination by the Board, including questions suggested by the parties, at an oral presentation.[137] These are precisely the types of issues the Commission envisioned could be resolved by the Boards—acting as "active inquisitors of the factual,

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[134] *Id.* at 30.

[135] *See Vermont Yankee*, LBP-04-30 60 NRC at 700 (concluding that generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or representatives do not satisfy the "credibility" or "motive" elements of either criterion of 10 C.F.R. § 2.310(d)).

[136] New York Motion at 30.

[137] *See* 10 C.F.R. § 2.1207.

technical, and scientific evidence"—without resort to formal Subpart G procedures.[138] Moreover, "even if such witnesses are deemed eyewitnesses to their own calculations, and even if such calculations are deemed past activities, [there is] no demonstration that the truthfulness or credibility of any of these eyewitnesses may reasonably be expected to be at issue."[139]

In sum, New York's arguments implicate neither of the criteria of 10 C.F.R. § 2.310(d). As New York notes, the metal fatigue issue has been litigated in the *Vermont Yankee* license renewal proceeding. In fact, the contention being adjudicated by the Board in *Vermont Yankee* is substantially similar to the one admitted by the Board in this proceeding. In both cases, the intervenors have proffered the same expert witness (Joram Hopenfeld) to support the contention.[140] Accordingly, Entergy respectfully submits that this Board, like the *Vermont Yankee* Board, should apply Subpart L procedures in resolving this admitted contention on metal fatigue.

C. Riverkeeper Has Not Demonstrated That Any of the Admitted Contentions For Which It Seeks Subpart G Procedures Meet Either of the Decision Criteria in Section 2.310(d)

1. Riverkeeper Contention TC-1/TC-1A

As indicated above, Riverkeeper Contention TC-1/TC-1A has been consolidated with NYS Contention 26/26A. New York has been designated the lead intervenor for this contention. Riverkeeper states that it: (1) incorporates by reference the arguments made by New York in support of its request for a Subpart G hearing on Consolidated NYS Contention 26/26A-Riverkeeper Contention TC-1/TC-1A; (2) fully supports New York's interpretation of the relationship and requirements of Sections 2.309(g) and 2.310(d); and (3) requests that Riverkeeper receive the same opportunities as those requested by New York under Subpart G.[141]

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[138] *Vermont Yankee*, LBP-04-30 60 NRC at 697.

[139] *Id.* at 700 (internal quotation marks omitted).

[140] *Compare Vermont Yankee*, LBP-06-20, 64 NRC at 183-87, *with Indian Point*, LBP-08-13, slip op. at 104-116, 152-162. *See also* Consolidated Contention of Petitioners State of New York (No. 26/26-A) and Riverkeeper (TC-1/TC1-A) – Metal Fatigue and Designation of the State of New York as the Lead Litigator For This Consolidated Contention (Aug. 21, 2008).

[141] Riverkeeper Motion at 2.

Entergy opposes Riverkeeper's request for the use of Subpart G procedures for the same reasons set forth above in response to New York's request for a Subpart G hearing on Consolidated NYS Contention 26/26A-Riverkeeper Contention TC-1/TC-1A (and incorporates by reference that response). Additionally, for the reasons explained above, Entergy submits that New York and Riverkeeper have not correctly construed the relationship between, or requirements imposed by, 10 C.F.R. §§ 2.309(g) and 2.310(d). *See* Section III.A.2, *supra*.

2. Riverkeeper Contention TC-2

Riverkeeper Contention TC-2 challenges the adequacy of Entergy's AMP for flow-accelerated corrosion ("FAC"). Riverkeeper requests that the Board allow additional discovery methods pursuant to Section 2.705(a) of Subpart G due to Entergy's "lack of willingness to explain or publicly disclose the technical analyses relied on its defense of this portion of the LRA," as purportedly demonstrated in the *Vermont Yankee* license renewal proceeding.[142] In particular, Riverkeeper complains that Entergy has failed to disclose in that proceeding certain vendor computer codes as well as associated files and documentation because that information is proprietary to third-party vendors.[143] Riverkeeper posits that because the same scenario is likely to be repeated here, Subpart G discovery is justified.

Entergy opposes Riverkeeper's request for formal discovery procedures because Riverkeeper has not met its burden under 10 C.F.R. § 2.310(d). Nowhere in its Motion does Riverkeeper suggest, much less demonstrate, that the adjudication of Contention TC-2 will require examination of the motive, intent, or credibility of an eyewitness. Contention TC-2 centers on whether Entergy's AMP for FAC-affected components provides sufficient details (*e.g.*, inspection method and frequency, criteria for component repair or replacement), and whether Entergy has adequately benchmarked the

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[142] *Id.* Riverkeeper states that it is not presently requesting the use of cross-examination, as it would be premature at this state, but that explicitly reserves the right to make a showing to the Board at a later date that cross-examination is warranted. *Id.* at 2.

[143] *Id.* at 3-4.

CHECWORKS code to reflect uprated power levels. As such, resolution of Contention TC-2 will undoubtedly "turn [] upon technical data" rather than determinations of eyewitness credibility, motive, or intent.[144] Like Consolidated NYS Contention 26/26A-Riverkeeper Contention TC-1/TC-1A, a substantially similar contention involving the same proffered intervenor expert (Dr. Hopenfeld) is being adjudicated in the *Vermont Yankee* license renewal proceeding using Subpart L procedures.[145] This Board should respectfully do the same.

Tellingly, Riverkeeper's specific arguments are more in the nature of a hypothetical discovery dispute that it speculates might arise in the future—one which apparently has its genesis in the context of a *different* proceeding, and whose relevance to *this* Board's inquiry under 10 C.F.R. § 2.310(d) is not evident.[146] As noted above, given its burden of proof moving forward, Entergy has every incentive to proffer sufficient information to allow the Board to reach a decision that is both well-supported and favorable to Entergy. The mere potential for a discovery dispute does not dictate the need for Subpart G discovery, as discovery disputes are far from aberrations, and mechanisms exist under Subpart L for resolving such disputes.

3. Consolidated Riverkeeper Contention EC-3 & Clearwater Contention EC-1

Riverkeeper Contention EC-3, as consolidated with Clearwater Contention EC-1, challenges the adequacy of Entergy's assessment of the significance of the environmental impacts caused by leakage of radioactive constituents from the IPEC spent fuel pools. Riverkeeper requests additional discovery methods pursuant to Section 2.705(a) of Subpart G, including the audacious request for "permission to enter upon land or other property, for inspection and other purposes."[147] As the basis

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144 *Chem. Waste Mgmt.*, 873 F. 2d at 1484.

145 *Compare Vermont Yankee*, LBP-06-20, 64 NRC at 192-96, *with Indian Point*, LBP-08-13, slip op. at 162-69.

146 *See Vt. Yankee*, LBP-04-31, 60 NRC at 702 ("unless the allegations concern an individual who continues to work for Entergy and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied.")

147 Riverkeeper Motion at 5-6.

for this request, Riverkeeper cites Entergy's alleged "unwillingness to provide basic information as to the status of the Indian Point 2 spent fuel pool's condition, and whether it continues to leak."[148]

Entergy objects to Riverkeeper's request for Subpart G discovery for the same reasons discussed above relative to Contention TC-2. Riverkeeper merely postulates a *future* discovery dispute between the parties based upon Entergy's *assumed* lack of candor or willingness to meet its disclosure obligations. Riverkeeper establishes no nexus between its claims and any issue involving the credibility of eyewitnesses with respect to either the occurrence of a material past event, or the motive or intent of a party or eyewitness, as required by 10 C.F.R. § 2.310(d). As such, Riverkeeper has not furnished sufficient support for its request that this Board permit formal discovery (including Riverkeeper's amorphous request to visit the IPEC site for "inspection and other purposes").

D. Clearwater Has Not Demonstrated That Any of the Admitted Contentions For Which It Seeks Subpart G Procedures Meet Either of the Decision Criteria in Section 2.310(d)

Clearwater seeks the use of Subpart G procedures only with respect to Clearwater Contention EC-1, which, as noted above, has been consolidated with Riverkeeper EC-3.[149] Riverkeeper has been designated the lead intervenor with respect to the consolidated contention. Clearwater states that it "joins in the response submitted by Riverkeeper to this question and incorporates such response herein by reference its entirety."[150] With respect to its other admitted contention, EC-3, Clearwater states that it "believes that the provisions of Subpart L are more appropriate."[151]

Entergy opposes Clearwater's request for the use of Subpart G procedures for the same reasons discussed above in response to Riverkeeper's request for a Subpart G hearing on Riverkeeper Contention EC-3, and incorporates by reference its previous response. Entergy agrees with

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148 *Id.* at 5.

149 *See* Clearwater Motion at 1.

150 *Id.*

151 *Id.*

Clearwater that Subpart L procedures are appropriate for resolving Clearwater Contention EC-3, which raises a discrete environmental justice issue.

IV. CONCLUSION

For the reasons stated above, Entergy asserts that none of the intervenors—New York, Riverkeeper, or Clearwater—has demonstrated that any of their admitted contentions meet the criteria of 10 C.F.R. § 2.310(d), so as to mandate the use of Subpart G procedures. Accordingly, Entergy respectfully submits that the Board should apply Subpart L procedures in resolving each of the admitted contentions.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 07-858-03-LR-BD01
	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	September 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to Intervenors' Requests for the Application of Subpart G Procedures to Certain Admitted Contentions," dated September 15, 2008, were served this 15th day of September, 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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