UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of	Docket No. 50-247-LA
ENERGY NUCLEAR OPERATIONS, INC.	ASLBP No. 15-942-06-LA-BD01
(Indian Point Nuclear Generating Station, Unit 2)	License No. DPR-26
	June 19, 2015

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STATE OF NEW YORK
REPLY IN SUPPORT OF
PETITION TO INTERVENE
AND REQUEST FOR HEARING

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

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(2), proposed intervenor State of New York (the State) submits this reply to the Answers filed by Entergy Nuclear Operations, Inc. (Entergy) and the Nuclear Regulatory Commission (NRC) Staff on June 12, 2015. Entergy and NRC Staff do not oppose the State's standing to submit a Petition to Intervene and Request for Hearing (NYS Petition), but argue that the State has failed to raise an admissible contention. Entergy's Answer Opposing State of New York's Petition to Intervene and Request for Hearing, at 13-38 (June 12, 2015) (Entergy's Answer); NRC Staff's Answer to State of New York Petition to Intervene and Request for Hearing, at 12-28 (June 12, 2015) (NRC Staff Answer). The objections of NRC Staff and Entergy lack merit. The NYS Petition includes two contentions that call into question the propriety of Entergy's license amendment request (LAR) to delay an important test of the integrity of the degraded containment liner at Indian Point Generating Unit 2 (IP2), and meet the admissibility requirements of 10 C.F.R. § 2.309 (f). Accordingly, the attempt by Entergy and NRC Staff to hold the State to a higher standard than that required by law should be rejected, and the Atomic Safety and Licensing Board (the Board) should grant the NYS Petition and set the matter down for a hearing.

PROCEDURAL HISTORY

Entergy owns and operates two nuclear power reactors at the Indian Point facility in the Village of Buchanan, New York, roughly 24 miles north of New York City, in one of the most densely populated parts of the country. On December 9, 2014, Entergy submitted a request seeking NRC authorization to amend Operating License DPR-26 for IP2, Docket No. 50-247, to obtain a permanent extension of the frequency with which it must conduct a containment

integrated leak rate test (or ILRT) from 10 years to 15 years.[1] Letter from Lawrence Coyle, Site Vice President, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-14-128 (Dec. 9, 2014) (ML14353A015). The LAR was accompanied by a probabilistic risk assessment (PRA) prepared by an Entergy vendor. *See* Risk Assessment for Indian Point Regarding the ILRT (Type A) Permanent Extension Request, Revision 0, Attachment 3 to NL-14-128 (October 2013). The integrated leak rate test is an important test of containment integrity that protects the environment and members of the public from exposure to uncontrolled releases of radiation from the reactor. Despite its importance, since 1995, Entergy and its predecessor licensee have steadily reduced the frequency with which this leak test has been conducted, from three inspections per ten years, to one inspection per ten years, to a one-time extension to once every 15 years, and now – if Entergy's LAR is granted – to once per fifteen years on a permanent basis.[2] *See Id.* at 1-1. If the LAR is granted, the next ILRT for the IP2 containment will be conducted in 2021 – rather than 2016 – and, after that, will likely not be conducted again for the remaining life of the plant. The IP2 containment liner, in particular, has been subjected to a variety of unusual degradation events over more than four decades, including buckling in 1968, deformations caused by a jet of steam and hot water in 1973, and corrosion due to a flooding event in 1980. Entergy's LAR fails to mention, let alone consider, these plant-specific events,

[1] Entergy had obtained a one-time extension of the ILRT frequency from 10 to 15 years in 2002. *See* Letter from Patrick D. Milano, Office of Nuclear Reactor Regulation, to Michael R. Kansler, Entergy (Aug. 5, 2002) (ML021860178).

[2] The State of New York has previously expressed its concerns with extending the period between ILRTs for Indian Point, Unit 3 (IP3). *See* New York State Comments on Indian Point 3 Proposed License Amendment Regarding Extending the Containment Type A Leak Rate Testing Frequency to 15 Years (February 2015) (ML15055A512). Nonetheless, the NRC approved Entergy's prior request to increase the period between ILRTs from once per 10 years to once per 15 years. *See* Letter from Douglas Pickett, Office of Nuclear Reactor Regulation, to Vice President of Operations, Entergy (March 13, 2015) (ML15028A308).

presenting instead a generic analysis. Furthermore, the LAR does not include any environmental analysis of the proposed amendment.

Entergy's LAR for IP2 was published in the Federal Register on March 17, 2015. *See* 80 Fed. Reg. 13,902 (March 17, 2015). NRC Staff, based upon its review of analysis presented in Entergy's LAR, "propose[d] to determine that the [LAR] involves no significant hazards consideration" under 10 C.F.R. § 50.92. 80 Fed. Reg. at 13,906. The State, concerned that Entergy was proposing to roll back a significant safety inspection without adequate consideration of plant-specific conditions or any evaluations of potential environmental impacts, timely filed the NYS Petition on May 18, 2015. The NYS Petition includes two Contentions, which are supported by detailed and specific bases as well as supporting evidence. *See* NYS Petition, at 5-23. Contention NYS-1 alleges that:

> Entergy's Request to Amend the Indian Point Unit 2 Operating License and Technical Specification Should Be Denied Because It Involves a Significant Safety and Environmental Hazard, Fails to Demonstrate That It Complies with 10 C.F.R. §§ 50.40 and 50.92 or 10 C.F.R 50, Appendix J, and Fails to Demonstrate That It Will Provide Reasonable Assurance of Adequate Protection for the Public Health and Safety as Required by Section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232[a]) if the Proposed Amendment to the Operating License Is Approved.

NYS Petition, at 5. Contention NYS-2 alleges that:

> Entergy's Request to Amend the Indian Point Unit 2 Operating License and Technical Specifications Should Be Denied Because Entergy Has Not Submitted an Environmental Report as Required By 10 C.F.R §§ 51.53 and It Has Not Undergone the Required NRC Staff Environmental Review Pursuant to 10 C.F.R § 51.101 and, Despite Entergy's Claim to the Contrary, the Proposed Amendment Is Not Categorically Exempt from That Review Under 10 C.F.R. § 51.22(c)(9).

NYS Petition, at 20.

LEGAL STANDARDS

I. Contention Admissibility

Section 189 of the Atomic Energy Act (AEA) provides that, in any proceeding under the AEA "for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239 (a) (1) (A). To gain party status in an NRC adjudicatory proceeding, a petitioner must have standing and submit at least one admissible contention. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station, LBP-06-22, 64 N.R.C. 229, 234 n. 6 (2006). The State's standing is not contested. Entergy Answer, at 1-2; NRC Staff Answer, at 4. Accordingly, the only issue is whether the State has proffered an admissible contention.

Under 10 C.F.R. § 2.309(f), contentions are admissible if they:

> (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including reference to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.

Entergy Nuclear Operations, Inc. (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP 08-13, 68 N.R.C. 43, 60-61 (July 31, 2008). Requirements 3 through 6, as set forth in 10 C.F.R. § 2.309(f)(1)(iii) to (vi), are at issue

here.[3] The NRC's "contention rules require reasonably specific factual and legal allegations at the outset to assure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to the opposing parties of the issues they will need to defend against." *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 309 (March 26, 2010) (internal quotation marks and citations omitted). "The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 N.R.C. 116, 120 (1994). Accordingly, a contention that raises legitimate issues should not be rejected based on an intervenor's failure to comply with "pleading 'niceties'" or use of "imperfect phraseology." *Id.* The contention admissibility rule must be "reasonably applied" and the Commission's rules of procedure "are not to be applied in an 'overly formalistic' manner[.]" *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 206 (1993).

"Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits." *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP 08-13, 68 N.R.C. 43, 63 (July 31, 2008); *see Sierra Club v. USNRC*, 862 F.2d 222, 226 (9th Cir. 1988) ("In passing on the admissibility of a contention . . . it is not the function of a licensing board to reach the merits of [the] contention." [internal quotations and

[3] Entergy's Answer contends that the NYS Petition fails to meet the requirements of 10 C.F.R. § 2.309 (f)(1)(iii)-(vi). Entergy Answer, at 14-38. NRC Staff's Answer focuses on the purported failure of the NYS Petition to raise a genuine issue of material fact as required by section 2.309 (f)(1)(vi). Accordingly, neither party contests the State's compliance with section 2.309 (f) (1) (i) or (ii). Accordingly, those provisions will not be briefed or discussed here.

citation omitted]).[4] An intervenor is not required "to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention." Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). The Commission has said:

> At the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in formal evidentiary form, nor be as strong as that necessary to withstand a summary disposition motion. What is required is 'a minimal showing that material facts are in dispute, thereby demonstrating that an "inquiry in depth" is appropriate.'

Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 51 (1994), quoting 54 Fed. Reg. at 33,170. Indeed, "the contention pleader is entitled to at least the same benefit of construction as a party opposing a summary judgment motion. . . . [The] pleading must be viewed in the light most favorable to accepting it. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 N.R.C. 397, 411 (1991), *appeal denied* CLI-91-12, 34 N.R.C. 149 (1991). Moreover,

> if a petitioner, through reference to the application itself, as well as through expert opinion, a document or documents, a fact-based argument, or some combination of all three, provides support for an otherwise admissible contention, sufficient to show a genuine dispute on a material issue of fact or law and reasonably indicating that further inquiry is appropriate, it should be admitted.

[4] NRC precedent on this is clear and voluminous. *See, e.g., Louisiana Energy Services, L.P.*, CLI-04-35, 60 N.R.C. 619, 623 (2004) (finding Intervenors are not asked to prove their case at the contention stage, but simply to provide sufficient alleged factual or legal bases to support the contention); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1654 (1982) (finding that a licensing board should not address the merits of a contention when determining its admissibility); *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 N.R.C. 585, 596-97 (2005) (finding that determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits, and that a petitioner does not have to prove its contention at the admissibility stage); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 N.R.C. 546, 551 n.5 (1983) (All that is required for a contention to be acceptable for litigation is that it be specific and have a basis; whether or not the contention is true is left to litigation on the merits in the licensing proceeding).

Luminant Generation Co., LLC. (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17. 70 N.R.C. 311, 329 (2009).

II. Substantive Standards

A. Contention NYS-1

Under 10 C.F.R § 50.92, "[i]n determining whether an amendment to a license . . . will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses . . . to the extent applicable and appropriate." Under section 182(a) of the Atomic Energy Act (AEA), 42 U.S.C. § 2232(a), a license application must include sufficient information to show that the issuance of the amendment "will provide adequate protection to the health and safety of the public." Under 10 C.F.R. § 50.40(a) and (c), the Commission, in order to grant a license application, must consider whether: (1) "technical specifications . . . provide reasonable assurance that . . . the health and safety of the public will not be endangered"; and (2) the issuance of the license "to the applicant will not, in the opinion of the Commission, be inimical to the common defense and security or to the health and safety of the public."

An integrated leak rate test (ILRT), also known as a Type A leakage rate test, is a comprehensive leakage rate test of the containment structure, which measures the integrated leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate containment. An ILRT monitors for any leakage through the containment liner or other structural element due to corrosion or cracking. The scope and frequency of Type A, Type B, and Type C leakage rate tests are governed by 10 C.F.R. 50, Appendix J. Entergy claims that Option B of Appendix J dictates that the frequency of Type A leakage tests should be based on "plant-specific performance data" and "on consideration of the operating history of the component and the resulting risk from its failure." Attachment 1 to NL-14-182, at 2 (citing 10 C.F.R. 50 Appendix J, NEI 94-01 Revision 2A, and Regulatory Guide

1.163). Notably, the Type B and Type C leakage tests relate to containment penetrations, valves, and other discrete fittings and do not test the overall integrity of the containment liner itself. *See* Attachment 1 to NL-14-128, at 6-9.

B. Contention NYS-2

The National Environmental Policy Act (NEPA) requires federal agencies to prepare "a detailed statement . . . on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(1)(C)(i). At a minimum, if any agency is going to allow a licensee to engage in activities with environmental impacts without the agency first issuing a detailed environmental impact statement, the agency must do an environmental analysis and issue a "finding of no significant impact" (FONSI). 40 C.F.R. § 1501.4 (regulations of President's Council on Environmental Quality).

NRC regulations seek to incorporate various NEPA requirements. *See* 10 C.F.R. Part 51, Subpart A. In general, a licensing or regulatory action undertaken by NRC requires the preparation of an environmental impact statement (EIS) under section 51.20(b) or an environmental assessment under section 51.21, unless the action is subject to a categorical exclusion under section 51.22(c) or (d). Under section 51.101(a), if a proposed licensing or regulatory action requires an environmental impact statement or environmental assessment, the Commission may take "[n]o action" on the proposal "which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives" until the EIS is complete or a FONSI is made. However, 10 C.F.R. § 51.22 (b) provides that "[e]xcept in special circumstances, as determined by the Commission upon its own initiative or upon request of any interested person, an environmental assessment or an environmental impact statement is not required for any action within a category of actions included in the list of categorical exclusions

set out in paragraph (c) of this section." Section 51.22 (c) (9) includes a categorical exclusion for

> the issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes an inspection or a surveillance requirement; provided that:
>
> (i) The amendment or exemption involves no significant hazards consideration;
>
> (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and
>
> (iii) There is no significant increase in individual or cumulative occupational radiation exposure.

ARGUMENT

I. Contention NYS-1 Meets the Requirements of 10 C.F.R. § 2.309 (f) and Is Admissible

A. The Issue Raised by Contention NYS-1 Is within the Scope of This Proceeding and Is Material to the Findings the NRC Must Make to Grant the License Amendment Request, as Required by 10 C.F.R. § 2.309(f)(1)(iii) and (iv)

Contention NYS-1 alleges that Entergy's license amendment request does not comply with section 182(a) of the AEA or 10 C.F.R. §§ 50.40 and 50.92 or 10 C.F.R. 50, Appendix J. NYS Petition, at 5-20. These statutory and regulatory provisions set forth findings that the NRC must make in order to grant Entergy's LAR. Accordingly, whether the LAR meets these standards is clearly an issue within the scope of this proceeding and material to the findings that NRC must make to grant the LAR.

Entergy contends that the bases and supporting evidence underlying Contention NYS-1 relating to severe accident mitigation alternatives (SAMA) analysis and elevated seismic risks are outside the scope of this proceeding. Entergy's Answer, at 3-4, 29-35. However, both of these issues support Contention NYS-1 and are well within the scope of this proceeding. First,

the State identified sections of the LAR that relied on the SAMA analysis, and identified the specific limitations of that analysis. NYS Petition, at 19-20 & 19 n. 6. The fact that some of the SAMA deficiencies were considered in the context of NEPA in an ASLB decision currently under review by the Commission in the separate Indian Point relicensing proceeding does not preclude the State from raising SAMA deficiencies here. Second, the elevated seismic risks are relevant both to the likelihood that a seismic-induced accident will occur, and to the possibility that the already weakened and degraded IP2 containment will fail entirely during an unexpectedly large earthquake. *Id.* at 10, 15-16. In fact, the PRA prepared by Entergy's contractor considers seismic risks as relevant to the risk assessment of the LAR, but fails to address the new seismic data. *See* Attachment 3 to NL-14-182, at 5-26 to 5-31.

B. The State Has Provided a Concise Statement of the Alleged Facts and Sufficient Information Supporting Contention NYS-1 to Show a Genuine Dispute on a Material Issue of Law or Fact, as Required by 10 C.F.R. § 2.309(f)(1)(v) and (vi)

Although Entergy and NRC Staff correctly observe that the State has not yet submitted an expert opinion to support its Petition, the State's statement of facts supporting Contention NYS-1 – including specific references to a variety of supporting documents – is sufficient at this stage in the proceeding to warrant a hearing. *See Luminant Generation Co., LLC.* (Comanche Peak Nuclear Power Plant, Units 3 and 4), 70 N.R.C. at 329. The State has presented a variety of specific bases and supporting evidence underlying its contention, including (1) historical occurrences that have damaged the containment liner, (2) an Atomic Energy Commission (AEC) recommendation that the frequency of leak rate tests should be *increased*, (3) reports from visual inspections of the liner showing significant signs of degradation attributed to the historical degradation events, (4) NRC Staff's observation that past ILRT results indicate that the leakage rate will surpass applicable acceptance criteria by the time of the next inspection, (5) evidence that the risk of seismic events at IP2 is greater than was expected when it was first licensed, and

(6) specific shortcomings in the SAMA analysis used to evaluate the risk posed by the reduction in ILRT frequency at IP2. NYS Petition, at 5-20. Taken together, these facts support the State's overarching contention that Entergy has not adequately considered the plant-specific history of the IP2 containment liner, and that Entergy has not submitted sufficient evidence for the Commission to conclude that there is a "reasonable assurance that . . . the health and safety of the public will not be endangered" in the LAR is granted. *See id*. At this stage in the proceeding, nothing more is required from the State.

Entergy and NRC Staff contend that the historical degradation events described by the State are not material to the LAR, because corrective actions were taken at the time of each event and each event, by itself, did not result in the failure of the IP2 containment. Entergy Answer, at 18-24; NRC Staff Answer, at 17. However, the State is not contesting the adequacy of the historical handling of these events, but rather is arguing that – considering the conceded importance of plant-specific operating experience to the LAR – these events make the IP2 containment a poor candidate for relaxed inspection requirements. Each of the events described in the NYS Petition directly affected the IP2 containment liner. Entergy and NRC Staff do not and cannot dispute that each of the degradation events occurred. Entergy and NRC Staff's opposition to this aspect of the NYS Petition essentially ignores the fact that historical events are relevant to present and future operating conditions. Indeed, NRC Staff states that "any significant corrosion or degradation that was observed in the past would have been remediated and/or deemed acceptable[.]" NRC Staff Answer, at 14. However, corrosion and degradation are not static instances that can be "remediated" or "deemed acceptable" and thereafter ignored – they are ongoing processes that may increasingly affect plant operations as the facility operates out to 60 years. Indeed, recent inspections confirm that historical events have observable effects

long into the future. *See* NYS Petition, at 17-18 (noting that 2002 inspection revealed liner corrosion attributed to 1980 containment flooding). To the extent that Entergy and NRC Staff argue that the historical events have not affected the current integrity of the IP2 containment liner, that goes to the merits of the State's contention.

The State's position that these events warrant increased attention to the containment liner integrity is supported by the recommendation of AEC Staff at the time of the 1973 liner damage that the liner should receive increased attention throughout the life of the plant. *See* NYS Petition, at 14. NRC Staff makes no attempt to reconcile the recommendation of its predecessor that the containment liner should be subject to increased inspection frequency with its current position that Contention NYS-1 does not raise a material issue of fact. Entergy rejects the AEC recommendation, on the grounds that "NRC's and industry's understanding of containment-related phenomena and integrated leakage rate testing has increased substantially as a result of substantially as a result of subsequent technical studies and four decades of operating experience." Entergy Answer, at 22. However, this conclusion is not supported by the LAR, which utterly failed to consider the possible impact of the historical degradation events at IP2 on present or future containment liner integrity.

Entergy and NRC Staff also reject the State's claim that the historical trend of ILRT results indicates that the IP2 containment is on pace to fail to meet the acceptance criteria during its next test in 2016. Entergy Answer, at 26-29; NRC Staff Answer, at 16. NRC Staff's litigation position is undercut by its own prior statement that "the historical trend indicates that consistently, for all five historical ILRTs, the 'As found Leakage' is on a continuous trend towards eclipsing the IP2 [Technical Specification] 5.5.14.d.1 leakage rate acceptance criteria of $\leq 0.75\ L_a$ (i.e., 0.075 percent containment weight per day)." NRC Staff, Request for Additional

Information 4, at 3 (April 28, 2015) (ML15103A259) (quoted in NYS Petition, at 17). Moreover, although Entergy and NRC Staff attempt to discredit the State's argument on the grounds that the acceptance criteria of 0.75 L_a represents the "as left" acceptance criteria (as opposed to the "as found" acceptance criteria), they concede that IP2 would not be permitted to restart following an ILRT until the observed leakage rate was brought below 0.75 L_a. Entergy Brief, at 28; NRC Staff, at 16. Whatever the 0.75 L_a acceptance criteria is called, the result if it is exceeded is that IP2 remains offline. Accordingly, the evidence that past ILRT results suggest that the 0.75 L_a threshold will be exceeded during the next scheduled ILRT in 2016 supports the State's contention that an LAR delaying the next ILRT until 2021 is inappropriate. To the extent that Entergy now seeks to rely on its June 8, 2015 response to NRC Staff's RAI to establish that the historical ILRT trend is not a problem, this represents a dispute on the merits of the State's contention.

Entergy is also wrong to suggest that Contention NYS-1 should be rejected because it is based solely on an RAI. Entergy Answer, at 26-27. An intervenor may rely "on a staff letter to an applicant which requests additional information [RAIs] based on a regulatory guide citation" as "a starting point" for an admissible contention, so long as the intevenor also "explain[s] how the alleged inadequacies support its contention and provide[s] additional information in support[.]" *Louisiana Energy Services L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 N.R.C. 332, 338-339 (1991); *see Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 N.R.C. 328, 336 (1999). The NRC Staff RAI cited by the State is just one basis for Contention NYS-1, used to support the State's position that reduced inspection of the degraded IP2 containment liner is inappropriate.

Entergy and NRC Staff fault the State for failing to contest the PRA prepared by Entergy's contractor. Entergy Answer, at 2-3; NRC Staff Answer, at 15-18. To the contrary, the State has identified multiple deficiencies in the PRA, including (1) its apparent joint evaluation of IP2 and IP3 more than a year before the LAR was submitted, (2) its failure to discuss or consider plant-specific historic degradation events at IP2 and the related recommendation of AEC Staff to conduct more frequent inspections throughout the life of the plant, (3) its failure to consider updated seismic hazards, and (4) its reliance on a deficient SAMA. NYS Petition, at 7, 10, 19-20. The attempts by Entergy and NRC Staff to rebut these arguments on a point-by-point basis goes to the merits of Contention NYS-1, not its admissibility. Additionally, the existence of an industry-prepared PRA should not prevent a proposed intervenor from seeking a hearing on legitimate safety concerns regarding a license amendment request.

Entergy and NRC Staff argue that the State's concerns regarding elevated seismic hazards are immaterial to the LAR, because NRC Staff determined that the plant was safe to continue operating under its current licensing basis notwithstanding the increased seismic hazards. Entergy Answer, at 29-30; NRC Staff, at 18. However, the State is not challenging the current licensing basis of IP2, which requires the next ILRT be conducted in 2016. Rather, the State is challenging a request to *amend* that licensing basis in order to *relax* an existing safety inspection. *See* 10 C.F.R. § 54.3 (current licensing basis includes "technical specifications"). Entergy and NRC Staff cannot contest that Indian Point's current seismic hazard spectra exceeds the original seismic spectra developed in the 1970s; Entergy's and NRC Staff's own data and chart, presented in the NYS Petition, confirm this fact. *See* NYS Petition, at 16. The State contends that reducing the frequency of ILRTs at IP2 is not appropriate, in part because an increased risk of seismic activity may translate to an increased risk of an accident, in which case

the integrity of the IP2 containment will be essential to preventing the exposure of the State's citizens and environment to radiation. NYS Petition, at 10, 15-16.

Entergy and NRC Staff object to the State's position that savings of cost and plant outage time are not valid reasons for reducing the frequency of ILRT inspections. Entergy Answer, at 35-36; NRC Staff Answer, at 22. The NYS Petition quotes the LAR's statement that "[t]he performance of fewer ILRTs would result in significant savings in radiation exposure to personnel, cost, and critical path time during future refueling outages." NYS Petition, at 10 (Attachment 1 to NL-14-128, at 3). NRC Staff suggests that "Entergy made this statement to explain the *reasons* why it is seeking to extend the ILRT interval frequency, rather than as a basis for finding the LAR acceptable." NRC Staff Answer, at 22. Entergy contends that "[n]owhere in the LAR does Entergy cite reduced costs or outage times as justification for the requested [LAR.]" Entergy Answer, at 36. The State is not clear on the difference, if any, between a "reason," a "basis," or a "justification" for a license amendment, as those terms are used by Entergy and NRC Staff. Additionally, Entergy's position appears to be that the discussion of reduced costs and outage time is completely superfluous to the LAR, which raises the question of why that information was included. In any case, if Entergy intends to expose millions of the State's citizens to an increased risk of radiation exposure by reducing an important safety inspection, as the State has alleged, Entergy should be required to proffer a sufficient reason, basis, and justification for taking such an action.

The fact that NRC Staff rejected a similar argument in connection with the extension of the ILRT inspection frequency of IP3 is of no moment. The State merely offered comments on that license amendment request, and did not seek to intervene or request a hearing. *See* New York State Comments on Indian Point 3 Proposed License Amendment Regarding Extending the

Containment Type A Leak Rate Testing Frequency to 15 Years (February 2015) (ML15055A512). In the instant proceeding, the State has met its burden to establish the need for a hearing on whether Entergy improperly is seeking to rely on cost savings and reduced outage time to justify the LAR.

Entergy also claims that the State has overstated the importance of ILRTs and ignored other inspection techniques that would be unaffected by the LAR. Entergy Answer, at 16-17. However, the State's contention relates primarily to concerns with the integrity of the IP2 containment liner, which is the component that has been most directly affected by historical degradation events. NYS Petition, at 12-15. Entergy's own submissions establish that the Type B and C local leak rate tests (LLRTs) do not test of the overall integrity of the containment liner. *See* Attachment 1 to NL-14-128, at 6-9 (cited in NYS Petition, at 12). Additionally, visual inspections may detect signs of wear, but Entergy has failed to provide any evidence that visual inspections are sufficient to assess the overall integrity of the containment liner during accident conditions. Entergy Answer, at 11-13, 16-17.

Entergy also seeks to rely on the existence of a "weld channel pressurization system" to rebut the State's proposed Contention NYS-1. Entergy Answer, at 3, 7. However, Entergy failed to refer to the existence of a weld channel pressurization system in support of its LAR. Entergy's discussion of the weld channel pressurization system's function in its Answer is based on a 2002 safety evaluation conducted by NRC Staff on Entergy's request for a one-time extension of the ILRT frequency from 10 to 15 years. *Id.* The 2002 license amendment was not challenged by the State, and is not the subject of this proceeding. Moreover, the failure to include a description of the weld channel pressurization system in the instant LAR illustrates the State's point that the analysis set forth in the LAR and PRA are generic and not specific to IP2.

NYS Petition, at 7. To the extent that Entergy seeks to show that the concerns raised by the State will be addressed by the weld channel pressurization system, that argument goes to the merits of Contention NYS-1.

C. Contention NYS-1 Is Not Barred By 10 C.F.R. § 50.58 (b) (6)

Entergy and NRC Staff argue that Contention NYS-1 is inadmissible because it seeks to challenge the Staff's proposed finding that the LAR poses no significant hazards consideration. Entergy Answer, at 31-33; NRC Staff Answer, at 19-21. Indeed, 10 C.F.R. § 50.58 (b) (6) provides that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination." However, the Commission – when it adopted this provision – was careful to note that

> there is no intrinsic safety significance to the 'no significant hazards consideration' standard. Neither as a notice standard nor as a standard about when a hearing may be held does it have a substantive safety significance. Whether or not an action requires prior notice or a prior hearing, no license and no amendment may be issued unless the Commission concludes that it provides reasonable assurance that the public health and safety will not be endangered . . . .

"Final Procedures and Standards on No Significant Hazards Considerations," 51 Fed. Reg. 7,744, 7,746 (March 6, 1986).

Entergy and NRC Staff's argument proves too much: it cannot be that a Staff proposal or declaration that a requested amendment to an operating license involves no significant hazards consideration precludes or terminates any hearing right under 42 U.S.C. § 2239. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 N.R.C. 1, 6 n. 3 (1986) ("a 'no significant hazards consideration' finding is a procedural device to

determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur."). The State is not precluded from raising its substantive safety concerns, as set forth in Contention NYS-1, notwithstanding the NRC Staff's proposed finding of no significant hazards consideration.

Additionally, because there is only a proposed determination of no significant hazards consideration, *see* 80 Fed. Reg. at 13,906, the State's argument with respect to the no significant hazard consideration is relevant to whether the NRC Staff's proposed determination should become final. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 N.R.C. 85, 90 (1990). Should the NRC Staff issue a final determination of no significant hazards consideration, the State's argument on this point will be relevant to whether the Commission should exercise its discretion to review the determination. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Plant) CLI-01-07, 53 N.R.C. 113 (2001). Finally, the State's argument with respect to the finding of no significant hazards is but one aspect of Contention NYS-1, which also refers to various statutory and regulatory standards that are clearly within the Board's authority to review. Accordingly, 10 C.F.R. § 50.58 (b) (6) does not require dismissal of Contention NYS-1.

II. Contention NYS-2 Meets the Requirements of 10 C.F.R. § 2.309 (f) and Is Admissible

The State's Contention NYS-2 alleges that the NRC cannot grant the LAR because Entergy has failed to submit an environmental report as required by 10 C.F.R. § 51.53 and the LAR has not undergone the environmental review required by 10 C.F.R. § 51.101. *See* NYS Petition, at 20. Additionally, the State contends that the LAR is not categorically exempt from environmental review under 10 C.F.R. § 51.22(c)(9). *Id.*

Entergy and NRC Staff argue that Contention NYS-2 constitutes an impermissible challenge to a no significant hazards determination, and is therefore barred by 10 C.F.R. § 50.58(b)(6). Entergy Answer, at 37; NRC Staff Answer, at 24-25. However, at this point there has been no final Staff finding of no significant hazards consideration, and the State's argument is relevant to whether the Commission should ultimately make such a final determination. Furthermore, the determination that the LAR is subject to a categorical exclusion from environmental review requires more than an intermediate Staff determination that the application involves no significant hazards consideration – it also requires a consideration, under 10 C.F.R. § 51.22 (b), of whether "special circumstances" warrant an environmental assessment or an environmental impact statement. Indeed, "10 C.F.R. § 51.22(b) specifically bestows upon any interested person the right to challenge the use of a categorical exclusion by presenting special circumstances." *See Pa'ina Hawaii, LLC*, LBP-06-04, 63 N.R.C. 99, 108-109 (2006). Additionally, when the Commission proposed the categorical exclusion currently set forth in 10 C.F.R. § 51.22(c)(9), it made clear that:

> Before using a categorical exclusion for a proposed action, it should be considered whether there may be any special (e.g. unique, unusual or controversial) circumstances arising from or related to that proposed action that may result in the potential for a significant effect to the human environment. If such special circumstances are, or are likely to be present, the NRC would then prepare an EA and, if necessary, an EIS. If special circumstances are not present, then the categorical exclusion may be applied and the NRC will satisfy its NEPA obligation for that proposed action.

"Categorical Exclusions from Environmental Review," 73 Fed. Reg. 59,540, 59,541 (Oct. 9, 2008). The various historical degradation events at IP2 as well as the reactor's location in the most densely populated part of the country, where any release of radiation could impact millions of people, constitute just such "special circumstances." NYS Petition, at 3, 21-23

Additionally, extending 10 C.F.R. § 50.58(b)(6) to determinations regarding the need for an environmental review is inappropriate. The reason that a finding of no significant hazard considerations may not be challenged is that "the finding is a procedural device whose only purpose is to determine the timing of the hearing (before or after issuance of the amendment)." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 N.R.C. 85, 90 (1990), citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 N.R.C. 1, 6 n.3 (1986), *reversed in part on other grounds*, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 799 F.2d 1268 (9th Cir. 1986). If the determination that a proposed amendment is subject to the categorical exclusion of 10 C.F.R. § 51.22(c)(9) is also unreviewable, the "no significant hazards consideration" becomes more than a procedural decision relating to the timing of a hearing – it becomes an unassailable substantive conclusion that Industry and NRC Staff can employ to avoid environmental review of proposed actions.

NRC Staff also contends that because a categorical exclusion exists for amendments that pose no significant hazards consideration, a sufficient environmental review has already been conducted. NRC Staff Answer, at 25-26. However, a contention may challenge the appropriateness of the invocation of a categorical exclusion to the National Environmental Policy Act (NEPA) set forth in NRC regulations, and such a contention does not constitute an impermissible challenge to the regulation itself. *Pa'ina Hawaii, LLC*, 63 N.R.C. at 108-112 & 108 n 36; *see id.* at 109 (admitting intervenor's contention alleging, in part, that "the NRC 'cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment.'"). Accordingly, the State

may challenge the appropriateness of applying the categorical exclusion set forth in section 51.22(c)(9) to IP2.

CONCLUSION

A nuclear power plant's containment liner and building form the last barrier to prevent the release to the environment of the fission products generated in case of a core damage accident or the release of radiation from primary or secondary side components. Therefore, an assurance of the containment leak tightness during the course of a core damage accident or radiation release is critical to plant safety. The control of the containment leak tightness is principally carried out by the containment leakage rate test program. The objective of this program is to guarantee that throughout a nuclear power plant's operation, the containment leakage rate holds well below the radiation exposure limits. A key element in this program is the containment integrated leakage rate test.

In order to save money and time, Entergy now seeks to delay the integrated leakage rate test for Indian Point Unit 2 from March 2016 until 2021. The Indian Point Unit 2 containment liner presents a unique, site-specific case in that it has been subjected to significant damage and degradation over the past 40 years. The State also has identified a number of additional deficiencies in Entergy's operating license amendment application and accompanying accident analysis. The release of radiation from Indian Point Unit 2 would have significant and destabilizing impact on the public health and environment in the New York City metropolitan area. Entergy's requested amendment to the operating license will weaken the current license protections to the State, its citizens, and its environment. The amendment application represents a back sliding from the current license conditions to the detriment of the State of New York. The State has adequately presented two contentions in opposition to the proposed amendment.

Accordingly, the State respectfully requests that the Board admit the State's proposed contentions NYS-1 and NYS-2, and set the matter down for a hearing.

Respectfully submitted,

Signed (electronically) by

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