UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-247-LA
	)	
(Indian Point Nuclear Generating, Unit 2)	)	

NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S DENIAL OF ITS PETITION TO INTERVENE AND REQUEST FOR HEARING (LBP-15-26)

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November 16, 2015

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INTRODUCTION

On October 20, 2015, the State of New York ("New York") filed a "Notice of Appeal" and supporting Brief,[1] in which it seeks Commission review, pursuant to 10 CFR § 2.311, of the Atomic Safety and Licensing Board's ("Board") decision (LBP-15-26)[2] denying its petition to intervene and a request for hearing[3] on a license amendment request ("LAR") submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") for Indian Point Nuclear Generating Unit 2 ("Indian Point Unit 2" or "IP2").[4] The LAR would modify IP2 Technical Specification ("TS")

[1] "State of New York Notice of Appeal of LBP-15-26" (Oct. 20, 2015); "State of New York Brief Supporting Appeal Pursuant to 10 C.F.R. § 2.311 of Atomic Safety and Licensing Board Decision LBP-15-26 Denying New York's Petition to Intervene and Request for Hearing" (Oct. 20, 2015) ("NYS Brief").

[2] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2), "Memorandum and Order (Denying New York's Petition to Intervene)," LBP-15-26, 82 NRC __ (Sept. 25, 2015) (slip op.).

[3] "State of New York Petition to Intervene and Request for Hearing" (May 18, 2015) ("Petition").

[4] The current license for IP2 authorizes operation until September 28, 2013. In April 2007, Entergy submitted a timely application for renewal of the IP2 operating license, which is currently under NRC consideration; as a result, IP2 continues to operate under timely renewal in accordance with 10 C.F.R. § 2.109(b).

5.5.14, to allow extension of the ten-year frequency of the plant's Type A or Integrated Leak Rate Test ("ILRT") to 15 years on a permanent basis.[5]

In LBP-15-26, the Board denied New York's Petition, finding that New York's proposed contentions failed to satisfy the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).[6] Those contentions had asserted (1) that Entergy's LAR ignores plant-specific circumstances and events that have weakened and damaged key containment components, as well as recent updates regarding elevated seismic hazards at the Indian Point site; and (2) that Entergy failed to conduct an environmental review as required by 10 C.F.R. § 51.22(c)(9)(i), in that the LAR allegedly presents a significant hazards consideration.

On appeal, New York argues that the Board erred "by imposing an unduly stringent standard for the admission of the State's contentions and improperly evaluating the merits of the State's contentions at the contention admissibility stage,"[7] and that "[t]he Board erred in weighing the State's evidence and evaluating the merits of its contentions."[8] For the reasons set forth below, the Staff respectfully submits that these and all of New York's other arguments are without merit, and that the Board correctly denied New York's Petition for failing to meet the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

BACKGROUND

Indian Point Unit 2 is located at the Indian Point Energy Center ("IPEC"), situated on the east bank of the Hudson River in Buchanan, NY, approximately 24 miles north of the northern

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[5] Letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-14-128, "Proposed License Amendment Regarding Extending the Containment Type A Leak Rate Testing Frequency to 15 years" (Dec. 9, 2014), at 1 ("LAR") (ADAMS Accession No. ML14353A015). Entergy enclosed three attachments with its LAR: (1) "Analysis of Proposed Technical Specification Changes Regarding 15 Year Containment ILRT" ("Attachment 1"); (2) "Marked Up Technical Specifications Pages for Proposed Changes Regarding 15 Year Containment ILRT" ("Attachment 2"); and (3) "Risk Impact of Extending the ILRT Interval Associated with the Proposed Technical Specification Changes" ("Attachment 3"). *See id.*

[6] LBP-15-26, slip op. at 1, 8, and 10-21.

[7] NYS Brief at 1.

[8] *Id.* at 2.

boundary of New York City. IP2 is a pressurized water reactor ("PWR") supplied by Westinghouse Electric Corp., and is authorized to operate at 3216 megawatts thermal (MWt), which corresponds to a turbine generator output of approximately 1080 MW electric (MWe).

In accordance with its current license, IP2 is required to complete an ILRT (Type A test) in 10-year intervals.[9] The last IP2 ILRT was completed in April 2006; the next ILRT is currently scheduled to be conducted during the refueling outage scheduled for March 2016. In its LAR, Entergy proposed a change to TS 5.5.14 to allow an extension of the ten-year frequency of the Type A test to 15 years on a permanent basis.[10] The proposed extension of the ILRT frequency interval would revise the due date for the next scheduled ILRT to March 2021, and would allow future ILRTs to be performed at 15-year intervals (assuming acceptable performance history).[11]

On March 17, 2015, the NRC published a notice of opportunity to request a hearing on the LAR.[12] The notice included a proposed no significant hazards consideration ("NSHC") determination, and required that requests for hearing be filed by May 18, 2015.[13] On May 18, 2015, New York filed its Petition, in which it addressed its standing to intervene and presented two proposed contentions challenging Entergy's LAR. Entergy and the Staff filed answers opposing New York's Petition, on the grounds that its proposed contentions failed to satisfy the contention admissibility standards in 10 C.F.R. § 2.309(f)(1);[14] New York filed a combined reply

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[9] *See* 10 C.F.R. Part 50, Appendix J, § III.D.

[10] *See* LAR, Attachment 1, at page 2 of 19. Entergy submitted a license amendment request in 2001, which the NRC approved in August 2002, extending IP2's first ILRT interval from 10 to 15 years. *Id.* The NRC has also granted Entergy's separate request to extend the ILRT interval frequency for Indian Point Unit 3 from 10 to 15 years, by license amendment issued in March 2015.

[11] LAR, Attachment 1, at 3.

[12] "Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations," 80 Fed. Reg. 13,902, 13905 (Mar. 17, 2015).

[13] *Id.* at 13,905-06.

[14] *See* (1) "NRC Staff's Answer to 'State of New York Petition to Intervene and Request for Hearing'" (June 12, 2015) ("Staff Answer"); and (2) "Entergy's Answer Opposing State of New York's Petition to Intervene and Request for Hearing'" (June 12, 2015) ("Entergy's Answer").

to those Answers on June 19, 2015.[15] On July 30, 2015, the Board held oral argument on New York's Petition,[16] and on September 25, 2015, the Board issued its decision in LBP-15-26, denying New York's Petition for failing to set forth an admissible contention.

DISCUSSION

I. Applicable Legal Standards Governing Intervention

A. Standing Requirements

The Commission's regulations in 10 C.F.R. § 2.309 require that a petitioner seeking leave to intervene must demonstrate its standing to intervene and must proffer at least one admissible contention before it can be admitted as a party to a licensing proceeding. Generally, in order to establish standing to intervene, a petitioner must show it has an interest that may be adversely affected by the proceeding.[17] Where a State seeks to intervene in a "proceeding [that] pertains to a production or utilization facility . . . located within the boundaries of the State," it is not required to provide any "further demonstration of standing."[18] Accordingly, the Board properly found that New York had standing to intervene in this proceeding.[19]

B. Contention Admissibility Standards

In addition to demonstrating standing, a contention must also meet the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Under § 2.309(f)(1), an admissible contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted. . .
>
> (ii) Provide a brief explanation of the basis for the contention;

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[15] "State of New York Reply in Support of Petition to Intervene and Request for Hearing" (June 19, 2015) ("Reply").

[16] *See* "Notice and Order (Scheduling and Providing Instructions for Oral Argument)" (July 6, 2015; Transcript ("Tr.") at 19-145.

[17] *See* 10 C.F.R. §§ 2.309(a) and (d) (requirements for standing).

[18] 10 C.F.R. § 2.309(h)(1)-(2).

[19] LBP-15-26, slip op. at 8.

> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief . . . .

10 C.F.R. § 2.309(f)(1).

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[20] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing" as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.[21] The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are "strict by design."[22] The failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention;[23] further,

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[20] Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[21] *Id*.

[22] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

[23] *Private Fuel Storage, L.L.C.* (Independent Irradiated fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

attempting to satisfy these requirements by "[m]ere 'notice pleading' does not suffice."[24]

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.[25] While a Board may view a petitioner's supporting information in a light favorable to the petitioner, if a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions or draw inferences that favor the petitioner, nor may the Board supply the information that a contention is lacking.[26] Additionally, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.[27] The Board is not expected to sift through attached material and documents in search of factual support.[28] Therefore, the Commission "discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be 'comprehensive, concise, and self-contained.'"[29]

Further, pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as delineated by the Commission's

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[24] *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

[25] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[26] *See Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553-54 (2009); *Arizona Pub. Serv. Co*. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI 91-12, 34 NRC 149, 155 (1991).

[27] *See Fansteel,* CLI-03-13, 58 NRC at 204-05.

[28] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

[29] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 139 n.41 (2012) (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 219 (2011)).

hearing notice.[30] Thus, a contention that challenges a license amendment must confine itself to "health, safety or environmental issues fairly raised by [the license amendment]."[31] The adequacy of the Staff's review of the application cannot be challenged.[32]

In addition, pursuant to 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not material to findings the NRC must make to support the action involved in the proceeding. The proponent of a proposed contention in a licensing proceeding "must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application."[33] In other words, the issue raised "must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief."[34] Moreover, the scope of NRC proceedings is limited to the matters specified in the notice of hearing.[35] Here, the *Federal Register* notice stated that the LAR "would revise Technical Specification 5.5.14, "Containment Leakage Rate Testing Program," to extend the frequency of the Containment Integrated Leak Rate Test or Type A Test from once every 10 years to once every 15 years on a permanent basis."[36] Thus, any claims by a petitioner that do not relate to the proposed changes to the license are outside the scope of this proceeding.

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[30] *See Public Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

[31] *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

[32] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 n.56 (2010); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009).

[33] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

[34] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), *reconsid. granted in part on other grounds,* LBP-98-10, 47 NRC 288 (1998). *See also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989) (Final rule).

[35] *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n. 6 (1979) (citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976)); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Unit 3), LBP-08-9, 67 NRC 421, 437 (2008), *aff'd,* CLI-08-17, 68 NRC 231, 240 (2008).

[36] 80 Fed. Reg. at 13,905.

Finally, challenges to NRC regulations are prohibited in an adjudicatory proceeding, unless (1) a petition for waiver of the rules in the proceeding has been filed,[37] (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that application of the rule would not serve the purposes for which the rule was adopted, and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.[38]

II. Regulatory Overview: Integrated Leakage Rate Testing

The Commission's regulations at 10 C.F.R. § 50.54(o) require that the "[p]rimary reactor containments for water cooled power reactors . . . shall be subject to the requirements set forth in Appendix J to [10 C.F.R. Part 50]." In turn, 10 C.F.R. Part 50, Appendix J, "Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors," contains two options: "Option A – Prescriptive Requirements," and "Option B – Performance-Based Requirements," either of which can be chosen by a licensee for meeting the requirements of Appendix J. As pertinent here, pursuant to a license amendment issued in April 1997, IP2 voluntarily adopted and has been implementing Option B for meeting the requirements of 10 C.F.R. Part 50, Appendix J.

Option B of 10 C.F.R. Part 50, Appendix J, specifies performance-based requirements and criteria for preoperational and subsequent periodic leakage-rate testing. The testing requirements for Appendix J, Option B, ensure that (a) leakage through containments or systems and components penetrating containments does not exceed allowable leakage rates specified in the technical specifications or associated bases; and (b) the integrity of the containment structure is maintained during its service life.

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[37] 10 C.F.R. § 2.335(a). *See also Vermont Yankee Nuclear Power Corp.& AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000) (petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings); 10 C.F.R. § 2.309(f)(1)(iii) (contention must be within the scope the proceeding to be admissible).

[38] 10 C.F.R. § 2.335(a).

These requirements are met by the performance of three types of tests: (1) Type A tests that measure the containment system overall integrated leakage rate conducted under conditions representing design basis loss-of-coolant accident containment peak pressure; (2) Type B pneumatic tests that detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries such as penetrations; and (3) Type C pneumatic tests that measure containment isolation valve leakage rates. Appendix J, Section III, describes the performance-based leakage-test requirements for the tests. For Type A tests, Section III states:

> Type A tests to measure the containment system overall integrated leakage rate must be conducted under conditions representing design basis loss-of-coolant accident containment peak pressure. A Type A test must be conducted (1) after the containment system has been completed and is ready for operation and (2) at a periodic interval based on the historical performance of the overall containment system as a barrier to fission product releases to reduce the risk from reactor accidents. A general visual inspection of the accessible interior and exterior surfaces of the containment system for structural deterioration which may affect the containment leak-tight integrity must be conducted prior to each test, and at a periodic interval between tests based on the performance of the containment system. The leakage rate must not exceed the allowable leakage rate (La) with margin, as specified in the Technical Specifications. The test results must be compared with previous results to examine the performance history of the overall containment system to limit leakage.

The NRC has issued regulatory guidance regarding the conduct of ILRTs under Appendix J, Option B, as set forth in NRC Regulatory Guide (RG) 1.163.[39] This Regulatory Guide endorses, with certain exemptions, Nuclear Energy Institute (NEI) Topical Report (TR)

[39] Regulatory Guide (RG) 1.163, "Performance-Based Containment Leak-Rate Testing Program" (Sep. 1995) (ADAMS Accession No. ML003740058). Current TS 5.5.14 for IP2, "Containment Leakage Rate Testing Program," incorporates this guidance, stating that "[a] program shall establish the leakage rate testing of the containment as required by 10 C.F.R. 50.54(o) and 10 C.F.R. Part 50, Appendix J, Option B, as modified by approved exemptions. This program shall be in accordance with the guidelines contained in Regulatory Guide 1.163, 'Performance-Based Containment Leak Test Program,' dated September, 1995." The proposed TS revision would eliminate the reference to RG 1.163, and replace it with a reference to NEI-94-01, Revision 2A (Oct. 2008). *See* LAR, Attachment 2, "Marked Up Technical Specifications Pages for Proposed Changes Regarding 15 Year Containment ILRT."

94-01, Revision 0.[40] Option B of 10 C.F.R. Part 50, Appendix J, in concert with RG 1.163 and NEI TR 94-01, Rev. 0, allows licensees with a satisfactory ILRT performance history (*i.e.,* two consecutive, successful Type A tests) to reduce the test frequency for the Type A containment ILRT from three tests in 10 years to one test in 10 years.[41] This relaxation was based on an NRC risk assessment contained in NUREG-1493,[42] and the Electric Power Research Institute (EPRI) Technical Report (TR) 104285,[43] both of which showed that the risk increase associated with extending the ILRT surveillance interval was very small.[44]

In addition, guidance for extending Type A ILRT surveillance intervals beyond ten years is provided in NEI 94-01, Revision 2-A.[45] Specifically, Section 9.2.3.1 ("General Requirements for ILRT Interval Extensions Beyond Ten Years") of NEI-94-01, Rev. 2-A, states that plant-specific confirmatory analyses are required when extending the Type A ILRT interval beyond ten years. Section 9.2.3.4 ("Plant-Specific Confirmatory Analyses") further states that the assessment should be performed using the approach and methodology described in EPRI TR-1009325, Rev. 2-A.[46] The analysis is to be performed by the licensee and retained in the plant documentation and records as part of the basis for extending the ILRT interval. In its June 2008 SE,[47] the NRC Staff found the methodology in NEI 94-01, Rev. 2, and EPRI

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[40] Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Rev. 0, "Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J" (July 1995) (ADAMS Accession No. ML11327A025).

[41] Final Safety Evaluation for NEI TR 94-01, Rev. 2 and EPRI Report No. 1009325 (June 2008) ("June 2008 SE") (ADAMS Accession No. ML081140105), at 2.

[42] NUREG-1493, "Performance-Based Containment Leak-Test Program, Final Report" (Sept. 1995).

[43] Electric Power Research Institute (EPRI), "A Risk Impact Assessment of Revised Containment Leak Rate Testing Intervals," Report No. 104285 (August 1994).

[44] June 2008 SE, at 2.

[45] NEI 94-01, Rev. 2-A, Industry Guideline for Implementing Performance-Based Option of 10 CFR Part 50, Appendix J (Oct. 2008) (ADAMS Accession No. ML100620847). The designation "2-A" signifies that Revision 2 of the NEI guidance, set forth in this document, was approved by the NRC Staff.

[46] EPRI Technical Report (TR) 1009325, Rev. 2-A, "Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals" (ADAMS Accession No. ML14024A045).

[47] *See* n.41, *supra.*

TR-1009325, Rev. 2 acceptable for referencing by licensees proposing to amend their TS to permanently extend the ILRT interval to 15 years, provided certain conditions, recited in Section 4.2 of the SE for EPRI TR-1009235, Rev. 2, are satisfied.[48]

The above-referenced guidance was adopted in Entergy's LAR. As discussed *supra* at 8, IP2 has been implementing Option B of 10 C.F.R. Part 50, Appendix J, since 1997. Indian Point Unit 2 TS 5.5.14 reflects this approach. The LAR would revise current IP2 TS 5.5.14 by replacing the reference to RG 1.163 with a reference to NEI TR 94-01, Rev. 2-A, as the implementation document applied by Entergy in the IP2 performance-based leakage testing program, in accordance with Option B of 10 C.F.R. Part 50, Appendix J.[49] As the Board noted, Entergy seeks no modification to the frequency of Type B or Type C testing, or to the frequency of containment visual inspections.[50]

III. The Board Correctly Held that New York's Contentions Are Inadmissible

As discussed below, the Licensing Board correctly found that Contentions NYS-1 and NYS-2 failed to meet the Commission's contention admissibility requirements. New York's appeal from the Board's decision should be denied.[51]

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[48] *See generally* June 2008 SE. Consistent with NRC policy on approving topical reports for use in referencing in licensing applications, the industry typically resubmits a topical report with the suffix "-A" denoting that the document has been approved by the NRC.

[49] LAR, Attachment 1, at 3. *See* n. 39, *supra*.

[50] LBP-15-26, slip op. at 6.

[51] It is well established that the Commission gives deference to Board decisions on contention admissibility and will not overturn a Board decision absent an abuse of discretion or error of law. *See, e.g., Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-15-20, 82 NRC __ (Oct. 1, 2015), slip op. at 14.

A. Contention NYS-1 is Inadmissible

Proposed Contention NYS-1 states as follows:

> 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.[52]

In LBP-15-26, the Board reviewed each of the bases submitted by New York in support of the contention, observing as follows:

> First, New York alleges that granting the LAR will threaten public safety in light of (1) the "specific history of structural and corrosive damage" to the containment; and (2) the containment's "recent inspections that revealed significant corrosion and other wear." New York Petition at 7-8. Second, New York asserts that granting the LAR will jeopardize public safety because recent Type A leak tests indicate that the containment liner is trending toward exceeding the leakage acceptance criteria by 2016, i.e., five years before the next Type A test would be performed if the LAR were granted. *See id*. at 8, 16-17. Third, the State argues that granting the LAR "poses a significant hazards consideration under 10 C.F.R. § 50.92(c)." *Id.* at 8. Finally, the State argues that the LAR is defective because it (1) improperly fails to address new, relevant seismic data; (2) improperly relies on a risk assessment that was based on the Surry reactor in rural Virginia, which has a population that is considerably less than the densely populated urban area where Indian Point Unit 2 is located; and (3) improperly relies on an allegedly flawed 2009 Severe Accident Mitigation Alternatives (SAMA) analysis. *See id*. at 15,19-20.[53]

The Board then analyzed each of those bases, and then correctly held that New York had not satisfied the contention admissibility standards of 10 C.F.R. § 2.309(f)(1).[54]

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[52] Petition at 5. Contention NYS-1 is, in essence, a safety contention. To the extent that New York raised environmental issues, these arguments are addressed below regarding Contention NYS-2.

[53] LBP-15-26, slip op. at 10.

[54] *Id.* at 11-16.

1. Plant-Specific Events and Inspection Results.

In its Petition, New York asserted that the IP2 containment liner "has been subjected to a variety of unusual 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."[55] New York asserted that "Entergy's license amendment application fails to mention, let alone consider, these plant-specific events, presenting instead a generic analysis."[56] New York expanded upon these assertions in Contention NYS-1, asserting that "[d]uring its construction and 42 years of operation, the IP2 containment liner has been subjected to a series of damaging incidents, making it ill-suited for the relaxed monitoring proposed by Entergy."[57] New York then asserted that "Entergy has failed to consider the plant-specific history of the IP2 containment liner," despite Entergy's recognition that Option B of Appendix J requires 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."[58]

Similarly, New York asserted that Entergy's evaluation of the risk posed by reducing the ILRT inspection frequency "fails to consider the specific history of structural and corrosive damage to the IP2 containment liner."[59] New York pointed to damage to the containment liner during construction (liner plate buckling in 1968, and a feedwater line break resulting in liner deformation in 1973);[60] corrosion that resulted from a 1980 flooding event;[61] liner degradation observed during visual inspections of the containment liner in 2000, 2008, 2012, and 2014

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[55] Petition at 2.

[56] *Id.*

[57] *Id.* at 5-6 (¶ 2).

[58] *Id*. at 6 (¶ 2), *quoting* LAR, Attachment 1, at 2. New York repeats these assertions in its Brief on appeal. *See* NYS Brief at 19.

[59] *Id.* at 7 (¶ 5), *citing* "Risk Assessment for Indian Point Regarding the ILRT (Type A) Permanent Extension Request, Revision 0, Attachment 3 to NL-14-128 (October 2013), at 1-4 to 7-2.

[60] *Id.* at 7 (¶ 6), and 13-14 (¶ 15-16).

[61] *Id.* at 8 (¶ 7), and 15 (¶ 18).

(which New York observed, was reported in Entergy's LAR, in Attachments 1 and/or 2).[62] Also, New York claimed that the results of IP2 containment ILRTs conducted in 1979, 1984, 1987, 1991, and 2006 "indicate that the integrity of the IP2 liner has steadily declined between 1979 and 2006, and is on pace to not meet the applicable acceptance criteria by 2016."[63]

The Board correctly found that New York's recitation of these historical events was "factually and legally flawed," and that "New York's argument is an improper attempt to graft a 'historical event' criterion onto the 'performance criteria' specified in Appendix J, Option B."[64] The Board held that this attempt to impose a requirement in addition to the requirements established by the regulations was barred by 10 C.F.R. § 2.235(a), in that New York had not filed a petition for waiver of the rule, which was necessary for its contention to be admitted.[65] Further, the Board observed that the Commission was aware of containment degradation issues when it adopted its Appendix J, Option B performance-based testing regulations and other visual inspection requirements, and that the Commission had not imposed any "'historical event' restriction on reactors electing to comply with Appendix J through performance-based testing."[66] Accordingly, the Board held that New York's argument must be rejected, for "(1) failing to raise a genuine dispute on a material issue with the LAR, *see* 10 C.F.R. § 2.309(f)(1)(vi); and (2) raising an impermissible challenge to a Commission regulation and, thus, falling outside the scope of the proceeding. *See id.* § 2.309(f)(1)(iii)."

On appeal, New York argues, first, that the Board erred in holding that New York's reliance on various historic degradation events and recent inspections constituted an

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[62] *Id*. at 8 (¶ 7), and 17-18 (¶¶ 20-21).

[63] *Id*. at 16-17 (¶ 20).

[64] LBP-15-26, slip op. at 11.

[65] *Id., citing NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 315 & n.88 (2012).

[66] *Id.* at 11-12.

impermissible attempt to impose new requirements beyond those imposed in Appendix J.[67] Significantly, however, New York fails to point to any legal requirement – either in the regulations, the Statement of Consideration, Commission case law, or any other source – which would support its view that a licensee must address historic events in adopting the Appendix J performance-based testing requirements.[68] Lacking legal support for its view, New York asserts only that "the State's argument was a natural extension of the requirements of 10 C.F.R. Part 50, Appendix J, Option B."[69]

New York's argument fails to demonstrate that the Board erred in rejecting its view of the regulation and in concluding that New York was attempting to impose additional requirements that had no basis in the regulation. Further, New York fails to address the Board's observation that the Commission was aware of containment degradation issues when it adopted the regulations in Appendix J, Option B, and omitted any requirement that such matters must be addressed by a licensee in adopting the performance-based testing requirements in Appendix J.[70] New York also faults the Board for finding that the Atomic Energy Commission ("AEC") staff's recommendations in 1974 (for "more frequent inspections and closer monitoring") were never adopted by the agency and were superseded by subsequent regulatory developments that allowed reducing the frequency of Type A tests,[71] but it provides no reason to believe that the Board erred in its assessment of this matter, nor does it offer any basis for reconciling its claims with the extensive set of regulatory requirements that have been adopted since those recommendations were made in 1974. In sum, New York's argument that the Board erred in rejecting its view of the regulations lacks merit and should be rejected.

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[67] NYS Brief at 19.

[68] *See generally, id.* at 17-27.

[69] *Id.* at 19; emphasis added.

[70] LBP-15-26, slip op. at 11-12.

[71] NYS Brief at 20-21; *see* LBP-15-26, slip op. at n.26.

Second, New York argues that the Board "adopted an unduly restrictive view of Contention NYS-1, mischaracterizing it "as asserting that 'the reduced frequency of Type A testing . . . poses a significant health and safety hazard to the public.'"[72] According to New York, the Board failed to recognize that the contention alleged that the LAR fails to satisfy Section 182(a) of the Atomic Energy Act, 42 U.S.C. 2232(a), and the requirements of 10 C.F.R. §§ 50.40, 50.92 and Part 50, Appendix J.[73] These assertions are without merit. The Board's statement, recited by New York, merely summarized the thrust of the contention; the Board did not limit its evaluation of the contention in the manner suggested by New York, and it did not reject the contention for failing to raise a "significant" issue. To the contrary, the Board determined, as a matter of law, that the contention sought to impose a requirement that was beyond those imposed by regulation. Accordingly, New York's assertion that the Board failed to properly characterize its contention must be rejected.

Third, New York asserts that its Petition had "far exceeded the State's 'minimal' obligation to show 'a fact or facts' necessary to warrant a hearing on the merits," and that the Board "imposed an unwarranted and erroneous evidentiary standard on the State at the contention admissibility stage."[74] New York claims that the Board "improperly weighed the evidence in concluding that each historic degradation event . . . had been 'remediated' and had no lasting impacts on the containment liner,"[75] and "improperly reached the merits of the State's contention."[76] These assertions are without merit: The Board did not make a decision on the merits; rather, it found that the documents cited by New York contradicted its assertions. Thus, the Board stated:

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[72] *Id.* at 18.

[73] *Id*.

[74] *Id*.

[75] *Id*. at 20, *citing* LBP-15-26, slip op. at 12.

[76] *Id*.

> The documents on which New York relies actually contradict its assertion. Specifically, they indicate that (1) containment damage at Unit 2 has been remediated; (2) subsequent testing and inspection have proven acceptable; and (3) visual observations confirm no worsening of conditions. This aspect of Contention NYS-1 is thus inadmissible for failure to show that a genuine dispute exists with the LAR. See 10 C.F.R. § 2.309(f)(1)(vi).[77]

The Board's examination of New York's documents, and its determination to reject New York's claims for failing to show a genuine dispute with the LAR, was fully in accord with the Commission's contention admissibility requirements, as it is well established that materials provided in support of a contention are subject to the Board's scrutiny, both for what they do and do not show.[78] The Board properly examined the documents, finding that they did not establish a genuine dispute with the LAR.[79] Nowhere did the Board reach a determination on the merits, notwithstanding New York's claims to the contrary.

Moreover, the Board's determination that New York had failed to establish a genuine dispute of material fact with the LAR is supported by an examination of the LAR. While New York recited numerous issues regarding liner degradation and corrosion and previous ILRT results at IP2, these matters were addressed in Entergy's LAR – and New York showed no reason to believe that Entergy failed to adequately consider those matters in its LAR. In fact, Section 4.3.1 of LAR Attachment 1 ("ILRT Test Results") presents a summary of the ILRTs that were conducted in 1979, 1984, 1987, 1991, and 2006.[80] Similarly, Section 4.4 of LAR Attachment 1 ("Code Inspections") provides a summary of the visual inspections of the containment liner that were conducted to date as part of the plant's Containment In-service

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[77] LBP-15-26, slip op. at 12; footnotes omitted.

[78] *See, e.g., PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 24 (2007); *USEC, Inc*. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds,* CLI-96-7, 43 NRC 235 (1996).

[79] *See, e.g.,* LBP-15-26, slip op. at 12 n.25.

[80] LAR, Attachment 1 ("Analysis of Proposed Technical Specification Changes Regarding 15 Year Containment ILRT"), at pages 5-6 of 19.

Inspection (ISI) Plan, to implement the requirements of ASME Code, Section XI, Subsection IWE and IWL.[81] Section 4.4.1 of Attachment 1 provides a summary of the IWE examinations that have been conducted,[82] while Section 4.4.2 provides a summary of the IWL examinations that have been conducted.[83] In accordance with the ASME Code and the plant's ISI Plan requirements, those visual inspections included all accessible areas of the IP2 containment liner – including areas in which corrosion or degradation had been observed in the past. Further, any significant corrosion or degradation that was observed in the past would have to be remediated and/or deemed acceptable, and documented in plant records; and all subsequent inspections would have to be evaluated based in part on an observed change from that condition. Entergy's LAR demonstrates its satisfaction of these requirements.[84] New York's Petition failed to address Entergy's corrective actions or the LAR's discussion of these matters. Accordingly, Contention NYS-1 failed to establish a genuine dispute of material fact with the LAR.

2. Trend in ILRT Results.

In its Petition, New York cited an NRC Staff Request for Additional Information ("RAI") regarding a perceived trend in the plant's ILRT results, and asserted that the results of IP2 ILRTs conducted in 1979, 1984, 1987, 1991, and 2006 "indicate that the integrity of the IP2 liner has steadily declined between 1979 and 2006, and is on pace to not meet the applicable

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[81] *Id.* at 10-13.

[82] *Id*. at 11-12.

[83] *Id.* at 12-13.

[84] Thus, in LAR Attachment 1, Entergy acknowledged that (a) surface corrosion, flaking and peeling of the liner coating, and water seepage had been observed in past IWE inspections, and (b) concrete weathering, cracking and spalling had been observed in the past IWL inspections; as Entergy further noted, corrective actions were taken to address these matters, as necessary. *Id.* at 11-12 and 13. Further, Entergy observed that its recent IWE examinations (in 2008 and 2012) identified only minor recordable conditions, most of which had not changed from previous inspections, and it concluded that none of the observed conditions resulted in "any structural degradation that adversely affects the ability of the containment to perform its design function of maintaining integrity during accident conditions." *Id.* at 12. Similarly, Entergy observed that its most recent IWL examinations (in 2005 and 2010) of containment building exterior concrete had identified only minor conditions, all of which were evaluated and found not to present structural concerns. *Id.* at 13.

acceptance criteria by 2016."[85] New York did not dispute that each of those tests produced satisfactory results, with containment leakage shown to be within the acceptance criteria. While New York speculated that a future ILRT may produce unsatisfactory results, its only basis for that assertion was its attempt to predict the future based on a perceived trend in past results.[86] As the Board found, however, New York's conjecture that a trend in past ILRT results suggests that future ILRT results may not be satisfactory, altogether ignored the fact that Type A test results include leaks through Type B and C penetrations in addition to containment liner leaks.[87]

Moreover, while New York asserted that past ILRT results indicate a trend whereby a future ILRT may identify a leakage rate greater than the 75% allowable leakage (L_a) criterion specified in 10 C.F.R. Part 50 Appendix J, the Board correctly found that New York's argument "reflects a fundamental misunderstanding of the acceptance criteria."[88] As the Board explained, the allowable leakage rate criterion for reactor operation, including design basis accidents, is 100% of L_a; in contrast, the 75% criterion cited by New York denotes the maximum leakage rate allowed in order for the plant to restart following the ILRT.[89] Even assuming that New York was correct in stating that past ILRT results show a trend approaching the 75% value, the Board found that New York had presented no reason to believe that a future ILRT will detect a leakage rate approaching the 100% value.[90] Accordingly, the Board correctly concluded that, "to the

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[85] Petition at 16-17 (¶ 20); emphasis added.

[86] The LAR's deterministic analysis discussed the results of previous IP2 ILRTs. *See* LAR, Attachment 1, § 4.3.1 ("ILRT Test Results"), at 5-6. Further, the LAR's probabilistic analysis acknowledged those results and considered the risk of containment failure due to corrosion or other mechanisms (including consideration of more severe and/or non-visible liner corrosion). *See* LAR Attachment 3 ("Risk Impact of Extending the ILRT Interval Associated With the Proposed Technical Specification Changes"), at 4-14 – 4-16.

[87] LBP-15-26, slip op. at 14 & n.29. While New York now quarrels with this determination, it presents nothing to show that the Board erred in finding that New York had made "no effort to rebut Entergy's explanation." *See* NYS Brief at 23.

[88] *Id.* at 13; emphasis added.

[89] *Id.*; *see* 10 C.F.R. Part 50, Appendix J, Option B, § III.A.

[90] LBP-15-26, slip op. at 13 & n.28.

extent that Contention NYS-1 claims that Entergy's LAR must be rejected because the leakage will exceed 0.75 L_a by 2016, it is inadmissible for failing to raise a material issue."[91] There is no basis for New York's claim that this constituted "an inappropriate weighing of the evidence."[92]

3. Entergy's Risk Assessment

In its Petition, New York contended that Entergy's risk assessment (LAR, Attachment 3) was deficient, in part,[93] in that it (a) did not include consideration of the "updated seismic hazard analysis" that Entergy performed for IP2 in response to the NRC's post-Fukushima "Near Term Task Force Report" recommendations (a seismic risk analysis based on that information is to be submitted by June 30, 2017);[94] (b) inappropriately used the Surry reactor, located in a far less densely populated area, as a "benchmark plant";[95] and (c) improperly relied upon a 2009 Severe Accident Mitigation Alternatives (SAMA) analysis that was submitted as part of Entergy's license renewal application.[96] New York provided no expert opinion or affidavit in support of these claims, made no attempt to calculate whether its perceived flaws have any adverse effect on the risk assessment's conclusions, and nowhere alleged or attempted to show that Entergy's risk assessment underestimates the risk posed by the LAR.

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[91] *Id.* at 13, *citing* 10 C.F.R. § 2.309(f)(1)(iv) (the issue raised must be shown to be "material to the findings the NRC must make to support the action"). *See also* 10 C.F.R. § 2.309(f)(1)(vi) (the petition must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact."

[92] NYS Brief at 22.

[93] New York's Petition also claimed that Entergy's risk assessment had improperly included risk information concerning Indian Point Unit 3. *See* Petition at 7 (¶ 5). New York does not raise this issue on appeal.

Similarly, New York's Petition had challenged the Staff's "no significant hazards consideration" ("NSHC") determination, asserting that "the LAR poses a significant hazard consideration under 10 C.F.R. § 50.92(c)." *Id.* at 8-10 (¶ 8). The Board properly rejected these assertions, finding that they did not present a "litigable" issue, and that "the NRC Staff's [NSHC] determination under section 50.92(c) may not be contested." LBP-15-26, slip op. at 14-15. New York does not appeal from that determination in its appeal from the Board's rejection of this contention, but raises NSHC issues solely with regard to Contention NYS-2. *See* NYS Brief at 11 and 27-29. Those arguments are addressed below in the Staff's discussion of Contention NYS-2.

[94] *Id*. at 15-16 (¶ 19).

[95] *Id.* at 19 (¶ 23).

[96] *Id.* at 19-20 (¶ 24).

In LBP-15-26, the Board considered each of New York's assertions, and found that they did not satisfy the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(iv)-(vi).[97] First, with respect to the revised seismic studies, the Board found that New York had not explained the significance of those seismic studies for the ILRT interval extension LAR, and thus did not demonstrate a genuine dispute of material fact as required by § 2.309(f)(1)(vi).[98] On appeal, New York claims that the Board erred in dismissing its seismic hazard claims, asserting that it had pointed to portions of the PRA that consider seismic events, and that "[t]he 'significance' of a PRA purporting to evaluate a risk factor should be self-explanatory."[99] Nowhere, however, does New York point to any expert opinion or facts to support its claim that the revised seismic analyses have any effect on the LAR's proposed extension of the ILRT testing interval for IP2. Accordingly, New York's assertions regarding this matter do not demonstrate a genuine dispute of material fact with the LAR, as required by § 2.309(f)(1)(vi).

Second, with respect to New York's claim that Surry's low population rendered that plant inapposite as a "benchmark plant" for risk assessment purposes, the Board found that the LAR "explicitly accounts for Indian Point's site-specific population"[100] – and in failing to controvert that fact, New York failed to demonstrate a genuine dispute of material fact.[101] On appeal, New York claims that the Board "summarily rejected the State's arguments with respect to . . . reliance on the non-representative Surry, Virginia plant in assessing the risk of the amendment,"[102] but New

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[97] LBP-15-26, slip op. at 15-16.

[98] In addition, it is not disputed that the plant's current seismic design basis was not changed by Entergy's post-Fukushima revised seismic analysis, and it is the current licensing basis that governs any licensing assessments that are performed to support a license amendment request.

[99] NYS Brief at 24.

[100] *See* LBP-15-26, slip op. at 15-16; LAR Attachment 3 at 4-7 – 4-12, and 5-6 – 5-13.

[101] LBP-15-26, slip op. at 16.

[102] NYS Brief at 11.

York is otherwise entirely silent on this point and offers no explanation as to why it believes the Board erred in its treatment of this issue.[103]

Finally, with respect to New York's assertion that Entergy had relied on an allegedly defective 2009 SAMA analysis, the Board found that New York (a) had failed to present any "expert opinions or adequate facts" in support of its assertions, contrary to § 2.309(f)(1)(v); (b) did not show how its contention relates to the SAMA analysis; and (c) did not establish a genuine dispute of material fact, contrary to § 2.309(f)(1)(vi).[104] On appeal, New York claims that the Board's decision "turns the evidentiary standard for an admissible contention . . . on its head – 'expert opinions' or multitudinous supporting facts are simply not required."[105] New York presents no case law in support of this claim,[106] and it fails to observe that its claim contravenes the provisions of 10 C.F.R. § 2.309(f)(1)(v) and (vi) and well-established Commission case law,

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[103] In its Brief, New York presents a lengthy discussion of remarks it made during oral argument, alleging that the IP2 PRA was deficient in that it utilized a liner corrosion analysis that was developed for use at the Calvert Cliffs nuclear plant. *See* NYS Brief at 25-27. According to New York, the Board "prevented the State from developing these arguments by reaching the merits of Contention NYS-1 at the contention admissibility stage." *Id.* at 27. These claims are without merit. First, New York's arguments concerning the Calvert Cliffs analysis were presented, for the first time, during oral argument on its contentions (*see* Tr. at 39-40, 62-63, 71 and 140). No mention was made of the Calvert Cliffs analysis in New York's Petition or even in its Reply to the Staff's and Entergy's Answers. Indeed, New York candidly stated, "That issue isn't specifically addressed in our Petition," claiming that it was not required "to come forward with its entire case at this stage in the proceeding." Tr. at 63. Notwithstanding New York's incorrect view of its pleading obligations, New York's claims were impermissibly late and were properly disregarded by the Board in LBP-15-26. Second, there is no basis for New York's claim that the Board prevented it "from developing these arguments by reaching the merits of Contention NYS-1." To the contrary, as discussed in the text above, the Board properly evaluated the information that New York presented in support of this contention, and properly found that New York had failed to satisfy the contention admissibility standards in 10 C.F.R. § 2.309(f)(1).

[104] LBP-15-26, slip op. at 16.

[105] NYS Brief at 25.

[106] *See id.* In support of this assertion, New York cites a statement in a 1989 Statement of Consideration, which it claims establish that that a petitioner "is required merely 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.'" *Id.* at 25, *citing* Final Rule, "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process,' 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). New York fails to observe, however, that the Statement of Consideration goes on to say that the revised rules did not lessen a petitioner's burden to establish sufficient facts to make out an admissible contention, and that a petitioner must provide "some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists." *Id.* at 33,170.

which require petitioners to provide sufficient facts or expert opinion to demonstrate the existence of a genuine issue of material fact or law with the applicant.[107]

B. Contention NYS-2 Is Inadmissible

In its appeal, New York asserts that the Board improperly rejected Contention NYS-2, claiming that the Board: (1) improperly extended the bar on challenges to the Staff's NSHC determination; and (2) imposed an inappropriately steep and formalistic admissibility standard on the State.[108] Contrary to New York's assertions, and as explained below, the Board did not commit an error of law or abuse its discretion in finding Contention NYS-2 inadmissible. Accordingly, the Board's decision rejecting admission of Contention NYS-2 should be upheld.

1. Legal Standards

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., requires federal agencies, including the NRC, to take a "hard look" at the environmental impacts of their actions.[109] A NEPA review for a license amendment requires an evaluation of only those environmental impacts beyond those evaluated previously which will result from the proposed action.[110] Under 10 C.F.R. Part 51, an environmental impact statement ("EIS") is not automatically required for operating license amendments.[111] Instead, pursuant to 10 C.F.R. § 51.21, the Staff determines whether an EIS or environmental assessment ("EA") is required

[107] In accordance with 10 C.F.R. § 2.309(f)(1)(v), petitioners must state "the alleged facts or expert opinions which support the requestor/petitioner's position . . . and on which the requestor/ petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position." In accordance with § 2.309(f)(1)(vi), petitioners must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of fact or law," together with references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute . . . ."

[108] NYS Brief at 27-29.

[109] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333, 350 (1989).

[110] *Florida Power & Light Co.* (Turkey Point Plant Unit Nos. 3 and 4), LBP-90-16, 31 NRC 509, 536-37 (1990) (citations omitted).

[111] *Id.*, *citing* 10 C.F.R. § 51.20.

for the proposed action, or whether the action is eligible for a categorical exclusion for which no environmental review document is required.[112]

A categorical exclusion is applied to a category of actions that the agency has determined not to have a significant effect, either individually or cumulatively, on the human environment.[113] Under 10 C.F.R. § 51.22(b), except in special circumstances as determined by the Commission, an EA or EIS is not required for any action within a category of actions included in the list of categorical exclusions set out in 10 C.F.R. § 51.22(c). As pertinent here, § 51.22(c)(9) states:

> (9) Issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes a requirement . . . or 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.

2. Contention NYS-2 Impermissibly Challenged the NRC Staff's NSHC Determination.

Contention NYS-2 challenged the applicability of the categorical exclusion in 10 C.F.R. § 51.22(c)(9) on the grounds that it "does not apply, because the LAR involves a significant hazards consideration."[114] In LBP-15-26, the Board correctly found Contention NYS-2 inadmissible because the contention was based solely on the argument that Entergy's LAR involves a significant hazards consideration in derogation of 10 C.F.R. § 51.22(c)(9)(i).[115] As

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[112] *Id., citing* 10 CFR §§ 51.21, 51.22(b), 51.22(c)(9) and (10), and 51.14(a).

[113] 10 C.F.R. § 51.22(a).

[114] *See* Petition at 20-22.

[115] LBP-15-26, slip op. at 18.

the Board noted, New York's contention ignores the "broad and unqualified rule of unreviewability established by section 50.58(b)(6)."[116] Indeed, while the Commission may exercise discretionary review, the Staff's NSHC determination may not be contested by any party. This principle has been recognized and applied by the Commission and Atomic Safety and Licensing Boards in numerous NRC adjudicatory proceedings.[117] Accordingly, inasmuch as the Staff determined that the LAR raises no significant hazards consideration, the Board properly found Contention NYS-2 inadmissible.

On appeal, New York argues that Entergy is essentially using the regulation at § 50.58(b)(6) as "a sword to avoid review of its determination that an environmental review is not required."[118] However, New York fails to note that the categorical exclusion in § 51.22(c)(9), specifically applies when "[t]he amendment or exemption involves no significant hazards consideration."[119] Moreover, a categorical exclusion does not indicate the absence of an environmental review, but rather, that the agency has established a sufficient administrative record to show that the subject actions do not, either individually or cumulatively, have a

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[116] *Id.*

[117] *See, e.g., Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, 61 NRC 359, 361 n.2 (2005); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 NRC 113, 118 (2001); *FirstEnergy Nuclear Operating Co*. (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC 177, 181 n.18 (2013); *FPL Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-08-20, 68 NRC 549, 550-51 (2008); *FPL Energy Point Beach, LLC* (Point Beach Nuclear Plant, Unit 1), LBP-08-19, 68 NRC 545. 546 (2008); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541 (2008); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 32 n.22 (2007); *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 560-61 (2004).

[118] NYS Brief at 27-28. New York also asserts that Entergy has used its own finding of "no significant hazards consideration" to qualify for the categorical exclusion set forth in 10 C.F.R. § 51.22(c)(9) and that this finding "has not been adopted by the NRC Staff." *Id.* Inasmuch as § 50.92 requires the NRC Staff to determine whether a LAR presents a significant hazards consideration as part of its procedural process, licensees routinely include a discussion of the regulation in their applications, for consideration by the Staff under § 50.92—as the Applicant did here. Moreover, contrary to New York's assertion, the Staff has reviewed the licensee's analysis in accordance with 10 C.F.R. § 50.92, and reached a proposed determination that the amendment presents no significant hazards consideration. 80 Fed. Reg. at 13,905-06. It is the Staff's NSHC determination, not Entergy's view of this issue, that renders the categorical exclusion applicable to the LAR pursuant to 10 C.F.R. § 51.22(c)(9).

[119] 10 C.F.R. § 51.22(c)(9)(i).

significant effect on the human environment.[120] Thus, in promulgating the categorical exclusion in § 51.22(c)(9), the NRC generically determined that amendments that involve no significant hazards consideration, and also meet the remaining criteria in § 51.22(c)(9)(ii)-(iii), do not, either individually or cumulatively, have a significant effect on the human environment. New York's argument, in essence, is an impermissible challenge to the Commission's regulation in 10 C.F.R. § 51.22(c)(9) without a waiver.[121] Accordingly, New York has failed to demonstrate that the Board's decision constituted an error of law or abuse of discretion.

Additionally, New York argues that the Board's decision means that a proposed NSHC determination effectively prevents any party from challenging whether the LAR qualifies for the categorical exclusion in § 51.22(c)(9).[122] However, the Board's decision precisely addresses this argument and delineates how a petitioner with supporting facts may seek review of a § 51.22(c)(9) categorical exclusion determination.[123] New York's appeal does not mention the Board's discussion let alone explain how it constituted an error of law or abuse of discretion.

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[120] 10 C.F.R. § 51.22(a). *See also* 40 C.F.R. § 1508.4; *Brodsky v. NRC*, 704 F.3d 113, 119-20 (2nd Cir. 2013). *See* 40 C.F.R. §§ 1507.3(b)(2), 1508.4; *see also* 10 C.F.R. § 51.22(c) (establishing categorical exclusions for various NRC actions).

[121] New York references *Pa'ina Hawaii, LLC* where the licensing board rejected an argument that a challenge to the applicability of categorical exclusion is a challenge to the Commission's regulations because the thrust of the petitioner's contention was that the agency improperly invoked the categorical exclusion by not addressing special circumstances making such an exclusion inapplicable. LBP-06-04, 63 NRC 99, 108 -109 (2006). However, *Pa'ina* is inapplicable here because NYS-2 challenged the applicability of the categorical exclusion in that the LAR involves a significant hazards consideration, and did not allege or show that "special circumstances" are present. *See* Petition at 21. Additionally, as explained below, the Board properly dismissed New York's late-filed argument regarding special circumstances as untimely. *See also* LBP-15-26, slip op. at 20 n.37.

[122] NYS Brief at 28-29.

[123] Specifically, the Board identified two challenges that are available to a petitioner, *i.e.,* "(1) challenging either of the two additional findings made under section 51.22(c)(9)(iii) or (iii) that are necessary for a categorical exclusion determination; and (2) if the requirements of section 51.22(c)(9) are satisfied, by showing the existence of 'special circumstances' pursuant to 10 C.F.R. § 51.22(b) that would justify excepting a proposed license amendment from the categorical exclusion of section 51.22(c)." LBP-15-26 at 19. Contention NYS-2 only challenges Entergy's determination under 10 C.F.R. § 51.22(c)(9)(i); it does not challenge Entergy's determinations under 10 C.F.R. § 51.22(c)(9)(ii) and (iii). Further, as explained below, the Board appropriately dismissed New York's late-filed arguments regarding special circumstances as untimely.

Accordingly, New York's claim that the Board erred in finding Contention NYS-2 inadmissible is without merit, and the Board's ruling in LBP-15-26 should be upheld.

3. The Board Properly Rejected New York's Late-Filed "Special Circumstances" Argument

In its reply brief, New York argued for the first time that the Staff's determination of whether the categorical exclusion in 10 C.F.R. § 51.22(c)(9) applies also requires consideration of "special circumstances" under § 51.22(b).[124] The Board's decision in LBP-15-26 properly rejected New York's argument as untimely. It is well-established that a reply brief cannot introduce new issues or expand the scope of the arguments set forth in the original hearing request.[125] Moreover, as the Board correctly noted, this rule promotes adjudicative efficiency and ensures fairness to the other parties by putting them on sufficient notice of what they must defend against.[126] New York's late-filed claims of "special circumstances" were therefore properly rejected as untimely.

On appeal, New York argues that the Board adopted an unduly technical and formalistic interpretation of NYS-2 because, although its petition does not use the words "special circumstances" or specifically cite to the applicable regulation, the entire petition is "grounded in the theory" that IP2 is an unusual plant and that New York's arguments relating to special circumstances "were a natural extension" of its petition and did not introduce any new arguments that could not have been anticipated by Entergy or the Staff.[127] However, Commission regulations and precedent are clear that contentions must be pled with

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[124] Reply at 19. As the NRC Staff explained during oral argument, this was a new argument that New York had not raised in its initial petition. Tr. at 132.

[125] LBP-15-26, slip op. at 20 (*citing DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC __, __ (Sept. 8, 2015), slip op. at 15; *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-02-14, 69 NRC 580, 588 (2009)).

[126] LBP-15-26, slip op. at 20 (*citing Palisades*, CLI-06-17, 63 NRC at 732); *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004)).

[127] NYS Brief at 29; emphasis added. As discussed above, New York also claimed that its unsupported view of the regulations in Appendix J, Option B, was a "natural extension" of the regulations. *See* discussion *supra* at 15.

particularity, to ensure that the parties and licensing board are on notice of the issues to be litigated.[128] As New York conceded at oral argument, its Petition did not cite § 51.22(b) nor did it assert that "special circumstances" precluded application of a categorical exclusion.[129] Thus, neither the Staff nor Entergy were on notice that New York was challenging the categorical exclusion based on a claim of "special circumstances."

Further, as the Staff noted in its answer opposing New York's Petition, New York attempted to incorporate portions of its bases and supporting evidence for Contention NYS-1 into Contention NYS-2.[130] However, New York provided no explanation as to how these bases or evidence support the admission of Contention NYS-2, let alone how they might relate to an argument regarding special circumstances. The Commission has previously noted that the Board is not expected to sift through attached material and documents in search of factual support for a petition.[131] Moreover, the Commission discourages incorporating pleadings or arguments by reference and expects briefs to be "comprehensive, concise, and self-contained."[132] Thus, to the extent that New York asserts that the Staff and Entergy should have

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[128] 10 C.F.R. § 2.309(f)(1); *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010) (quoting *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 70 NRC 90, 100-01 (2010)). The Commission has also recently stated that petitioners are expected to present "well-defined issues," not issues based on "little more than guesswork. *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC __ (Nov. 9, 2015) (slip op. at 6) (quoting *Crow Butte Resources, Inc*. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009)).

[129] Tr. at 138-39. New York cites to *Sequoyah Fuels* where a licensing board found that identification of a legitimate issue should not be negated because of an intervenor's failure to comply with "pleading 'niceties'" or use of "imperfect phraseology." NYS Brief at 29 (citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116, 120 (1994)). However, *Sequoyah Fuels* is inapplicable here because, in admitting the contention, that licensing board noted that "it is clear, although not emphatically stated," that the intervenor was raising legitimate issues. *Sequoyah Fuels*, LBP-94-8, 39 NRC at 119-20. In contrast, here New York neither used imperfect phraseology nor stated or suggested that it was raising an argument about special circumstances in its Petition. Rather, New York simply never raised the argument at all until it filed its reply brief. *Compare* Petition at 20-23 *with* Reply at 19.

[130] Staff Answer at 27.

[131] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

[132] *Pilgrim*, CLI-12-3, 75 NRC at 139 n.41 (quoting *Vogtle*, CLI-11-8, 74 NRC at 219).

somehow anticipated its subsequent arguments related special circumstances because New York's Petition was grounded in the theory that IP2 is "unusual,"[133] its argument should be rejected.

Finally, even assuming New York's arguments regarding "special circumstances" were timely, the Board correctly found that New York's arguments did not support admission of Contention NYS-2. As the Board pointed out, New York's underlying assertions in NYS-1 regarding the various historical degradation events as well as the reactor's location in a densely populated region fail to raise a genuine dispute of material fact or law with Entergy's LAR.[134] Indeed, all the events New York references as past history of degradation at IP2 have either been corrected or found to not be an issue, and New York provides no support that any of these events are an ongoing problem.

[133] New York cites to a proposed rule to assert that the Commission has made clear that before using a categorical exclusion, "it should be considered whether there may be any special (e.g. unique, unusual or controversial) circumstances arising from or related to the proposed action that may result in the potential for significant effect to the human environment." NYS Brief at 29 (citing a proposed rule, "Categorical Exclusions from Environmental Review," 73 Fed. Reg. 59,540, 59,541 (Oct. 9, 2008)). However, New York fails to note that, in the final rule, the Commission removed the language suggesting that special circumstances include those that are "unique, unusual or controversial" and stated that this determination of whether special circumstances are present is a matter of Staff discretion. *See* Categorical Exclusions From Environmental Review, 75 Fed. Reg. 20,248, 20,250 (Apr. 19, 2010).

[134] LBP-15-26, slip op. at 21.

CONCLUSION

For the reasons discussed above, the NRC Staff respectfully submits that New York has not demonstrated that the Board committed any error or abuse of discretion in finding that Contentions NYS-1 and NYS-2 failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1). Accordingly, New York's appeal from the Board's decision in LBP-15-26 should be denied.

Respectfully submitted,

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Dated at Rockville, Maryland
this 16th day of November, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-247-LA
	)	
(Indian Point Nuclear Generating, Unit 2)	)	

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO THE STATE OF NEW YORK'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S DENIAL OF ITS PETITION TO INTERVENE AND REQUEST FOR HEARING (LBP-15-26)," dated November 16, 2015, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 16th day of November, 2015.

Signed (electronically) by

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