

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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| In the Matter of: |) | |
| |) | Docket No. 50-247-LA |
| ENTERGY NUCLEAR OPERATIONS, INC. |) | ASLBP No. 15-942-06-LA-BD01 |
| (Indian Point Nuclear Generating Station, Unit 2) |) | November 16, 2015 |
| |) | |
| |) | |

ENTERGY’S ANSWER OPPOSING NEW YORK STATE’S APPEAL OF LBP-15-26

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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | ii |
| I. INTRODUCTION | 1 |
| II. STATEMENT OF THE CASE..... | 3 |
| A. Regulatory Background | 3 |
| 1. Applicable NRC Requirements, Including Required Leakage Tests..... | 3 |
| 2. Appendix J Test Program Option B and Related NRC-Approved Guidance | 4 |
| 3. Leakage Rate Test Acceptance Criteria..... | 6 |
| 4. The IP2 Containment Leakage Rate Testing Program | 7 |
| 5. Required Code Inspections of the Reactor Containment..... | 8 |
| B. Procedural History | 9 |
| C. Summary of Board Decision (LBP-15-26)..... | 10 |
| D. Summary of New York’s Appeal | 13 |
| III. STANDARD OF REVIEW | 14 |
| IV. THE COMMISSION SHOULD REJECT NEW YORK’S APPEAL..... | 15 |
| A. Contrary to New York’s Claims, the Board Applied the Correct Legal Standards and Did Not Improperly Evaluate the Merits of the Proposed Contentions | 15 |
| B. New York’s Appeal Fails to Demonstrate That the Board Erred or Abused Its Discretion in Rejecting Contention NYS-1 As Inadmissible Under Section 2.309(f)(1)..... | 17 |
| 1. The Board Did Not Take an “Unduly Restricted View” of Contention NYS-1 | 17 |
| 2. The Board Correctly Found That New York’s Argument Regarding Plant-Specific Degradation Events Is Factually and Legally Flawed..... | 19 |
| 3. The Board Correctly Rejected As Factually Unfounded New York’s Claims Regarding the Nature and Significance of Recent Inspection Results | 21 |

TABLE OF CONTENTS
(continued)

| | Page |
|--|-------------|
| 4. The Board Correctly Rejected As Unsupported and Immaterial New York’s Argument That Recent Type A Tests Indicate That Containment Leakage Likely Will Exceed the Acceptance Criterion | 21 |
| 5. The Board Correctly Rejected New York’s Argument That the LAR Failed to Consider “Updated Seismic Hazards Data” | 23 |
| 6. The Board Appropriately Rejected New York’s Miscellaneous Arguments Related to the Adequacy of the LAR Confirmatory Risk Impact Assessment | 25 |
| C. New York’s Appeal Fails to Demonstrate That the Board Erred or Abused Its Discretion in Rejecting Contention NYS-2 As Inadmissible Under Section 2.309(f)(1) | 27 |
| V. CONCLUSION | 30 |

TABLE OF AUTHORITIES

Pages

U.S. COURT OF APPEALS DECISIONS

Brodsky v. NRC, 704 F.3d 113 (2d Cir. 2013).....28

ADMINISTRATIVE DECISIONS

U.S. Nuclear Regulatory Commission

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station),
CLI-06-24, 64 NRC 111 (2006)12

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant),
CLI-01-7, 53 NRC 113 (2001)12, 28

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3),
CLI-01-24, 54 NRC 349 (2001).....2, 15, 16

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3),
CLI-04-36, 60 NRC 631 (2004).....14

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, & 3),
CLI-99-11, 49 NRC 328 (1999).....16

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant),
CLI-15-22, 82 NRC __ (Nov. 9, 2015) (slip op.)3, 14, 15 17, 20

Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant),
CLI-15-23, 82 NRC __ (Nov. 9, 2015) (slip op.)24, 27

Ga. Inst. of Tech. (Ga. Tech Research Reactor, Atlanta, Ga.),
CLI-95-10, 42 NRC 1 (1995)16

Ga. Inst. of Tech. (Ga. Tech Research Reactor, Atlanta, Ga.),
CLI-95-12, 42 NRC 111 (1995)16

Hydro Res., Inc. (P.O. Box 777, Crownpoint, NM 87313),
CLI-06-1, 63 NRC 1 (2006).....14

NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1),
CLI-12-5, 75 NRC 301 (2012)10

Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant),
CLI-06-17, 63 NRC 727 (2006).....2

TABLE OF AUTHORITIES
(continued)

| | Pages |
|--|---------------|
| <i>PPL Susquehanna, LLC</i> (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-8, 81 NRC __ (Apr. 14, 2015) (slip op.)..... | 14, 15 |
| <i>Private Fuel Storage, L.L.C.</i> (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26 (1998) | 16 |
| <i>Shieldalloy Metallurgical Corp.</i> (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499 (2007)..... | 14 |
| <i>USEC Inc.</i> (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433 (2006)..... | 2 |
| <i>USEC Inc.</i> (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451 (2006) | 17 |
| <u>Atomic Safety and Licensing Board</u> | |
| <i>Calvert Cliffs 3 Nuclear Project, LLC</i> (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720 (2010)..... | 17 |
| <i>Entergy Nuclear Operations, Inc.</i> (Indian Point Nuclear Generating Station, Unit 2), LBP-15-26, 82 NRC __ (Sept. 25, 2015) (slip op.) | <i>passim</i> |
| <i>Entergy Nuclear Operations, Inc.</i> (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43 (2008)..... | 18 |
| <i>Entergy Nuclear Operations, Inc.</i> (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246 (2013) | 26 |
| <i>Ga. Inst. of Tech.</i> (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281 (1995) | 16 |
| <i>Pa'ina Haw., LLC</i> (Materials License Application), LBP-06-4, 63 NRC 99 (2006)). | 29 |
| <i>Private Fuel Storage, L.L.C.</i> (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (2008)..... | 16 |
| <i>Yankee Atomic Elec. Co.</i> (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996) | 17 |

TABLE OF AUTHORITIES
(continued)

Pages

FEDERAL STATUTES

| | |
|---|-----------------------|
| Atomic Energy Act of 1954 (“AEA”), as amended, 42 U.S.C. §§ 2011 to 2297h-13 | 2 |
| National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 to 4370h..... | 2, 12, 14, 26, 28, 29 |

FEDERAL REGULATIONS

| | |
|---|-------------------------------|
| 10 C.F.R. § 2.309(f)(1) | 2, 14, 15, 16, 17, 27 |
| 10 C.F.R. § 2.309(f)(1)(i)..... | 14 |
| 10 C.F.R. § 2.309(f)(1)(ii) | 2, 14 |
| 10 C.F.R. § 2.309(f)(1)(iii) | 14, 16 |
| 10 C.F.R. § 2.309(f)(1)(iv)..... | 12, 14, 24, 18 |
| 10 C.F.R. § 2.309(f)(1)(v)..... | 3, 12, 14, 16, 23, 26 |
| 10 C.F.R. § 2.309(f)(1)(vi)..... | 12, 14, 16, 18, 23, 24, 26 |
| 10 C.F.R. § 2.311(b) | 1 |
| 10 C.F.R. § 2.335 | 3 |
| 10 C.F.R. § 2.335(a)..... | 3, 10, 20 |
| 10 C.F.R. § 2.341(c)(3)..... | 1 |
| 10 C.F.R. Part 50, Appendix J, Option B | 2, 3, 4, 8, 9, 10, 20, 22, 25 |
| 10 C.F.R. § 50.54(o) | 3 |
| 10 C.F.R. § 50.58(b)(6)..... | 11, 12, 27, 28 |
| 10 C.F.R. § 50.90 | 9 |
| 10 C.F.R. § 50.92 | 2 |

TABLE OF AUTHORITIES
(continued)

| | Pages |
|-----------------------------------|---------------|
| 10 C.F.R. § 50.92(c)..... | 9, 11, 12, 28 |
| 10 C.F.R. § 51.22..... | 27, 28 |
| 10 C.F.R. § 51.22(b)..... | 12, 13, 29 |
| 10 C.F.R. § 51.22(c)..... | 13, 14, 29 |
| 10 C.F.R. § 51.22(c)(9)..... | 2, 12, 13, 28 |
| 10 C.F.R. § 51.22(c)(9)(ii)..... | 29 |
| 10 C.F.R. § 51.22(c)(9)(iii)..... | 29 |
| 10 C.F.R. Part 100..... | 4 |
| 40 C.F.R. § 1508.4..... | 28 |

FEDERAL REGISTER

| | |
|--|----------|
| Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 13,902 (Mar. 17, 2015)..... | 10 |
| Final Rule, Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors, 60 Fed. Reg. 49,495 (Sept. 26, 1995) (Apr. 17, 2003)..... | 4, 5, 20 |
| Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989)..... | 24 |

MISCELLANEOUS

| | |
|---|---|
| ANSI/ANS-56.8-2002, “Containment System Leakage Testing Requirements” (Reaffirmed Aug. 9, 2011)..... | 7 |
| Electric Power Research Institute Technical Report 1018243, “Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals: Revision 2-A of 1009325” (Oct. 2008)... | 6 |
| Final Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment | |

TABLE OF AUTHORITIES
(continued)

| | Pages |
|--|--------------|
| No. 232 to Facility Operating License No. DPR-26, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit No. 2, Docket No. 50-247 (Aug. 5, 2002)..... | 3, 4, 6, 22 |
| Final Safety Evaluation by the Office of Nuclear Reactor Regulation, Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Revision 2, “Industry Guideline for Implementing Performance-Based Option of 10 CFR Part 50, Appendix J” and Electric Power Research Institute (EPRI) Report No. 1009325, Revision 2, August 2007, “Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals,” Nuclear Energy Institute Project No. 689 (June 25, 2008)..... | 6 |
| NEI 94-01, Rev. 0, “Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J” (July 1995)..... | 5 |
| NEI 94-01, Rev. 2-A, “Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J,” at 12 (Oct. 2008)..... | 5, 6, 9 |
| NUREG-1493, “Performance-Based Containment Leak-Test Program” (Sept. 1995)..... | 25 |
| Regulatory Guide 1.163, “Performance-Based Containment Leak-Rate Testing Program” (Sept. 1995)..... | 5 |

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ENTERGY’S ANSWER OPPOSING NEW YORK STATE’S APPEAL OF LBP-15-26

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(b) and 2.341(c)(3), Entergy Nuclear Operations, Inc. (“Entergy”) hereby opposes the October 20, 2015 Appeal filed by New York State (“New York” or “the State”) in the captioned proceeding.¹ This proceeding concerns Entergy’s December 9, 2014, license amendment request (“LAR”), which seeks to revise Indian Point Unit 2 (“Unit 2” or “IP2”) Technical Specification 5.5.14, “Containment Leakage Rate Testing Program,” to extend the frequency of the Containment Integrated Leakage Rate Test (“ILRT”) or Type A Test for IP2 from once every 10 years to once every 15 years on a permanent basis.²

New York seeks review of the Atomic Safety and Licensing Board’s (“Board”) Memorandum and Order (LBP-15-26)³ denying its Petition to Intervene and Request for Hearing,

¹ See *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) (“Appeal”) (ADAMS accession no. ML15293A585). Reply briefs are not permitted in support of appeals under 10 C.F.R. § 2.311.

² See 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, Indian Point Unit Number 2, Docket No. 50-247, License No. DPR-26 (Dec. 9, 2014) (“LAR”) (ML14353A015).

³ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2), LBP-15-26, 82 NRC __ (Sept. 25, 2015) (slip op.) (“LBP-15-26”).

as filed on May 18, 2015.⁴ As discussed below, New York proffered two proposed contentions—a safety contention (NYS-1) and an environmental contention (NYS-2)—neither of which was supported by any expert opinion. After reviewing the parties’ briefs and holding oral argument in Rockville, MD, the Board found both contentions inadmissible under 10 C.F.R. § 2.309(f)(1).⁵

The Commission’s “customary practice is to affirm Board rulings on contention admissibility absent an abuse of discretion or error of law.”⁶ New York’s Appeal provides no basis for disturbing the Board’s well-reasoned rejection of its proposed contentions. In short, the Board correctly determined that New York’s supporting arguments or bases for the proposed contentions: (1) improperly challenged NRC regulations; (2) lacked adequate factual or expert opinion support; and (3) failed to raise a genuine dispute with the LAR on a material issue of law or fact.⁷ With respect to NYS-2, the Board also found that New York had untimely raised a new argument in its reply to Entergy’s and the NRC Staff’s Answers to its Petition.⁸

As discussed further below, New York fails to identify any legal error or abuse of discretion in the Board’s decision. Contrary to New York’s claims, that decision rests soundly on a carefully rendered analysis of each of New York’s proffered bases under the well-established and deliberately “strict” contention admissibility criteria of 10 C.F.R. § 2.309(f)(1).⁹ In fact, New

⁴ See *Indian Point*, LBP-15-26, slip op. at 1, 21; *State of New York Petition to Intervene and Request for Hearing* (May 18, 2015) (“Petition”) (ML15138A415). NYS-1 alleged that Entergy’s LAR fails to comply with 10 C.F.R. §§ 50.40 and 50.92 or 10 C.F.R. Part 50, Appendix J, and therefore does not provide reasonable assurance of adequate protection for the public health and safety, as required by the Atomic Energy Act of 1984, as amended (“AEA”). NYS-2 alleged that the proposed license amendment is not categorically exempt from environmental review under 10 C.F.R. § 51.22(c)(9), and that Entergy and the NRC Staff must perform an environmental review to meet the requirements of the National Environmental Policy Act (“NEPA”). Petition at 5, 20.

⁵ See generally LBP-15-26 (slip op.).

⁶ *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 729 (2006) (citing *USEC Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 439-40 (2006)).

⁷ See *Indian Point*, LBP-15-26, slip op. at 12-20

⁸ See *id.* at 18-20.

⁹ *Id.* at 9 (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); *Am. Centrifuge Plant*, CLI-06-09, 63 NRC at 437).

York’s arguments on appeal only confirm the Board’s well-supported conclusions that New York’s proposed contentions improperly challenge NRC regulations, fail to establish a genuine material dispute, and lack any factual or technical support. As the Board noted, New York has attempted “to graft a ‘historical event’ criterion onto the ‘performance criteria’ specified in [10 C.F.R. Part 50] Appendix J, Option B,” in contravention of 10 C.F.R. § 2.335(a).¹⁰ The Board also correctly noted that arguments reflecting only New York counsel’s “belief” rather than alleged facts or expert opinion are insufficient to support the admission of a contention.¹¹ In short, New York’s overarching allegations that the Board imposed an “unduly stringent standard” for contention admissibility and improperly evaluated the merits of its contentions are unfounded.¹² Any blame for New York’s failed intervention attempt lies solely with New York—not the Board.

Accordingly, for the reasons discussed herein and for the reasons stated by the Board, the Commission should deny the Appeal and affirm LBP-15-26 in its entirety.

II. STATEMENT OF THE CASE

A. Regulatory Background

1. Applicable NRC Requirements, Including Required Leakage Tests

To ensure that reactor containments are maintained properly and able to perform their design-basis functions, NRC regulations require that licensees conduct leakage rate testing and inspections of containments and associated pressure-retaining components at periodic intervals.¹³ Under 10 C.F.R. § 50.54(o), primary reactor containments are subject to the leakage testing

¹⁰ *Id.* at 11. Under section 2.335, “[c]hallenges to [the NRC’s] regulatory scheme are not permitted in adjudicatory proceedings absent a waiver.” *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 NRC __ (Nov. 9, 2015) (slip op. at 12). New York did not seek a waiver here. *See* LBP-15-26, slip op. at 11 n.22.

¹¹ LBP-15-26, slip op. at 13 n.28 (citing 10 C.F.R. § 2.309(f)(1)(v)).

¹² Appeal at 17.

¹³ *See* Letter from Patrick D. Milano, NRC, to Michael, R. Kansler, Entergy, Indian Point Nuclear Generating Unit No. 2 – Amendment Re: One-Time Deferral of Containment Integrated Leak Rate Test (TAC No. MB2414), encl. 2, Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 232 to Facility Operating License No. DPR-26, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit No. 2, Docket No. 50-247, at 2 (Aug. 5, 2002) (“2002 IP2 Safety Evaluation”) (ML021860178).

requirements contained in 10 C.F.R. Part 50, Appendix J, “Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors.” Appendix J identifies three types of required tests:¹⁴

(1) Type A or ILRT tests, which measure the containment overall integrated leakage rate;¹⁵
(2) Type B local leakage-rate tests (“LLRTs”), which detect local leaks and measure leakage across pressure-containing or leakage limiting boundaries (other than valves) for containment penetrations; and (3) Type C LLRTs, which measure containment isolation valve leakage.¹⁶ The instant LAR, if approved, would modify only the Type A testing interval.¹⁷ In addition, the frequencies of the general visual inspections discussed below will not change.¹⁸

2. Appendix J Test Program Option B and Related NRC-Approved Guidance

Before, 1995, the NRC required licensees to perform three Type A tests in every 10-year period.¹⁹ In 1995, however, the NRC amended Appendix J to provide a performance-based option, *i.e.*, Option B, for containment leakage testing requirements.²⁰ This performance-based option allows licensees with a satisfactory Type A test performance history (*i.e.*, two consecutive, successful Type A tests) to reduce the test frequency of Type A testing from three tests in ten

¹⁴ See 10 C.F.R. pt. 50, app. J, Option B, secs. III.A. & III.B.

¹⁵ See *id.* sec. III.A. The Type A test or ILRT measures integrated leakage rate from all potential leakage paths, including containment liner welds, valves, fittings, and components that penetrate containment. See 2002 IP2 Safety Evaluation at 2. These tests typically involve pressurizing the containment atmosphere to a specified test pressure for a duration that is sufficient to determine what the containment leakage would be under design-basis accident conditions. See *id.* The acceptance criteria for the Type A test and the Technical Specification leakage limits are conservatively established to ensure that, in the event of a design-basis accident, the dose received by a member of the general public will not exceed the limits specified in 10 C.F.R. Part 100. See *id.*

¹⁶ 10 C.F.R. pt. 50, app. J, Option B, sec. III.B.

¹⁷ As the Board noted, Entergy seeks no change in the frequency of the Type B and C leakage tests, which will continue to be performed at least every five years. LBP-15-26, slip op. at 6 (citing LAR, attach. 1 at 3).

¹⁸ See LBP-15-26, slip op. at 3 (citing LAR, attach. 1 at 10) (noting that “containment visual inspections ... will continue to be conducted on the steel containment about every three and one-third years, and on the concrete containment every five years”).

¹⁹ See Final Rule, Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors, 60 Fed. Reg. 49,495, 49,499 (Sept. 26, 1995) (“1995 Final Rule”).

²⁰ See *id.* at 49,495.

years to one test in ten years.²¹ This reduction in the testing frequency permitted by Option B was based on risk assessments conducted by the NRC and EPRI that showed the risk increase associated with extending the ILRT surveillance interval was very small, given that Type B and C tests identify the vast majority of potential containment leakage paths.²² In fact, the NRC found that Type B and C tests can detect over 97 percent of containment leakages, and “[o]f the 97 percent, virtually all leakages are identified by [Type C testing] of containment isolation valves.”²³

Current IP2 Technical Specification 5.5.14 states that leakage rate testing shall be performed as required by Option B, as modified by approved exemptions, and in accordance with the guidelines contained in NRC Regulatory Guide 1.163.²⁴ Regulatory Guide 1.163 endorses Nuclear Energy Institute (“NEI”) Report 94-01, Revision 0,²⁵ which NEI has since revised several times in response to subsequent developments, including NRC Staff requests for additional information (“RAIs”).²⁶ Revision 2-A of NEI 94-01, issued in October 2008, added guidance for extending Type A ILRT surveillance intervals beyond ten years.

NEI 94-01, Revision 2-A, the revision referenced in the LAR, states that plant-specific “confirmatory analyses” are required when extending the Type A ILRT interval beyond ten years.²⁷ Section 9.2.3.4 of NEI 94-01 states that the assessment should be performed using the

²¹ See LAR, attach. 1 at 2.

²² See 1995 Final Rule, 60 Fed. Reg. at 49,499 (stating that “[t]he fraction of leakages detected only by ILRTs is small, on the order of a few percent,” and that “[r]educing the frequency of ILRT testing from 3 every 10 years to 1 every 10 years leads to a marginal increase in risk”).

²³ *Id.*

²⁴ See LAR, attach. 2; NRC Regulatory Guide 1.163, “Performance-Based Containment Leak-Rate Testing Program” (Sept. 1995) (ML003740058).

²⁵ NEI 94-01, Rev. 0, “Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J” (July 1995) (ML11327A025).

²⁶ NEI submitted NEI 94-01, Revision 1 to the NRC in December 2005, and Revision 2 in August 2007. The NRC Staff approved Revision 2 as a topical report in a safety evaluation issued on June 25, 2008. At the Staff’s request, NEI issued an NRC-approved version as NEI 94-01, Rev. 2-A in October 2008. (The industry typically resubmits a topical report with the suffix “-A” to denote that the document has been approved by the NRC.)

²⁷ NEI 94-01, Rev. 2-A, “Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J,” at 12 (Oct. 2008) (ML100620847).

approach and methodology described in Electric Power Research Institute (“EPRI”) Technical Report (“TR”) 1009325, Revision 2-A, “Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals.”²⁸ 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 a safety evaluation issued on June 25, 2008, the NRC Staff found the methodology in NEI 94-01, Revision 2, and EPRI TR-1009325, Revision 2, to be acceptable for referencing by licensees proposing to amend their licenses to permanently extend the ILRT interval to 15 years, provided that certain conditions set forth in Section 4.2 of the NRC’s safety evaluation are satisfied.²⁹ In its safety evaluation, the Staff noted that Type B and Type C testing ensures that individual penetrations are essentially leak tight, and that aggregate Type B and Type C leakage rates support the leakage tightness of primary containment by minimizing potential leakage paths.³⁰

3. Leakage Rate Test Acceptance Criteria

The acceptance criteria for containment leakage rate tests are typically expressed in terms of the maximum allowable containment leakage rate, L_a , which would occur at the calculated peak containment internal pressure related to the design-basis loss-of-coolant accident (“LOCA”).³¹ Plant Technical Specifications typically specify values for L_a in terms of the allowable weight percent of the containment atmosphere that may leak in 24 hours at the peak containment internal pressure (P_a).³² The acceptance criteria for Type A tests, and the combined Type B and Type C

²⁸ See *id.* at 13; EPRI Technical Report 1018243, “Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals: Revision 2-A of 1009325” (Oct. 2008), *available at* www.epri.com.

²⁹ See Final Safety Evaluation by the Office of Nuclear Reactor Regulation, Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Revision 2, “Industry Guideline for Implementing Performance-Based Option of 10 CFR Part 50, Appendix J” and Electric Power Research Institute (EPRI) Report No. 1009325, Revision 2, August 2007, “Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals,” Nuclear Energy Institute Project No. 689 (June 25, 2008) (ML081140105).

³⁰ See *id.* at 20. See also *id.* at 2 (describing the risk increase associated with extending the ILRT surveillance interval as “very small”).

³¹ See 2002 IP2 Safety Evaluation at 2.

³² See *id.*

tests, are typically specified as multiples of L_a .³³

The IP2 maximum allowable containment leakage rate and leakage test acceptance criteria are specified in the plant Technical Specifications.³⁴ The maximum allowable containment leakage rate (L_a) is 0.1 weight percent per day of the containment steam air atmosphere (at 47 pounds per square inch gauge (psig) and 271 degrees Fahrenheit (°F)).³⁵ The “as-found” ILRT acceptance criterion is $1.0 L_a$, and the “as-left” ILRT acceptance criterion is $0.75 L_a$.³⁶ The five Type A (ILRT) tests performed at IP2 to date all have been successful; *i.e.*, met the “as-found” acceptance criterion of $1.0 L_a$.³⁷

4. The IP2 Containment Leakage Rate Testing Program

By letters dated August 7, 1996 and March 12, 1997, IP2 submitted a Technical Specification change request to implement Appendix J, Option B. The NRC approved that request as Amendment 190 issued on April 10, 1997. With the approval of the amendment, IP2 transitioned to a performance-based 10-year frequency for the Type A tests. On July 13, 2001 Entergy submitted an amendment request to extend the ILRT interval on a one-time basis from ten years to 15 years. The NRC approved that amendment request, as later supplemented, in Amendment 232 to the license issued on August 5, 2002.³⁸ The current proposed extension of the

³³ *See id.*

³⁴ *See* LAR, attach. 2 (Technical Specification 5.5.14).

³⁵ *See id.*

³⁶ *Id.* The “as-found” performance criterion for a Type A test is met if the performance leakage rate is less than $1.0 L_a$. As reflected in ANSI/ANS-56.8-2002, “Containment System Leakage Testing Requirements” (Reaffirmed August 9, 2011), the “as-left” leakage rate essentially refers to the leakage rate following any repairs or adjustments to the barrier being tested. The acceptance criterion for the “as-left” Type A test is set at 75% of the allowed leakage rate (*i.e.*, $0.75 L_a$), which provides a minimum 25% margin to address the possibility of containment leak tightness degradation over time between Type A tests while continuing to maintain less than the maximum allowable containment leakage rate (L_a).

³⁷ *See* LAR, attach. 1, at 5-6 (“Past IP2 ILRT results have confirmed that the containment is acceptable with respect to the design criterion of 0.1% leakage of containment air weight at the design basis [LOCA] pressure (L_a).”).

³⁸ In recent years, the NRC has approved numerous one-time and permanent extensions of the ILRT interval from 10 to 15 years for various plants based on the performance-based NRC regulations and NRC-approved industry guidelines (*i.e.*, topical reports) discussed below. *See* Entergy Answer at 4 n.12 (citing examples).

primary containment ILRT from ten to 15 years, if approved, would mean that the next scheduled ILRT would need to be completed by March 2021 (instead of March 2016).³⁹ Entergy previously conducted periodic ILRTs in 1979, 1984, 1987, 1991, and 2006.⁴⁰

5. Required Code Inspections of the Reactor Containment

10 C.F.R. Part 50, Appendix J, Option B, paragraph III.A requires that, prior to each Type A test and at a periodic interval between tests based on the performance of the containment system, a visual inspection of the accessible interior and exterior surfaces of the containment system be performed to identify structural deterioration that may affect the containment leak-tight integrity.⁴¹ In addition, inspections are performed as part of the Containment Inservice Inspection (“ISI”) Plan to implement the requirements of American Society of Mechanical Engineers Boiler and Pressure Vessel Code (“ASME Code”), Section XI, Subsection IWE and IWL.⁴²

Each 10-year ISI interval is divided into three approximately equal inspection periods.⁴³ A minimum of one inspection of the metal containment liner accessible surface areas, as required by the IWE inspection program, is performed during each inspection period (*i.e.*, approximately once every three and one-third years).⁴⁴ IWL visual examinations of accessible external concrete containment surfaces are to be completed once every five years, resulting in at least two IWL examinations being performed during a 15-year Type A interval.⁴⁵ The proposed LAR does not seek any changes to these inspection frequencies.

³⁹ Since the last ILRT was completed in April 2006, and the next one would be performed in March 2020 based on the current refueling outage schedule (if the LAR is granted), the actual interval would be about 14 years. *See* LAR, attach. 1 at 10.

⁴⁰ *See* LBP-15-26, slip op. at 4 (citing LAR, attach. 1 at 5-6).

⁴¹ *See id.* at 5 (citing 10 C.F.R. Part 50, app. J, Option B, § III.A; LAR, attach. 1 at 10).

⁴² *See id.* (citing LAR, attach. 1 at 10).

⁴³ *See id.* at 6.

⁴⁴ *See id.*

⁴⁵ *See id.*

B. Procedural History

On December 14, 2014, Entergy filed with the NRC an application to amend the IP2 operating license pursuant to 10 C.F.R. § 50.90. The proposed amendment would revise Technical Specification 5.5.14, “Containment Leakage Rate Testing Program,” to extend the frequency of the ILRT from once every 10 years to once every 15 years on a permanent basis.⁴⁶ As noted above, because Entergy conducted the last Type A test in 2006, NRC approval of the LAR would authorize performance of next Type A test in 2021.

Attachment 1 to the LAR contains a detailed technical evaluation of the proposed Technical Specification changes, which are in accordance with 10 C.F.R. Part 50, Appendix J, and the NRC-approved guidance document NEI 94-01, Rev. 2-A, “Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J” (Oct. 2008). Among other things, the LAR evaluation discusses the safety significance of the proposed Technical Specification change in accordance with the criteria of 10 C.F.R. § 50.92 (“Issuance of Amendment”).⁴⁷ Entergy determined that the proposed amendment does not involve a significant hazards consideration under 10 C.F.R. § 50.92(c).⁴⁸ In addition, the application includes a detailed confirmatory risk impact assessment (Attachment 3 to LAR) that evaluates the risk associated with implementing a permanent extension of the ILRT interval from 10 years to 15 years.⁴⁹ That assessment demonstrates that increasing the ILRT interval is not risk significant because it represents only a small change in the IP2 plant-specific risk profile.⁵⁰

The NRC accepted the LAR for docketing, and published a Hearing Notice on March 17,

⁴⁶ See LAR at 1.

⁴⁷ See LAR, attach. 1 at 17-18.

⁴⁸ *Id.* at 18.

⁴⁹ See *id.*, attach. 3. Entergy third-party vendor ERIN Engineering & Research, Inc. prepared the risk impact assessment in accordance with NRC-approved industry guidelines. See *id.* at 1-1.

⁵⁰ See *id.* at 7-2. This conclusion is consistent with the findings of previous NRC and industry studies that the risk impact associated with extending the ILRT interval to one in 15 years is small. See LAR, attach. 1 at 15.

2015.⁵¹ The Hearing Notice included the NRC Staff’s proposed no significant hazards consideration determination and provided interested parties 60 days (*i.e.*, until May 18, 2015) to request a hearing related to the LAR.⁵² In response, New York filed its Petition on May 18, 2015, proffering proposed safety contention NYS-1 and environmental contention NYS-2.

On June 12, 2015, Entergy and the NRC Staff filed answers opposing New York’s Petition,⁵³ to which New York replied on June 19, 2015.⁵⁴ On July 30, 2015, the Board held oral argument regarding the admissibility of New York’s contentions.⁵⁵ On September 25, 2015, the Board issued its admissibility ruling in LBP-15-26, which New York now appeals.

C. Summary of Board Decision (LBP-15-26)

In LBP-15-26, the Board denied New York’s Petition for failure to proffer an admissible contention.⁵⁶ With respect to NYS-1, the Board found, as a legal matter, that New York’s allegations about an unusual “history of structural and corrosive damage” to the IP2 containment structure and liner constitute an improper attempt to graft a “historical event” criterion onto the “performance criteria” specified in 10 C.F.R. Part 50, Appendix J, Option B.⁵⁷ The Board found—and correctly so—that such an argument is barred by 10 C.F.R. § 2.335(a).⁵⁸ As a factual

⁵¹ Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 13,902 (Mar. 17, 2015) (“Hearing Notice”).

⁵² *See id.* at 13,903, 13,905-06.

⁵³ *See* Entergy Answer; *NRC Staff’s Answer to “State of New York Petition to Intervene and Request for Hearing”* (June 12, 2015) (“NRC Staff Answer”).

⁵⁴ *See State of New York Reply in Support of Petition to Intervene and Request for Hearing* (June 19, 2015) (“New York Reply”).

⁵⁵ *See* Licensing Board Notice and Order (Scheduling and Providing Instructions for Oral Argument) (July 6, 2015) (unpublished); Transcript, “Entergy Nuclear Operations, Inc. Indian Point Nuclear Generating Station Unit 2” at 14-145 (July 30, 2015) (“July 30, 2015 Tr.”).

⁵⁶ *Indian Point*, LBP-15-26, slip op. at 1, 8, 21.

⁵⁷ *Id.* at 11 (citing 10 C.F.R. Part 50, app. J, Option B, §§ II and III).

⁵⁸ *Id.* (citing 10 C.F.R. § 2.335(a); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 315 & n.88 (2012)). As the Board further explained, the Commission was fully aware of containment degradation issues when it promulgated its performance-based testing and visual inspection requirements in 10 C.F.R. Part 50, but nevertheless placed no “historical event” restriction on licensees electing to comply with Appendix J through performance-based testing. *Id.*

matter, the Board found that the historical documents on which New York relied as support for its contention actually contradict its claims, because they indicate that: (1) containment damage at IP2 has been remediated; (2) subsequent testing and inspection have proven acceptable; and (3) visual containment observations confirm no worsening of conditions.⁵⁹

The Board also found that New York’s argument that granting the LAR will jeopardize public safety because recent Type A tests allegedly reveal that leakage likely will exceed the acceptance criterion of 0.75 L_a by 2016 “reflects a fundamental misunderstanding of the acceptance criteria.”⁶⁰ As the Board correctly noted, the regulatory limit for Type A leakage—*i.e.*, the “as-found acceptance criterion”—is 1.0 L_a.⁶¹ The 0.75 L_a criterion cited by New York is referred to as the “as-left criterion,” and there is no regulatory bar to exceeding that criterion during plant operations; rather, it is a criterion that must be satisfied prior to a plant restart after testing.⁶² Furthermore, the Board found, even if the “apparent trend” in IP2 Type A leakage test results cited by New York were extrapolated, it is undisputed that the leakage would *not* exceed the regulatory limit of 1.0 L_a during the 15-year period between consecutive Type A tests.⁶³

The Board rejected New York’s argument that the LAR poses a significant hazards consideration under 10 C.F.R. § 50.92(c) as “not litigable.”⁶⁴ On this point, the Board concluded—consistent with controlling Commission precedent—that 10 C.F.R. § 50.58(b)(6)

⁵⁹ *Id.* at 12 (citing the LAR and various historical documents).

⁶⁰ *Id.* at 13.

⁶¹ *Id.*

⁶² *Id.* (citing Letter from Lawrence Coyle, Entergy, to NRC Document Control Desk, NL-15-068, Response to Request for Additional Information Regarding License Amendment to Permanently Extend the Frequency of the Containment Integrated Leak Rate Test (TAC No. MF3369), Indian Point Unit Number 2, Docket No. 50-247, License No. DPR-26, attach. 1 at 5 (June 8, 2015) (“June 8, 2015 RAI Response”).

⁶³ *Id.* at 14 (citing June 8, 2015 RAI Response, attach. 1 at 5). *See also id.* at 13 n.28 (“Notably, New York does not claim, nor does the LAR indicate, that Type A leakage would exceed the regulatory limit of 1.0 L_a during plant operation.”).

⁶⁴ *Id.* at 14.

proscribes adjudicatory challenges to the NRC Staff's no significant hazards consideration determination under 10 C.F.R. § 50.92(c).⁶⁵

Finally, the Board found New York's remaining arguments in support of NYS-1 to be insufficient to support admission of the contention. The Board found that New York's challenges to the adequacy of the risk impact assessment contained in Attachment 3 to the LAR failed to establish a genuine material dispute with the LAR and lacked adequate factual or expert opinion support, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(iv)-(vi).⁶⁶ It also rejected as unsupported New York's claim that Entergy relied on reduced costs or outage times to justify the requested 5-year extension of the ILRT interval.⁶⁷

The Board further concluded that NYS-2 "constitutes an impermissible challenge to the NRC Staff's no significant hazards consideration determination" because it "ignores the broad and unqualified rule of unreviewability established by section 50.58(b)(6)."⁶⁸ It found no merit in New York's argument that the "unreviewability" of the NRC Staff's no significant hazards consideration determination impermissibly renders the NEPA-related categorical exclusion determination of 10 C.F.R. § 51.22(c)(9) "unassailable."⁶⁹ Lastly, the Board rejected New York's "attempt[] to salvage Contention NYS-2 by advancing a new argument in its reply brief ... as untimely and unavailing."⁷⁰ Specifically, it found that New York's Petition did not cite 10 C.F.R.

⁶⁵ See *id.* at 14-15 (citing 10 C.F.R. § 50.58(b)(6); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001)). The sole effect of a no significant hazards consideration determination is to permit the Staff to make an authorized license amendment effective immediately, despite the pendency of an adjudication. See *id.* at 15 n.30. Therefore, the Board further explained, issues regarding when an authorized license amendment should become effective are irrelevant to this proceeding, which involves a challenge to the merits of Entergy's LAR. See *id.*

⁶⁶ See *id.* at 15-16.

⁶⁷ See *id.* at 16 n.32 (citing Entergy Answer at 35-36; NRC Staff Answer at 22) (noting that "Entergy does not seek to justify its LAR on economic grounds").

⁶⁸ *Id.* at 18 (quoting New York Reply at 20).

⁶⁹ *Id.* at 18-19

⁷⁰ *Id.* at 18.

§ 51.22(b), much less argue that “special circumstances” within the meaning of section 51.22(b) justify excepting Entergy’s LAR from the categorical exclusion of section 51.22(c).⁷¹ The Board further concluded, in any event, that New York’s belated claim of “special circumstances” fails because it relies on the same unsubstantiated factual assertions as NYS-1.⁷²

D. Summary of New York’s Appeal

On appeal, New York argues that the Board acted contrary to NRC regulations and precedent concerning the “minimal” requirements that a petitioner must meet to obtain a hearing.⁷³ Specifically, it claims that the Board imposed an “unduly stringent” contention admissibility standard and improperly evaluated the merits of its proposed contentions.⁷⁴ According to New York, NYS-1 was supported by evidence relating to: (1) historical degradation events at IP2; (2) the Atomic Energy Commission (“AEC”) Staff’s recommendation (in April 1974) to increase surveillance of the IP2 containment liner; (3) actual signs of degradation detected during recent inspections, some of which could be attributed to the historical degradation events; (4) previous ILRT results indicating that the rate of containment leakage was increasing, and could surpass the acceptance criterion by 2016; (5) revised and elevated seismic hazard spectra; and (6) shortcomings in Entergy’s probabilistic risk assessment (“PRA”), including deficiencies in the Indian Point license renewal severe accident mitigation alternatives (“SAMA”) analysis from which limited information was obtained.⁷⁵

New York notes that proposed contention NYS-2 was supported by “much of the same evidence” as NYS-1, but centered on the alleged “unavailability” of 10 C.F.R. § 51.22(c)(9).⁷⁶ It

⁷¹ *Id.* at 19-20.

⁷² *Id.* at 20-21.

⁷³ Appeal at 1, 18-19.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 1-2, 18-19.

⁷⁶ *Id.* at 10.

claims that the Board improperly permitted Entergy to declare its LAR categorically exempt from environmental review and to avoid any scrutiny of this determination, thereby “creating a loophole in NEPA.”⁷⁷ It further alleges that the Board adopted “an unduly technical and formalistic interpretation” of NYS-2, purportedly to thwart any New York argument that “special circumstances” render the categorical exclusion of 10 C.F.R. § 51.22(c) inapplicable in this case.⁷⁸

For the reasons set forth below, New York’s arguments have no legal or factual merit, and do not establish any error of law or abuse of discretion in the Board’s rulings in LBP-15-26.

III. STANDARD OF REVIEW

The standard for review of contention admissibility determinations is as follows: the Commission “will defer to the Board’s rulings on contention admissibility absent an error of law or abuse of discretion.”⁷⁹ Thus, when a board has reviewed the record in detail, the Commission generally is disinclined to upset its findings, particularly on matters involving fact-specific issues or consideration of expert affidavits or submissions.⁸⁰

An appeal that does not point to an error of law or an abuse of discretion, but simply restates the petitioner’s arguments, does not constitute a valid appeal.⁸¹ When a licensing board holds that a contention is inadmissible for failing to meet more than one of the requirements specified in 10 C.F.R. § 2.309(f)(1)(i)-(vi), a petitioner’s failure to address each ground for the Board’s ruling is sufficient justification for the Commission to reject the petitioner’s appeal.⁸²

⁷⁷ *Id.* at 27.

⁷⁸ *Id.* at 29.

⁷⁹ *Palisades*, CLI-15-22, slip op. at 7 (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006)).

⁸⁰ *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-1, 63 NRC 1, 2 (2006).

⁸¹ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 503-05 (2007).

⁸² *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004). Section II.A of the Board’s decision contains a discussion of the NRC’s contention admissibility requirements and related legal principles and precedent. *See* LBP-15-26, slip op. at 9; *see also* PPL

Furthermore, when considering an appeal, the Commission is free to affirm a board decision on any ground finding support in the record, whether or not relied on by the Board.⁸³

IV. THE COMMISSION SHOULD REJECT NEW YORK'S APPEAL

A. Contrary to New York's Claims, the Board Applied the Correct Legal Standards and Did Not Improperly Evaluate the Merits of the Proposed Contentions

New York's core argument on appeal is that the Board applied an "unwarranted and erroneous evidentiary standard" to New York's proposed contentions, and thus improperly evaluated the contentions' merits at the admissibility stage.⁸⁴ As demonstrated below, the Board committed no such error. Instead, it correctly applied the Commission's contention admissibility criteria in 10 C.F.R. § 2.309(f)(1) and, based on that analysis, appropriately concluded that New York's proposed contentions failed to meet each of those criteria.

Notably, the Board's analysis of New York's proposed contentions begins with a verbatim recitation of the six-factor admissibility test in 10 C.F.R. § 2.309(f)(1),⁸⁵ which the Board notes is "strict by design."⁸⁶ As the Board further notes, a petitioner's failure to comply with any of the six Section 2.309(f)(1) criterion renders a contention inadmissible.⁸⁷ Thus, there is no question that the Board fully apprehended the governing contention admissibility requirements.

And, more importantly, the Board explicitly applied each of those requirements to New York's proposed contentions. For example, with respect to contention NYS-1, the Board considered each of New York's proffered bases and concluded that the contention must be

Susquehanna, LLC (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-15-8, 81 NRC __ (Apr. 14, 2015) (slip op. at 5-6) (summarizing the Commission's contention admissibility standards).

⁸³ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005) (redacted public version of decision) (citing federal court precedent).

⁸⁴ Appeal at 18-19.

⁸⁵ See *Indian Point*, LBP-15-26, slip op. at 9 (quoting 10 C.F.R. § 2.309(f)(1)).

⁸⁶ *Id.* (quoting *Millstone*, CLI-01-24, 54 NRC at 358). See also *Palisades*, CLI-15-22, slip op. at 7.

⁸⁷ *Indian Point*, LBP-15-26, slip op. at 9 (citing *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)).

rejected because it: (1) impermissibly challenges NRC regulations and thus falls outside the scope of the proceeding; (2) fails to raise a material issue; (3) lacks support in the form of adequately-supported facts or expert opinions; and (4) fails to directly controvert the LAR or establish a genuine dispute with Entergy on a material issue.⁸⁸ In other words, it found that NYS-1 failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(iii)-(vi).⁸⁹ Similarly, the Board found contention NYS-2 to be inadmissible due to a host of legal and factual deficiencies discussed herein.

New York's argument that the Board erred by weighing the State's evidence and evaluating the merits of its contentions is specious.⁹⁰ In essence, New York urges the Commission to adopt notice pleading, a practice that the Commission abandoned long ago and which clearly violates both the letter and intent of 10 C.F.R. § 2.309(f)(1). The Commission strengthened its contention admissibility standards in 1989 because licensing boards had admitted numerous contentions that appeared to be based on "little more than speculation."⁹¹ Section 2.309(f)(1)(v), in particular, requires a petitioner "to provide the analyses and expert opinion showing *why* its bases support its contention,"⁹² and to "provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show *why* the proffered bases support its contention."⁹³ Simply alleging or asserting "facts" does not, by itself, necessarily make those facts reliable, relevant, and material, as New York appears to argue in its Appeal.⁹⁴

⁸⁸ *See id.* at 11-16.

⁸⁹ *See id.*

⁹⁰ *See Appeal* at 2, 10, 14, 20, 22-25,

⁹¹ *Millstone*, CLI-01-24, 54 NRC at 358 (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

⁹² *Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (emphasis added).

⁹³ *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd*, CLI-98-13, 48 NRC 26 (1998) (emphasis added).

⁹⁴ *See, e.g., Appeal* at 18 ("The NYS Petition far exceeded the State's 'minimal' obligation to show 'a fact or facts' necessary to warrant a hearing on the merits.").

Under the section 2.309(f)(1) standard, “licensing boards are expected ‘to examine cited materials to verify that they do, in fact, support a contention.’”⁹⁵ Thus, although a board does not decide the merits or resolve conflicting evidence at the contention admissibility stage, “materials cited as the basis for a contention *are subject to scrutiny by the board to determine whether they actually support the facts alleged.*”⁹⁶ The board may examine both the statements in the document that support the petitioner’s assertions and those that do not.⁹⁷ Here, the Board’s legitimate and transparent efforts to evaluate the information and documents proffered by New York in support of its contentions do not constitute a misapplication of section 2.309(f)(1) or an improper evaluation of the merits of those contentions.⁹⁸ Accordingly, there is no error of law or abuse of discretion that warrants Commission review and reversal of LBP-15-26.

B. New York’s Appeal Fails to Demonstrate That the Board Erred or Abused Its Discretion in Rejecting Contention NYS-1 As Inadmissible Under Section 2.309(f)(1)

1. The Board Did Not Take an “Unduly Restricted View” of Contention NYS-1

New York claims that the Board erred by adopting “an unduly restricted view of contention NYS-1, mischaracterizing it as asserting that ‘reducing the frequency of Type A testing from once in ten years to once in fifteen years poses a significant health and safety hazard to the public.’”⁹⁹ According to New York, NYS-1 raised a “much broader” challenge to the propriety of the requested license amendment, alleging that the amendment would not comply with the

⁹⁵ *Palisades*, CLI-15-22, slip op. at 14 n.68 (quoting *USEC Inc. (Am. Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 457 (2006)). *See also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, LBP-96-2, 43 NRC 61, 90 (1996) (supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to licensing board scrutiny, “both for what it does and does not show”).

⁹⁶ *Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3)*, LBP-10-24, 72 NRC 720, 750 (2010) (emphasis added).

⁹⁷ *Id.*

⁹⁸ *Cf. Palisades*, CLI-15-22, slip op. at 14 (“The Board appropriately reviewed the support provided for the contention and determined that it did not apply to the circumstances presented here.”).

⁹⁹ Appeal at 17-18 (quoting *Indian Point*, LBP-15-26, slip op. at 7).

applicable statutory and regulatory standards.¹⁰⁰ New York posits that the Board’s alleged failure to recognize this aspect of the contention “set[] the Board up to dismiss the contention for failing to raise a material issue of fact.”¹⁰¹

New York’s argument is contrived, and finds no support in the Board’s decision. First, New York ascribes undue significance to a Board statement that simply paraphrases what New York itself alleged in contention NYS-1; *i.e.*, that the requested license amendment poses a “significant safety and environmental hazard” and involves a “significant reduction in a margin of safety.”¹⁰² Regardless, the Board explicitly noted New York’s argument that “Entergy’s LAR threatens public health and safety *in violation of the Atomic Energy Act and Commission regulations.*”¹⁰³ As such, New York’s argument is factually incorrect.

Furthermore, to be admitted, a contention must raise an issue that is “material to the findings the NRC must make to support the action that is involved in the proceeding” and establish a genuine dispute with the applicant “on a material issue of law or fact.”¹⁰⁴ To meet those threshold requirements, the petitioner must make at least a “minimal demonstration” that the application “fails to meet a statutory or regulatory requirement.”¹⁰⁵ Thus, the Board, by necessity, considered whether New York had proffered any alleged facts or supporting documents that would support such a demonstration. As fully explained in its decision (and discussed further below), the Board found none and thus properly rejected New York’s contentions as inadmissible.

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² Petition at 3, 5, 9.

¹⁰³ *Indian Point*, LBP-15-26, slip op. at 12 (citing Petition at 8) (emphasis added).

¹⁰⁴ 10 C.F.R. § 2.309(f)(1)(iv), (vi).

¹⁰⁵ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 187 (2008).

2. The Board Correctly Found That New York’s Argument Regarding Plant-Specific Degradation Events Is Factually and Legally Flawed

One of New York’s principal arguments in support of contentions NYS-1 and NYS-2 is that the Indian Point Unit 2 containment liner has experienced a “specific history of structural and corrosive damage” that somehow sets it apart from other plants.¹⁰⁶ Like Entergy and the Staff in their respective briefs, the Board carefully examined each of the documents submitted by New York as putative support for this allegation.¹⁰⁷ And, like Entergy and the Staff, the Board found New York’s allegation to be “factually and legally flawed.”¹⁰⁸

As a factual matter, the Board found that “[t]he documents on which New York relies actually contradict its assertion” because they indicate that: (1) containment damage at IP2 has been remediated; (2) subsequent testing and inspection have proven acceptable; and (3) visual observations confirm no worsening of conditions.¹⁰⁹ It further noted that the specific historical events cited by New York, all of which occurred several decades ago, were found not to have reduced the structural capacity of the containment liner to perform its safety function.¹¹⁰ In making these dispositive findings, the Board—consistent with Commission expectations and well-established precedent—reviewed the documents cited by New York to ascertain whether they in fact supported New York’s claims. The Board did not, as New York falsely alleges, improperly review and “weigh” each piece of evidence in order to reach a decision on the merits of the State’s claims.¹¹¹ Further, as a legal matter, the Board appropriately rejected New York’s “historical

¹⁰⁶ *Indian Point*, LBP-15-26, slip op. at 10 (quoting Petition at 7).

¹⁰⁷ *See id.* at 12-13 & nn.25-26.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *Id.* at 12.

¹¹⁰ *Id.* at 11 n.21 (citing LAR, attach. 1 at 11-13; Entergy Answer at 25).

¹¹¹ Appeal at 19.

event” argument as falling outside the scope of this proceeding because it collaterally attacks the “performance criteria” specified in 10 C.F.R. Part 50, Appendix J, Option B.¹¹²

Nothing in New York’s Appeal suggests that the Board’s factual conclusions are implausible or that its legal conclusions are erroneous. For the most part, New York repackages arguments already considered and rejected by the Board, without demonstrating any Board error.¹¹³ One such argument is that in April 1974, the AEC recommended increased surveillance and inspections of the IP2 containment liner during the life of the plant.¹¹⁴ The Board bluntly but accurately described that 41-year-old agency observation as a “hoary recommendation” that has been rendered outdated and inapplicable by many subsequent events, including NRC Staff assessments in 1997 and 2002 that authorized reducing the frequency of Type A testing at Unit 2 pursuant to the performance-based requirements in 10 C.F.R. Part 50, Appendix J.¹¹⁵

Additionally, the AEC made its recommendation regarding increased testing frequency based on the information and technical knowledge then available to it in 1974. Unsurprisingly, since that time, the NRC’s and industry’s understanding of containment-related phenomena and integrated leakage rate testing has increased substantially as a result of subsequent technical studies and four decades of operating experience.¹¹⁶ In view of the above, New York has failed to identify any error or abuse of discretion in the Board’s ruling.

¹¹² See *Indian Point*, LBP-15-26, slip op. at 11-12 (noting that a contention that seeks to impose a requirement beyond those imposed by a Commission regulation is barred by 10 C.F.R. § 2.335(a)).

¹¹³ See *Palisades*, CLI-15-22, slip op. at 13.

¹¹⁴ See Appeal at 20-21 (citing Letter from R.R. Maccary, Assistant Director for Engineering, Directorate of Licensing, AEC, to Donald J. Skovholt, Assistant Director for Operating Reactors, Directorate of Licensing, AEC, Consolidated Edison Company of New York, Inc., Indian Point Stations, Unit #2 – “Feedwater Line Incident” Report Dated January 14, 1974 (TAR-805), Structural Evaluation of the Liner Damage (April 15, 1974) (ML093630690)).

¹¹⁵ *Indian Point*, LBP-15-26, slip op. at 12-13 n.26.

¹¹⁶ It is that enhanced understanding and additional operating experience that led the NRC to issue in 1995 “a new risk-based regulation based on the performance history of components (containment, penetrations, valves) as the means to justify an increase in the interval for Type A, B, and C tests,” and to approve one-time and permanent extensions of the ILRT interval from 10 to 15 years for various plants—including IP2 and IP3. See 1995 Final Rule, 60 Fed. Reg. at 49,999; Entergy Answer at 4 n.12.

3. The Board Correctly Rejected As Factually Unfounded New York’s Claims Regarding the Nature and Significance of Recent Inspection Results

New York further asserts that the Board overlooked evidence indicating “actual signs of degradation detected during recent inspections, some of which could be attributed to the historical degradation events.”¹¹⁷ But the Board’s decision indicates that it specifically considered New York’s argument and found it to be factually unsupported.¹¹⁸ As noted above, the Board found that the LAR and the documents on which New York relies indicate that subsequent testing and inspections have proven acceptable, and that visual observations confirm no worsening of conditions of the IP2 containment structure and liner.¹¹⁹ In support, the Board cited specific portions of the NRC Staff’s safety evaluation for the 2002 one-time extension of the Unit 2 ILRT interval, the instant LAR, and Entergy’s Answer opposing New York’s Petition (which summarizes the results of the 2008, 2012, and 2014 IWE inspections that are discussed in more detail in the LAR).¹²⁰ Nothing in New York’s Appeal suggests that the Board’s conclusion rests on a misreading or misunderstanding of the relevant facts.

4. The Board Correctly Rejected As Unsupported and Immaterial New York’s Argument That Recent Type A Tests Indicate That Containment Leakage Likely Will Exceed the Acceptance Criterion

New York describes as “particularly egregious” the Board’s rejection of its argument that recent Type A tests indicate that containment leakage likely will exceed the *purported* acceptance

¹¹⁷ Appeal at 9.

¹¹⁸ See *Indian Point*, LBP-15-26, slip op. at 11 (noting New York’s allegation of a “‘history of structural and corrosive damage’ that is reflected in recent inspections”); *id.* n.20 (“Regarding the results of recent inspections, New York states that ‘visual inspections of the . . . containment liner in 2008, 2012, and 2014 revealed numerous other signs of degradation, including corrosion, buckling of loose plates, and leaking water.’”).

¹¹⁹ See *id.* at 12.

¹²⁰ See *id.* n.25. Notably, as stated in the LAR, the most recent Containment Inservice Inspection (the 2014 Refueling Outage 2R21 inspection) findings generally coincided with previous inspection findings and were minor in nature. LAR, attach. 1 at 12. Additionally, as discussed in LAR Section 4.4.2, all of the recordable indications identified during the IWL general visual inspections performed in 2005 and 2010 involved no structural concerns or reductions in the containment structure’s ability to perform its safety function. See *id.* at 12-13.

criterion of 0.75 L_a by 2016.¹²¹ But New York’s argument only reinforces its misunderstanding of the applicable requirements. As the Board explained, the overall integrated leakage rate must not exceed the allowable leakage rate (L_a) with margin, as specified in the Technical Specifications.¹²² The relevant IP2 technical specification states that the “containment leakage rate acceptance criterion is 1.0 L_a .”¹²³ Thus, on this basis, the Board correctly concluded as follows:

The regulatory limit for Type A leakage—which is also referred to as the “as-found acceptance criterion”—is 1.0 L_a . See 2002 Safety Evaluation at 4. Restated, Type A leakage at Unit 2 “must not exceed” 1.0 L_a . 10 C.F.R. Part 50, app. J, Option B, § III.A. In contrast, the 0.75 L_a criterion cited by New York is referred to as the “as-left criterion,” see 2002 Safety Evaluation at 4, and there is no regulatory bar to exceeding that criterion during plant operations; rather, it is a criterion that must be satisfied *prior to a plant restart*. The “as-left criterion” is lower than the regulatory limit applicable to plant operations to “assure[] that there is margin for potential degradation that could increase the containment leakage rate before the next [Type A test] is performed.” RAI Response at 5.¹²⁴

The Board further concluded that even if the apparent trend in Type A tests were extrapolated, “it is undisputed that the leakage would *not* exceed the regulatory limit of 1.0 L_a during the fifteen-year period between consecutive Type A tests.”¹²⁵ Accordingly, it concluded that insofar as 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 under section 2.309(f)(1)(v) and (vi) because it lacks adequate support and fails to raise a genuine dispute on a material issue with the LAR.¹²⁶

On appeal, New York claims that “the supposedly ‘dispositive’ distinction between the ‘as found’ acceptance criteria of 1.0 L_a and the ‘as left’ criteria of 0.75 L_a appears to be a fiction

¹²¹ Appeal at 21.

¹²² *Indian Point*, LBP-15-26, slip op. at 4 n.9 (citing 10 C.F.R. Part 50, app. J, Option B, § III.A.). The leakage rate acceptance limit, L_a , is based on minimizing leakage that would occur at the calculated peak containment internal pressure related to the design basis loss-of-coolant accident. *Id.*

¹²³ LAR, attach. 2 (page. 5.5-14 of the Indian Point Unit 2 Technical Specifications).

¹²⁴ *Indian Point*, LBP-15-26, slip op. at 13 (emphasis added).

¹²⁵ *Id.* at 14 (citing June 8, 2015 RAI Response at 5) (emphasis in original). See also *id.* at 13 n.28.

¹²⁶ *Id.*

created by Entergy and adopted by the Board for the purpose of this litigation.”¹²⁷ But here again New York ignores the plain language of the legally-binding IP2 Technical Specifications, which clearly indicate that the “[c]ontainment leakage rate acceptance criterion is 1.0 L_a” for Type A tests, and that the 0.75 L_a cited by New York applies to “the first unit startup following testing.”¹²⁸ Thus, the dispositive distinction between the as-found (1.0 L_a) and as-left (0.75 L_a) acceptance criteria is no fiction—it is expressly incorporated into the IP2 Technical Specifications.¹²⁹

In view of the above, the Board correctly concluded that New York had failed to provide any information indicating that the leakage rate would exceed the as-found leakage acceptance criterion of 1.0 L_a, as specified in IP2 Technical Specification 5.5.14., during the 15-year period between consecutive Type A tests.¹³⁰ New York’s Appeal therefore raises no doubts concerning the Board’s associated conclusion that NYS-1 lacks adequate support and fails to raise a genuine material dispute, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

5. The Board Correctly Rejected New York’s Argument That the LAR Failed to Consider “Updated Seismic Hazards Data”

New York also fails to demonstrate that the Board committed any error—much less reversible error—in rejecting as immaterial New York’s argument that the LAR did not consider

¹²⁷ Appeal at 23.

¹²⁸ LAR, attach. 2 (page. 5.5-14 of the Indian Point Unit 2 Technical Specifications).

¹²⁹ Relatedly, New York states that the Entergy procedure for conducting ILRTs lists the “required containment leak rate” acceptance criterion as 0.75 L_a. Appeal at 22 (citing 2-PT-10Y001, Rev. 2, Integrated Leak Rate Test, at 49 (Aug. 28, 2006), encl. to June 8, 2015 RAI Response (ML15163A166)). However, Entergy Procedure 2-PT-10Y001 explicitly distinguishes between the “AS FOUND” and “AS LEFT” acceptance criteria and states: “Only the ‘AS LEFT’ leakage calculated in step 4.8.1.1 below must be met *prior to entering a mode of operation that requires containment integrity*” (*i.e.*, plant restart). Entergy Procedure 2-PT-10Y001 at 45 (emphasis added).

¹³⁰ As Entergy explained, even if the next “as-found” leakage rate is determined to be 0.78 L_a, which New York predicts for an ILRT performed in 2016 based on its extrapolation of the current data, that value still will be less than the applicable “as found” acceptance criterion of 1.0 L_a. Entergy Answer at 28. Moreover, even if the data are extrapolated to 2021 using New York’s approach, the resulting “as-found” leakage rate value would be 0.85 L_a, which still is less than the acceptance criterion of 1.0 L_a. *Id.* The Board and parties made similar observations during the July 30, 2015 oral argument. Indeed, the figure contained in Attachment 2 to New York’s Appeal—which New York itself prepared—illustrates this undisputed point and the critical flaw in New York’s argument.

“updated seismic hazards data.”¹³¹ In its Petition, New York cited revised seismic studies performed by Entergy as part of its ongoing response to the NRC’s post-Fukushima “Near Term Task Force Report” recommendations and related Commission directives.¹³² Both Entergy and the NRC Staff explained in their respective Answers that there has been no change to the current IP2 seismic design basis as a result of the ongoing seismic re-evaluation, and that New York failed to provide any alleged facts or expert opinion suggesting that the current licensing basis and/or the LAR’s seismic assessment are inadequate to support the requested license amendment.¹³³ The Board agreed, finding that New York had failed to explain: (1) the significance of the cited seismic information relative to the potential containment leakage monitored by the testing at issue, and (2) how that information controverts the portion of the LAR (*i.e.*, the confirmatory risk impact assessment in Attachment 2 to the LAR) that reviewed seismic impacts.¹³⁴ Therefore, it concluded, New York failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).¹³⁵

New York’s Appeal provides no reason to question the Board’s ruling. New York merely avers that that the “significance” of the cited seismic information should be “self-explanatory,” and that “[t]he weight of this evidence should have been explored in an evidentiary hearing, not dismissed out of hand by the Board.”¹³⁶ But such conclusory statements by counsel—unsupported by any expert opinion—do not excuse New York’s failure to meet *its* burden, as the proponent of the contention, to “explain why the application is deficient.”¹³⁷ New York (still) has made no

¹³¹ Appeal at 24.

¹³² See Petition at 15-16.

¹³³ See Entergy Answer at 29-31; NRC Staff Answer at 18-19.

¹³⁴ *Indian Point*, LBP-15-26, slip op. at 15.

¹³⁵ *Id.*

¹³⁶ Appeal at 24.

¹³⁷ 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). See also *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC __ (Nov. 9, 2015) (slip op. at 6, 11).

attempt to explain why the “new seismic information” is relevant to the ILRT LAR or associated risk analysis; how, if at all, it might be considered within the context of those documents; and what impact, if any, it might have on the risk analysis results. The Board, therefore, appropriately rejected this aspect of New York’s contention as lacking both materiality and adequate support.

6. The Board Appropriately Rejected New York’s Miscellaneous Arguments Related to the Adequacy of the LAR Confirmatory Risk Impact Assessment

New York’s Appeal identifies no grounds for review of the Board’s rejection of the State’s other miscellaneous criticisms of the LAR. Namely, in its Petition, New York alleged that the LAR risk impact assessment is deficient because it purportedly relies on information from the SAMA analysis prepared as part of the IP2 license renewal application.¹³⁸ In particular, it claimed that the SAMA analysis: (1) does not take into account the value or decontamination cost of offsite properties with iconic value, natural resources, or critical infrastructure; (2) improperly limits its scope to land and population within 50 miles of the site; and (3) relies on an outdated dollar per person-rem value of \$2,000.¹³⁹ New York also criticized Entergy’s reference to NUREG-1493 in the LAR risk impact assessment, insofar as the “representative” reactor considered in that study was the Surry reactor in rural Virginia.¹⁴⁰

In LBP-15-26, the Board specifically considered these additional New York arguments and found that New York failed to: (1) provide any expert opinion or adequate facts in support of the alleged deficiencies, and (2) explain the relationship between its unsubstantiated criticisms of the

¹³⁸ See Petition at 19-20.

¹³⁹ *Id.* at 20.

¹⁴⁰ Petition at 19. NUREG-1493, “Performance-Based Containment Leak-Test Program” (Sept. 1995), provided the technical basis for the 1995 rulemaking that revised the leakage rate testing requirements in 10 C.F.R. Part 50, Appendix J, Option B. It considered the effects of containment leakage on the public health and safety and the benefits realized from the containment leak rate testing, and determined that for a representative PWR plant (*i.e.*, Surry), containment isolation failures contribute less than 0.1 percent to the latent risks from reactor accidents.

license renewal SAMA analysis and the contents of the LAR,¹⁴¹ particularly the risk impact assessment.¹⁴² As a result, the Board correctly concluded that New York failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).¹⁴³

New York's arguments on appeal fail to identify any clear and reviewable error in the Board's decision in LBP-15-26. New York asserts that it "has identified sections of the PRA that purport to rely on the SAMA analysis developed in the license renewal hearings on IP2, and has laid out a number of specific deficiencies that the State has identified in that analysis."¹⁴⁴ But such conclusory statements do not establish the existence of any clear and material error in the Board's decision. Given that New York provided no credible facts, supporting references, or expert opinion in support of the alleged "deficiencies" in the SAMA analysis, the Board appropriately rejected its proposed contention.

Significantly, in its Appeal, New York relies heavily on an argument that it did not raise until the July 30, 2015 oral argument—*after* the parties completed briefing on the Petition.¹⁴⁵ That is, it argues that the LAR risk impact assessment is not sufficiently plant-specific because it relies, in part, on a liner corrosion analysis that was developed for use at the Calvert Cliffs plant and, therefore, does not account for the "historic degradation events described by the State."¹⁴⁶ New

¹⁴¹ Entergy's license renewal SAMA analysis (including the projected year-2035 population estimate and decontamination cost input values used therein) was the subject of extensive litigation before the Licensing Board in the Indian Point Units 2 and 3 license renewal proceeding. That Board found Entergy's SAMA analysis and the Staff's review thereof to be reasonable and acceptable under NEPA. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 450-89 (2013). New York's appeal of the Board's ruling on Contention NYS-12C concerning the SAMA decontamination cost estimates is pending with the Commission.

¹⁴² *Indian Point*, LBP-15-26, slip op. at 15-16.

¹⁴³ *Id.* at 16.

¹⁴⁴ Appeal at 25.

¹⁴⁵ See July 30, 2015 Tr. at 39-40, 62, 71 (Mr. Lusignan, New York counsel).

¹⁴⁶ Appeal at 25-27.

York further asserts that “these arguments relating to the differences between Calvert Cliffs and IP2 could appropriately have been developed in an evidentiary hearing” on the LAR.¹⁴⁷

New York’s argument on this point cannot (and does not) provide any basis for Commission review of the Board’s decision. As noted above, the argument was belatedly advanced by New York counsel during the oral argument. Furthermore, it is not supported by any technical analysis or expert opinion—it is simply speculation by counsel.¹⁴⁸ Thus, it does not undermine the Board’s contention admissibility ruling, including the Board’s related observation, as informed by its review of the LAR, that Entergy’s risk impact assessment specifically considers “[t]he impact of aging, concealed corrosion, and the effectiveness of visual inspections.”¹⁴⁹

* * *

In conclusion, New York’s Appeal fails to identify any error of law or abuse of discretion with respect to the Board’s decision to reject contention NYS-1 as inadmissible.

C. New York’s Appeal Fails to Demonstrate That the Board Erred or Abused Its Discretion in Rejecting Contention NYS-2 As Inadmissible Under Section 2.309(f)(1)

The Board’s rejection of contention NYS-2 as inadmissible rests firmly on its correct interpretation of the regulations at issue (10 C.F.R. § 50.58(b)(6) and § 51.22) as well as controlling Commission precedent construing those regulations. In short, the Board found that

¹⁴⁷ *Id.* at 26-27.

¹⁴⁸ *See Palisades*, CLI-15-23, slip op. at 6, 10 (internal quotation marks and citations omitted) (stating that petitioners must “present well-defined issues, not issues based on little more than guesswork,” and that even an expert opinion that merely states a conclusion without providing a reasoned basis or explanation for that conclusion is inadequate under 10 C.F.R. § 2.309(f)(1)). New York provided no supporting expert opinions.

¹⁴⁹ *Indian Point*, LBP-15-26, slip op. at 16 n.32 (citing LAR, attach. 3 at 4-15). Section 4.4 of Entergy’s confirmatory risk impact assessment (Attachment 3 to the LAR) specifically describes the manner in which Entergy applied the Calvert Cliffs liner corrosion analysis methodology to IP2 to assess the risk implications of corrosion-induced leakage of the containment steel liner occurring and going undetected during the extended ILRT interval. *See* LAR, attach. 3 at 4-15 to 4-19. *See also* July 30, 2015 Tr. at 89-91 (Mr. Bessette, Entergy counsel) (noting that Entergy considered the likelihood of containment liner leakage due to concealed corrosion as a sensitivity analysis); *id.* at 127-28 (Mr. Turk, NRC Staff counsel) (noting that Entergy’s risk assessment considered undetected corrosion using the “NRC staff approved” Calvert Cliffs methodology). Even assuming *arguendo* that New York’s arguments on this issue were timely, New York made no particularized, adequately-supported challenges to that portion of the LAR discussing Entergy’s use of the Calvert Cliffs approach.

NYS-2 impermissibly challenged the NRC Staff’s no significant hazards consideration determination because it “ignores the broad and unqualified rule of unreviewability established by section 50.58(b)(6).”¹⁵⁰ That regulation authorizes the NRC to make no significant hazards consideration determinations and declares that such determinations are immune from adjudicatory challenges.¹⁵¹ Accepting New York’s argument, the Board noted, would require it to carve out an exception to section 50.58(b)(6) that “would swallow its rule of unreviewability.”¹⁵²

The Board also properly rejected as “ineffectual” New York’s argument that treating the Staff’s no significant hazards consideration determination as unreviewable transforms the categorical exclusion of 10 C.F.R. § 51.22(c)(9) into “an unassailable substantive conclusion that Industry and the NRC Staff can employ to avoid environmental review of proposed actions.”¹⁵³ As the Board correctly explained, the categorical exclusions listed in 10 C.F.R. § 51.22 are not “device[s] for evading environmental review of proposed actions.”¹⁵⁴ Instead, they represent generic NRC findings, adopted through the rulemaking process, that certain actions “do[] not individually or cumulatively have a significant effect on the human environment” and thus may be categorically excluded from further environmental review under NEPA and Part 51.¹⁵⁵

The Board also properly rejected New York’s argument that the categorical exclusion determination of section 51.22(c)(9) is “unassailable.” The Board explained that a petitioner may seek review of a section 51.22(c)(9) determination by at least two methods.¹⁵⁶ As relevant here,

¹⁵⁰ *Indian Point*, LBP-15-26, slip op. at 18 (citing 10 C.F.R. § 50.58(b)(6)).

¹⁵¹ *See id.* at 14-15 (citing 10 C.F.R. § 50.58(b)(6); *Shearon Harris*, CLI-01-7, 53 NRC at 118) (“Pursuant to 10 C.F.R. § 50.58(b)(6), apart from discretionary review by the Commission, the NRC Staff’s no significant hazards consideration determination under section 50.92(c) may not be contested.”).

¹⁵² *Id.* at 18.

¹⁵³ *Id.* (quoting New York Reply at 20).

¹⁵⁴ *Id.* at 19.

¹⁵⁵ *Id.* at 18-19 (citing NRC Staff Answer at 26; 40 C.F.R. § 1508.4; *Brodsky v. NRC*, 704 F.3d 113, 119-20 (2d Cir. 2013)).

¹⁵⁶ *Id.* at 19.

one method includes showing the existence of “special circumstances” pursuant to section 51.22(b) that would justify excepting a proposed license amendment from the categorical exclusion of section 51.22(c).¹⁵⁷ In this case, the Board found that, by its own concession, New York first alleged the existence of “special circumstances” in its Reply, not in its Petition.¹⁵⁸ Therefore, the Board rejected that argument as “unjustifiably late” under settled Commission precedent governing the proper scope of reply briefs.¹⁵⁹ The Board nevertheless found that even if New York’s section 51.22(b) argument had been timely raised and litigable, the Board still would find it to be “insubstantial” given its reliance on the same factual assertions underlying contention NYS-1, which, as discussed above, failed to raise a genuine material dispute with the LAR.¹⁶⁰

New York’s Appeal identifies no clear error or abuse of discretion in that portion of LBP-15-26 rejecting contention NYS-2 as inadmissible. Indeed, New York largely repeats its previous arguments in support of NYS-2, but seeks to bolster them with specious allegations. For example, New York accuses Entergy of using NRC regulations as a “sword” to eschew the environmental review requirements of NEPA, and the Board of erroneously construing those regulations to create a “loophole in NEPA.”¹⁶¹ Such baseless, hyperbolic claims are insufficient to warrant Commission review of the Board’s ruling.

¹⁵⁷ *Id.* As noted by the Board, the other method (which New York never pursued, even belatedly in its Reply or Appeal) involves challenging either of the two additional findings made under section 51.22(c)(9)(ii) or (iii) that are necessary for a categorical exclusion determination. *See id.*

¹⁵⁸ *Id.* at 20 (citing July 30, 2015 Tr. at 138-39).

¹⁵⁹ *Id.* *See also id.* at nn.35 & 36 (citing Commission cases addressing the proper scope of reply briefs). As the Board also noted, New York’s reliance on another board’s decision in *Pa’ina Hawaii, LLC* is misplaced because in that case, the board admitted contentions when the petitioner raised a *timely* argument asserting that “special circumstances” existed under section 51.22(b) that precluded application of the categorical exclusion. *Id.* at 20 n.37 (citing *Pa’ina Haw., LLC* (Materials License Application), LBP-06-4, 63 NRC 99, 108, 112 (2006)).

¹⁶⁰ *Id.* at 20-21 (citing New York Reply at 19) (noting that New York’s arguments in support of NYS-1 “gain no additional traction in New York’s effort to show that ‘special circumstances’ justify excepting Entergy’s LAR from the categorical exclusion of section 51.22(c)”).

¹⁶¹ Appeal at 27.

Accordingly, New York's Appeal also fails to identify any error of law or abuse of discretion with respect to the Board's decision to reject contention NYS-1 as inadmissible.

V. CONCLUSION

For the foregoing reasons, the Commission should reject New York's Appeal of LBP-15-26. New York has not identified any Board error or raised a genuine dispute with the LAR.

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Dated in Washington, D.C.
this 16th day of November 2015

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

| | | |
|---|---|-----------------------------|
| In the Matter of: |) | |
| |) | Docket No. 50-247-LA |
| ENTERGY NUCLEAR OPERATIONS, INC. |) | ASLBP No. 15-942-06-LA-BD01 |
| (Indian Point Nuclear Generating Station, Unit 2) |) | November 16, 2015 |
| |) | |
| |) | |

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of “Entergy’s Answer Opposing New York State’s Appeal of LBP-15-26” were served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned proceeding.

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