

**UNITED STATES
NUCLEAR REGULATORY COMMISSION**

**BEFORE COMMISSIONERS
KRISTINE L. SVINICKI,
WILLIAM C. OSTENDORFF,
JEFF BARAN AND
CHAIRMAN STEPHEN G. BURNS**

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Station,
Unit 2)

Docket No. 50-247-LA

ASLBP No. 15-042-06-LA-BD01

February 26, 2016

**STATE OF NEW YORK
MOTION TO VACATE OR FOR STAY OF STAFF ACTION PENDING APPEAL OF
ATOMIC SAFETY AND LICENSING BOARD DECISION LBP-15-26 REGARDING
LICENSE AMENDMENT FOR ENTERGY INDIAN POINT UNIT 2 TO DELAY THE
CONTAINMENT LEAK RATE TEST FOR FIVE YEARS**

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

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PRELIMINARY STATEMENT

The State of New York (State) moves, pursuant to 10 C.F.R. §§ 2.323, 2.341, 2.342, 2.1213, and the Commissioners' inherent supervisory authority over NRC Staff, to vacate or, alternately, for a stay of Staff's February 23, 2016 action granting Entergy's application for a license amendment to reduce the frequency of integrated leak rate testing at Indian Point Nuclear Generating Unit No. 2 (IP2) and delay the next test until 2021.¹ The Commission has not ruled on the State's October 20, 2015 appeal to the Commission pursuant to 10 C.F.R. § 2.311 for review of the Atomic Safety and Licensing Board's (the Board) September 25, 2015 decision denying the State's "Petition to Intervene and Request for a Hearing" on Entergy's license amendment request to reduce the frequency with which it must conduct an integrated leak rate test at Indian Point Nuclear Generating Unit No. 2 (IP2). *See* Declaration of Assistant Attorney General John Sipos (Sipos Decl.), Ex. 5, *Entergy Nuclear Operations, Inc.* (Indian Point Generating Unit No. 2), LBP-15-26, Memorandum and Order (Denying New York's Petition to Intervene), Slip Op. (Sept. 26, 2015) (Board Order) (ML15268A386); Ex. 6, *State of New York Brief Supporting Appeal Pursuant to 10 C.F.R. § 2.311 of ASLB Decision LBP-15-26* (October 20, 2015). Disregarding the pending appeal, Staff issued the challenged license amendment on February 23, 2016. Staff's improvident granting of the license amendment during the pendency of the State's appeal circumvents the Commission's appellate authority, skews orderly

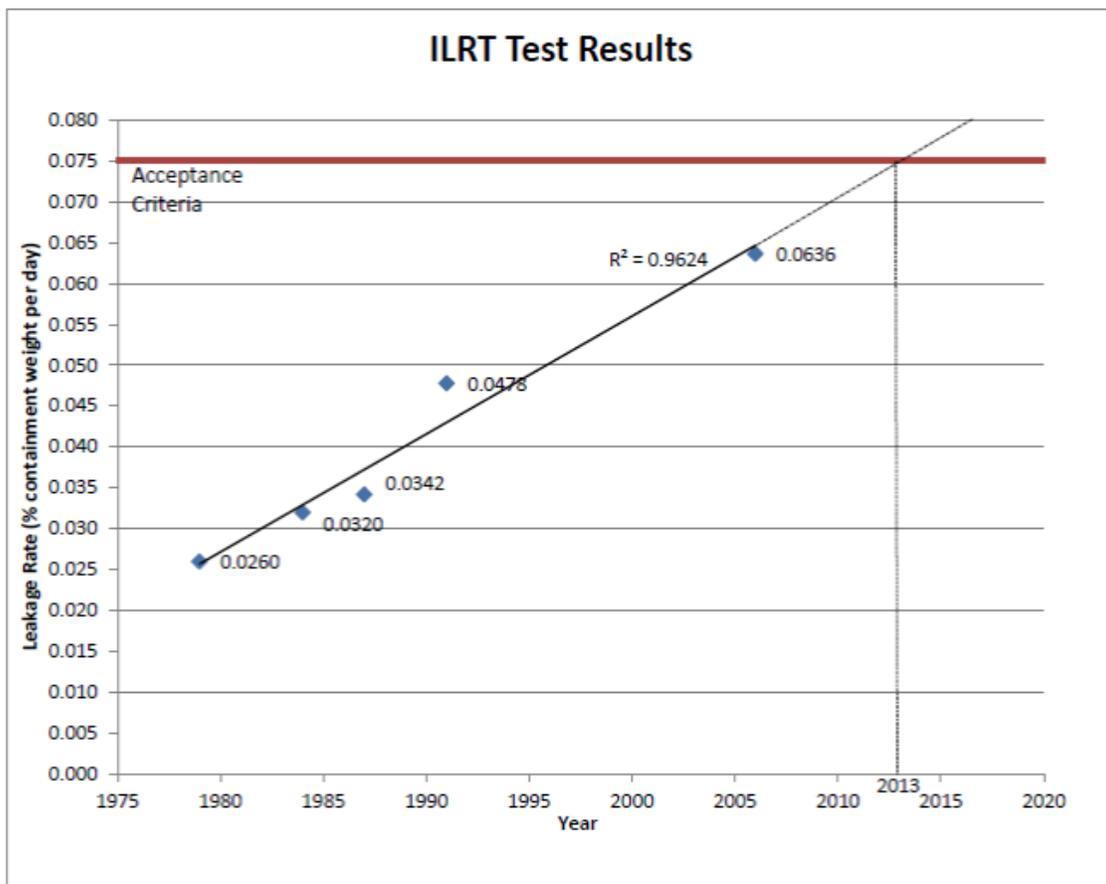
¹ The integrated leak rate test (or ILRT), also known as a Type A leak rate test, is the only comprehensive test of the overall integrity of a reactor's containment during design-basis accident conditions. *See Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors*, 60 Fed. Reg. 49,495, 49,499 (Sept. 26, 1995) ("No alternative to ILRTs has been identified to provide assurance that the containment structure would meet allowable leakage rates during design-basis accidents."); *Performance-Based Containment Leak-Test Program*, NUREG-1493, at 6-1 (Sept. 1995) ("Of the Appendix J test methods, integrated leakage-rate testing is the only method capable of detecting all existing leaks in the reactor containment system."). The ILRT "can detect a number of component failures such as liner breach and failure of some sealing surfaces, which can lead to leakage." *Risk Assessment for Indian Point Regarding the ILRT (Type A) Permanent Extension Request*, at 4-13 (October 2013) (hereinafter, PRA), Attachment 3 to NL-14-128 (ML14353A015).

consideration of regulatory issues and undermines the integrity of the Commission's legal process. In addition to prejudicing the State's rights, the Staff action goes against the NRC's professed guarantees of transparency and fairness. *See, e.g.*, NRC, NRC Approach to Open Government, <http://www.nrc.gov/public-involve/open.html>; NRC, Values, <http://www.nrc.gov/about-nrc/values.html>. Accordingly, the Commission should exercise its regulatory discretion and supervisory authority over Staff to vacate the February 23, 2016 license amendment or stay its effectiveness under 10 C.F.R. §§ 2.202, 2.342, and 2.1213 pending consideration and resolution of the State's appeal.

The four factors relevant to a stay request set forth in 10 C.F.R. §§ 2.342(e) and 2.1213(e) are present here. First, the State has demonstrated – using NRC and Entergy data and supporting facts – that it is likely to prevail on the merits of its appeal regarding the admissibility of its contentions on the license amendment application, and is likely to succeed on the merits of its claim that the license amendment should not be granted. Second, the State's procedural and substantive due process rights are directly and irreparably violated by Staff's preemptive granting of a contested license amendment during the pendency of the State's appeal to the Commission. Third, a stay at this juncture will not harm other participants, but will preserve the *status quo* by requiring Entergy to comply with the terms of its current operating license until the State's challenge to its license amendment request is resolved. Finally, and perhaps most importantly, the public interest plainly lies with the State, which seeks to protect the health and well-being of its citizens and environment, as well as to preserve the Commission's transparency, accountability and regulatory integrity.

NRC Staff's February 23, 2016 amendment to the operating license of Indian Point Unit 2 (IP2) delays until 2021 Entergy's obligation to conduct a leak rate test of the IP2 containment.

Staff's action is taken not only in contravention of the pending appeal, but with knowledge of significant aging management and maintenance issues at both IP2 and IP3 which would suggest more frequent and rigorous oversight and testing of those facilities is warranted, not less. Of particular concern to the State is delaying this comprehensive and important containment integrity testing until 2021 when the ongoing license renewal proceeding has concluded and IP2 is well into its period of extended operation, especially in light of the history of incidents and accidents at IP2 relevant to containment integrity, critical changes in the NRC's understanding of seismic risk, and the demonstrated trend of the operators' testing data through 2013 showing that leakage rates have increased over time and may already exceed the NRC's acceptance criteria.



Source: "Analysis of Proposed Technical Specification Changes Regarding 15 Year Containment ILRT," at 5-6, Attachment 1 to NL-14-128 (December 9, 2014) (ML14353A015)

See, Sipos Decl., Ex. 3.² The testing at issue is more than a mere bureaucratic requirement: the IP2 containment surrounds the IP2 reactor, and in the event of an accident, the containment is the last line of defense preventing the release of radiation from the reactor core to the environment. The injury to New York of such an accident would be both devastating and irreparable.

The State consulted with the other parties in this proceeding regarding this motion. Counsel for Entergy and NRC Staff stated they intend to oppose the motion.

PROCEDURAL HISTORY

On December 9, 2014, Entergy submitted a request for license amendment to the NRC, seeking to reduce the frequency with which it must conduct ILRTs at IP2, delaying the test from once every 10 years to once every 15 years. Sipos Decl., Ex. 1, Letter from Lawrence Coyle, Site Vice President, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-14-128 (Dec. 9, 2014) (ML14353A015). Thus, Entergy proposed the next ILRT for the IP2 containment would be conducted in 2021 – rather than 2016 – and, after that, would likely not be conducted again for the remaining life of the plant.³ On March 17, 2015, notice of Entergy’s requested license amendment was published in the Federal Register. *Id.*, Ex. 2.

On May 18, 2015, the State filed a Petition to Intervene and Request for Hearing. Sipos Decl., Ex.3. On May 26, 2015, the Secretary Referred the State’s Petition to Intervene to the Atomic Safety Licensing Board. *Id.* Ex. 4. On May 28, 2015, the ASLB issued an Order of

² The leakage rate is measured as a percent of containment volume lost per day, *id.* at 2-2, and is typically expressed in reference to the maximum allowable leakage rate (L_a). See 10 C.F.R. Part 50, Appendix J, Option B, § II. For example, a leakage rate of 1.0 L_a would be the maximum allowable leakage rate, which – generally and in the specific case of IP2 – is 0.1% of containment volume per day. See *Marked Up Technical Specifications for IP2*, Attachment 2 to NL-14-128; NUREG-1493, at 2-2. However, the leakage rate “must not exceed the allowable leakage rate (L_a) with margin, as specified in the Technical Specifications.” 10 C.F.R. Part 50, Appendix J, Option B, § III(A). The Technical Specifications for IP2 provide that “[d]uring the first unit startup” after an ILRT, “the leakage rate acceptance criteria [is] $\leq 0.75 L_a$ [.]” *Marked Up Technical Specifications for IP2*, Attachment 2 to NL-14-128.

³ This assumes that Entergy’s license renewal application for IP2 seeking to extend the plant’s operating life from 40 years to 60 years, which is the subject of a separate administrative proceeding, is granted. Technical Analysis, at 3, Attachment 1 to NL-14-128.

Establishment, which Notice was published in the Federal Register on June 3, 2015. *Id.*, Exs. 5 and 6. NRC Staff and Entergy responded to the Petition, and the State filed a reply. *Id.*, Exs. 7, 8 and 9. Following oral argument before the ASLB on July 30, 2015, the Board issued a decision denying the State's Petition on September 25, 2015. *Id.*, Ex. 10. The State timely appealed on October 20, 2015. *Id.*, Ex. 11. On February 22, 2016, Staff notified the Commission that it intended to take significant licensing action, and on February 23, 2016, issued the license amendment. *Id.*, Exs. 12 and 13. On February 24, 2016, Staff notified the parties of the license amendment. *Id.*, Ex. 14.

THE STATE'S APPEAL

As the State's appeal contends, the Board erred in denying admission of the State's two contentions 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. The Board failed to comply with the Commission's regulations and precedent regarding the "minimal" requirements that a proposed intervenor must meet to justify an evidentiary hearing. The State's substantive claims regarding the propriety of deferring containment inspection were supported by specific facts and legal arguments that the license amendment request failed to meet relevant statutory and regulatory standards. Sipos Decl., Ex. 3. Specifically, the State's appeal delineates evidence provided to the Board of (1) historic degradation events that directly impacted the integrity of the IP2 containment liner; (2) recent inspections showing liner degradation, some of which was attributed to the historic events; (3) a recommendation from the Atomic Energy Commission (AEC) Staff that, in light of the historic events, the IP2 containment liner should be subject to more frequent inspections; (4) evidence that the actual leak rate has been increasing, and is on pace to exceed a rate which, if discovered,

would prevent IP2 from operating; (5) recent data showing an increased risk of seismic hazards at IP2 that Entergy failed to consider; and (6) shortcomings in the probabilistic risk assessment supporting the license amendment. The other State contention relates to Entergy and NRC's failure to comply with the National Environmental Policy Act (NEPA) or its implementing regulations in review of the license amendment, and improper invocation of a categorical exclusion of NEPA. In sum, the State's appeal argues that it demonstrated a genuine dispute on a triable issue that directly implicated the propriety of issuing the license amendment, and that the Board erred in weighing the State's evidence and evaluating the merits of its contentions. *Id.*

LEGAL FRAMEWORK

An application to stay a decision or action of the NRC Staff is governed by 10 C.F.R. §§ 2.342 and 2.1213, which – although numbered and phrased slightly differently – outline four factors relevant to a stay request: (1) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (2) Whether the requestor will be irreparably injured unless a stay is granted; (3) Whether the granting of a stay would harm other parties; and (4) Where the public interest lies. 10 C.F.R. §§ 2.342(e), 2.1213(e). Additionally, 10 C.F.R. §§ 2.202(a) broadly authorizes the Commission to commence a proceeding to “to modify, suspend, or revoke a license or take such other action as may be proper.”

DISCUSSION

I. The Commission Should Vacate or Stay the Amendment

The State's procedural and substantive due process rights have been plainly violated by the Staff's February 23, 2016 issuance of the contested IP2 license amendment. The Atomic Energy Act establishes a formal, rule-based, iterative process for NRC consideration and administration of nuclear facility operating license amendments. The State has acted

conscientiously and in accordance with those NRC rules and procedures, timely sought intervention and hearing regarding the Entergy's request for license amendment, and has abided by the NRC's administrative process. A party in that same administrative process, "the Staff does not occupy a favored position[.]" *Consolidated Edison Co.*, (Indian Point Nuclear Generating Units 2 & 3, ALAB-304, 3 N.R.C. 1, 6 (1976)). Staff's unilateral action granting the license amendment during the pendency of the State's appeal subverts the process and the Commission's orderly consideration of regulatory concerns as the legally-responsible decision maker. *See, e.g., Vermont Dep't of Public Service v. NRC*, 684 F.3d 149 (D.C. Cir. 2012). Respectfully, Staff's action could not be more arbitrary or capricious, and it is incumbent upon the Commission to correct the error for its own benefit, as well as for the State's.

II. The State Has Shown A Likelihood of Success on the Merits

As detailed in the State's "Brief on Appeal," the Board's Order currently under review by the Commission suffers from a number of legal deficiencies and factual inaccuracies, and the State is likely to prevail on the merits of the appeal. Sipos Decl., Ex. 8. Moreover, the evidence submitted by the State in support of its Petition to Intervene identified multiple reasons for refusing to grant Entergy's request to delay the next ILRT. *Id.*, Ex. 3. Briefly summarized, the State's evidence showed that (1) the IP2 containment liner has been subjected to a number of degradation events that have directly impacted the integrity of the containment liner; (2) recent inspections discovered signs of liner degradation, some of which was attributable to the historic degradation events; (3) the Atomic Energy Commission Staff recommended that the IP2 containment liner be subject to more frequent inspections; (4) previous ILRT results showed that the IP2 containment's leak rate was increasing, and was on pace to exceed a leakage rate which, if discovered, would prevent IP2 from operating; (5) Entergy utterly failed to consider increased

seismic risk hazards that Entergy and Staff have recently recognized discovered at IP2; and (6) Entergy relied on a probabilistic risk assessment that suffered from a variety of shortcomings. In its appeal, the State cited to specific legal errors in the Board's analysis demonstrating that it had applied an unduly strict standard for contention admissibility. Given the extent of the State's evidence, the State is likely to succeed in having the Board's order reversed and, ultimately, to obtain a ruling on the merits that the license amendment should not be granted.

III. Irreparable Injury to the State Will Occur Without Action to Vacate or Stay the Amendment

Absent the Commission acting to vacate or stay the February 23, 2016 license amendment moving the deadline for ILRT from 2016 to 2021, Entergy will essentially circumvent Commission review to obtain the relief it requested in its license amendment request.⁴ This prejudices the State by truncating the Commission's consideration of the State's legitimate regulatory and public safety concerns. Additionally, the State's citizens and environment will be subjected to an increased risk of exposure to the accidental release of radiation. By essentially foreclosing real and meaningful consideration of the State's issues on appeal, the NRC Staff's action wholly devalues the State's good-faith dedication of its limited and precious government resources to addressing those concerns.

IV. Vacating or Staying the Amendment Will Not Prejudice Other Parties

Vacating the February 23, 2016 Staff license amendment for IP2, or staying its effectiveness pending resolution of the State's appeal of LBP-15-26 to the Commission, would have little if any actual prejudice to the other parties to the proceeding, Staff and Entergy.

⁴ NRC Staff seeks to rely on its finding of no significant hazards consideration under 10 C.F.R. §§ 50.91 and 50.92(c) to justify its issuance of the amendment while the administrative review process is ongoing. *See Sipos Decl. Ex. 13, License Amendment, Safety Evaluation*, at 27. Notably, a finding of no significant hazards consideration is not, itself, reviewable in an administrative proceeding. 10 C.F.R. § 50.58(b)(6). Accordingly, NRC Staff seeks to claim the remarkable power to issue license amendments while the administrative review process is ongoing, based on a determination that is not itself subject to administrative review. The due process deprivation in this circular regulatory scheme is manifest.

Rather, Entergy would be required to operate IP2 pursuant to the terms of its current operating license. Although this could mean, in the event a Commission decision is not forthcoming in the next few weeks, that Entergy would be required to conduct an ILRT during IP2's March 2016 refueling outage, this is a requirement imposed by IP2's current operating license – it is not a new or additional burden. If the Commission ultimately sides with Entergy, it could still grant the license amendment request by extending the interval between future ILRTs from 10 to 15 years.

V. The Public Interest Warrants Commission Action to Vacate or Stay the Amendment

Perhaps most important are the public interests implicated here. The State's pending appeal raises significant and concrete safety and regulatory oversight issues that are of concern to its citizens. Entergy's expenditure of time and money – fully consistent with the obligations of its current operating license – to conduct the ILRT in 2016 does not outweigh the State's interest in protecting its citizens and vindicating its procedural and substantive due process rights.

The public interest does not reside only with the State of New York. As an agency “that prides itself on openness” the NRC has articulated its own compelling interest in maintaining public confidence in the integrity of its regulatory process. *See, e.g.*, NRC, The NRC Approach to Open Government, <http://www.nrc.gov/public-involve/open.html>. (“NRC has a long history of, and commitment to, transparency, participation, and collaboration in our regulatory activities.”). The Commission's public website extolls the agency's values of “good regulation,” “openness,” “efficiency,” “clarity,” and “reliability.” *See*, NRC, Values, <http://www.nrc.gov/about-nrc/values.html>. The Staff's issuance of the February 23, 2016 license amendment during the pendency of the State's appeal to the Commission does not further those articulated goals and values.

The State's appeal advocates for full appreciation of NRC's cornerstone guidance that the agency takes a "risk-informed, tiered approach to ensuring plant safety" by focusing on reactor safety, radiation safety, and security safeguards. "Satisfactory licensee performance in the cornerstones provides reasonable assurance of safe facility operation and that the NRC's safety mission is being accomplished." To that end, regulatory oversight by the NRC is based on inspection programs and performance indicators reported by the licensed operators. NUREG-1649, Reactor Oversight Process, <http://pbadupws.nrc.gov/docs/ML1405/ML14052A306.pdf>. The State's appeal seeks to ensure that the IP2 license amendment request "will provide adequate protection to the health and safety of the public" under 42 U.S.C. § 2232(a), or that it will "provide reasonable assurance that . . . the health and safety of the public will not be endangered" and "will not . . . be inimical to the common defense and security or to the health and safety of the public" under 10 C.F.R. § 50.40(a), (c), *see* Sipos Decl., Ex. 11. The Staff's February 23, 2016 license amendment eliminates the State's ability to have its appeal properly considered and addressed by the Commission, usurps the Commission's authority and corrupts the regulatory process.

CONCLUSION

For the reasons described above, the Commission should vacate the Staff's February 23, 2016 IP2 license amendment, or stay it pending resolution of the State's appeal of Board Order LBP-15-26.

Dated: February 26, 2016

Respectfully submitted,

Signed (electronically) by
John J. Sipos
Brian Lusignan
Assistant Attorneys General
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224
(518) 776-2380

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b), I certify that I have made a sincere effort to contact counsel for NRC Staff and Entergy in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful.

Signed (electronically) by

John J. Sipos
Assistant Attorney General
State of New York
The Capitol
State Street
Albany, New York 12224
john.sipos@ag.ny.gov
518-776-2380

dated: February 26, 2016