

**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

October 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**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

FACTS AND PROCEDURAL HISTORY 2

 I. Background of IP2 Containment and Leak Rate Tests..... 2

 II. Plant-Specific History of IP2 Containment Liner..... 4

 III. Revision of Seismic Hazards Spectra 6

 IV. Entergy’s License Amendment Request and New York’s Petition to Intervene..... 7

 V. The Board’s Memorandum and Order 10

LEGAL STANDARDS 12

 I. Contention Admissibility Standards 12

 II. Standards for License Amendment Requests Regarding Integrated Leak Rate Test
 Frequency..... 14

 III. Standards for Environmental Review Under NEPA and Implementing Regulations 16

ARGUMENT 17

 I. The Board Erred in Holding that Contention NYS-1 Is Not Admissible 17

 II. The Board Erred in Holding that Contention NYS-2 Is Not Admissible 27

CONCLUSION..... 30

ATTACHMENT 1: USNRC Chart of Revised Seismic Hazard Spectra for Indian Point 2

ATTACHMENT 2: Graph of Historic and Extrapolated Integrated Leak Rate Test Results

TABLE OF AUTHORITIES

Federal Court Decisions

Sierra Club v. USNRC,
862 F.2d 222 (9th Cir. 1988)13

Federal Statutes

Atomic Energy Act (AEA)
42 U.S.C. § 2239(a)(1)(A).....12

42 U.S.C. § 2232(a)15, 18

National Environmental Policy Act (NEPA)
42 U.S.C. § 4332(1)(C)(i).....16

Federal Administrative Agency Regulations

10 C.F.R. § 2.309(f)12
10 C.F.R. § 2.309(f)(1)(v).....25
10 C.F.R. § 2.3111
10 C.F.R. § 2.311(c).....11
10 C.F.R. § 50.409, 18
10 C.F.R. § 50.40(a).....15, 18
10 C.F.R. § 50.40(c).....15, 18
10 C.F.R. § 50.58(b)(6).....27
10 C.F.R. § 50.928, 9, 15, 18
10 C.F.R. Part 50, Appendix A, General Design Criteria for Nuclear Power Plants,
Criterion 16 – Containment design.....2
10 C.F.R. Part 50, Appendix J passim
10 C.F.R. Part 50, Appendix J, Option B passim
10 C.F.R. Part 50, Appendix J, Option B, § II.....3

10 C.F.R. Part 50, Appendix J, Option B, § III(A).....	3,4
10 C.F.R. Part 50, Appendix J, Option B § III(B)	4
10 C.F.R. Part 51, Subpart A	17
10 C.F.R. § 51.20(b)	17
10 C.F.R. § 51.22(b)	17, 29
10 C.F.R. § 51.22(c).....	29
10 C.F.R. § 51.22(c)(9).....	passim
10 C.F.R § 51.53	9
10 C.F.R. § 51.101	9
40 C.F.R. § 1501.4	17

Federal Register Notices

54 Fed. Reg. 33168 (Aug. 11, 1989), <i>Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process</i>	14, 19, 25, 27
60 Fed. Reg. 49495 (Sept. 26, 1995), <i>Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors</i>	3, 5, 15
73 Fed. Reg. 59540 (Oct. 9, 2008), <i>Categorical Exclusions from Environmental Review</i>	29
80 Fed. Reg. 13902 (March 17, 2015), <i>License Amendment Request</i>	8, 28

Nuclear Regulatory Commission and Atomic Safety Licensing Board Decisions

<i>Arizona Public Service Co.</i> (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 N.R.C. 397 (1991), <i>appeal denied</i> CLI-91-12, 34 N.R.C. 149 (1991).....	14
<i>Calvert Cliffs 3 Nuclear Project, LLC</i> (Combined License Application for Calvert Cliffs Unit 3), LBP-12-17, 76 N.R.C. 71, 2012 NRC Lexis 39	19

<i>Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.</i> (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287 (March 26, 2010)	12, 19
<i>Entergy Nuclear Operations, Inc.</i> (Indian Point Generating Unit No. 2), LBP-15-26, Memorandum and Order, Slip Op. (Sept. 26, 2015) (ML15268A386)	passim
<i>Entergy Nuclear Operations, Inc.</i> (Indian Point Nuclear Generating Station, Unit 2) Notice and Order (July 6, 2015) (unpublished) (ML15187A273)	10
<i>Entergy Nuclear Operations, Inc.</i> (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP 08-13, 68 N.R.C. 43 (July 31, 2008)	12, 13
<i>Entergy Nuclear Operations, Inc.,</i> (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions), (July 6, 2011) (unpublished) (ML111870344)	14
<i>Gulf States Utilities Co.</i> (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43 (1994)	14
<i>Louisiana Energy Services, L.P.</i> , CLI-04-35, 60 N.R.C. 619 (2004)	13 n. 3
<i>Luminant Generation Co., LLC.</i> (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 N.R.C. 311 (2009)	14
<i>Pacific Gas & Electric Co.</i> (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 N.R.C. 1 (1986) <i>reversed in part on other grounds</i> , <i>San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission</i> , 799 F.2d 1268 (9 th Cir. 1986)	27
<i>Pa'ina Hawaii, LLC</i> , (Material License Application), LBP-06-04, 63 N.R.C. 99 (Jan. 24, 2006)	28
<i>Public Service Co. of New Hampshire</i> (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649 (1982)	13 n. 3
<i>Sacramento Municipal Utility District</i> (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200 (1993)	13

<i>Sequoyah Fuels Corp.</i> (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 N.R.C. 116 (1994).....	13, 19, 29
<i>USEC, Inc.</i> (American Centrifuge Plant), LBP-05-28, 62 N.R.C. 585 (2005).....	13 n. 3
<i>Vermont Yankee Nuclear Power Corp.</i> (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 N.R.C. 85 (1990)	27, 29
<i>Washington Public Power Supply System</i> (WPPSS Nuclear Project No. 2), ALAB-722, 17 N.R.C. 546, (1983)	13 n. 3

Additional Citations

<i>Analysis of Proposed Technical Specifications Changes Regarding 15 Year Containment ILRT, Attachment 1 to NL-14-128.....</i>	passim
Consolidated Edison Company of New York, Inc., <i>Feedwater Line Incident Report – Indian Point Unit No. 2</i> (Jan. 14, 1974) (ML100200180).....	5
Entergy Answer Opposing State of New York’s Petition to Intervene and Request for Hearing, (June 12, 2015) (ML15163A302).....	10, 21
2-PT-10Y001, Rev. 2, Integrated Leak Rate Test, (Aug. 28, 2006), Attachment to NL-15-068 (ML15163A166)	22
Letter from W. J. Cahill, Jr., Vice-President, Consolidated Edison, to J. P. O’Reilly, Director, Regulatory Operations of Atomic Energy Commission, (Nov. 30, 1973) (ML093560700)	5
Letter from L. Coyle, Site Vice President, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-14-128 (Dec. 9, 2014) (ML14353A015).....	7
Letter from R.R. Maccary, Assistant Director for Engineering, AEC, to D. J. Skovholt, Assistant Director for Operating Reactors, AEC (April 15, 1974), Attachment (ML093630690)	5, 20
Letter from Patrick D. Milano, Office of Nuclear Reactor Regulation, to Michael R. Kansler, Entergy (Aug. 5, 2002) (ML021860178)	16
<i>Marked Up Technical Specifications for IP2, Attachment 2 to NL-14-128.....</i>	3, 22

Response to RAI 3, Attachment to NL-15-062 (May 20, 2015) (ML15149A139).....	26
Response to RAI, Attachment to NL-15-083 (June 29, 2015) (ML15189A026)	26
New York State Petition to Intervene and Request for Hearing (May 18, 2015) (ML15138A415).....	passim
NRC, IE Information Notice No. 80-37: Containment Cooler Leaks and Reactor Cavity Flooding at Indian Point Unit 2 (Oct. 25, 1980) (ML031180421).....	6
NRC Regulatory Guide 1.163 (September 1995).....	15, 19
NRC Safety Evaluation of NEI 94-01, Rev. 2.....	16
NRC Staff's Answer to State of New York Petition to Intervene and Request for Hearing (June 12, 2015) (ML15163A320).....	10
NRC Staff, Request for Additional Information 4 (April 28, 2015) (ML15103A259).....	8
NRC Staff, Slides, Near-Term Task Force Recommendation 2.1: Entergy (June 19, 2014) (ML14169A489)	6
NRC Staff, Support Document for Screening and Prioritization Results Regarding Seismic Hazard Re-Evaluations for Operating Reactors in the Central and Eastern United States (May 21, 2014) (ML14136A126).....	7
NUREG-1493, <i>Performance-Based Containment Leak-Test Program</i> (Sept. 1995)	3, 22
<i>Report on the Containment Building Liner Plate Buckle in the Vicinity of the Fuel Transfer Canal</i> , (January 1968) (ML093521587)	4
<i>Risk Assessment for Indian Point Regarding the ILRT (Type A) Permanent Extension Request</i> , (October 2013) Attachment 3 to NL-14-128 (ML14353A015).....	passim
Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 232 to Facility Operating License No. DPR-26 (Aug. 5, 2002) (ML021860178)	6, 26
<i>Staff Assessment by the Office of Nuclear Reactor Regulation Related to Seismic Hazard and Screening Report, attached to Letter from Frankie Vega, Office of Nuclear Reactor Regulation, to Vice President, Operations, Entergy</i> (May 7, 2015) (ML15096A340)	7

State of New York Reply in Support of Petition to Intervene
and Request for Hearing (June 19, 2015) (ML15170A430).....10, 22, 24, 25

Technical Report NEI 94-01, Revision 0.....15, 16

Technical Report NEI 94-01, Revision 2A.....16, 19, 21

Transcript, Oral Argument (July 30, 2015) (ML15215A650).....10, 25

USNRC Office of Inspection and Enforcement,
Investigation Report No. 50-247/80-19 (Nov. 28, 1980) (ML100191212).....6

Pursuant to 10 C.F.R. § 2.311, the State of New York appeals to the U.S. Nuclear Regulatory Commission (the Commission) for review of a September 25, 2015 decision of the Atomic Safety and Licensing Board (the Board), which denied the State's "Petition to Intervene and Request for a Hearing" on Entergy's request to reduce the frequency with which it must conduct an integrated leak rate test at Indian Point Nuclear Generating Unit No. 2 (IP2). *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). The Board erred by imposing an unduly stringent standard for the admission of the State's contentions and improperly evaluating the merits of the State's contentions at the contention admissibility stage. 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 proffered two broad contentions challenging the propriety of Entergy's request to delay its performance of the only comprehensive test of the containment liner integrity at IP2, each of which was supported by specific facts and legal arguments. First, the State alleged that the license amendment request failed to meet the relevant statutory and regulatory standards. Specifically, the State referred to (1) historic degradation events that directly impacted the integrity of the 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 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. Second, the State alleged that the license amendment did not comply with the National Environmental Policy Act (NEPA) or its implementing regulations, because Entergy and NRC failed to conduct any environmental review of the license amendment. The State also objected to Entergy's attempt to invoke a categorical exclusion to NEPA. With respect to both contentions, the State met its burden to show the existence of a genuine dispute on a triable issue that directly implicated the propriety of issuing the license amendment. The Board erred in weighing the State's evidence and evaluating the merits of its contentions. The Commission should reverse the Board's decision, grant State's petition, and set the matter down for an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

I. Background of IP2 Containment and Leak Rate Tests

In the event of an accident, the IP2 containment is the last line of defense preventing the exposure of nearly 20 million citizens and numerous historical, cultural, and natural resources located within 50 miles of Indian Point to the uncontrolled release of radiation.¹ Accordingly, the containment structure must be "essentially leak-tight." 10 C.F.R. Part 50, Appendix A, General Design Criteria for Nuclear Power Plants, *Criterion 16 – Containment design*. The IP2 containment structure is a steel-lined reinforced concrete vertical cylinder with a flat base mat and hemispherical dome that completely encloses the entire reactor and reactor coolant system. The containment liner at IP2 is made from several pieces of welded steel, at least ¼" thick, attached to the inside face of the concrete shell of the containment structure.

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

¹ In addition to the sources specifically cited, the factual background set forth herein is based on the contents of the State's Petition and the documents cited therein.

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). An ILRT is conducted by pressurizing the primary reactor containment to a level that emulates the expected pressure during a design basis accident, and then measuring how much air escapes the containment structure. *See* NUREG-1493, at 3-1. An ILRT can be conducted in about 24 hours, and is done when the reactor is offline. *Id.* at 3-2. 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.

Local leak rate tests, also known as Type B and Type C leak rate tests, are also used to evaluate leakage pathways through specific penetrations of the containment structure. 10 C.F.R. Part 50, Appendix J, Option B § III(B). Type B tests measure leakage rates across each pressure-containing or leakage-limiting boundary for various primary reactor containment penetrations. *Id.* Type C tests measure containment isolation valve leakage rates. *Id.* Notably, the local leak rate tests do not measure leakage through the containment liner itself. *See Analysis of Proposed Technical Specifications Changes Regarding 15 Year Containment ILRT* (hereinafter Technical Analysis), at 6-9, Attachment 1 to NL-14-128 (listing specific components tested by local leak rate tests). The condition of the containment structure is also monitored through visual inspections. 10 C.F.R. Part 50, Appendix J, Option B § III(A).

II. Plant-Specific History of IP2 Containment Liner

The IP2 steel containment liner has been subjected to a series of stresses and degradation events that make it particularly ill-suited for reduced inspections. As early as 1968, when the IP2 containment structure was still under construction, plate buckling was detected in the IP2 containment liner in the vicinity of the fuel transfer tube canal penetration. *See Report on the Containment Building Liner Plate Buckle in the Vicinity of the Fuel Transfer Canal*, at 1 (January 1968) (ML093521587). The buckled plates, discovered between elevations 56'-7" and 59'-7", exceeded the acceptable tolerance limits for local buckling and had to be corrected by forcibly jacking the liner back within tolerance limits and installing strongback and stud anchors to hold the liner within the tolerance limits. *Id.* at 3, 8. Accordingly, the IP2 containment liner was subjected to unusual stresses from its beginning.

On November 13, 1973, shortly after IP2 received its operating license, the IP2 containment liner was subject to further damage when the feedwater line to the No. 22 steam

generator broke, causing a jet of steam and hot water to deform the containment liner. Letter from William J. Cahill, Jr., Vice-President, Consolidated Edison, to James P. O'Reilly, Director, Regulatory Operations of Atomic Energy Commission, at 2-3, 5 (Nov. 30, 1973) (ML093560700). Subsequent inspections determined that intermittent bulging extended over an arc of approximately 60 feet at an elevation of 73' in the containment liner. Consolidated Edison Company of New York, Inc., *Feedwater Line Incident Report – Indian Point Unit No. 2*, at 3-1 to 3-2 (Jan. 14, 1974) (ML100200180). The accident pulled the liner away from some of the anchor studs holding the liner to the concrete containment shell, and an ultrasonic inspection of the damaged area revealed that 9 of the 18 studs in the bulged area were broken. *Id.* at 3-2. The ultrasonic inspection also revealed that the studs at this elevation were spaced at intervals of 28 inches, not the “specified 14 inches” – indeed, the inspection report noted the unexplained “absence” of two rows of studs around the containment circumference. *Id.* Apparently, even when the containment liner was first installed in IP2, it did not conform with the applicable specifications. As part of the licensee’s remediation of this event, AEC Staff recommended that “because of this occurrence, increased attention should be given to the surveillance of the liner during the life of the plant and that the frequency of leakage tests required by the technical specification should be increased.” Letter from R.R. Maccary, Assistant Director for Engineering, AEC, to Donald J. Skovholt, Assistant Director for Operating Reactors, AEC (April 15, 1974), Attachment at 4 (ML093630690). At that time, ILRTs had to be conducted three times in every ten-year period. *See* 60 Fed. Reg. 49,495, 49,496 (Sept. 26, 1995).

The IP2 containment liner was subjected to further damage during a 1980 flooding event. An inspection of the containment structure conducted on October 17, 1980 discovered that leaking service water pipes had resulted in the containment area being flooded with more than

100,000 gallons of brackish water from the Hudson River. *See* NRC, IE Information Notice No. 80-37: Containment Cooler Leaks and Reactor Cavity Flooding at Indian Point Unit 2 (Oct. 25, 1980) (ML031180421); USNRC Office of Inspection and Enforcement, Investigation Report No. 50-247/80-19, at 2-13, 48 (Nov. 28, 1980) (ML100191212). Liner corrosion from this event was discovered as recently as 2000, at the 46 foot elevation, where the liner meets the concrete containment floor. *See* Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 232 to Facility Operating License No. DPR-26, at 8 (Aug. 5, 2002) (hereinafter 2002 SE on One-Time ILRT Extension) (ML021860178). The liner had deteriorated from a thickness of .5 inches to .355 inches, which an Entergy contractor concluded was only .015 inches thicker than the required minimum thickness. *Id.*

III. Revision of Seismic Hazards Spectra

Recent evaluations conducted by both Entergy and NRC Staff have shown that IP2 faces a greater seismic hazard than was believed at the time the plant was designed and built. Ground motion response spectra (GMRS) developed for IP2 in 2014 significantly exceed the safe shutdown earthquake (SSE) design curves. *See* NRC Staff, Slides, Near-Term Task Force Recommendation 2.1: Entergy, at 6 (June 19, 2014) (ML14169A489). The chart showing the updated GMRS and SSE design curves is included as Attachment 1 to this Brief. NRC Staff placed IP2 in the “Priority Group 1” for additional review. According to Staff, “Group 1 plants are generally those that have the highest re-evaluated hazard relative to the original plant seismic design basis as well as ground motions in the 1-10Hz range that are generally higher in absolute magnitude. Group 1 plants are expected to conduct a seismic risk evaluation and submit it by June 30, 2017.” NRC Staff, Support Document for Screening and Prioritization Results Regarding Seismic Hazard Re-Evaluations for Operating Reactors in the Central and Eastern

United States, at 2 (May 21, 2014) (ML14136A126). Indeed, NRC Staff has recently stated that “[b]oth the licensee’s and staff’s GMRS exceed the SSE for both Indian Point Units 2 and 3 for all frequencies above 3Hz.” *Staff Assessment by the Office of Nuclear Reactor Regulation Related to Seismic Hazard and Screening Report*, at 7, attached to Letter from Frankie Vega, Office of Nuclear Reactor Regulation, to Vice President, Operations, Entergy (May 7, 2015) (ML15096A340). Accordingly, Entergy is required to perform a plant seismic risk evaluation. *Id.* at 8.

IV. Entergy’s License Amendment Request and New York’s Petition to Intervene

On December 9, 2014, Entergy submitted a license amendment request (or LAR) 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. Letter from Lawrence Coyle, Site Vice President, Entergy Nuclear Northeast, to U.S. Nuclear Regulatory Commission, NL-14-128 (Dec. 9, 2014) (ML14353A015). Under the proposed license amendment, 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.² Technical Analysis, at 3, Attachment 1 to NL-14-128. The containment liner would be over 50 years old by the time of the proposed 2021 ILRT. The amendment request was accompanied by a probabilistic risk assessment (PRA) prepared by an Entergy vendor for both IP2 and IP3 more than a year before the amendment request. *See* PRA, Attachment 3 to NL-14-128. Neither the amendment request nor the PRA considered the plant-specific history of containment liner damage at IP2, or the recently increased seismic hazard spectra. Furthermore, the amendment request did not include any environmental review of the proposed amendment.

² 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.

A summary of historic ILRT results submitted in Entergy's amendment request indicated that the leakage rate had been steadily increasing since 1979, even as the test pressure had generally been reduced. Technical Analysis, at 5-6, Attachment 1 to NL-14-128. This prompted NRC Staff to observe, in a request for additional information (RAI), that "the historical trend indicates that consistently, for all five historical ILRTs, the 'As found Leakage' is on a continuous trend towards eclipsing the IP2 [Technical Specification] 5.5.14.d.1 leakage rate acceptance criteria of $\leq 0.75 L_a$ (i.e., 0.075 percent containment weight per day)." NRC Staff, Request for Additional Information 4, at 3 (April 28, 2015) (ML15103A259). A graph prepared by State showing historical and projected ILRT results is included as Attachment 2 to this Brief.

Entergy's LAR for IP2 was published in the Federal Register on March 17, 2015. *See* 80 Fed. Reg. 13,902 (March 17, 2015). NRC Staff, based upon its review of analysis presented in Entergy's LAR, "propose[d] to determine that the [LAR] involves no significant hazards consideration" under 10 C.F.R. § 50.92. *Id.* at 13,906.

The State, concerned that Entergy was proposing to roll back a significant safety inspection without adequate consideration of plant-specific conditions or any evaluation of environmental impacts, timely filed a "Petition to Intervene and Request for Hearing" (NYS Petition) on May 18, 2015 (ML15138A415). The NYS Petition noted that IP2 is located "twenty-four miles north of New York City, in one of the most densely populated parts of the State or, indeed, the country." *Id.* at 3. The NYS Petition also noted that "[t]he 50-mile area around IP2 contains some of the densest real estate development in the country, numerous landmarks, iconic and irreplaceable sites, and vital components of the State and Nation's critical infrastructure." *Id.* The NYS Petition included two attachments: (1) a list of historic, unique or

otherwise significant sites within 50 miles of Indian Point, and (2) a map of reservoirs in the vicinity of Indian Point. NYS Petition, Attachments 1 and 2.

The NYS Petition includes two Contentions, which are supported by detailed and specific bases as well as supporting evidence. *See* NYS Petition, at 5-23. Contention NYS-1 alleges that:

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

NYS Petition, at 5. Contention NYS-1 was supported by evidence relating to (1) the historical degradation events; (2) the recommendation of AEC Staff 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) prior ILRT results indicating that the rate of containment leakage was increasing, and could surpass the acceptance criteria by 2016; (5) the revised and increased seismic hazard spectra; and (6) shortcomings in the PRA, including deficiencies in Severe Accident Mitigation Alternatives (SAMA) analysis. NYS Petition, at 5-20.

Contention NYS-2 alleges that:

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

NYS Petition, at 20. Contention NYS-2 was supported by much of the same evidence as Contention NYS-1, but focused on the unavailability of the NEPA categorical exclusion under 10 C.F.R. § 51.22(c)(9).

Entergy and NRC Staff opposed the State's Petition. Entergy's Answer Opposing State of New York's Petition to Intervene and Request for Hearing, at 13-38 (June 12, 2015) (Entergy's Answer) (ML15163A302); NRC Staff's Answer to State of New York Petition to Intervene and Request for Hearing, at 12-28 (June 12, 2015) (NRC Staff Answer) (ML15163A320). The State then submitted a Reply in further support of the Petition. State of New York Reply in Support of Petition to Intervene and Request for Hearing (June 19, 2015) (NYS Reply) (ML15170A430). Oral arguments on the admissibility of the State's contentions were held on July 30, 2015. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Unit 2) Notice and Order (Scheduling and Providing Instructions for Oral Argument) (July 6, 2015) (unpublished) (ML15187A273); Oral Argument Transcript (July 30, 2015) (ML15215A650).

V. The Board's Memorandum and Order

The Board denied the State's Petition in a September 25, 2015 Memorandum and Order, LBP-15-26 (Board Order). The Board ruled on the merits of each argument supporting the State's contentions by weighing and rejecting the evidence proffered by the State. Board Order, at 10-21. With respect to Contention NYS-1, the Board held that the State's evidence respecting historical degradation events at IP2 failed to raise a genuine dispute on a material issue and was outside the scope of the proceeding, characterizing the State's argument as "an improper attempt to graft a 'historical event' criterion onto" 10 C.F.R Part 50, Appendix J, Option B. Board Order, at 11-12. The Board also claimed that because there was evidence that containment

damage at IP2 had “been remediated,” there was no genuine dispute with respect to whether those historical events should have been considered. *Id.* at 12. The Board held that the State’s arguments regarding the steadily increasing ILRT results did not raise a material issue, because the State alleged that only the “as left” acceptance criteria of 0.75 L_a would be exceeded, rather than the “as found” acceptance criteria of 1.0 L_a . *Id.* at 13. The Board also accepted Entergy’s explanation that the ILRT results did not indicate that the containment’s leakage rate was increasing, even though that explanation was contradicted by the actual results reported in the LAR. *Id.* at 14. The Board also summarily rejected the State’s arguments with respect to increased seismic risk, reliance on the non-representative Surry, Virginia plant in assessing the risk of the amendment, and SAMA deficiencies, claiming that the State had failed to support its arguments with expert testimony, or adequately explain the significance of its claims. *Id.* at 15-16.

With respect to Contention NYS-2, the Board first held that the State could not challenge the Staff’s proposed no significant hazards consideration, even in the context of arguing that a categorical exclusion from NEPA should not apply. *Id.* at 17-18. The Board noted that the State could challenge the applicability of the NEPA categorical exclusion by alleging that “special circumstances” existed, but held that the State could not pursue this argument because it failed to use the words “special circumstances” or cite specifically to subdivision (b) of section 51.22 until the NYS Reply. *Id.* at 18-20.

The State now appeals the Board Order. Because the Board Order denied the State’s Petition to Intervene and Request for Hearing, it is appealable by the State “on the question as to whether the . . . petition should have been granted.” 10 C.F.R. § 2.311(c).

LEGAL STANDARDS

I. Contention Admissibility Standards

Section 189 of the Atomic Energy Act (AEA) provides that, in any proceeding under the AEA “for the granting, suspending, revoking, or amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.” 42 U.S.C. § 2239(a)(1)(A). The only issue in this proceeding is whether the State has proffered an admissible contention. Under 10 C.F.R. § 2.309(f), contentions are admissible if they:

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

Entergy Nuclear Operations, Inc. (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP 08-13, 68 N.R.C. 43, 60-61 (July 31, 2008). The NRC’s “contention rules require reasonably specific factual and legal allegations at the outset to assure that matters admitted for hearing have at least some minimal foundation, are material to the proceeding, and provide notice to the opposing parties of the issues they will need to defend against.” *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. 287, 309 (March 26, 2010) (internal

quotation marks and citations omitted). “The obvious intent of the procedural requirements on contentions is to ensure the identification of bona fide litigative issues.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 N.R.C. 116, 120 (1994). Accordingly, a contention that raises legitimate issues should not be rejected based on an intervenor’s failure to comply with “pleading ‘niceties’” or use of “imperfect phraseology.” *Id.* The contention admissibility rule must be “reasonably applied” and the Commission’s rules of procedure “are not to be applied in an ‘overly formalistic’ manner[.]” *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 206 (1993).

“Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.” *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP 08-13, 68 N.R.C. 43, 63 (July 31, 2008); *see Sierra Club v. USNRC*, 862 F.2d 222, 226 (9th Cir. 1988) (“In passing on the admissibility of a contention . . . it is not the function of a licensing board to reach the merits of [the] contention.” [internal quotations and citation omitted]).³ An intervenor is not required “to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” *Rules of*

³ NRC precedent on this point is clear and voluminous. *See, e.g., Louisiana Energy Services, L.P.*, CLI-04-35, 60 N.R.C. 619, 623 (2004) (finding Intervenor’s are not asked to prove their case at the contention stage, but simply to provide sufficient alleged factual or legal bases to support the contention); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1654 (1982) (finding that a licensing board should not address the merits of a contention when determining its admissibility); *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 N.R.C. 585, 596-97 (2005) (finding that determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits, and that a petitioner does not have to prove its contention at the admissibility stage); *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 N.R.C. 546, 551 n.5 (1983) (All that is required for a contention to be acceptable for litigation is that it be specific and have a basis; whether or not the contention is true is left to litigation on the merits in the licensing proceeding).

Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54

Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). The Commission has said:

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

Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 51 (1994), quoting 54 Fed. Reg. at 33,170. The Board “do[es] not weigh the evidence” at this stage of the proceeding. *Entergy Nuclear Operations, Inc.*, (Indian Point Units 2 and 3), Memorandum and Order (Ruling on Pending Motions for Leave to File New and Amended Contentions), ASLBP No. 07-858-03-LR-BD01, at 28 (July 6, 2011) (unpublished). Indeed, “the contention pleader is entitled to at least the same benefit of construction as a party opposing a summary judgment motion. . . . [The] pleading must be viewed in the light most favorable to accepting it. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 & 3), LBP-91-19, 33 N.R.C. 397, 411 (1991), *appeal denied* CLI-91-12, 34 N.R.C. 149 (1991). Moreover,

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

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

II. Standards for License Amendment Requests Regarding Integrated Leak Rate Test Frequency

In order to grant a license amendment request, the Commission is “guided by the considerations which govern the issuance of initial licenses . . . to the extent applicable and

appropriate.” 10 C.F.R. § 50.92. The application for a license amendment must include sufficient information to show that the issuance of the amendment “will provide adequate protection to the health and safety of the public.” 42 U.S.C. § 2232(a). To grant the license amendment, the Commission must find that: (1) the “technical specifications . . . provide reasonable assurance that . . . the health and safety of the public will not be endangered”; and (2) the amendment “will not, in the opinion of the Commission, be inimical to the common defense and security or to the health and safety of the public.” 10 C.F.R. § 50.40(a), (c).

The scope and frequency of ILRTs, as well as LLRTs (Type B and Type C tests), is governed by 10 C.F.R. Part 50, Appendix J. Prior to 1995, Appendix J required licensees to conduct ILRTs three times every 10 years. 60 Fed. Reg. at 49,497. In 1995, the NRC added “Option B” to Appendix J, which authorizes licensees to adopt a “performance-based” test frequency for ILRTs. *Id.* at 49,504-505. When the Commission promulgated Option B, it made clear that it was authorizing the extension of the permissible ILRT test frequency from three times every ten years to once every ten years. *Id.* at 49,497, 49,499 (describing proposal to reduce ILRT test frequency to once every ten years, and technical support for that change); *id.* at 49,501 (noting, in response to commenter who expressed concern about extending test frequency beyond once every ten years, that “NRC has decided, in general, to maintain the present level of prescriptiveness in the proposed rule and, in particular, to not decrease further the test frequency of ILRTs”); *id.* at 49,502 (noting support for 10-year ILRT test interval, and stating that NRC decided to retain “120-month interval for Type A” tests). A footnote in Appendix J, Option B references NRC’s Regulatory Guide 1.163 (September 1995), which in turn states that an industry document, NEI 94-01, Revision 0 (July 1995), “provides methods acceptable to the NRC Staff for complying with the provisions of Option B in Appendix J[.]” Technical Report

NEI 94-01, Rev. 0, states that “Type A testing shall be performed during a period of reactor shutdown at a frequency of at least once per 10 years based on acceptable performance history.”

NEI 94-01, Rev. 0, at 10.

Beginning in 2001, the industry initiated a project to further reduce ILRT frequency. *See* NRC Safety Evaluation of NEI 94-01, Rev. 2, at 2. As a result of this program, many nuclear plants – including IP2 – received a one-time extension of ILRT test-frequency to once in 15 years. *Id.*; *see* Letter from Patrick D. Milano, Office of Nuclear Reactor Regulation, to Michael R. Kansler, Entergy (Aug. 5, 2002) (ML021860178). In October 2008, the industry issued a technical report, which NRC Staff reviewed and accepted, contemplating that licensees be permitted to apply for permanent extensions of ILRT intervals to once every 15 years. *See* NEI 94-01, Revision 2A. NEI 94-01, Rev. 2A specifies that “in general, the risk impact associated with ILRT interval extensions for intervals up to fifteen years is small[,]” but that “plant-specific confirmatory analyses are required.” *Id.* at 12. In short, NEI 94-01, Rev. 2A, provides for extensions of ILRT intervals beyond once every 10 years on a “plant-specific” basis. *See* Technical Analysis, at 2, Attachment 1 to NL-14-128. Notably, NRC has never promulgated a formal amendment to 10 C.F.R. Part 50, Appendix J, Option B authorizing extensions of ILRT frequency beyond once every 10 years.

III. Standards for Environmental Review Under NEPA and Implementing Regulations

The National Environmental Policy Act (NEPA) requires federal agencies to prepare “a detailed statement . . . on the environmental impact” of any proposed major federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(1)(C)(i). At a minimum, if any agency is going to allow a licensee to engage in activities with environmental impacts without the agency first issuing a detailed environmental impact statement, the agency

must do an environmental assessment and issue a “finding of no significant impact” (FONSI). 40 C.F.R. § 1501.4 (regulations of President’s Council on Environmental Quality).

NRC regulations seek to incorporate various NEPA requirements in 10 C.F.R. Part 51, Subpart A. In general, a licensing or regulatory action approved by NRC requires the preparation of an environmental impact statement (EIS) under section 51.20(b) or an environmental assessment under section 51.21. However, 10 C.F.R. § 51.22(b) provides that “[e]xcept in special circumstances, as determined by the Commission upon its own initiative or upon request of any interested person, an environmental assessment or an environmental impact statement is not required for any action within a category of actions included in the list of categorical exclusions set out in paragraph (c) of this section.” Section 51.22(c)(9) includes a categorical exclusion for:

the issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes an inspection or a surveillance requirement; provided that:

(i) The amendment or exemption involves no significant hazards consideration;

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and

(iii) There is no significant increase in individual or cumulative occupational radiation exposure.

ARGUMENT

I. The Board Erred in Holding that Contention NYS-1 Is Not Admissible

As an initial matter, from the outset the Board adopted 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.” Board Order, at 7. In fact, Contention NYS-1 raised a much broader challenge to the propriety of the license amendment. In addition to challenging the “significance” of the risk posed by the license amendment, the State also alleges that the license amendment would not comply with the statutory and regulatory standards set forth in AEA (42 U.S.C.) section 182(a) and 10 C.F.R. §§ 50.40, 50.92 and Part 50, Appendix J. Namely, the State alleged that the license amendment request does not establish that it “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* NYS Petition, at 5-10. Moreover, the State alleged that the license amendment request failed to conduct an adequate plant-specific risk evaluation as required by Appendix J, Option B. *See* NYS Petition, at 5-6. By constricting the State’s claim to the “significance” of the license amendment request, the Board effectively ignored the other aspects of Contention NYS-1 that go directly to the findings which the Commission must make to grant the license amendment, setting the Board up to dismiss the contention for failing to raise a material issue of fact.

The Board also imposed an unwarranted and erroneous evidentiary standard on the State at the contention admissibility stage. The NYS Petition far exceeded the State’s “minimal” obligation to show “a fact or facts” necessary to warrant a hearing on the merits. Indeed, the State’s broad contention that the license amendment extending the inspection interval from ten to fifteen years could not be granted was supported by evidence that (1) Entergy failed to consider plant-specific degradation events; (2) recent inspections revealed degradation, some of which was attributed to those historical events; (3) AEC Staff recommended that the liner should be

subject to *increased* surveillance during the life of the plant; (4) prior ILRT results indicated that the rate of containment leakage was increasing, and could surpass the acceptance criteria when next tested; (5) the license amendment request failed to consider recent increases in seismic hazards at IP2; and (6) the PRA relied on a flawed methodology for assessing the risk posed by the release of radiation from IP2. NYS Petition, at 5-20. Rather than assess whether the State had made the “minimal” showing of the existence of a “bona fide litagative issue” that warranted “inquiry-in-depth” at an evidentiary hearing, the Board improperly reviewed and weighed each piece of evidence in order to reach a decision on the merits of the State’s claims. *See* 54 Fed. Reg. at 33,170; *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. at 309; *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 N.R.C. at 120.

With respect to the historical degradation events, the Board also ignored or misapplied relevant substantive law. For example, it is uncontested that the determination of whether to grant an ILRT extension from 10 to 15 years requires consideration of “plant-specific performance data” as well as “the operating history of the component and the resulting risk from its failure.” Technical Analysis, Attachment 1 to NL-14-182, at 2 (citing 10 C.F.R. Part 50 Appendix J; NEI 94-01, Rev. 2A; Regulatory Guide 1.163). Nonetheless, the Board rejected the State’s argument that the operating history of the IP2 containment liner – namely, multiple events resulting in known damage to the liner – should have been considered in Entergy’s license amendment request. *See* Board Order, at 11. Contrary to the Board’s decision, the State’s argument was a natural extension of the requirements of 10 C.F.R. Part 50, Appendix J, Option B – not “an improper attempt to graft a ‘historical event’ criterion” onto that law. *Id.*; *see Calvert Cliffs 3 Nuclear Project, LLC* (Combined License Application for Calvert Cliffs Unit 3),

LBP-12-17, 76 N.R.C. 71, 2012 NRC Lexis 39, at *25-26 (Board should “consider issues that, although not expressly stated, can reasonably be inferred from the arguments presented”).

The Board also improperly weighed the evidence in concluding that each historic degradation event described by the State had been “remediated” and had no lasting impacts on the containment liner. Board Order, at 12. In fact, the State submitted evidence that the 1973 feedwater breach and resulting deformation of a large swath of the liner resulted in an AEC recommendation to give “increased attention . . . to the surveillance of the liner during the life of the plant” and to “increase the frequency of liner inspections[.]” NYS Petition, at 14, citing Letter from R.R. Maccary, Assistant Director for Engineering, AEC, to Donald J. Skovholt, Assistant Director for Operating Reactors, AEC (April 15, 1974), Attachment at 4. The State also submitted evidence that corrosion caused by the 1980 flooding had been discovered as recently as 2000, resulting in the deterioration of the liner to within .015 inches of the required minimum thickness. NYS Petition, at 18, citing 2002 SE on One-Time ILRT Extension, at 8. Additionally, each of the historical events directly impacted the containment liner, the overall integrity of which can only be tested through ILRTs. *See* Technical Analysis, at 6-9, Attachment 1 to NL-14-128. Rather than permit a hearing on the merits of the State’s claim that this plant-specific history of degradation rendered IP2 ill-suited for further relaxation of the ILRT frequency, the Board improperly reached the merits of the State’s contention and concluded that the NYS Petition, standing alone, failed to prove that the LAR should not be granted.

The Board dismissed the AEC recommendation that the containment liner should be subject to more frequent inspections and closer monitoring throughout its life in a footnote, stating merely that the AEC Staff’s “hoary recommendation” had not been adopted by the AEC and “was superseded by subsequent Commission assessments” that reduced the frequency of

ILRT testing at IP2. *Id.* at 12-13 n. 26. However, there is no evidence that the Commission considered – or even knew about – the 1974 AEC recommendation when it granted license amendments reducing the frequency of ILRTs at IP2 in 1997 and 2002. The State is not attempting to relitigate whether IP2 qualifies for the “performance based” testing intervals set forth in 10 C.F.R. Part 50, Appendix J, Option B, but contends that the further reduction in test interval from once every 10 years to once every 15 years – an interval only contemplated in the industry-produced technical report NEI 94-01, Rev. 2A – is not appropriate at IP2. Rather than permit the State to explore the basis and continued vitality of the AEC recommendation in an evidentiary hearing, the Board rejected it based on the Commission’s presumed *sub silentio* overruling of the recommendation.

The Board’s determination that the consistent increase in historic ILRT results failed to raise an issue of material fact warranting an evidentiary hearing is a particularly egregious example of its consideration of the merits of Contention NYS-1, rather than its admissibility. The State submitted evidence – based on data in the license amendment request and an NRC Staff RAI – that the ILRT results had been steadily increasing and, if such increase continued, would exceed the Technical Specifications’ leakage rate acceptance criteria of $0.75 L_a$ by the date of the next scheduled ILRT in 2016. NYS Petition, at 17, citing RAI 4, at 3; *see* Attachment 2, *infra*. The State argued that it was improper to delay the ILRT until 2021, essentially allowing the plant to operate in a failure state for five years. NYS Petition, at 8. Entergy and NRC Staff responded that the $0.75 L_a$ was the “as-left” acceptance criteria, which must be met prior to the plant restarting after an ILRT, and that the only relevant acceptance criteria was $1.0 L_a$, also known as the “as-found” acceptance criteria. Entergy Answer, at 28; NRC Staff Answer, at 16. In reply, the State noted that whatever it was called, if the leakage rate exceeded $0.75 L_a$ then IP2

could not operate. NYS Reply, at 11-12. The Board accepted the position of Entergy and NRC Staff and disregarded the State's argument, concluding that whether or not IP2 was on pace to exceed $0.75 L_a$ by 2016 was not material to whether the license amendment should be granted. Board Order, at 13. This conclusion represents an inappropriate weighing of the evidence, rather than determination of whether the contention is admissible in the first place.

In fact, the supposedly dispositive distinction between the "as found" acceptance criteria of $1.0 L_a$ and the "as left" acceptance criteria of $0.75 L_a$ is simply not supported by the regulations or prior submissions from Entergy or NRC Staff, which state much more generally that the leakage rate cannot exceed $0.75 L_a$. First, 10 C.F.R. Part 50, Appendix J, Option B, section III(A) provides that for ILRTs, "[t]he leakage rate *must not* exceed the allowable leakage rate (L_a) *with margin*, as specified in the Technical Specifications" (emphasis added). The relevant IP2 Technical Specifications note that "[d]uring the first unit startup following testing in accordance with this program, the leakage rate acceptance criteria [is] $\leq 0.75 L_a$ for Type A tests." *Markup of Technical Specifications*, Attachment 2 to NL-14-128. Similarly, Entergy's procedural manual for conducting ILRTs lists the "required containment leak rate" acceptance criteria as $0.75 L_a$. 2-PT-10Y001, Rev. 2, Integrated Leak Rate Test, at 49 (Aug. 28, 2006), Attachment to NL-15-068 (ML15163A166). Moreover, when the NRC Staff raised the issue of the increasing ILRT results with Entergy, it stated simply that "for all five historical ILRTs, the 'As found Leakage' is on a continuous trend towards eclipsing the IP2 [Technical Specifications] leakage rate acceptance criteria of $\leq 0.75L_a$." RAI 4, at 3. Furthermore, when NRC Staff evaluated historical ILRT results at nuclear reactors in NUREG-1493, it treated ILRTs with "as-found" leakage rates between $0.75 L_a$ and $1.0 L_a$ as "identified failures[.]" NUREG-1493, at 4-1. Far from representing a "fundamental misunderstanding" on the part of the State, Board Order, at

13, 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 created by Entergy and adopted by the Board for the purpose of this litigation. If an ILRT of IP2 shows a leak rate exceeding $0.75 L_a$, the plant must remain offline until the leak rate can be reduced. This evidence is sufficient to warrant an “inquiry-in-depth” into the State’s concern that IP2 should not be permitted to operate for five years in the state that, if discovered, would require the plant to remain offline.

Similarly, the Board erred in accepting Entergy’s explanation of the steadily-increasing ILRT results. Entergy claimed that the steady increase in ILRT results was a simple coincidence, arguing that the ILRT “as found” leakage rate included leakage from Type B and C penetrations that, according to Entergy, “vary from ILRT to ILRT depending on the systems that are vented, drained, and open to atmosphere for the ILRT.” Attachment 1 to NL-15-068, at 5. The Board fully accepted Entergy’s explanation and criticized the State for “mak[ing] no effort to rebut Entergy’s explanation.” Board Order, at 14. This evidentiary finding is misplaced for a variety of reasons. First, it is inappropriate for the Board to weigh the evidence at the contention admissibility stage of the hearing. Second, the State *has* offered an explanation for the steadily increasing ILRT results – namely, that the containment is degrading. Third, Entergy’s explanation that the ILRT results vary from test to test is directly contradicted by the actual ILRT results at IP2, which show a steadily increasing leakage rate. *See* Attachment 2, *infra*. Fourth, Entergy’s explanation was offered in an RAI response submitted on June 8, 2015, *after* the State had filed its Petition. *See* NL-15-068. In short, the Board should have permitted the State to explore Entergy’s explanation for the trend in the increasing ILRT results at an evidentiary hearing on the merits.

The Board also erred in rejecting the State’s argument that the license amendment request should have considered updated seismic hazards data. *See* Board Order, at 15. The State submitted evidence that Entergy and NRC Staff had discovered an increased risk of seismic hazards at the IP2 site in March 2014, and noted that Entergy had failed to consider these updated data. NYS Petition, at 10, 15-16. Indeed, although the license amendment request was submitted in December 2014, after the development of the revised seismic hazards data, the PRA submitted in support of the license amendment request was prepared a year earlier, in October 2013, before the updated hazards data had been developed. *See* PRA, Attachment 3 to NL-14-128. The Board faults the State for failing to point out the “significance” of the updated seismic hazards data. Board Order, at 15. However, the NYS Petition cited pages 5-26 to 5-31 of the PRA, which purport to consider the impact of seismic events on the risk posed by the license amendment. NYS Petition, at 10. The “significance” of a PRA purporting to evaluate a risk factor but failing to consider the most up-to-date information regarding that risk factor should be self-explanatory. Nonetheless, the State removed any remaining confusion in its Reply, noting that “an increased risk of seismic activity may translate to an increased risk of an accident, in which case the integrity of the IP2 containment will be essential to preventing the exposure of the State’s citizens and environment to radiation.” NYS Reply, at 14-15. The Board compared the State’s arguments with respect to seismic data to an expert claiming that an application is “deficient,” inadequate,” or “wrong[.]” Board Order, at 15 n. 31. Far from such a bald assertion of error, the State used the updated seismic hazards information as one piece of evidence submitted to support its overarching contention that the license amendment request fails to comply with the applicable statutory and regulatory requirements. The weight of this evidence should have been explored in an evidentiary hearing, not dismissed out of hand by the Board.

The Board also erred in dismissing the State’s concerns regarding the adequacy of Entergy’s SAMA analysis, based on the State’s purported failure “to provide expert opinions or adequate facts in support of these alleged deficiencies as required by 10 C.F.R. § 2.309(f)(1)(v). Board Order, at 16. This turns the evidentiary standard for an admissible contention under 10 C.F.R. § 2.309 on its head – “expert opinions” or multitudinous supporting facts are simply not required. *See* 54 Fed. Reg. at 33,170 (at the contention admissibility phase, a proposed intervenor is required merely to “indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.”). The State 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. *See* NYS Petition, at 19-20 & n. 6. At this stage in the proceeding, that is all that is required.

By improperly weighing the evidence and resolving the merits of the State’s Contention NYS-1, the Board prevented the State from further developing its case and submitting additional evidence in an evidentiary hearing. During oral argument, the State described some of the evidence it would seek to pursue in an evidentiary hearing. Oral Argument Tr., at 62-63. For example, as additional support for the claim that the PRA is not appropriately plant-specific, *see* NYS Petition, at 7-8; NYS Reply, at 11, the State observed that the PRA relies on a liner corrosion analysis developed for use at the Calvert Cliffs, Maryland nuclear plant. Oral Argument Tr., at 39, 62-63; *see* PRA, at 1-1.4-15, Attachment 3 to NL-14-128, at 4-1 to 4-15. However, the Calvert Cliffs containment liner differs significantly from the IP2 liner both in design and in history.

First, significant sections of the IP2 containment liner are considered inaccessible for visual inspections because they are covered by a steel insulation jacket. *See* Response to RAI 3, at 2-3, Attachment to NL-15-062 (May 20, 2015) (ML15149A139); Response to RAI, at 1-2, Attachment to NL-15-083 (June 29, 2015) (ML15189A026). However, the Calvert Cliffs liner corrosion analysis notes that the only sections of the liner that were inaccessible for visual inspections were “the fuel transfer tube and area under the containment floor.” Letter from Charles H. Cruse, Constellation Nuclear, to NRC Document Control Desk, at 2 (March 27, 2002) (ML020920100). To the extent that Entergy’s PRA purports to assess the likelihood that a flaw in the containment liner would be visually detected at IP2, it is inappropriate to rely on the risk assessment developed for the materially different liner at Calvert Cliffs. *See* PRA, at 4-18, Attachment 3 to NL-14-128 (noting only a 10% likelihood that a flaw would not be visually detected, but failing to consider likelihood that flaw would develop under insulation paneling).

Second, the operator of the Calvert Cliffs plant, in developing the liner corrosion program, noted that there had been “over 500 examinations” of the containment liner “with no indications of liner deterioration.” Letter from Charles H. Cruse, at 4. However, numerous signs of corrosion have been detected in the IP2 containment liner, including liner corrosion around the containment floor attributable to the 1980 flooding event, surface corrosion, and buckling and/or loose insulation panels. SE of Amendment No. 232, at 8; Technical Analysis, at 11-12, Attachment 2 to NL-14-128. This plant-specific difference in the condition of the containment liner – directly attributable to the historic degradation events described by the State – makes it inappropriate to use of the same assessment of the likelihood that a flaw would develop in the containment liner. *See* PRA, at 4-17 to 4-18, Attachment 3 to NL-14-128. These arguments relating to the differences between Calvert Cliffs and IP2 could appropriately have been

developed in an evidentiary hearing to further support the State's criticism of the license amendment request as inadequately "plant-specific." *See* 54 Fed. Reg. at 33,170 (proposed intervenor is not required "to make its case" at the contention admissibility stage).

Unfortunately, the Board prevented the State from developing these arguments by reaching the merits of Contention NYS-1 at the contention admissibility stage.

II. The Board Erred in Holding that Contention NYS-2 Is Not Admissible

With respect to Contention NYS-2, the Board improperly permitted Entergy to both declare its license amendment request categorically exempt from environmental review *and* to avoid any scrutiny of this determination, essentially creating a loophole in NEPA. Board Order, at 17-19. The Board also, once again, imposed an inappropriately steep and formalistic admissibility standard on the State, essentially dismissing the State's concerns regarding the lack of any environmental review based on the State's failure to use certain specific words or cite a particular subsection of the applicable regulation. *Id.* at 19-21.

First, the Board inappropriately extended the bar on challenges to the procedural determination that a license request involves "no significant hazards consideration" to also block any review of an industry's self-declared finding that an environmental review under NEPA is not required. Board Order, at 18. Under 10 C.F.R. § 50.58(b)(6), "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission." The reason that a determination of no significant hazard considerations may not be challenged is that "the finding is a procedural device whose only purpose is to determine the timing of the hearing (before or after issuance of the amendment)." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 N.R.C. 85, 90 (1990), citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant,

Units 1 and 2), CLI-86-12, 24 N.R.C. 1, 6 n. 3 (1986), *reversed in part on other grounds*, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 799 F.2d 1268 (9th Cir. 1986). Here, however, Entergy has used its own finding of “no significant hazards consideration” – a finding that has not been adopted by the NRC Staff, *see* 80 Fed. Reg. at 13,903 – to qualify for the categorical exclusion from NEPA set forth in 10 C.F.R. § 51.22(c)(9). Entergy takes a regulation designed to shield purely administrative determinations from unnecessary administrative review, and uses it as a sword to avoid review of its determination that the environmental review required by NEPA and its implementing regulations is not required. The Board Order now approves this loophole in the environmental review regulations.

The Board claims that a finding of no significant hazards consideration does not mean that environmental review is being circumvented, because the Commission has made a “generic finding” that such actions do not individually or cumulatively have a significant effect on the human environment. Board Order, at 19, quoting 10 C.F.R. § 51.22(a). However, the relevant issue is not whether the Commission properly promulgated the categorical exclusion set forth in section 51.22(c)(9), but whether Entergy’s specific license amendment request fits the requirements of that categorical exclusion. *See Matter of Pa’ina Hawaii, LLC* (Material License Application), LBP-06-04, 63 N.R.C. 99, 109 (Jan. 24, 2006) (rejecting argument of licensee and NRC Staff that challenge to applicability of categorical exclusion is a challenge to Commission regulations). The Board’s Order means that a proposed finding of no significant hazards consideration has the effect of *both* relieving the licensee from the obligation of completing any environmental review based on the categorical exclusion of 51.22(c)(9) *and* preventing any party from raising the issue of whether the licensee’s proposed action actually qualifies for the categorical exclusion. This elevates a finding of no significant hazards considerations far beyond

being a “procedural device whose only purpose is to determine the timing of the hearing[.]” *Vermont Yankee Nuclear Power Corp.*, LBP-90-6, 31 N.R.C. at 90.

The Board also adopted an unduly technical and formalistic interpretation of Contention NYS-2 in order to prevent the State from arguing that “special circumstances” exist which render the categorical exclusion of 10 C.F.R. § 51.22(c) inapplicable. The Commission has made clear that “[b]efore using a categorical exclusion for a proposed action, it should be considered whether there may be any special (e.g. unique, unusual or controversial) circumstances arising from or related to that proposed action that may result in the potential for significant effect to the human environment.” *Categorical Exclusions from Environmental Review*, 73 Fed. Reg. 59,540, 59,541 (Oct. 9, 2008). The State’s Contention NYS-2 broadly alleges, as relevant here, that “the proposed amendment is not categorically exempt from [environmental] review under 10 C.F.R. § 51.22(c)(9). NYS Petition, at 20. It also identified several unique aspects of the containment liner’s history and the communities within 50 miles of IP2. Although the NYS Petition does not use the words “special circumstances” or specifically cite 10 C.F.R. § 51.22(b), the entire NYS Petition, including the sections related to NEPA, is grounded in the theory that IP2 is an unusual nuclear plant both in the history of its containment liner and in its location. *See* NYS Petition, at 1-2, 11-23. In short, the State’s specific arguments relating to special circumstances in the NYS Reply were a natural extension of the NYS Petition, relating to a threshold consideration that NRC must make before granting a categorical exclusion, and did not introduce any new arguments that could not have been anticipated by NRC Staff or Entergy. *See Sequoyah Fuels Corp.*, 39 N.R.C. at 120 (a contention that raises legitimate issues should not be rejected based on an intervenor’s failure to comply with “pleading ‘niceties’” or use of “imperfect phraseology”). The Board should have admitted Contention NYS-2.

CONCLUSION

For the reasons described above, the Commission should reverse the Board Order (LBP-15-26) on appeal, and grant the State's Petition to Intervene and Request for a Hearing.

Dated: October 20, 2015

Respectfully submitted,

Signed (electronically) by

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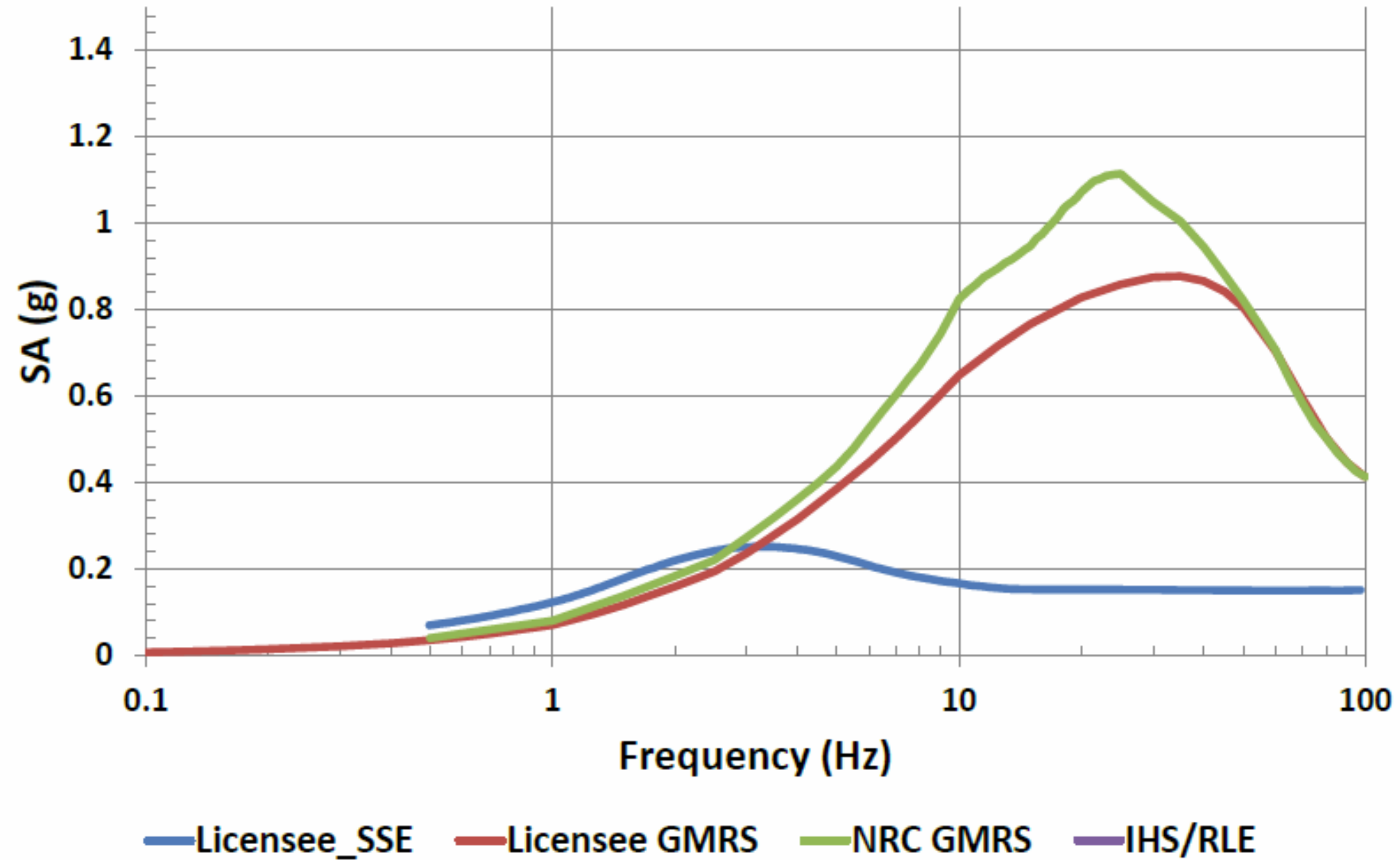
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ATTACHMENT 1

Revised Seismic Hazards Spectra

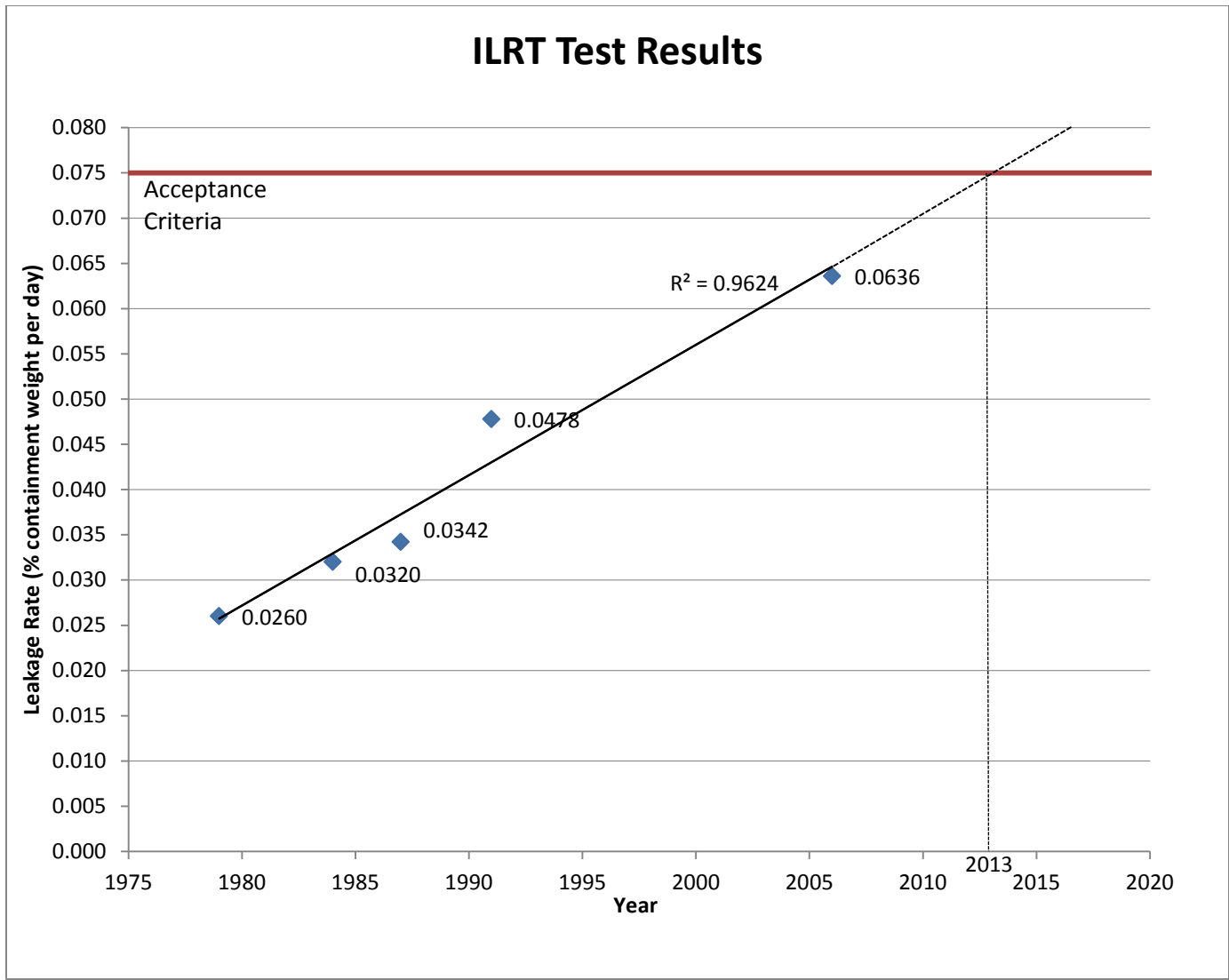


Indian Point 2



Source: NRC Staff, Slides, Near-Term Task Force Recommendation 2.1: Entergy, at 6 (June 19, 2014) (ML14169A489)

ATTACHMENT 2



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)