

Proposed Contention NYS-40 addresses the NRC's Staff determination regarding site-specific severe accident modifications as disclosed and set out in the Staff's December 2015 Draft Supplemental Environmental Impact Statement (Draft SEIS) concerning the application for renewed 20-year operating licenses for the Indian Point facilities.

The State's February 22, 2016 motion for leave demonstrated the Contention NYS-40 meets various regulatory criteria, including 10 C.F.R. § 2.309(f)(2) and 2.309(c).<sup>1</sup> However, the motion inadvertently did not address another set of criteria -- those contained in § 2.309(f)(1).<sup>2</sup> This submission discusses the applicability of the § 2.309(f)(1) criteria to NYS-40.

### **The Contention Meets the Requirements of 10 C.F.R. § 2.309(f)(1)(i-vi)**

#### **1. Specific Statement of Legal or Factual Issue to be Contested – 10 C.F.R. § 2.309(f)(1)(i)**

Proposed Contention NYS-40 sets out the State's claim that NRC Staff's treatment of the cost-effective site-specific severe accident mitigation alternatives developed in this proceeding violates NEPA, implementing regulations, prior NRC regulatory action, federal court precedent, and the Administrative Procedure Act. The Atomic Safety and Licensing Board previously accepted two other contentions presented by New York that set out similar legal and factual statements. *See* LBP-10-17, at 29-30, 35 (referencing § 2.309(f)(1)). The State submits that NYS-40 satisfies § 2.309(f)(1)(i).

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<sup>1</sup> These are references to the former § 2.309(c) and § 2.309(f). In 2012, NRC promulgated amendments to certain 10 C.F.R. Part 2 regulations including portions of those two provisions. 77 Fed. Reg. 46,562 (Aug. 3, 2012). The Board ordered that the July 1, 2010 Scheduling Order and references to regulations should continue to apply in this proceeding notwithstanding the Part 2 revisions. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Concerning Recent Changes to 10 C.F.R. Part 2), 1-2 (Aug. 8, 2012) ML12221A390. The substantive requirements of former subsection 2.309 (f)(2)(i),(ii),(iii) and current subsection 2.309(c)(1)(i),(ii),(iii) are similar.

<sup>2</sup> *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Scheduling Order, at 5 (July 1, 2010) (ML101820387).

**2. Adequate Bases Have Been Provided for the Contention –  
10 C.F.R. § 2.309(f)(1)(ii)**

Proposed Contention NYS-40 sufficiently explains the contention’s premise and provides more than the requisite “brief explanation” of the basis supporting the contention’s admission. The proffered bases describe the development of the issue in this proceeding up to the completion of engineering cost estimates and Staff’s determination that finalized cost-beneficial site-specific severe accident mitigation alternatives need not be implemented (NYS-40 at ¶¶ 2-10), the applicable legal framework (¶¶ 11-16, 19-22), relevant previous orders in this proceeding (¶ 6) and various locations in the Draft SEIS where – the State asserts – Staff departed from applicable legal requirements (¶¶ 8-10, 14-16, 20-22). The contention also sets out the history of the Indian Point facilities (¶¶ 23-29), the fact that the reactors have not been subject to a severe accident mitigation alternatives analysis until the present proceeding (¶¶ 22, 27), and the lack of modern seismic spectra for the interconnected and interdependent Indian Point Unit 1 facility (¶ 28). The contention also identifies many unique sites and improvements within 50 miles of the Indian Point site, which could be adversely affected by a severe accident at Indian Point Unit 2 or Unit 3. *Id.*, ¶ 26 and Attachment *List of Various Site-Specific Improvements, Including Landmarks, Parks, Arenas, Universities, and Transportation Facilities Within 50 Miles of Indian Point Power Reactors and Spent Fuel Pool Facilities*. Furthermore, NYS-40 and its accompanying bases explain the contention’s premise. *See* NYS-40, and ¶ 1. Thus, the contention readily meets the requirement in § 2.309(f)(1)(ii) for a “brief explanation of the basis for the contention.”

**3. The Contention is Within the Scope of this License Renewal Proceeding – 10 C.F.R. § 2.309(f)(1)(iii)**

Authorizing a nuclear power plant to operate is a “major federal action” under the National Environmental Policy Act (NEPA). As such, NRC must comply with NEPA, its own NEPA regulations and rulings, CEQ’s regulations, and the Administrative Procedure Act before it can issue a renewed operating license to either Indian Point facility. *See, e.g.*, 10 C.F.R. §§ 51.53(c)(3)(ii)(L), 51.95(c), 51.101, 51.103; PRM 51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001). This contention challenges the adequacy of the Staff’s compliance with NEPA and various implementing regulations and whether the Draft SEIS provides a valid justification for not requiring the applicant to implement cost-effective site-specific modifications. In addition, the Atomic Safety and Licensing Board recognized that two previous contentions with a similar focus were within the scope of license renewal. *See* LBP-10-13, at 3-5, 28-29, 35 (June 30, 2010) (contention admissibility ruling on NYS-35 and NYS-36). As such, the contention is comfortably within the scope of license renewal and this proceeding.

**4. The Issues Raised are Material to the Findings that the NRC Must Make to Support the Proposed Action Involved in this Proceeding – 10 C.F.R. § 2.309(f)(1)(iv)**

Staff’s compliance with NEPA is a material issue in this licensing proceeding. Contention NYS-40 addresses mitigation alternatives to the proposed action involved in this proceeding. NRC’s licensing framework and regulations require such issues, both of which have been raised in this proceeding, be addressed before a nuclear power facility may receive a 20-year renewed operating license. 10 C.F.R. §§ 51.71, 51.95, 51.101, 51.103(a)(4).<sup>3</sup> In this proceeding, the Atomic Safety and Licensing Board admitted contentions that raised similar

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<sup>3</sup> *See also Calvert Cliffs’ Coordinating Comm., Inc., v. Atomic Energy Comm’n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971); 10 C.F.R. § 51.101(a)(Until a record of decision or finding of no significant impact is issued, (1) the NRC can take no action which would have an adverse environmental impact or limit the choice of reasonable alternatives, and (2) any such actions taken by the applicant are grounds for denial of the license.).

concerns and also granted the State's motion for summary disposition on those contentions. *See* LBP-10-13 (June 30, 2010); LBP-11-17 (July 14, 2011). If the State is correct in its assertions, then Staff and NRC cannot grant Entergy's Indian Point license renewal application as it currently stands. *See, e.g.*, 10 C.F.R. §§ 54.29(b), 51.103(a)(4). Accordingly, the claims raised by the contention are material to Staff's and NRC's decisions whether to grant the application to renew the operating licenses, and, thus, the contention satisfies 10 C.F.R. § 2.309(f)(1)(iv).

**5. A Concise Statement of Facts Support the Contention – 10 C.F.R. § 2.309(f)(1)(v)**

Proposed Contention NYS-40 provides a concise statement of facts and references to the specific documents that support the State's claim. As noted above, the contention identifies various locations in the Draft SEIS where, the State asserts, Staff departed from applicable legal requirements following Staff's determination that the engineering cost estimates were completed (¶¶ 8-10, 14-16, 20-22). The State also provided specific citation to the twelve cost-beneficial site-specific severe accident mitigation alternatives identified by Staff in the Draft SEIS (¶¶ 30, 31). Given the applicable legal standards, previous NRC actions, and Board rulings on similar contentions in this proceeding, the State at this time does not believe that expert opinion testimony is necessary to support the proposed contention. The contention presents a "concise statement the alleged facts" and references to "specific sources and documents" that support the State's position, as required by 10 C.F.R. § 2.309(f)(1)(v).

**6. A Genuine Dispute Exists with the Applicant and Staff on a Material Issue of Law or Fact – 10 C.F.R. § 2.309(f)(1)(vi)**

The State's contention provides sufficient information showing that a genuine dispute exists with the applicant and NRC Staff on material factual and legal issues. The Atomic Safety and Licensing Board previously admitted two similar contentions presented by the State;

thereafter, the Board granted the State’s motion for summary disposition concerning decision not to complete the analysis of engineering costs or implement potentially-cost-beneficial mitigation alternatives as part of this proceeding. LBP-10-13, LBP-11-17.<sup>4</sup> The Board ruled that the articulated position was not reasonable. LBP-11-17. Those Board rulings reflect the existence of a genuine dispute between the State and Entergy/Staff on the question of implementing cost-beneficial site-specific mitigation alternatives in this proceeding.

That dispute has continued forward. Following LBP-11-17, Entergy proffered additional refined implementation/engineering project costs. NYS-40 at ¶ 7 (*discussing* Entergy ltr. NL-13-075). After 30 months of communications with Entergy between May 2013 and December 2015, Staff announced its position in the Draft SEIS. *Id.* ¶¶ 7-8. Staff and Entergy have agreed that the engineering cost estimates are now complete. NYS-40 at ¶¶ 30-31; Draft SEIS at 5, 7 (referring to Entergy’s implementation or engineering cost estimates as “revised, “refined” and “completed”); *id.* at § 3.1.3 (Staff analysis and resolution of Entergy’s cost estimates). Staff and Entergy have furthermore agreed that the identified cost-effective mitigation alternatives need not be implemented as part of this licensing proceeding. NYS-40 at ¶ 18; Draft SEIS at § 3.1.5. They maintain this position despite the fact that it was not until this proceeding that the Indian Point facilities were required to conduct a site-specific severe accident mitigation alternatives analysis. 10 C.F.R. §§ 51.53(c)(3)(ii)(L); 61 Fed. Reg. 28,467, 28,480-81 (June 5, 1996) (acknowledging *Limerick* ruling).

The State disputes Staff and Entergy’s approach to the cost-effective site-specific severe accident mitigation alternatives as disclosed in the recent Draft SEIS and its legal insufficiency. Statements in the Draft SEIS, reflect Entergy and Staff’s opinion that Staff lacks the authority to require the implementation of severe accident mitigation measures which have been shown to be

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<sup>4</sup> As noted, Entergy and Staff have appealed these rulings to the Commissioners (NYS-40, ¶ 1).

cost-effective for a specific nuclear power plant site and its surrounding environment and communities. Draft SEIS at 5, 21. It is the State's position that an ample basis exists to require Entergy to implement those severe accident mitigation measures that have been shown to be cost effective for the environment at issue in this proceeding – the New York metropolitan area.

The State maintains that Staff's agreement with Entergy and determination not to require the implementation of cost-effective site-specific alternatives is inconsistent with previous NRC actions and contrary to NEPA and related regulations. NYS-40 (*referencing, e.g.,* PRM 51-7, 10 C.F.R. §§ 51.101, 51.103(a)(4); 40 C.F.R. § 1502.14). The fact that both Indian Point facilities are now in their extended operating periods, but have declined to implement cost-effective mitigation alternatives, further underscores the State's concern and dispute with Entergy and Staff. *Id.* at ¶¶ 1, 15, 25. NYS-40 thus provides information demonstrating the existence of a genuine dispute between the State and the other parties as to material legal and factual issues in this proceeding. Therefore, the contention satisfies § 2.309(f)(1)(vi).

Respectfully submitted,

***Signed (electronically) by***

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February 29, 2016