UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	March 18, 2016

ENTERGY'S OPPOSITION TO PROPOSED NEW YORK STATE CONTENTION NYS-40 REGARDING SEVERE ACCIDENT MITIGATION ALTERNATIVES

William B. Glew, Jr., Esq.
Entergy Services, Inc.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3360
E-mail: wglew@entergy.com

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5738
E-mail: kathryn.sutton@morganlewis.com
E-mail: paul.bessette@morganlewis.com

Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
E-mail: martin.o'neill@morganlewis.com

COUNSEL FOR ENTERGY NUCLEAR OPERATIONS, INC.

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(i)(1) and the Atomic Safety and Licensing Board ("Board") Order in this proceeding dated July 9, 2013,[1] Entergy Nuclear Operations, Inc. ("Entergy") files this Answer opposing New York State's ("New York's") Motion for Leave and Contention NYS-40, dated February 22, 2016, and related supplement dated February 29, 2016.[2] Contention NYS-40 alleges that the Nuclear Regulatory Commission ("NRC") Staff's December 22, 2015 Draft Supplement to the 2010 FSEIS for Indian Point Units 2 and 3 ("IP2" and "IP3") license renewal[3] violates the National Environmental Policy Act ("NEPA"), federal regulations

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1 Licensing Board Order (Granting Entergy's Motion [for] Clarification) (July 9, 2013) (unpublished) ("July 9, 2013 Order"). Pursuant to the Board's July 9, 2013 Order, the deadline for filing new or amended contentions was February 22, 2016. *See* July 9, 2013 Order at 3 ("[A]djudicatory submissions based on NL-13-075 are due no later than 60 days after the Staff issues its draft [Final Supplemental Environmental Impact Statement ("FSEIS")] supplement or an equivalent document discussing its review of NL-13-075.").

2 *See* State of New York Motion for Leave [to File] Contention NYS-40 (Feb. 22, 2016) ("Motion"); State of New York Contention NYS-40 (Feb. 22, 2016) ("Contention NYS-40" or "NYS-40"); State of New York's Supplemental Submission (Feb. 29, 2016) ("Contention NYS-40 Supplement") (supplementing Contention NYS-40 to include a discussion of the 10 C.F.R. § 2.309(f)(1) contention admissibility criteria due to New York's "inadvertent" failure to address those criteria in its initial submission of NYS-40).

3 NUREG-1437, Supp. 38, Vols. 1-3, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 - Final Report" (Dec. 2010); NUREG-1437, Supp. 38, Vol. 5, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants:

implementing NEPA, and the Administrative Procedure Act ("APA").[4] In short, New York again asserts—as it has since March 2010—that the NRC Staff has acted unlawfully by not requiring the implementation of cost-beneficial severe accident mitigation alternatives ("SAMAs") as a condition of license renewal.[5]

As set forth below, Entergy opposes the admission of NYS-40 on the grounds that it: (1) is untimely, because it fails to meet the criteria in 10 C.F.R. § 2.309(f)(2) and § 2.309(c)(1); and (2) is inadmissible, because it fails to meet the substantive admissibility standards in 10 C.F.R. § 2.309(f)(1). Despite New York's contrary representations, NYS-40, which the State belatedly supplemented to address the mandatory admissibility criteria in Section 2.309(f)(1), is not based on any new or previously-unavailable information. Indeed, the "new" contention has nothing to do with the principal SAMA-related subject discussed in the Staff's Draft Supplement; *i.e.*, Entergy's May 2013 refined engineering project cost estimates for certain potentially cost-beneficial SAMAs.[6] By New York's own admission, it instead reasserts, under the guise of a "new" contention, a repetitive legal claim which is now pending before the Commission on appeal, as a result of the parties' litigation of another contention, NYS-35/36, that embodies the *same* legal claim.[7]

Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 - Draft Report for Comment" (Dec. 2015) ("Draft Supplement").

4 *See* Contention NYS-40 at 1, 5-8.

5 *See id.* at 1-2. *See also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-10-30, 72 NRC 564, 566 (2010) ("NYS-35 additionally claimed that any of these SAMAs ultimately found 'sufficiently cost-effective[] must be added as license conditions before a new and extended operating license can be issued.'" (alteration in original)).

6 *See* Letter from Fred Dacimo, Entergy, to NRC Document Control Desk, NL-13-075, License Renewal Application—Completed Engineering Project Cost Estimates for SAMAs Previously Identified as Potentially Cost-Beneficial (May 6, 2013) ("NL-13-075") (ML13142A013); Draft Supplement at xv ("This new information is derived from the following: Entergy provided refined engineering project cost estimates for the 22 potentially cost-beneficial severe accident mitigation alternatives (SAMAs) previously identified in the FSEIS.").

7 *See* Contention NYS-40 at 2 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-15-3, 81 NRC __ (Feb. 18, 2015) (slip op.)). During consultations on Contention NYS-40, New

Accordingly, the Board should deny admission of Contention NYS-40 for the reasons set forth herein. Admitting the contention would not only contravene the NRC's contention timeliness and admissibility requirements, but also needlessly sanction relitigation of a legal issue that is undergoing appellate review by the Commission and, thus, over which the Board lacks subject matter jurisdiction. As such, the proposed contention's admission would undermine, not materially advance, the orderly disposition of this proceeding.

II. BACKGROUND

To provide necessary background and context for the arguments supporting its Answer, Entergy first presents an overview of the relevant aspects of the Indian Point license renewal SAMA analysis, the NRC Staff's review thereof, the parties' litigation of Contention NYS-35/36, and Proposed Contention NYS-40.

A. NRC Staff Review Of Entergy's SAMA Analysis And The Parties' Litigation Of Related Contention NYS-35/36

In its 2007 license renewal application ("LRA"), Entergy submitted a detailed site-specific evaluation of potentially cost-beneficial SAMAs for IP2 and IP3 as part of its Environmental Report ("ER").[8] In December 2008, the Staff issued its Draft Supplemental Environmental Impact Statement ("DSEIS") for license renewal of IP2 and IP3.[9] The Staff stated that because the SAMAs identified as potentially cost-beneficial do not relate to adequately managing the effects

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York Counsel, John Sipos, confirmed that New York is not challenging the refined cost estimates that are the primary subject of the SAMA-related discussion in the Draft Supplement.

[8] *See* ER § 4.21, & App. E (ML071210530 and ML071210562). Entergy prepared this analysis using state-of the-art practices and in full accordance with NEPA and the NRC-endorsed guidance in NEI 05-01. *See id*.; NEI 05-01, Rev. A, Severe Accident Mitigation Alternatives (SAMA) Analysis, Guidance Document (Nov. 2005) (ML060530203) ("NEI 05-01"). The ER identified 12 potentially cost-beneficial SAMAs, but stated that because those SAMAs do not relate to adequately managing the effects of aging, they were submitted for further engineering project cost-benefit analysis as part of ongoing plant operation. ER at 4-73; *see also id*. at 4-74 to 4-78 (listing and describing potentially cost-beneficial SAMAs).

[9] NUREG-1437, Supp. 38, Vols. 1-2, Draft Report, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment" (Dec. 2008) (ML083540594 and ML083540614) ("DSEIS").

of aging during the period of extended operation ("PEO"), they need not be implemented as part of license renewal pursuant to 10 C.F.R. Part 54.[10]

One year later, Entergy submitted a revised SAMA analysis for Staff review.[11] New York filed new and amended contentions in response to Entergy's revised SAMA analysis.[12] On June 30, 2010, the Board issued LBP-10-13, in which it admitted consolidated Contention NYS-35/36. The admitted contention alleged that the DSEIS did not provide a rational basis for granting license renewal "without mandating a CLB [current licensing basis] backfit" to mandate implementation of cost-effective SAMAs.[13] It also alleged the need for "completion" of the SAMA analyses through further engineering cost analyses, and that the Staff had violated NEPA by allegedly failing to explain why license renewal could be granted without requiring implementation of cost-beneficial SAMAs.[14]

In December 2010, the Staff issued its FSEIS, which, like the ER and DSEIS, concluded that none of the potentially cost-beneficial SAMAs were related to aging management, and that they therefore would be addressed under the agency's oversight of the current operating licenses.[15] To specifically address the Board's ruling in LBP-10-13, the Staff substantially expanded its explanation of the SAMA implementation process, and concluded that "there is no regulatory

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10 *Id.*, Vol. 2, App. G at G-36.

11 *See* Letter from Fred Dacimo, Entergy, to NRC, NL-09-165, License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data (Dec. 11, 2009) (ML093580089). The only changes to the SAMA analysis related to wind direction inputs, but as a result, the number of cost-beneficial SAMAs changed.

12 *See* State of New York's New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Mar. 11, 2010) ("New York New and Amended SAMA Contentions"). New York alleged for the first time that Entergy had not provided a complete SAMA cost-benefit analysis, and that the alleged failure to complete this evaluation violated NEPA. *Id.* at 13, 15-17, 22-35. It further alleged that SAMAs ultimately found to be cost-beneficial "must be added as license conditions" for the renewed licenses. *Id.* at 13.

13 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13, 71 NRC 673, 698 (2010), *petition for interlocutory review denied*, CLI-10-30, 72 NRC 564 (2010), *petition for review granted*, CLI-15-3, 81 NRC __ (slip op.) (appeal pending).

14 *See id*. at 702.

15 *See* FSEIS, Vol. 1 at 5-11.

basis to suggest that potentially cost-beneficial SAMAs unrelated to Part 54 requirements must be imposed as a backfit to the CLB, as a condition for license renewal."[16]

Following issuance of the FSEIS, New York sought summary disposition of NYS-35/36.[17] Entergy and the Staff both filed cross-motions for summary disposition.[18] In LBP-11-17, the Board granted New York's motion and denied the cross-motions.[19] Entergy filed a petition for interlocutory review of LBP-11-17, which the Commission denied "without prejudice to Entergy's ability to seek review after the Board's final decision in this case."[20] Subsequently, in May 2013, Entergy sought to resolve the Board's concerns in LBP-11-17 by submitting to the Staff completed, refined engineering project cost estimates for the potentially cost-beneficial SAMAs.[21]

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16 *Id*.

17 State of New York's Motion for Summary Disposition of Consolidated Contention NYS-35/36 (Jan. 14, 2011) (ML110270252).

18 *See* Applicant's Consolidated Memorandum in Opposition to New York State's Motion for Summary Disposition of Contention NYS-35/36 and in Support of its Cross-Motion for Summary Disposition (Feb. 3, 2011) (ML110460187) ("Entergy's February 2011 Summary Disposition Motion"); NRC Staff's (1) Cross-Motion for Summary Disposition, and (2) Response to New York State's Motion for Summary Disposition, of Contention NYS-35/36 (Severe Accident Mitigation Alternatives) (Feb. 7, 2011) (ML110400012).

19 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-11-17, 74 NRC 11, 15 (2011), *petition for interlocutory review denied*, CLI-11-14, 74 NRC 801 (2011), *petition for review granted*, CLI-15-3, 81 NRC __ (slip op.) (appeal pending). The Board held that "Entergy's licenses cannot be renewed unless and until the NRC Staff reviews Entergy's completed SAMA analyses and either incorporates the result of these reviews into the FSEIS or, in the alternative, modifies its FSEIS to provide a valid reason for recommending the renewal of the licenses before the analysis of potentially cost-effective SAMAs is complete and for not requiring the implementation of cost-beneficial SAMAs." *Id.* at 27.

20 *Indian Point*, CLI-11-14, 74 NRC at 813-14. Importantly, the Commission observed that "[i]n granting New York's motion for summary disposition of Contention NYS-35/36, the Board was careful not to *require* that the Staff impose the cost-beneficial SAMAs as a condition on the renewal of Entergy's licenses," *id.* at 813 (emphasis in original), apparently recognizing that while NEPA requires consideration of mitigation measures, "it does not, in and of itself, provide the statutory basis for their implementation," *id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 n.16 (1989)).

21 *See* NL-13-075 & Attach. 1 ("License Renewal Application-Completed Engineering Project Cost Estimates for SAMAs Previously Identified as Potentially Cost Beneficial"). Based on the refined cost estimates, Entergy determined that 6 of the 22 SAMAs previously determined to be potentially cost-beneficial were not cost-beneficial. It also stated that a number of the remaining SAMAs might be affected by actions that Entergy is taking at Indian Point in response to NRC Order EA-12-049, which imposes substantial additional requirements to mitigate certain beyond-design-basis events in response to the March 2011 accident at Fukushima Dai-ichi. Entergy further noted its (now completed) implementation of four SAMAs (IP3-052, IP3-053, IP2-GAG, and IP3-GAG) previously identified as potentially cost-beneficial.

After the Board issued its November 2013 Partial Initial Decision (LBP-13-13) on nine "Track 1" contentions,[22] Entergy and the Staff filed petitions seeking Commission review of, *inter alia*, the Board's admissibility and merits rulings on Contention NYS-35/36.[23] On February 18, 2015, the Commission issued CLI-15-3, in which it granted the petitions for review of LBP-10-13 and LBP-11-17, and sought additional briefing from the parties on four issues.[24] Entergy's and the Staff's appeals remain pending before the Commission.

B. NRC Staff's Issuance Of The Draft Supplement And New York's Submittal Of Proposed Contention NYS-40

On December 22, 2015, the NRC Staff issued the Draft Supplement (Volume 5) to the FSEIS for IP2 and IP3 license renewal.[25] Section 3.0 of the Draft Supplement presents the Staff's detailed evaluation of Entergy's refined engineering project cost estimates for the SAMAs previously identified as being potentially cost-beneficial. The Staff reviewed the various methods, assumptions, and inputs used in preparing the refined cost estimates (and also performed

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22 *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246 (2013), *aff'd in part and rev'd in* part, CLI-15-6, 81 NRC __ (Mar. 9, 2015) (slip op.).

23 *See* Applicant's Petition for Review of Board Decisions Regarding Contentions NYS-8 (Electrical Transformers), CW-EC-3A (Environmental Justice), and NYS-35/36 (SAMA Cost Estimates) (Feb. 14, 2014) ("Entergy's February 2014 Petition for Review"); NRC Staff's Petition for Commission Review of LBP-13-13 In Part (Contentions NYS-8 and CW-EC-3A), and LBP-11-17 (Contention NYS-35/36) (Feb. 14, 2014).

24 *See Indian Point*, CLI-15-3, 81 NRC __ (slip op.). In brief, the Commission posed four specific questions relating to: (1) whether the Staff has a process in place to determine which "potentially cost-beneficial" SAMAs the licensee ultimately found to be cost-beneficial, and which SAMAs (if any) the licensee implemented at its plant; (2) the circumstances under which the Staff might judge a "potentially cost-beneficial" mitigation alternative to warrant "further NRC consideration outside of the license renewal review process"; (3) the level of uncertainty the Staff considers acceptable for the implementation cost portion of the SAMA cost-benefit analysis; and (4) the purpose of the SAMA analysis in light of the Staff's generic determination that the probability-weighted consequences of severe accidents to be "SMALL" for all plants. The Staff filed its brief on March 30, 2015, and Entergy and New York filed reply briefs on May 11, 2015. *See* NRC Staff's Response to the Commission's Memorandum and Order of February 18, 2015 (CLI-15-3), Regarding Contention NYS-35/36 (Mar. 30, 2015); Entergy Nuclear Operations, Inc. Reply Brief Related to Commission Questions in CLI-15-3 Concerning Contention NYS-35/36 (May 11, 2015); State of New York's Reply to NRC Staff's Response to Commission Order CLI-15-3 Requesting Further Briefing on Contention NYS-35/36 Concerning the Site-Specific Indian Point Severe Accident Mitigation Alternatives Analysis (May 11, 2015).

25 *See generally* Draft Supplement.

sensitivity analyses) and found them to be reasonable and acceptable for purposes of NEPA.[26] It also reviewed Entergy's decision to defer further action for certain SAMAs until after the completion of certain other voluntary and required post-Fukushima plant improvements designed to reduce severe accident risk, finding it to be reasonable.[27]

On February 22, 2016, New York filed its Motion and Contention NYS-40, alleging that the Draft Supplement violates NEPA, NRC, and Council on Environmental Quality regulations, the APA, and judicial precedent because it identifies a number of potentially cost-beneficial site-specific mitigation alternatives that "are not being included as *conditions* of the proposed new operating licenses for the Indian Point facilities in this proceeding."[28] Contention NYS-40 thus mirrors Contention NYS-35/36, insofar as it alleges that the SAMAs identified as potentially cost-beneficial in Entergy's revised SAMA analysis "must be added as *license conditions* before a new and extended operating license can be issued."[29] In this respect, Contention 40 focuses exclusively on the asserted need to *implement* cost-beneficial SAMAs as a condition of license renewal, not on the adequacy *per se* of the Staff's evaluation of Entergy's SAMA analysis under NEPA.

Indeed, New York acknowledges that "the NRC Commissioners currently are considering appeals by Entergy and NRC Staff from previous Board rulings concerning *similar* issues."[30] However, the nature of any difference between the contentions remains undefined by New York. Indeed, it claims to have filed NYS-40 "to ensure that NRC includes cost effective site-specific

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26 *See id.* at 5-19.

27 *See id.* at 19-21.

28 Contention NYS-40 at 1 (emphasis added).

29 New York and Amended SAMA Contentions at 13 (emphasis added); *see also id.* at 36 (alleging, in Contention NYS-36, that potentially cost-beneficial SAMAs need to be included as license conditions in the renewed operating licenses).

30 Contention NYS-40 at 2 (emphasis added).

severe accident mitigation alternatives as conditions to any operating license and decision issued in this proceeding."[31] This echoes its previous (and already-litigated) arguments in this proceeding.[32]

III. LEGAL STANDARDS GOVERNING CONTENTION ADMISSIBILITY

In general, a contention must be based on the application or other documents available at the time the hearing request and petition to intervene is filed.[33] NRC regulations, however, allow an intervenor to file a new or amended contention after the initial deadline for intervention petitions—for example, based on a draft or final NRC review document or supplement thereto—but only if the intervenor demonstrates "good cause" by showing that:

(i) The information upon which the filing is based was *not previously available*;

(ii) The information upon which the filing is based is *materially different from information previously available*; and

(iii) The filing has been submitted in a *timely* fashion based on the availability of the subsequent information.[34]

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31 *Id.*

32 Indeed, in its belated contention supplement, New York cites the Board's rulings in LBP-10-13 and LBP-11-17 as putative support for the admission of NYS-40 under 10 C.F.R. § 2.309(f)(1). *See* Contention NYS-40 Supplement at S-1, S-3 to S-5.

33 *See* 10 C.F.R. § 2.309(f)(2); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 312 (2012) (noting a petitioner's "'ironclad obligation' to review the Application thoroughly and to base their challenges on its contents") (citing *Shaw AREVA MOX Servs., LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009) (referring to intervenors' "ironclad obligation to . . . diligently search publicly available NRC or Applicant documents for information relevant to their [c]ontention" (internal quotation marks and citation omitted)); *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) ("We likewise frown on intervenors seeking to introduce a new contention later than the deadline established by our regulations, and we accordingly hold them to a higher standard for the admission of such contentions.").

34 10 C.F.R. § 2.309(c)(1)(i)-(iii) (emphasis added); 10 C.F.R. § 2.309(f)(2) (stating that participants may file new or amended environmental contentions based on a draft or final NRC environmental impact statement, or any supplements to these documents, if the contention complies with the requirements in 10 C.F.R. § 2.309(c)); *see also Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Memorandum and Order (Granting Motions for Leave to File Amendments to Contentions NYS-25 and NYS-38/RK-TC-5) at 1 (Mar. 31, 2015) (unpublished) ("To be admissible, a new or amended contention must satisfy the good cause requirements of 10 C.F.R. § 2.309(c)(1) . . . .."). The requirements for demonstrating "good cause" under current 10 C.F.R. § 2.309(c)(1)(i)–(iii) are the same as the requirements for filing "late" contentions previously available under former 10 C.F.R. § 2.309(f)(2)(i)–(iii); *i.e.*, before the NRC revised Section 2.309 in August 2012. *See* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566, 45,571 (Aug. 3, 2012).

Although the Board's July 9, 2013 Order established a 60-day deadline for the filing of new or amended contentions based on the Draft Supplement, the above criteria still apply to New York's proposed new contention. Thus, with respect to the specific information in the Draft Supplement on which Contention NYS-40 is based, New York must explain why that information is new and how it is materially different from previously available information.[35] That is, "new or amended contentions must be *based on new facts* not previously available."[36] Insofar as a proposed new contention simply repeats previously-asserted claims or relies on information that is not materially different from previously-available information (in the FSEIS or otherwise), it fails to meet the requirements of 10 C.F.R. § 2.309(c)(1)(i) and (ii).[37] With respect to the third criterion, a contention filed within the 60-day period specified by the Board in its July 9, 2013 Order ordinarily would be deemed timely under 10 C.F.R. § 2.309(c)(1)(iii).[38]

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35 *See Crow Butte Res., Inc.* (License Renewal for the *In Situ* Leach Facility, Crawford, Neb.), LBP-15-11, 81 NRC __, __ (slip op. at 7) (Mar. 16, 2015), *petitions for interlocutory review denied*, CLI-15-17, 82 NRC __ (slip op. at 2, 20) (Aug. 6, 2015).

36 *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original); *see also id.* ("We did not suggest that it is appropriate to file amended contentions only to raise claims that are not based on *genuinely new* information.") (emphasis added); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983) (The finding of good cause for late-filing of new or amended contentions is related to the "total previous unavailability of information.").

37 *See Crow Butte*, LBP-15-11, 81 NRC at ___ (slip op. at 21) ("New contentions cannot be based on previously available information."); *id.* at 34 ("Intervenors do not explain how the EA [environmental assessment] introduces new or materially different information from the LRA. Indeed, Intervenors state that their asserted defects with the EA were 'carried forward' from the LRA. . . . Because it is not based on new information, EA Contention 8 is inadmissible as untimely."); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-15-1, 81 NRC __ (slip op. at 20-21) (Jan. 15, 2015) (denying motion to amend and supplement a contention because the applicant document on which it purportedly was based contained "no new or materially different information"); *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 53 (2010) ("We agree with the Board that [the intervenor] has simply rehashed old arguments in Contention 2C . . . .").

38 *See Crow Butte*, LBP-15-11, 81 NRC at (slip op. at 7) ("The third factor concerns whether the new/amended contention and any supporting information—even if newly available and materially different from any information that was previously available—nonetheless was *seasonably* submitted.") (emphasis added). As discussed further below, New York belatedly submitted a supplement to Contention NYS-40 a full week after the 60-day deadline.

New or amended contentions, including those based on an NRC Staff draft environmental document, also must meet the substantive admissibility standards that apply to all contentions.[39] The Commission's "strict-by-design contention admissibility standards focus [the] hearing process on 'disputes that can be resolved in … adjudication.'"[40] Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[41]

IV. PROPOSED CONTENTION NYS-40 IS UNTIMELY AND INADMISSIBLE

A. Contention NYS-40 Should Be Rejected As Untimely Because It Fails To Meet The Requirements In 10 C.F.R. § 2.309(f)(2) And § 2.309(c)(1)

A new or amended environmental contention filed by an intervenor must meet the requirements of Section 2.309(c)(1)(i)-(iii).[42] Contention NYS-40 fails to do so, and therefore must be rejected.

1. Contention NYS-40 Does Not Meet 10 C.F.R. § 2.309(c)(1)(i) and (ii)

Contention NYS-40 is not based on new and materially different information—a *sine qua non* for the admission of a new or amended contention.[43] It simply reiterates New York's long-stated desire for a license condition requiring implementation of cost-beneficial SAMAs. In its Motion, New York tries to mask the repetitive nature of NYS-40 by averring that "the contention

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[39] Namely, under 10 C.F.R. § 2.309(f)(1)(i)-(vi), the contention must: (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 references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

[40] *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC __, (slip op. at 5) (Nov. 9, 2015) (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008)).

[41] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[42] *See* 10 C.F.R. § 2.309(f)(2); *N.J. Envtl. Fed'n v. NRC*, 645 F.3d 220, 229 (3d. Cir. 2011).

[43] *See N.J. Envtl. Fed'n*, 645 F.3d at 231 ("The NRC properly affirmed the Board's rejection of the Spatial Scope Contention because this information was previously available, rendering the contention deficient under 10 C.F.R. § 2.309(f)(2).").

relies on information not previously available and thus meets the first prong of the test set forth in 10 C.F.R. § 2.309(f)(e)(i) [sic]."[44] It claims, in particular, that "Contention NYS-40 is based upon Entergy's NL-13-075 and NRC Staff's discussion of the engineering cost estimates in its December 2015 Draft EIS [Supplement]."[45]

That claim is patently incorrect and devoid of support in fact or law. In NYS-40, New York presents *no* criticisms of Entergy's May 2013 refined engineering project cost estimates for the implementation of potentially cost-beneficial SAMAs. Further, Section 3.0 of the Draft Supplement discusses in detail the Staff's review of those refined cost estimates.[46] New York conspicuously fails to raise any objections to the nature or outcome of the Staff's review in its purportedly new contention.

In summary, it is clear that New York is lodging yet another challenge against the NRC Staff's (and Entergy's) long-held, unwavering position that because the cost-beneficial SAMAs are not necessary for managing the effects of aging at IP2 and IP3 during the PEO, they need not be implemented as a condition of license renewal under 10 C.F.R. Part 54.[47] Insofar as the Draft Supplement reiterates that position,[48] it presents no new and materially different information that might serve as the foundation for a new contention.[49] By simply calling yet again for a license

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44 Motion at 3.

45 *Id.*

46 *See* Draft Supplement at 7-19.

47 For example, New York acknowledges that the "NRC Staff has *previously asserted* that cost-effective SAMAs need not be implemented as a condition of license renewal," Contention NYS-40 at 7 (emphasis added), and quotes a passage from the Staff's 2008 DSEIS, which states, in pertinent part: "[N]one of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation. Therefore, they need not be implemented as part of the license renewal pursuant to 10 CFR Part 54." *Id.* (quoting DSEIS at 5-10).

48 *See* Draft Supplement at 5 ("If a SAMA is determined to be potentially cost beneficial but is not related to adequately managing the effects of aging during the relicensing period, it is not required to be implemented as part of the license renewal process pursuant to [10 C.F.R. Part 54].").

49 *See N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493 (2010) (agreeing with the licensing board that "the [safety evaluation report] contained no information that was

condition,[50] New York fails to identify any specific *new* information as the basis for its contention, and to explain why that information was "not previously available" and is "materially different."[51] And this comes as no surprise, because there is no such new information upon which to ground New York's repetitive legal challenge, which it first raised six years ago.

2. Contention NYS-40 Does Not Meet 10 C.F.R. § 2.309(c)(1)(iii)

New York also fails to meet Section 2.309(c)(1)(iii)'s requirement that a new contention be "submitted in a timely fashion based on the availability of the subsequent information." Although New York filed NYS-40 on February 22, 2016, per the Board's July 9, 2013 Order, that filing was materially incomplete. Specifically, New York failed to address the contention admissibility criteria in 10 C.F.R. § 2.309(f)(1)—the regulatory backbone of a proposed contention. It did not do so until it filed a "supplement" to the proposed contention on February 29, 2016—one week after the 60-day filing deadline imposed by the Board's July 9, 2013 Order. In effect, New York unilaterally extended the filing deadline for its new contention.

Significantly, New York did not seek leave for an extension of time to make this additional submittal, nor did it provide any explanation of the necessary "good cause" supporting its failure to address the compulsory Section 2.309(f)(1) criteria in its February 22, 2016 filing. Instead, in the cover letter transmitting its belated supplement, counsel for New York stated only that "[w]hile the motion discussed various criteria including [10] C.F.R. §§ 2.309(f)(2) and 2.309(c), it *inadvertently* did not address another set of criteria—those contained in

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either new or materially different from that previously available, and that these two facts render the contention fatally untimely"); *see also id.* at 495 (noting that any alleged new and materially different information must articulate a "reasonably apparent" foundation for the contention).

[50] Contention NYS-40 at 2 (stating that implementation of cost-beneficial SAMAs must be required through "conditions to any operating license and decision issued in this proceeding").

[51] 10 C.F.R. § 2.309(c)(1)(i), (ii).

§ 2.309(f)(1)."[52] Counsel further characterized the State's omission of the Section 2.309(f)(1) criteria from its February 22, 2016 filings as an "oversight."[53]

A mistake or oversight by counsel does not establish the presence of "unavoidable and extreme circumstances"[54] or otherwise support a showing of "good cause" for an untimely filing.[55] Given that a petitioner "must" address the six criteria in Section 2.309(f)(1)(i)-(vi),[56] and that New York failed to do so without good cause in its February 22, 2016 filing, NYS-40 was not timely filed in accordance with 10 C.F.R. § 2.309(c)(1)(iii).

* * *

For the foregoing reasons, Contention NYS-40 fails to meet the criteria for a new or amended contention in 10 C.F.R. § 2.309(c)(1), and may be rejected on that ground alone.

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[52] Letter from John Sipos, Assistant Attorney General, State of New York, to Administrative Judges, at 1 (Feb. 29, 2016) ("Sipos Letter") (emphasis added). *See also* Contention NYS-40 Supplement at S-1.

[53] Sipos Letter at 1.

[54] *See S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC 616, 636 (2010) (citing *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC 474, 476 (2010)) ("[T]he Commission [has] reiterated its longstanding rule that deadlines are to be strictly enforced. According to the Commission, strict enforcement furthers the dual interests of efficient case management and prompt resolution of adjudications. Only in truly 'unavoidable and extreme circumstances' . . . would late filings be accepted.") (citation omitted); *Hydro Res., Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 3 n.2 (1999) (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998)) ("We caution all parties in this case, however, to pay heed to the guidance in our policy statement that ordinarily only 'unavoidable and extreme circumstances' provide sufficient cause to extend filing deadlines.").

[55] *See Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-12-12, 75 NRC 742, 749-50 (2012) (Noting that intervenors' failure to meet a filing deadline was at least partly due to their counsel's misunderstanding of the deadline for filing amended or new contentions based on the availability of the Staff's DEIS, and that "the failure to review the scheduling order does not constitute good cause for failure to meet a filing deadline."); *Tenn. Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319, 327 (2010) ("Fundamentally, fairness requires that all participants in NRC adjudicatory proceedings abide by our procedural rules, especially those who, as here, are cognizant of those rules and represented by counsel."); *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999) (finding that petitioner's failure "to read carefully the governing procedural regulations" did not constitute good cause).

[56] 10 C.F.R. § 2.309(f)(1).

B. Proposed Contention NYS-40 Also Should Be Rejected As Inadmissible Because It Fails To Meet The NRC's Contention Admissibility Criteria In 10 C.F.R. § 2.309(f)(1)

Entergy also opposes NYS-40 for the same reasons that it opposed the admission of NYS-35/36, as both contentions make the same legal claim; *viz.*, the Staff must require implementation of potentially cost-beneficial SAMAs, even if they are unrelated to aging management during the PEO, as a condition of license renewal.[57] Entergy has described the legal bases for its position on this issue at length in briefs submitted at the contention admissibility, summary disposition, and appellate stages of this proceeding.[58]

To briefly summarize that position, the NRC lacks the regulatory authority to require, as a condition of license renewal, implementation of SAMAs if, as in this case, they are unrelated to aging management. Here, license renewal is the "major federal action" subject to NEPA review by the NRC. The scope of license renewal as defined by 10 C.F.R. Part 54 is, by design, limited to aging management issues during the period of extended operation.[59] As such, the NRC's Part 54 safety review does not encompass assessment of possible CLB modifications to mitigate the

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[57] Entergy recognizes that, in admitting NYS-35/36 and later granting summary disposition of that contention in favor of New York, the Board disagreed with Entergy's principal legal arguments. For that reason, Entergy (and the Staff) appealed the Board's rulings in LBP-10-13 and LBP-11-17, and Entergy continues to respectfully assert that the Board erred as a matter of law in those decisions.

[58] Entergy adopts, and incorporates by reference, its previous arguments here. *See* Applicant's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis (Apr. 5, 2010); Applicant's Petition for Interlocutory Review of LBP-10-13 (July 15, 2010); Entergy's February 2011 Summary Disposition Motion; Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 (July 29, 2011); Entergy's February 2014 Petition for Review.

[59] *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7-10 (2001). *See also* Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,960 (Dec. 13, 1991) ("[T]he NRC's decision should normally be limited to whether actions have been identified and have been or will be taken to address age-related degradation unique to license renewal and whether the relevant [NEPA] requirements, as set forth in 10 CFR part 51, have been met.").

potential environmental impacts of postulated severe accidents—an issue wholly unrelated to aging management or continuation of the CLB during the license renewal term.[60]

For the above reasons, Contention NYS-40 should be rejected as inadmissible under 10 C.F.R. § 2.309(f)(1).

V. THE BOARD SHOULD NOT ADMIT FOR FURTHER LITIGATION A LEGAL ISSUE THAT IS UNDERGOING APPELLATE REVIEW BY THE COMMISSION

Due to Entergy's and the NRC Staff's pending appeals of LBP-10-13 and LBP-11-17, the issue of whether the Staff has the legal and regulatory authority to require the implementation of cost-beneficial SAMAs as a condition of license renewal (if, as in this case, the SAMAs are unrelated to aging management) is directly before the Commission. Therefore, while Entergy does not contest the Board's jurisdiction to rule on the *admissibility* of a proposed contention (which, in this case, should be denied for the reasons set forth above), the Board lacks subject matter jurisdiction to decide the *merits* of the substantive legal issue raised in NYS-40 given the pending appeals.[61] As another board has noted, "aside from the impracticality of shared jurisdiction, the better interpretation of the NRC regulations is that jurisdiction over a particular subject is not simultaneously shared."[62] Furthermore, until the Commission issues a decision on Entergy's pending appeals and definitively resolves the legal issues raised therein, the Board has

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60 Final Rule, Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,490 (May 8, 1995) (noting that in promulgating Part 54, the Commission chose not "to impose requirements on a licensee that go beyond what is necessary to adequately manage aging effects").

61 *Cf. Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB–699, 16 NRC 1324, 1327 (1982) (noting that once exceptions are filed, appellate review of the merits commences); *Lancaster v. Indep. School Dist.*, 149 F.3d 1228, 1237 (10th Cir. 1998) (noting the general rule that, when a litigant files a notice of appeal, the district court loses jurisdiction "save for collateral matters not involved in the appeal").

62 *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-86 , 16 NRC 1190, 1193 (1982); *see also id.* ("But the identity of the presiding officer changes as the proceeding moves up the appellate ladder either as to an entire initial decision or as to particular issues.").

no clear authority to grant the relief sought by New York in NYS-40—*i.e.*, the conditioning of the IP2 and IP3 renewed operating licenses to require implementation of cost-beneficial SAMAs.[63]

VI. CONCLUSION

For the foregoing reasons, the Board should *deny* the admission of Contention NYS-40.

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)
Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 739-5738
E-mail: kathryn.sutton@morganlewis.com
E-mail: paul.bessette@morganlewis.com

Signed (electronically) by Martin J. O'Neill
Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
martin.o'neill@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

William B. Glew, Jr., Esq.
Entergy Services, Inc.
440 Hamilton Avenue
White Plains, NY 10601
Phone: (914) 272-3360
E-mail: wglew@entergy.com

Dated at Washington, DC
this 18th day of March 2016

[63] *See* Motion at 1 ("The State also seeks to ensure that NRC includes cost-effective site-specific severe accident mitigation alternatives as conditions to any operating license and decision issued in this proceeding."); Contention NYS-40 at 2 (same); Contention NYS-40 Supplement at S-6 ("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 NRC's contention admissibility criteria presuppose that a licensing board can grant the relief sought by a petitioner, lest the petitioner's claim would lack materiality under 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	March 18, 2016

ANSWER CERTIFICATION

Counsel for Entergy certifies that he has made a sincere effort to make himself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the Motion for Leave, and that his efforts to resolve the issues have been unsuccessful.

Executed in Accord with 10 C.F.R. § 2.304(d) by Paul M. Bessette

Paul M. Bessette, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave. NW
Washington, DC 20004
Phone: (202) 739-5796
Fax: (202) 739-3001
E-mail: pbessette@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.

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(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	March 18, 2016

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of "Entergy's Opposition to Proposed New York State Contention NYS-40 Regarding Severe Accident Mitigation Alternatives" were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill
Martin J. O'Neill, Esq.
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
Phone: (713) 890-5710
Fax: (713) 890-5001
martin.o'neill@morganlewis.com

Counsel for Entergy Nuclear Operations, Inc.