UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point Nuclear Generating Station, Unit 2)	Docket No. 50-247-LA

CLI-16-05

MEMORANDUM AND ORDER

This proceeding stems from the application of Entergy Nuclear Operations, Inc. to amend the operating license for the Indian Point Nuclear Generating Station, Unit 2, to permanently reduce the frequency of the reactor containment Integrated Leak Rate Test from once every ten years to once every fifteen years. In LBP-15-26, the Atomic Safety and Licensing Board denied the State of New York's intervention petition challenging the request.[1] The State of New York has appealed. As discussed below, we affirm the Board's decision.

[1] LBP-15-26, 82 NRC 163 (2015); *see State of New York Petition to Intervene and Request for Hearing* (May 18, 2015) (New York Petition to Intervene).

I. BACKGROUND

A. Containment Leakage Tests

Nuclear power plants in the United States, like Indian Point, have containment systems that serve as "the principal barrier, after the reactor coolant pressure boundary, to prevent the release of quantities of radioactive material that would have a significant radiological effect on the health of the public."[2] To ensure the continued integrity of the containment system during the operating life of the reactor, 10 C.F.R. § 50.54(o) mandates that "[p]rimary reactor containments … shall be subject to the requirements set forth in appendix J to [10 C.F.R. Part 50]." Appendix J directs licensees to conduct periodic tests to ensure that leakage from the containment does not exceed the allowable leakage rates specified in the plant's technical specifications.[3] The Appendix J test requirements ensure that the "integrity of the containment structure is maintained during its service life."[4] At issue here are "Type A" tests, which measure the containment's overall integrated leakage rate.[5]

As explained by the Board, under the original regulations governing these tests, licensees performed three Type A tests over a ten-year period.[6] In 1995, the NRC amended

---

[2] 10 C.F.R. pt. 50, app. J, Option B § II.

[3] *Id.* pt. 50, app. J, Option B § I.

[4] *Id.*

[5] *Id.* pt. 50, app. J, Option B § III.A. The regulations also require licensees to perform "Type B" and "Type C" tests. Type B tests detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries. Type C tests measure containment isolation valve leakage rates. *Id.* pt. 50, app. J, Option B § III.B.

[6] LBP-15-26, 82 NRC at 169 (citing Final Rule, Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors, 60 Fed. Reg. 49,495, 49,499 (Sept. 26, 1995) (Containment Leakage Testing Rule)).

Appendix J to add a performance-based option for containment leakage testing requirements ("Option B").[7] Under Option B, a licensee with two consecutive successful Type A tests may seek to amend its license to require one test in each ten-year period instead of the previously required three.[8] In 2001, the industry began developing a technical basis to justify further reducing the frequency of Type A testing.[9] By 2008, about seventy-five operating reactors, including Indian Point, had used this information to support a one-time extension of the Type A testing interval to fifteen years.[10] In June 2008, the NRC staff reviewed and accepted a methodology for licensees to apply when seeking to amend their licenses to permanently extend the Type A testing interval to fifteen years.[11]

B. Containment Leakage Tests at Indian Point, Unit 2

On December 9, 2014, Entergy submitted the subject license amendment application, which builds on two previous license amendments granted for Unit 2.[12] The first amendment, approved by the NRC Staff in 1997, allowed the use of the "Option B" performance-based testing schedule for Unit 2, which changed the schedule from three times every ten years to

---

[7] *See* Containment Leakage Testing Rule, 60 Fed. Reg. at 49,499.

[8] *See id.*

[9] LBP-15-26, 82 NRC at 169 n.8.

[10] *Id.*

[11] *Id.* at 170.

[12] Letter from Lawrence Coyle, Site Vice President, Entergy Nuclear Northeast, to NRC (Dec. 9, 2014) (ADAMS accession no. ML14353A015) (License Amendment Request), Attach. 1, at 2.

once every ten years.[13] The second amendment, approved by the Staff in 2002, allowed for a one-time extension to the Type A testing interval from once every ten years to once every fifteen years.[14] The instant license amendment request seeks to make this change permanent.[15]

Following receipt of the license amendment application, the Staff published in the *Federal Register* a notice of the application, the opportunity to request a hearing on the application, and the Staff's proposed no significant hazards consideration determination.[16] In response, New York challenged the request, submitting two proposed contentions.[17] Entergy and the Staff both opposed New York's intervention petition, arguing that neither contention was

---

[13] Letter from Jefferey F. Harold, Project Manager, Office of Nuclear Reactor Regulation, NRC, to Mr. Stephen E. Quinn, Vice President, Nuclear Power, Consolidated Edison Co. of New York, Inc. (Apr. 10, 1997) (ML003778846).

[14] Letter from Patrick D. Milano, Senior Project Manager, Office of Nuclear Reactor Regulation, NRC, to Michael R. Kansler, Senior Vice President and Chief Operating Officer, Entergy Nuclear Operations, Inc. (Aug. 5, 2002) (ML021860178) (2002 License Amendment).

[15] *See* License Amendment Request at 1. The Staff recently granted Entergy's request to extend permanently the Type A testing interval from ten to fifteen years for Indian Point, Unit 3. *See* Letter from Douglas V. Pickett, Senior Project Manager, Office of Nuclear Reactor Regulation, NRC, to Vice President, Operations, Entergy Nuclear Operations, Inc. (Mar. 13, 2015) (ML15028A308).

[16] Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 13,902, 13,903-06 (Mar. 17, 2015); *see* 10 C.F.R. §§ 50.58(b)(5), 50.92(c). The Staff has issued the license amendment to Entergy. *Notification of Issuance of License Amendment* (Feb. 24, 2016); Letter from Douglas V. Pickett, Senior Project Manager, Office of Nuclear Reactor Regulation, NRC, to Vice President, Operations, Entergy Nuclear Operations, Inc. (Feb. 23, 2016) (ML15349A794).

[17] *See* New York Petition to Intervene. The Board found that New York had established standing to intervene—neither Entergy nor the Staff argued otherwise. *See* LBP-15-26, 82 NRC at 172-73; *see also Entergy's Answer Opposing State of New York's Petition to Intervene and Request for Hearing* (June 12, 2015), at 1-2 (Entergy Answer to New York Petition); *NRC Staff's Answer to "State of New York Petition to Intervene and Request for Hearing"* (June 12, 2015), at 3-4 (Staff Answer to New York Petition).

admissible.[18] The Board rejected both of New York's proposed contentions and denied New York's intervention petition.[19] New York now seeks review of the Board's decision.[20] Entergy and the Staff oppose New York's appeal.[21]

II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision on the question of whether a petition to intervene should have been granted.[22] We defer to a Board's contention admissibility rulings "unless the appeal points to an 'error of law or abuse of discretion.'"[23]

A. Contention Admissibility Requirements

Under our rules, a request for hearing must "set forth with particularity the contentions sought to be raised."[24] A petitioner must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;

---

[18] Entergy Answer to New York Petition at 14-38; Staff Answer to New York Petition at 12-27.

[19] LBP-15-26, 82 NRC at 179, 180, 183.

[20] *State of New York Notice of Appeal of LBP 15-26* (Oct. 20, 2015); *State of New York Brief Supporting Appeal Pursuant to 10 CF.R. § 2.311 of Atomic Safety and Licensing Board Decision LBP-15-26 Denying New York's Petition to Intervene and Request for Hearing* (Oct. 20, 2015) (New York Appeal).

[21] *Entergy's Answer Opposing New York State's Appeal of LBP-15-26* (Nov. 16, 2015) (Entergy Answer to New York Appeal); *NRC Staff's Answer to the State of New York's Appeal from the Atomic Safety and Licensing Board's Denial of Its Petition to Intervene and Request for Hearing (LBP-15-26)* (Nov. 16, 2015) (Staff Answer to New York Appeal).

[22] *See* 10 C.F.R. § 2.311(c).

[23] *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 14 (2014) (quoting *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 543 (2009)).

[24] 10 C.F.R. § 2.309(f)(1).

(ii) Provide a brief explanation of the basis of the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions that support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must include references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Our case law makes clear that these standards are "strict by design" and that failure to fulfill any one of these requirements renders a contention inadmissible.[25] Moreover, a petitioner cannot satisfy these requirements by "[m]ere 'notice pleading.'"[26]

In its intervention petition, New York proposed two contentions. In Contention NYS-1, New York challenged the license amendment request on the ground that it constituted "a

---

[25] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); *see South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010).

[26] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

significant safety and environmental hazard."[27] In Contention NYS-2, New York challenged the compliance of the license amendment request with the NRC's environmental regulations—specifically calling into question whether the license amendment request met the criteria in our regulations for a categorical exclusion from the requirement to prepare an environmental analysis under the National Environmental Policy Act of 1969 (NEPA).[28] On appeal, New York contends that the Board erred in finding its proposed contentions inadmissible.[29] We find that New York has not demonstrated that the Board either made an error of law or abused its discretion in declining to admit New York's contentions. Accordingly, and as explained further below, we affirm the Board's decision.

B. Contention NYS-1

Contention NYS-1, as submitted by New York, states:

> 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. [Part] 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.[30]

---

[27] New York Petition to Intervene at 5.

[28] *Id.* at 20; *see* 10 C.F.R. § 51.22 (describing the NRC's process for applying categorical exclusions); 42 U.S.C. § 4332.

[29] New York Appeal at 1.

[30] New York Petition to Intervene at 5.

New York made numerous arguments in support of Contention NYS-1, but the Board determined that none rendered the contention admissible.[31] On appeal, New York contends that the Board erred in rejecting the contention.[32]

New York articulates two general challenges to the Board's ruling. First, New York argues that the Board made improper merits determinations regarding the claims New York raised in its petition.[33] Second, New York asserts, without more, that "the Board effectively ignored … aspects of Contention NYS-1 that go directly to the findings which the Commission must make to grant the license amendment …."[34] We disagree. Regarding the first argument, as Entergy and the Staff note, rather than reach the merits of the contention, the Board followed our precedent and considered whether the bases proffered by New York actually supported the contention and found they did not.[35] With respect to the second argument, the Board did not

---

[31] LBP-15-26, 82 NRC at 175.

[32] New York Appeal at 17-27.

[33] *See id.* at 18-21, 23, 25-27. For example, New York contended for the first time at oral argument before the Board that the analysis Entergy cited to support its request was insufficiently plant-specific because it relied on analysis developed for use at the Calvert Cliffs site in Maryland. Tr. at 62-63; *see also* License Amendment Request, Attach. 1, at 13. The Board did not address this argument in its decision. On appeal, New York points to what it contends are key differences between Calvert Cliffs and Indian Point, Unit 2 and argues that the Board prevented it from pursuing these claims by ruling on the merits of the contention rather than focusing solely on contention admissibility. New York Appeal at 25-27. Our case law makes clear that "[a petitioner] is confined to the contention as initially filed and may not rectify its deficiencies through its reply brief or on appeal." *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009) (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)). Therefore, the Board did not err in declining to consider this argument, as it was not timely made.

[34] New York Appeal at 18.

[35] Entergy Answer to New York Appeal at 16-17; Staff Answer to New York Appeal at 16-17; *see also Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 NRC __, __ (Nov. 9, 2015) (slip op. at 14) (noting that the "Board appropriately reviewed the support

ignore regulatory findings but simply provided a short-hand description of the claim at one point in the order and in fact fully stated the regulatory findings New York challenged elsewhere.[36] Indeed, with respect to each argument New York put forth to support Contention NYS-1, the Board identified a deficiency regarding the contention admissibility standards, ultimately concluding that NYS-1 did not meet the requirements of 10 C.F.R. § 2.309(f)(1).[37] New York has not shown that the Board erred in reaching its conclusion.

In addition to its general challenges to the Board's decision, New York raised several specific arguments on appeal. We address each in turn.

1. History of Unit 2 Containment Liner

To support Contention NYS-1, New York argued that Entergy's license amendment request did not comply with 10 C.F.R. Part 50, Appendix J because it failed to consider the plant-specific history of Unit 2's containment liner.[38] New York contended that Unit 2 has a "specific history of structural and corrosive damage" revealed by recent inspections.[39] The Board found this argument both "factually and legally flawed."[40] Contrary to New York's claims, the Board determined that New York's argument was factually flawed because the license amendment request addressed observed corrosion or degradation of the Unit 2 containment

---

provided for the contention and determined that it did not apply to the circumstances presented").

[36] *Compare* New York Appeal at 18, *with* LBP-15-26, 82 NRC at 172, 175-76.

[37] *See* LBP-15-26, 82 NRC at 175-179.

[38] New York Petition to Intervene at 5-8.

[39] *See id.* at 7-8.

[40] LBP-15-26, 82 NRC at 175.

liner.[41] In its ruling, the Board noted that the documents New York provided in support of its contention actually contradicted its claims.[42] Additionally, the Board found that New York's challenge was legally flawed, calling it "an improper attempt to graft a 'historical event' criterion onto the 'performance criteria' specified in Appendix J, Option B."[43] The Board therefore also concluded that this argument constituted an impermissible challenge to 10 C.F.R. Part 50, Appendix J, Option B, which, absent a waiver, is barred by 10 C.F.R. § 2.335(a).[44]

Further, the Board addressed New York's assertion that a decades-old recommendation by the Atomic Energy Commission (AEC) Staff "that the [Unit 2] containment liner should be subject to more frequent inspections" indicated continued concerns with the containment liner at Unit 2.[45] The Board noted that the AEC recommendation was superseded by the 1997 and 2002 analyses, which supported the Staff's approvals of the prior Type A testing frequency reductions.[46]

---

[41] *Id.* (citing License Amendment Request, Attach. 1, at 11-13 (explaining that inspection records state that all observed corrosion or degradation has either been remediated or was not deemed to have reduced the structural capacity of the containment to perform its safety function)).

[42] *Id.* at 176 & n.25. For example, New York relied on the Staff's safety evaluation attached to the 2002 license amendment to support its arguments "that significant corrosion, resulting from a 1980 flooding event, had reduced the liner thickness to within .015 inches of the minimum required thickness." New York Petition to Intervene at 8. But the Board noted that the 2002 safety evaluation discussed the 1980 event and concluded "that the structural integrity of the containment is acceptable because the remaining liner thickness is sufficient to withstand the loading associated with design-basis accident conditions." LBP-15-26, 82 NRC at 176 n.25 (quoting 2002 License Amendment, Enclosure 2, at 8).

[43] *Id.* at 175 (citing 10 C.F.R. pt. 50, app. J, Option B §§ II and III; Tr. at 128).

[44] *Id.* at 175-76.

[45] New York Petition to Intervene at 7.

[46] LBP-15-26, 82 NRC at 176 n.26.

On appeal, New York takes issue with the Board's rulings regarding historic degradation events. Specifically, New York argues that the Board "ignored or misapplied relevant substantive law."[47] New York contends that the Board erred in concluding that historic degradation events had been remediated and had no ongoing impact on the Unit 2 containment liner.[48] And New York disagrees with the Board's conclusion that subsequent NRC assessments superseded the AEC Staff recommendation regarding increased monitoring of the containment liner at Unit 2.[49] Therefore, New York argues, it should have been allowed "to explore the basis and continued vitality of the AEC recommendation in an evidentiary hearing."[50]

As noted above, we will defer to a board's contention admissibility determinations unless an appellant demonstrates an error of law or abuse of discretion.[51] Based on our review of the record, New York has not done so here. Contrary to New York's suggestion, the Board did not find a legal bar to considering the operating history of the Unit 2 containment liner in the license amendment request.[52] Rather, in responding to an earlier assertion from New York, the Board reasonably concluded that because the "Commission was aware of containment degradation issues [but still] promulgated performance-based testing," there is no "'historical event' *restriction* on reactors electing to comply with Appendix J through performance-based testing."[53]

---

[47] New York Appeal at 19.

[48] *Id.* at 20.

[49] *Id.*

[50] *Id.* at 21.

[51] *Crow Butte*, CLI-14-2, 79 NRC at 13-14.

[52] New York Appeal at 19.

[53] LBP-15-26, 82 NRC at 175 (emphasis added).

Likewise, the Board did not conclude that the historic degradation events had been remediated. Instead, the Board only noted that contrary to New York's assertions in its petition to intervene, the license amendment request in fact considered the historic degradation in its analysis.[54] With respect to the AEC recommendation, New York argues that the Board's finding was unreasonable because the subsequent NRC findings may not have been informed by the AEC recommendation. But such speculation, without more, does not demonstrate error.[55] The Board carefully considered New York's claims with respect to historic degradation at Unit 2 and reasonably concluded that New York's arguments did not support admission of Contention NYS-1.[56]

2. Test Results Trend

New York also argued before the Board that the proposed license amendment would jeopardize public health and safety because previous Type A test results reveal that Unit 2's containment leakage rate is increasing over time.[57] New York contended that this trend suggests that leakage would likely exceed 0.75 L_a by 2016, which New York asserted was the current technical specification leakage rate acceptance criterion.[58] The Board found that New

---

[54] *Id.* (citing New York Petition at 6, 7-8; License Amendment Request, Attach. 1, at 11-13).

[55] New York Appeal at 20-21; *see Dominion Nuclear Connecticut* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC 231, 241 (2008) (finding appeals based on "nothing more than speculation" insufficient to support Commission review).

[56] LBP-15-26, 82 NRC at 175-76.

[57] New York Petition to Intervene at 8, 16-17.

[58] *Id.* at 17. As relevant here, 10 C.F.R. Part 50, Appendix J, Option B defines "L_a (percent/24 hours)" as the maximum allowable leakage rate at pressure P_a as specified in the plant's technical specifications. "P_a," in turn, means "the calculated peak containment internal pressure related to the design basis loss-of-coolant accident as specified in the Technical Specifications."

York's argument "reflect[ed] a fundamental misunderstanding of the acceptance criteria" and explained that the regulatory limit for Type A leakage—also known as the "as-found acceptance rate"—is, in fact, 1.0 L_a.[59] By contrast, the Board noted "the 0.75 L_a criterion cited by New York is referred to as the 'as left' criterion … and there is no regulatory bar to exceeding that criterion during plant operations; rather, it is a criterion that must be satisfied *prior* to a plant restart."[60] Moreover, the Board concluded that "dispositively, even if the apparent trend in Type A tests were extrapolated, it is undisputed that the leakage would *not* exceed the regulatory limit of 1.0 L_a during the fifteen-year period between consecutive Type A tests."[61] Therefore, the Board concluded that New York's claims regarding the trend in Type A test results did not raise a material issue, as required by 10 C.F.R. § 2.309(f)(1)(iv).[62] The Board also cited Entergy's explanation for the perceived trend and noted that New York did not attempt to rebut this explanation.[63]

On appeal, New York challenges the Board's finding that this claim did not raise a material fact sufficient to merit a hearing.[64] Here again, New York argues that the Board made its determination based on the merits of the arguments rather than limiting itself to contention

---

[59] LBP-15-26, 82 NRC at 176; *see also id.* at 170 n.9.

[60] *Id.* at 176-77. Unit 2 Technical Specification 5.5.14 states that the leakage rate acceptance criterion for the first unit startup following testing—the "as left" criterion—is less than or equal to 0.75 L_a for Type A tests. Further, the technical specifications clarify that the containment leakage rate acceptance criterion—or "as found" criterion—is 1.0 L_a. *See* License Amendment Request, Attach. 2; *see also* 2002 License Amendment, Enclosure 2, at 4.

[61] LBP-15-26, 82 NRC at 177 (citing Entergy Answer to New York Petition, Attach. 1, at 5).

[62] *Id.*

[63] *Id.*

[64] New York Appeal at 21.

admissibility.[65] But as discussed above, the Board did not consider the merits of New York's contention. At this stage in a proceeding the petitioner bears the burden of proffering an admissible contention. The Board found that New York has not done so, and New York has not provided us with sufficient information to show that the Board finding was an error of law or abuse of discretion.

New York also questions the distinction the Board drew between the "as left" and "as found" acceptance criteria, arguing that "the supposedly dispositive distinction between the 'as found' acceptance criteri[on] of 1.0 L_a and the 'as left' acceptance criteri[on] of 0.75 L_a is simply not supported by the regulations or prior submissions from Entergy or NRC Staff …."[66] But as New York itself argues, Option B states that for Type A tests, "[t]he leakage rate must not exceed the allowable leakage rate (L_a) with margin, as specified in the Technical Specifications."[67] The Unit 2 Technical Specifications provide that the "[c]ontainment leakage rate acceptance criterion is 1.0 L_a. During the first unit startup following testing in accordance with this program the leakage rate acceptance criteri[on] [is] … [less than or equal to] 0.75 L_a for Type A tests."[68] In reaching its decision, the Board relied on the plain language of the technical specifications.[69] Nothing New York has raised on appeal would lead us to question the Board's determination here.

---

[65] *Id.*

[66] *Id.* at 22.

[67] 10 C.F.R. pt. 50, app. J, Option B § III.A; *see also* New York Appeal at 22.

[68] License Amendment Request, Attach. 2, Technical Specification 5.5.14.

[69] *See* LBP-15-26, 82 NRC at 170 n.9, 176-77.

New York further argues that the Board erred when it accepted Entergy's arguments and disregarded New York's viewpoint.[70] But the Board carefully analyzed New York's arguments regarding the perceived increasing trend in Type A test results and determined that those arguments failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).[71] Our review of the record does not reveal any error of law or abuse of discretion with respect to the Board's holding on this aspect of NYS-1.

3. Seismic Risk

In its petition to intervene, New York stated that the updated seismic hazard analysis for Unit 2 "shows that the anticipated ground motion is larger for higher frequency events than was understood when [Unit 2] received its operating license in 1973."[72] The Board found that New York had merely referenced this seismic hazard analysis without adequately explaining its significance to the proposed permanent extension of the Type A test interval or how it controverts the portion of the license amendment request discussing seismic impacts.[73] Accordingly, the Board concluded that this portion of New York's contention neither raised a material issue nor established a genuine dispute, as required by 10 C.F.R. § 2.309(f)(1)(iv) and (vi).[74]

---

[70] New York Appeal at 23.

[71] LBP-15-26, 82 NRC at 177-78.

[72] New York Petition to Intervene at 15.

[73] LBP-15-26, 82 NRC at 178.

[74] *Id.*

On appeal, New York argues that the Board erred in rejecting its seismic risk argument—"[t]he 'significance' of a [probabilistic risk assessment] purporting to evaluate a risk factor but failing to consider the most up-to-date information regarding that risk factor should be self-explanatory."[75] This argument misconstrues our contention admissibility standards, which require a petitioner to address—and meet—each of the six factors set forth in 10 C.F.R. § 2.309(f)(1). Here, the Board found that New York failed to demonstrate a material issue or raise a genuine dispute with the application.[76] On appeal New York does not identify any error of law or abuse of discretion with respect to the Board's ruling on the updated seismic studies.

4. Severe Accident Mitigation Alternatives (SAMA) Analysis

As part of NYS-1, New York claimed that the SAMA analysis prepared for the Indian Point license renewal proceeding "does not take into account the value or decontamination cost of offsite properties with iconic value," "artificially and improperly limits its scope to land and population only within 50 miles of the site," and "relied on [an outdated] dollar per person rem value of $2,000."[77] The Board concluded that New York had not demonstrated how its SAMA analysis claims raised a genuine dispute on a material issue with the license amendment

---

[75] New York Appeal at 24. Additionally, New York argues in its appeal that it had "removed any remaining confusion" in its reply in support of its petition to intervene. *Id.* But a reply cannot introduce arguments not originally included in an intervention petition. *See, e.g.*, *U.S. Department of Energy*, CLI-09-14, 69 NRC at 588.

[76] LBP-15-26, 82 NRC at 178.

[77] New York Petition to Intervene at 20. The SAMA analysis is being litigated in the context of the Indian Point, Units 2 and 3 license renewal proceeding. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-2, 81 NRC 213 (2015); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 450-89 (2013) (appeals pending); *see also* Staff Answer to New York Petition at 19 & n.78.

application.[78] Moreover, the Board found that New York "fail[ed] to provide expert opinions or adequate facts in support of [the] alleged deficiencies, as required by 10 C.F.R. § 2.309(f)(1)(v)."[79] Therefore, the Board concluded that New York had not met its burden to show a genuine dispute with the license amendment application.[80]

On appeal, New York argues that the Board erred by dismissing New York's concerns regarding the adequacy of Entergy's license renewal SAMA analysis. Specifically, New York claims that the Board erred by turning "the evidentiary standard for an admissible contention … on its head—'expert opinions' or multitudinous supporting facts are simply not required."[81] However, the Board did not require New York to provide support for its contentions beyond our normal contention admissibility standard.[82] Also, the Board noted that, like the seismic claim, the SAMA claim did not demonstrate a material dispute with the application.[83]

---

[78] LBP-15-26, 82 NRC at 179.

[79] *Id*.

[80] *Id*.

[81] New York Appeal at 25.

[82] *Compare* New York Appeal at 25, *with* LBP-15-26, 82 NRC at 179 (noting that New York did not provide expert opinions or "adequate facts in support of these alleged deficiencies").

[83] LBP-15-26, 82 NRC at 179. To the extent that New York generally challenges the Indian Point SAMA analysis, New York has not demonstrated that such a claim is within the scope of this license amendment proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii). Nonetheless, the SAMA analysis is being litigated in the context of the Indian Point license renewal application; the adjudication on that application is ongoing and New York is pursuing its SAMA analysis claims in that forum. *See State of New York Petition for Review of Atomic Safety and Licensing Board Decision LBP-13-13 with respect to Consolidated Contention NYS-12C* (Feb. 14, 2014) (ML14045A414) (pending).

In sum, New York has not persuaded us that the Board erred at law or abused its discretion in holding Contention NYS-1 inadmissible. Accordingly, we affirm the Board's decision with respect to NYS-1.

C. Contention NYS-2

Contention NYS-2, as submitted by New York, states:

> 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).[84]

As part of Contention NYS-2, New York asserted that the license amendment request could not be considered for a categorical exclusion[85] because it involves a significant hazards consideration, which would prevent it from being exempted pursuant to 10 C.F.R. § 51.22(c)(9).[86] New York contended that its "argument [was] relevant to whether the Commission should ultimately make such a final determination."[87] Additionally, New York argued that if the no significant hazards consideration determination is unreviewable, then a

---

[84] New York Petition to Intervene at 20.

[85] Section 51.22 identifies categories of actions that are exempt from NEPA review because the NRC has made a generic finding that the "actions do[] not individually or cumulatively have a significant effect on the human environment." 10 C.F.R. § 51.22(a). These are generally referred to as "categorical exclusions."

[86] New York Petition to Intervene at 21. Before the Board New York made the same argument in support of Contention NYS-1. *See* New York Petition to Intervene at 8-10. The Board rejected this argument because our regulations do not allow the Staff's no significant hazards consideration determination to be contested. LBP-15-26, 82 NRC at 178; *see* 10 C.F.R. § 50.58(b)(6). New York did not appeal this aspect of the Board's holding on Contention NYS-1.

[87] *State of New York Reply in Support of Petition to Intervene and Request for Hearing* (June 19, 2015), at 19.

categorical exclusion pursuant to 10 C.F.R. § 51.22(c)(9) "becomes an unassailable substantive conclusion that Industry and NRC Staff can employ to avoid environmental review of proposed actions."[88]

The Board reiterated that a no significant hazards consideration determination may not be contested, consistent with our regulation in 10 C.F.R. § 50.58(b)(6).[89] But the Board differentiated a petitioner's ability to challenge the categorical exclusion determination. In particular, the Board observed that a petitioner may either show the existence of "special circumstances" or show that the license amendment would result in increased offsite releases of effluents or increased individual or cumulative occupational radiation exposure.[90] The Board found that New York did not seek to show that the license amendment would result in significant increases to offsite effluent releases or occupational radiation exposure.[91] And while New York sought to demonstrate the existence of "special circumstances," it first did so in its reply brief, which the Board found untimely.[92] The Board noted that, even if New York had timely asserted "special circumstances," the arguments it presented—"various historical degradation events … as well as the reactor's location in the most densely populated part of the country"—would have been unavailing and, therefore, that the contention was inadmissible.[93]

---

[88] *Id.* at 20.

[89] LBP-15-26, 82 NRC at 180-81; *see also id.* at 178 n.30 (citing *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001)).

[90] *Id.* at 181.

[91] *Id.*

[92] *Id.* at 181-82.

[93] *Id.* at 182 (internal citations omitted).

On appeal, New York renews its argument that the bar on challenges to no significant hazards consideration determinations effectively bars challenges to categorical exclusions.[94] We disagree. As the Board observed, our regulations provide specific avenues for petitioners to challenge categorical exclusion determinations.[95] New York did not avail itself of these opportunities, nor does it explain how the Board's holding constituted an error of law or abuse of discretion. New York also objects to the Board's rejection of the "special circumstances" argument as untimely—New York asserts that the argument was "a natural extension" of its intervention petition.[96] But the Board did not base its determination solely on timeliness—it reasonably determined that the arguments New York presented would have been unavailing even if timely proffered.[97]

New York does not demonstrate error of law or abuse of discretion by the Board; we therefore affirm the Board's holding with respect to Contention NYS-2.[98]

---

[94] New York Appeal at 27.

[95] *See* 10 C.F.R. § 51.22(b), (c)(9)(ii) and (iii).

[96] New York Appeal at 29.

[97] LBP-15-26, 82 NRC at 182. Further, New York does not demonstrate Board error as to the timeliness determination. At oral argument New York conceded that its original petition neither cited 10 C.F.R. § 51.22(b) nor argued for "special circumstances." *See* Tr. at 138-39. And it is well-settled in our jurisprudence that "a petitioner may not use its reply to raise new issues for the first time." *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 146 (2015) (citing *Crow Butte*, CLI-09-12, 69 NRC at 568; *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Louisiana Energy Services*, CLI-04-25, 60 NRC at 224-25).

[98] Just after the Staff issued the license amendment, New York requested that we vacate or, in the alternative, stay the Staff's issuance of the license amendment to Entergy pending our resolution of this appeal. *State of New York Motion to Vacate or for Stay of Staff Action Pending Appeal of Atomic Safety and Licensing Board Decision LBP-15-26 Regarding License Amendment for Entergy Indian Point Unit 2 to Delay the Containment Leak Rate Test for Five Years* (Feb. 26, 2016); *see NRC Staff's Answer in Opposition to State of New York Motion to*

III. CONCLUSION

For the reasons set forth above, we *affirm* the Board's decision in LBP-15-26.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
This 5th day of April, 2016.

Vacate or Stay Issuance of License Amendment (Mar. 7, 2016); *Entergy's Answer Opposing New York State's Motion to Vacate or Stay the Effectiveness of the February 23, 2016 License Amendment Regarding Indian Point Unit 2 Integrated Leak Rate Testing* (Mar. 7, 2016). We deny New York's motion as moot. Because New York sought to stay or vacate the Staff's action pending our review of its appeal and we have now taken action on its appeal, we need not consider the stay application further.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-247-LA
	)	
(Indian Point Nuclear Generating Station, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-16-05)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4M
Washington, DC 20555-0001
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

E. Roy Hawkens, Chairman
Chief Administrative Judge
Roy.Hawkens@nrc.gov

Dr. Gary S. Arnold
Administrative Judge
Gary.Arnold@nrc.gov

Dr. Sue H. Abreu
Administrative Judge
Sue.Abreu@nrc.gov

Alana Wase, Law Clerk
alana.wase@nrc.gov

Catherine Scott, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Sherwin E. Turk, Esq.
Brian Harris, Esq.
Anita Ghosh, Esq.
John Tibbetts, Paralegal
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Catherine.Scott@nrc.gov
edward.williamson@nrc.gov
beth.mizuno@nrc.gov
david.roth@nrc.gov
sherwin.turk@nrc.gov
brian.harris.@nrc.gov
anita.ghosh@nrc.gov
john.tibbetts@nrc.gov

OGC Mail Center
OGCMailCenter@nrc.gov

Paul M. Bessette, Esq.
Raphael Kuyler, Esq.
Kathryn M. Sutton, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
pbessette@morganlewis.com
rkuyler@morganlewis.com;
ksutton@morganlewis.com

Martin O'Neil, Esq.
Morgan, Lewis & Bockius, LLP
1000 Louisiana Street
Suite 4000
Houston, TX 77002
martin.oneill@morganlewis.com

William B. Glew, Jr.
Organization: Entergy
440 Hamilton Avenue, White Plains, NY 10601
wglew@entergy.com

Siobhan Blank, Esq.
Lisa S. Kwong, Esq.
Brian Lusignan, Esq.
John J. Sipos, Esq.
Assistant Attorneys General
Teresa Manzi, Legal Assistant
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224-0341
siobhan.blank@ag.ny.gov
lisa.kwong@ag.ny.gov
brian.lusignan@ag.ny.gov
john.sipos@ag.ny.gov
teresa.manzi@ag.ny.gov

Jeanne Cho, Esq.
Senior Counsel
Entergy Services, Inc.
440 Hamilton Avenue
White Plains, NY 10601
jcho1@entergy.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of April, 2016