UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO "STATE OF NEW YORK PETITION TO INTERVENE AND REQUEST FOR HEARING"

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June 12, 2015

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INTRODUCTION

On May 18, 2015, the State of New York ("New York") filed a petition to intervene and a request for hearing ("Petition") concerning a license amendment request ("LAR") for Indian Point Nuclear Generating, Unit 2 ("Indian Point Unit 2" or "IP2") submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant").[1] Entergy's LAR seeks to modify IP2 Technical Specification ("TS") 5.5.14 to allow extension of the ten-year frequency of the plant's Type A or Integrated Leak Rate Test ("ILRT") to 15 years on a permanent basis.[2]

In its Petition, New York proffers two contentions, asserting that (1) Entergy's LAR ignores plant-specific circumstances and events that have weakened and damaged key containment components as well as recent updates regarding elevated seismic hazards at the

[1] "State of New York Petition to Intervene and Request for Hearing" (May 18, 2015) ("Petition") (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML15138A415).

[2] Letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-14-128, "Proposed License Amendment Regarding Extending the Containment Type A Leak Rate Testing Frequency to 15 years" (Dec. 9, 2014), at 1 ("LAR") (ADAMS Accession No. ML14353A015). Entergy enclosed with its LAR three attachments: (1) "Analysis of Proposed Technical Specification Changes Regarding 15 Year Containment ILRT" ("Attachment 1"); (2) "Marked Up Technical Specifications Pages for Proposed Changes Regarding 15 Year Containment ILRT" ("Attachment 2"); and (3) "Risk Impact of Extending the ILRT Interval Associated with the Proposed Technical Specification Changes" ("Attachment 3").

Indian Point site, and (2) Entergy failed to conduct an environmental review of its LAR as required by 10 C.F.R. § 51.22(c)(9)(i), in that the LAR presents a significant hazards consideration.

Pursuant to 10 C.F.R. § 2.309(i), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its answer to New York's Petition. As set forth below, the Staff respectfully submits that New York has standing to intervene, but its Petition should be denied because its proposed contentions are inadmissible under 10 C.F.R. § 2.309(f)(1) and established Commission case law.

BACKGROUND

This proceeding involves a license amendment application for Indian Point Unit 2, submitted by Entergy on December 9, 2014. IP2 is located at the "Indian Point Energy Center" ("IPEC"), situated on the east bank of the Hudson River in Buchanan, NY, approximately 24 miles north of the northern boundary of New York City. IP2 is a pressurized water reactor ("PWR") supplied by Westinghouse Electric Corp., and is authorized to operate at 3216 megawatts thermal (MWt), which corresponds to a turbine generator output of approximately 1080 megawatts electric (MWe). The current license for IP2 authorizes operation until September 28, 2013; In April 2007, Entergy submitted a timely application for renewal of the IP2 operating license, which is currently under NRC consideration; as a result, the license is currently in timely renewal under 10 C.F.R. § 2.109(b).

In its LAR, Entergy proposed a change to TS 5.5.14 to allow extension of the ten-year frequency of the Type A or ILRT to 15 years on a permanent basis.[3] The last IP2 ILRT was completed in April, 2006. The ILRT is currently required to be performed at ten year intervals and is due in April, 2016; the next ILRT is currently scheduled to be conducted during the next

[3] LAR at 1. A similar request to increase the frequency of the ILRT from a ten to 15 year interval was approved by the NRC for Indian Point Generating, Unit 3 in March 2015. *See* Letter from Douglas V. Pickett (NRC) to Vice President, Operations (Entergy), "Indian Point Nuclear Generating Unit No. 3 – Issuance of License Amendment Re: Extension of the Type A Containment Integrated Leak Rate Test Frequency From 10 to 15 Years" (March 13, 2015) (ADAMS Accession No. ML15028A308).

IP2 refueling outage, scheduled for March 2016. The proposed extension of the ILRT frequency interval would revise the due date for the next scheduled ILRT to March 2021, and would also allow successive ILRTs to be performed at 15-year intervals (assuming acceptable performance history).[4]

On March 17, 2015, the NRC published in the *Federal Register* a notice of opportunity to request a hearing on the LAR.[5] The notice included a proposed no significant hazards considerations ("NSHC") determination, and required that any requests for hearing be filed by May 18, 2015.[6] In response to this Notice, New York filed its May 18, 2015 request for hearing, in which it addressed its standing to intervene and proposed two contentions challenging Entergy's LAR.

DISCUSSION

I. Applicable Legal Standards Governing Intervention

A. Standing Requirements

The Commission's regulations in 10 C.F.R. § 2.309 require that a petitioner seeking leave to intervene must demonstrate its standing to intervene and must proffer at least one admissible contention before it can be admitted as a party to a licensing proceeding. Generally, in order to establish standing to intervene, a petitioner must show it has an interest that may be adversely affected by the proceeding.[7] However, where a State seeks to intervene in a

[4] LAR, Attachment 1, at 3. The LAR remains under Staff review at this time. To date, the Staff has transmitted three requests for additional information (RAIs) to Entergy, to which Entergy responded on May 20 and June 8, 2015. *See* (1) letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-15-062 (May 20, 2015) (ADAMS Accession No. ML15149A139); (2) letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-15-069 (May 20, 2015) (ADAMS Accession No. ML15149A137); and (3) letter from Lawrence Coyle (Entergy) to NRC Document Control Desk, NL-15-068 (June 8, 2015) (ADAMS accession number to be determined).

[5] "Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations," 80 Fed. Reg. 13,902, 13905 (Mar. 17, 2015).

[6] *Id.* at 13,905-06.

[7] The regulations at 10 C.F.R. §§ 2.309(a) and (d) provide the general standing requirements.

"proceeding [that] pertains to a production or utilization facility . . . located within the boundaries of the State," it is not required to provide any "further demonstration of standing."[8]

New York has established its standing to intervene. In its Petition, New York alleges that "[t]he State of New York and its citizens have a direct interest in ensuring the safe operation of IP2" and "meet all the requirements for intervenor standing under 10 C.F.R. § 2.309(d)(1)."[9] New York then sets forth a number of reasons why the State, itself, has standing to intervene in this proceeding.[10] New York does not address the standing of any of its citizens to intervene in their individual capacity, and their individual standing to intervene has therefore not been established. Nonetheless, inasmuch as IP2 is a utilization facility[11] located within the boundaries of New York, the State has standing to intervene in this proceeding.[12]

B. Contention Admissibility Standards

In addition to demonstrating standing, a contention must also meet the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Under § 2.309(f)(1), an admissible contention must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted. . .
>
> (ii) Provide a brief explanation of the basis for 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 which support the requestor's/petitioner's position

[8] 10 C.F.R. § 2.309(h)(1)-(2).

[9] Petition at 2.

[10] *Id*. at 2-4.

[11] "Utilization facility" is defined, in 10 C.F.R. Part 50, as "[a]ny nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233." 10 C.F.R. § 50.2.

[12] 10 C.F.R. § 2.309(f)(h)(2).

> 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 requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that 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 . . . .[13]

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[14] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing" as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.[15] The Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are "strict by design."[16] The failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention;[17] further, attempting to satisfy these requirements by "[m]ere 'notice pleading' does not suffice."[18]

Pursuant to 10 C.F.R. § 2.309(f)(1)(v), a proposed contention must be rejected if it does not provide a concise statement of the facts or expert opinions that support the proposed

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[13] 10 C.F.R. § 2.309(f)(1). A further provision, § 2.309(f)(1)(vii), applies only to combined license (COL) applications submitted under 10 C.F.R. Part 52.

[14] Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[15] *Id*.

[16] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

[17] *Private Fuel Storage, L.L.C.* (Independent Irradiated fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

[18] *Amergen Energy Co., L.L.C.* (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)).

contention together with references to specific sources and documents. Neither mere speculation nor bare or conclusory assertions, even by an expert, suffices to allow the admission of a proposed contention.[19] While a Board may view a petitioner's supporting information in a light favorable to the petitioner, if a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions or draw inferences that favor the petitioner, nor may the Board supply the information that a contention is lacking.[20] Additionally, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.[21] The Board is not expected to sift through attached material and documents in search of factual support.[22] Therefore, the Commission "discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be 'comprehensive, concise, and self-contained.'"[23]

Further, pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues beyond the scope of the proceeding as dictated by the Commission's hearing notice.[24] Thus, a proposed contention that challenges a license amendment must confine itself to "health, safety or environmental issues fairly raised by [the license amendment]."[25] The adequacy of the Staff's review, as opposed to the adequacy of the application, cannot be

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[19] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006); *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[20] *See Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553-54 (2009); *Arizona Pub. Serv. Co*. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI 91-12, 34 NRC 149, 155 (1991).

[21] *See Fansteel,* CLI-03-13, 58 NRC at 204-05.

[22] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

[23] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 139 n.41 (2012) (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 219 (2011)).

[24] *See Public Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

[25] *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

challenged.[26] In addition, pursuant to 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not material to findings the NRC must make to support the action involved in the proceeding. The proponent of a proposed contention in a licensing proceeding "must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application."[27] In other words, the issue raised in the proposed contention "must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief."[28]

Further, the scope of NRC proceedings is limited to the matters specified in the notice of hearing.[29] Here, the *Federal Register* notice stated that the LAR "would revise Technical Specification 5.5.14, "Containment Leakage Rate Testing Program," to extend the frequency of the Containment Integrated Leak Rate Test or Type A Test from once every 10 years to once every 15 years on a permanent basis."[30] Thus, any claims by a petitioner that do not relate to Entergy's proposed changes to the current license are outside the scope of this proceeding.

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[26] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-0-27, 72 NRC 481, 493 n.56 (2010) ("The contention . . . inappropriately focused on the Staffs [sic] review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications."); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); Final Rule, 69 Fed. Reg. at 2202. Moreover, a Board lacks the authority to supervise the Staff's review. *See Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-12-4, 75 NRC 154, 156 (2012), *citing* LBP-11-30, 74 NRC 627, 632-633 (2011)..

[27] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

[28] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), *reconsid. granted in part on other grounds,* LBP-98-10, 47 NRC 288 (1998). *See also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989) (Final rule) ("[A]dmission of a contention may also be refused . . . if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.").

[29] *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n. 6 (1979) (citing *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976)); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Unit 3), LBP-08-9, 67 NRC 421, 437 (2008), *aff'd,* CLI-08-17, 68 NRC 231, 240 (2008).

[30] 80 Fed. Reg. at 13,905.

Finally, challenges to NRC regulations are prohibited in an adjudicatory proceeding, unless (1) a petition for waiver of the rules in the proceeding has been filed,[31] (2) the presiding officer determines that the waiver petition has made a *prima facie* showing that the application of the specific rule would not serve the purposes for which the rule was adopted and then certifies the matter directly to the Commission, and (3) the Commission makes a determination on the matter.[32]

As set forth below, Contentions NYS-1 and NYS-2 fail to meet these requirements, and New York's Petition must therefore be rejected.

II. Regulatory Overview: Integrated Leakage Rate Testing

The Commission's regulations at 10 C.F.R. § 50.54(o) require that the "[p]rimary reactor containments for water cooled power reactors . . . shall be subject to the requirements set forth in Appendix J to [10 C.F.R. Part 50]." In turn, 10 C.F.R. Part 50, Appendix J, "Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors," contains two options: "Option A – Prescriptive Requirements," and "Option B – Performance-Based Requirements," either of which can be chosen by a licensee for meeting the requirements of Appendix J. As pertinent here, pursuant to a license amendment issued in April 1997, IP2 voluntarily adopted and has been implementing Option B for meeting the requirements of 10 C.F.R. Part 50, Appendix J.[33]

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[31] 10 C.F.R. § 2.335(a). *See also Vermont Yankee Nuclear Power Corp.& AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000) (noting that a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings). 10 C.F.R. § 2.309(f)(1)(iii) (requiring contention to be within the scope the proceeding to be admissible).

[32] *Id*.

[33] *See* LAR, Attachment 1, at page 2 of 19. Entergy submitted a license amendment request in 2001, which the NRC approved in August 2002, extending IP2's first ILRT interval from 10 to 15 years. *Id.* As noted above, the NRC granted Entergy's separate request to extend the ILRT interval frequency for Indian Point Unit 3 from 10 to 15 years, by license amendment issued in March 2015. *See* n.3, *supra*.

Option B of 10 C.F.R. Part 50, Appendix J, specifies performance-based requirements and criteria for preoperational and subsequent periodic leakage-rate testing. The testing requirements for Appendix J, Option B, ensure that (a) leakage through containments or systems and components penetrating containments does not exceed allowable leakage rates specified in the technical specifications or associated bases; and (b) the integrity of the containment structure is maintained during its service life.

These requirements are met by the performance of three types of tests: (1) Type A tests that measure the containment system overall integrated leakage rate conducted under conditions representing design basis loss-of-coolant accident containment peak pressure; (2) Type B pneumatic tests that detect and measure local leakage rates across pressure-retaining, leakage-limiting boundaries such as penetrations; and (3) Type C pneumatic tests that measure containment isolation valve leakage rates. Appendix J, Section III, describes the performance-based leakage-test requirements for these tests. Specifically, for Type A tests, Section III states:

> Type A tests to measure the containment system overall integrated leakage rate must be conducted under conditions representing design basis loss-of-coolant accident containment peak pressure. A Type A test must be conducted (1) after the containment system has been completed and is ready for operation and (2) at a periodic interval based on the historical performance of the overall containment system as a barrier to fission product releases to reduce the risk from reactor accidents. A general visual inspection of the accessible interior and exterior surfaces of the containment system for structural deterioration which may affect the containment leak-tight integrity must be conducted prior to each test, and at a periodic interval between tests based on the performance of the containment system. The leakage rate must not exceed the allowable leakage rate (La) with margin, as specified in the Technical Specifications. The test results must be compared with previous results to examine the performance history of the overall containment system to limit leakage.

The NRC has issued regulatory guidance regarding the conduct of ILRTs under Appendix J, Option B, as set forth in NRC Regulatory Guide (RG) 1.163.[34] This RG endorses, with certain exemptions, Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Revision 0.[35] Option B of 10 C.F.R. Part 50, Appendix J, in concert with RG 1.163 and NEI TR 94-01, Rev. 0, allows licensees with a satisfactory ILRT performance history (*i.e.,* two consecutive, successful Type A tests) to reduce the test frequency for the Type A containment ILRT from three tests in 10 years to one test in 10 years.[36] This relaxation was based on an NRC risk assessment contained in NUREG-1493,[37] and the Electric Power Research Institute (EPRI) Technical Report (TR) 104285,[38] both of which showed that the risk increase associated with extending the ILRT surveillance interval was very small.[39]

In addition, guidance for extending Type A ILRT surveillance intervals beyond ten years is provided in NEI 94-01, Revision 2-A.[40] Specifically, Section 9.2.3.1 ("General Requirements for ILRT Interval Extensions Beyond Ten Years") of NEI-94-01, Rev. 2-A, states that plant-specific confirmatory analyses are required when extending the Type A ILRT interval beyond

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[34] Regulatory Guide (RG) 1.163, "Performance-Based Containment Leak-Rate Testing Program" (Sep. 1995) (ADAMS Accession No. ML003740058). Current TS 5.5.14 for IP2, "Containment Leakage Rate Testing Program," incorporates this guidance, stating that "[a] program shall establish the leakage rate testing of the containment as required by 10 C.F.R. 50.54(o) and 10 C.F.R. Part 50, Appendix J, Option B, as modified by approved exemptions. This program shall be in accordance with the guidelines contained in Regulatory Guide 1.163, "'Performance-Based Containment Leak Test Program,' dated September, 1995." The proposed TS revision would eliminate the reference ito RG 1.163, and replace it with a reference to NEI-94-01, Revision 2A (Oct. 2008). *See* LAR, Attachment 2, "Marked Up Technical Specifications Pages for Proposed Changes Regarding 15 Year Containment ILRT."

[35] Nuclear Energy Institute (NEI) Topical Report (TR) 94-01, Rev. 0, "Industry Guideline for Implementing Performance Based Option of 10 CFR Part 50, Appendix J" (July 1995).

[36] Final Safety Evaluation for NEI TR 94-01, Rev. 2 and EPRI Report No. 1009325 (June 2008) ("June 2008 SE") (ADAMS Accession No. ML081140105), at 2.

[37] NUREG-1493, "Performance-Based Containment Leak-Test Program, Final Report" (Sept. 1995)

[38] Electric Power Research Institute (EPRI), "A Risk Impact Assessment of Revised Containment Leak Rate Testing Intervals," Report No. 104285 (August 1994).

[39] June 2008 SE, at 2.

[40] NEI 94-01, Rev. 2-A, Industry Guideline for Implementing Performance-Based Option of 10 CFR Part 50, Appendix J (Oct. 2008) (ADAMS Accession No. ML100620847). The designation "2-A" signifies that Revision 2 of the NEI guidance, set forth in this document, was approved by the NRC Staff.

ten years. Section 9.2.3.4 (“Plant-Specific Confirmatory Analyses”) further states that the assessment should be performed using the approach and methodology described in EPRI TR 1009325, Rev. 2-A.[41] The analysis is to be performed by the licensee and retained in the plant documentation and records as part of the basis for extending the ILRT interval. In its June 2008 SE,[42] the NRC Staff found the methodology in NEI 94-01, Rev. 2, and EPRI TR-1009325, Rev. 2 acceptable for referencing by licensees proposing to amend their TS to permanently extend the ILRT interval to 15 years, provided certain conditions, recited in Section 4.2 of the SE for EPRI TR-1009235, Rev. 2, are satisfied.[43]

The above-referenced guidance is adopted in Entergy’s instant LAR. As discussed *supra* at 8, IP2 has been implementing Option B of 10 C.F.R. Part 50, Appendix J, since 1997. Indian Point Unit 2 TS 5.5.14 reflects this approach. The proposed license amendment would revise current IP2 TS 5.5.14 by replacing the reference to RG 1.163 with a reference to NEI TR 94-01, Rev. 2-A, as the implementation document applied by Entergy in the IP2 performance-based leakage testing program, in accordance with Option B of 10 C.F.R. Part 50, Appendix J.[44]

[41] EPRI Technical Report (TR) 1009325, Rev. 2-A, "Risk Impact Assessment of Extended Integrated Leak Rate Testing Intervals" (ADAMS Accession No. ML14024A045).

[42] *See* n.36, *supra.*

[43] *See generally* June 2008 SE. Consistent with NRC policy on approving topical reports for use in referencing in licensing applications, the industry typically resubmits a topical report with the suffix "-A" denoting that the document has been approved by the NRC.

[44] LAR, Attachment 1, at 3.

III. New York Has Not Filed an Admissible Contention

A. Contention NYS-1 is Inadmissible

Proposed Contention NYS-1 states as follows:

> Entergy's Request to Amend the Indian Point Unit 2 Operating License and Technical Specification Should Be Denied Because It Involves a Significant Safety and Environmental Hazard, Fails to Demonstrate That It Complies with 10 C.F.R. §§ 50.40 and 50.92 or 10 C.F.R. 50, Appendix J, and Fails to Demonstrate That It Will Provide Reasonable Assurance of Adequate Protection for the Public Health and Safety as Required by Section 182(a) of the Atomic Energy Act (42 U.S.C. § 2232[a]) if the Proposed Amendment to the Operating License Is Approved.[45]

As discussed below, Contention NYS-1 is inadmissible because it fails to meet the contention admissibility standards of 10 C.F.R. § 2.309(f)(1), in that it (1) fails to identify a specific challenge to Entergy's license amendment application, and (2) impermissibly challenges the Staff's NSHC determination.[46]

1. Plant-Specific Events and ILRT Results.

In support of its Petition, New York asserts that the IP2 containment liner "has been subjected to a variety of unusual events over more than four decades, including buckling in 1968, deformations caused by a jet of steam and hot water in 1973, and corrosion due to a flooding event in 1980."[47] Further, New York asserts that "Entergy's license amendment application fails to mention, let alone consider, these plant-specific events, presenting instead a generic analysis."[48] In Contention NYS-1, New York expands upon these assertions.[49] Thus, New York asserts that "[d]uring its construction and 42 years of operation, the IP2 containment

[45] Petition at 5.

[46] Contention NYS-1, in essence, is a safety contention. To the extent New York raises environmental issues, these arguments are addressed in the Staff's responses to Contentions NYS-2. *See* discussion *infra* at 22-27.

[47] Petition at 2.

[48] *Id.*

[49] *See id*. at 5-15.

liner has been subjected to a series of damaging incidents, making it ill-suited for the relaxed monitoring proposed by Entergy."[50] Further, New York asserts that "Entergy has failed to consider the plant-specific history of the IP2 containment liner," despite Entergy's recognition that Option B of Appendix J requires that "the frequency of Type A leakage tests should be based on 'plant-specific performance data' and 'on consideration of the operating history of the component and the resulting risk from its failure."[51]

More specifically, New York contends that Entergy's evaluation of the risk posed by reducing the ILRT inspection frequency "fails to consider the specific history of structural and corrosive damage to the IP2 containment liner."[52] New York points to damage to the containment liner during construction (liner plate buckling in 1968, and a feedwater line break resulting in liner deformation in 1973);[53] corrosion that resulted from a 1980 flooding event;[54] liner degradation observed during visual inspections of the containment liner in 2000, 2008, 2012, and 2014 (which, New York observes, was reported in Entergy's LAR, in Attachments 1 and/or 2).[55] In addition, New York points to the results of IP2 containment ILRTs conducted in 1979, 1984, 1987, 1991, and 2006, which it asserts "indicate that the integrity of the IP2 liner has steadily declined between 1979 and 2006, and is on pace to not meet the applicable acceptance criteria by 2016."[56]

While New York recites numerous issues regarding liner degradation and corrosion and previous ILRT results at IP2, these matters were addressed in Entergy's LAR – and New York shows no reason to believe that Entergy failed to adequately consider those matters in its LAR.

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[50] *Id.* at 5-6 (¶ 2).

[51] *Id*. at 6 (¶ 2), *quoting* LAR, Attachment 1, at 2.

[52] *Id.* at 7 (¶ 5), citing "Risk Assessment for Indian Point Regarding the ILRT (Type A) Permanent Extension Request, Revision 0, Attachment 3 to NL-14-128 (October 2013), at 1-4 to 7-2; *id.* at."

[53] *Id.* at 7 (¶ 6), and 13-14 (¶ 15-16).

[54] *Id.* at 8 (¶ 7), and 15 (¶ 18).

[55], *Id*. at 8 (¶ 7), and 17-18 (¶¶ 20-21).

[56] *Id*. at 16-17 (¶ 20).

Thus, Section 4.3.1 of LAR Attachment 1 ("ILRT Test Results") presents a summary of the ILRTs that were conducted in 1979, 1984, 1987, 1991, and 2006.[57] Similarly, Section 4.4 of LAR Attachment 1 ("Code Inspections") provides a summary of the visual inspections of the containment liner that were conducted to date as part of the plant's Containment In-service Inspection (ISI) Plan, to implement the requirements of ASME Code, Section XI, Subsection IWE and IWL.[58] Section 4.4.1 of Attachment 1 provides a summary of the IWE examinations that have been conducted,[59] while Section 4.4.2 provides a summary of the IWL examinations that have been conducted.[60] In accordance with the ASME Code and the plant's ISI Plan requirements, those visual inspections included all accessible areas of the IP2 containment liner – including areas in which corrosion or degradation had been observed in the past.

In accordance with Entergy's license requirements, any significant corrosion or degradation that was observed in the past would have been remediated and/or deemed acceptable, and documented in plant records; further, all subsequent inspections would have been evaluated based in part on an observed change from that condition.[61] Thus, in LAR Attachment 1, Entergy acknowledged that (a) surface corrosion, flaking and peeling of the liner coating, and water seepage had been observed in past IWE inspections, and (b) concrete

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[57] LAR, Attachment 1 ("Analysis of Proposed Technical Specification Changes Regarding 15 Year Containment ILRT"), at pages 5-6 of 19.

[58] *Id.* at 10-13. The "ASME Code" is the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel (B&PV) Code. ASME Code Section XI ("In-Service Inspection of Nuclear Power Plant Components") includes Subsections IWE (metal containments) and IWL (concrete containments). The ASME Code requires visual examinations, a determination of acceptability, and repair or replacement of impaired conditions. *See, e.g.*, IWE-3511 General Visual Examination of Coated and Noncoated Areas ("The condition of the examined area is acceptable if the Responsible Individual determines that there is no evidence or degradation requiring further evaluation or performance of a repair/replacement activity. Suspect conditions shall be evaluated to the extent necessary to determine that the component function is not impaired.").

[59] LAR, Attachment 1, at 11-12.

[60] *Id.* at 12-13.

[61] Licensed nuclear power reactors are required to comply with applicable NRC regulations, including 10 C.F.R. § 50.55a. In particular, 10 C.F.R. § 50.55a(g)(4) ("Inservice inspection requirements") requires licensees to comply with ASME Boiler and Pressure Vessel (BPV) Code Section XI, including Subsections IWE and IWL.

weathering, cracking and spalling had been observed in the past IWL inspections; as Entergy further noted, however, corrective actions have been taken to address these matters, as necessary.[62] Further, Entergy observed that its recent IWE examinations (in 2008 and 2012) identified only minor recordable conditions, most of which had not changed from previous inspections, and it concluded that none of the observed conditions resulted in "any structural degradation that adversely affects the ability of the containment to perform its design function of maintaining integrity during accident conditions."[63] Similarly, Entergy observed that its most recent IWL examinations (in 2005 and 2010) of containment building exterior concrete had identified only minor conditions, all of which were evaluated and found not to present structural concerns, and do not "reduce the structural capacity or ability of the containment structure to perform its safety function."[64] New York altogether fails to address the corrective actions that have occurred over time or Entergy's discussion of these matters, and its reliance on the events that preceded those corrective actions is therefore misplaced and lacks factual basis.

While New York asserts that the results of IP2 ILRTs conducted in 1979, 1984, 1987, 1991, and 2006 "indicate that the integrity of the IP2 liner has steadily declined between 1979 and 2006, and is on pace to not meet the applicable acceptance criteria by 2016,"[65] New York does not dispute that each of those tests produced satisfactory results, with containment leakage shown to be within the acceptance criteria. Moreover, while New York speculates that a future ILRT may produce unsatisfactory results, no evidence has been presented to support that assertion other than an attempt to predict the future based on a perceived trend in past results. Significantly, the LAR's deterministic analysis discusses the results of previous IP2

[62] *Id.* at 11-12 and 13.

[63] *Id.* at 12.

[64] *Id.* at 13.

[65] Petition at 16-17 (¶ 20).

ILRTs,[66] while its probabilistic analysis acknowledges those results but goes on to consider the risk of containment failure due to corrosion or other mechanisms, including consideration of more severe and/or non-visible liner corrosion.[67] Thus, New York's conjecture that a trend in past ILRT results suggests that future ILRT results may not be satisfactory, does not establish a genuine dispute of material fact with Entergy's LAR.

Finally, it should be noted that while New York speculates that past ILRT results indicate a trend whereby a future ILRT may identify a leakage rate greater than the 75% allowable leakage (L_a) criterion specified in 10 C.F.R. Part 50, Appendix J,[68] New York fails to observe that the allowable leakage rate criterion for nuclear reactor operation, including design basis accidents, is 100% of L_a; in contrast, the 75% criterion denotes the maximum leakage rate allowed in order for the plant to restart following the ILRT.[69] Here, even assuming that New York is correct in stating that past ILRT results show a trend approaching the 75% value, it has presented no information or reason to believe that a future ILRT will detect a leakage rate approaching the 100% value. Thus, New York's assertions do not establish a genuine dispute of material fact regarding the safety of Entergy's LAR.

As discussed *supra*, at 4-5, 10 C.F.R. § 2.309(f)(1)(vi) requires a petitioner for leave to intervene to "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." In particular, the information provided by a

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[66] LAR, Attachment 1, § 4.3.1 ("ILRT Test Results"), at 5-6.

[67] *See* LAR Attachment 3 ("Risk Impact of Extending the ILRT Interval Associated With the Proposed Technical Specification Changes"), at 4-14 – 4-16.

[68] In 10 C.F.R. Part 50, Appendix J, Option B, the term "L_a" is defined as follows: "L_a (percent/24 hours) means the maximum allowable leakage rate at pressure Pa as specified in the Technical Specifications." The term Pa is defined as follows: "P_a (p.s.i.g) means the calculated peak containment internal pressure related to the design basis loss-of-coolant accident as specified in the Technical Specifications."

[69] In accordance with 10 C.F.R. Part 50, Appendix J, Option B, the Type A "leakage rate must not exceed the allowable leakage rate (L*a*) *with margin, as specified in the Technical Specifications*." Id. (emphasis added). In turn, IP2 Technical Specification (TS) 5.5.14 states that the "containment 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 criteria [is] … <= 0.75 L_a for Type A tests.""

petitioner "must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that 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." Contrary to these requirements, New York provides no indication that it disputes the LAR's discussion of IP2 liner degradation and corrosion or previous IP2 ILRT results, or that the LAR is deficient in its assessment of these matters. Moreover, the LAR plainly shows there is no basis for New York's *ipse dixit* assertion that "Entergy's license amendment application fails to mention, let alone consider, these plant-specific events, presenting instead a generic analysis."[70] Accordingly, New York's assertions regarding these matters do not demonstrate a genuine dispute of material fact with the Applicant, as required by 10 C.F.R. § 2.309(f)(1)(vi).

2. Entergy's Risk Assessment

New York contends that Entergy's risk assessment (LAR, Attachment 3) is deficient, in that it (a) improperly included risk information concerning Indian Point Unit 3 ("IP3");[71] (b) does not include consideration of the "updated seismic hazard analysis" that Entergy performed for IP2 in response to the NRC's post-Fukushima "Near Term Task Force Report" recommendations (for which a seismic risk analysis based on that information is to be submitted by June 30, 2017);[72] (c) inappropriately used the Surry reactor, located in a far less densely populated area, as a "benchmark plant";[73] and (d) improperly relied upon a 2009 Severe

[70] Petition at 2.

[71] *Id*. at 7 (¶ 5).

[72] *Id*. at 15-16 (¶ 19).

[73] *Id.* at 19 (¶ 23).

Accident Mitigation Alternatives (SAMA) analysis that had been submitted as part of Entergy's license renewal application.[74]

These assertions do not establish a genuine dispute of material fact with the LAR. Significantly, while New York points to various aspects of the risk assessment that it seeks to challenge, it provides no expert opinion or affidavit in support of its (lawyers') claims, and nowhere does New York allege that the risk assessment underestimates the risk posed by the requested license amendment. Rather, New York relies solely on its attorneys' non-expert assertions, and makes no attempt to calculate whether its alleged flaws have any adverse effect on the risk assessment's conclusions.

Moreover, New York's specific challenges to the risk assessment do not establish a genuine dispute of material fact. First, with respect to Entergy's inclusion of information regarding Indian Point Unit 3, New York acknowledges that Entergy stated it had included that information for "informational [purposes] only," and that the IP3 information is" not part of the basis for the current LAR.[75] Second, while New York refers to the updated seismic hazard analysis that Entergy performed in response to the NRC's "Near Term Task Force Report" recommendations, New York does not dispute that the plant's <u>current</u> seismic design basis was not changed by Entergy's recent seismic analysis, and New York has shown no facts or expert opinion to suggest that the current licensing basis[76] and/or the LAR's seismic assessment are

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[74] *Id.* at 19-20 (¶ 24).

[75] *Id*. at 7 (¶ 5).

[76] The "current licensing basis" is defined in 10 C.F.R. § 54.3, as follows:

> *Current licensing basis* (CLB) is the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring compliance with and operation within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect. The CLB includes the NRC regulations . . . ; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 CFR 50.2 as documented in the most recent final safety analysis report (FSAR) as required by 10 CFR 50.71 and the licensee's commitments remaining in effect that were made in docketed licensing correspondence such as

inadequate to support the requested license amendment. Third, New York incorrectly suggests that the Surry reactor cannot be used as a reference point in the IP2 risk assessment, due the Surry site's lower population density; in fact, however, while Entergy considered the Surry plant for "benchmark[ing]" purposes, it explicitly accounted for Indian Point's site-specific population in its risk assessment.[77]

Finally, while New York challenges Entergy's use of its 2009 SAMA analysis (developed in support of IP2/IP3 license renewal), New York fails to note that this analysis was the subject of extensive litigation before the Atomic Safety and Licensing Board in the license renewal proceeding, and that the Board explicitly found Entergy's SAMA analysis and the Staff's review thereof to be reasonable and acceptable under NEPA.[78] Further, New York appears to misapprehend the type of risk analysis that Entergy performed in support of its LAR. Accordingly, New York's assertions regarding these matters do not demonstrate a genuine dispute of material fact with the Applicant, as required by 10 C.F.R. § 2.309(f)(1)(vi).

3. Challenges to Entergy's NSHC Discussion

New York disputes Entergy's conclusion that the requested license amendment presents "no significant hazard consideration," asserting that "the LAR poses a significant hazard consideration under 10 C.F.R. § 50.92(c)" because it: (1) involves a significant increase in the consequence of an accident previously evaluated; and (2) involves a significant reduction in a margin of safety.[79] As discussed below, these assertions fail to raise an admissible issue.

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licensee responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.

[77] *See, e.g.,* LAR Attachment 3 at 4-7 – 4-12, 5-6 – 5-13,.

[78] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-13-13, 78 NRC 246, 450- 89 (2013). While New York has challenged the Board's decision regarding Entergy's estimate of SAMA decontamination costs (Contention NYS-12C), 78 NRC at 450-74, it did not challenge the Board's decision approving Entergy's SAMA population estimates (Contention NYS-16B). *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-15-2, 81 NRC __ (Feb. 18, 2015), slip op. at 1-2. New York's appeal from the Board's decision on that other issue remains pending before the Commission.

[79] *Id*. at 8-10 (¶ 8).

It is well established that a petitioner cannot challenge the NRC's "no significant hazards consideration" ("NSHC") determination. As set forth in 10 C.F.R. § 50.58(b)(5), the NRC (Staff) "will use the standards in § 50.92 to determine whether a significant hazards consideration is presented by an amendment to an operating license"; moreover, the regulation further provides that the Commission "may make the amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved."[80] Significantly, the regulations in 10 C.F.R. § 50.58(b)(6) further state that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission. The staff's determination is final, subject only to the Commission's discretion, on its own initiative, to review the determination." This principle has been recognized and applied by the Commission and Atomic Safety and Licensing Boards in numerous NRC adjudicatory proceedings.[81]

Accordingly, New York's assertions regarding Entergy's NSHC discussion must be rejected. New York fails to recognize that Entergy's NSHC discussion, presented in Section 5.0 ("Regulatory Analysis") of its LAR, addresses the specific requirements of 10 C.F.R. § 50.92 ("Issuance of amendments"). That regulation requires, in part, that the Commission must follow certain procedural steps in its evaluation of a proposed license amendment. As the Commission has observed, "a 'no significant hazards consideration' finding is a procedural

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[80] 10 C.F.R. § 50.58(b)(5).

[81] *See, e.g., Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-14, 61 NRC 359, 361 n.2 (2005); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 NRC 113, 118 (2001); *Firstenergy Nuclear Operating Co*. (Davis-Besse Nuclear Power Station, Unit 1), LBP-13-11, 78 NRC 177, 181 n.18 (2013); *FPL Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-08-20, 68 NRC 549, 550-51 (2008); *FPL Energy Point Beach, LLC* (Point Beach Nuclear Plant, Unit 1), LBP-08-19, 68 NRC 545. 546 (2008); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541 (2008); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 32 n.22 (2007); *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 560-61 (2004).

device to determine when, not whether, petitioners' right to a hearing under the Atomic Energy Act will occur.'"[82] As the Atomic Safety and Licensing Board observed in another proceeding:

> . . . Entergy's demonstration that [a proposed amendment] will not create a significant hazard as required by 10 C.F.R. § 50.92 - is not material to this proceeding. The only purpose of the analysis of the no significant hazard consideration (NSHC) contained in the application is to assist the Staff in deciding a procedural matter, i.e., whether an opportunity for a hearing must be provided before or after any amendment that might be granted. *See* AEA § 189a and 10 C.F.R. § 50.92(a). The NRC's NSHC determination is not subject to review. See 10 C.F.R. § 50.58(b)(6). The current proceeding concerns challenges to the merits of the application, not the timing of a hearing, and thus the adequacy of the applicant's NSHC analysis is not material.[83]

Inasmuch as 10 C.F.R. § 50.92 requires the agency to determine whether a license amendment application presents a significant hazards consideration as part of its procedural process, licensees routinely include a discussion of the regulation in their applications, for consideration by the Staff under § 50.92 –as the Applicant did here. Subsequently, in the Staff's March 17, 2015 *Federal Register* Notice, the Staff reviewed the licensee's analysis in accordance with 10 C.F.R. § 50.92, and reached a proposed determination that the amendment presents no significant hazards consideration.[84] As discussed above, the Staff's NSHC determination may not be challenged in an NRC adjudicatory proceeding. Accordingly, New York's assertions regarding Entergy's no significant hazards consideration – which Entergy submitted for consideration by the agency in its determination as to whether the proposed amendment presents a significant hazard consideration – must be rejected.[85]

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[82] *Pacific Gas and Electric Co*. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1; 6 n.3 (1986).

[83] *Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LPB-04-28, 60 NRC 548, 560-61 (2004).

[84] 80 Fed. Reg. at 13,905-06.

[85] *Florida Power & Light Co*. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-08-18, 68 NRC 533, 541 (2008).

4. Cost Savings and Dose Reductions

New York asserts that Entergy improperly included in its LAR, as justification for increasing the ILRT frequency from 10 to 15 years, a statement that "[t]he performance of fewer ILRTs would result in significant savings in radiation exposure to personnel, cost, and critical path time during future refueling outages."[86] New York asserts that it would be improper for the Commission to include such considerations in its evaluation of the LAR, and that in any event, Entergy has not provided a detailed cost analysis to support such considerations.[87]

The Staff does not share New York's understanding of Entergy's statement. Contrary to New York's apparent belief, the Staff's reading of the LAR indicates that Entergy made this statement to explain the reasons why it is seeking to extend the ILRT interval frequency, rather than as a basis for finding the LAR acceptable. Thus, the challenged statement appears in LAR Section 3.0 ("Background"), and is nowhere addressed in Entergy's technical evaluation or any other portion of the LAR. As such, the challenged statement is irrelevant to Entergy's safety assessment or the NRC's evaluation of the merits of Entergy's proposed license amendment.

B. Contention NYS-2 Is Inadmissible

In proposed Contention NYS-2, New York asserts that:

> Entergy's Request to Amend the Indian Point Unit 2 Operating License and Technical Specifications Should Be Denied Because Entergy Has Not Submitted an Environmental Report as Required By 10 C.F.R. §§ 51.53 and It Has Not Undergone the Required NRC Staff Environmental Review Pursuant to 10 C.F.R. § 51.101 and, Despite Entergy's Claim to the Contrary, the Proposed Amendment Is Not Categorically Exempt from That Review Under 10 C.F.R. § 51.22(c)(9). [88]

Notwithstanding New York's assertions in Contention NYS-2, the Commission's regulations in 10 C.F.R. § 51.53 do not require Entergy to submit an environmental report to

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[86] Petition at 10 (*quoting* LAR Attachment 1 at 3).

[87] *Id.* at 11.

[88] Petition at 20 (emphasis omitted).

support its LAR. Moreover, categorical exclusions are explicitly provided for by the Commission's regulations. As explained below, proposed Contention NYS-2 impermissibly challenges the Staff's NSHC determination and the Commission's categorical exclusions rule,[89] without seeking a waiver of that rule. Accordingly, this contention must be rejected.[90]

1. Legal Standards

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., requires federal agencies, including the NRC, to take a "hard look" at the environmental impacts of their actions.[91] The scope of the Staff's NEPA environmental review of a license amendment is more limited than one performed prior to initial licensing.[92] A NEPA review for a license amendment requires an evaluation of only those environmental impacts beyond those evaluated previously which will result from the proposed action. [93]

Under the Commission's regulations in 10 C.F.R. Part 51, an environmental impact statement ("EIS") is not automatically required for operating license amendments.[94] Instead, pursuant to 10 C.F.R. § 51.21, the Staff determines whether an EIS or environmental assessment ("EA") is required for the proposed action, or whether the action is eligible for a categorical exclusion for which no environmental review document is required.[95] A categorical exclusion is applied to a category of actions that the agency has determined not to have a

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[89] *See* Categorical Exclusions From Environmental Review, 75 Fed. Reg. 20,248 (Apr. 19, 2010) ("Final Rule").

[90] *See* 10 C.F.R. § 2.335.

[91] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 333, 350 (1989).

[92] *Florida Power & Light Co.* (Turkey Point Plant Unit Nos. 3 and 4), LBP-90-16, 31 NRC 509, 536-37 (1990), *citing Florida Power and Light Co.* (Turkey Point Nuclear Generating Station, Units 3 and 4), LBP-81-14, 13 NRC 677, 684-85 (1981); *Consumers Power Co*. (Big Rock Nuclear Plant), ALAB-636, 13 NRC 312, 319 (1981).

[93] *Turkey Point,* LBP-90-16, 31 NRC at 536-37.

[94] *Id.*, *citing* 10 C.F.R. § 51.20.

[95] *Id., citing* 10 CFR §§ 51.21, 51.22(b), 51.22(c)(9) and (10), and 51.14(a).

significant effect, either individually or cumulatively, on the human environment.[96] Under 10 C.F.R. § 51.22(b), except in special circumstances as determined by the Commission, an EA or EIS is not required for any action within a category of actions included in the list of categorical exclusions set out in 10 C.F.R. § 51.22(c). In particular, as pertinent here, § 51.22(c)(9) states:

> (9) Issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes a requirement or issuance of an exemption from a requirement, with respect to installation or use of a facility component located within the restricted area, as defined in part 20 of this chapter; or the issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter that changes an inspection or a surveillance requirement; provided that:
>
> (i) The amendment or exemption involves no significant hazards consideration;
>
> (ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and
>
> (iii) There is no significant increase in individual or cumulative occupational radiation exposure.

2. Contention NYS-2 Is Impermissible

In Contention NYS-2, New York challenges Entergy's statements that the proposed changes to the IP2 TS in the LAR "do not involve (i) a significant hazards consideration, (ii) a significant change in the types or significant increase in the amounts of any effluent that may be released offsite, or (iii) a significant increase in individual or cumulative occupational radiation exposure," such that (in Entergy's view) the LAR meets the eligibility criterion for categorical exclusion set forth in 10 C.F.R. § 51.22(c)(9) and, consequently, pursuant to 10 C.F.R. § 51.22(b), no EIS or EA need be prepared in connection with the LAR.[97] New York challenges

[96] 10 C.F.R. § 51.22(a).

[97] LAR, Attachment 1, at 19.

these statements, asserting that the categorical exclusion under 10 C.F.R. § 51.22(c)(9) "does not apply, because the LAR involves a significant hazards consideration."[98]

Specifically, New York argues that contrary to Entergy's conclusions, the LAR poses a significant hazard consideration under 10 C.F.R. § 50.92(c) in that the LAR involves a significant increase in the consequence of an accident previously evaluated and involves a significant reduction in a margin of safety.[99] However, as explained above, this assertion does not present an admissible issue because the licensee's analysis was not submitted as a basis for granting the amendment, but was instead submitted for consideration by the Staff in reaching a proposed NSHC determination under 10 C.F.R. § 50.92(c) – and the Staff has, in fact, reached a proposed NSHC determination.[100] Apart from discretionary review by the Commission, the Staff's NSHC determination is final and may not be contested by any party.[101] Accordingly, New York's contention impermissibly challenges the Applicant's proposed NSHC determination, which was submitted for the Staff's consideration under § 50.92(c), contrary to 10 C.F.R. § 50.58(b)(6).

Further, New York argues that the LAR is insufficient because "[NEPA] and applicable NRC regulations require at least some level of environmental review before the NRC acts on matters potentially affecting the environment."[102] Essentially, New York is arguing that the potential for a categorical exclusion as raised by Entergy is insufficient because a categorical

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[98] *See* Petition at 20-22. In Contention NYS-2, New York appears to only challenge Entergy's determination that a categorical exclusion applies under 10 C.F.R. § 51.22(c)(9)(i). New York does not challenge Entergy's determinations that the categorical exclusion applies under 10 C.F.R. § 51.22(c)(9)(ii) and (iii) because the LAR does not involve a "significant change in the types or significant increase in the amounts of any effluent that may be released offsite," or a "significant increase in individual or cumulative occupational radiation exposure."

[99] Petition at 21-22.

[100] 80 Fed. Reg. at 13,905-06.

[101] *Shearon Harris*, CLI-01-07, 53 NRC at 118-19.

[102] Petition at 20.

exclusion is not a "level of environmental review." This argument contradicts the Commission's previous determination in a categorical exclusions rulemaking, in which the Commission stated:

> [A] categorical exclusion does not indicate the absence of an environmental review, but rather, that the agency has established a sufficient administrative record to show that the subject actions do not, either individually or cumulatively, have a significant effect on the human environment. Agencies establish sufficient administrative records to support categorical exclusions through the use of professional staff opinions, past NEPA records which show that the agency made a FONSI each time it considered the action, and the establishment of similar categorical exclusions by other agencies.[103]

Additionally, the Council on Environmental Quality's regulations enacting NEPA explicitly recognize that a categorical exclusion is a generic finding that a category of actions do not individually or cumulatively have a significant effect on the human environment.[104] Therefore, New York is incorrect in arguing that a categorical exclusion is somehow not an environmental review under NEPA and that neither Entergy nor the NRC would be in compliance with NEPA if they were to use a categorical exclusion with respect to the instant LAR. Ultimately, the Commission's regulations provide for the potential for such an environmental review for license amendments and New York cannot challenge these regulations in this individual licensing proceeding without a waiver of these regulations.[105]

Moreover, the categorical exclusion in § 51.22(c)(9), specifically applies when "[t]he amendment or exemption involves no significant hazards consideration."[106] As explained above, the Staff has issued a proposed determination that this LAR involves no significant

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[103] 75 Fed. Reg. at 20,251.

[104] *See* 40 C.F.R. § 1508.4. *See also Brodsky v. NRC*, 704 F.3d 113, 119-20 (2nd Cir. 2013) ("Implementing regulations promulgated by the Council on Environmental Quality ("CEQ") permit agencies categorically to exclude certain classes of actions from the EIS requirement on the ground that such actions do not individually or cumulatively have a significant effect on the environment."); *See* 40 C.F.R. §§ 1507.3(b)(2), 1508.4; *see also* 10 C.F.R. § 51.22(c) (establishing categorical exclusions for various NRC actions).

[105] 10 C.F.R. § 2.335.

[106] 10 C.F.R. § 51.22(c)(9)(i).

hazards consideration.[107] Thus, to the extent New York asserts that the categorical exclusion in § 51.22(c)(9) is not applicable despite the Staff's NSHC determination, New York again impermissibly challenges the regulation without a waiver. Accordingly, New York's arguments are beyond the scope of this proceeding and do not support admission of Contention NYS-2.[108]

Finally, New York attempts to incorporate portions of its bases and supporting evidence for Contention NYS-1 into Contention NYS-2.[109] However, New York provides no explanation as to how these bases or evidence support the admission of Contention NYS-2. The Commission has previously noted that simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention.[110] Further, the Board is not expected to sift through attached material and documents in search of factual support for a petition.[111] Moreover, the Commission "discourage[s] incorporating pleadings or arguments by reference [and] expect[s] briefs . . . to be 'comprehensive, concise, and self-contained.'"[112] Accordingly, New York's arguments should be rejected.[113]

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[107] 80 Fed. Reg. at 13,905-06.

[108] 10 C.F.R. § 2.309(f)(1)(iii).

[109] Petition at 22-23.

[110] *See Fansteel,* CLI-03-13, 58 NRC at 204-05.

[111] *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012).

[112] *Pilgrim,* CLI-12-3, 75 NRC at 139 n.41 (quoting Vogtle, CLI-11-8, 74 NRC at 219).

[113] 10 C.F.R. § 2.309(f)(1)(v).

CONCLUSION

For the reasons discussed above, the NRC Staff respectfully submits that New York has standing to intervene but has not proffered an admissible contention, as required by 10 C.F.R. § 2.309(f)(1)(i)-(vi). Accordingly, New York's Petition should be denied.

Respectfully submitted,

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Dated at Rockville, Maryland
this 12th day of June, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO STATE OF NEW YORK PETITION TO INTERVENE AND REQUEST FOR HEARING," dated June 12, 2015, have been served upon the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 12th day of June, 2015.

Signed (electronically) by

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Date of Signature: June 12, 2015