

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Richard A. Meserve, Chairman  
Greta Joy Dicus  
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Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
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)

POWER AUTHORITY OF THE )  
STATE OF NEW YORK and )  
ENERGY NUCLEAR FITZPATRICK LLC, )  
ENERGY NUCLEAR INDIAN POINT 3 LLC, )  
and ENERGY NUCLEAR )  
OPERATIONS, INC. )

Docket Nos. 50-333-LT  
and 50-286-LT  
(consolidated)

(James A. FitzPatrick Nuclear Power Plant )  
and Indian Point Nuclear Generating )  
Unit No. 3) )  
\_\_\_\_\_)

CLI-00-22

MEMORANDUM AND ORDER

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## I. INTRODUCTION

This proceeding involves applications which together seek the Commission's authorization to transfer the operating licenses of both the Indian Point Nuclear Generating Unit No. 3 ("Indian Point 3") and the James A. FitzPatrick Nuclear Power Plant ("FitzPatrick"). The Indian Point plant is located in Westchester County, New York, beside the Hudson River. Its property lies partially within the Town of Cortlandt and entirely within the Hendrick Hudson School District. The FitzPatrick plant is located in the town of Scriba in Oswego County, New York.

The Power Authority of the State of New York ("PASNY") seeks to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point 3 plant to Entergy Nuclear Indian Point 3, LLC ("Entergy Indian Point") and Entergy Nuclear Operations, Inc. ("Entergy Nuclear Operations"), respectively. Similarly, PASNY would transfer its ownership interest in, and operating/maintenance responsibility for, the FitzPatrick plant to Entergy Nuclear FitzPatrick, LLC ("Entergy FitzPatrick") and Entergy Nuclear Operations, respectively.

The applications were submitted to the Commission on May 11 and 12, 2000, pursuant to Section 184 of the Atomic Energy Act of 1954 ("AEA")<sup>1</sup> and section 50.80 of the

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<sup>1</sup> 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing). On November 9, 2000, the NRC staff issued orders approving the two applications for license transfer. Pursuant to 10 C.F.R. § 2.1327, the petitioners in this proceeding could have asked the Commission by November 17, 2000, to stay the effect of the staff's two orders, but petitioners filed no stay motion. Consequently, PASNY and the Entergy companies were free to close the sale of the two nuclear plants, which they did on November 21, 2000. Neither the staff's approvals, nor the closing of the sale affects the instant adjudicatory proceeding. The purpose of this proceeding is to resolve whether, for the reasons raised by the petitioners, the Commission should disapprove the transfers and require the applicants to return the plant ownership to the status quo ante or modify the license notwithstanding the staff's orders and the applicants' actual consummation of the sale. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 82-83 (2000).

Commission's regulations.<sup>2</sup> On June 28, 2000, the Commission published notices of the FitzPatrick and Indian Point 3 applications in the Federal Register. See 65 Fed. Reg. 39,953 and 39,954, respectively.

The Commission received five petitions to intervene (or participate) and requests for hearing from individuals or entities wishing to address or oppose one or both of the license transfer applications. The petitioners are Citizens Awareness Network ("CAN"); the Town of Cortlandt together with the Hendrick Hudson School District (collectively "Cortlandt"); Westchester County ("Westchester") (petitioning to participate as a governmental entity); Local 1-2 of the Utility Workers of America ("the Union"); and the Nuclear Generation Employees Association, together with William Carano, Thomas Pulcher and Richard Wiese, Jr. (collectively "the Association").<sup>3</sup> The applicants filed an Answer to each of these hearing requests. All petitioners except Westchester submitted replies to the applicants' answers. The Union subsequently withdrew its petition. The NRC staff is not participating as a party in the adjudicatory portion of this proceeding. See generally 10 C.F.R. § 2.1316(b), (c). We consider the pleadings under Subpart M of our procedural rules. 10 C.F.R. §§ 2.1301 - 2.1331.

For the reasons set forth below, we grant the requests for hearing of CAN, Cortlandt and the Association. We also grant Westchester's request to participate in a hearing as an interested governmental entity. Finally, we admit certain issues involving whether the Entergy companies have demonstrated their financial ability to operate and maintain the plants safely

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<sup>2</sup> 10 C.F.R. § 50.80. This regulation reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

<sup>3</sup> In addition, the County of Putnam sought and was granted an extension of time until July 31, 2000, by which to file its petition to intervene and request for hearing. However, Putnam filed no petition or request.

and whether they have provided a reasonable assurance of adequate decommissioning funding.

## II. THE LICENSE TRANSFER APPLICATIONS

As noted above, PASNY, Entergy FitzPatrick and Entergy Nuclear Operations have filed applications seeking to transfer the ownership of the FitzPatrick plant to Entergy FitzPatrick and the operating and maintenance responsibilities for the plant to Entergy Nuclear Operations. The regulatory responsibility for decommissioning the plant would also transfer to Entergy FitzPatrick. Pursuant to the Decommissioning Agreements and subject to the monetary limits of those Agreements, PASNY would retain the decommissioning funds and would have a contractual obligation to provide funds to Entergy FitzPatrick (up to a specified limit) to decommission the FitzPatrick plant.<sup>4</sup>

Similarly, PASNY, Entergy Indian Point and Entergy Nuclear Operations have filed applications seeking to transfer the ownership of the Indian Point plant to Entergy Indian Point and the operating and maintenance responsibilities for the plant to Entergy Nuclear Operations. The regulatory responsibility for decommissioning the plant would also transfer to Entergy Indian Point. Pursuant to the Decommissioning Agreements and subject to the monetary limits of those Agreements, PASNY would retain the Decommissioning Funds and would have a contractual obligation to provide funds to Entergy Indian Point (up to a specified limit) to decommission the Indian Point 3 plant.

Under both applications, however, PASNY would have the option of terminating this contractual obligation upon the occurrence of certain events specified in the Decommissioning Agreements. Upon such termination, PASNY would have no further contractual responsibility to its successor owner (Entergy FitzPatrick or Entergy Indian Point, as applicable) and no

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<sup>4</sup> Commitments limiting PASNY's role to holding and disbursing the decommissioning funds are contained in a letter dated Sept. 21, 2000.

further involvement with the decommissioning process for that plant. At that point, PASNY would be required to transfer the decommissioning funds to its successor owner, subject to certain conditions.

If PASNY does not terminate its contractual responsibility before the decommissioning of the applicable plant begins, then PASNY's contractual responsibility would be carried out pursuant to the Decommissioning Agreements. Under those Agreements, PASNY and Entergy Nuclear, Inc. ("ENI") must enter into an agreement whereby ENI would decommission the plants in accordance with the Decommissioning Agreements. Entergy FitzPatrick and Entergy Indian Point, through their authorized agent, Entergy Nuclear Operations, would at all times retain ultimate control over the timing and control of the decommissioning activities of ENI and its contractors.

The new owners and the new operator of the Indian Point 3 and FitzPatrick nuclear plants are not "electric utilities" under our rules, and thus must demonstrate financial qualifications to own and/or operate the plant. See 10 C.F.R. § 50.33(f). These Entergy companies have submitted five-year cost and revenue projections in accordance with our rules, see id., but much of their material was submitted as confidential financial information and has been withheld from public disclosure.

Upon the closing of the purchase and sales agreements, all employees within PASNY's Nuclear Generation Department, and certain other employees supporting the Nuclear Generation Department, would become employees of Entergy Nuclear Operations. The application proposes no physical or operational changes to the FitzPatrick or Indian Point facilities, but does request certain administrative changes to the licenses that are necessary to reflect the proposed transfers. See 65 Fed. Reg. at 39,953-54.

Before reaching petitioners' standing and the admissibility of their issues, we must first address certain pending procedural motions.

### III. PRELIMINARY PROCEDURAL ISSUES

#### A. CAN'S MOTION TO CONSOLIDATE THE COMMISSION'S CONSIDERATION OF THE APPLICATIONS

CAN moves for a joint hearing on all applications. CAN argues that there are overarching concerns that affect the transfer of both facilities -- concerns stemming from the Entergy companies' joint negotiation of both sales and their intertwining of the two plants' finances, day-to-day operations and reactor decommissioning. See CAN's Petition, dated July 31, 2000, at 7. Conversely, Cortlandt objects to such a consolidation. Cortlandt states that the issuance of separate orders for each facility would be in the public interest because it "would facilitate review thereof and action thereupon."<sup>5</sup> However, Cortlandt has offered us no rationale to justify this conclusion. Given that CAN and the Association present a number of arguments applicable to both plants, we believe that the parties' and the Commission's resources are better spent by addressing these arguments only once. We therefore grant CAN's motion to consolidate the FitzPatrick and Indian Point 3 license transfer proceedings.

#### B. THE ASSOCIATION'S AND CAN'S MOTIONS FOR STAY

The Association seeks a stay of this NRC proceeding pending a decision by the New York courts regarding the rights, obligations and liabilities of its members, the Entergy companies, and PASNY. See Association's Petition to Intervene, dated July 17, 2000, at 19, 21. The Association brought that state court action on July 27, 2000.<sup>6</sup> In support, the

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<sup>5</sup> See Cortlandt's Petition for Extension of Time, dated July 7, 2000, at 4 n.1. This petition, despite its name, includes both a petition to intervene and request for hearing.

<sup>6</sup> See Verified Petition, Nuclear Generation Employees Ass'n v. New York Power Auth. (Sup. Ct., Westchester Co., NY), Index No. 11129/00 (filed July 27, 2000) (appended to Association's Reply Brief as Exh. 1). See also Association's Reply Brief, dated Aug. 3, 2000, at 3. We note in passing that, on July 26, 2000, the Town of Cortlandt filed a separate action in New York State court, also challenging the transfer. See Verified Petition, Town of Cortlandt v. Power Auth. of the State of N.Y. (Sup. Ct., Westchester Co., NY), Index No. 11084-00 (filed

(continued...)

Association asserts that the state court action could render void or voidable the sales transaction involving the two plants, that the outcome of the state court action could assist in clarifying the Commission record, and that consummation of the sales transaction could render irreversible many aspects of the Association members' relationship with the applicants. See Association's Reply Brief, dated Aug. 3, 2000, at 26.

Similarly, CAN seeks a stay of the adjudication until the Internal Revenue Service ("IRS"), the Federal Energy Regulatory Commission ("FERC") and the New York State Department of Environmental Conservation ("DEC") have completed their own proceedings involving the transfer of the two plants.<sup>7</sup> CAN asserts that these agencies' rulings could affect

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<sup>6</sup>(...continued)

July 26, 2000) (appended to Cortlandt's Supplemental Statement, dated July 31, 2000) (hereafter "Cortlandt Verified Petition"), petition denied (Sept. 15, 2000), appeal noticed (Sept. 22, 2000) (court denial and appeal notice both appended to Cortlandt's Submission of Supplemental Information, dated Sept. 28, 2000). See also Affirmation of Peter Henner, dated July 31, 2000, at ¶ 29 (appended to Cortlandt's Supplemental Statement, dated July 31, 2000). (We cite to the paragraph rather than the page number of Mr. Henner's Affirmation because neither version of this document is paginated and because the contents of the first version appear on different pages from the same content of the second version.)

<sup>7</sup> On Sept. 29, 2000, FERC authorized Entergy Indian Point's and Entergy FitzPatrick's purchase of the Indian Point 3 and FitzPatrick nuclear plants, respectively, from PASNY. See Entergy Nuclear Indian Point 3, LLC and Entergy Nuclear FitzPatrick, LLC, Docket No. EC00-100-000, "Order Authorizing Disposition of Jurisdictional Facilities," 92 FERC ¶ 61,281 (Sept. 29, 2000).

Separately, it is not at all clear whether there is any request or proceeding pending before the IRS. Such a request appears to be the assumption on which one of the Association's issues rests (see Association's Petition at 18, referring to the potential effects of "[a] contrary ruling by the IRS"), and also is expressly one of the assumptions on which CAN bases its instant stay request. However, the record contains no indication that the applicants have ever sought such an IRS ruling. Conversely, the applicants' responses to the Association's (and CAN's) arguments never deny seeking an IRS ruling.

the Entergy companies' ability to own, operate and decommission the two plants,<sup>8</sup> and that DEC or IRS rulings adverse to Entergy could render the sales agreement void or voidable.<sup>9</sup>

As we indicated in a prior case, the pendency of parallel proceedings before other forums is not adequate grounds to stay a license transfer adjudication. See Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999). We therefore deny the motions for a stay. However, we instruct the parties to inform the Commission promptly of any court or administrative decision that might in any way relate to, or render moot, all or part of the instant proceeding. Similarly, if at any point the parties to this proceeding reach a settlement of this dispute, or if the transfer applicants decide to withdraw or postpone their application, we expect immediate notification to the Commission.

**C. APPLICANTS' REQUEST TO DENY CORTLANDT'S HEARING MOTION ON PROCEDURAL GROUNDS**

Applicants assert that Cortlandt's Motion for Hearing should be denied because Cortlandt failed to serve the applicants in a manner that ensured delivery on the due date of filing. See Answer to Cortlandt's Petition, dated Aug. 14, 2000, at 3-4. We consider such a sanction too severe for the offense. Cortlandt has acknowledged its error, apologized, and explained that it was based on a "communications error" with the Commission's Office of the Secretary. See Cortlandt's Reply Brief, dated Aug. 21, 2000, at 8. Also, applicants do not appear to have suffered any prejudice as a result of Cortlandt's error. We therefore deny their motion.

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<sup>8</sup> See CAN's Petition at 1-7. See also id. at 14 (rapid consolidation of nuclear industry justifies a stay pending changes in NRC regulations and enforcement practices); CAN's Reply Brief, dated Aug. 17, 2000, at 5-6.

<sup>9</sup> CAN's Reply Brief at 6.

**D. CAN'S MOTION FOR A FORMAL SUBPART G HEARING**

In both a separate motion and throughout its presentation on standing and issues, CAN requests a formal hearing under Subpart G of our procedural regulations. See CAN's Petition at 9-11, 22, 23, 29, 36, 42, 47, 51, 55, 56, 64, 66; CAN's Reply Brief at 4-5, 9-10, 12. CAN's motion for a Subpart G proceeding is expressly prohibited under 10 C.F.R. § 2.1322(d). See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station, CLI-00-20, 52 NRC at \_\_\_, slip op. at 3 (Oct. 6, 2000)).

In an effort to avoid this prohibition, CAN asserts that this proceeding falls within the bounds of 10 C.F.R. § 2.1329, providing for waiver of rules under "special circumstances" which demonstrate that the "application of a rule or regulation would not serve the purposes for which it was adopted." As "special circumstances," CAN points to the fact that "the matters in this license transfer are not strictly 'financial in nature' as contemplated in the promulgation of Subpart M." See CAN's Petition at 9.

CAN's interpretation of the appropriate scope of Subpart M procedures is, in our view, overly restrictive. Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial,<sup>10</sup> and indeed this expectation has been fulfilled. However, we also predicted that petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) -- a prediction that has also been fulfilled.<sup>11</sup> For that reason, when promulgating Subpart M, we expressly declined to adopt the

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<sup>10</sup> See Nine Mile Point, CLI-99-30, 50 NRC at 345.

<sup>11</sup> See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_, slip op. at 11-14 (petitioners raised issues involving technical qualifications); Northern States Power Co. (Monticello Nuclear Generating Plant), CLI-00-14, 52 NRC 37 (2000) (petitioners raised issues regarding the proposed licensees' technical qualifications), reconsid'n denied, CLI-00-19, 52 NRC 135 (2000); Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), CLI-99-23, 50 NRC 21

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nuclear industry trade organization's suggestion that we limit the scope of Subpart M proceedings to financial matters.<sup>12</sup> We deny CAN's motion for essentially the same reason. The nature of petitioners' financial and technical allegations do not call for an alteration in the usual Subpart M process.

As an alternative request, CAN moves for a consolidated hearing by the Commission, FERC and DEC. See CAN's Petition at 11; CAN's Reply Brief at 7-8. We believe holding a consolidated hearing would be impractical in the particular circumstances of this proceeding, given that each agency would be operating under a different set of procedural rules and governing statutes. Moreover, as indicated in footnote 7, supra, FERC has already concluded its parallel proceeding involving the FitzPatrick and Indian Point 3 plants.

Finally, as a second alternative request, CAN asks that the Commission initiate a Subpart M hearing, but consider the possibility of converting it to a Subpart G hearing at a later date. See CAN's Reply Brief at 9. In our view, CAN is asking nothing more than the Commission's regulations already provide. See 10 C.F.R. § 2.1322(d) ("The Commission, on its own motion, or in response to a request from a Presiding Officer ..., may use additional procedures, such as direct and cross-examination, or may convene a formal hearing under subpart G of this part on specific and substantial disputes of fact ... that cannot be resolved with sufficient accuracy except in a formal hearing"). We deny CAN's second alternative request as unnecessary.

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<sup>11</sup>(...continued)  
(1999) (petitioner raised labor issues between union and management relating to plant safety); Duquesne Light Co. (Beaver Valley Power Station, Units 1 and 2), CLI-99-25, 50 NRC 224 (1999) (same).

<sup>12</sup> See Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,724 (Dec. 3, 1998).

**E. PETITIONERS' REQUEST FOR ACCESS TO UNREDACTED VERSIONS OF FINANCIAL INFORMATION**

Cortlandt asserts that its lack of access to certain confidential financial information (e.g., the five-year estimates of Indian Point 3's annual operating costs, the credit agreement, and the financial statements for Entergy International Ltd., Entergy Global Investments, LLC and Entergy Indian Point) precludes it from fully presenting its arguments. See Cortlandt's Petition at 8; Cortlandt's Supplemental Filing, dated July 31, 2000, at 3; Cortlandt's Reply Brief at 4-7. See generally Affirmation of Peter Henner at ¶ 10 ("materials made available in the public record are insufficient for an assessment of [Entergy Indian Point]'s ability [to] operate under the issued license and to restore the [Indian Point 3] site to greenfield status"); Letter from George E. Sansoucy to Paul V. Nolan, Esq., dated July 28, 2000, at 1 ("Sansoucy Letter"), appended to Cortlandt's Supplemental Filing. More specifically, Cortlandt's expert notes that

[I]t is not possible to render an opinion as to whether the income stream to Entergy will be sufficient to make the required payments. A particular problem is that the fuel payment stream cited in the application is for the combined fuel assets of [Indian Point] 3 and James A. FitzPatrick Nuclear Generating Station and does not allocate the portion of payments assigned to each site [citing Purchase and Sale Agreement, p. 14].

[I]t is not possible to estimate the ability of Entergy to fund required payments to the Decommissioning Fund.

See Sansoucy Letter at 2, 3. CAN similarly complains about lack of access to decommissioning documents. See, e.g., CAN's Petition at 3, 11, 15; CAN's Reply Brief at 18.

We find below that Cortlandt and CAN have made sufficient showings of standing and have raised admissible issues. We also recognize that the lack of access to the applicants' full financial information could affect their ability to present their substantive case at the hearing. E.g., pages 19, 22, 23, infra. Cortlandt and CAN (along with the Association and Westchester, if they wish) should discuss access to proprietary information with the applicants and thereafter file with the Presiding Officer a mutually-agreeable protective order. If the parties cannot agree

on a protective order, CAN and Cortlandt may move for issuance of such an order.<sup>13</sup> Moreover, we note that portions of the hearing (which we herein grant) may have to be closed to the public when issues involving proprietary information are being addressed.

#### IV. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," i.e., it must demonstrate "standing." See AEA, § 189a, 42 U.S.C. § 2239(a). The Commission's rules for license transfer proceedings also require that a petition to intervene raise at least one admissible issue. See 10 C.F.R. § 2.1306. For the reasons set forth below, we conclude that CAN, the Association and Cortlandt have demonstrated standing, and that Westchester is entitled to governmental participant status in this proceeding. We also conclude that CAN, the Association and Cortlandt have each raised at least one admissible issue. We therefore set the case for hearing.

##### A. STANDING

To demonstrate standing in a Subpart M license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
  - (a) alleging a concrete and particularized injury (actual or threatened) that
  - (b) is fairly traceable to, and may be affected by, the challenged action (e.g., the grant of an application to approve a license transfer), and
  - (c) is likely to be redressed by a favorable decision, and
  - (d) lies arguably within the "zone of interests" protected by the governing statute(s).

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<sup>13</sup> See GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 211 (2000); North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1) & Northeast Nuclear Energy Co. (Millstone Station, Unit 3), CLI-99-27, 50 NRC 257, 268 (1999); North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 225 (1999); North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), unpublished Protective Order of Presiding Officer, 1999 WL 202690 (March 24, 1999). Cf. 10 C.F.R. § 2.740(c)(6).

(2) specify the facts pertaining to that interest.

See 10 C.F.R. §§ 2.1306, 2.1308; Nine Mile Point, CLI-99-30, 50 NRC at 340-41 and n.5 (and cited authority). Moreover, an organization which seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action, must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 4; Oyster Creek, CLI-00-6, 51 NRC at 202 (and cited authority).

**1. CAN**

CAN seeks permission to represent the interests of two of its members -- Linda Downing, who lives 5½ miles from the FitzPatrick plant, and Marilyn Elie, who lives the same distance from the Indian Point 3 plant. See Declaration of Linda Downing, dated July 31, 2000; Declaration of Marilyn Elie, dated July 31, 2000. On Ms. Downing's and Ms. Elie's behalf, CAN alleges potential health-and-safety impacts on them if the Commission approves the two license transfers, seeks specific relief to prevent such injuries (disapproval of the transfers or imposition of conditions), and asserts that the safety-related issues fall within the zone of interests protected by the AEA and the National Environmental Policy Act ("NEPA"). See CAN's Petition at 14, 22, 28-29, 25-26, 34, 36, 40-41, 46-47, 50-51, 55-56, 63-64, 65-66; CAN's Reply Brief at 10-11. We recently granted standing in the Vermont Yankee, Oyster Creek and Monticello license transfer proceedings to petitioners who (like CAN) raised similar assertions and who (again like CAN) were authorized to represent members living or active quite close to the site.<sup>14</sup> Based on these similarities, we conclude that CAN has satisfied our standing requirements and is granted standing with respect to both the FitzPatrick and Indian Point 3 license transfers.

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<sup>14</sup> See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 4-5; Oyster Creek, CLI-00-6, 51 NRC at 202-03; Monticello, CLI-00-14, 52 NRC at 47.

## 2. The Association

The Association is a group of about 400 technical and management employees (e.g., reactor operators, reactor engineers) in the nuclear generation component of PASNY.<sup>15</sup> The Association is concerned that the proposed transfer will directly and materially affect (and, in fact, is already affecting) its members' morale and economic interests (salaries, benefits, pensions), as well as their working conditions, professional roles and safety culture -- factors the Association believes will affect performance, attrition and operational safety at the two plants. The Association also argues that its members' health and safety may suffer as a direct result of the license transfer if an insufficient amount of revenue were to preclude the Entergy companies from adequately funding both occupational radiation protection and safe decommissioning activities. See Association's Petition at 17; Association's Reply Brief at 7-8, 25-26. The Association supports its assertions with notarized affirmations of the three individual petitioners, and it requests both intervenor status and a hearing. As relief, it seeks an order declining to approve the license transfer.

The Association's submission satisfies our standing requirements. Given that we have found that people (like CAN's members here) living or active within a few miles of a nuclear plant have shown standing in license transfer cases, it follows that employees who work inside a plant should ordinarily be accorded standing as well, as long as the alleged injury is fairly traceable to the license transfer. Here the Association has made a sufficient linkage to establish standing. The Association's concerns, if substantiated at a hearing, would be redressed by a favorable decision, i.e., a decision declining to approve the transfer.

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<sup>15</sup> Messrs. Carano and Pulcher (both cosignatories on the Association's Petition to Intervene and Request for Hearing) are managers at the Indian Point 3 plant; Mr. Wiese (also a cosignatory) is a manager at the FitzPatrick plant. See Association's Petition at 2-6.

### **3. Local Governmental Entities**

Cortlandt and the Hendrick Hudson School District collectively seek standing in the Indian Point 3 license transfer proceeding on the grounds that the Indian Point 3 plant is located within the boundaries of both governmental entities and that the plant's safe operation and decommissioning is of great concern to the safety and long-term economic well-being of the Town and School District communities. We find that, for these reasons, Cortlandt has demonstrated standing with respect to the Indian Point 3 license transfer application. See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_, slip op. at 5. Moreover, Cortlandt is the locus of the Indian Point 3 plant and therefore is in a position analogous to that of an individual living or working within a few miles of a plant whose license may be transferred. See discussion of CAN's standing, at page 14, supra.

Westchester, the County where the Indian Point 3 plant is located, seeks participant (but not intervenor) status in this proceeding, citing 10 C.F.R. § 2.715(c). See Westchester's Petition, dated July 31, 2000, at 2-3. As we indicated in Nine Mile Point, CLI-99-30, 50 NRC at 344, "the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc." We therefore grant Westchester's request for participant status regarding the Indian Point 3 license transfer.

### **B. ADMISSIBILITY OF ISSUES**

To demonstrate that issues are admissible under Subpart M, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and

- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1308; Nine Mile Point, CLI-99-30, 50 NRC at 342 (and cited authority).

These standards do not allow mere “notice pleading;” the Commission will not accept “the filing of a vague, unparticularized” issue, unsupported by alleged fact or expert opinion and documentary support. See Seabrook, CLI-99-6, 49 NRC at 219 (citation and internal quotation marks omitted). General assertions or conclusions will not suffice. This is not to say, however, that our threshold admissibility requirements should be turned into a “fortress to deny intervention.” Cf. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

#### **1. General Concerns**

We initially touch on two general concerns raised by the Association and CAN. The first is a claimed decline in the educational opportunities and talent necessary for an effective nuclear workforce in the United States. See Association’s Petition at 19-20. The second is an alleged over-concentration in the ownership of nuclear power plants. See CAN’s Petition at 12-18. These may well be significant questions warranting Commission inquiry. Indeed, as we recently pointed out in Vermont Yankee, the NRC staff, at Commission direction, already is examining the industry consolidation question. See CLI-00-20, 52 NRC at \_\_, slip op. at 17. But an individual license transfer adjudication is not an appropriate forum for a legislative-like inquiry into issues affecting the entire nuclear industry. See id. We therefore decline to admit for hearing petitioners’ general issues on a declining nuclear workforce and on overly concentrated ownership.<sup>16</sup>

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<sup>16</sup> Entergy’s acquisition of the Indian Point and FitzPatrick plants, if the proposed deals  
(continued...)

## 2. Financial Qualifications Issues

Cortlandt and CAN question whether Entergy FitzPatrick and Entergy Indian Point will have the necessary level of financial qualifications to run the FitzPatrick and Indian Point 3 plants safely. See Cortlandt's Petition at 5-6; CAN's Petition at 54-55. We admit Cortlandt's issue as discussed below insofar as it argues that Entergy Indian Point's potential joint and several liability for Entergy FitzPatrick's fuel and plant purchase expenses could draw into question the "reasonable assurance" that Entergy Indian Point has "the funds necessary" to operate the Indian Point plant safely. See 10 C.F.R. § 50.33(f)(2). In addition, we give Cortlandt and CAN an opportunity to formulate a challenge to Entergy's cost-and-revenue projections for both plants, after a protective order is entered making Entergy's confidential financial data available. See generally Seabrook, CLI-99-6, 49 NRC at 219-21. We turn now, briefly, to petitioners' specific claims.

### a. Joint and Several Liability

Cortlandt asserts that several of the agreements underlying the transfer impose liability on Entergy Indian Point for certain financial obligations of Entergy FitzPatrick. See Cortlandt's Petition at 6-8 and Affirmation of Peter Henner at ¶ 14, both of which refer to a \$586 million Facilities Payment Note (Exh. A to Indian Point Application) and a \$171 million Fuel Payment Note (Exh. B to Indian Point 3 Application). Cortlandt is worried that these joint and several

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<sup>16</sup>(...continued)

are consummated, would give the "Entergy family" control over approximately 7.9 nuclear plants. If Entergy then merges with the FPL Group and purchases the Indian Point 2 facility, as has been proposed, the Entergy conglomerate will then control 12.75 nuclear power plants. To place this in perspective, Commonwealth Edison historically (and currently) has held an ownership interest in 12.5 plants. See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_, slip op. at 20 n.20. There are over 100 nuclear power reactor units in the United States. Petitioners have not explained why adding two reactors to Entergy's current fleet, in and of itself, poses a unique health and safety risk warranting an adjudicatory hearing.

liability obligations would place the Indian Point 3 plant in financial jeopardy in the event of an accident at either Indian Point 3 or FitzPatrick.

Such financial jeopardy could, according to Cortlandt, leave the Indian Point plant in an unsafe condition which would place at risk both the environment and the public health. See Cortlandt's Petition at 7; Cortlandt's Supplemental Filing at 3; Affirmation of Peter Henner at ¶¶ 13, 60. In support, Cortlandt points to the fact that Entergy Indian Point has agreed to sell its entire output of electricity to PASNY for 3.6 cents per kilowatt-hour through 2004 -- a revenue level Cortlandt considers sufficient to cover Unit 3's operating costs, but insufficient to simultaneously satisfy any obligations arising from activities at the FitzPatrick plant. See Affirmation of Peter Henner at ¶ 15. According to Cortlandt, the problem is exacerbated by the Entergy companies' ostensible failure to allocate between the Indian Point 3 and FitzPatrick plants the payment for those plant's combined fuel assets.<sup>17</sup>

The applicants respond only briefly to this general line of argument, stating merely that Cortlandt's assertions of joint and several liability are vague and baseless. See Answer to Cortlandt's Petition at 13-14. We disagree with the applicants.<sup>18</sup> Cortlandt points specifically to two financial obligations (the Facilities Payment Note and the Fuel Payment Note) as sources of joint and several liability and asserts that PASNY's 3.6 cent per kilowatt hour payments would be insufficient to satisfy the transferees' obligations at both FitzPatrick and Indian Point 3.

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<sup>17</sup> See Affirmation of Peter Henner at ¶ 17. See also Sansoucy Letter at 2 (“[I]t is not possible to render an opinion as to whether the income stream to Entergy will be sufficient to make the required payments. A particular problem is that the fuel payment stream cited in the application is for the combined fuel assets of [Indian Point] 3 and James A. FitzPatrick Nuclear Generating Station and does not allocate the portion of payments assigned to each site [citing Purchase and Sale Agreement, p. 14].”)

<sup>18</sup> We do, however, agree with the applicants on one point. We see no factual basis (e.g., affidavits or other documents) in the record for Cortlandt's assertion regarding the inadequacy of Entergy's proposed \$50 million letter of credit. See Cortlandt's Petition at 7. This aspect of the financial qualifications issue is therefore not admitted for hearing.

Moreover, Cortlandt's expert (Mr. Sansoucy) concludes that the estimated net operating income from Indian Point 3 for the next seven years would, under certain assumptions, be insufficient to cover the facility and fuel payments during that time. See Sansoucy Letter at 2. These allegations, backed by an expert's affidavit, create a genuine dispute warranting a hearing.<sup>19</sup>

b. Limited Liability Corporation

As a second line of argument regarding financial qualifications, Cortlandt asserts that Entergy Indian Point, as a limited liability company, may not have the necessary resources to protect the environment and meet its legal, contractual and regulatory obligations to its employees, PASNY (pursuant to the Indian Point 3 and FitzPatrick sales contracts), and those who may be injured or suffer property damage in a nuclear accident. See Affirmation of Peter Henner at ¶ 25(e). Cortlandt anticipates that Entergy Indian Point could lack the necessary resources to respond to these obligations if it were to face an accident, a shortfall in operating revenue due to fluctuations in the market, or changes in the energy market or in the cost of producing nuclear power. See Affirmation of Peter Henner at ¶ 54. Cortlandt asserts that the newly-formed Entergy Indian Point should be subject to the stricter financial requirements of 10 C.F.R. § 50.33(f)(3) and (4). See Affirmation of Peter Henner at ¶ 53.

Cortlandt acknowledges that we have issued reactor operating licenses to limited liability corporations in the past and that we have recently approved a transfer of such a license to an

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<sup>19</sup> See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996) (citations and internal quotation marks omitted):

Although section 2.714 imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. Nor does section 2.714 require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in formal affidavit or evidentiary form, sufficient to withstand a summary disposition motion. On the other hand, a petitioner must present sufficient information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate.

LLC whose only asset was the generating facility. See Affidavit of Peter Henner at ¶ 55, citing Oyster Creek, CLI-00-6, 51 NRC at 208. However, Cortlandt considers Oyster Creek factually distinguishable inasmuch as the transferor in that proceeding was an investor-owned utility while the transferor in the instant proceeding is a public entity. See Affirmation of Peter Henner at ¶ 59. Cortlandt also considers Oyster Creek to have been wrongly decided and argues that it creates a “fortress to deny intervention.” See Affirmation of Peter Henner at ¶ 62.

We decline to admit this issue. The applicants have already provided the financial data called for by the requirements of 10 C.F.R. § 50.33(f)(3) and (4). Moreover, Cortlandt has offered us no convincing reason to reconsider our legal ruling in Oyster Creek,<sup>20</sup> and we find equally unconvincing its effort to distinguish that case factually. The issue at bar is the financial qualifications of the transferee. Cortlandt has not explained why the public status of the transferor is relevant to this issue.

c. Baseline Funding

CAN contends that we should decline to approve the license transfers until Entergy FitzPatrick and Entergy Indian Point, together with their parent corporations, establish “baseline funding” that is clearly defined and substantially increased over the current level. See CAN’s Petition at 54. This general line of argument is quite similar (and, in some cases, identical) to an issue raised by CAN in Vermont Yankee. As we noted in that decision, CAN “nowhere defines the term [“baseline funding”]; nor is it a term with which we are familiar.” See CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 16. However, from the context of CAN’s references to baseline funding, it appears in the instant proceeding that CAN is referring to the \$90 million line of credit that the Entergy companies are offering as supplemental funding, if necessary. For the reasons set forth below, we find that CAN has failed to provide an adequate basis for

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<sup>20</sup> We recently reaffirmed our Oyster Creek holding. See Monticello, CLI-00-14, 52 NRC at 57.

most of this issue, but may submit a revised issue regarding one facet of the “baseline funding” question within twenty days of issuance of a protective order that provides CAN access to the applicants’ proprietary information.

CAN initially argues that the applicants have failed to explain whether the \$50 million letter of credit from Entergy Global Investments, Inc., is to support all of Entergy’s current nuclear holdings and future acquisitions, and whether those funds are immediately available to Entergy FitzPatrick and Entergy Indian Point or whether instead they are available only upon repayment of a \$50 million letter of credit from Entergy Corp. See CAN’s Petition at 54-55. In response, the applicants explain that the Entergy Corp.’s \$50 million line of credit is part of the \$90 million supplemental funding that various Entergy companies are making available to meet contingencies for both Entergy FitzPatrick and Entergy Indian Point. The funds, according to the applicants, are not available to the entire fleet of Entergy reactors. See Answer to CAN’s Petition at 26 n.20. In our view, the applicants’ explanation fills the informational gap about which CAN complains, leaving no “genuine dispute” on this point. See 10 C.F.R. § 2.1306(b)(2)(iv). We therefore do not admit this portion of CAN’s “baseline funding” issue.<sup>21</sup>

CAN next argues that (a) neither FitzPatrick nor Indian Point 3 has ever met, on a sustained basis, the revenue generation standards required under the Purchase and Sale Agreement; (b) maintenance outage costs could easily exceed the \$90 million in supplemental funding available to the two plants; and therefore (c) the applicants must provide additional assurance as to the health and safety of both the workers and the public. See CAN’s Petition at 55. Applicants respond that CAN has provided no affidavits, supporting documents or other evidence to support this claim. See Answer to CAN’s Petition at 26. However, CAN explains

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<sup>21</sup> Entergy Global Investments, Inc., has offered two \$20 million lines of credit to Entergy FitzPatrick and Entergy Indian Point, respectively. However, contrary to CAN’s representations, it has not issued a \$50 million dollar letter of credit.

that the applicants' exclusion of certain financial information from the two applications precludes CAN from comparing the anticipated operating costs with the anticipated revenues and thereby assessing the transferees' ability to plan for maintenance outages or to build up sufficient funds for unexpected outages. See CAN's Reply Brief at 18.

Regarding part (b) of this argument, the "sufficiency" vel non of the \$90 million supplemental funding does not constitute grounds for a hearing. In Vermont Yankee, we recently declined to admit essentially the same issue (also raised by CAN) on the ground that NRC rules do not mandate supplemental funding. "The parent company guarantee is supplemental information and not material to the financial qualifications requirements of 10 C.F.R. § 50.33(f)(2)."<sup>22</sup> CAN has given us no reason to reach a different conclusion in the instant proceeding.

Regarding the remainder of CAN's argument, however, we reach a somewhat different conclusion. CAN's claim of revenue shortfalls essentially challenges the Entergy companies' cost and revenue projections -- precisely the kind of challenge we have indicated would be acceptable if based on sufficient facts, expert opinion or documentary support. See Oyster Creek, CLI-00-6, 51 NRC at 207, 208, citing Seabrook, CLI-99-6, 49 NRC at 219-21. In fact, we have already ruled that Cortlandt's somewhat different financial qualifications issue meets our threshold requirements for a hearing. It is true that CAN's version of the issue appears only in its Petition, without back-up support. However, we believe that CAN's explanation regarding the unavailability of relevant data entitles it to gain access to the data through a protective order

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<sup>22</sup> See CLI-00-20, 52 NRC at \_\_\_, slip op. at 21-22, citing Oyster Creek, CLI-00-6, 51 NRC at 205. See also Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_, slip op. at 25:

[A]lthough AmerGen's \$200 million reserve fund provides significant assurance of sufficient operating and decommissioning funds in the event of a problem, the fund is not, strictly speaking, required by our rules. It therefore lies outside the bounds of our license transfer hearing process -- which focuses on whether AmerGen Vermont meets the required financial and technical qualifications.

(see page 12, supra) before being held to our usual specificity requirements.<sup>23</sup> The same is true of Cortlandt insofar as it also chooses to challenge Entergy's cost-and-revenue projections. We therefore authorize CAN and Cortlandt to submit a properly formulated and supported financial qualifications issue within 20 days of the entry of a protective order.

We caution CAN, and Cortlandt as well, that "absolute certainty" in financial forecasts is impossible, and that we do not require it. See Seabrook, CLI-99-6, 49 NRC at 221-22. Challenges to Entergy's financial qualifications "ultimately will prevail only if [they] can demonstrate relevant uncertainties significantly greater than those that usually cloud business outlooks." Id. at 222.

Finally, CAN asserts that Entergy's supplemental \$90 million will prove inadequate to cover Entergy's various potential liabilities, including its Price-Anderson Act responsibility. We have already explained why the \$90 million in supplemental funds is not part of this license transfer case. And, in our recent Vermont Yankee decision, we rejected an identical Price-Anderson claim by CAN:

[N]othing about Price-Anderson coverage changes as a result of this license transfer. The same coverage will exist after license transfer as exists today. Moreover, contrary to what CAN suggests, Price-Anderson indemnification agreements continue in effect even after plants have ceased permanent operation and are engaged in decommissioning. See 10 C.F.R. § 140.92 (NRC Indemnification Agreement, Article VII); 10 C.F.R. § 50.54(w). Thus, CAN's Price-Anderson argument is ill-conceived....<sup>24</sup>

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<sup>23</sup> Subpart M calls for "specificity" in pleadings. See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000). However, in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.

<sup>24</sup> CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 22. In that same decision, we further commented on the analogous Price-Anderson argument of another petitioner (Vermont) that:

... our regulations only require it to show that it has sufficient cash equivalents  
(continued...)

In sum, we will consider a revised issue submitted by CAN regarding the applicants' cost and revenue projections, but we reject CAN's claims regarding the \$90 million supplemental fund and the Price-Anderson Act.

**3. Decommissioning Issues**

a. Consistency of Decommissioning Funding Arrangement with 10 C.F.R. § 50.75

As explained at pages 5-6, supra, the applicants have structured an unusual arrangement whereby the transferor (PASNY) keeps the decommissioning fund after transferring the FitzPatrick and Indian Point 3 plants to the Entergy companies. Ordinarily, a transferee would receive the decommissioning fund along with the nuclear plant with which it was associated.

The Association raises the question whether the applicant's arrangement is consistent with the Commission's own decommissioning requirements of 10 C.F.R. § 50.75(e) which, according to the Association, requires the transferee (here, the Entergy companies) to hold the decommissioning funds. See Association's Petition at 18; Affidavit of Stephen Prussman. The Association disputes applicants' claim that the license transfer request meets the requirements of 10 C.F.R. § 50.75(e)(1)(vi), i.e., that the applicant provide financial assurance "equivalent" to that offered by the decommissioning devices (e.g., a surety or insurance arrangement) specified in the earlier portions of section 50.75(e)(1). In support, the Association asserts that

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<sup>24</sup>(...continued)

(such as the parent company guarantee) to cover the retroactive \$10 million premium required by our regulations at 10 C.F.R. § 140.21(e)-(f). See Oyster Creek, CLI-00-6, 51 NRC at 206.... Vermont's argument that the applicant must meet financial requirements in addition to those imposed by our regulations constitutes, in effect, a demand for additional rules, but it does not provide an adequate basis for a hearing. Id. Moreover, ..., prior to issuance of the amended license to AmerGen Vermont, it must obtain all regulatorily-required property damage insurance.

CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 25-26.

outstanding questions of tax liability limit the availability of the decommissioning funds and also that the applicants impose various contractual limitations upon the availability of the funds (i.e., limits based upon plants owned, limits on the Authority's liability, and provisions to pay less than the full decommissioning funding). See Prussman Affidavit at 2. The Association also asserts that the arrangement contravenes 10 C.F.R. § 50.75(e)(1)(v), which specifies that the terms of the contract must be with the licensee's customers and include provisions that the electricity buyers will pay for decommissioning. See Prussman Affidavit at 2.

At bottom, the issue here is whether the applicants' financial assurance arrangement is lawful under 10 C.F.R. § 50.75 and the "equivalent" of those otherwise prescribed in the regulations (10 C.F.R. § 50.75(e)(1)(i)-(v)). The issue raises genuine disputes of law and fact and we admit it for hearing.<sup>25</sup> We now move to the remaining decommissioning issues. None of these is admissible.

b. Commitment and Ability to Decommission Indian Point 3 to Greenfield Condition

Cortlandt's first substantive issue regarding decommissioning funding is whether the Entergy companies are both committed and financially able to decommission the Indian Point 3 facility to "greenfield" condition<sup>26</sup> and thereby give Cortlandt the benefits of the greenfield

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<sup>25</sup> CAN raises related issues: whether NRC approval of the transfers will deprive the Commission of authority to require PASNY to conduct remediation under decommissioning, and whether, under those circumstances, PASNY would no longer have access to the decommissioning trust fund for the remediation it would need to complete. See CAN's Reply Brief at 14. These issues relate to the admitted issue involving 10 C.F.R. § 50.75, supra, and CAN may address them at the hearing in that context.

CAN and the Association should be aware, however, that the decommissioning trust agreement has been modified somewhat by the NRC staff's November 9, 2000 orders. See both Staff Orders at 6 ¶ 9.

<sup>26</sup> See Cortlandt's Petition at 8; Cortlandt's Supplemental Filing at 2; Affirmation of Peter Henner at ¶ 9, 26(a), 31-32, 35-36, 52, 61; Sansoucy Letter at 4. Cortlandt is particularly concerned about whether the transferees have the financial ability to remove permanently the

(continued...)

decommissioning of not only Unit 3 but also Units 1 and 2 (whose decommissioning awaits the decommissioning of Unit 3).<sup>27</sup>

Concerning the Entergy companies' commitment, Cortlandt maintains that the transfer documents do not commit Entergy Indian Point to greenfield decommissioning, even though the planning for greenfield decommissioning must begin soon if it is to be achieved.<sup>28</sup> Cortlandt does not trust Entergy Indian Point, as a for-profit entity, to spend more than the minimum amount possible to decommission the facility, even if this means decommissioning it to less than greenfield conditions.<sup>29</sup>

Concerning the Entergy companies' ability to fund decommissioning, Cortlandt questions the adequacy of the decommissioning fund in light of Entergy Indian Point's joint and several liability for Entergy FitzPatrick's obligations.<sup>30</sup> It also challenges the applicants' reliance on the decommissioning cost estimate established in the NRC's regulations, arguing that the actual costs may be higher than the regulations envision.<sup>31</sup> Cortlandt objects that the applicants have not made enough information available for Cortlandt to determine the sufficiency of the

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<sup>26</sup>(...continued)

spent fuel rods from the site upon decommissioning, without using dry cask storage. See Affirmation of Peter Henner at ¶ 12; Sansoucy Letter at 3; Cortlandt Verified Petition at 16. PASNY estimates that the fund for decommissioning both the FitzPatrick and Indian Point 3 plants will contain \$1.9 billion at the time of license expiration. See Cortlandt Verified Petition at 11.

<sup>27</sup> See Affirmation of Peter Henner at ¶ 7. Although it is less than clear, Cortlandt appears to argue that the full decommissioning of Indian Point Unit 1 was postponed to coincide with the decommissioning of Units 2 and 3. See Affirmation of Peter Henner at ¶¶ 43-46; Cortlandt's Reply Brief at 14. Units 1 and 2 are not owned by PASNY and are not the subject of this proceeding.

<sup>28</sup> See Affirmation of Peter Henner at ¶ 35.

<sup>29</sup> See Affirmation of Peter Henner at ¶¶ 36, 41; Cortlandt Verified Petition at 11.

<sup>30</sup> See Cortlandt's Reply Brief at 11.

<sup>31</sup> See Cortlandt's Reply Brief at 11-12.

decommissioning fund.<sup>32</sup> Cortlandt explains that “greenfielding” is particularly important to it because the plant property is a prime area for either residential/commercial development or recreational use.<sup>33</sup>

The principal difficulty Cortlandt faces with this issue is that our regulations do not require Entergy Indian Point to decommission the plant to greenfield condition. Although Cortlandt may have grounds for an action in a State Court against PASNY for breach of a contractual commitment to return the facility land to greenfield condition,<sup>34</sup> Cortlandt has provided no basis for us to question Entergy Indian Point’s ability or willingness to comply with the NRC’s decommissioning requirements.

Cortlandt’s argument has other flaws as well. Its challenge to the applicants’ use of the very decommissioning cost estimate methodology sanctioned by our rules amounts to an impermissible collateral attack on 10 C.F.R. § 50.75.<sup>35</sup> Cortlandt has not attempted to justify a waiver here of our rule prohibiting such attacks. See 10 C.F.R. § 2.1329. Notably, the fund’s

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<sup>32</sup> See Cortlandt’s Petition at 8; Cortlandt’s Supplemental Filing at 3.

<sup>33</sup> See Affirmation of Peter Henner at ¶ 33; Cortlandt Verified Petition at 10.

<sup>34</sup> See note 6, *supra*. Cortlandt refers to a “social compact” between Cortlandt and PASNY. According to Cortlandt, PASNY agreed in this compact to decommission Indian Point Units 1, 2 and 3 to greenfield condition in return for Cortlandt agreeing to permit the siting of Indian Point 3 at its current location. See Cortlandt’s Reply Brief at 10-11. Similarly, Cortlandt asserts that “[t]he monies in the decommissioning fund were contributed based on [PASNY’s] commitment to the surrounding community, including [Cortlandt], to restore the site to greenfield conditions.” Cortlandt asserts that the applicants cannot legitimately argue that greenfielding is beyond the scope of the transfer proceeding yet, at the same time, transfer the money that was placed in the decommissioning fund on the understanding that it would be used to “greenfield” the site. See Cortlandt’s Reply Brief at 15.

<sup>35</sup> See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 8. CAN also challenges Entergy’s use of our generic decommissioning cost formula. See CAN’s Petition at 18-23; CAN’s Reply Brief at 12-13. For the reasons we gave in Vermont Yankee, 52 NRC at \_\_\_\_, slip op. at 8, we find CAN’s claim inadmissible.

current assets exceed regulatory requirements.<sup>36</sup> Finally, the decommissioning funds are held in a special fund, separate and apart from Entergy Indian Point's other assets, and are therefore unaffected by any joint and several liability that Entergy Indian Point may have for the obligations of Entergy FitzPatrick.

For the reasons set forth above, this issue is not admissible.

c. Extension or Renewal of Indian Point 3 License

Cortlandt's next substantive issue is whether the Entergy companies would seek to extend or renew the Indian Point 3 operating license (which expires in 2015)<sup>37</sup> and thereby delay Cortlandt's enjoyment of the full panoply of health-and-safety benefits associated with the expected decommissioning of all three units.<sup>38</sup> Specifically, Cortlandt refers to its expectations

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<sup>36</sup> As we indicated in Seabrook, CLI-99-6, 49 NRC at 218 n.9, power reactor licensees will occasionally set aside more funds than the NRC requires -- generally to cover activities such as the removal and subsequent disposal of spent fuel or non-radioactive structures and materials beyond the level necessary to reduce residual radioactivity to the levels required under our regulations. Moreover, other governmental agencies, such as the FERC and state public utilities commissions, may also impose funding requirements which licensees may have to satisfy, over and above those of the NRC.

<sup>37</sup> See Affirmation of Peter Henner at ¶ 3. Cortlandt explains that certain other Entergy companies are already in the process of renewing the licenses of other nuclear plants (e.g., Arkansas One), thereby purportedly increasing the likelihood that Entergy Indian Point would likewise seek to renew the Indian Point 3 license. See Affirmation of Peter Henner at 25(b).

Along similar lines, Cortlandt also asks the Commission to consider the impact of the proposed transfers on possible requests for extensions and/or renewals of the licenses for Unit 2 at Indian Point. See Cortlandt's Petition at 8-9; Cortlandt's Supplemental Filing at 2, 4. Cortlandt explains that the operating license for this unit expires in 2013. See Affirmation of Peter Henner at ¶ 3. According to Cortlandt, the instant license transfer application will affect whether and by whom a future application for license renewal is ultimately made. See Affirmation of Peter Henner at ¶ 39.

<sup>38</sup> See Affirmation of Peter Henner at ¶ 6, 7, 11, 44; Cortlandt's Supplemental Filing at 3; Cortlandt's Reply Brief at 12-14. Cortlandt explains that Indian Point Unit 1 has not been an operating facility since 1974 but has yet to be fully decommissioned (see Affirmation of Peter Henner at ¶ 3) and claims that Consolidated Edison Inc. of New York ("ConEd," the owner of Indian Point Units 1 and 2) has committed to decommission its units for unrestricted use at the same time as PASNY decommissions Unit 3 for unrestricted use. See Cortlandt's Petition at

(continued...)

that PASNY would dismantle and move the facility (i.e., Unit 3) offsite and that any onsite storage of spent fuel by PASNY would be of limited duration.<sup>39</sup> Cortlandt claims that any delay in decommissioning Unit 3 (and any consequent postponement of the decommissioning of Units 1 and 2) will adversely affect Cortlandt's health and safety interests<sup>40</sup> by subjecting Cortlandt and its citizens to the possibility of increased radiological exposure as a result of both the continued operation of the plant and the continued (and possibly expanded) onsite storage of spent fuel.<sup>41</sup> By contrast, Cortlandt expects Entergy Indian Point, as a for-profit entity, to run the plant as long as possible, in order to continue generating revenue.<sup>42</sup> For this reason, Cortlandt asserts that, with the time for decommissioning planning so near, the NRC staff's assessment of financial ability must not be truncated, but should instead include an evaluation of the transferees' ability to decommission Indian Point 3 -- both as currently licensed and as that license may be renewed or extended.<sup>43</sup>

These concerns do not fall within the scope of this license transfer proceeding. Entergy Indian Point does not here seek in its application to renew or extend the Indian Point 3 operating license, nor does its pending application assume such a request. Moreover, a request to renew or extend the license would seem just as likely from PASNY as from Entergy Indian Point, assuming the plant remains profitable. Finally, in posing this issue, Cortlandt

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<sup>38</sup>(...continued)  
8-9; Cortlandt's Supplemental Filing at 2, 4.

<sup>39</sup> See Cortlandt's Petition at 5; Cortlandt's Supplemental Filing, at 4; Cortlandt Verified Petition at 16.

<sup>40</sup> See Affirmation of Peter Henner at ¶ 11.

<sup>41</sup> See Affirmation of Peter Henner at ¶¶ 25(b), 34; Cortlandt Verified Petition at 16.

<sup>42</sup> See Affirmation of Peter Henner at ¶¶ 36, 40; Cortlandt Verified Petition at 11.

<sup>43</sup> See Affirmation of Peter Henner at ¶ 6; Cortlandt's Reply Brief at 12-14.

overlooks its right to seek intervenor status in any application for license renewal or license extension that Entergy Indian Point may file. These grounds for rejection apply equally to Cortlandt's concerns regarding delayed decommissioning of the three units, the resulting need both to store additional spent fuel onsite during the plant's extended life and the resulting need to continue the storage of current spent fuel for a longer time than Cortlandt had anticipated.<sup>44</sup>

In a related vein, Cortlandt expresses concern that the Indian Point 3 facility will be used as a temporary repository for spent fuel from other nuclear facilities owned by the Entergy family of companies.<sup>45</sup> This is pure speculation. The transfer application does not seek such authority, and the Indian Point 3 facility could not accept spent fuel from other facilities without transshipment license authority. Should Entergy ever seek such authority, Cortlandt would have the right to seek intervenor status.

d. Management of Indian Point 3 Decommissioning Fund

Cortlandt next questions whether sufficient controls exist regarding the management of the decommissioning fund.<sup>46</sup> It suggests that the decommissioning agreements contain ill-defined and uncertain liabilities for the public, and expresses concern that any such additional liabilities or costs incurred by PASNY will have to be absorbed either by PASNY customers or the New York taxpayers.<sup>47</sup> Also, Cortlandt (through its expert, Mr. Sansoucy) claims that PASNY may be retaining decommissioning funds in excess of the amount required and that the

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<sup>44</sup> See Cortlandt's Petition at 5; Cortlandt's Supplemental Filing at 4; Affirmation of Peter Henner at ¶¶ 11-13, 61; Sansoucy Letter at 3; Cortlandt Verified Petition at 16; Cortlandt's Reply Brief at 12, 14.

<sup>45</sup> See Affirmation of Peter Henner at ¶ 25(c); Cortlandt Verified Petition at 16.

<sup>46</sup> See Cortlandt's Petition at 8.

<sup>47</sup> See Cortlandt's Petition at 9.

application is silent as to the distribution of any excess money remaining after decommissioning.<sup>48</sup>

With the exception of Mr. Sansoucy's assertion concerning excess funds, the issue is overly vague. Cortlandt nowhere identifies the liabilities about which it is concerned. Nor does it explain why it believes they would fall on the public's shoulders. Mr. Sansoucy's claim, while sufficiently specific, lies beyond the scope of this proceeding. The Commission does not have statutory authority to determine the recipient of excess decommissioning funds. For these reasons, we decline to admit this issue.<sup>49</sup>

e. Scope of Commission's Consideration of Indian Point 3 Decommissioning Issues to Include Indian Point 2 Matters

In addition to raising these substantive issues regarding decommissioning funding, Cortlandt requests that the Commission consider the transfer in light of both the fact that Units 2 and 3 share common facilities and the possibility that Entergy Indian Point (or one of its affiliates) may acquire Indian Point Unit 2 -- a possibility which Cortlandt states is specifically contemplated in the Indian Point 3 transfer agreements.<sup>50</sup> We decline to expand the scope of this proceeding in the two ways that Cortlandt requests. Cortlandt has not explained how either the commonality of facilities or Entergy's possible purchase of Unit 2 bears on the acceptability of the Indian Point 3 transfer.

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<sup>48</sup> See Sansoucy Letter at 3.

<sup>49</sup> To the extent that Mr. Sansoucy intended here to argue that such retention of decommissioning funds was a way of making a profit off of the fund, we address that issue at page 33, below.

<sup>50</sup> See Affirmation of Peter Henner at ¶¶ 8, 42, 46; Cortlandt's Reply Brief at 14. In fact, Entergy recently announced that it had contracted to purchase from ConEd both Indian Point Units 1 and 2. See "Entergy to Purchase 2 Nuclear Power Plants in New York State," Wall Street Journal at A-6 (Nov. 10, 2000).

f. Entergy's Intention to Make a Profit on the Decommissioning Fund

CAN objects to Entergy's espoused intent to make a profit on the decommissioning trust funds and to return that profit to its shareholders. To accomplish this, Entergy would, according to CAN, have to cut corners and thereby risk public health and safety. See CAN's Petition at 21. CAN believes that Entergy will try to turn a profit by minimizing the onsite remediation by constructing new power plants on the decommissioning sites and rotating the decommissioning work schedules at simultaneously decommissioning facilities. See CAN's Petition at 21, 22.

In support, CAN refers us to page 23 of Entergy's 1999 Annual Report.<sup>51</sup> We have checked the cited page on Entergy's web page and find no such statement. Although page 24 of the Annual Report does contain a reference to "manag[ing] decommissioning of nuclear plants ... as a source of earnings," the reference is made in the context of Entergy's contracts to decommission plants owned by other entities. We conclude that CAN has provided no basis for this issue, and we decline to admit it.

g. Lack of Provision for Off-Site Remediation

CAN asserts that, despite both plants having an incontestible record of off-site releases of hazardous radioactive and non-radioactive material, neither the Decommissioning Cost Estimates, the Purchase and Sale Agreement nor the License Transfer Applications contain a provision addressing off-site remediation. See CAN's Petition at 20, 23-26. In support, CAN points specifically to section 2.4(b) of the Purchase and Sale Agreement, which provides that Entergy will not assume decommissioning responsibility for the remediation of off-site contamination occurring during PASNY's ownership of the plants. Although CAN acknowledges that it may be unfair to hold Entergy accountable for contamination occurring

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<sup>51</sup> CAN's Petition at 21 and n.22. However, CAN provides us a copy of neither the report nor the cited page. Even after Entergy denied ever expressing such an intent (Answer to CAN's Petition at 13 n.9), CAN in its Reply Brief still failed to support its claim with the necessary documentation.

under PASNY's ownership, it points out that the Purchase and Sales Agreement contains no provision holding PASNY liable for that contamination. CAN is concerned that an NRC approval of the transfer could absolve both Entergy and PASNY of such responsibility. See CAN's Petition at 23-24.

To resolve this problem, CAN proposes that the Commission impose one of the following two conditions on the transfer:

"Through the Environmental Impact Statement requested [elsewhere in CAN's Petition, the NRC staff should] establish an accurate and detailed study of [the off-site] contamination ... which PASNY must remediate before the license can be transferred."

or

PASNY "should not simply be released from all licensee responsibility, but rather issued a 'decommissioning' license until [PASNY] has completed" whatever remediation for which Entergy is not assuming responsibility.

See CAN's Petition at 24. If the Commission imposes either of these conditions, CAN requests that it also address how to fund this partial remediation. CAN is concerned that PASNY's accountability for partial site remediation and cleanup not compromise the quantity of funds available to complete the decommissioning after the license expires. See CAN's Petition at 24.

CAN also provides a third alternative condition:

The Commission disregard "clause 2.4(b) ... insofar as [it affects] decommissioning responsibilities..., and Entergy should be required to conduct a complete ... decommissioning without regard to whether the off-site contamination was caused by [PASNY] or Entergy, but [with] Entergy ... allowed to recover those [actual] costs from [PASNY that] ... exceed the amount in the Decommissioning Trust."

See CAN's Petition at 24-25.

Applicants respond that nothing in the purchase and sales agreement relieves PASNY of any liabilities not assumed by the Entergy applicants, and that PASNY "retains liability for off-site disposal, storage, etc. that occurred prior to closing." See Answer to CAN's Petition at 14. Our review of the agreement gives us no reason to question the applicants' interpretation. We

therefore see no reason to impose the conditions CAN has requested. Moreover, we see no basis for CAN's concern that this retained liability will somehow deplete the FitzPatrick and Indian Point 3 decommissioning trust funds. Those funds are set aside in a trust specifically and exclusively dedicated to the purpose of decommissioning the plant sites; the trust cannot be used for offsite remediation.<sup>52</sup> In short, we see nothing in CAN's offsite remediation argument that raises a material issue of fact or law meriting a hearing.

h. Environmental Impact Statements

CAN requests the Commission to prepare environmental impact statements ("EIS") regarding the adequacy of the decommissioning funding. See CAN's Petition at 26-27. CAN later refines this request to cover only the levels of on- and off-site contamination. See CAN's Reply Brief at 18. CAN points out that, prior to 1980, plants throughout the United States buried radioactive waste both on- and off-site, with poor documentation and few safeguards. CAN would like the Commission to prepare EIS's for the two plants to determine the extent of contamination and to set realistic funding requirements. CAN points to the experimental nature of decommissioning and to the decommissioning cost overruns at every decommissioned plant to date. See CAN's Petition at 26-27. CAN doubts Entergy's claim that, with experience, it can decrease its decommissioning costs by developing special techniques. CAN also doubts that Entergy will have garnered that experience by the time it needs to decommission both Indian

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<sup>52</sup> Decommissioning trusts are reserved for decommissioning as defined in 10 C.F.R. § 50.2. Thus, offsite remediation would not be an accepted expense. However, some licensees use the decommissioning trust to accumulate funds for both "decommissioning" as NRC defines it and decommissioning in the broader sense that includes interim spent fuel management, non-radioactive structure demolition, and site remediation to greenfield status. The Commission accepts this approach as long as the NRC-defined "decommissioning" funds are clearly earmarked. Also, once the funds are in the decommissioning trust, withdrawals are limited by 10 C.F.R. § 50.82, so that non-"decommissioning" funds (again, as defined by the NRC) could only be spent after the NRC-defined "decommissioning" work had been finished or committed.

Point 3 and FitzPatrick starting in 2013 and 2015, respectively.<sup>53</sup> CAN further asserts that the Entergy companies' inability to recoup their decommissioning expenses from ratepayers constitutes yet another obstacle to successful decommissioning. See CAN's Petition at 28. We decline to admit this issue for the same reasons set forth in our recent decision in Vermont Yankee:

CAN's "NEPA" issue amounts to another effort to litigate site-specific decommissioning cost estimates. CAN's position rests on the assumption that our regulations require AmerGen Vermont, in its license transfer application, to provide an estimate of the actual decommissioning and site clean-up costs. As explained in the previous section of this order, our regulations impose no such requirement. Our decommissioning funding regulation (10 C.F.R. § 50.75(c)) generically establishes the amount of decommissioning funds that must be set aside. 47/ CAN cannot challenge the regulation in this proceeding. As noted above, the NRC's decommissioning funding rule reflects a deliberate decision not to require site-specific estimates in setting decommissioning funding levels. CAN has not sought a waiver of that rule in this proceeding. See 10 C.F.R. § 2.1329 ...; Seabrook, CLI-99-6, 49 NRC at 217 n.8. Nor has CAN reconciled its demand for a NEPA review with our rules' "categorical exclusion" of license transfers from NEPA requirements. See 10 C.F.R. § 51.22(c)(21).

47/ CAN's supporting argument that decommissioning technology is still in an experimental stage fails for the same reason, i.e., it is a collateral attack on 10 C.F.R. § 50.75(c) establishing the amount of decommissioning funds that must be set aside. It is worth noting that the NRC rule which CAN attacks, 10 C.F.R. § 50.75(c), is in fact supported by a generic environmental impact statement. See Generic Environmental Impact Statement, NUREG-0586 (August 1988) (issued in conjunction with the promulgation of 10 C.F.R. §§ 50.75 and 50.82). See generally Final Rule, "General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,051 (June 27, 1988).<sup>54</sup>

CAN also seeks an EIS on two grounds unrelated to decommissioning: that the problems at Indian Point 3 which persuaded Entergy to pass up an opportunity to become the plant's operator in 1996 still exist (see CAN's Petition at 48-51), and that the Commission's failure to conduct an antitrust review constitutes a major federal action affecting the quality of

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<sup>53</sup> See CAN's Petition at 27-28. The FitzPatrick license actually expires in 2014.

<sup>54</sup> CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 8-10 (final footnote omitted). See also Monticello, CLI-00-14, 52 NRC at 59.

the environment (see CAN's Petition at 61). CAN later broadens the first of these so as to seek an EIS on the new owners' operation of both plants. See CAN's Reply Brief at 17-18. We reject these two EIS issues on the same grounds as set forth immediately above. In addition, we exclude the first EIS issue (as broadened) on the ground that the scope of this proceeding does not include the new owners' operation of the plants -- but includes only the transfer of their operating licenses. Further, we exclude the antitrust EIS issue on same ground we used to reject CAN's same argument in Vermont Yankee.<sup>55</sup>

#### **4. CAN's Non-Labor Related Technical Qualifications Issues**

CAN raises an array of challenges to the technical qualifications of the workforce that will be employed at FitzPatrick and Indian Point 3 once the Entergy companies take over those plants. CAN's claims, however, are not directly linked to the license transfers at issue here, but rest largely on current operational issues at the two plants and on Entergy's operation of other plants, including non-nuclear plants. As in our recent Vermont Yankee and Oyster Creek decisions, where we rejected claims all but identical to CAN's, we find here that CAN has provided no documents, facts or expert opinion establishing a genuine issue concerning technical qualifications. See also Millstone, CLI-00-18, 52 NRC at 131-32, citing 10 C.F.R. § 2.1306(b)(2)(iii).

##### **a. Age-Related Defects at Both Plants**

CAN asserts that the Entergy companies lack the ability to manage FitzPatrick (a boiling-water reactor or "BWR") and Indian Point 3 (a pressurized-water reactor or "PWR").

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<sup>55</sup> CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 11 (footnote omitted):

The fact that a particular license transfer may have antitrust implications does not remove it from the categorical exclusion. In any event, because the AEA does not require, and arguably does not even allow, the Commission to conduct antitrust evaluations of license transfer applications, our purported "failure" to conduct such an evaluation cannot constitute a Federal action warranting a NEPA review.

CAN claims that FitzPatrick is older and subject to more age-related degradation than Entergy's other BWRs. See CAN's Petition at 29-36. CAN concludes that Entergy is significantly overstating its claim of experience in maintaining and operating BWRs and that Entergy's spotty record in managing PWRs (such as Indian Point 3) suggests the company's ability to manage an increasing number of aging reactors may be stretched past the breaking point. See id. at 29-30. Based on these arguments, CAN asks the Commission to "take into consideration the effect of consolidating a large number of aging, mismanaged and otherwise troubled facilities under a single corporate umbrella, especially given the rigors of operating those facilities in a deregulated electricity market without the flexibility of returning to ratepayers to reimburse unexpected operating and maintenance costs." See id. at 30.

CAN ignores Entergy Nuclear Operations' stated intent to employ the same personnel as are currently working at the two plants. Nor does CAN's Petition challenge these individuals' technical qualifications. Its discussion of Entergy's experience in operating other BWRs and PWRs and the age of other Entergy plants does not bear on the technical qualifications of the transferees and their intended employees at FitzPatrick and Indian Point 3. See Vermont Yankee, CLI-00-20, 52 NRC at \_\_, slip op. at 11-13 (declining to admit a similar issue where CAN failed to challenge the technical qualifications of the plant's intended employees). We therefore decline to admit this issue.

b. Leak-Detection Problems at Both Plants

CAN points to alleged leak detection problems at the two plants and asks the Commission to require Entergy to modify inspections and leak detection equipment and to institute programs to study the rate of crack propagation. CAN further asks the Commission to oversee the development of systems and procedures necessary to provide an objective review of these actions. See CAN's Petition at 32-33. Moreover, CAN asks the Commission to deny the license transfer application on the ground that Entergy, with a tightly-packed maintenance

schedule and a depleted workforce (due to “profitability” cuts), lacks the flexibility necessary to react quickly to surprises at two or more generating plants. See CAN’s Petition at 33. In a similar technical challenge to the two applications, CAN points to certain evidence that the Updated Final Safety Analysis Reports (“UFSAR”) for both plants have not been kept up-to-date, and argues that it would be premature to approve a transfer of licenses for reactors which were in an unanalyzed condition. See CAN’s Petition at 34-36.

We recently addressed a quite similar argument from CAN in Vermont Yankee concerning another company’s ability to discern cracks and leaks. We consider our response there equally dispositive of CAN’s contention in this proceeding:

These arguments address the adequacy of the plant’s ongoing safety-related programs. Operational issues of this kind will remain the same whether or not the license is transferred. The Commission has indicated that a license transfer hearing is not the proper forum in which to conduct a full-scale health-and-safety review of a plant. 14/

14/ “A license transfer proceeding is not a forum for a full review of all aspects of current plant operation.” See Oyster Creek, CLI-00-6, 51 NRC at 213, 214..... CAN may, of course, file a petition for staff enforcement action pursuant to 10 C.F.R. § 2.206 if it is concerned about current safety issues at Vermont Yankee.

See Vermont Yankee, CLI-00-20, 52 NRC at \_\_, slip op. at 13. Moreover, in Vermont Yankee, we rejected a similar request from CAN (that the Commission require special training as a condition for its approval of the transfer) on the ground that CAN “failed to demonstrate that a genuine dispute exists, with requisite specificity, on this basis.” See CLI-00-20, 52 NRC at \_\_, slip op. at 13. See also 10 C.F.R. § 2.1306(b)(2)(iv). This ruling applies equally to CAN’s similar argument here.<sup>56</sup>

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<sup>56</sup> CAN indicated, for the first time in its Reply Brief, that it was raising the cracks-and-leaks and UFSAR arguments not only as technical and administrative problems meriting the Commission’s attention and correction, but also as an indication of the lack of technical qualifications of the existing plants’ staff, on whose technical qualifications Entergy Nuclear

(continued...)

c. Issues of Management “Character”

CAN asserts that Entergy’s license transfer applications rely on the resources and experience of the parent company (Entergy Corp.), its public utility subsidiaries (Entergy Arkansas Inc., Entergy Gulf States Inc., Entergy Louisiana Inc., and System Energy Resources Inc.), and its operations subsidiary (Entergy Operations Inc.) to establish a track record as a nuclear operator. CAN describes the operating records of these affiliates as “mixed at best, irrelevant in some regards, and alarming in many others.” See CAN’s Petition at 37. CAN further argues that, because the majority of Entergy Nuclear Operations’, Entergy FitzPatrick’s and Entergy Indian Point’s corporate officers hold positions in other Entergy companies, these two new companies will inevitably inherit the existing companies’ record and operational style. See CAN’s Petition at 37; CAN’s Reply Brief at 16. According to CAN, this record and style are reflected in the facts that Entergy has among the highest number of NRC violations in the United States and that the company’s improved capacity factors are “shadowed by questionable maintenance practices and inadequate procedures, work performance, and operator training.” See CAN’s Petition at 38. CAN relies not only on Entergy’s record as a nuclear generator; it also points to findings that, in the electrical transmission and delivery business, Entergy has a record of marginalizing safe operations by chronically postponing maintenance and reducing the skilled workforce to levels that compromise worker and public safety. See CAN’s Petition at 38-40, citing findings of the Texas Public Utility Commission (“Texas PUC”) and the Council of the City of New Orleans, both in 1998.<sup>57</sup>

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<sup>56</sup>(...continued)

Operations is relying in the applications. See CAN’s Reply Brief at 16. CAN’s effort to recast its claim is unavailing. As indicated in Vermont Yankee (quoted in the text immediately above), any ongoing operational deficiencies at nuclear plants subject to a license transfer must be addressed regardless of the transfer.

<sup>57</sup> See CAN’s Petition at 39-40 (citing and quoting Public Utility Commission of Texas, (continued...))

Absent strong support for a claim that difficulties at other plants run by a corporate parent will affect the plant(s) at issue before the Commission, we are unwilling to use our hearing process as a forum for a wide-ranging inquiry into the corporate parent's general activities across the country. Here, CAN's various references to problems of other Entergy subsidiaries, including the non-nuclear subsidiaries, tell us little if anything about Entergy Nuclear Operations' technical qualifications to operate FitzPatrick and Indian Point 3 using the same workforce that is already there. See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_, slip op. at 14-15, (concluding that "claims of staffing deficiencies at other nuclear facilities owned by AmerGen" were insufficient to trigger our hearing process). See also Oyster Creek, 51 NRC at 209-10.

Nor do we believe a hearing is merited by CAN's conclusory assertions that the corporate culture of Entergy Nuclear Operations will be tainted by the influence of high-level officials from the parent company and other subsidiaries. CAN does not identify which officials will undercut safety at Indian Point and FitzPatrick or explain how they will do so. CAN's claims are too broad and too vague to be suitable for adjudication. We therefore decline to admit this issue.

d. Cost-Cutting Pressures

CAN questions whether Entergy FitzPatrick and Entergy Indian Point can safely accomplish the goals necessary for the companies to reduce costs to a level sufficiently low for the plants' electric rates to be competitive, i.e., reducing maintenance and outage times and

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<sup>57</sup>(...continued)

Docket No. 18249, Entergy Gulf States, Inc., Service Quality Issues (Feb. 1998); Groesch, Report to New Orleans City Council for the Alliance for Affordable Energy (Aug. 13, 1999); and Groesch, Statement before the New Orleans City Council Utility Committee (Aug. 12, 1999)). The second and third of these three documents are included in Exh. 9 to CAN's Petition.

workforce size.<sup>58</sup> According to CAN, Entergy's applications indicate a goal of 85-percent capacity (or 15-percent downtime). CAN acknowledges that PASNY was able to meet the same refueling schedule at Indian Point 3 that Entergy will need to maintain, but says that PASNY did so only by unnecessarily exposing its workforce to radiation. See CAN's Petition at 41-42. Finally, CAN draws the Commission's attention to ConEd's decision not to replace the steam generators at Indian Point Unit 2, warning that Entergy will experience cost-cutting pressures similar to those which led to ConEd's problems.<sup>59</sup>

CAN has failed to provide adequate support or basis for its general "cost-cutting" issue. It has not provided the necessary nexus between the problems at other plants (some not even in this country) operated by different companies and the difficulties it anticipates from Entergy FitzPatrick, Entergy Indian Point and Entergy Nuclear Operations. See Oyster Creek, CLI-00-6, 51 NRC at 209-10. Nor does it offer any factual support for its claim that the Entergy companies will subordinate safety to production goals or profits. See Oyster Creek, CLI-00-6, 51 NRC at 207 ("Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations") and cited authority. Finally, CAN's speculation about the likelihood and ramifications of staff reductions is insufficient to trigger a hearing on this issue. CAN points to no information suggesting that Entergy plans to reduce its staff below NRC requirements. As we stated in Oyster Creek:

For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. See 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility

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<sup>58</sup> See CAN's Petition at 41-47. CAN points to the problems of a foreign nuclear plant owner, British Energy, as an example of how public safety can be adversely affected by over-reduction of the workforce. See CAN's Petition at 44-46. See also Declaration of David A. Lochbaum, dated July 31, 2000, at 2 (¶ 9(a)), appended as Attachment 3 to CAN's Petition.

<sup>59</sup> See CAN's Petition at 42. ConEd has informed the NRC that it has replaced these steam generators. See Letter from John A. Zwolinski (NRC) to A. Alan Blind (ConEd) (Oct. 11, 2000).

to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then (as noted above) the agency can and will take the necessary enforcement action to ensure the public health and safety. The Oyster Creek application does not on its face suggest any likelihood of a cost-driven lapse in compliance with NRC safety rules.

CLI-00-6, 51 NRC at 209. See also id. at 214 ("so long as personnel decisions do not impose [a] risk [to the public health and safety], our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff").

##### **5. The Association's Labor-Related Technical Qualifications Issues**

The Association raises labor-related issues which, it claims, bear directly on the question whether the transfer will ensure the presence of "sufficient management personnel, and appropriate working conditions, so as to assure continued safe operation of the facilities." See Association's Petition at 9. As noted in the discussion of standing, supra, the Association alleges a precipitous decline in morale among the members of the Association; a high level of confusion regarding future rights and benefits; a significantly increased attrition rate among Association members; a general belief that the transfer will markedly reduce their rights and benefits; and a developing uneasiness with, and unwillingness to trust, or communicate safety-related problems to, senior executive nuclear management or corporate management. See Association's Petition at 17.

The Association's claims arise out of what it says is the "increasingly adversarial nature of the dialogue (or lack thereof) between its members and the proposed transferor and transferees concerning the putative rights and benefits that will be available to petitioners following the proposed transfer." See id. A contest over "putative rights and benefits" amounts, of course, to a labor dispute rooted in economic concerns. Indeed, the Association has brought state-court litigation to adjudicate the labor controversy and, as if to stress the labor relations

nature of its claims, the Association has included its lengthy state-court complaint in the record before us.<sup>60</sup>

As a nuclear safety agency, however, we are loath to step into the middle of a labor dispute. The Association seemingly expects us to consider whether Entergy's commitments regarding salary, benefits and job security are so unjust as to ruin employee morale and cause excessive attrition at FitzPatrick and Indian Point 3. But we have neither the expertise nor the legislative charter of a National Labor Relations Board or labor mediator. We see no natural limits to the labor issues the Association wants us to consider. We thus find the Association's labor grievances unsuitable for a license transfer hearing.

The Association, apparently sensitive to the Commission's reluctance to enmesh itself in management-worker conflicts at nuclear facilities, attempts to argue that its labor dispute with PASNY and Entergy translates into a health and safety problem that the Commission should consider at a hearing. But, while the Association's pleadings frequently allude to alleged health and safety effects of the labor controversy, what the Association has given us, at bottom, consists of specific accusations of bad faith in labor relations and that are tied to vague or conclusory assertions about health and safety. On the latter issue, the only one falling within the NRC's jurisdiction, the Association provides no expert support, no concrete facts, and no claims of specific rule violations.

Further, the specific concerns about pay, benefits and conditions that the Association points to as the source for morale issues are potential (not certain) changes in pay, benefits and conditions that would not occur for between one and three years after completion of the transfer. The Commission is particularly reluctant to engage in prognostication of the impact of

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<sup>60</sup> See Verified Petition, Nuclear Generation Employees Ass'n v. New York Power Auth. (Sup. Ct., Westchester Co., NY), Index No. 11129/00 (filed July 27, 2000) (appended to Association's Reply Brief as Exh. 1). See also Association's Reply Brief, dated Aug. 3, 2000, at 3.

changes in current working conditions that the Association has in its own pleadings and affidavits acknowledged may occur years in the future. Unsupported hypothetical theories or projections, even in the form of an affidavit, will not support invocation of the hearing process. In short, the Association has not provided tangible regulatory issues around which to organize a hearing.

The Association's most specific health and safety claims are charges that the labor controversy will provoke high attrition and poor morale. But neither claim raises a genuine controversy for hearing. As for the purported increase in attrition, the Association merely says that it is so. The Association does not provide factual data, expert witnesses, or even affidavits of employees who have or will quit as a result of the license transfer.<sup>61</sup> As for morale, we do not see how we could adjudicate such an abstract concept at a hearing absent some allegation of specific rule violations or specific safety challenges arising out of lower morale. Notably, the Association has submitted no evidence, such as inspection reports or other indicators, suggesting an increase in safety problems at the two plants.

We add a cautionary note. Today's decision does not hold that economic concerns, whether of a labor, commercial or other nature, are categorically excluded from the NRC hearing process. Such concerns, if closely tied to specific health and safety concerns or to potential violations of NRC rules, can be admitted for hearing. See, e.g., North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 262-63 (1999). Indeed, in our Subpart M rulemaking, which established our current license transfer hearing process, we expressed a willingness to review labor-type issues to a limited extent:

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<sup>61</sup> The Association's failure to provide actual data on departing employees renders virtually meaningless its reference to a "more than doubl[ing]" of the normal attrition rate for its members. See Joint Declaration at 6. By way of extreme example, if the normal attrition rate were one person per year per plant, a doubling of this rate would provide no conceivable basis for health-and-safety concerns.

[I]f a significant loss and replacement of critical plant personnel can be anticipated as the result of a particular license transfer[,], this might well be a reason not to approve the transfer or to condition the transfer on the maintenance of adequate technical qualifications.

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If, in a particular license transfer case, a need is identified for submission of a critical staff retention plan in order to address the applicant's technical qualifications, this matter can readily be addressed in the hearing process and can ultimately result in a condition on license transfer approval.

Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, 66,723 (Dec. 3, 1998).

Claims resting on the loss and replacement of "critical" staff derive directly from our rules, which specify both minimum staffing requirements for trained operators at reactors and the technical qualifications of such employees. See 10 C.F.R. § 50.54(m). See also Oyster Creek, CLI-00-06, 51 NRC at 209 (NRC staffing regulations cover "key positions necessary to operate the plant safely"). Here, the Association asserts no current or future section 50.54(m) violations arising out of the PASNY-Entergy license transfer. (Nor, frankly, would we expect such a challenge from the Association, some of whose members hold the very staff positions covered by section 50.54(m).)

Notwithstanding the narrow exception in the rulemaking language quoted above, the Commission generally does not involve itself in the personnel decisions of licensees. As we indicated in Oyster Creek:

the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff....

CLI-00-6, 51 NRC at 214. See also Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 14 n.16 and accompanying text. We would require personnel claims considerably more concrete than the Association's -- i.e., specific indications of a potential rule violation or of deteriorating

safety conditions linked to the license transfer -- before we would consider admitting plant staffing questions into an NRC license transfer hearing.

We by no means intend to denigrate the concerns of the Association's members, who work at FitzPatrick and Indian Point 3 and have an understandable interest in working conditions at the two plants. The question whether those conditions are fair and lawful is an important one. But our license transfer hearings under Subpart M are designed solely to adjudicate genuine health and safety disputes arising out of license transfers. The grant of hearings merely on the broad assertion that contentious labor controversies will lead to deleterious health and safety consequences would have no stopping point and would risk converting our agency into a labor relations forum, contrary to our statutory mission and at a significant cost in resources and effort.

For these reasons, we decline to admit for hearing the Association's labor-related issues.<sup>62</sup>

## **6. Issues Involving Emergency Evacuation Plans**

Cortlandt asks the Commission to consider the impact of the proposed transfers on the need for changes to the Emergency Evacuation Plans. See Cortlandt's Supplemental Filing at 2. It expresses similar concerns about whether the transferees for Indian Point 3 will discontinue the emergency warning program, emergency preparedness training program, and health impact training program currently run by PASNY.<sup>63</sup>

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<sup>62</sup> Like the Association, CAN raises the issue that much of the plants' existing staff will quit their jobs as a result of the transfer. See CAN's Petition at 44; CAN's Reply Brief at 16. But CAN has provided little detail, and no back-up support, for this claim. For the reasons stated in the text, CAN's claims on this score are inadmissible. See also Oyster Creek, CLI-00-6, 51 NRC at 209-10, 214.

<sup>63</sup> See Affirmation of Peter Henner at ¶ 25(d); Cortlandt Verified Petition at 5, 8, 19 (referring to "emergency planning and health impact training programs;" "emergency preparedness plans, local preparedness resources, and the Four County Notification System;"

(continued...)

The new licensees will have to meet all of the requirements of 10 C.F.R. § 50.47 and Appendix E to 10 C.F.R. Part 50 concerning emergency planning and preparedness. The emergency notification system is required by the regulations and will remain in place. Cortlandt has not alleged, with supporting facts, that Entergy is likely to violate the NRC's emergency planning rules. Under these circumstances, we see no basis for further pursuit of this issue.

**7. Appropriateness of Indian Point 3 Transfer, Given its Location**

Cortlandt asks the Commission to consider the appropriateness of the proposed Indian Point 3 transfer in light of the plant's proximity to metropolitan areas (New York City, White Plains and Peekskill) and to locations for sporting and cultural events. See Cortlandt's Supplemental Filing at 4. Cortlandt explains that the plant is located 24 miles north of New York City in the heavily-populated Westchester County, and that it is two miles from the City of Peekskill (population 20,000), 2 miles from a military reservation (Camp Smith), and eight miles from West Point. See Affirmation of Peter Henner at ¶¶ 2-3. We do not see how Indian Point 3's proximity to these locations is relevant to the question whether to approve the license transfer for that plant. We therefore decline to admit this issue.

**8. Antitrust Issue**

Cortlandt expresses an antitrust concern that, if Entergy merges with Florida Power and Light Company (FPL Group), the combined entity's market share will give it an inordinate amount of control over the nation's nuclear industry. Cortlandt's Reply Brief at 17. As we have

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<sup>63</sup>(...continued)  
and "the payment of the State Emergency Management Office, bus driver training and reception centers, public education programs, including emergency planning and radiological training and medical drills").

explained in prior cases, the Commission no longer conducts antitrust reviews in license transfer proceedings.<sup>64</sup>

CAN also raises the antitrust issue, acknowledging our precedents but disagreeing with them. CAN criticizes the Commission for having declined to conduct further antitrust review in these cases, calls that decision an abdication of the agency's antitrust responsibilities under the AEA, and predicts that such abdication will lead to a rapid consolidation of nuclear power ownership through premature acceptance of this and other Entergy applications and overly-accelerated hearing schedules. CAN's Petition at 13. See also id. at 14-15, 56-64; CAN's Reply Brief at 18-20. For the reasons set forth in both the Wolf Creek decision and the rulemaking, supra, we do not agree with CAN's characterization that we are abdicating our statutory authority. Nor do we believe we are acting precipitously in giving expedited treatment to license transfer applications. We therefore find this issue inadmissible.<sup>65</sup>

### **9. Independent Evaluation of the Plants**

CAN asserts that, given the historical problems in NRC's Region I, the Commission should arrange for an independent analysis of the two plants' conditions. See CAN's Petition at 51-54. We decline to do so for the same reasons we gave in Vermont Yankee when rejecting CAN's similar issue:

An inquiry such as the one CAN advocates would go considerably beyond the scope of our inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. We also note that Region I's overall performance in overseeing Vermont Yankee is far outside the scope of a license transfer proceeding. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the

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<sup>64</sup> See Vermont Yankee, CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 11, 19-20; Oyster Creek, CLI-00-06, 51 NRC at 210; Kansas Gas and Elec. Co., (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999). See also Final Rule, "Antitrust Review Authority: Clarification," 65 Fed. Reg. 44,649 (July 19, 2000).

<sup>65</sup> Regarding CAN's prediction of industry consolidation, see note 16, supra.

imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities.<sup>66</sup>

## V. OTHER PROCEDURAL MATTERS

### A. DESIGNATION OF ISSUES

Our opinion in this case has considered in some detail numerous concerns raised by the various petitioners. Some issues we have found admissible, and some inadmissible. To avoid confusion, and to delineate the boundaries of the admitted issues, we direct the parties to organize their presentations at the hearing around the following two issues:

Whether Entergy Indian Point's liability for certain financial obligations of Entergy FitzPatrick would place the Indian Point 3 plant in financial jeopardy in the event of an accident at either Indian Point 3 or FitzPatrick and would thereby call into question whether Entergy Indian Point has the funds necessary to operate the Indian Point plant safely, within the meaning of 10 C.F.R. §§ 50.33(f)(2), 50.33(f)(3) and 50.80(b)?

Whether the transfer applicants' plan for handling decommissioning funds for the FitzPatrick and Indian Point nuclear plants -- whereby control of the decommissioning funds will remain with PASNY but responsibility for decommissioning the plants will reside with the Entergy companies -- provides reasonable assurance of adequate decommissioning funding, within the meaning of 10 C.F.R. §§ 50.75(b) and 50.75(e)(1)(vi).

The precise contours of these two admitted issues are set forth above at pages 18-20 (issue 2a, raised by Cortlandt regarding the effect of joint and several liability on the Entergy companies' financial qualifications) and 25-26 (issue 3a, raised by the Association and CAN regarding whether the decommissioning funding arrangement is consistent with the requirements of 10 C.F.R. § 50.75), respectively. The parties' filings and arguments must be confined to the contours of these two issues. In addition, as indicated on page 23, we permit

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<sup>66</sup> CLI-00-20, 52 NRC at \_\_\_\_, slip op. at 15. See also Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995); Final Rule, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) ("With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance").

CAN and Cortlandt to submit a revised issue challenging the Entergy companies' cost-and-revenue projections, such issue to be filed within 20 days of the issuance of a protective order giving CAN and Cortlandt access to applicants' proprietary information.

The parties should be prepared to offer pre-filed testimony and exhibits containing specific facts and/or expert opinion in support of their positions on these issues. All parties should keep their pleadings as short, and as focused on the admitted issues, as possible. The Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b)), and will not consider claims rejected in the course of this opinion. Redundant, duplicative, unreliable or irrelevant submissions are not acceptable and will be stricken from the record. See 10 C.F.R. § 2.1320(a)(9). We also direct the intervenors to state explicitly exactly what remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

**B. DESIGNATION OF PRESIDING OFFICER**

The Commission directs the Chief Administrative Judge promptly to appoint a Presiding Officer for this proceeding. Until the appointment of a presiding officer, the parties should file any written submissions with the Office of the Secretary.

**C. NOTICES OF APPEARANCE**

To the extent that they have not already done so, each counsel or representative for each party shall, not later than 11:59 p.m. on December 7, 2000 (i.e., ten days after the issuance date of this order), file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). In each such notice of appearance, the counsel or representative should specify his or her business address, telephone number, facsimile number, and e-mail address. Any counsel or representative who has already entered an appearance but who has not

provided one or more of these pieces of information should do so not later than the date and time specified above.

**D. FILING SCHEDULE**

If the parties agree to a non-oral hearing, they must file their joint motion for a “hearing consisting of written comments” no later than 11:59 p.m. (Eastern Time) on December 12, 2000 (i.e., fifteen days of the date of this order). 10 C.F.R. § 2.1308(d)(2). No later than that same date, the parties should complete any necessary negotiations on a protective order regarding any proprietary data and should submit a joint protective order to the presiding officer. If they are unsuccessful in negotiating such an order, they should inform the Office of the Secretary by that date and indicate any areas in which they were able to agree.<sup>67</sup> We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 11:59 p.m. on December 27, 2000 (thirty days after the issuance date of this order). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits) and all proposed questions directed to written direct testimony must be filed no later than 11:59 p.m. on January 16, 2000 (the first working day following the twentieth day after the submission of written statements of position and written testimony). 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed questions directed to written rebuttal testimony must

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<sup>67</sup> Separately, we have directed CAN and Cortlandt to formulate and submit a properly-supported financial qualifications issue within 20 days of the entry of a protective order. See page 23, supra. CAN’s failure to do so will preclude its participation with regard to the financial qualifications issue. If such an issue is submitted, the Presiding Officer should establish a supplemental briefing schedule to permit answers and replies thereto. Cf. 10 C.F.R. § 2.1307.

be submitted to the Presiding Officer no later than 11:59 p.m. on January 26, 2001 (ten days after the submission of rebuttal testimony).<sup>68</sup>

If the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m on February 2, 2001, at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issues designated above, along with any admissible financial qualifications issue regarding the Entergy companies' cost-and-revenue projections that CAN and/or Cortlandt may choose to submit within 20 days of the entry of a protective order. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

Any party or participant submitting pre-filed direct testimony should make the sponsor of that testimony available for questioning at the hearing. The Presiding Officer will issue an order establishing the amount of time available for the initial and reply presentations of the parties and participant. Given the expedited nature of license transfer proceedings, the Commission anticipates that the hearing will take no longer than one day. The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party. See 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b).

Finally, all written post-hearing statements of position must be filed no later than 11:59 p.m. on February 22, 2001 (twenty days after the oral hearing). See 10 C.F.R. § 2.1322(c). The Commission expects to issue a final memorandum and order on the merits of this proceeding by April 13, 2001 (50 days after the oral hearing).

The Commission is confident that the proceeding can be resolved fairly and efficiently within the prescribed time schedule.

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<sup>68</sup> See 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The seven-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b), extended by three days, because the period includes a Saturday and Sunday.

**E. PARTICIPANTS IN THE HEARING AND THE PROCEEDING; SERVICE LIST**

The parties to this proceeding will be CAN, Cortlandt, the Association, the Power Authority of the State of New York, Entergy Nuclear Operations, Entergy FitzPatrick, and Entergy Indian Point. Westchester will be a governmental participant in the proceeding. The recipients on the service list will be:

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<sup>69</sup> Mr. Egan's office is located in Washington, DC, but his phone number has a Northern Virginia area code. There appears to be an error here. If so, the Commission requests Mr. Egan to correct it.

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We direct the parties immediately to supplement or correct the above information to the extent that it is incomplete or inaccurate, and immediately to notify all recipients of any such changes.

Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC staff has indicated that it will not be a party to this proceeding. Notwithstanding this fact, the staff is still expected both to offer into evidence its SER and to proffer one or more sponsoring witnesses for that document. See 10 C.F.R. § 2.1316(b).

#### **F. SERVICE REQUIREMENTS**

Although the parties and Westchester have a number of options under 10 C.F.R. § 2.1313(c) by which to serve their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 11:59 p.m. of the due date under our Subpart M rules. However, we also require the parties to submit a single signed hard copy of any such filings<sup>70</sup> to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is [secy@nrc.gov](mailto:secy@nrc.gov).

### **VI. CONCLUSION**

For the reasons set forth above:

(1) The license transfer adjudications involving FitzPatrick and Indian Point 3 license transfers are consolidated.

(2) CAN's, Cortlandt's and the Association's petitions to intervene and requests for hearing are granted;

(3) Westchester's petition for governmental participant status is granted;

(4) The Association's and CAN's motions for stay are denied;

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<sup>70</sup> We draw the attention to the difference between this requirement and that of Subpart G, which provides that any service whether by fax or e-mail on the Secretary should be followed with an original and two conforming copies of the service by regular mail in accordance with 10 C.F.R. § 2.708(d).

(5) Cortlandt's motion to expand this adjudication's scope of review is denied;

(6) CAN's motion for a Subpart G hearing is denied;

(7) CAN and Cortlandt may formulate and submit a properly-supported financial qualifications issue within 20 days of the entry of a protective order.

(8) The parties are required to inform the Commission of any court or administrative orders, settlements or business decisions that may in any way relate to, or render moot, part or all of the instant proceeding.

(9) Within fifteen days of the issuance date of this order, the parties shall complete any necessary negotiations on a protective order regarding any proprietary data and shall submit a joint protective order to the Presiding Officer. If they are unsuccessful in negotiating such an order, they shall so inform the Presiding Officer by that date and shall indicate any areas in which they were able to agree.

IT IS SO ORDERED.

For the Commission<sup>71</sup>

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 27th day of November, 2000.

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<sup>71</sup> Commissioner Dicus was not present for the affirmation of this Order. Had she been present, she would have affirmed her prior vote to approve this Order.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
POWER AUTHORITY OF THE STATE OF )  
NEW YORK, ET AL. )  
)  
(James A. FitzPatrick Nuclear Power Plant )  
and Indian Point Nuclear Generating )  
Unit No. 3) )

Docket Nos. 50-333-LT and  
50-286-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-00-22) have been served upon the persons listed below by electronic mail. Each recipient will also receive a paper copy of the Commission Memorandum and Order by U.S. mail.

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Docket Nos. 50-333-LT and 50-286-LT  
COMMISSION MEMORANDUM AND ORDER  
(CLI-00-22)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 27<sup>th</sup> day of November 2000