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USNRC
February 1, 2001

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judge:

Charles Bechhoefer,
Presiding Officer

In the Matter of

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

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

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

ASLBP No. 01-785-02-LT

**NYPA/ENTERGY COMPANIES' RESPONSE TO
CITIZENS AWARENESS NETWORK, INC.'S STATEMENT OF POSITION**

I. INTRODUCTION

In its Memorandum and Order in this proceeding, CLI-00-22, 52 N.R.C. ____ (November 27, 2000), the Commission established the procedures to be followed in connection with the hearing that it directed to be held. Implementing the provisions of 10 C.F.R. § 2.1309, the Commission established a three phase process for the parties to file their submittals with the Presiding Officer. The first step called for filing of initial written statements of position and written direct testimony (with any supporting affidavits); the second step called for submittal of written responses to direct testimony, rebuttal testimony (with any supporting affidavits) and all

proposed questions directed to written direct testimony; and the third step called for filing of proposed questions directed to written rebuttal testimony. CLI-00-22, slip op. at 52. The Presiding Officer's Memorandum and Order (CAN Motion for Schedule Change and Change of Hearing Location), dated December 22, 2000, set the schedule for these filings.

In accordance with the Presiding Officer's December 22, 2000 Memorandum and Order, the Power Authority of the State of New York ("NYPA"), and Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Indian Point 3, LLC ("Entergy Owners") and Entergy Operations, Inc. (collectively "NYPA/Entergy Companies") on January 12, 2001, filed their initial written statement of position and written direct testimony (with supporting affidavits). The remaining intervenor in this proceeding, Citizens Awareness Network, Inc. ("CAN") filed no written direct testimony (and obviously no supporting affidavits, there being no testimony to support). CAN did, however, file a "Statement on Issue #2 Admitted for Hearing by Commission Order CLI-00-22, November 27, 2000" ("CAN Statement").

Since CAN filed no written direct testimony, the NYPA/Entergy Companies cannot file a "written response to direct testimony." Similarly, since CAN has filed no evidentiary material of any sort, there is nothing for the NYPA/Entergy Companies to rebut. However, since CAN has filed what appears to be an initial statement of position, the NYPA/Entergy Companies believe that some response to CAN's filing is both appropriate and fair.

Our response is made difficult by the nature of CAN's filing. Many different arguments are scattered throughout the document, some only tangentially related to Issue #2, which is at

this time the only issue set for hearing.¹ Nevertheless, NYPA/Entergy Companies set forth below their responses to various of the points included in CAN's Statement.

II. RESPONSES TO CAN ARGUMENTS

A. Prepayment Methodology

CAN argues that the decommissioning funding methodology adopted by NYPA/Entergy Companies and approved by the NRC Staff does not "satisfy" the prepayment methodology described in 10 C.F.R. § 50.75(e)(1)(i). CAN Statement at 5. CAN's logic for this claim is that a "strict interpretation" of 10 C.F.R. § 50.75(e)(1)(i) requires that the fund be in the possession of the Entergy Owners and that the fund has not "accumulated to the level required by NRC for decommissioning." CAN's first argument fails because nothing in the language of 10 C.F.R. § 50.75(e)(1)(i) requires that the fund be in the possession of the Entergy Companies. CAN's second argument fails because the fund has "accumulated to the level required by the NRC for decommissioning", as shown in the Applications² at 16 and the SERs³ at 9. CAN seems to ignore the fact that the prepayment option explicitly allows NYPA/Entergy Companies to "take credit for projected earnings on the prepaid decommissioning trust funds using up to a 2 percent annual real rate of return from the time of future funds' collection through the projected decommissioning period." 10 C.F.R. § 50.75(e)(1)(i). In any event, the NRC in determining that

¹ Issue #2 is limited to the impact on the reasonable assurance of adequate decommissioning funding caused by NYPA's continuing to retain the decommissioning funds after the transfer of the plants to the Entergy Owners. CLI-00-22, slip op. at 50.

² Applications for Transfer of Facility Operating license (Encl. 1 to letters dated May 11, 2000 from NYPA to NRC and May 12, 2000 from Entergy to NRC) ("Applications")

³ Safety Evaluations by the Office of Nuclear Reactor Regulation, Transfer of Facility Operating Licenses from the Power Authority of the State of New York to Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC, and Entergy Nuclear Operations, Inc., Docket Nos. 286, 333, November 9, 2000 ("SERs").

the decommissioning funding methodology selected by NYPA/Entergy Companies complied with 10 C.F.R. § 50.75(e)(1)(vi) was only required to determine that the methodology provide “assurance of decommissioning funding equivalent to that provided by” prepayment and the other methodologies described in 10 C.F.R. § 50.75(e)(1)(i) – (v).

CAN also asserts that NYPA/Entergy Companies fail to comply with the prepayment option because NYPA could potentially hold the trust fund for 75 years or more, thus increasing uncertainty because of NYPA’s no longer being an NRC licensee. The period during which the decommissioning funds might remain in the hands of the trustee (the Bank of New York, not NYPA) is irrelevant. The same period of time may exist whether the trust is a “NYPA trust” or an “Entergy Companies” trust. The money still remains in the hands of the trustee, is still dedicated to the decommissioning of the units, and cannot be disbursed if NRC objects. The additional conditions imposed by the NRC on NYPA in connection with the transfer and the additional commitments agreed to by NYPA in connection with the transfer grant the NRC Staff the authority that they believe is necessary and appropriate to assure that the decommissioning funding of the units its adequately assured. See SERs at 12-14.

B. Surety Methodology

CAN next argues that the NYPA/Entergy Companies’ methodology does not satisfy 10 C.F.R. § 50.75(e)(1)(iii) (“surety method, insurance, or other guarantee method”). CAN Statement at 6. As noted above, NYPA/Entergy Companies methodology need only provide assurance “equivalent” to another approved methodology, not compliant with it. CAN is correct that NYPA is not regulated or licensed as a surety company. However, as explained in the Applications, the decommissioning funds here exist in actuals funds set aside and held by a

trustee (the Bank of New York) as compared to the promise embodied in a surety, guarantee or insurance to pay money at some future time. Applications at 16. Even though the promisor may be, in CAN's words, "regulated or licensed as a surety company," the NYPA/Entergy mechanism of a fully funded trust provides at least as much financial assurance. CAN's attempt to distinguish NYPA's status as a governmental entity, CAN Statement at 6 and n. 3, misses the point and misinterprets the NRC regulations. NYPA has not claimed to be "an appropriate State or Federal government entity" as that term is used in 10 C.F.R. § 50.75(e)(1)(iii)(A)(2). That provision deals with the qualifications to be "an acceptable trustee" to receive the surety or insurance. The trustee for the decommissioning funds involved in this proceeding is not NYPA but the Bank of New York. Finally, CAN's attempt to compare NYPA's bond ratings, which allegedly "rest on the Authority's participation in an increasingly volatile and competitive energy market," with the "comparatively stable and conservative strategy, of a licensed surety company" are merely unsupported and uninformed speculation.

C. SECY-98-164

CAN cites to the NRC Staff paper which was issued in conjunction with the final rule on decommissioning financial assurance. SECY-98-164, "Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (July 2, 1998). See CAN Statement at 7-8. Referring to § 3.2.4 of the Regulatory Analysis included in SECY-98-164, CAN claims that nothing in that section contemplates the possibility of a decommissioning trust fund being held by another company or entity that is not a parent or affiliated company. Since that section does not purport to catalog the financial assurances that can be used to comply with 10 C.F.R. § 50.75(e)(1)(vi), CAN's citation is not relevant. By definition, "any other

mechanism or combination of mechanisms” authorized by that provision is not intended to only cover those mechanisms specified in other provisions of the rule. If it were, that provision would be surplusage. While CAN argues that NYPA “cannot be credited with providing the same degree of surety as a parent company,” CAN chooses to ignore the fact that a parent company guarantee does not require that the required money be set aside in a fund. Here, a prepaid fund, held by the trustee (the Bank of New York) has been set aside, whose assets may only be used for decommissioning the plants and from which disbursements may only be made with NRC approval. CAN’s complaint that the NRC is “bending the rules” and “unjustifiably compromis[ing] the guidance of previous Staff evaluations”, CAN Statement at 9, ignores the wording of the rules (i.e., “equivalent assurance”) and fails to recognize that the “previous Staff evaluations” are not the regulatory provision and do not even address the regulation with which the NYPA/Entergy Companies are complying.

D. Environmental Considerations

CAN complains that the conditions that NRC has imposed on NYPA “do not address environmental considerations or clean up consequences potentially required of NYPA.” CAN Statement at 9. CAN also alleges “mishandling and illegal dumping of radioactive materials in local communities, leading to potentially hazardous levels of off-site contamination.” *Id.* at 5. The bases cited for these allegations include a 1994 newspaper article about non-radioactive discharges from Indian Point 3 (Ex. 6 to CAN Request for Hearing), which discharges are obviously outside the scope of NRC’s radiological decommissioning responsibilities; a 1993 local newspaper article about gaseous discharges which CAN does not even allege are beyond NRC-permitted release limits (Ex. 7 to CAN Request for Hearing); and a 1994 article from a

publication entitled Peace News about off-site shipments of sewage sludge, again not even alleged to be inconsistent with NRC regulatory requirements. These articles are not relevant to this proceeding and provide no support to CAN's position on Issue #2.

The short answer to CAN's attempted introduction of these allegations is that they have already been rejected by the Commission in this proceeding. CAN sought to raise off-site remediation issues in its initial petition. CAN Petition at 20, 23-26. The Commission rejected CAN's attempt to raise this issue. CLI-00-22, slip op. at 33-35. Since the Commission has already ruled that "the [decommissioning] trust cannot be used for off-site remediation", *id.* at 35, Can's attempt to reintroduce the off-site remediation issue at this stage is improper.⁴

CAN also argues that the scope of NYPA's remediation responsibilities must be determined in order to make provision for both financial assurance and enforceability. The only example cited by CAN is outside the scope of NRC decommissioning responsibilities. CAN cites to Schedule 5.13 of the Purchase and Sales Agreement, CAN Statement at 10, which (like other schedules in the Agreement) was not part of the documentation submitted to – or reviewed by – the NRC. However, Schedule 5.13 deals with non-radiological remediation issues, i.e. "a spill of turbine oil which occurred in 1989 adjacent to the turbine pad at IP3". Non-radiological remediation issues are outside the scope of decommissioning as defined by NRC regulations and

⁴ "The Commission . . . will not consider claims rejected in the course of this opinion." CLI-00-22, slip op. at 51.

are therefor beyond the scope of this proceeding. See, CLI-00-22, slip op. at 35 n. 52 (citing 10 C.F.R. § 50.2⁵).

Finally, CAN apparently suggests that the NRC issue an environmental impact statement in connection with the license transfer, CAN Statement at 11, 17. Again, this is an issue which the Commission has already rejected. CLI-00-22, slip op. at 35-37.

E. NYPA's Financial Strength

Can seems to be concerned with NYPA's financial strength, citing NYPA's "participation in an increasingly volatile and competitive energy market" as imperiling NYPA's future bond ratings. CAN Statement at 7. CAN provides nothing beyond mere speculation for this concern. CAN also seems to forget that only several pages later, it would laud "NYPA's strong bond ratings." Id. at 14, n. 9. The facts do not support CAN's bond rating concern. In fact, NYPA's bond ratings have recently been increased. In July 2000, Fitch raised NYPA's long-term debt rating from AA- to AA and in November 2000, Moody's Investors Service raised its long-term debt rating for NYPA from Aa3 to Aa2⁶. In any case, NYPA's financial strength is at best a tertiary issue. The money is already set aside in a decommissioning trust fund. The fund is held by the trustee (the Bank of New York), not by NYPA, and money cannot be released from the fund if the NRC objects in writing.

⁵ "Decommission" means to remove a facility or site safely from unrestricted use and reduce residual radioactivity to a level"

⁶ The Bond Buyer, November 27, 2000 at 37 (quoting Moody's as "prais[ing] NYPA for its strong competitive position, well-maintained finances, and focused strategic plan, and not[ing] that since 1995 the agency has reduced its long-term debt by more than 40%").

F. Taxes

CAN makes a number of allegations on tax issues. After asserting without support that the NYPA/Entergy Companies' decommissioning funding arrangement was occasioned in part by "uncertainties and unresolved questions regarding the tax status of the decommissioning fund", CAN Statement at 2, CAN observes that "NYPA has agreed to retain the decommissioning trust fund (pending a favorable IRS ruling on its tax status.)" *Id.* CAN provides no basis for this claim. Neither NYPA, the Entergy Companies, nor anyone else has requested such an IRS ruling in connection with these transfers. Nor is NYPA's agreement to retain the decommissioning trust fund in any way linked to "a favorable IRS ruling on its tax status."

CAN alleges that "Entergy is asking the Commission to undermine its rules" because "a large capital gains tax liability might compromise [the Entergy Owners'] ability to complete the sale of the facilities, [although] this consideration is not within the NRC's jurisdiction." CAN Statement at 13. Whether or not there is "a large capital gains tax liability" (an allegation for which CAN provides no support), CAN's fears are moot since the Entergy Owners have already completed the sale of the facilities.

G. "Dangerous Precedent"

At several points in its Statement, CAN argues against the NRC's approval of the license transfers because they would "set dangerous precedents for future license transfer proceedings." *Id.* at 2, 9, 12, 15, 16. CAN's argument flies in the face of the Commission's regulations. The NYPA/Entergy Companies' decommissioning funding assurance is governed by 10 C.F.R. § 50.75(e)(1)(vi). That section specifically requires that the NRC Staff review "the specific

circumstances of each licensee submittal.” Therefore, unless another licensee comes forward with the same “specific circumstances,” the NRC’s approval of these transfers can have no precedential value. It is certainly pure speculation on CAN’s part that such a situation will occur. In addition, the Commission in this proceeding specifically excluded “inquiry into issues affecting the entire nuclear industry.” CLI-00-22, slip op. at 17. CAN’s allegedly “dangerous precedent” is by definition an issue that affects not “an individual license transfer adjudication”, but rather “the entire nuclear industry”, and is therefore inappropriate here.

H. NRC Authority over the Decommissioning Funds

Throughout CAN’s Statement, CAN argues that the Commission does not have adequate authority over NYPA and the decommissioning funds. For example, CAN claims that the transfers “negate the Commission’s regulatory authority to ensure that NYPA satisfies NRC requirements for protecting the public health and safety”, CAN Statement at 1. CAN alleges that the “NRC has relinquished authority to enforce regulations attendant to radioactive materials,” *id.* at 2. CAN asserts that the transfers leave open the question of “how the NRC maintains authority and enforcement power over an entity that is no longer licensed under the Commission’s rules” and “carve out whole areas of responsibility for radiological remediation over which the Commission would no longer have enforcement authority.” *Id.* at 12.

In contrast to CAN’s unsupported allegations that the issue of NRC authority over the decommissioning funding is unresolved or open to question, the NRC has in fact spelled out in detail the controls and authority that will exist with respect to the decommissioning funds and, to the extent necessary to assure that those funds are properly used, with respect to NYPA. The SERs devote the better part of four, single-spaced pages to the conditions and commitments that

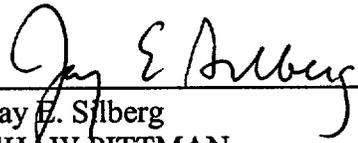
the NRC has deemed necessary and appropriate to reasonably assure the adequacy of decommissioning funding so as to protect the public health and safety. SERs at 11-14. These include an amendment to the decommissioning trust agreement stating that the provisions or purpose of the trust agreement may be enforced by the NRC against NYPA and the trustee with respect to the disbursement of the trust funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements. *Id.* at 11. These also include a waiver by NYPA of any right to deny, contest or challenge the Commission's jurisdiction over NYPA with respect to the two transferred facilities to the extent that there may arise any matter warranting NRC action to ensure compliance with NRC decommissioning requirements regarding the disposition and use of the amounts accumulated in the decommissioning trust funds and retained by NYPA. *Id.* CAN cannot prevail where it has failed to specifically address the very steps which the NRC has adopted to address what it claims are unresolved or unaddressed issues. This is particularly the case where the Commission explicitly reminded the CAN of the modifications to the decommissioning trust agreement that specifically address the very issues that CAN vaguely references. CLI-00-22, slip op. at 26, n. 25.

III. CONCLUSION

For the reasons set forth above, NYPA/Entergy Companies respectfully submit that the arguments set for in CAN's Statement should be rejected.

February 1, 2001

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NYPA/Entergy Companies' Response to Citizens Awareness Network, Inc.'s Statement of Position" were served on the persons listed below by electronic mail, with conforming copies by U.S. mail, first class, postage prepaid, this 1st day of February, 2001.

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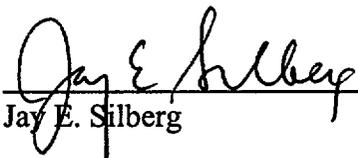
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