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February 1, 2001

Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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

Dear Judge Bechhoefer,

Enclosed for filing is "Citizens Awareness Network, Inc.'s Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2" and "Citizens Awareness Network, Inc.'s Questions Directed to Pre-Filed Written Direct Testimony in Support of 'NYPA/Entergy Companies' Initial Written Statement of Position,' per Commission Memorandum & Order CLI-00-22."

Sincerely,

Timothy L. Judson
Citizens Awareness Network, Inc.

Cc: Office of the Secretary;
attached service list

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SECY-02

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UNITED STATES OF AMERICA
before the
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

'01 FEB 12 P3:09

Before Administrative Judge:
Charles Bechhoefer,
Presiding Officer

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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.**	**Docket Nos. 50-333-LT** **and 50-286-LT** **(consolidated)**
	ASLBP No. 01-785-02-LT
(James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3)	**February 1, 2001**

CITIZENS AWARENESS NETWORK'S RESPONSE TO APPLICANTS' INITIAL WRITTEN STATEMENT OF POSITION AND WRITTEN DIRECT TESTIMONY ON CAN ISSUE #2

On January 12, 2001, the Power Authority of the State of New York ["NYPA"], Entergy Nuclear Indian Point 3, LLC ["ENIP"], Entergy Nuclear FitzPatrick, LLC ["ENF"], and Entergy Nuclear Operations, Inc. ["ENO" or collectively, "the Entergy companies"; with NYPA, "the Applicants"] submitted a Written Statement of Position ["Applicants' Statement"] and Pre-filed Written Testimony of two witnesses (George W. Collins and Joseph T. Henderson) on Issue #2 admitted for hearing by Commission Memorandum & Order CLI-00-22 ["M&O"]. Applicants' Statement explains NYPA and the Entergy companies' belief that the arrangements for decommissioning proposed in their license transfer applications satisfy the Nuclear Regulatory Commission's ["NRC"] financial assurance requirements, do not deprive the Commission of "authority to require NYPA to conduct decommissioning," and do not deprive NYPA of

"access to the decommissioning trust fund for any decommissioning it may be required to undertake." *Applicant's Statement at 3.* Mr. Collins's testimony further explains the Applicants' proposed arrangements for and agreements on decommissioning, supports Applicants' assertion that the fund as constituted satisfies NRC requirements for decommissioning funding, and the tax status of the fund. Mr. Henderson's testimony discusses the tax status of the decommissioning fund.

On January 12, 2001, the Citizens Awareness Network, Inc. ["CAN"], submitted its Statement of Position on Issue #2 ["CAN's Statement"]. CAN's statement explained its position that the applications do not satisfy NRC financial assurance requirements, would deprive the Commission of authority to require NYPA to complete its remediation responsibility, that approval would set a dangerous precedent undermining the Commission's regulations and authority, and that approval would threaten the public health and safety. Although CAN maintains there are material disputes of law and fact with the Applicants' position on this issue, CAN does not seek to reiterate its positions on Issue #2 here. CAN's purpose in this response is to address the arguments and information raised in Applicants' Statement and Mr. Collins's and Mr. Henderson's testimonies.

I. TERMS AND PARAMETERS OF THE ISSUES ADMITTED

Applicants' Statement of Position reveals that their grasp of the issues the Commission admitted, as well as their use of certain terms, is inconsistent and/or unclear. In regard to NYPA's responsibilities, Applicants' Statement confuses the

concepts of decommissioning and remediation. Although Applicants directly cite the Commission's M&O in the introduction of their Statement of Position, nowhere in the Applicants' statement do they address NYPA's responsibilities for *remediation.* From the beginning, Applicants consistently address the issue in terms of NYPA's responsibility to "conduct decommissioning." *Applicants' Statement at 3.* Applicants' Statement addresses NYPA's responsibility to "conduct decommissioning" only insofar as it relates to NYPA's possession and disposition of the Decommissioning Trust. This relationship essentially amounts to no more or less than paying the Entergy companies for their decommissioning expenses. *Applicants' Statement at 3 and paragraph 9; see also Collins's Testimony at Questions 11, 13.*

The NRC regulations define "decommissioning" for the purposes of license requirements, criteria for license termination, and establishing financial assurance criteria:

> *Decommission* means to remove a facility or site safely from service and reduce residual radioactivity to a level that permits--
> (1) Release of the property for unrestricted use and termination of the license; or
> (2) Release of the property under restricted conditions and termination of the license.

10 CFR § 50.2. This definition of decommissioning is typically interpreted as referring to the site defined in the facility operating license under the jurisdiction of the NRC. Any other responsibilities for cleanup to which a licensee would be held accountable – for instance, off-site contamination in excess of permitted levels – do not fall under the rubric of decommissioning, and must be termed remediation.

The fundamental dispute, which the Applicants fail to address, is whether the NRC will have regulatory authority to enforce NYPA's remediation responsibilities once the NRC permits NYPA to transfer its operating license for IP3 and Fitzpatrick to the Entergy companies. CAN's admitted contention on this point is that the Applicants' arrangement attempts to exploit a gray area in the Commission's regulations. Permitting the license transfer at issue could threaten public health and safety by permitting NYPA to avoid cleaning up contamination for which the Entergy companies, per agreement with NYPA, will not be held responsible. The Applicants' PSA describes the fact that NYPA retains certain undisclosed "remediation" responsibilities as a result of liabilities the Entergy companies will not assume, and includes a schedule limiting currently anticipated responsibilities. *See* PSA Schedule 5.13 *(listing responsibilities).*

The PSA and the Applications, however, do not address the regulations and standards to which NYPA will be held accountable. Significantly, they also do not address provisions for funding NYPA's remediation activities. In fact, there is serious question about NYPA access to the decommissioning funds for two reasons: (1) NYPA's remediation responsibilities do not fall under the NRC regulation's rubric concerning decommissioning; and (2) amendments to the Master Decommissioning Trust and the conditions NRC Staff have placed on the license transfer limit NYPA to withdrawing funds for the purpose of compensating the Entergy companies solely for the costs of decommissioning. Because the Applicants do not address either CAN's or the Commission's concerns in this regard – neither in the applications, the PSA, nor in their Statement of Position —

the Applicants fail to demonstrate that NRC approval of the applications would not undermine the Commission's authority with respect to NYPA's responsibilities for cleanup. Thus, The Board must conclude that either the Applicants do not fully comprehend the NRC's regulations and the implications of their actions in relation to the regulations, or that their request to release NYPA from the license constitutes what amounts to an impermissible collateral attack on the Commission's regulations. This collateral attack takes place through the Applicant's attempt to avoid, through NYPA's role under the decommissioning agreement, the NRC's authority to protect the public health and safety from the adverse effects of exposure to radioactive materials created by the operation of the FitzPatrick and Indian Point 3 reactors — a responsibility that will ultimately fall to NYPA after it is no longer an NRC regulated entity

Applicants' arguments and testimony also primarily rely upon the 'fact' that the decommissioning fund meets NRC requirements under 10 CFR §50.75(c). This Commission has already found this alleged fact irrelevant to the issue admitted for hearing. There is no dispute over this question.[1] The Commission's M&O set forth the "precise contours" of the admitted issues and cautioned parties that "filings and arguments must be confined" to those contours. *See M&O at page 50.*

Issue #2, as admitted, has two dimensions. These are, in pertinent part:

[1] The Commission's M&O specifically rejected arguments that the amount of money currently in the decommissioning trust fund for FitzPatrick and Indian Point 3 does not satisfy NRC requirements, since the fund as currently constituted meets inflation- and rate of return-adjusted levels established under NRC regulations. *See M&O at pages 28 and 36.*

> 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))....[25]
>
> . . . .
>
> [25] 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.

M& O at 26 and footnote 25. Thus, CAN's Issue #2 as admitted plainly deals with two legal questions. These are: (1) whether the *arrangements* for the possession and disposition of the decommissioning fund are *permissible* under the Commission's regulations on financial assurance, and (2) whether approval of the applications will deprive the Commission of authority over NYPA with regard to the remediation responsibilities NYPA retains under the terms of the Purchase and Sale Agreement ["PSA"]. The latter issue also implies two more legal questions: (3) will NYPA be able *to access* the decommissioning fund to cover its remediation responsibilities, and, consequently, (4) do the applications as submitted provide adequate financial assurance for NYPA's completion of its remediation responsibilities.

Curiously, Applicants' witnesses offer no evidence that they know or understand the NRC's financial assurance requirements for decommissioning, e.g., 10 CFR § 50.75(e)(1)(i)-(v) and SECY 1998-164. As the Applicants' primary witness on this issue, Mr. Collins, by his qualifications, can only address the issue of whether the decommissioning fund as currently constituted satisfies the requirements of 10 CFR § 50.75(b) and (c). Unfortunately for the Applicants, this

issue is irrelevant to Issue #2 under the Commission's rulings concerning the subject matters of this hearing. Furthermore, Mr. Collins does not testify that he has any expertise related to the legal and licensing matters at issue in this hearing. Insofar as Mr. Collins states that the purpose of his testimony is "to demonstrate that the arrangement between [the Applicants] provides reasonable assurance of adequate decommissioning funding for the FitzPatrick Nuclear Plant and the Indian Point Nuclear Plant," his testimony is unable to support the Applicants' case, and he appears unqualified to make such an evaluation.

II. 10 CFR § 50.75(e)(1)(i)-(v) ISSUES

Applicants Statement of Position attempts to explain how their decommissioning arrangements satisfy the NRC's requirements for demonstrating financial assurance under 10 CFR § 50.75(e)(1)(i)-(v). *See Applicants' Statement at paragraphs 11 to 13.* Applicants' arguments rest on the Decommissioning Trusts' satisfaction of 10 CFR § 50.75(c)[2], certain "contract, trust and license limitations set forth in the Applications[3], and the conditions on the applications proposed by the NRC Staff.[4] The crux of Applicants' argument is that the proposed arrangement is equivalent to both the Prepayment mechanism of § 50.75(e)(1)(i) and the Guarantee/Surety mechanisms described in § 50.75(e)(1)(iii). However, Applicants may only argue that it is equivalent to one or the other. Any suggestion that the single method proposed could qualify as a

[2] In the case of the Prepayment and Guarantee/Surety mechanisms. *Id.*
[3] In the case of the Gurantee/Surety mechanisms. *Id.* at paragraph 14.
[4] In the case of both mechanisms. *Id. at paragraphs 15-20.*

combination of Prepayment and Surety mechanisms would be based on a misinterpretation or incorrect application of § 50.75(e)(1)(vi).[5]

Applicants' Statement should demonstrate that the proposed arrangement is equivalent to Prepayment or a Guarantee/Surety mechanism. Applicants' arguments on this point are not at all persuasive. They do not explain how the mechanism they proposed meets the NRC's criteria for Prepayment and Surety/Guarantees. The NRC's regulations on the issue of decommissioning funding assurance are based on a conservative evaluation of stability, accountability and enforceability of such guarantees provided by well-established contractual and fiduciary mechanisms. To demonstrate that their proposed mechanism meets these standards, the Applicants should have provided an explanation of the way the proposed arrangement provides equivalent degrees of surety to those in the NRC's regulations. In this regard, it is telling that the Applicants do not do so, nor do they refer to the NRC's standards and tests for demonstrating financial assurance under §50.75(e)(1)(iii).

The Applicants' proposed arrangement does not meet the same degree of assurance as NRC regulations require of each of the mechanisms individually. Without addressing these differences directly and providing adequate reasons why the NRC's usual requirements should not be applied in this case, or else

[5] CAN interprets the reference to a "combination of mechanisms" in § 50.75(e)(1)(vi) to require separate arrangements that reinforce each other, if the applicant cannot provide a single satisfactory mechanism. For instance, if an applicant's prepayment did not satisfy financial assurance requirements, they would be required to combine it with a satisfactory insurance, guarantee or surety method. In fact, on the basis of this reasoning, the NRC Staff's evaluation in SECY 1998-164 determined that non-utility licensees who

demonstrating how the arrangement still satisfies the same NRC tests and criteria, Applicants are implicitly arguing that the NRC's regulations are either insufficient or irrelevant in this case. This is an implicit collateral attack on the Commission's existing regulations. As such, it should not be permitted.

The NRC Staff's Safety Evaluation Reports describes uncertainties which undermine the ability of Applicants' proposal to meet NRC requirements. In pertinent part, the NRC staff note that: (1) NYPA "could potentially hold the trust for 75 years even without considering license renewal"; (2) "the NRC would not retain the same type of direct regulatory authority over [NYPA] that the NRC would have, if [NYPA] remained a licensee"; and (3) "although the proposal contains certain similarities to a third party guarantee, [NYPA] is not regulated or licensed as a surety company." *NRC Staff SER for FitzPatrick at 11, NRC Staff SER for Indian Point 3 at 10-11.* As described in CAN's Written Statement of Position on Issue #2, the Commission's licensing authority over the holder of the decommissioning trust fund is a basic assumption of the Prepayment mechanism for satisfying financial qualifications requirements.[6] The uncertainties the NRC staff noted in (1) and (2) above directly contradict and undermine Applicants' assertion that their decommissioning arrangement is equivalent to Prepayment.

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wished to use the External Sinking Fund mechanism would *have* to supplement it with a satisfactory mechanism under § 50.75(e)(1)(iii).

[6] Furthermore, this is the first license transfer case in which reactors are being sold from the original owner and operator to another completely separate and unrelated corporate entity in which ownership of the decommissioning trust fund is not being transferred. Thus, the Applicants' proposed mechanism is not only unpremeditated under the NRC's rules, guidelines, and case law, but the nuclear industry has not contemplated it as a viable method for establishing financial assurance for decommissioning, either.

The fact noted in (3) is yet another reason not to permit the disputed arrangement.

The Staff's evaluation raises lingering doubts about whether the imposition of conditions on the applications is sufficient protection of public health and safety to warrant a precedent-setting bending of the Commission's well-considered regulations on financial assurance qualifications just to approve NYPA and the Entergy companies' decommissioning arrangements for FitzPatrick and Indian Point 3. Such doubt should be resolved in favor of following and implementing the existing regulations on financial qualifications which were promulgated pursuant to the requirements of the Administrative Procedures Act. In any event, even with the Staff's proposed conditions the arrangement at issue does not qualify, by any stretch of the imagination, as a Guarantee or Surety as outlined in NRC regulations at § 50.75(e)(1)(iii). In pertinent part, the NRC regulations are violated in the following ways:

1. 50.75(e)(1)(iii)(A)(1) specifies that the surety or insurance must be either open-ended or, if the licensee cannot find a replacement mechanism when the agreement expires, that it must be indefinitely extended. Applicants' agreement is neither open-ended nor does it have a set term. Furthermore, NYPA is not a licensed insurer. In fact, should the IRS decide that NYPA must pay tax on the fund, NYPA may be unwilling to comply with the NRC rules in this section. Therefore NYPA is not qualified to hold the decommissioning funds.

2. Under 50.75(e)(1)(iii)(A)(2) the surety must be payable to an acceptable trustee. An acceptable trustee "includes an appropriate State or

Federal government agency or an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State agency." *Id.* NYPA is not an appropriate State or Federal agency,[7] would be in a potential conflict of interest in the arrangement (as described *infra*), and is not a licensed insurer. Therefore NYPA is not an acceptable trustee under NRC regulations.

3. 50.75(e)(1)(iii)(B) refers to parent company guarantees. NYPA is not a parent company of the Entergy companies. SECY 1998-164 recommends that the NRC hold non-utilities and new entities (such as ENF and ENIP) to a higher standard than utilities using parent company guarantees. Given Staff's evaluation, it is only rational that NYPA, the company that decided to divest itself of the reactors and limit its liability, cannot provide the same degree of financial assurance as the parent company which will own the reactors. Therefore NYPA is not qualified.

4. 50.75(e)(1)(iii)(C) addresses various self-guarantee methods, and the tests under 10 CFR § 30 that an applicant's proposed mechanism must pass to qualify as an appropriate self-guarantor. Applicants here have neither proposed their arrangement as a self-guarantee, nor applied any of the required tests. Therefore the NRC cannot approve NYPA's arrangement for holding the decommissioning funds under the self-guarantee provisions of this section.

[7] CAN addresses this issue in its Statement of Position. In summary, although the regulations are unclear, one must assume that an "appropriate" agency would be one with regulatory authority for decommissioning activities, such as the NRC or EPA.

CAN contends, therefore, per 1 through 4 above, that the Applicants' proposed arrangement is, thus, not in any way equivalent to the NRC's required methods under §50.75(e)(1)(i) and (iii) for providing reasonable assurance of funding for decommissioning. Although the NRC Staff attempted to impose conditions to address the deficiencies in the applications on this point, the proposed conditions are plainly inadequate. There must be a compelling reason for the NRC to accommodate the Applicants' request for exceptions to NRC regulations. In this case, Applicants have provided no compelling reasons for such an exemption.

III. THE TAX ISSUE

Applicants' Statement of Position offers no convincing reason for granting an exception to NYPA and the Entergy companies in order to permit NYPA to help ENF and ENIP avoid federal taxes on a fund transfer. In fact, examination of the Applicants' Statement of Position provides compelling reasons not to grant such an exception. The NRC Staff SERs explain that Applicants' sole discernable reason for proposing that NYPA retain possession of the decommissioning fund is to protect the Entergy companies from tax liability on acquiring the fund. The Applicants' views on this point, however, are far less straight-forward, and appear somewhat specious. Applicants' witness Mr. Henderson testifies that transferring the funds to the ENF and ENIP "should not create a tax liability." *See* Henderson Testimony *at page 3.* His confidence in that assertion is based on the IRS's previous private letter rulings that "the transfer of decommissioning trusts in connection with nuclear acquisitions does

not create a tax liability for the purchaser." *Id.* Unfortunately, the rulings Mr. Henderson cites in support of his confidence explicitly state that they "may not be used or cited as precedent."[8]

Thus, careful reading of this testimony reveals that the Applicants are at pains to justify the NRC accommodating their applications through an exception on this point. In fact, the reasons for the Applicants' arrangements are utterly confounded by their Statement of Purpose and their proffered testimony on the tax status of the decommissioning fund. On the one hand, Applicants' ask the NRC to make exceptions to its rules to accommodate uncertainties on the possession and disposition of the fund because of its uncertain tax status. On the other hand, Applicants' Statement of Purpose and the testimony of both of its witnesses declare unequivocally that "as long as the trusts are held by NYPA, the trusts and any income they earn will continue to be tax-free." *Compare* Applicants' Statement at ¶8 *with* Mr. Collins' Testimony at A. 17 and Mr. Henderson's Testimony at 2-3.[9]

If it is such an unlikely scenario that NYPA would be taxed, it is hard to fathom why Applicants treat this as such a central concern in the fate of the decommissioning fund. Moreover, given that alleged certainty, why do the Decommissioning Agreements require the Entergy companies to make annual

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[8] *See* IRS rulings 200034007, 200034008, 200034009, 200037020. However, CAN was unable to obtain copies of the other two rulings cited by Mr. Henderson (20004040 and 199952074).

[9] Applicants' and their witnesses' reasoning appears based solely on NYPA's status as a tax-exempt entity. However, it appears to CAN that the relevant question is not NYPA's tax status, but whether it is legal for NYPA to use tax status to function as a tax shelter for the ENF and ENIP.

payments to NYPA for holding the fund? *See* Exhibit O-1 to the Purchase and Sale Agreement.

Significantly, Applicants' representations conveniently change depending on whether they are arguing for an exception to the regulations or arguing that the applications meet financial assurance requirements for decommissioning. These contradictory statements, facts and representations call into question the reasonableness of Applicants' arguments and the credibility and reliability of the testimony offered in support of those questionable arguments. Furthermore, Applicants' Statement of Position and Mr. Collins's Testimony raise an additional, serious question whether the proposed agreement will place NYPA in a conflict of interest.

IV. NYPA'S CONFLICT OF INTEREST

In the Applicants' Statement of Purpose and Mr. Collins's Testimony, Applicants clarify that NYPA's obligation to the Entergy companies under decommissioning as being limited to "the **lesser** of the Inflation-Adjusted Cost Amount [of decommissioning the reactors] ... or the amount in the Decommissioning Fund." Collins Testimony at A.11 (emphasis added); *see also* Applicants' Statement at ¶¶9-11. Given that the decommissioning fund at its current level now exceeds the level required under 10 CFR § 50.75(c), CAN contends that it is reasonable to expect that it will accrue to a significantly greater sum than the current Inflation Adjusted Cost Amount for decommissioning. Under the existing agreements and the Commission's regulations, if the proposed agreement is approved, NYPA will retain the difference between the

amount in the fund and the amount Entergy needs to decommission the facilities to NRC standards. This would take place notwithstanding the NRC Staff proposed conditions on approval of the applications. As this may be the most significant difference between the present case and other license transfer matters[10] – in all of which the buyers have assumed ownership of the decommissioning fund and potential liability for tax – the Commission must ascertain whether the potential for NYPA to profit from the proposed arrangement constitutes a conflict of interest with NYPA's fiduciary obligations to the ratepayers and citizens of New York. Those duties not only encompass prudent management of the fund, but also include preserving enough money to accomplish the unspecified final remediation of the reactor sites. Furthermore, if NYPA has a conflict of interest in this regard, such a conflict cannot provide the basis for granting the relief Applicants request in this case. In fact, approval of the applications could undermine a basic principle in the establishment of sinking funds by nuclear utilities, viz., that funds collected from ratepayers are expressly intended solely for the protection of the public health and safety through, if at all possible, complete site clean-up at license termination.

This aspect of the arrangement, however, could also preclude the NRC from obtaining an additional degree of financial assurance sometime in the future. Applicants' Statement explains Entergy's potential financial liability for decommissioning:

> If, in the future, NRC requirements call for additional monies to be deposited, the Entergy Owners would be obligated to make such

[10] Pilgrim, Three Mile Island Unit 1, Oyster Creek, Clinton, Millstone Units 1, 2, & 3.

contributions to additional decommissioning funds to be created by the Entergy Owners to meet such requirements.

Id. at ¶10. Neither Applicants' Statement nor its applications offer an explanation of how the new entities, ENF and ENIP, would provide additional financial assurance under this scenario. While the NRC may not have a way of requiring that the Entergy applicants provide financial assurance for such a situation — one that could, in fact, occur years down the road – it would be difficult for ENF and ENIP to satisfy NRC requirements under the existing rules. The reason for this is simple. ENF and ENIP are not electric utilities. They have provided no financial assurance per the requirements of the NRC rules cited above in reference to NYPA's lack of qualification under §50.75. As long as NYPA is permitted to retain a financial interest in the Decommissioning Trust, the Entergy companies' ability to offer financial assurance is compromised. It is also compromised because at any time in the future, NYPA could decide to terminate its trusteeship, take the surplus money accumulated, and leave the Entergy companies without any mechanism for accumulating decommissioning funds or funding sources to meet new NRC funding requirements.

NYPA is being placed in the position of having divided loyalties which form the basis for a potential conflict of interest. On the one hand, NYPA has a fiduciary responsibility to ratepayers and citizens of New York State for growing the decommissioning trust fund and being certain that it has all the fund necessary to do a complete decommissioning and clean-up of the IP3 and Fitzpatrick reactor sites. On the other hand, the proposed NYPA agreement with the Entergy companies provides an incentive for NYPA to permit Entergy to do

the cheapest decommissioning NRC regulations will allow so that NYPA will get the maximum benefit from the surplus decommissioning funds. Even with the inclusion of the NRC Staff proposed conditions for NYPA's management of the fund, the very position NYPA will be placed in by virtue of the agreement is anathema to its role as fiduciary of the fund as a fund for the protection of the health and safety of the ratepayers and local citizens, and as a fund dedicated to assure complete and adequate clean-up of the IP3 and Fitzpatrick reactor sites.

This issue of a fiduciary, such as NYPA, in a conflict of interest over disposition of the funds it controls can be understood by analogy. Surely, for example, no one at the NRC would want to have even the suggestion of compromise of the fiduciary's loyalty and duty, were the fiduciary at issue the keeper of the NRC's pension funds. Why should the NRC allow such an appearance of conflict of interest when the fund in question is one that will determine whether two nuclear reactor sites will be completely cleaned up at end of license? The answer in this case is plain. The agreement between the Entergy companies and NYPA was not contemplated under existing NRC regulations. Along with the other points argued above, it is because allowing such a potential conflict situation in fund management runs counter to every recognized principle for prudent and acceptable fiduciary behavior.

Applicants have failed to completely avoid this potential, serious conflict of interest situation for NYPA. The NRC Staff conditions do not eliminate the bases for such potential conflicts. The NRC rules do not describe or permit such a situation. NRC guidance does not permit or describe such a situation.

Moreover, once NYPA is no longer a Part 50 licensee, there is at least some question as to how easily the NRC will be able to affect NYPA's course of action.

Under these circumstances, this Board should find that the NYPA/Entergy agreement is in derogation of pubic policy, repugnant to the public interest, and cannot be approved.

V. CONCLUSION

For the reasons set forth above, CAN contends that the Applicants' Statement of Position and Testimony are unpersuasive, deficient, and raise additional issues concerning the legality of the Applicants' proposed arrangements. These issues further undermine the Applicants' assertions concerning their ability to provide reasonable financial assurance of funding for decommissioning. For these reasons, their application should be dismissed on the facts now before this Board.

DATED at Syracuse, New York, this 1st day of February, 2001.

Respectfully submitted:

CITIZENS AWARENESS NETWORK, INC.

BY: _____

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UNITED STATES OF AMERICA
before the
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:
Charles Bechhoefer,
Presiding Officer

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, Timothy Judson, hereby certify that copies of the foregoing RESPONSE TO APPLICANTS' STATEMENT AND PRE-FILED TESTIMONY ON ISSUE #2 ADMITTED FOR HEARING BY COMMISSION ORDER CLI-00-22 have been served upon the persons listed below by electronic mail or US Postal Mail.

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Timothy L. Judson
Citizens Awareness Network

Dated at Syracuse, New York,
this 1st day of February, 2001