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UNITED STATES OF AMERICA
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 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 February 5, 2001

MEMORANDUM AND ORDER
(CAN's Revised Contention on Financial Qualifications)

On January 10, 2001, the Citizens Awareness Network (CAN) submitted a revised contention on financial qualifications, as authorized by the Commission in CLI-00-22.[1] On January 24, 2001, the Licensees (Power Authority of the State of New York (PASNY), Entergy Nuclear FitzPatrick LLC (ENF), Entergy Nuclear Indian Point 3 LLC (ENIP), and Entergy

[1]Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications Issue in the License Transfers for James A. FitzPatrick and Indian Point Unit 3 Nuclear Power Stations Per Commission Memorandum & Order, November 27, 2000, dated January 10, 2001 [CAN Revised Contention]. On January 23, 2001, CAN submitted errata to its proposed contention, consisting largely of typographical errors or corrected references. In evaluating this contention, the Presiding Officer will consider the corrected version of the contention.

Nuclear Operations, Inc.) filed their response, opposing admission of the entire proposed contention.[2] On January 31, 2001, CAN filed a reply.[3]

For the reasons set forth, the Presiding Officer admits portions of the proposed contention, subject to the qualifications set forth below. Further, schedules for filings on this contention are set forth, all leading to an oral hearing already scheduled for March 13, 2001.

1. Background. The Commission, in its Memorandum and Order of November 27, 2000, CLI-00-22, 52 NRC 266 (2000), granted the request for a hearing submitted by, inter alia, the Citizens Awareness Network (CAN), and the Town of Cortlandt together with the Hendrick Hudson School District (collectively, Cortlandt). In doing so, it found each of those organizations to have standing and to have each submitted at least one acceptable contention. The Commission also approved transfer of the hearing responsibilities in this proceeding to a Presiding Officer, the undersigned having been selected, with responsibility for the final decision remaining with the Commission.

Subsequently, Cortlandt withdrew from the proceeding, and the contention it solely sponsored (hereinafter Issue 1, concerning "Joint and Several Liability," approved in CLI-00-22, 52 NRC at 296-97) was thus dismissed. See Memorandum and Order (Approving Withdrawal of Cortlandt/Hendrick Hudson School District), LBP-00-34, 52 NRC __ (December 22, 2000). Cortlandt additionally, however, proposed another contention (hereinafter Issue 3, concerning "revenue shortfalls") that was approved in CLI-00-22, 52 NRC at 300, subject to further specification based on proprietary data (to which Cortlandt previously had not had access).[4]

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[2]NYPA/Entergy Companies' Response to Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications, dated January 24, 2001 [Licensees' Response].

[3]Citizens Awareness Network, Inc.'s Reply to NYPA/Entergy Companies' Response to CAN's Revised Contention on Financial Qualifications, dated January 31, 2001 [CAN Reply].

[4]The other contention approved by the Commission (Issue 2) was sponsored by the Nuclear Generation Employees Association (NGEA) as well as by CAN. It remains an issue in

CAN also proposed a similar issue as a portion of its "Baseline Funding Issue," which the Commission likewise approved subject to further specification based on proprietary data. Cortlandt and CAN were each authorized to submit a revised financial qualifications issue based on "revenue shortfalls," following their access to the proprietary data.

Cortlandt, of course, has withdrawn from the proceeding. CAN, however, on January 10, 2001, timely (in accord with the schedule I previously set) submitted its revised financial qualifications issue following its access to the proprietary data. I turn now to the acceptability of its proposed issue (hereinafter referenced as Issue 3).[5]

2. Issue 3:

As submitted by CAN, Issue 3 reads as follows:

> The license transfer applications do not provide adequate financial assurance for the safe operation of FitzPatrick and Indian Point 3 because the applications do not demonstrate an appropriate margin between anticipated operating costs and revenue projections, and the Entergy applicants do not provide evidence of access to sufficient reserve funding.

In support of this claim, CAN (through an expert witness) sets forth both general and specific scenarios in which, it claims, the Licensees' funding may be projected as being deficient. For example, CAN generally references the possibility of lengthy outages at either or both reactors as influencing the financial ability of the licensees to operate the reactors successfully, i.e., at a profit. Further, it claims that the revenue projections are based on flawed assumptions regarding prices for power in the Northeast's new deregulated markets. Finally, CAN claims that the uncertain cost-and-revenue projections, minimal projected profit margins,

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this proceeding, albeit being sponsored solely by CAN.

[5]Although proposed Contention 3 (including its bases) references proprietary data to some extent, this Memorandum and Order is intended not to reveal any such data and thus may be released publicly.

and shared responsibilities for the facilities and fuel payments make continued operation of the reactors financially dependent upon each other.

In further support of its claim, CAN sets forth five specific reasons (designated as in CAN's contention):

(A) the property tax agreements with local municipalities are not considered in cost projections;

(B) the revenue projections are based on unreasonable assumptions--in particular, the projected average annual capacity factor of 85% for each reactor is not supported by the operating histories of either reactor;

(C) the revenue projections are not adequate to cover common increases in operating costs--as supported by its expert's declaration, the anticipated annual operating costs are on the low end of those common in the nuclear industry, and because operation and maintenance costs in his opinion can reasonably be expected to increase by 15% or more annually, potentially for years at a time, the licensees' projections for both reactors--FitzPatrick and Indian Point 3--must be analyzed for both increased operating expenses and decreased capacity factors;

(D) the supplemental funding available to the Licensees (assertedly, credit arrangements with two other Entergy subsidiaries) does not provide adequate financial assurance to protect the public and worker health and safety; specifically, according to CAN's expert, the credit arrangements would only be able to support a limited outage at a single facility or a slightly longer outage time between the two reactors (both less than one year[6]), whereas, in the past 15 years, at least 23 nuclear power plants have been shut down for a year

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[6]The precise number of months asserted by CAN is being omitted because of its proprietary content.

or longer (with the recent outage at Indian Point 2 exceeding the duration that either reactor involved here could survive); and

(E) the Licensees' market revenue projections have not been evaluated (presumably by the NRC Staff) to determine whether their assumptions about market prices are reasonable; market factors in the market areas for each reactor could introduce significant uncertainty and prevent the companies from meeting their revenue requirements, thereby undermining the licensees' ability to offer adequate financial assurance. In particular, CAN asserts that the five-year revenue projections submitted by the licensees are inadequate in light of the regulatory requirement set forth in 10 C.F.R. § 50.33(f)(2) that licensees provide estimated operating costs "for the period of the license."

3. Response of Licensees:

In their response dated January 24, 2001, the Licensees claim that the entire contention should be rejected. To substantiate this claim, they pose what they regard as several premises of the Commission's ruling in CLI-00-22 that, in their view, affect the matters on which a revised contention may be based. They then proceed to assert that the five aspects of the revised contention fail to satisfy one or more of these premises and accordingly claim that the issues either "(1) are not based on the proprietary information of the Entergy Companies, or (2) are new issues that could have been raised in CAN's Petition but were not, or (3) fail to meet the requirements for the adoption of issues in Subpart M proceedings."[7]

The premises set forth by the Licensees are (1) that the only issues admissible are those arising from the Entergy Companies' proprietary information made available to CAN pursuant to CLI-00-22; and (2) the issues would need to meet the admissibility requirements for Subpart M proceedings, as set forth in 10 C.F.R. § 2.1306(b)(2). With respect to CAN's five

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[7]Licensees' Response, dated January 24, 2001, at 4.

specific issues, the Licensees assert that (A) estimated costs associated with the Entergy Companies' property tax agreements with local municipalities (although marginally less than the costs cited in CAN's proposed contention) were included in the Entergy Companies' cost projections; (B) CAN's challenge to the Entergy Companies' 85% capacity factor assumption should be rejected as untimely; (C) CAN's challenges to ENF's and ENIP's proposed operating costs are vague and speculative; (D) CAN's challenges to the Entergy Companies' supplemental funding have been previously rejected by the Commission and either fail to rely on proprietary information or are erroneous; and (E) CAN's challenges to the Entergy Companies' market projections do not rely on proprietary information and raise no admissible contention.

Further, the Licensees read CAN's petition as raising certain other issues and seeking relief apart from the question of admissibility of particular issues. They deem the other allegations in CAN's revised contention as failing to raise an issue warranting adjudication. Specifically, they claim that CAN's challenge to the use of five-year economic projections is impermissible and untimely and that CAN's proposed license conditions should be rejected, as being both irrelevant (because not relating to the financial qualifications issue) and premature (given their view that CAN has not raised any admissible issues).

4. CAN's Reply.

In its timely reply, which is backed by the declaration of its expert witness, CAN challenges almost all of the Licensees' assertions, demonstrating (in its view) the relevance of all of its claims to the issue authorized by CLI-00-22. Further, it claims why, contrary to the Licensees' claims, the issue should not be considered late-filed but, rather, should be evaluated under standards for timely-filed issues, as set forth at 10 C.F.R. § 2.1306(c)(3). It adds, however, that its issues also satisfy the late-filed standards set forth in 10 C.F.R. § 2.1308(b)(2).

5. Analysis.

In determining the acceptability of this proposed issue or contention, I differ in certain respects from the premises that the Licensees read as incorporated into CLI-00-22. In particular, I believe that the Commission perceived access to proprietary data as necessary to formulate a contention challenging the cost and revenue projections of the Licensees, but not requiring that proprietary data be actually incorporated into the contention itself. Although certain aspects of the contention could perhaps have been formulated earlier on the basis of non-proprietary information, the Intervenor could not have been able to formulate the entire issue or to have determined whether certain of its claims incorporated therein are meaningful without at least having had access to the proprietary data. In CAN's words, "[t]he issues CAN raised which were not based directly on proprietary information were pertinent either (1) because their full significance could not be ascertained independently of the proprietary information that was only recently provided to CAN and its supporting expert, Edward A. Smeloff; or (2) because the non-proprietary information is necessary to understand whether the proprietary information provides reasonable financial assurance to warrant approval of the applications."[8]

In that connection, although the Licensees would portray the issue as five separate issues, I interpret CAN as posing a single issue with five subparts or bases. Further, along the same line, where the non-proprietary bases of the issue are being considered, the Commission did not limit the issue's bases to information arising after the time when information supporting the proposed contention was being submitted. The issue sanctioned by CLI-00-22 seeks to create a complete picture of the alleged potential revenue shortfall, without regard to the precise minute that the separate bases may have become available to CAN. True, CLI-00-22

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[8]CAN reply, dated January 31, 2001, at 3-4.

does not permit litigation of issues that the Commission has already rejected. But it also does not contemplate a characterization of all asserted facts as falling within the parameters of such rejected issues, particularly where, as here, the same facts may undergird an essentially different issue. Moreover, because the issue relies in part on certain information existing at the time issues were first defined, combining that information with later-arising or later-available information does not convert the particular aspects of the issue based on pre-existing information as late-filed issues that are subject to the more stringent acceptance criteria (see 10 C.F.R. § 2.1308(b)) applicable to such issues.

I note that, under 10 C.F.R. Part 2, Subpart G, any issues submitted after the initial filing date for contentions would be considered late-filed. See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235 (1996). But the appearance of information for the first time in a document not available when contentions initially were to be filed would satisfy the "good cause for delay" aspect of the late-filed contention criteria, assuming the proposed contention was filed shortly after the information became available. Id. at 255; but cf. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983)(unavailability of licensing-related document does not establish good cause for late filing of a contention if information was publicly available early enough to provide the basis for the timely filing of that contention).

Here, under 10 C.F.R. Subpart M, similar criteria might govern, absent Commission direction to the contrary. According to CAN, however, the Commission in CLI-00-22 has so directed. The Commission noted that CAN had not had access to the proprietary information it needed to formulate its issue with sufficient particularity, and it set a schedule (which has been modified to some degree by the Presiding Officer) for filing, using "usual specificity requirements." CLI-00-22, 52 NRC at 300 (2000). CAN timely submitted its issue under that revised schedule. In the circumstances, therefore, CAN's proposed issue should be, and is

being, evaluated under standards of 10 C.F.R. § 2.1306(c)(3) applicable to timely-submitted issues[9].

(A). Turning first to the sub-issues raised by CAN and challenged by the Licensees, the first--consideration of property-tax agreements or payments in lieu of taxes to local municipalities--appears to have only minimal impact on the adequacy of the revenue projections. The Licensees assert that payments in lieu of taxes were projected as an estimated expense in the initial transfer application, and the actual payment amounts (which were not revealed until November 15, 2000 and December 4, 2000, respectively) were only marginally greater than those estimated. The payment amounts, which will affect the adequacy of projected revenues and hence the overall contention, will only affect the adequacy of revenue projections in a minimal way. Thus, this sub-issue thus does not warrant separate adjudication, although the bottom-line payment amounts must be considered in assessing the overall adequacy of revenue and cost projections.

(B). On the other hand, the second sub-issue--the unreasonableness of several of the assumptions relied upon by the Licensees and the failure of the Licensees to provide estimates for the life of the licenses (rather than the 5 years in fact projected by the Licensees)--creates two issues worthy of litigation.

(i). The first concerns the validity of the capacity factor assumed by the Licensees. CAN, backed by the declaration of its expert witness, claims that the capacity factor (85%) is significantly higher than has in fact been achieved for either reactor in the past (for the years 1994-99, 52.3% for Indian Point-3, and 80.7% for FitzPatrick). It further asserts that no more than a 75% capacity factor should be assumed and, at that level, neither reactor could operate

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[9]I note, however, that CAN has addressed the criteria for late-filed issues and, in the opinion of the Presiding Officer, has also satisfied those standards for the issues that are being admitted.

profitably. (CAN cites proprietary information demonstrating significant consequences to the Licensees if the 85% capacity factor is not achieved.)

The Licensees oppose this issue as being late-filed because, they claim, the capacity factors for each reactor, both achieved in the past and projected for the future, were known at the time of the license-transfer application. Although that may be so, the margin of profit that the Licensees need to achieve to satisfy their license-transfer obligations, along with penalties that may be incurred by the Licensees should such capacity factors not be achieved, was not known nor could have been known by CAN prior to its access to the proprietary data. The penalties facing ENF and ENIP for not achieving the 85% capacity factor are particularly pertinent, for without the proprietary data, CAN could not have known whether achieving a particular capacity factor made any difference with respect to ENF's or ENIP's obligations with respect to license-transfer contracts--an essential ingredient of any approved issue or contention. See 10 C.F.R. § 2.1306(b)(2)(iv). That being so, CAN could not have set forth this issue with adequate specificity at the time its issues were initially being formulated. I hereby accept for litigation this aspect of Contention 3.

(ii). The second aspect of Subpart (B)--whether the Licensees should be required to submit estimates for receipts and operating costs over the life of the license rather than for only 5 years--parallels a portion of the issue set forth as part (E) of this issue. Both issues pose a legal question that is suitable for litigation. Under 10 C.F.R. § 50.33(f)(2), an applicant for an operating license (including organizations such as ENF and ENIP) must submit "information that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license" (emphasis supplied). The section goes on to require that an applicant submit "estimates for total annual operating costs for each of the first five years of operation of the facility." In addition, a "newly formed entity organized for the primary purpose of . . . operating a facility" must include certain additional information

(10 C.F.R. § 50.33(f)(3)), and the Commission may request such a newly formed entity to submit additional or more-detailed information, including "information regarding a licensee's ability to continue the conduct of the activities authorized by the license." 10 C.F.R. § 50.33(f)(4). CAN asserts that, under the foregoing criteria, ENF and ENIP should be required to file estimates of total operating costs for the remaining authorized years of each of the licenses under review. (CAN acknowledges that ENF and ENIP have filed the requisite 5-year cost-and-revenue projections with their license applications.) CAN regards ENF and ENIP as newly formed entities organized primarily for operating the reactors in question and thus subject to additional filing requirements.

In contrast, the Licensees claim that CAN's challenge to the use of five-year economic projections is impermissible and untimely. The Licensees portray CAN's challenge as an impermissible attack on NRC regulations. They also would reject it as untimely in that, in their view, it did not require access to proprietary information to formulate.

The regulation, itself, appears to support the view advanced by CAN, particularly since ENF and ENIP appear to be newly formed entities organized primarily for operating the reactors in question. As support for its interpretation of the rules, CAN cites the Commission's decision in an earlier license-transfer case, North Atlantic Energy Service Corp., CLI-99-6, 49 NRC 201 (1999), to the effect that

> Section 50.33(f)(2) nowhere declares that the proffering of 5-year projections will, per se, prove adequate in any and all cases. To the contrary, the rule contains a "safety-valve" provision explicitly reserving the possibility that, in particular circumstances, and on a case-by-case basis, additional protections may be necessary. See 10 C.F.R. § 50.33(f)(4) (to ensure adequate funds for safe operation, NRC may require "more detailed or additional information" if appropriate). As we detail below, [the intervenor] is entitled to argue that this case calls for additional financial qualification measures beyond 5-year projections and that the Applicants therefore have not met their burden under section 50.33(f)(2) to satisfy Commission financial qualification requirements.

49 NRC at 220.

It is clear that, as formulated, this aspect of Issue B as well as Issue E does not constitute an attack on the rule, but only on the Licensees' (and perhaps the Staff's) interpretation of the rule. As such, the issue is admissible. As for timeliness, the proprietary data appears to have provided CAN with a rationale for seeking cost and revenue projections for more than the prescribed 5-year period. Without such a rationale, based on penalties and other costs that could be incurred beyond the 5-year period, in a period of deregulation (see Smeloff declaration dated January 10, 2001, at ¶ 20), CAN could not have asserted a meaningful contention on this subject without resort to the proprietary data. Thus, I am admitting this legal issue for litigation.[10]

(C). This subpart of Issue 3, which asserts that the Licensees' cost and revenue projections are not adequate to cover common increases in operating costs, is premised upon Mr. Smeloff's declaration that the operation and maintenance cost projections submitted with the applications are on the low end of those common in the nuclear industry, that those costs can reasonably be expected to increase by 15% or more annually, potentially for years at a time (greater than specified by the Licensees) and, accordingly, that the Licensees' projections must be analyzed for increased operating expenses and decreased capacity factors (as outlined under Issue B (I).) CAN further faults the Staff for not including a projected 15% increase in revenues and costs in its SER analysis. (Tangentially, CAN also here reiterates its claim that the cost and revenue projections must be analyzed for the life of the license, rather than for 5 years--a claim that we have accepted as a legal issue and will not repeat in this context.)

In response, the Licensees characterize the issue as vague and speculative. Particularly with respect to the 15% increase, the Licensees assert that it is premised "purely on

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[10]Although not a party, the NRC Staff is invited to submit its views on this legal question, on the same schedule as governs other parties on this issue. In presenting its Safety Evaluation Report (SER) at the oral hearing, the Staff is requested to be able to comment on this issue.

unsupported speculation by Mr. Smeloff"[11] and that he provides no basis for his 15% increase claim. Specifically, they fault Mr. Smeloff for not analyzing the past cost and revenue experiences of the two plants in question.

In its reply, CAN disputes both the Licensees' evaluation of Mr. Smeloff's expertise and its lack-of-basis assertions for the 15% increase. Specifically, CAN emphasizes the relevance of Mr. Smeloff's experience to the legitimacy of his projections and the incorrectness of the Licensees' lack-of-basis assertions, noting that Mr. Smeloff was not in fact predicting a 15% increase in costs but only asserting that, because of Mr. Smeloff's actual experience in estimating revenues and costs, the Licensees should perform a sensitivity analysis concerning the adequacy of increases that they have predicted. CAN views the Licensees' assertions concerning the failure to analyze past cost experiences at FitzPatrick and Indian Point 3 as specious, noting that such information was not provided in the license-transfer application and is not publicly available.

I view the substance of this contention as a dispute between experts as to how predicted costs increases must be calculated. How the cost increases were being calculated is clearly derived from the proprietary data. Accordingly, this is a dispute that can appropriately be litigated in this proceeding. (The portions of the issue concerning the adequacy of annual capacity factors and the necessity vel non of estimating costs (and revenues) for the life of the license are being litigated under other issues and will not be included in this one.) I therefore accept Subpart (C) as an issue to be litigated, to the extent it challenges the methodology for calculating cost projections.

(D). This subpart of Issue 3 asserts that the supplemental funding available to ENF and ENIP does not offer adequate financial assurance to protect the public and worker health and

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[11]NYPA/Entergy Companies Response, dated January 24, 2001, at 11.

safety. Such funding is said to be comprised of (1) a credit agreement with Entergy Global Investments, Inc. [EGI] to provide $20 million each to ENF and ENIP as a working capital credit line, and (2) a credit agreement with Entergy International Ltd. [EIL] for a total of $50 million to be shared by ENF and ENIP.[12] Mr. Smeloff declares that such funding would only be able to support a limited-time outage at a single facility or slightly greater outage time between the two reactors (both periods less than a year, but not here set forth specifically to avoid revealing proprietary data). CAN claims such funding is insufficient, particularly in light of ENF's and ENIP's status as newly formed entities that are not public utilities. CAN further claims, based on Mr. Smeloff, that the credibility of the credit arrangements with EGI and EIL have not been clearly established. CAN concludes that the "possibility that ENF and/or ENIP would need to draw on those agreements and then find that the required funds are not available could compromise safety at FitzPatrick and/or IP3."[13]

In response, the Licensees assert that the Commission has already ruled that questions regarding the sufficiency of supplemental funding do not constitute grounds for a hearing, "on the ground that NRC rules do not mandate supplemental funding." See CLI-00-22, 52 NRC at 300, On that basis, according to the Licensees, the Commission refused to admit as an issue CAN's challenge to supplemental funding and there is no reason "why CAN should fare better the second time around with this previously rejected contention."[14] In the alternative, the Licensees also claim that the issue was based on non-proprietary versions of the applications and thus should be rejected as untimely.[15]

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[12]CAN Revised Contention, dated January 10, 2001, at 9.

[13]Id. at 11.

[14]Licensees' Response at 14-15.

[15]Id. at 15.

Finally, however, the Licensees concede that Mr. Smeloff's knowledge of the cash and cash equivalents of EGI and EGL arises from the proprietary data made available to CAN. But they claim, based on the affidavit of their expert, Barrett E. Green, Director, Finance and Development, Entergy Nuclear Operations, Inc., that Mr. Smeloff has totally misread the financial statements and, contrary to his claim, the actual cash and cash equivalent amounts available to EIL and EGI are more than sufficient to support the lines of credit.[16]

In its reply, CAN claims that this sub-issue does not challenge the amount of supplemental funding--the issue that was barred by CLI-00-22--but rather takes issue with EGI and EHL's cost projections stemming from proprietary data previously unavailable to CAN. Further, that CAN's assertions on this sub-issue are based in part on the maximum outage time for each reactor for which EGI and EIL would provide, a calculation that could only be derived from the proprietary data. CAN lists numerous outage times at various reactors, including simultaneous outages of multiple-unit reactors, that far exceed the maximum outage for which the funds provided by EGI and EIL would suffice.[17] CAN emphasizes that Mr. Smeloff has also raised concerns about EGI and EIL's interlocking fiduciary interests, their lack of due diligence investigations into ENF's and ENIP's business plans, and the fact that neither company is a well-known financial institution--to use the vernacular, shell corporations. Although such concerns may not be fully based on proprietary information, they are "relevant to the concerns Mr. Smeloff raises with respect to the liquidity of EGI's and EIL's assets, and the need for the Entergy companies to provide more information to establish the reliability of the supplemental funding offered."[18]

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[16]Id. at 16; affidavit of Barrett E. Green, dated January 22, 2001, at ¶ 5.

[17]Declaration of Edward A. Smeloff, dated January 10, 2001, at ¶¶ 17-18; declaration of Edward A. Smeloff, dated January 31, 2001, at ¶ 9.

[18]CAN Reply at 16-17.

This sub-issue may to some extent rely on information available other than through the proprietary information. But the issue as a whole can be better understood after reference to the proprietary data. As set forth by CAN, its arguments on this sub-issue "are based in part on the financial statements of EGI and EIL, which were not available to CAN prior to" CLI-00-22.[19] Indeed, because one crucial aspect of the issue was, as conceded by the Licensees, only available through the proprietary data, I am not prepared to reject the issue as a whole for untimeliness or to require it to meet the more-stringent standards applicable to late-filed issues.

Further, taking the nature of the issue as described by CAN, the issue does not focus solely on the amount of supplemental funding required so as to be barred by the prohibitions of CLI-00-22. It does not, except incidentally, focus on the amount of supplemental funding required. Rather, the issue to the extent acceptable seeks to determine the adequacy of supplemental funding in the context of the EGI and EIL's asserted status as non-electrical utilities that are newly formed entities and their ability to demonstrate the validity of projected operations and maintenance (O&M) costs in the context of cost and revenue projections.

The crucial unresolved question in this sub-issue is the difference of opinion between Mr. Smeloff and Mr. Green, both of whom appear to be qualified experts, on the limited liquidity of EGI and EIL's assets. The correctness vel non of these individuals' calculations is the basis for acceptance in part of this issue. On that basis, I accept for litigation the extent to which the limited liquidity of EGI and EIL's assets undermines ENF and ENIP's ability to demonstrate reasonable financial assurance, as required by 10 C.F.R. § 50.33(f).

(E). Turning now to the fifth and final sub-issue, CAN asserts that the Licensees' market revenue projections for FitzPatrick or IP3 have not been effectively evaluated by the Licensees or the Staff in light of significant uncertainty in the market, such as utility deregulation

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[19]CAN Reply, at 16.

and planned new generation, and furthermore, because the Licensees have only provided revenue data for five years versus the period remaining for the licenses, as assertedly required in section 50.33 (f)(2). Acknowledging the difficulty in predicting market prices, CAN argues that there needs to be a "deeper investigation of applicant's financial reserves"[20], which CAN alleges its expert witness has done, in order for the Licensees to demonstrate their adequate financial assurance.

Licensees, on the other hand, have asserted that CAN's claim should be rejected as being untimely due to the fact that CAN only asserts publicly available testimony given in another licensing proceeding involving market volatility in New England, publicly available energy generation projections in New York, and news accounts of deregulation effects in California, all of which could have been cited without access to Licensees' proprietary data. Furthermore, the Licensees claim that, even if the sub-issue be considered timely, the NRC Staff has already performed a detailed analysis of the Licensees' market projections, and they fault CAN for not providing any specific criticism of the Staff's methodology, and for only asserting that it wants a more thorough review of the facts.[21]

After evaluating the arguments of the parties, I first note that the question of whether or not financial projections of the Licensees should extend for five years or for the remaining term of the license (a legal interpretation of 10 C.F.R. § 50.33 (f)) has already been addressed and admitted for hearing under sub-part B(i) of this decision. Because I have already determined to admit this issue, I need not again address the merits of each argument in the context of this issue.

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[20] CAN Revised Contention at 12.

[21] See Licensees' Response at 17-20.

However, the admissibility of the other aspect of this subpart--the sufficiency of the Licensees' and Staff's market projections--must be analyzed in more detail. First, I find the Licensees' argument that this subpart of the contention be considered late-filed, and hence inadmissible, due to the use of publicly available information unpersuasive. Again, I will reiterate that even though this information may have been available at the time the original contention was filed, proprietary information provided by the Licensees was arguably necessary for CAN to assess the adequacy of the Licensees' and Staff's projections. Therefore, this argument is rejected.

On the other hand, although I agree with CAN's assertion that the Staff's data and findings with regard to the market revenue projections are "extremely vague"[22], CAN itself admits "the difficulty in predicting market prices in the next several years."[23] Even with an in depth analysis of the market, as CAN requests, these projections and estimates are so speculative, subjective, and uncertain that there is no assurance that the figures could reflect accurately Licensees' situation in the future. Furthermore, even if I accepted CAN's position with respect to the need for a further analysis of the projected market conditions, CAN has not stated what aspects, nor a methodology for projecting these figures in the Staff's report that it regards as inadequate. Therefore, I reject this subpart of the revised issue (to the extent not encompassed within other issues accepted for litigation) for lack of specificity.

(F). CAN additionally sets forth alternative conditions to be considered for approval of the license transfer applications, in the event that its issues prevailed but the Commission ultimately determined that dismissal of the applications is not warranted. The Licensees regard the conditions as irrelevant (because not relating to the financial qualifications issue) and

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[22] See CAN Revised Contention at 11.

[23] See id. at 12.

premature (given their view that CAN has not raised any admissible issues). Further, the Licensees reiterate their view that none of the contentions and (accordingly) none of the proposed conditions arise from proprietary data and hence should be rejected as late-filed.

I have, of course, accepted certain of the issues. In doing so, I have found them not to have been late-filed. I agree, however, with the Licensees' final point, that I lack jurisdiction to resolve any of the issues and hence to accept any of the proposed remedies. After hearing the issues in question, I will certify the entire record to the Commission, including CAN's proposed conditions, without a recommended or preliminary decision. See 10 C.F.R. § 2.1309(b)(3). The Commission, of course, will resolve all of the issues and determine what remedies, if any, warrant adoption.

6. Filing Schedules:

With respect to CAN's revised issue, to the extent admitted, the following filing schedules will govern. I note that these schedules are quite compressed but are necessary to be able to meet the March 13, 2001 oral hearing date already scheduled for Issue 2.

1. February 26, 2001 (11:59 p.m.): Filing of initial statements of position and written direct testimony (together with supporting affidavits).

2. March 5, 2001 (11:59 p.m.):

1. Submission of written responses to direct testimony, and rebuttal testimony (with supporting affidavits).

2. Submission of proposed questions on written direct testimony.

3. March 8, 2001 (11:59 p.m.): Submission of proposed questions directed to written rebuttal testimony.

4. March 13, 2001 (9:30 a.m.): Oral hearing.

6. Order.

Based on the foregoing, it is, this 5th day of February, 2001,

ORDERED:

1. CAN Issue 3, subparts B.i, Bii (and the similar issue in subparts C and E), (C)(concerning projected cost increases), and (D)(concerning the financial soundness of ENF and ENIP) are hereby accepted as issues for litigation.

2. CAN Issue 3. Subparts A and E (to the extent not accepted elsewhere) are hereby rejected as issues for litigation.

3. The filing schedules set forth in Section 5 of this Memorandum and Order are hereby adopted.

/RA/

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 5, 2001

[Copies of this Memorandum and Order have been transmitted this date by e-mail to counsel for or representatives of each of the parties, as well as the NRC Staff.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
POWER AUTHORITY OF THE STATE OF NEW YORK, ET AL.	)	
	)	Docket Nos. 50-333-LT and 50-286-LT
(James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CAN'S REVISED CONTENTION ON FINANCIAL QUALIFICATIONS) (LBP-01-04) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER
(CAN'S REVISED CONTENTION ON
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of February 2001