

## Robert Rader

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**From:** Robert Rader  
**Sent:** Thursday, May 01, 2008 3:41 PM  
**To:** richardbrodsky@msn.com; mbw@wisecarter.com  
**Subject:** Second Circuit Motion to Dismiss  
**Attachments:** Brodksy Motion to Dismiss Filed.doc

Gentlemen,

Attached is the Motion to Dismiss mailed to the Second Circuit this afternoon for filing. While I cannot include the exhibits, I think you have them. Mike, if you don't, I can fax them.

I anticipate filing a short procedural motion, after we receive Mr. Bass's Order, asking the Court to delay briefing until a ruling on this motion.

Bob Rader  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Division of Legal Counsel  
Mailstop O-15 D21  
Rockville, MD 20852  
Office: 301-415-1955  
Fax: 301-415-3200



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

OFFICE OF THE  
GENERAL COUNSEL

May 2, 2008

Catherine O'Hagan Wolfe, Clerk  
United States Court of Appeals  
for the Second Circuit  
United States Court House  
40 Foley Square  
New York, New York 10007

Attn: Maria Rodriguez

Dear Ms. Wolfe,

Enclosed for filing please find an original and four copies of Federal Respondents' Motion to Dismiss, with attachments, and Form 1080.

Also enclosed is an additional copy of page one of the Motion. At your convenience, please date stamp and return this page in the stamped, self-addressed envelope I've included.

Thank you for your kind assistance.

Yours truly,

A handwritten signature in black ink that reads "Robert M. Rader".

Robert M. Rader  
Senior Attorney  
Office of the General Counsel  
Nuclear Regulatory Commission  
(301) 415-1955 (voice)  
(301) 415-3200 (fax)  
[Robert.Rader@nrc.gov](mailto:Robert.Rader@nrc.gov) (e-mail)

cc: Counsel of Record

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 08-1454-ag

Brodsky v. U.S. Nuclear Regulatory Commission

Motion for: Dismissal and denial of the Petition for Review

Set forth below precise, complete statement of relief sought:  
Dismissal of the Petition for Review; Summary denial of any portion not dismissed

MOVING PARTY: U.S. Nuclear Regulatory Commission/Federal Respondents

OPPOSING PARTY: Brodsky/Petitioner

- Plaintiff  Defendant  
 Appellant/Petitioner  Appellee/Respondent

MOVING ATTORNEY: Robert M. Rader

OPPOSING ATTORNEY [Name]: Richard L. Brodsky

[name of attorney, with firm, address, phone number and e-mail]  
U.S. Nuclear Regulatory Commission, Mail Stop 0-15D21, Washington DC 20555  
301-415-1955  
Robert.Rader@nrc.gov

[name of attorney, with firm, address, phone number and e-mail]  
Assemblyman, 92nd District, Westchester County, State of New York  
Legislative Office Building, Room 422, Albany, NY 12228  
518-455-5753  
richardbrodsky@msn.com

Court-Judge/Agency appealed from: U.S. Nuclear Regulatory Commission

Please check appropriate boxes:

Has consent of opposing counsel:

- A. been sought?  Yes  No  
B. been obtained?  Yes  No

Is oral argument requested?  Yes  No  
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?  Yes  No  
If yes, enter date \_\_\_\_\_

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below?  Yes  No

Has this relief been previously sought in this Court?  Yes  No

Requested return date and explanation of emergency:  
\_\_\_\_\_  
\_\_\_\_\_

Signature of Moving Attorney:

Date: May 2, 2008

Has service been effected?  Yes  No  
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: \_\_\_\_\_

By: \_\_\_\_\_

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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<b>RICHARD L. BRODSKY, et al.,</b>	)	
	)	
	)	
<b>Petitioners,</b>	)	
	)	<b>Motion to Dismiss</b>
<b>v.</b>	)	
	)	
<b>U.S. NUCLEAR REGULATORY COMMISSION</b>	)	<b>Docket No. 08-1454-AG</b>
	)	
<b>and</b>	)	
	)	
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
	)	
<b>Respondents.</b>	)	

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**Federal Respondents' Motion to Dismiss**

**Preliminary Statement**

Petitioners, a New York State Assemblyman and various organizations, seek review of an order of respondent Nuclear Regulatory Commission<sup>1</sup> issued January 30, 2008, denying petitioners a hearing on the NRC's grant of an exemption to the

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<sup>1</sup> We refer to the Commission as the collegial body of Commissioners who direct the activities of the NRC, and to the NRC as the entire agency.

licensee of Indian Point Nuclear Generating Unit No. 3. The petition for review asks that this Court review the exemption on its merits, vacate the exemption and remand to the Commission for further action.

The sixty days provided by statute (28 U.S.C. § 2344) for petitioners to seek judicial review of the exemption – issued in October 2007 – long since expired when petitioners filed suit on March 26, 2008. Petitioners’ hearing request to the Commission on December 3, 2008 did not toll the running of the sixty days. Therefore, this Court lacks jurisdiction over petitioners’ merits-related challenge to the exemption.

As for the petitioners’ hearing request, the Commission correctly denied it. Under established law, “the grant of an exemption from a generic requirement does not constitute an amendment to the reactor’s license that would trigger hearing rights.” *See* Secretary of the Commission letter, Jan. 30, 2008 (Exh. 1) (*quoting Kelley v. Selin*, 42 F.3d 1501, 1517 (6<sup>th</sup> Cir. 1995)).

This petition for review should therefore be rejected summarily.

## **Procedural History**

On September 28, 2007, the NRC noticed its issuance of an exemption, which revised certain exemptions it had already granted years ago to the licensee of Indian Point 3. The new exemption allows an alternative, equivalent means of compliance with NRC regulations for ensuring the reactor's capability to shut down safely in the event of a fire. *See* 72 Fed. Reg. 56798 (Oct. 4, 2007)(Exh. 2). On December 3, 2007, petitioners filed with the Commission an objection to the grant of the exemption, a petition to reconsider, and a request for a hearing with a petition for leave to intervene and proposed contentions for the putative hearing. The Commission denied this relief on January 30, 2008 (Exh. 1).

## **Argument**

### **I. The petition's challenge to the exemption is untimely.**

This Court need not determine whether or how it would review the challenged exemption on its merits. Insofar as it seeks merits review, the petition for review should be dismissed as untimely. Under the Hobbs Act, a petition to review an NRC order must be filed within 60 days of the entry of the NRC order sought to be reviewed. 28 U.S.C. § 2344. This timeliness requirement is mandatory and jurisdictional, and may not be judicially altered or expanded.

*Stone v. INS*, 514 U.S. 386, 405 (1995) (“strict fidelity” to Hobbs Act required).<sup>2</sup> It is not subject to equitable tolling. *Stone*, 514 U.S. at 405. Strict enforcement of this filing deadline in NRC cases is shown in such cases as *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998), which dismissed a petition that cited an interlocutory order rather than the final order intended for review. *See also NRDC v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981).

Petitioners challenge the exemption published in the Federal Register on October 4, 2007. 72 Fed. Reg. 56798. For non-hearing orders like an exemption, assuming the orders are reviewable at all, public notice in the Federal Register commences the 60-day filing period. *See, e.g., North American Catholic Education Programming Foundation v. FCC*, 437 F.3d 1206, 1208 (D.C. Cir. 2006); *Arctic Express, Inc. v. DOT*, 194 F.3d 767, 770 (6<sup>th</sup> Cir. 1999); *Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663, 667-78 (9<sup>th</sup> Cir. 1989). Therefore,

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<sup>2</sup> *See also New York v. United States*, 568 F.2d 887, 892 (2d Cir. 1977). *Accord, Brazoria County v. EEOC*, 391 F.3d 685, 688 (5<sup>th</sup> Cir. 2004); *California Ass’n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9<sup>th</sup> Cir. 1987); *NRDC v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981). The 60-day limit embodies the intent of Congress to “impart finality into the administrative process, thereby conserving judicial resources and protecting the reliance interest of those who might confirm their conduct to the administrative regulations.” *NRDC*, 666 F.2d at 602.

insofar as petitioners challenge the exemption merits (as distinct from denial of their hearing request), their petition is untimely.

The pleading filed by petitioners with the Commission<sup>3</sup> on December 3, 2007, seeking reopening and an NRC hearing, did not toll the running of the 60 days. First, the Commission explicitly made the exemption “effective upon issuance.” Exh. 1 at 56801. Publication of an immediately effective order starts the calendar, and underscores the availability of judicial review. *See Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991).

Second, petitioners’ request that the Commission “reopen for consideration” the grant of the revised exemption is nowhere authorized by statute or regulation. While the Commission entertains motions to reopen and to reconsider in its adjudicatory hearing cases,<sup>4</sup> no such mechanism exists in non-hearing cases such

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<sup>3</sup> We append the first page of petitioners’ filing with the Commission, entitled “Objection to Grant of Exemption and License Amendment, Petition to Reopen for Consideration, Petition for Leave to Intervene and Request for Hearing, and Contentions (Exh. 3). Another version of this filing accompanied the Petition for Review here. Although petitioners labeled their filing with the Commission “security related,” none of those pleadings or attachments was, in fact, security related. The entire pleading with attachments is a publicly available record.

<sup>4</sup> In those cases, the Commission requires that any motion to reconsider be filed within 10 days of the decision. 10 C.F.R. § 2.345. Motions to reopen a closed (continued. . .)



as an exemption. In *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284 (1987), the Supreme Court held that a timely petition for reconsideration *under established agency procedures* for hearings tolls the 60-day filing period under 28 U.S.C. § 2344. That case has no play here. Petitioners cannot, by bootstrap, extend the time for filing by invoking agency procedures that do not exist.

The *Locomotive Engineers* tolling principle applies to “timely” petitions for reconsideration only. See *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334 (D.C. Cir. 2006). The requirement of a “timely” petition shows that there must be some rule-based or statute-based procedure in place from which timeliness can be measured. Because no NRC procedure exists for reconsideration of an exemption, however, the “timeliness” of a petition would be impossible to determine. By contrast, the Commission *does* have a procedure for seeking timely reconsideration of its adjudicatory hearing decisions. 10 C.F.R. § 2.345 (ten days)

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(...continued)

record in a hearing “must be timely” and satisfy strict criteria. 10 C.F.R. § 2.326(a)(1). These rules apply to hearing cases; no such opportunity to seek reopening or reconsideration exists for agency actions noticed in the Federal Register for which an opportunity for hearing is not offered, especially, as here, an order made immediately effective.

Accordingly, petitioners here cannot resuscitate a late challenge to the exemption simply by asking the Commission to reopen or reconsider its “immediately effective” action noticed in the Federal Register, especially when the Commission’s regulations provide no such relief. They cannot “do indirectly what . . . is forbidden by statute from doing directly,” that is, “seek review . . . even though [they] could have but did not seek direct review” of the underlying agency action. *NRDC v. NRC*, 666 F.2d at 601. To hold otherwise would “permit back door procedural challenges by those who had the opportunity to seek direct review of [agency actions] but failed to do so in a timely fashion.” *Id.* at 602.

## **II. An exemption is not a licensing action or rulemaking.**

As shown, petitioners are too late to ask for a substantive review of the exemption. Insofar as their petition for judicial review challenges the Commission’s rejection of their hearing request, this Court does have jurisdiction (*see Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985)), but the petition should be summarily denied. The grant of an exemption is not a licensing or rulemaking action under Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, that triggers a right to a hearing. Section 189(a) grants hearing rights to persons whose interest “may be affected by the proceeding” where the proceeding is “for

the granting, suspending, revoking, or amending of any license” or “for the issuance or modification of rules and regulations dealing with the activities of licensees.”

In this case, the NRC’s grant of an exemption for Indian Point 3 did not grant or amend the plant’s operating license, or issue or modify any rule. An exemption is not one of the NRC actions Section 189 lists as triggering a hearing. Accordingly, no right to a hearing existed here.

Every court to consider this issue has rejected the attempt to cloak the NRC’s exemptions with the mantle of a license amendment. As the Sixth Circuit made clear in *Kelley v. Selin*, 42 F.3d 1501 (6<sup>th</sup> Cir. 1995), “the mere grant of an exemption . . . does not trigger a right to an adjudicatory hearing on the part of petitioners.” *Id.* at 1514. Or, putting it in terms of Section 189, “the grant of an exemption from a generic requirement does not constitute an amendment to the reactor’s license that would trigger hearing rights.” *Id.* at 1517. As the Court explained:

[N]ot every proposed action falls under this provision; the right to automatic participation applies only when the agency acts in a matter provided for in § 189(a), which includes matters generally concerned with the licensing process. . . . If the Commission did not have such authority, and public participation were automatically required for any agency action, the public would be entitled to an unrestrained platform that would disable the Commission and effectively prevent it

from taking any action.”

42 F.2d at 1514 (*citing Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983)).

*See also Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1<sup>st</sup> Cir. 1989)(exemption from emergency drill regulation did not trigger hearing rights). Inasmuch as the license for Indian Point 3 was not amended, no basis exists for petitioners to demand a hearing.

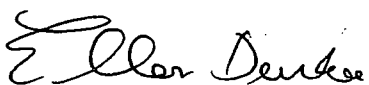
As it has consistently done in the past, however, the Commission would, if requested by petitioners, consider and respond to their substantive safety concerns about the exemption under its citizens’ petition process in 10 C.F.R. § 2.206. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Riverkeeper v. Collins*, 359 F.3d 156, 158 (2d Cir. 2004). The courts have noted, in fact, that persons like petitioners are “not without recourse” inasmuch as they may file a Section 2.206 petition. *Kelley v. Selin*, 42 F.3d at 1515.

### **Conclusion**

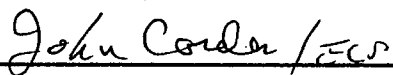
The petition is untimely insofar as it seeks a merits review of the exemption granted to Indian Point 3. The 60-day period for filing was far exceeded and was not tolled by petitioners’ request for a hearing. As for petitioners’ hearing request, Section 189 of the Act does not provide for hearings on exemptions such as the

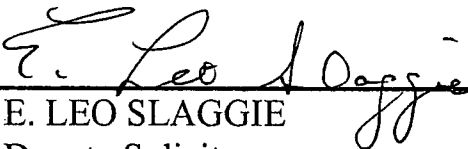
fire protection exemption at issue here. So, the NRC lawfully refused to grant a hearing here. The NRC has never offered an opportunity for hearing in such as case, nor is it required to do so under Section 189. Accordingly, this case petition for review should be dismissed for lack of jurisdiction insofar as it seeks merits review, and denied summarily insofar as it challenges the Commission's denial of a hearing.

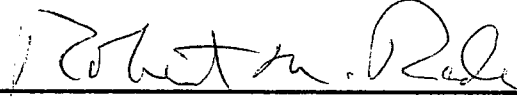
Respectfully submitted,

  
\_\_\_\_\_  
ELLEN DURKEE /EDW  
Attorney  
Appellate Section  
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P.O. Box 23795  
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KAREN D. CYR  
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Dated: May 2, 2008

Exh. 1



SECRETARY

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

January 30, 2008

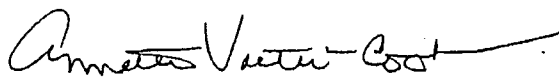
Susan Shapiro, Esquire  
12 Perlman Drive  
Spring Valley, NY 10977

RE: Objection to NRC's grant of an exemption to Indian Point Unit 3

Dear Ms. Shapiro:

We received your petition on behalf of several organizations expressing your objection to the U.S. Nuclear Regulatory Commission's (NRC) September 28, 2007 grant of an exemption concerning Indian Point Unit 3 fire protection standards. The action you are challenging is an exemption from NRC regulations; it is not a license amendment as asserted in your petition. In *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90 (2000), the Commission examined the text and legislative history of §189a. of the Atomic Energy Act and concluded that the Atomic Energy Act does not provide for hearings on exemptions from NRC regulations. See also *Kelley v. Selin*, 42 F.3d 1501, 1517 (6<sup>th</sup> Cir. 1995), ("[T]he grant of an exemption from a generic requirement does not constitute an amendment to the reactor's license that would trigger hearing rights.") Accordingly, your request for a hearing is denied.

Sincerely,

  
Annette Vietti-Cook

Martin J. O'Neill, Esquire

**Federal Register** of a permit applications received. Permits were issued on October 1, 2007 to: Andrea Polli, Permit No. 2008-001. Robert A. Garrott, Permit No. 2008-016.

Nadene G. Kennedy,  
Permit Officer.

[FR Doc. E7-19611 Filed 10-3-07; 8:45 am]

BILLING CODE 7555-01-P

## NATIONAL SCIENCE FOUNDATION

### Notice of Permits Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95-541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

**FOR FURTHER INFORMATION CONTACT:** Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

**SUPPLEMENTARY INFORMATION:** On August 27, 2007, the National Science Foundation published a notice in the **Federal Register** of a permit application received. A permit was issued on September 28, 2007 to: Mahlon C. Kennicutt, Permit No. 2008-014.

Nadene G. Kennedy,  
Permit Officer.

[FR Doc. E7-19622 Filed 10-3-07; 8:45 am]

BILLING CODE 7555-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-286]

### Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Unit No. 3.; Revision to Existing Exemptions

#### 1.0 Background

Entergy Nuclear Operations, Inc. (ENO or the licensee) is the holder of Facility Operating License No. DPR-64, which authorizes operation of the Indian Point Nuclear Generating Unit No. 3 (IP3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC or the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Westchester County, New York.

#### 2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR), Part 50, § 50.48, requires that nuclear power plants that were licensed before January 1, 1979, of which IP3 is one, must satisfy the requirements of 10 CFR Part 50, Appendix R, Section III.G. Subsection III.G.2 addresses fire protection features for ensuring that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. Subsection III.G.2.c provides use of a 1-hour fire barrier, in addition to installed fire detection and automatic fire suppression in the area, as one means for complying with this fire protection requirement.

In an NRC letter and safety evaluation (SE) dated February 2, 1984, the NRC granted the licensee exemptions from the requirements of Appendix R, Section III.G.2, for Fire Area ETN-4 (Fire Zones 7A, 60A and 73A) to the extent that redundant safe-shutdown trains are not separated by more than 20 feet without intervening combustibles or fire hazards, and that redundant safe-shutdown trains are not separated by 1-hour rated fire barrier in an area protected by automatic fire detection and suppression systems. The exemption was based on the minimum of 12' spatial separation between the redundant trains, minimal fire hazards in the area, the use of asbestos-jacketed flame-retardant cables, and the installed automatic fire detection and cable tray suppression systems.

Following a comprehensive reassessment of the IP3 Appendix R compliance basis, the licensee identified the need for additional separation measures and installed 1-hour rated fire wraps on several redundant safe-shutdown raceways in Fire Area ETN-4 (Fire Zones 7A, 60A and 73A). By SE dated January 7, 1987, the NRC accepted the use of 1-hour rated fire barriers in the above fire area and confirmed continued validity of the exemption granted by the February 2, 1984 SE. IP3 used the Hemyc fire barrier system to provide the 1-hour rated fire barriers. In the January 7, 1987 SE, the NRC also approved an exemption from Appendix R, Section III.G.2, separation requirements for Fire Area PAB-2 (Fire Zone 1) to the extent that redundant safe-shutdown trains are not separated by more than 20 feet without intervening combustibles or fire hazards, and that an automatic suppression system has not been

provided. The basis for this exemption included the partial spatial separation between the redundant safe-shutdown trains, the low fire loading in the area, and the existing fire protection features including an automatic fire detection system, manual hose stations and portable extinguishers, a partial-height non-combustible barrier designed to protect redundant equipment against radiant heat from a fire, and a 1-hour rated Hemyc cable wrap around the normal power feed to the redundant Component Cooling Water (CCW) Pump 33.

Testing by the NRC in 2005 identified Hemyc electrical raceway fire barrier system (ERFBS) as a potential nonconforming barrier, potentially not capable of providing a 1-hour fire rating, and Information Notice (IN) 2005-07, "Results of HEMYC Electrical Raceway Fire Barrier System Full Scale Fire Testing," and Generic Letter (GL) 2006-03, "Potentially Nonconforming Hemyc and MT Fire Barrier Configurations," were issued to licensees to inform them of the issue and to collect information regarding Hemyc fire barrier installations. In response to GL 2006-03, ENO informed the NRC that they had declared the Hemyc ERFBS at IP3 inoperable and implemented temporary compensatory measures including an hourly fire watch and verification that fire detection systems are operable in the affected fire areas until compliance is restored for the Hemyc ERFBS. In a letter dated July 24, 2006, ENO stated they would modify the installed Hemyc ERFBS based on the test results. This would provide at least a 24-minute rated fire barrier for cable tray configurations, and a 30-minute rating for conduit and box configurations, between redundant trains of safe-shutdown equipment and cables, which is less than the previously approved 1-hour fire barrier. ENO asserted that in light of the minimal fire hazards and the existing fire protection features in the affected fire areas, this configuration continues to satisfy the basis for an exemption in accordance with 10 CFR 50.12.

In summary, by letter dated July 24, 2006, and supplemental letters dated April 30, May 23, and August 16, 2007, responding to the NRC staff's request for additional information, ENO submitted a request for revision of existing exemptions for the Upper and Lower Electrical Tunnels (Fire Area ETN-4, Fire Zones 7A and 60A, respectively), and the Upper Penetration Area (Fire Area ETN-4, Fire Zone 73A), to the extent that 24-minute rated fire barriers are used to protect redundant safe-shutdown trains located in the above fire areas in lieu of the previously

approved 1-hour rated fire barriers per the January 7, 1987 SE. For the 41' Elevation CCW Pump Area (Fire Area PAB-2, Fire Zone 1) ENO is requesting a revision of the existing exemptions to the extent that a 30-minute rated fire barrier is provided to protect redundant safe shutdown trains located in the same fire area.

### 3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. One of these special circumstances, described in 10 CFR 50.12(a)(2)(ii), is that the application of the regulation is not necessary to achieve the underlying purpose of the rule.

The underlying purpose of Subsection III.G.2 of 10 CFR 50, Appendix R, is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. The provisions of III.G.2.c through the use of a 1-hour fire barrier with fire detectors and an automatic fire suppression system is one acceptable way to comply with this fire protection requirement.

The NRC staff reviewed the licensee's evaluation in support of the subject exemption revision request for a 24-minute rated fire barrier for ETN-4, and 30-minute rated fire barrier for PAB-2, in lieu of a 1-hour rated barrier, and concluded that given the existing fire protection features in the affected fire zones, ENO continues to meet the underlying purpose of 10 CFR Part 50, Appendix R, Subsection III.G.2 for the cable tray, conduit and junction box configurations. The following technical evaluation provides the basis for this conclusion.

#### 3.1 Fire Hazards

The licensee stated that the fire hazards and ignition sources in both Fire Areas ETN-4 and PAB-2 remain materially unchanged from those described in the SEs dated February 2, 1984, and January 7, 1987. For Fire Area ETN-4, the ignition sources consist of limited transient combustibles (in all fire zones), and several instrument cabinets and a 3kVA 480V/120V instrument power transformer in Fire Zone 73A. The current IP3 Fire Hazard Analysis calculated the fire severity in Fire Area ETN-4 to be less than 60

minutes, with asbestos-jacketed flame-retardant cable insulation being the predominant combustible. The licensee states that the asbestos-jacketed cable would not constitute a significant component of the fuel source due to the flame-retardant nature of the cable.

Based on a November 22, 1982, letter that included results of testing of asbestos-jacketed cable, NRC staff concludes that the ignition sources in the area are unlikely to cause fire propagation along the cables to a significant degree, and therefore, it is reasonable to exclude the asbestos-jacketed cable from being considered a hazard within the area.

For the 41' Elevation CCW Pump Area (PAB-2, Fire Zone 1), the current IP3 Fire Hazard Analysis indicated a fire severity of less than 10 minutes. Combustibles are predominantly attributed to the CCW pump bearing lubricating oil and transient materials.

#### 3.2 Rated Fire Wraps

The licensee has performed an engineering evaluation to compare the details of the NRC-sponsored Hemyc fire test configurations as reported in NRC IN 2005-07, "Results of Hemyc Electrical Raceway Fire Barrier System Full Scale Fire Testing," with the details of the installed Hemyc ERFBS at IP3. The evaluation established that the configurations are comparable in most cases. Where differences were noted, minor enhancements to the ERFBS supports and installation of additional over-banding on certain enclosures will be performed to upgrade the configurations. Based on these upgrades, the licensee expected the Hemyc ERFBS at IP3 to provide at least 24 minutes of protection for cable tray configuration, and 30 minutes for conduit and box-type configurations, as demonstrated by comparison to relevant NRC-tested configurations. The following are comparisons between the IP3 Hemyc installations and NRC-sponsored test configurations:

##### 4-Inch Conduit Configuration

The Hemyc-wrapped 4-Inch Conduit Configuration installed in Fire Area ETN-4 (Fire Zones 60A and 73A) and Fire Area PAB-2 (Fire Zone 1) is comparable to Configuration 1A in NRC Test 1. These are 4" conduits protected by a direct-attached 2"-thick Hemyc blanket wrap. Tests performed by both NRC and industry indicated that this configuration provides at least 30 minutes of protection from an exposed fire using the American Society for Testing and Materials (ASTM) standard E-119 time-temperature profile.

##### Box-Type Configuration

The Hemyc-wrapped Box-Type Configuration installed in Fire Area ETN-4 (Fire Zone 73A) is comparable to Configuration 2G in NRC Test 2, except for the lack of the stainless steel over-banding. These enclosures are protected by a direct-attached 2"-thick Hemyc blanket wrap. Both NRC and industry-sponsored tests indicated that box-type configurations provided at least 30 minutes of thermal protection when tested in accordance with ASTM E-119. However, to more closely reflect Configuration 2G, the licensee is committed to install over-banding on the Box-Type Configuration at IP3.

##### Cable Tray Configuration

The Hemyc-wrapped Cable Tray Configuration installed in Fire Area ETN-4 (Fire Zones 7A and 73A) is comparable to Configuration 2B and 2D of NRC Test 2. These cable trays are protected by a 1-1/2"-thick Hemyc blanket wrap with a nominal 2" air gap between the protected cable tray and the blanket. Fire tests conducted by both NRC and industry indicated that these Hemyc-wrapped cable tray configurations will provide at least 24 minutes of thermal protection in accordance with the ASTM E-119 time-temperature profile.

Based on the above, the NRC staff concludes that the licensee has adequately demonstrated a 30-minute rated fire wrap for the 4-Inch Conduit Configuration and Box-Type Configuration. The Cable Tray Configuration has been adequately demonstrated to provide a 24-minute rated fire wrap.

#### 3.3 Existing Fire Protection Features

Fire Area ETN-4 contains the Upper and Lower Electrical Tunnels (Fire Zones 7A and 60A, respectively) and the Upper Penetration Area (Fire Zone 73A). This area is separated from other plant areas by 3-hour rated fire barriers. Automatic fire detection systems and automatic cable tray fire suppression systems are installed in the area. Manual fire suppression features including accessible fire hose stations and portable fire extinguishers are also provided.

Fire Area PAB-2 contains the 41' Elevation CCW Pump Area (Fire Zone 1). This fire area is separated from other fire areas by 3-hour rated fire barriers. There is a portion of open grating from this area to the 55' elevation above. However, the open grating is located approximately 9 feet to the east of the CCW pumps; therefore, there is no potential for combustible liquids to drip



directly onto the CCW pumps area. Furthermore, the area on the 55' elevation only houses components such as the CCW heat exchangers, boric acid transfer pump, air receivers, and various compressed air and gas tanks that normally contain minimal combustible liquids. Automatic fire detection systems and manual fire suppression features in the form of accessible fire hose stations and portable fire extinguishers are provided in this fire zone. In addition, a 7' partial height, noncombustible barrier is installed around the redundant 33 CCW Pump to shield this pump from radiant heat in the event of a fire in the other CCW pumps area.

### 3.4 Enhanced Administrative Controls of Hot Work and Transient Combustibles

The licensee stated that administrative controls of hot work and transient combustibles have improved since the previous exemptions. IP3 administrative procedures now designated Fire Areas ETN-4 and PAB-2 as "Level 2" combustible control areas, which constrain transient combustibles to "moderate" quantities as follows:

- 100 pounds of fire retardant treated lumber, or
- 25 pounds of loose ordinary combustibles or plastics, or
- 5 gallons of combustible liquids stored in approved containers, or
- One pint of flammable liquids stored in approved containers, or
- One 20 ounce flammable aerosol can.

Any planned introduction of transient combustibles that is more than the allowable amount will require prior review and approval by a Fire Protection Engineer. In addition, any planned hot work in Fire Areas ETN-4 and PAB-2 will also require prior review and approval by a Fire Protection Engineer. The review will determine if additional protective or compensatory measures is required.

### 3.5 Evaluation

10 CFR Part 50, Appendix R, Section II states that a licensee's fire protection program shall extend the concept of defense-in-depth (DID) to fire protection with the following objectives:

1. To prevent fires from starting,
2. To detect rapidly, control, and extinguish promptly those fires that do occur, and
3. To provide protection for structures, systems, and components important to safety so that a fire that is not promptly extinguished by the fire

suppression activities will not prevent the safe shutdown of the plant.

The NRC staff has evaluated the elements of DID used for fire protection at IP3, applicable to the fire zones under review. The staff was concerned about the introduction of additional ignition sources and transient combustibles into the affected areas. However, the concern is addressed by existing administrative controls at IP3 which effectively limit transient combustibles to a level that would not significantly challenge the existing fire protection features in the affected areas. The administrative control procedures at IP3 ensure that transient combustibles, which may exceed the allowable limit, will not be introduced into the affected fire zones without prior evaluation by a qualified Fire Protection Engineer, and without appropriate additional compensatory measures. The three CCW pumps make up the ignition sources in the 41' Elevation CCW Pump Area (Fire Zone 1). Each of these pumps contain a small amount of lubricating oil, with a combined fire severity of less than 10 minutes. As such, a significant fire is not expected to develop in this fire zone. The Upper Electrical Tunnel, Fire Zone 60A, contains no fixed ignition sources, and the combustible load consists of primarily asbestos-jacketed cables. Therefore, based upon consideration of the limited fire ignition sources and fire hazards in the affected areas, and the existing administrative controls of hot works and transient combustibles at IP3, the staff concludes that objective one of DID is adequately met.

Based on the evaluation of fire detection and suppression systems provided in the affected fire zones, the NRC staff determined that any postulated fire is expected to be promptly detected by the available automatic fire detection systems in Fire Area ETN-4 (Fire Zone 60A) and Fire Area PAB-2 (Fire Zone 1). Fire Zone 60A is provided with an automatic cable tray fire suppression system, as well as manual suppression equipment. Fire Zone 1 is provided with manual fire suppression only. The available fire detection and suppression equipment in these fire zones ensure that a postulated fire will not be left unchallenged. In addition, since Fire Zone 1 and 60A contain low combustible loading, the NRC staff concluded that the reduction in the level of DID due to the lack of an areawide automatic fire suppression system in these fire zones does not affect the prompt detection and suppression capability of DID objective 2.

With the proposed additional protection of electrical raceway supports and installation of over-banding on Hemyc box configurations, the modified fire barrier configurations are expected to afford at least 24 minutes for cable tray configurations and 30 minutes of protection for conduit and box configurations. Since the Hemyc ERFBS is expected to provide only 24 or 30 minutes of protection for redundant components and cables in the event of a fire, the NRC staff was concerned about the fire loading in Fire Area ETN-4 (Fire Zone 60A). However, in light of the properties of the asbestos-jacketed cables and the installed fire detection and automatic and manual suppression systems in the area, the staff determined that a credible fire in Fire Zone 60A will be limited in severity and would not challenge the 24- or 30-minute barriers. For Fire Area PAB-2 (Fire Zone 1), the NRC staff also concluded that the 30-minute fire barrier rating is adequate in protecting the redundant safe shutdown equipment due to the lack of significant combustible loading in the area, the partial fire wall which localizes a postulated fire from affecting redundant equipment, and the available fire detection and manual suppression systems.

Based on the limited ignition sources and administrative controls satisfying DID objective 1, in conjunction with installed fire detection and suppression features which adequately satisfy DID objective 2, the NRC staff concluded that the minimal combustibles in the areas and existing active/passive fire protection features can compensate for the reduction in DID of objectives 3 and would not impact IP3 post-fire safe-shutdown capability.

### 3.6 Authorized by Law

This exemption would allow use of a fire barrier expected to provide less than 1 hour of fire protection. As stated in Section 3.0 above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR Part 50. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

### 3.7 No Undue Risk to Public Health and Safety

The underlying purpose of Subsection III.G.2 of 10 CFR Part 50, Appendix R, is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of

fire damage in the event of a fire. Based on the existing fire barriers, fire detectors, automatic and manual fire suppression equipment, administrative controls, the fire hazard analysis, the Hemyc configuration, and the absence of significant combustible loads and ignition sources, the NRC staff judges that application of Subsection III.G.2 of 10 CFR Part 50, Appendix R, for these Fire Areas is not necessary to achieve the underlying purpose of this regulation. No new accident precursors are created by allowing use of a fire barrier expected to provide less than 1 hour of fire protection and the probability of postulated accidents is not increased. Similarly, the consequences of postulated accidents are not increased. Therefore, there is no undue risk (since risk is probability multiplied by consequences) to public health and safety.

### 3.8 Consistent With Common Defense and Security

The proposed exemption would allow use of a fire barrier expected to provide less than 1 hour of fire protection based on the existing fire barriers, fire detectors, automatic and manual fire suppression equipment, administrative controls, the fire hazard analysis, the Hemyc configuration, and the absence of significant combustible loads and ignition sources. This change to the plant requirements for the specific configuration in this fire zone has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

### 3.9 Special Circumstances

One of the special circumstances, described in 10 CFR 50.12(a)(2)(ii), is that the application of the regulation is not necessary to achieve the underlying purpose of the rule. The underlying purpose of Subsection III.G.2 of 10 CFR Part 50, Appendix R, is to ensure that one of the redundant trains necessary to achieve and maintain hot shutdown conditions remains free of fire damage in the event of a fire. For Fire Area ETN-4 (Fire Zones 7A, 60A, and 73A) and Fire Area PAB-2 (Fire Zone 1), the NRC staff finds that the existing configuration described herein will ensure that a redundant train necessary to achieve and maintain safe shutdown of the plant will remain free of fire damage in the event of a fire in these fire zones. Based upon consideration of the information in the licensee's Fire Hazards Analysis, administrative controls for transient combustibles and ignition sources, previously-granted exemptions for this fire zone, and the considerations noted above, the NRC

staff concludes that this exemption meets the underlying purpose of the rule.

### 4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(a), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. In addition, a special circumstance is present such that the application of the regulation in these particular circumstances is not necessary to achieve the underlying purpose of the rule. Therefore, the Commission hereby grants ENO an exemption from the requirement of Section III.G.2 of 10 CFR Part 50, Appendix R, for Fire Area ETN-4 (Fire Zones 7A, 60A, and 73A) and Fire Area PAB-2 (Fire Zone 1) at IP3, provided that the existing Hemyc ERFBS in these areas are modified to achieve at least a 24-minute fire resistance rating for cable tray configuration and 30-minute fire resistance rating for conduits and box configurations, consistent with the licensees comparison to the NRC's tested configurations as documented in Entergy Engineering Report IP-RPT-06-00062, Revision 0, "Comparison of IP3 Hemyc Electrical Raceway Fire Barrier System to NRC Hemyc Fire Test Results," which meet ASTM-E-119 temperature rise acceptance criteria. The modifications, as committed in Entergy Letter NL-07-061, dated May 23, 2007, will include:

Complete modification (including supporting engineering evaluation) to install stainless steel over-banding (as described), additional protection of the electrical raceway supports, and protection of certain metallic penetration items, associated with the existing Hemyc ERFBS located outside containment at Indian Point 3. [This is a clarification of commitment 3 (licensee reference number COM-07-00034) made in Entergy Letter NL-06-060 dated June 8, 2006.]

The licensee is also committed to keep fire protection compensatory measures in place at IP3 until the aforementioned modifications are completed. The scheduled completion date of these modifications is December 1, 2008. The acceptance of this exemption is also based on the licensee's stated availability of administrative control procedures that control hot work and limit transient combustibles in the affected areas.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment (72 FR 55254).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 28th day of September 2007.

For the Nuclear Regulatory Commission.

Catherine Haney,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7-19663 Filed 10-3-07; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket No. STN 50-456]

### Exelon Generation Company, LLC; Braidwood Station, Unit 1; Exemption

#### 1.0 Background

Exelon Generation Company, LLC (Exelon, the licensee) is the holder of Facility Operating License No. NPF-72, which authorizes operation of Braidwood Station, Unit 1. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of two pressurized-water reactors located in Will County in Illinois.

#### 2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50, section 50.46,

"Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors," requires, in part, "that each boiling or pressurized light-water nuclear power reactor fueled with uranium oxide pellets within cylindrical Zircaloy or ZIRLO cladding must be provided with an emergency core cooling system (ECCS) that must be designed so that its calculated cooling performance following postulated loss-of-coolant accidents conforms to the criteria set forth in paragraph (b) of this section." 10 CFR Part 50, Appendix K, "ECCS Evaluation Models," requires, among other items, that the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation. 10 CFR 50.46 and 10 CFR Part 50, Appendix K make no provisions for use of fuel rods clad in a material other than Zircaloy or ZIRLO.

The Braidwood, Unit 1 core consists of a combination of Westinghouse-designed VANTAGE 5 and VANTAGE+ fuel assemblies. Each fuel assembly has 264 fuel rods arranged in a 17 by 17 array. The licensee intends to insert up to eight fuel assemblies containing AREVA NP Inc. (AREVA) modified Advanced Mark-BW(A) (Advanced Mark-BW(A)) fuel. These assemblies will be placed in nonlimiting locations of the core during Cycles 15, 16,

UNITED STATES  
NUCLEAR REGULATORY COMMISSION

*In the matter of*

ENERGY NUCLEAR INDIAN POINT 2, LLC, ENERGENCY )  
NUCLEAR INDIAN POINT 3, L.L.C, And Entergy Nuclear )  
Operations, Inc. and Entergy North East, Inc., regarding the )  
Indian Point Energy Center )  
Unit 2 and Unit 3 )  
License Amendment Regarding Fire Protection Program )

License No. DPR 26 an  
License No. DPR 6  
Docket No. 50-247 an  
Docket No. 50-28

**OBJECTION TO GRANT OF EXEMPTION**  
**AND LICENSE AMENDMENT,**  
**PETITION TO REOPEN FOR CONSIDERATION,**  
**PETITION FOR LEAVE TO INTERVENE and**  
**REQUEST FOR HEARING, AND CONTENTIONS**

Westchester Citizen’s Awareness Network (referred to hereinafter as  
“WestCAN”), Rockland County Conservation Association (referred to  
hereinafter as “RCCA”), and Public Health and Sustainable Energy (referred  
to hereinafter as “PHASE”), Sierra Club –Atlantic Chapter (“Sierra Club”),  
Beyond Nuclear, and New York State Assemblyman Richard Brodsky  
 (“Brodsky”) , are individually and jointly referred to hereinafter as  
“Stakeholders”, pursuant to 10 CFR § 2.309 (d) and (e), object to the Nuclear

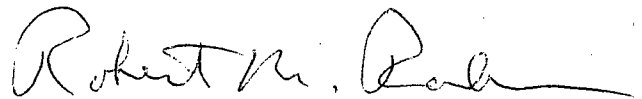
## CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of May 2008 served upon the following, by deposit in the United States Mail, first class, postage prepaid, a copy of Federal Respondents' Motion to Dismiss and form T-1080:

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