

March 18, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/ 50-286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

NRC STAFF'S ANSWER TO APPLICANT'S MOTION FOR
SUMMARY DISPOSITION OF NEW YORK STATE
CONTENTION 17/17-A (PROPERTY VALUES)

Pursuant to 10 C.F.R. § 2.1205(b), the NRC Staff ("Staff") hereby files its answer to "Entergy Nuclear Operations, Inc. Motion for Summary Disposition of New York State Contention 17/17-A (Property Values)" ("Motion"), filed by Entergy Nuclear Operations, Inc. ("Applicant" or "Entergy") on February 26, 2010.¹ For the reasons set forth below, the Staff has concluded that it agrees with the statements contained in the Applicant's Statement of Material Facts and the arguments set forth in its Motion. Based on its review of these matters, the Staff submits that no genuine dispute of material fact exists with respect to New York State ("NYS") Contention 17/17-A, and the Applicant's Motion should be granted as a matter of law.²

¹ In support of its Motion, Entergy filed a "Statement of Material Facts on Which No Genuine Dispute Exists" ("Statement of Material Facts"), and two Exhibits: (1) "Excerpt from David Clark & Leslie Nieves, An Interregional Hedonic Analysis of Noxious Facility Impacts on Local Wages and Property Values, 27 J. of Env'l Econ. & Mgmt. 235 (1994)," and (2) "Sherman Folland and Robin Hough, Externalities of Nuclear Power Plants: Further Evidence, 40 J. of Reg'l Sci. 735 (2000)."

² On March 18, 2010, New York filed its response to the Applicant's Motion. See "State of New York's Response to Entergy's Motion for Summary Disposition on New York Contentions 17 and 17-A" ("NYS Response"), dated March 18, 2010.

BACKGROUND

The State of New York ("State" or "New York") filed NYS Contention 17 on November 30, 2007.³ As filed by the State, NYS Contention 17 asserted:

NYS Contention 17

The Environmental Report fails to include an analysis of adverse impacts on off-site land use of license renewal and thus erroneously concludes that relicensing of IP2 and IP3 "will have a significant positive economic impact on the communities surrounding the station" (ER Section 8.5) and understates the adverse impact on off-site land use (ER Sections 4.18.4 and 4.18.5) in violation of 10 C.F.R. Part 51, Subpart A, Appendix B.

NYS Petition at 167; capitalization omitted. In support of this contention, New York asserted that Entergy's ER analysis of land use impacts is deficient "because it ignores the positive impact on land use and land value from denial of the license extension." *Id.* at 168. New York stated that the ER "looks only at tax-driven and population-driven impacts" and "completely ignor[es] the impact on adjacent lands of the unexpected continued operation of a nuclear generating facility." *Id.* at 169. Further, New York asserted that property values in the vicinity of the Indian Point site would rise if the licenses were not renewed, relying on the Declaration of Stephen C. Sheppard and a report which he had authored. *Id.* at 172-74. Both the Applicant and the Staff opposed the admission of NYS Contention 17.⁴

³ "New York State Notice of Intention to Participate and Petition to Intervene," filed November 30, 2007 ("NYS Petition") at 167-74.

⁴ See "NRC Staff's Response to Petitions for Leave to Intervene Filed by (1) Connecticut Attorney General Richard Blumenthal, (2) Connecticut Residents Opposed to Relicensing of Indian Point, and Nancy Burton, (3) Hudson River Sloop Clearwater, Inc., (4) the State of New York, (5) Riverkeeper, Inc., (6) the Town of Cortlandt, and (7) Westchester County" ("Staff Response to Initial Contentions"), filed January 22, 2008; at 58-59; and "Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene" ("Applicant's Response to Initial Contentions"), filed January 22, 2008, at 113-18.

On July 31, 2008, the Atomic Safety and Licensing Board ("Board") issued its ruling on petitions to intervene and the admissibility of contentions.⁵ Therein, the Board, *inter alia*, granted New York's petition and admitted 11 of the State's contentions. In particular, as pertinent here, the Board admitted NYS Contention 17,⁶ explaining its decision as follows:

. . . In its ER, the Applicant concluded that the land-use impact from license renewal would be small.

NYS contends that Entergy's analysis was flawed because it did not consider the positive impacts on land values in the Indian Point area that would accrue if the licenses for IP2 and IP3 were not renewed. In support of its claim, NYS submitted the Sheppard Declaration to demonstrate that the value of residential property within two miles of the Indian Point facility would increase by almost \$600 million if the LRA was denied. Neither Entergy nor the NRC Staff has challenged Dr. Sheppard's conclusion regarding the increase in land value. Rather each claims that Entergy's analysis is adequate because the only Category 2 land-use issue that needs to be considered in license renewal proceedings is the potential for tax-driven land use changes. We disagree.

In conducting its analysis of the impact of the license renewal on land-use, Entergy should have considered the impact on real estate values that would be caused by license renewal or non-renewal. NRC Regulations do not limit consideration to tax-driven land-use changes. Table B-1 merely notes that "significant changes in land use may be associated with population and tax-revenue changes resulting from license renewal." It does not limit consideration to tax-driven land-use changes. Accordingly, we admit NYS-17 as a contention of omission.

LBP-08-13, 68 NRC at 115-16; emphasis added, footnotes omitted.⁷

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

⁶ LBP-08-13, 68 NRC at 113-16.

⁷ As summarized by the Board, NYS Contention-17 asserted: "The ER limits consideration of land value to tax-driven land-use changes and does not consider the impact on real estate values caused by license renewal or the positive impacts on land values if the license is not renewed." LBP-08-13, 68 NRC at 218.

In December 2008, the Staff issued its Draft Supplemental Environmental Impact Statement ("Draft SEIS" or "DSEIS"),⁸ concerning the requested license renewal of Indian Point Units 2 and 3 ("IP2" and "IP3"). In its Draft SEIS, the Staff provided a preliminary analysis of the environmental impacts of license renewal and alternatives thereto. Like the Applicant's ER, the Draft SEIS considered population-related and tax revenue-related offsite land use impacts, and it concluded that there would be no population-related or tax revenue-related land use impacts "during the license renewal term beyond those already being experienced." Draft SEIS, § 4.4.3, at 4-40 – 4-41. Further, however, the Draft SEIS explicitly evaluated the impact on property values that might result from non-renewal of the licenses, and concluded as follows:

The shutdown of IP2 and IP3 may result in increased property values of the homes in the communities surrounding the site (Levitan and Associates, Inc. 2005). This would result in some increases in tax revenues. However, to fully offset the revenues lost from the shutdown of IP2 and IP3, taxing jurisdictions most likely would have to compensate with higher property taxes [Id.]. The combined increase in property values and increased taxes could have a noticeable effect on some area homeowners and business, though Levitan and Associates did not indicate the magnitude of this effect and whether the net effect would be positive or negative.

Revenue losses from Indian Point operation would likely affect only the communities closest to and most reliant on the plant's tax revenue and PILOT [Payment-In-Lieu-Of-Taxes]. If property values and property tax revenues increase, some of these effects would be smaller. The NRC staff concludes that the socioeconomic impacts of plant shutdown would likely be SMALL to MODERATE (MODERATE effects for the Hendrick Hudson Central School District, Village of Buchanan, Town of Cortlandt, and the Verplanck Fire District). See Appendix J to NUREG-0586, Supplement 1 (NRC 2002), for additional discussion of the potential impacts of plant shutdown.

⁸ "Generic Environmental Impact Statement for License Renewal of Nuclear Plants Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3," NUREG-1437, Supp. 38 (Dec. 2008).

Draft SEIS at 8-29 – 8-30; emphasis added. In sum, the Staff determined that the magnitude of land use impacts resulting from license renewal would be “SMALL,” as defined in the Generic Environmental Impact Statement (“GEIS”).⁹ *Id.* at 4-40 and 8-27.¹⁰

On February 27, 2009, the State filed five amended and new contentions concerning the Draft SEIS.¹¹ In particular, the State filed Amended NYS Contention 17-A to challenge the Staff’s discussion of land use impacts in the Draft SEIS. See DSEIS Contentions at 14-20. Just as it had asserted in NYS Contention 17 with respect to the Applicant’s ER, in Amended Contention 17-A the State asserted that the Staff’s Draft SEIS had “ignore[d]” the adverse impact of license renewal on nearby land values. The State asserted:

⁹ “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” NUREG-1437 (May 1996). In the GEIS, the environmental impacts of license renewal are categorized as having “SMALL” significance where the “environmental impacts are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute of the resource. . . .” NUREG-1437, at 1-4. In contrast, impacts having “MODERATE” significance are those where the “environmental effects are sufficient to alter noticeably but not to destabilize important attributes of the resource”; impacts having “LARGE” significance are those where the “environmental effects are clearly noticeable and are sufficient to destabilize important attributes of the resource.” *Id.* at 1-4 – 1-5. *Accord*, DSEIS at 1-3. With respect to land use impacts, Section 4.7.4 of the GEIS defines the magnitude of land use changes resulting from plant operation during the license renewal term as follows:

- SMALL— Little new development and minimal changes to an area’s land use pattern.
- MODERATE— Considerable new development and some changes to the land use pattern.
- LARGE— Large-scale new development and major changes in the land use pattern.

GEIS at 4-107 – 4-108; see Draft SEIS at 4-40.

¹⁰ Similarly, the Staff considered the land use impacts of the “no-action” alternative, in which the operating licenses of IP2 and IP3 are not renewed. In this regard, the Staff observed that “full dismantling of structures and site decontamination may not occur for up to 60 years after plant shutdown,” DSEIS at 8-25, the land use impacts would be similar regardless of whether decommissioning occurs after 40 or 60 years of operation, *Id.* at 8-27, and the land use impacts of plant shutdown would be “SMALL.” *Id.*

¹¹ “State of New York Contentions Concerning NRC Staff’s Draft Supplemental Environmental Impact Statement” (“DSEIS Contentions”), filed February 27, 2009.

The DSEIS's evaluation of land use impacts is deficient because it ignores the positive impact on land use and land value from denial of the license extension for IP2 and IP3. . . .

The DSEIS improperly limited its analysis of the land use impacts of relicensing to plant-related population growth or to land development driven by tax revenues generated by the plant. This analysis is improper because "NRC regulations do not limit consideration to tax-driven land-use changes" and "the impact on real estate values that would be caused by license renewal or non-renewal" should have been considered in an environmental analysis of relicensing IP2 and 3. [*citing* LBP-08-13, 68 NRC at 116.]

DSEIS Contentions at 15.

Significantly, nowhere in its contentions challenging the Draft SEIS did the State acknowledge or address the Draft SEIS's discussion of property value impacts (see Draft SEIS at 8-29); similarly, nowhere did the State address the Draft SEIS discussion of the 60-year period that would be required before the site would be decommissioned following plant shutdown.¹² Rather, New York claimed that if the licenses are not renewed, "the plants would be decommissioned in 6 years such that the site would be available for unrestricted use and all the nuclear wastes at the site would be gone by 2025." DSEIS Contentions at 15.¹³ According to the State, non-renewal of the licenses will "substantially increase the beneficial uses for land adjacent to (within 2 miles) of the Indian Point site and will increase the value of that land," whereas "[e]xtended operation of IP2 or IP3 will deprive adjacent lands of the economic recovery that they would otherwise enjoy if IP2 and IP3 are not relicensed" and result in additional storage of spent fuel and an "adverse impact on the value of adjacent land and its development." *Id.* at 15, 16. In presenting these claims, the State claimed that the Staff's

¹² See n.9 *supra*.

¹³ The State provided no apparent basis for its assertion that the site could be decommissioned "in 6 years," or any reason to believe that the site would be remediated and all spent fuel would be gone from the site by 2025. See NYS Petition at 168, DSEIS Contentions at 15.

discussion of population-related and tax revenue- related land use impacts on page 4-41 of the Draft SEIS “are the only two land use impacts addressed; “[t]he DSEIS did not consider the changes in property values” associated with license renewal and increased spent fuel storage; and if the licenses were not renewed, “the suppressed land values of adjacent property would recover” emphasis added. *Id.* at 18-19, 20.¹⁴

On June 16, 2009, the Board ruled on the admissibility of the State’s new and amended DSEIS contentions, in which it decided, *inter alia*, to admit NYS Contention 17-A.¹⁵ In so ruling, the Board found that the amended contention updated original NYS Contention 17 to assert that the Staff “erred in a similar manner to Entergy,” so that “the original contention is now relevant to the Draft SEIS, as well as to the ER.” Order of June 16, 2009, at 8. Significantly, the Board rejected Entergy’s assertion that the original contention had been mooted by the Draft SEIS, on the grounds that “Entergy has not filed a motion for summary disposition and we have not addressed the issue *sua sponte* at this time,” *Id.*, and the Board left open the opportunity to revisit this issue upon the filing of a motion to dismiss the contention as moot.¹⁶

On February 26, 2010, the Applicant filed its motion for summary disposition of NYS Contention 17/17-A. Therein, the Applicant asserted that NYS Contention 17/17-A should be dismissed, on the grounds that (1) the asserted impacts on property values are not required to be considered in an EIS under the National Environmental Policy Act of 1969 (“NEPA”),

¹⁴ Both the Applicant and the Staff opposed the admission of NYS Contention 17-A. See (a) “NRC Staff’s Answer to Amended and New Contentions Filed by the State of New York and Riverkeeper, Inc., Concerning the Draft [SEIS]” (“Staff Response to DSEIS Contentions”), dated March 24, 2009, at 14-16, and (b) “Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State” (“Applicant’s Response to DSEIS Contentions”), filed March 24, 2009, at 15-30.

¹⁵ “Order (Ruling on New York State’s New and Amended Contentions,” dated June 16, 2009 (“Order of June 16, 2009”), at 7-8.

¹⁶ “Order (Denying New York State’s Motion to Strike,” dated June 16, 2009, at 3.

42 U.S.C. § 4321, *et seq.*, where the impacts “are not directly linked to some physical impact to these properties” but instead are “associated with the public’s perception of risk and aversion to nuclear power facilities and spent fuel storage”; (2) “NEPA does not require consideration of impacts that are dependent on numerous speculative actions by unknown third parties to develop the IPEC site and the surrounding land,” and (3) as a contention of omission, “the omission alleged in this contention was rendered moot by the Draft SEIS.” Motion at 6.

Based on its review of the Applicant’s Motion and relevant case law, the Staff respectfully submits that NYS Contention-17/17-A should be dismissed as a matter of law.

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition

Pursuant to 10 C.F.R. § 2.1205(a), unless otherwise directed, any party may submit a motion for summary disposition in a Subpart L adjudicatory proceeding no later than 45 days prior to the commencement of evidentiary hearings. Such motions must include an explanation of the basis for the motion and affidavits to support statements of fact. In ruling on motions for summary disposition, the Board shall apply the standards for summary disposition set forth in 10 C.F.R. Part 2, Subpart G. 10 C.F.R. § 2.1205(c). Accordingly, as described in Subpart G:

The presiding officer shall render the decision sought if the filings in the proceeding, . . . together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.710(d)(2); *Pacific Gas And Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-08-7, 67 NRC. 361, 371 (2008). Under the NRC's rules, “[a]ll material facts set forth in the statement [of material facts] required to be served by the moving party will be considered to be admitted unless controverted by the statement required to be served by the opposing party. 10 C.F.R. § 2.710(a). The moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the

record that demonstrate the absence of a genuine issue of material fact. *Diablo Canyon*, 67 NRC at 371, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Any party opposing the motion cannot rest on “the mere allegations or denials” in its pleading, but must set forth specific facts showing that there is a genuine issue of fact for trial. 10 C.F.R. § 2.710(b); *Diablo Canyon*, 67 NRC at 372 and cases cited therein. Finally, the Board must examine the evidence in the light most favorable to the nonmoving party. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

B. No Genuine Issue of Material Fact Remains Concerning NYS Contention-17/17-A.

As set forth above (at 7-8), the Applicant’s Motion sets forth three independent legal bases for dismissal of NYS Contention 17/17-A; none of those bases requires consideration of any evidentiary material to support a ruling on the Motion. Thus, in its Statement of Material Facts, the Applicant recited the language of the State’s contentions or supporting documents, as well as language that appeared in the Applicant’s filings, the Draft SEIS or GEIS, or the Board’s rulings on contention admissibility.¹⁷ The Staff has reviewed the Applicant’s Statement of Material Facts and the legal arguments set forth in its Motion, and has determined that no genuine dispute of material fact exists with respect to NYS Contention 17/17-A. Accordingly, the Staff has concluded that summary disposition of this consolidated contention is appropriate and the Applicant’s Motion should be granted as a matter of law.

1. NYS Contention 17/17-A Should Be Dismissed as Moot.

As stated in the Applicant’s Motion (at 17 and n.82), both NYS Contention 17 and amended NYS Contention 17-A are “contentions of omission” – as the Licensing Board

¹⁷ See Material Facts 2, 9, 11-16, 23 (New York’s filings); Material Facts 1, 22 (Entergy’s filings); Material Facts 5-8, 20 (Draft SEIS); Material Facts 18-19 (GEIS); and Material Facts 3, 10 (Board rulings). No statements of an evidentiary nature were presented in the Statement of Material Facts in support of the Applicant’s Motion, and an affidavit in support of the Motion was therefore unnecessary.

explicitly ruled in admitting these contentions. See LBP-08-13, 68 NRC at 116 (“we admit NYS Contention-17 as a contention of omission”); Order of June 16, 2009, at 8 (“this amended contention updates the original to reflect that New York contends that the NRC Staff erred in a similar manner to Entergy and that the original contention is now relevant to the Draft SEIS, as well as to the ER. We admit the amended contention as such and consolidate it into NYS-17.”)

More specifically, New York asserted in NYS Contention 17 that the impact of license renewal on property values must be, but was not, considered in the Applicant’s ER. The State then reasserted this position in NYS Contention 17-A, asserting that the Staff must, but did not, consider this issue in its Draft SEIS. In fact, however, the Staff did consider the impact on property values in its Draft SEIS (see Draft SEIS at 8-29) -- as both the Staff and the Applicant pointed out in their responses opposing admission of the amended contention. In this regard, the Staff stated as follows, in opposing the admission of NYS Contention 17-A:

While the State claims that the Draft SEIS is deficient for failing to address certain land use issues, the sole reference provided by the State in support of these assertions is Draft SEIS at 4-41 (where the Staff discusses the “population-related impacts” of license renewal). See New York DSEIS Contentions, ¶¶ 17, at 18. The State fails to note that a discussion of the issues which it claims is missing, is presented in § 8.2 (“No Action Alternative”) of the Draft EIS, regarding socioeconomic impacts. See Draft SEIS at 8-29 - 8-30. The State fails to challenge the adequacy of that discussion.¹⁸

Thus, NYS Contention 17-A incorrectly asserted that the Draft SEIS failed to address the issue of property values raised in the contention; moreover, and importantly, nowhere did the contention challenge the adequacy of the Draft SEIS discussion of property values.

¹⁸ Staff Response to DSEIS Contentions at 14 n.27. The Applicant presented similar, more extensive, arguments in opposing the admission of this contention. See Applicant’s Response to DSEIS Contentions at 16, 17-19.

Inasmuch as NYS Contention 17 was rendered moot by the Staff's Draft SEIS, and NYS Contention 17/17-A failed to challenge the adequacy of the Draft SEIS discussion, NYS Contention 17/17-A must be dismissed as moot. *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286, 293 (2004). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 171-72 (2001), *petition for review denied*, CLI-04-4, 59 NRC 31, 40-41 (2004).¹⁹ In sum, NYS Contention 17/17-A should be dismissed, if for no other reason, on grounds of mootness.²⁰

2. NYS Contention 17/17-A Raises, in Part, An Impermissible Challenge to Commission Regulations.

In NYS Contention 17-A, the State raised, *inter alia*, an issue involving the “impacts on the value and potential use of adjacent lands” due to additional dry cask storage during the license renewal period. Draft SEIS Contentions at 16. As noted by the Applicant (Motion at 12-14), the impacts of on-site storage of spent fuel due to an additional 20 years of operation is a Category 1 issue under 10 C.F.R. Part 51, Appendix B, Table B-1 (“On-site spent fuel”). Accordingly, consideration of this issue is precluded in this proceeding, absent a waiver of the rule. *See, e.g., Entergy Nuclear Vermont Yankee and Entergy Nuclear Operations, Inc.*

¹⁹ Significantly, while the Board decided to admit the contention in its ruling of June 16, it explicitly reserved judgment as to whether the Draft SEIS had mooted the State's contention, on the grounds that a motion for summary disposition had not yet been filed. *See* Order of June 16, 2009, at 8. The Applicant's filing of the instant motion for summary disposition resolves the procedural issue noted by the Board.

²⁰ Only now, in its response to the Applicant's Motion, has New York raised a challenge to the adequacy of the Draft SEIS discussion of property values. *See* NYS Response, at 13-15, and “The State of New York's Counter-Statement of Material Facts” at 3-4, ¶ 8. New York's attempt to raise an issue as to the adequacy of the Draft SEIS discussion, for the first time in its response to a motion for summary disposition, comes too late -- and must be disregarded absent the filing of a new contention challenging the adequacy of the Draft SEIS. *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

(Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13; 20-21 (2007). As the Commission stated in that decision:

Fundamentally, any contention on a “category one” issue amounts to a challenge to our regulation that bars challenges to generic environmental findings. There are, however, procedural steps available to make such a challenge. A rule can be waived in a particular license proceeding only where “special circumstances . . . are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.”²⁹ In theory, Commission approval of a waiver could allow a contention on a category one issue to proceed where special circumstances exist.

²⁹ 10 C.F.R. 2.335(b).

In its rulings on the admissibility of NYS Contentions 17 and 17-A, the Board did not explicitly address the admissibility of New York’s claims regarding the impacts caused by the onsite storage of additional spent fuel resulting from license renewal. To the extent that the Board may have intended to admit this issue as part of the contentions, it is clear that the Commission’s rules in 10 C.F.R. Part 51, Appendix B, Table B-1, establish spent fuel storage impacts arising due to license renewal as a Category 1 issue. Accordingly, in the absence of any waiver of the rules, consideration of this issue is precluded in this proceeding.²¹

3. NYS Contention 17/17-A Fails to Raise a Cognizable Issue Under NEPA.

In its Motion, the Applicant asserts that any potential impacts to property values on adjacent offsite lands must be “linked to some physical impact to these properties” to be cognizable impacts under NEPA; the Applicant further asserts that here, the alleged property

²¹ See LBP 08-13, 68 NRC at 115-16; Order of June 16, 2009, at 7-8. This issue had been raised in the Applicant’s responses opposing the admission of the contentions, where the Applicant pointed out that claims regarding the impacts of additional onsite fuel storage due to license renewal constituted an impermissible challenge to the Commission’s rules, under 10 C.F.R. § 2.335. See Applicant’s Response to Initial Contentions at 117-18; Applicant’s Response to DSEIS Contentions at 24-26.

value impacts are not linked to a physical impact to those properties but instead are “associated with the public’s perception of risk and aversion to nuclear power facilities and spent fuel storage.” Motion at 8, 11-12. Further, the Applicant asserts that the State’s alleged impacts would result not from license renewal but from the independent actions of third persons, and as such, those impacts are too “attenuated” to bear a reasonably close causal nexus to license renewal, which is required for them to be considered in a NEPA evaluation of environmental impacts. *Id.* at 12. The Applicant’s assessment of this issue is correct.

(a) The Alleged Property Value Impact Is Not Connected to Any Physical Harm

In NYS Contention 17/17-A, the State did not assert that the alleged adverse impact on offsite property values was the result of any actual or physical harmful impact to those properties, such as might be caused by offsite radiological contamination, noxious fumes, or dust or traffic congestion due to construction activity. To the contrary, the State omitted any reference to offsite contamination or noxious activity, claiming instead that the adverse impact of concern here would be caused by license renewal, itself, and would be eliminated simply by non-renewal of the IP2 and IP3 operating licenses. See, e.g., NYS Petition, at 172-74; DSEIS Contentions at 15-16. Indeed, the State claimed that the denial of the IP2/IP3 license renewal application would eliminate the alleged harm: “Absent relicensing, the suppressed land values of adjacent properties would recover.” DSEIS Contentions at 20. Significantly, the impact alleged by the State would result not from any harm caused by the facility, but from the public’s alleged reaction to its perception of the risk of a nuclear facility. As such, this alleged impact is beyond the scope of the environmental impacts required to be considered under NEPA. See, e.g., *Metropolitan Edison Co. v. People Against Nuclear Energy* [“PANE”], 460 U.S. 766, 778 (1983) (psychological stress is not a cognizable impact under NEPA); *Babcock and Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-94-12, 39 NRC 215, 218-19 (1994) (decreased property values resulting from concern over license renewal do not

present a cognizable issue). *Cf. Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 109 n.26 (1998) (negative impacts on local property values should be considered in an EIS if they “will flow directly from radiological and environmental impacts” of the facility, rather than from “psychological effects stemming from a fear of nuclear power”).

The Licensing Board’s decision in *Parks Township* is particularly instructive in this regard. There, addressing a contention similar to NYS Contention 17/17-A, the Board explicitly found that adverse impacts on property values due to psychological concerns over a nuclear facility do not present a cognizable issue in an NRC proceeding. As stated by the Board:

Nowhere do the Requestors state in so many words that the depressed property values are directly attributable to the Parks Township facility or the renewal of its license, but, solely for the purpose of this ruling, I shall assume that such is the case.

Even so, I have no basis whatever to infer that the Requestors or their members are concerned about property values which are depressed because of *direct radiological contamination from the Parks facility*. To the contrary, the best inference is that potential buyers simply don't want to purchase property in the vicinity of the facility because of attitude, concern about resale values, and perhaps fear of living in the vicinity of the plant -- in other words, psychological concerns.

The Commission addressed the issue of psychological stress attributed to the fear of releases of radioactivity in a proceeding following the accident at Three Mile Island, and decided that, as a matter of public policy, NRC's administration of the Atomic Energy Act will not include psychological effects from the fear of radiation.⁷ Therefore, I cannot accept as an issue to be heard a concern that property values may be depressed where such effect is attributable solely to public and buyer attitude.

⁷ *Metropolitan Edison Co.* (Three Mile Island Unit 1) CLI-82-6, 15 NRC 407 (1982). With respect to the National Environmental Policy Act, the Supreme Court held that the NRC need not consider psychological effects in a related case. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). . . .

Parks Township, 39 NRC at 218-19; emphasis in original. A similar determination should be reached here, where NYS Contention 17/17-A fails to link the alleged impact on offsite property values to any actual or physical harm that might be caused by license renewal of IP2/IP3. See, e.g., *Metropolitan Edison Co. v. PANE*, 460 U.S. 766, 772-73 (1983) (“If a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply”).²²

(b) The Alleged Property Value Impact Is Not Causally Connected to License Renewal

As stated by the Applicant (Motion at 10, 14-15), NYS Contention 17/17-A asserts that offsite property values would increase if the IP2/IP3 licenses are not renewed, either because (1) the public’s concern over IP2/IP3 would be eliminated by denial of license renewal, or (2) property developers would be attracted to build in the area if the licenses are not renewed. See DSEIS Contentions at 16, 19-20; NYS Petition at 168, 172-74. In either case – i.e., whether the alleged property value impact is due to changes in public perceptions of risk or a land developer’s willingness to invest in property development, the alleged impact to property values would occur, not due to the NRC’s issuance of renewed licenses for IP2 or IP3, but due to the independent actions or concerns of third parties. As such, the State’s alleged property value impacts are too attenuated to be causally connected to the action of license renewal, such as to warrant consideration under NEPA.

²² *Accord, James v. TVA*, 538 F. Supp. 704, 709 (E.D. Tenn. 1982) (“when there is no significant impact on the physical environment, . . . socio-economic effects, such as effects on property values, are insufficient to trigger an agency’s obligation to prepare an EIS,” citing *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978), and *Breckinridge v. Rumsfeld*, 537 F.2d 864 (6th Cir. 1976), cert. denied, 429 U.S. 1061 (1977)). Cf. *Taubman Realty Group, Ltd. Partnership v. Mineta*, 320 F. 3d 475, 481 (4th Cir. 2003) (“potential devaluation of privately held commercial property is insufficient to trigger NEPA’s requirement that an EIS be prepared for every proposal for major federal action significantly affecting the quality of the human environment,” so as to be within the zone of interests required for NEPA standing).

In this regard, it is well established that NEPA requires consideration in an EIS of the reasonably foreseeable environmental impacts that may result from a major federal action; the statute does not, however, require consideration of impacts that flow from the independent actions of third persons in response to the action under consideration. *See, e.g., DOT v. Public Citizen*, 541 U.S. 752; 767 (2004) (foreign truckers' potential response to federal action need not be evaluated under NEPA, since "NEPA requires a 'reasonably close causal relationship' akin to proximate cause in tort law"); *Metropolitan Edison Co. v. PANE*, 460 U.S. 766, 774 (1983)); *N.J. Dep't of Environmental Protection v. NRC*, 561 F.3d 132, 139-40 (3d Cir. 2009) (NRC need not consider the risk of terrorism when preparing an EIS); *U.S. Dep't of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357; (2004) (potential acts of terrorism need not be considered under NEPA); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340; 347 (2002) (same).²³

(c) The Alleged Property Value Impact Lacks the Requisite Factual Basis

Finally, the Applicant's Motion demonstrates that NYS Contention 17/17-A lacks the requisite factual basis to warrant consideration under NEPA. In this regard, the Applicant correctly points out that the contention is premised on the faulty and baseless assumption that all spent fuel will be removed and the Indian Point site will be fully decommissioned by 2025 (*i.e.*, within 10 years after shutdown). *See* Motion at 14; Draft SEIS Contentions at 15-17; Sheppard Report at 3. In fact, as the Applicant notes (Motion at 16), the Commission's regulations contemplate that decommissioning will be achieved within 60 years after permanent cessation of operations. *See* 10 C.F.R. § 50.82(a)(3). Indeed, the Applicant has submitted a decommissioning plan for the Indian Point site, in which it proposed a 60-year period for

²³ *But see San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1031 (9th Cir. 2006), *cert. denied sub nom PG&E v. San Luis Obispo Mothers for Peace*, 127 S. Ct. 1124 (2007).

decommissioning,²⁴ and the Draft SEIS similarly contemplates a 60-year period for decommissioning. Draft SEIS at 8-25. No factual basis whatsoever has been provided by the State to support its or its expert's assumption that the Indian Point site will be decommissioned within 10 years following a cessation of operations.

Similarly, the State has provided no factual basis to support its assertion that if the Indian Point licenses are not renewed, property developers would transform the site into an "attractive riverfront development" upon decommissioning, producing a rise in offsite property values. See Draft SEIS Contentions at 15-17. The State's assertion is entirely speculative and need not be considered in an EIS under NEPA. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 374 (1989) (EIS should focus on "reasonably foreseeable impacts," and avoid "distorting the decisionmaking process by overemphasizing highly speculative harms"); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519; 551 (1978) (NEPA was not meant to require detailed discussion of the environmental effects of remote and speculative possibilities, *citing Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837-838 (D.C. Cir. 1972)).

²⁴ See Motion at 16 n. 76, *citing* letter from J.E. Pollack to NRC Document Control Desk, dated October 23, 2008.

CONCLUSION

For the foregoing reasons, the Staff respectfully submits that no genuine issue of material fact exists with respect to NYS Contention 17/17-A, and that Entergy's motion for summary disposition of the contention should be granted as a matter of law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is written in a cursive style with a prominent flourish at the end.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of March 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF NEW YORK STATE CONTENTION 17/17-A (PROPERTY VALUES)," dated March 18, 2010, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 18th day of March, 2010:

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Lawrence.McDade@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: Richard.Wardwell@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Dr. Kaye D. Lathrop
Atomic Safety and Licensing Board Panel
190 Cedar Lane E.
Ridgway, CO 81432
E-mail: Kaye.Lathrop@nrc.gov

Zachary S. Kahn, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Zachary.Kahn@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
(Via Internal Mail Only)

Kathryn M. Sutton, Esq.*
Paul M. Bessette, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com
E-mail: martin.o'neill@morganlewis.com

Michael J. Delaney, Esq.*
Vice President – Energy Department
New York City Economic Development
Corporation (NYCDEC)
110 William Street
New York, NY 10038
E-mail: mdelaney@nycedc.com

Justin D. Pruyne, Esq.*
Assistant County Attorney
Office of the Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
E-mail: jdp3@westchestergov.com

Daniel E. O'Neill, Mayor*
James Seirmarco, M.S.
Village of Buchanan
Municipal Building
Buchanan, NY 10511-1298
E-mail: vob@bestweb.net

Josh Kirstein, Esq.
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U. S, Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: Josh.Kirstein@nrc.gov

William C. Dennis, Esq.*
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601
E-mail: wdennis@entergy.com

Mylan L. Denerstein, Esq.*
Janice A. Dean, Esq.
Executive Deputy Attorney General,
Social Justice
Office of the Attorney General
of the State of New York
120 Broadway, 25th Floor
New York, NY 10271
E-mail: mylan.denerstein@oag.state.ny.us
janice.dean@oag.state.ny.us

Ross H. Gould, Esq.*
10 Park Ave, #5L
New York, NY 10016
T: 917-658-7144
E-mail: rgouldesq@gmail.com

John J. Sipos, Esq.*
Charlie Donaldson, Esq.
Assistants Attorney General
New York State Department of Law
Environmental Protection Bureau
The Capitol
Albany, NY 12224
E-mail: john.sipos@oag.state.ny.us

Robert Snook, Esq.*
Office of the Attorney General
State of Connecticut
55 Elm Street
P.O. Box 120
Hartford, CN 06141-0120
E-mail: robert.snook@po.state.ct.us

Phillip Musegaas, Esq.*
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591
E-mail: phillip@riverkeeper.org
dbrancato@riverkeeper.org

Elise N. Zoli, Esq.*
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109
E-mail: ezoli@goodwinprocter.com

Martin J. O'Neill, Esq.*
Morgan, Lewis & Bockius, LLP
1000 Louisiana Street, Suite 4000
Houston, TX 77002
E-mail: martin.o'neill@morganlewis.com

Daniel Riesel, Esq.*
Thomas F. Wood, Esq.
Ms. Jessica Steinberg, J.D.
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022
E-mail: driesel@sprlaw.com
jsteinberg@sprlaw.com

Joan Leary Matthews, Esq.*
Senior Attorney for Special Projects
New York State Department of
Environmental Conservation
Office of the General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-1500
E-mail: jmatthe@gw.dec.state.ny.us

John Louis Parker, Esq.*
Office of General Counsel, Region 3
New York State Department of
Environmental conservation
21 South Putt Corners Road
New Paltz, NY 12561-1620
E-mail: jlparker@gw.dec.state.ny.us

Manna Jo Greene*
Hudson River Sloop Clearwater, Inc.
112 Little Market Street
Poughkeepsie, NY 12601
E-mail: mannajo@clearwater.org



Sherwin E. Turk
Counsel for NRC Staff