

April 5, 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 STATE OF NEW YORK'S NEW AND  
AMENDED CONTENTIONS CONCERNING THE DECEMBER 2009  
SEVERE ACCIDENT MITIGATION ALTERNATIVE REANALYSIS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files its answer to the amended and new contentions filed by the State of New York ("New York" or "State") on March 11, 2010,<sup>1</sup> concerning the revised Severe Accident Mitigation Alternatives ("SAMA") analysis that was submitted by Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") on December 11, 2009.<sup>2</sup> In its supplemental SAMA contentions, New York submitted two revised contentions (Contentions 12-B and 16-B) and two new contentions (Contentions 35 and 36) regarding the Applicant's SAMA reanalysis.

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<sup>1</sup> "State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis," filed March 11, 2010 ("Supplemental SAMA Contentions"). The State's filing was accompanied by the "State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives" ("Motion for Leave"), dated March 11, 2010.

<sup>2</sup> Letter from Martin J. O'Neill, Esq. to the Licensing Board, dated December 14, 2009, enclosing Letter from Fred Dacimo (Vice President/License Renewal, Entergy Nuclear Northwest) to NRC Document Control Desk, dated December 11, 2009 (Subject: License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data, Indian Point Nuclear Generating Unit Nos. 2 & 3) ("SAMA Reanalysis").

For the reasons set forth below, the Staff does not oppose the admission of Contentions 12-B and 16-B (apart from one late-filed basis statement, discussed *infra* at 13), to the extent that the Board has previously admitted Contentions 12/12-A and 16/16-A. However, the Staff opposes the admission of Contentions 35 and 36 on the grounds that these contentions fail to satisfy the basis requirements set forth in 10 C.F.R. § 2.309(f)(1)(ii), fail to raise a material issue in dispute as required by 10 C.F.R. § 2.309(f)(1)(vi), and raise issues that are beyond the scope of this proceeding in contravention of 10 C.F.R. § 2.309(f)(1)(iii). Further, Contentions 35 and 36 are impermissibly late and fail to show that a balancing of the “good cause” and other factors set forth in 10 C.F.R. § 2.309(c)(1) favors their admission. Accordingly, the Staff respectfully submits that New York Contentions 35 and 36 should be rejected.

#### BACKGROUND

On April 23, 2007, Entergy filed its application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 (“IP2” and “IP3”), for an additional period of 20 years. As part of its license renewal application (“LRA”), the Applicant submitted an “Environmental Report” (“ER”), as required by 10 C.F.R. §§ 51.53(c) and 54.23. On May 11, 2007, the NRC published a notice of receipt of the Indian Point LRA,<sup>3</sup> and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.<sup>4</sup> The notice of opportunity for hearing required that petitions for leave to intervene and

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<sup>3</sup> “Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period,” 72 Fed. Reg. 26,850 (May 11, 2007).

<sup>4</sup> “Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period,” 72 Fed. Reg. 42,134 (Aug. 1, 2007).

requests for hearing be filed by October 1, 2007;<sup>5</sup> this deadline was later extended to November 30, 2007.<sup>6</sup>

On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York.<sup>7</sup> In its petition, New York filed a total of 32 contentions including, *inter alia*, Contentions 12 and 16, challenging the Applicant's SAMA analysis. More specifically, in Contention 12, New York alleged that the SAMA analysis presented in the Applicant's ER did not accurately reflect decontamination and clean-up costs associated with a severe accident;<sup>8</sup> in Contention 16, New York alleged, *inter alia*, that the Applicant's SAMA analysis did not accurately reflect the number of people who would be affected by a severe accident and that its air dispersion model did not accurately predict the dispersion of radionuclides in a severe accident.<sup>9</sup>

On July 31, 2008, the Board issued its Memorandum and Order ruling on the petitioners' standing to intervene and the admissibility of their contentions.<sup>10</sup> Therein, the Board found, *inter*

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<sup>5</sup> *Id.*, 72 Fed. Reg. at 42,135.

<sup>6</sup> "Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period: Extension of Time for Filing of Requests for Hearing or Petitions for Leave to Intervene in the License Renewal Proceeding," 72 Fed. Reg. 55,834 (Oct. 1, 2007). The deadline for filing petitions to intervene was extended to December 10, 2007 for persons whose filing of a petition to intervene was impeded by the NRC's Agencywide Documents Access and Management System ("ADAMS"). See (1) Commission Order of November 16, 2007, and (2) Licensing Board "Order (Granting an Extension of Time to CRORIP Within Which to File Requests For Hearing)," dated December 5, 2007.

<sup>7</sup> See "New York State Notice of Intention to Participate and Petition to Intervene" ("New York Petition" or "NY Petition"), filed November 30, 2007.

<sup>8</sup> NY Petition at 140-45.

<sup>9</sup> NY Petition at 163-67.

<sup>10</sup> *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3)*, LBP-08-13, 68 NRC 43 (2008).

*alia*, that New York Contention 12 was admissible as filed,<sup>11</sup> and that New York Contention 16 was admissible “to the extent that it challenges [a] whether the population projections used by Entergy [in its SAMA analyses] are underestimated, . . . [b] whether the ATMOS module in MACCS2 is being used beyond its range of validity – beyond thirty-one miles (fifty kilometers) – and, [c] whether use of MACCS2 with the ATMOS module leads to non-conservative geographical distribution of radioactive dose within a fifty-mile radius of IPEC.”<sup>12</sup>

On December 22, 2008, the NRC issued Draft Supplement 38 to the “Generic Environmental Impact Statement for License Renewal of Nuclear Plants” (“GEIS”), NUREG-1437 (May 1996), in which it provided its evaluation of the site-specific environmental impacts of license renewal for IP2 and IP3.<sup>13</sup> On January 14, 2009, the Board orally granted New York (and another intervenor) a 37-day extension of time in which to file contentions related to the Draft SEIS;<sup>14</sup> in its Order summarizing its ruling, the Board “reminded the parties that any new contentions may only deal with new environmental issues raised by the Draft SEIS. Tr. at 767-68. The Board will not entertain contentions based on environmental issues that could have been raised when the original contentions were filed.”<sup>15</sup>

On February 27, 2009, New York filed Amended Contentions 12-A and 16-A, along with

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<sup>11</sup> LBP-08-13, 68 NRC at 100-02.

<sup>12</sup> LBP-08-13, 68 NRC at 110-13.

<sup>13</sup> “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38 Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment,” NUREG-1437, Supplement 38 (December 2008) (“Draft SEIS” or “DSEIS”).

<sup>14</sup> See Transcript of Pre-Hearing Conference (January 14, 2009), at Tr.768-69; “Memorandum and Order (Summarizing Pre-Hearing Conference),” dated February 4, 2009 (“Pre-Hearing Conference Order”), at 2-3.

<sup>15</sup> Pre-Hearing Conference Order at 3; see Tr. 768.

three other new and/or amended contentions challenging the Draft SEIS.<sup>16</sup> On June 16, 2009, the Board issued its ruling on New York's new and amended contentions challenging the Staff's Draft SEIS; therein, the Board, *inter alia*, admitted Amended Contention 12-A, and admitted Amended Contention 16-A with limitations.<sup>17</sup>

In November 2009, the Staff held two telephone conference calls with the Applicant to discuss a discrepancy the Staff had identified in its review of the meteorological data inputs utilized by Entergy in its MACCS2 code SAMA analyses.<sup>18</sup> By letter dated November 16, 2009, the Applicant committed to correct its MACCS2 code meteorological inputs, to re-run its SAMA analyses, and to provide the results of its SAMA reanalysis by December 16, 2009.<sup>19</sup> In accordance with this commitment, on December 11, 2009, the Applicant submitted its SAMA Reanalysis to the NRC, using revised meteorological data inputs.<sup>20</sup>

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<sup>16</sup> See "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," filed February 27, 2009 ("DSEIS Contentions").

<sup>17</sup> See "Order (Ruling on New York State's New and Amended Contentions)," dated June 16, 2009, at 3-7. With respect to Amended Contention 16-A, the Board ruled that the amended contention would be limited to the three issues which were admitted in original Contention 16 in LBP-08-13; that litigation would not be permitted "beyond the limiting language of the [previously] admitted contention"; and that the issue of whether an EPA-approved air dispersion model must be used in the Staff's analysis is outside the scope of the contention. *Id.* at 6.

<sup>18</sup> See "Summary of Telephone Call Held on November 3, 2009, Between [NRC] and [Entergy], Concerning Meteorological Data Used for the Severe Accident Mitigation Alternative Analysis," dated November 17, 2009 (ADAMS Accession No. ML093170168), and "Summary of Telephone Call Held on November 9, 2009, Between [NRC] and [Entergy] Concerning Meteorological Data Used for the Severe Accident Mitigation Alternative Analysis," dated November 17, 2009 (ADAMS Accession No. ML093170171).

<sup>19</sup> See Letter from Paul Bessette, Esq. to the Licensing Board, dated November 17, 2009, enclosing Letter from Fred Dacimo, Vice President/License Renewal (Entergy) to NRC Document Control Desk, dated November 16, 2009 (Subject: Meeting Minutes; Telephone Conference, November 9, 2009, between Ms. Kimberly Green NRC and Entergy Staff Regarding Met Tower Data for SAMA Analyses).

<sup>20</sup> Letter from Fred Dacimo, Vice President/License Renewal (Entergy Nuclear Northwest), to NRC Document Control Desk, dated December 11, 2009 (Subject: License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data, Indian Point Nuclear Generating Unit Nos. 2 & 3).

On January 21, 2010, the State requested leave to file new or amended contentions related to the Applicant's SAMA Reanalysis on or before February 25, 2010.<sup>21</sup> By Order dated January 22, 2010, the Board granted the State's request that "new or amended contentions based on Entergy's revised SAMA submissions" may be filed by February 25, 2010," ruling that new contentions filed by the State by February 25, 2010, "which arise out of Entergy's revised SAMA submissions from December 21, 2009, through January 20, 2010, will be deemed timely under 10 C.F.R. § 2.309(f)(2)."<sup>22</sup> On February 25, 2010, the State filed its new and amended SAMA contentions.

## DISCUSSION

### I. Legal Standards Governing the Admission of Late-Filed Contentions

The standards governing the admissibility of contentions filed after the initial deadline for filing (*i.e.*, "late-filed contentions") are well established, and have previously been addressed by this Board.<sup>23</sup> In brief, the admissibility of late-filed contentions in NRC adjudicatory proceedings is governed by three regulations. These are: 10 C.F.R. § 2.309(f)(2), concerning new and timely contentions, 10 C.F.R. § 2.309(c), concerning non-timely contentions, and 10 C.F.R. § 2.309(f)(1), establishing the general admissibility requirements for contentions. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), "Order (Ruling on

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<sup>21</sup> "Motion by the State of New York for A Schedule Establishing February 25, 2010 as the Date By Which the State May File Contentions Related to Entergy's Revised Submission Concerning Severe Accident Mitigation Alternatives" ("Motion for Contention Filing Schedule"), dated January 21, 2010.

<sup>22</sup> "Order (Granting New York's Motion to Establish February 25, 2010 As the Date By Which New York May File Contentions Related to Entergy's Revised Submission Concerning Severe Accident Mitigation Alternatives)," dated January 22, 2010, at 2 (emphasis added).

<sup>23</sup> *See, e.g.*, "Order (Denying Clearwater's Petition to File a New Contention)," dated May 28, 2009, at 2-4; "Order (Ruling on New York State's New and Amended Contentions)," dated June 16, 2009, at 2.

New York State's New and Amended Contentions)" (June 16, 2009) (unpublished), slip op. at 2; *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

First, a late-filed contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave, if it meets the following requirements:

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents. Otherwise, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that –

(i) The information upon which the amended or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than information previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2) (emphasis added); *cf. Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) ("intervenors must file their environmental contentions as soon as possible, even before issuance of the draft EIS, if the contested issue is

addressed in the applicant's ER. See 10 C.F.R. § 2.714(b)(2)(iii)".<sup>24</sup>

Second, a contention that does not qualify for admission as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provisions governing nontimely contentions, set forth in 10 C.F.R. § 2.309(c)(1). As stated therein, nontimely contentions "will not be entertained absent a determination by the . . . presiding officer . . . that the . . . contentions should be admitted based upon a balancing of the following factors to the extent that they apply to the particular nontimely filing":

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/ petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/ petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/ petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1); *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234 n.7 (2006). Pursuant to 10 C.F.R. § 2.309(c)(2), each of these

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<sup>24</sup> The provisions of former § 2.714(b)(2)(iii) are now codified in 10 C.F.R. § 2.309(f)(2).

factors is required to be addressed in the requestor's nontimely filing.<sup>25</sup>

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the general admissibility requirements of 10 C.F.R. § 2.309(f)(1). The requirements of this regulation were addressed at length by the Board in LBP-08-13, 68 NRC at 60-64. Specifically, in order to be admitted, a contention must satisfy the following requirements:

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of

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<sup>25</sup> The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. See, e.g., *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1).

This Board has previously summarized the purpose for the contention filing requirements in § 2.309(f)(1), as follows:

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.” The Commission has emphasized that the rules on contention admissibility are “strict by design.” Failure to comply with any of these requirements is grounds for the dismissal of a contention.

*Indian Point*, LBP-08-13, 68 NRC at 61 (footnotes omitted);<sup>26</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

Finally, the Board in this proceeding has previously ruled, in its Order of January 22, 2010, that any new or amended contentions filed by the State with respect to the Applicant's revised SAMA analysis which are filed by February 25, 2010, will be considered timely only insofar as the newly-filed contentions are “based on Entergy's revised SAMA submissions” or insofar as they “arise out of Entergy's revised SAMA submissions from December 21, 2009,”

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<sup>26</sup> Similarly, long-standing Commission precedent establishes that contentions may only be admitted if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of former § 2.714(b) (currently § 2.309(f)), and applicable NRC case law. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Duquesne Light Co.* (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), *aff'd sub nom. BPI v. Atomic Energy Commission*, 502 F.2d 424, 429 (D.C. Cir. 1974).

through January 20, 2010.” Order of January 22, 2010, at 2. Consistent with this ruling and established case law, any new or amended contentions must be rejected as untimely, to the extent that they raise matters which could have been raised previously and are not supported by a favorable balancing of the factors set forth in 10 C.F.R. § 2.309(c) or (f)(2).<sup>27</sup>

II. The Admissibility of New York’s Amended SAMA Contentions 12-B and 16-B.

As part of its Supplemental SAMA Contentions, the State submitted two amended contentions (Contentions 12-B and 16-B), in which it proposed to revise the two SAMA contentions that the Board admitted in LBP-08-13 and modified in its “Order (Ruling on New York State’s New and Amended Contentions),” dated June 16, 2009.<sup>28</sup> The Staff’s position with respect to the admissibility of these two amended contentions is as follows.

A. Amended Contention 12-B

The December 14, 2009 SAMA Re-Analysis for IP2 and IP3 underestimates decontamination and clean up costs associated with a severe accident in the New York metropolitan area and, therefore, underestimates the cost of a severe accident and fails to consider mitigation measures which are related to license renewal in violation of NEPA.

Supplemental SAMA Contentions at 1 (capitalization omitted).

In support of this contention, New York presents 21 numbered paragraphs containing the bases and supporting evidence for the contention. The State’s bases and supporting evidence statements are substantially identical to the bases and supporting evidence

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<sup>27</sup> In the same manner, new or amended contentions concerning a draft EIS must address the new material in the Draft EIS to be considered timely. See, e.g., Pre-Hearing Conference Order at 3. To the extent that a late-filed new or amended contention raises a matter which the intervenor could have addressed previously, in response to the Staff’s Draft SEIS, the contention should be deemed to be untimely. See, e.g., *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998).

<sup>28</sup> See discussion *supra* at 5 and n.16.

statements that the State had previously submitted in support of Contention 12 and revised Contention 12-A, albeit modified to address the Applicant's SAMA Reanalysis.<sup>29</sup> Inasmuch as the Board has previously admitted Contention 12/12-A, the Staff does not oppose the admission of this revised contention, to the extent that Contention 12/12-A was previously admitted.

B. Amended Contention 16-B

The December 2009 SAMA Re-Analysis for IP2 and IP3 uses an air dispersion model which will not accurately predict the geographic dispersion of radionuclides released in a severe accident and will not present an accurate estimate of the costs of human exposure.

Supplemental SAMA Contentions at 7 (capitalization omitted).

In support of Contention 16-B, New York presents 14 numbered paragraphs containing the bases and supporting evidence for the contention. Most of the State's bases and supporting evidence statements are substantially identical to the bases and supporting evidence statements that the State had previously submitted in support of Contention 16 and revised Contention 16-A, modified to address the Applicant's SAMA Reanalysis. To that extent, the Staff does not oppose the admission of Contention 16-B, as limited by the Board's previous rulings on Contentions 16 and 16-A.

The Staff, however, opposes the admission of one basis statement for Contention 16-B, in which the State supplemented its previous basis statements for Contentions 16/16-A with information that was available previously and that could have been (but was not) submitted in support of Contentions 16 and 16-A. In this regard, Contention 16-B adds a challenge to the Applicant's assumptions regarding daytime transients and tourism, asserting that the Applicant's

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<sup>29</sup> The State appears to have added an introductory sentence and citation to Contention 12/12-A. Compare Supplemental SAMA Contentions at 6 n.2, with New York Petition at 145 n.34 and DSEIS Contentions at 9 n.3. The Staff does not oppose this modification of Contention 12/12-A..

SAMA Reanalysis does not adequately account for Census Data from 2000 and 2008, and that the Staff had questioned the Applicant's assumptions concerning these issues in November 2009. See Supplemental SAMA Contentions at 8 n.3. The State has not shown that it could not have raised this issue regarding the Applicant's previous SAMA analyses independently from the Staff, or that this additional issue arose from the Applicant's December 2009 revision of its SAMA analyses. Accordingly, the Staff opposes the admission of this portion of the revised contention, as untimely filed without the necessary showing that a balancing of the good cause and other factors set forth in 10 C.F.R. § 2.309(c)(1) warrants its admission.

III. The Admissibility of New York's SAMA Contentions 35 and 36.

In Contention 35, the State contends, in essence, that Entergy should perform additional analyses of certain SAMAs which Entergy has already found to be potentially cost-beneficial in its Environmental Report ("ER") and/or its SAMA Reanalysis, in order to reach a "final" determination as to whether they are cost-beneficial, and that those SAMAs "must" then be imposed as a condition for license renewal;<sup>30</sup> in Contention 36, the State contends that the NRC must require Entergy to implement certain of those SAMAs, which have been found to be "substantially" cost-beneficial as a condition of license renewal.<sup>31</sup> Significantly, nowhere in either contention does the State identify a single severe accident mitigation alternative that Entergy had not previously identified as potentially cost-beneficial.

In this regard, the Staff notes that Entergy had identified certain SAMAs as potentially

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<sup>30</sup> In Contention 35, New York asserts that the following SAMAs should be subject to additional engineering cost-benefit analysis: IP2 09, IP2 21, IP2 22, IP2 53, IP2 62, IP3 07, IP3 18, IP3 19, and IP3 53. See Supplemental SAMA Contentions at 33-34, ¶ 39.

<sup>31</sup> In Contention 36, New York asserts that the Staff must require the Applicant to implement the following SAMAs by way of making them license conditions: IP2 28, IP2 44, IP2 54, IP2 60, IP2 61, IP2 65, IP3 55, IP3 61, and IP3 62. See Supplemental SAMA Contentions at 50, ¶ 28.

cost-beneficial in its Environmental Report (“ER”);<sup>32</sup> additionally, the Staff identified various potentially cost-beneficial SAMAs in its Draft SEIS -- some (but not all) of which had been identified in Entergy’s ER as potentially cost-beneficial.<sup>33</sup> These SAMAs (with one exception) and certain other SAMAs were then identified as potentially cost-beneficial in Entergy’s SAMA Reanalysis.<sup>34</sup> The following provides a comparison of the parties’ treatment of these SAMAs:

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<sup>32</sup> In its Environmental Report, the Applicant identified the following SAMAs as potentially cost-beneficial: IP2 28, IP2 44, IP2 54, IP2 56, IP2 60, IP2 61, IP2 65, IP3 30, IP3 52, IP3 55, IP3 61, and IP3 62. See Environmental Report at 4-74 through 4-78.

<sup>33</sup> In the Draft SEIS, the Staff identified the following SAMAs as potentially cost-beneficial: IP2 09, IP2 28, IP2 44, IP2 53, IP2 54, IP2 56, IP2 60, IP2 61, IP2 65, IP3 52, IP3 53, IP3 55, IP3 61, and IP3 62. See DSEIS at G-35 to G-36.

<sup>34</sup> In its SAMA Reanalysis, the Applicant identified the following SAMAs as potentially cost-beneficial: IP2 09, IP2 21, IP2 22, IP2 28, IP2 44, IP2 53, IP2 54, IP2 56, IP2 60, IP2 61, IP2 62, IP2 65, IP3 07, IP3 18, IP3 19, IP3 52, IP3 53, IP3 55, IP3 61, and IP3 62. See SAMA Reanalysis at 31-32.

<b>Potentially Cost-Beneficial Severe Accident Mitigation Alternatives</b>					
SAMA Number	Found to be Potentially Cost-Beneficial in Entergy's ER	Found to be Cost-Beneficial in Draft SEIS	Found to be Cost-Beneficial in Applicant's SAMA Reanalysis:	New York Contention 35 Additional engineering cost-benefit analysis is needed:	New York Contention 36 SAMA should be required to be implemented, by license condition:
IP2 - 09	----	YES	YES	YES	----
IP2 - 21	----	----	YES	YES	----
IP2 - 22	----	----	YES	YES	----
IP2 - 28	YES	YES	YES	----	YES
IP2 - 44	YES	YES	YES	----	YES
IP2 - 53	----	YES	YES	YES	----
IP2 - 54	YES	YES	YES	----	YES
IP2 - 56	YES	YES	YES	----	----
IP2 - 60	YES	YES	YES	----	YES
IP2 - 61	YES	YES	YES	----	YES
IP2 - 62	----	----	YES	YES	----
IP2 - 65	YES	YES	YES	----	YES
IP3 - 07	----	----	YES	YES	----
IP3 - 18	----	----	YES	YES	----
IP3 - 19	----	----	YES	YES	----
IP3 - 30	YES	----	----	----	----
IP3 - 52	YES	YES	YES	----	----
IP3 - 53	----	YES	YES	YES	----
IP3 - 55	YES	YES	YES	----	YES
IP3 - 61	YES	YES	YES	----	YES
IP3 - 62	YES	YES	YES	----	YES

As discussed below, the State's contention that additional engineering evaluations should be performed for certain SAMAs which Entergy already found to be potentially cost-beneficial, and that SAMAs which are finally determined to be cost-beneficial must be imposed as license conditions (Contention 35), and its contention that certain "substantially" cost-

beneficial SAMAs must be imposed as a condition for license renewal (Contention 36), should be rejected as a matter of law.

A. Contention 35

The December 2009 Severe Accident Mitigation Alternatives (“SAMA”) Reanalysis does not comply with the requirements of the National Environmental Policy Act (42 U.S.C. Sections 4332(C)(iii) and (2)(e)), the President’s Council on Environmental Quality’s regulations (40 C.F.R. Section 1502.14), the Nuclear Regulatory Commission’s Regulations (10 C.F.R. Section 51.53(c)(3)(ii)(L)) or controlling federal court precedent (*Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)) because it identifies nine mitigation measures which have not yet been finally determined to be cost-effective, and which, if they are sufficiently cost effective, must be added as license conditions before a new and extended operating license can be issued.

Supplemental SAMA Contentions at 13 (capitalization omitted). In sum, in Contention 35 the State asserts that nine specific SAMAs (IP2 09, IP2 21, IP2 22, IP2 53, IP2 62, IP3 07, IP3 18, IP3 19, and IP3 53)<sup>35</sup> should be subject to further analysis to “finally” determine whether they are cost-effective, and that any such cost-effective SAMAs must be imposed as license conditions before a renewed license may be issued.<sup>36</sup>

1. Contention 35 Lacks Any Legal Basis and Fails to Raise A Material Issue for Litigation in This license Renewal Proceeding

New York Contention 35 should be rejected because it mistakenly asserts that federal statutes, regulations, and case law require that potentially cost-beneficial SAMAs must be imposed as license conditions for license renewal, and that the Applicant must perform additional engineering cost-benefit analyses in order for the NRC to determine which SAMAs are cost-beneficial. In making these assertions, New York misapprehends the law and the

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<sup>35</sup> *Id.* at 33-34, ¶ 39.

<sup>36</sup> *Id.*

effect of the Applicant's identification of certain SAMAs as potentially cost-beneficial. Accordingly, the contention lacks any basis in law and fails to raise a material issue in dispute. It is, therefore, inadmissible pursuant to 10 C.F.R. § 2.309(f)(1)(ii) and (vi).

(a) Contention 35 Lacks Any Basis in Law

An intervenor who files a contention must "provide sufficient alleged factual or legal bases to support the contention".<sup>37</sup> New York erroneously cites NEPA, the Administrative Procedure Act, CEQ regulations, NRC regulations, and federal court precedent in support of its assertion that potentially cost-beneficial SAMAs must be subject to further analysis and imposed as license conditions. None of those authorities support that proposition. Accordingly, New York Contention 35 lacks any basis in law and is inadmissible.

The Supplemental Environmental Impact Statement is the document through which the NRC satisfies the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*,<sup>38</sup> for license renewal of nuclear power plants. Under NEPA, a federal agency is required to take a "hard look" at the environmental impacts of major federal actions that could significantly affect the human environment.<sup>39</sup> Importantly, NEPA does not require any specific outcome nor does it mandate a course of action requiring the mitigation of potential environmental impacts.<sup>40</sup> Further, NEPA does not require that potentially cost-beneficial SAMAs

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<sup>37</sup> *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004); see 10 C.F.R. § 2.309(f)(1)(ii).

<sup>38</sup> 10 C.F.R. § 51.2.

<sup>39</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 339 (1989).

<sup>40</sup> See, e.g., *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (stating that NEPA requires "only that the agency take a 'hard look' at the environmental consequences before taking a major action"); *Sierra Club v. Army Corps of Engineers*, 446 F.3d 808, 815 (2006) (same); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998) (same); *Hydro Resources, Inc.* (continued. . .)

be implemented as license conditions.

The Supreme Court directly considered whether NEPA requires the mitigation of potential environmental impacts in *Methow Valley*. There, the Court noted that while NEPA announced sweeping policy goals, “NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Id.*, 490 U.S. at 350, citing *Stryker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28(1980) and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). As the Court further stated, “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Id.*, citing *Stryker’s Bay Neighborhood Council*, 444 U.S. at 227-28 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). In light of these principles, the Court found:

[There is a] fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted on the other.

*Id.* at 352. Thus, the Court concluded that the lower court had erred “in assuming that NEPA requires that action be taken to mitigate the adverse effects of major federal actions.” *Id.* at 353 (internal quotations omitted).

This Board has recognized the significance of the Supreme Court’s decision in *Methow Valley*, in ruling on the admissibility of contentions in LBP-08-13. There, in limiting the

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(. . .continued)

(P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53, 63-64 (2006) (same); see also *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 376 (2008) (“NEPA imposes only procedural requirements” and does not mandate any particular results).

admissibility of Clearwater Contention EC-3, the Board observed as follows:

NEPA does not require that a federal agency take any particular action. It does, however, require that the federal agency take a “hard look” at the environmental impact its proposed action could have before the action is taken, and to document what it has done.” . . . [T]he goals of NEPA are to inform federal agencies and the public about the environmental effects of proposed projects. See *Robertson*, 490 U.S. at 339.<sup>41</sup>

Because NEPA imposes no obligation on the NRC to mitigate adverse environmental impacts, it does not require the NRC to require the Applicant to reach a “final” determination as to the cost-beneficial status of SAMAs which the Applicant has already identified as potentially cost-beneficial, or to implement such “finally determined” cost-beneficial SAMAs as license conditions. Similarly, while the Applicant has now conducted a SAMA Reanalysis and has identified additional potentially cost-effective SAMAs (which will be addressed in the Staff’s Final SEIS), there is no legal basis for requiring a determination as to those SAMAs’ “final” cost-benefit or for requiring implementation of such SAMAs as a condition for license renewal.

While New York correctly states that the Administrative Procedure Act (“APA”) requires that agencies have a rational basis for their actions, Supplemental SAMA Contentions at 14, this general legal principle does not mandate the further analysis that New York seeks or require that cost-beneficial SAMAs be imposed as license conditions. The Staff has provided a rational basis for its evaluation of potentially cost-beneficial SAMAs, having discussed this issue at length in the Draft SEIS. New York has not identified any deficiency in the Staff’s analysis; rather, it simply disagrees with the Staff’s determination not to impose the identified SAMAs as a condition for license renewal. New York points to nothing in the APA that provides any legal

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<sup>41</sup> *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 201 n.1038 (2008).

basis for its claims in Contention 35.

New York's reliance on the *Limerick* decision<sup>42</sup> is also misplaced. In *Limerick*, the Third Circuit ruled that the NRC must evaluate the environmental impacts of severe accident mitigation design alternatives.<sup>43</sup> Nowhere in *Limerick* did the Third Circuit require or suggest that SAMAs must be implemented as license conditions.

In addition, New York Contention 35 assumes, erroneously, that the Council on Environmental Quality ("CEQ") regulations require the NRC to impose SAMAs as license conditions. New York asserts that the Staff's acceptance of the Applicant's SAMA Reanalysis and determination not to require implementation of potentially cost-beneficial SAMAs as license conditions violates the CEQ's regulations in 40 C.F.R. § 1502.14. However, the NRC, as an independent agency, is not bound by CEQ regulations that might have a substantive impact on the way in which the Commission performs its regulatory functions. Moreover, while it is the Commission's announced policy to "take account" of the CEQ regulations "voluntarily," 10 C.F.R. § 51.10(a), and to this end, the NRC has promulgated its regulations in 10 C.F.R. Part 51, the NRC is not bound to comply with CEQ regulations. Thus, to the extent that Contention 35 asserts that NRC action in this matter is in violation of the CEQ regulations, it is entirely without any legal basis.<sup>44</sup>

New York's reliance on 10 C.F.R. § 51.53(c)(3)(ii)(L) is similarly misplaced. That regulation requires that the Staff "consider" SAMAs in its environmental assessment or

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<sup>42</sup> *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989).

<sup>43</sup> *Id.* at 741.

<sup>44</sup> New York raises this issue again in Contention 36, asserting that certain SAMAs must be implemented as license conditions.

environmental impact statement, if it has not considered SAMAs for the plant previously. Nothing in the regulation requires a “final” determination of those SAMAs once they have been identified and considered, nor does it require the imposition of potentially cost-beneficial SAMAs as license conditions.

Likewise, the regulatory guidance documents that New York cites, NUREG/BR-0058<sup>45</sup> and NUREG-1555,<sup>46</sup> fail to support Contention 35. NUREG/BR-058 is a regulatory guide of general applicability. While it provides a definition of the term “substantial,”<sup>47</sup> it does not address SAMAs specifically and New York points to no provision in the guide in support of its position. NUREG-1555 is the NRC’s Standard Review Plan (“SRP”) for Severe Accident Mitigation Alternatives; it provides guidance for Staff tasked with the environmental review of licensing actions and describes the review which the Staff should perform of an applicant’s “methods for identifying the potential mitigation alternatives,” the range of mitigation alternatives identified, the applicant’s bases for estimating the SAMA’s costs and benefits, and the reasonableness of its estimates. NUREG-1555, Supp. 1 at 5.1.1-7 – 5.1.1-8. The SRP further states: “Any mitigation should be described along with the estimated benefit-cost ratio . . . . The statement for the SEIS should identify the mitigative measures considered and committed to by the applicant.” *Id.* at 5.1.1-8 Finally, as noted by the State (SAMA Supplemental Contentions at 26), the guidance states that, if SAMAs were not considered previously for the plant, the SEIS should include a “statement similar to the following”:

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<sup>45</sup> NUREG/BR-0058, Rev. 4, *Regulatory Analysis Guidelines of the US Nuclear Regulatory Commission*, (Sept. 2004) (ADAMS Accession No. ML0428201921).

<sup>46</sup> NUREG-1555, Supp. 1, *NRC Environmental Standard Review Plan for Severe Accident Mitigation Alternatives* (Oct. 1999) (ADAMS Accession No. ML003702019).

<sup>47</sup> NUREG/BR-0058 at 4, n.3.

The staff has concluded that the applicant completed a comprehensive, systematic effort to identify and evaluate the potential plant enhancements to mitigate the consequences of severe accidents. The staff has considered the robustness of this conclusion relative to critical assumptions in the analysis—specifically the impact of uncertainties in the averted offsite risk estimates and the use of October 1999 5.1.1-9 NUREG-1555, Supplement 1 alternative benefit-cost screening criteria. The staff has concluded that the findings of the analysis would be unchanged even considering these factors. Therefore, the staff concludes that the mitigation alternatives committed to by the applicant are appropriate, and no further mitigation measures are warranted.

*Id.* at 5.1.1.8 – 5.1.1.9.

Thus, the SRP does not compel mitigation, it simply instructs the Staff to describe any mitigation that the applicant has committed to undertake. If the Staff views that mitigation as appropriate and that no further mitigation is warranted, the Staff may conclude “that the mitigation alternatives committed to by the applicant are appropriate, and no further mitigation measures are warranted.” While the language suggests that the Staff may identify other mitigation alternatives as appropriate or warranted, the SRP does not establish a regulatory basis to require an applicant to implement any SAMAs that have been determined to be cost-beneficial. In sum, the SRP passage that New York relies upon does not support the proposition that potentially cost-beneficial SAMAs must be included as license conditions for license renewal.

Moreover, the SRP – a Staff guidance document – cannot compel the imposition of SAMAs as license conditions. The SRP suggests that the Staff discuss and acknowledge an applicant’s license commitments; it does not use the term “license condition”; it speaks in terms of mitigation alternatives to which the applicant has “committed”. A commitment is an explicit statement by an applicant, submitted in writing, that it will take a specific action; in contrast, a license condition is a legally binding requirement imposed on a licensee and most commonly

memorialized as an additional provision inserted in the license.<sup>48</sup> Not only is the SRP merely guidance, it addresses only unenforceable commitments, not legally binding license conditions.

(b) Contention 35 Fails to Raise a Material Issue

In accordance with 10 C.F.R. § 2.309(f)(1)(iv), an admissible contention must raise an issue that is “material to the findings the NRC must make to support the action that is involved in the proceeding.” The State, in Contention 35, fails to raise a material issue, in that it misunderstands the effect of the Applicant’s identification of various SAMAs as potentially cost-beneficial, and raises an issue that does not affect license renewal. New York asserts that the SAMA Reanalysis is deficient “because it identifies nine mitigation measures which have not yet been finally determined to be cost-effective and which, if they are sufficiently cost-effective must be added as license conditions before a new and extended operating license can be issued.”<sup>49</sup> What New York fails to recognize is that the Applicant’s identification of potentially cost-beneficial SAMAs establishes the range of SAMAs that might be considered cost-beneficial for the plant; while further analysis could result in a refinement of the cost/benefit ratio of those particular SAMAs, or in the deletion of certain SAMAs as no longer cost-beneficial, it would not result in the identification of any other mitigative alternatives that might be cost-beneficial.<sup>50</sup>

Significantly, New York does not request that further analysis be conducted to identify any other potentially cost-beneficial SAMAs, it does not contend that further analysis will identify any new SAMAs as potentially cost-beneficial, and it does not assert that the Applicant’s

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<sup>48</sup> SECY-00-045, Acceptance of NEI-99-04, *Guidelines for Managing NRC Commitments*, at 3 (Feb. 22, 2000) (ADAMS Accession No. ML003579799).

<sup>49</sup> *Id.* at 13.

<sup>50</sup> As the Staff explained in the Draft SEIS, the Applicant’s previous SAMA calculations overestimated the benefits of the SAMAs. See DSEIS at G-22.

analysis was flawed and that further analysis will result in a substantially different assessment of any identified SAMA's cost/benefit comparison. Rather, New York Contention 35 only seeks further analysis of SAMAs that have already been identified as potentially cost-beneficial by the Applicant and/or the Staff, with the goal of reaching a "final" determination of their cost/benefit ratio and to then require such "finally-determined" SAMAs to be imposed as a condition for license renewal. Such further analysis is immaterial, however, because even if further analysis is conducted, the SAMAs which have been identified would still not be imposed as condition for license renewal.<sup>51</sup> Thus, New York erroneously asserts that further analysis may show some SAMAs to be "sufficiently cost-beneficial" so that they must be added as license conditions. As discussed above, the regulations do not require an applicant to implement cost-beneficial SAMAs as a condition for license renewal. Accordingly, New York Contention 36 simply fails to raise a material issue in dispute.

In similar circumstances, the Commission questioned the benefit of further analysis where a SAMA had already been identified as potentially cost-beneficial. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 387-88 (2002). The intervenors in that case had argued that the applicant's SAMA analyses were deficient because they did not use higher containment failure probabilities and underestimated the benefit of a backup hydrogen control capability in a station black-out event and thus did not identify any potentially cost-beneficial SAMAs. The Staff's DSEIS,

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<sup>51</sup> New York's reliance on the Staff's publication, *Perspectives on Severe Accident Mitigation Alternatives for U.S. Plant License Renewal* (2009) (ADAMS Accession No. ML092750488) is misplaced. Section 3.5 of the Staff's paper refers to a "final step" that a licensee may opt to take, but is not required to take, within the scope of the SAMA analysis. For several of the SAMAs at issue in Contention 35, the Applicant already took this step, *i.e.*, the Applicant performed additional cost analysis and refined the costs estimates for SAMAs IP2 09, IP2 21, IP2 22, IP2 62, IP3 07, IP3 18, and IP3 19. The only other SAMAs at issue in Contention 35 are IP2 53 and IP3 53, both of which the Applicant has agreed to treat as potentially cost-beneficial.

however, found that backup hydrogen control capability was a potentially cost-beneficial SAMA.

The Commission observed as follows:

Given that the draft SEISs already finds that an ac-independent back-up power source appears to be a cost-beneficial SAMA under these assumptions, it is unclear what additional result or remedy would prove meaningful to the Intervenor.<sup>77</sup>

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<sup>77</sup> The SEISs also point out that "this SAMA does not relate to adequately managing the effects of aging during the period of extended operation," and "[t]herefore, it need not be implemented as part of license renewal pursuant to 10 CFR Part 54." See, e.g., Catawba Draft SEIS at 5-29. . . . [T]he ultimate agency decision on whether to require facilities with ice condenser containments to implement any particular SAMA will fall under a Part 50 current licensing basis review. NEPA "does not mandate the *particular* decisions an agency must reach," only the "process the agency must follow while reaching its decisions." *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448 (10th Cir. 1996) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

*Id.* at 388 (emphasis in original). *Subsequently*, the Commission denied the intervenors' petition for review of the Board's decision to reject the contention, finding the SAMA had already been determined to be potentially cost-beneficial and no further analysis was required.

We conclude with an overriding observation . . . . BREDL's SAMA contention . . . amounts to a demand for a stronger NRC endorsement of the beneficial effects of providing backup hydrogen control capability. But, as we indicated when this case was last before us, the EISs at issue here *already find the backup capability cost-beneficial*, albeit under particular assumptions. While the cost-benefit discussion in the EISs may not be as detailed or unequivocal as BREDL would like, the Supreme Court has made clear that the underlying statute, NEPA, demands no "fully developed plan" or "detailed explanation of specific measures which *will* be employed" to mitigate adverse environmental effects.

Under NEPA, mitigation (and the SAMA issue is one of mitigation) need only be discussed in "sufficient detail to ensure that environmental consequences [of the proposed project] have been fairly evaluated." Here, in a generic EIS the NRC has conducted a thorough NEPA evaluation of the probability and consequences of severe reactor plant accidents, and in plant-specific EISs the NRC staff has discussed at length possible mitigation measures. The mitigation analysis outlines relevant factors, discloses opposing viewpoints, and indicates particular

assumptions under which the staff ultimately concludes that "providing backup power to hydrogen igniters is cost-beneficial." The staff presented its analysis and conclusion based upon the "available technical information." NEPA requires no more.

NRC adjudicatory hearings are not EIS editing sessions. Our busy boards do not sit to parse and fine-tune EISs. To litigate a NEPA claim, an intervenor must allege, with adequate support, that the NRC staff has failed to take a "hard look" at significant environmental questions -- i.e., the staff has unduly ignored or minimized pertinent environmental effects. . . .

*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003) (emphasis in original; footnotes omitted).

Further, as the Commission recently explained in the Pilgrim license renewal proceeding, the proper question for adjudication is whether the SAMA analysis resulted in erroneous conclusions as to which SAMAs are cost-beneficial.<sup>52</sup> "The question is not whether there are 'plainly better' atmospheric dispersion models or whether the SAMA analysis can be refined further." *Pilgrim*, CLI-10-11, slip op. at 37. As the Commission noted, NEPA does not demand "virtually infinite study and resources." *Id.* While "there 'will always be more data that could be gathered,'" the Commission observed that "agencies 'must have some discretion to draw the line and move forward with decisionmaking.'" *Id.* The Commission concluded:

Unless it looks genuinely plausible that inclusion of an additional factor or use of other assumptions or models may change the cost-benefit conclusions for the SAMA candidates evaluated, no purpose would be served to further refine the SAMA analysis, whose goal is to determine what safety enhancements are cost-effective to implement.

*Id.*, slip op. at 39. Here, New York does not allege that additional SAMAs should have been identified as potentially cost-beneficial, nor does it allege that any significant errors were made

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<sup>52</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC \_\_\_\_ (March 26, 2010) (slip op. at 37).

in the Applicant's SAMA Reanalysis. Accordingly, the State has failed to establish that any purpose would be served by further analysis, and Contention 35 should therefore be rejected as failing to raise a material issue in dispute.

B. New York Contention 36

The December 2009 Severe Accident Mitigation Alternatives ("SAMA") Reanalysis does not comply with the requirements of the National Environmental Policy Act (42 U.S.C. Sections 4332(C)(iii) and (2)(e)), the President's Council on Environmental Quality's regulations (40 C.F.R. Section 1502.14), the Nuclear Regulatory Commission's Regulations (10 C.F.R. Section 51.53(c)(3)(ii)(L)), the Administrative Procedure Act 5 U.S.C. Section 553(c), 554(d), 557(c), and 706 or controlling federal court precedent (*Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)) because this SAMA Reanalysis identifies a number of mitigation alternatives which are now shown, for the first time, to have substantially greater benefits in excess of their costs than previously shown yet are not being included as conditions of the proposed new operating license.

Supplemental SAMA Contentions at 13. In sum, Contention 36 asserts that certain SAMAs that have been shown to be potentially cost-beneficial must now be included as conditions of the renewed license.

1. Contention 36 Lacks Any Basis in Law and Raises An Issue That Is Beyond the Scope of This Proceeding

(a) Contention 36 Lacks Any Legal Basis

There is no legal basis for New York's assertion that the NRC must require the Applicant to implement potentially cost-beneficial SAMAs as license conditions. As discussed above with respect to Contention 35, despite New York's assertions to the contrary, NEPA, the APA, and CEQ regulations do not require the NRC to require mitigation; the NRC's own regulations do not require that SAMAs be implemented as license conditions; and the *Limerick* case does not stand for this proposition, either. Thus, New York Contention 36 is inadmissible for lack of a legal basis. 10 C.F.R. § 2.309(f)(1)(ii).

(b) Contention 36 Raises an Issue Beyond  
The Scope of This Proceeding

New York Contention 36 is also inadmissible as it raises an issue that is outside the scope of this proceeding. The scope of license renewal encompasses only age-related degradation during the period of extended operations. Issues that relate to the current licensing basis are outside the scope of license renewal proceedings.<sup>53</sup> Indeed, this Board rejected New York Contentions 1, 2, 3, 18, 19, 20, 21, 22, and 29 on this basis. In this regard, this Board explicitly rejected New York Contention 20 because it found that the contention's challenge "relating to the NRC Staff's decision to grant Entergy the exemption from a one-hour [fire] barrier to a twenty-four/thirty minute barrier is a direct challenge to [the Applicant's] CLB (current licensing basis) and unrelated to the effects of plant aging and the LRA."<sup>54</sup>

Given the limited scope of license renewal, both the Applicant and the Staff have concluded that because "none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation, . . . they need not be implemented as part of the license renewal pursuant to 10 CFR Part 54."<sup>55</sup> Contention 36 reflects New York's fundamental disagreement with the NRC's determination to limit the scope of the license renewal to age-related degradation and, specifically, the application of that limitation with respect to SAMAs. The State's view is simply contrary to applicable law.

The Commission has explicitly recognized that a potentially cost-beneficial SAMA will not be imposed as a condition of license renewal unless it relates to adequate management of

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<sup>53</sup> 10 C.F.R. § 54.29 and *see Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 8-10 (2001).

<sup>54</sup> *Indian Point*, LBP-08-13, 68 NRC at 122 (2008) (emphasis added).

<sup>55</sup> DSEIS at 5-10, *see SAMA Reanalysis* at 32.

the effects of aging during the period of extended operation. Thus, in a decision issued two weeks ago in the Pilgrim license renewal proceeding, the Commission observed that the applicant had identified “seven potentially cost-effective SAMAs,” but because none of those SAMAs bear on adequately managing the effects of aging, none need be implemented as part of the license renewal safety review, pursuant to 10 CFR Part 54.”<sup>56</sup> Nor is this a new approach. As discussed *supra* at 25-26, the Commission has previously cited with approval the Staff’s view that the SEISs “point out that ‘this SAMA does not relate to adequately managing the effects of aging during the period of extended operation,’ and ‘[t]herefore, it need not be implemented as part of license renewal pursuant to 10 CFR Part 54.’” *McGuire/Catawba*, CLI-02-29, 56 NRC at 388 n.77. Further, the Commission went on to note that the question whether to implement the SAMA

will fall under a Part 50 current licensing basis review.” NEPA “does not mandate the particular decisions an agency must reach,” only the “process the agency must follow while reaching its decisions.” *Committee to Save the Rio Hondo and Lucero*, 102 F.2d 445, 448 (10<sup>th</sup> Cir. 1996) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

*Id.* It thus clear that potentially cost-beneficial SAMAs that do not address age-related degradation will not be required as part of license renewal; rather, the improvements addressed in those SAMAs are properly addressed in the context of the plant’s current licensing basis. Such issues are outside the scope of license renewal and are not admissible for litigation in license renewal adjudications.

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<sup>56</sup> *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC \_\_\_ (March 26, 2010) (slip op. at 7 n.26).

C. New York Contentions 35 and 36 are Inadmissible as Untimely.

Finally, in addition to being inadmissible for lack of basis and materiality, and as raising an issue that is beyond the scope of license renewal, Contentions 35 and 36 are inadmissible on the grounds that they were untimely filed and do not satisfy 10 C.F.R. § 2.309(f)(2), and a balancing of the “good cause” and other factors specified in 10 C.F.R. § 2.309(c)(1) does not favor their admission. In this regard, the contentions’ claims, that the Applicant must conduct further engineering cost analyses for SAMAs that are potentially cost-effective and that potentially cost-beneficial SAMAs must be imposed as license conditions, should have been raised in the State’s original contentions in response to the Applicant’s ER, or, at the very latest, in response to the Staff’s Draft SEIS issued on December 22, 2008.

A comparison of the ER, the DSEIS and the Applicant’s SAMA Reanalysis shows that the issues raised in New York Contentions 35 and 36 pertain to statements that appeared in the Applicant’s ER and in the Staff’s DSEIS. The information relied upon by the State is therefore “old” information, which could have been addressed by the State previously.

In its 2007 ER, the Applicant identified a set of potentially cost-beneficial SAMAs, and then stated as follows:

The above SAMA candidates for IP2 and IP3 do not relate to adequately managing the effects of aging during the license renewal period. In addition, since the SAMA analysis is conservative and is not a complete engineering project cost-benefit analysis, it does not estimate all the benefits or all the costs of a SAMA. For instance, it does not consider increases or decreases in maintenance or operation costs following SAMA implementation. Also, it does not consider the possible adverse consequences of the changes. Although not related to adequately managing the effects of aging during the period of extended operation, the above, potentially cost-beneficial SAMAs have been submitted for detailed engineering project cost-benefit analysis.

ER at 4-73. Thus, the Applicant’s ER stated that its SAMA analysis was conservative, that a complete engineering cost analysis had not been done, that the SAMA candidates did not

address the effects of aging, and that they were being submitted for further detailed cost-benefit analysis. The Applicant did not commit to implement the SAMA candidates and did not proffer the SAMA candidates as license conditions.

In the DSEIS, the Staff agreed with the Applicant's determination in the ER that further evaluation of the SAMAs was warranted outside of the license renewal arena and stated that because the potentially cost-beneficial SAMAs identified by the Applicant did not address age-related degradation, they would not be required to be implemented in connection with license renewal. The Staff stated:

Based on its review of the SAMA analysis, the staff concurs with Entergy's identification of areas in which risk can be further reduced in a cost-beneficial manner through the implementation of all or a subset of potentially cost-beneficial SAMAs. Given the potential for cost-beneficial risk reduction, the staff considers that further evaluation of these SAMAs by Entergy is warranted. However, none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation. Therefore, they need not be implemented as part of the license renewal pursuant to 10 CFR Part 54.

DSEIS at 5-10 (emphasis added).

In its December 14, 2009 SAMA Reanalysis, the Applicant repeated its prior statement that potentially cost-beneficial SAMAs were being submitted for further cost-benefit analysis. The Applicant also stated that because the effects of aging were being addressed by existing programs without the implementation of the SAMAs, the SAMAs need not be implemented as part of license renewal. The Applicant stated:

As described in the aging management review results for the integrated plant assessment presented in Section 3.1 through 3.6 of the license renewal application, IP2 and IP3 have programs for managing aging effects for components within the scope of license renewal (Reference 1). Since these programs are sufficient to manage the effects of aging during the license renewal period without implementation of the above SAMA candidates for IP2 and IP3, these potentially cost beneficial SAMAs need not be implemented as part of license renewal pursuant to 10 CFR Part 54. However, consistent with those

SAMAs identified previously as cost beneficial, the above potentially cost beneficial SAMAs have been submitted for engineering project cost benefit analysis.

SAMA Reanalysis at 32.

As the above comparison of the ER, the DSEIS, and the SAMA Reanalysis shows, the position that the Applicant stated in the SAMA Reanalysis was not new or materially different from its original position. In 2007, the Applicant stated that it did not intend to complete its engineering cost benefit analyses as part of its SAMA analysis; the Applicant's reiteration of that position in 2009 did not render its statement new.<sup>57</sup> Similarly, the Applicant's determination not to commit to implement the SAMAs or to proffer them as license conditions is not new. The ER does not contain any SAMA license commitments or license conditions. In the DSEIS, the Staff explicitly stated that SAMAs "need not be implemented as part of license renewal." In its SAMA Reanalysis, the Applicant repeats the Staff's language, stating that "these potentially cost beneficial SAMAS need not be implemented as part of license renewal". Again, the Applicant's repetition of the previously stated language did not make it new.

The Commission has rejected the idea that publication of a new document can transform previously available material into new information sufficient to support a new contention.<sup>58</sup> In *Oyster Creek*, the intervenors tried, unsuccessfully, to link their contentions to information that was highlighted in presentations and studies conducted and released between October 2006 and January 2007.<sup>59</sup> The Commission agreed with the Board's finding that the information

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<sup>57</sup> *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-79, 16 NRC 1116, 1118 (1982) (a contention based on dose calculations in a draft EIS was ruled untimely where the dose calculation was published months earlier in the applicant's safety analysis).

<sup>58</sup> *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272-73 (2009) (affirming the Board's order denying multiple late-filed contentions).

<sup>59</sup> *Id.* at 272-74.

underlying the intervenors' late-filed contentions had been available from at least 1991, holding that the contention should have been filed as part of the original petition to intervene and that it was untimely filed. *Id.* In sum, whether information is new is not determined by the date the petitioner discovers the information or realizes its significance, but by the date on which the information became available to the intervenor.<sup>60</sup>

Finally, while the Applicant's SAMA Reanalysis identifies new potentially cost-beneficial SAMAs, the contentions raise legal issues that are independent of the new SAMAs. The specific statements challenged by the State appeared in the Applicant's and Staff's previous publications. These issues do not "arise out of Entergy's revised SAMA submissions from December 21, 2009, through January 20, 2010,"<sup>61</sup> and the fact that the SAMA Reanalysis repeated information that was available earlier fails to provide an acceptable reason for the State to file what would otherwise be an untimely contention. New York Contentions 35 and 36 challenge positions that the Applicant and the Staff expressed years ago, and are not dependent on the number or type of potentially cost-beneficial SAMAs that were identified at Indian Point.

In its motion seeking to establish February 25, 2010, as the date for filing new or amended contentions on SAMA issues, the State explicitly "request[ed] that the Board issue an order approving a filing date of February 25, 2010 for new or amended contentions based on

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<sup>60</sup> *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) ("we think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset"); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) (petitioner could not justify good cause for a late filed contention on information that was previously reasonably available to the public but only recently discovered by the petitioner).

<sup>61</sup> Order of January 22, 2010, at 2.

the revised SAMA submission.”<sup>62</sup> In granting the State’s Motion, the Board ruled that “new or amended contentions based on Entergy’s revised SAMA submissions” or “which arise out of Entergy’s revised SAMA submissions from December 21, 2009, through January 20, 2010, will be deemed timely under 10 C.F.R. § 2.309(f)(2)” if filed by February 25, 2010. The Board did not offer the State an opportunity to file new contentions based on statements that had been made in the Applicant’s ER or the Staff’s Draft SEIS <sup>63</sup> Here, Contentions 35 and 36 are not based on new information; rather, they could and should have been filed as much as two years ago. Contrary to the State’s assertion (Motion for Leave to File, at 8), these contentions are not based on “information . . . which . . . was not previously available” or “materially different than information previously available.” The contentions therefore fail to satisfy the requirements of 10 C.F.R. § 2.309(f)(2).

Further, while New York recites factual differences between the SAMA Reanalysis and the ER’s SAMA analysis, it has failed to address the fact that the contentions challenge, not the analyses themselves, but the Applicant’s expression of what it intends to do with its SAMA analyses. As discussed above, those statements were made in the ER and could have been challenged previously. Accordingly, good cause for the late filing of these contentions, required by 10 C.F.R. § 2.309(c)(1) is lacking. Given the absence of good cause for the contentions’ late filing, the State’s demonstration on the other factors “must be particularly strong.” *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431,

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<sup>62</sup> Motion for Contention Filing Schedule, at 4.

<sup>63</sup> “Order (Granting New York’s Motion to Establish February 25, 2010 As the Date By Which New York May File Contentions Related to Entergy’s Revised Submission Concerning Severe Accident Mitigation Alternatives),” dated January 22, 2010, at 2 (emphasis added).

6 NRC 460, 462 (1977)). Here, however, the State treats the other seven factors – if at all – in a cursory fashion, and fails to establish a “particularly strong” showing that the contentions should be admitted. See Motion for Leave, at 13-15. Accordingly, the State has failed to satisfy the requirements of 10 C.F.R. § 2.309(c)(1).

CONCLUSION

For the foregoing reasons, the Staff does not oppose the admission of Contentions 12-B and 16-B (apart from one late-filed basis statement), to the extent that the Board has previously admitted Contentions 12/12-A and 16/16-A. However, the Staff respectfully submits that Contentions 35 and 36 should be rejected for the reasons set forth above.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Beth N. Mizuno', written in a cursive style.

Beth N. Mizuno  
Sherwin E. Turk  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 5<sup>th</sup> day of April 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. 50-247/286-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 STATE OF NEW YORK'S NEW AND AMENDED CONTENTIONS CONCERNING THE DECEMBER 2009 SEVERE ACCIDENT MITIGATION ALTERNATIVE REANALYSIS," dated April 5, 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 5<sup>th</sup> day of April, 2010:

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