

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

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Kaye D. Lathrop
Dr. Richard E. Wardwell

In the Matter of
ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point Nuclear Generating Units 2 and 3)

Docket Nos. 50-0247-LR and
50-286-LR
ASLBP No. 07-858-03-LR-BD01
April 22, 2010

Memorandum and Order

(Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A)

Before this Licensing Board is a Motion for Summary Disposition filed on February 26, 2010, by the Applicant, Entergy Nuclear Operations, Inc. (Entergy), seeking the summary disposition of New York State Contention 17/17A (NYS-17/17A). The Board denies Entergy's Motion because the contention is adequately supported, is properly within the scope of this proceeding, and there exists a genuine dispute over material facts.

I. Legal Standards for Summary Disposition

In our November 3, 2009, Memorandum and Order we summarized the legal standard for ruling on motions for summary disposition in NRC proceedings.¹ We will not repeat that discussion in full here. However, we note that in a recent Memorandum and Order in the Pilgrim license renewal proceeding, the Commission elaborated on the standard for summary disposition, explaining in part that:

[A] licensing board (or presiding officer) should not . . . conduct a "trial on affidavits." At this stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]." "The evidence of the non-movant is to be

¹ See Licensing Board Memorandum and Order (Ruling on Motions for Summary Disposition) (Nov. 3, 2009) at 1-2 (unpublished).

believed, and all justifiable inferences are to be drawn in his favor.” If “reasonable minds could differ as to the import of the evidence,” summary disposition is not appropriate. Caution should be exercised in granting summary disposition, which may be denied if “there is reason to believe that the better course would be to proceed to a full [hearing].”²

These standards govern our disposition of the instant Motion.

II. Entergy’s Motion for Summary Disposition of New York’s Contentions 17/17A

A. Procedural Background

On July 31, 2008, this Licensing Board admitted NYS-17, which alleged that:

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 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.³

The State of New York (New York) supplemented NYS-17 by moving to admit NYS-17A, based on the NRC Staff’s Draft Supplemental Environmental Impact Statement (Draft SEIS), further alleging that:

The [Draft SEIS] fails to address the impact of the continued operation of IP2 and IP3 for another 20 years on off-site land use, including real estate values in the surrounding area in violation of 10 C.F.R. §§ 51.71(a), 51.71(d), 51.95(c)(1), and 51.95(c)(4).⁴

The Board admitted NYS-17A and consolidated it with NYS-17.⁵ For ease of discussion, we will hereinafter refer to these consolidated contentions as NYS-17/17A.

² Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, __ (slip op. at 13) (Mar. 26, 2010) (citations omitted).

³ LBP-08-13, 68 NRC 43, 113 (2008).

⁴ State of New York Contentions Concerning NRC Staff’s Draft Supplemental Environmental Impact Statement (Feb. 27, 2009) at 14.

⁵ Licensing Board Order (Ruling on New York State’s New and Amended Contentions) (June 16, 2009) at 8 (unpublished).

On February 26, 2010, Entergy filed a Motion for Summary Disposition of NYS-17/17A.⁶ The NRC Staff filed an Answer supporting Entergy's Motion on March 18, 2010.⁷ New York filed its Response on March 18, 2010.⁸

B. Entergy's Motion

Entergy's Motion proffers both legal and factual arguments.

1. Entergy's Legal Argument

Entergy posits that the National Environmental Policy Act (NEPA) does not require consideration of the impact that the license renewal would have on property values adjacent to the Indian Point plant since any effect on property values would not be based on a physical impact upon those properties. Entergy also describes NYS-17/17A's assumption that property values will increase after denial of Entergy's license renewal application (LRA) for Indian Point as failing this test since reliance on a third party developing the Indian Point property and its environs "into something more attractive to nearby landowners," is too attenuated and unpredictable to mandate that Entergy (and thus the NRC Staff) review the impacts of such an occurrence.⁹ Entergy then argues that NYS 17/17A should be dismissed because NEPA requires consideration of potential changes in property value only if such effects (1) are directly linked to impacts to the physical environment and (2) are reasonably likely to actually occur as postulated by New York.¹⁰

⁶ Entergy Nuclear Operations, Inc. Motion for Summary Disposition of New York State Contention 17/17-A (Property Values) (Feb. 26, 2010) [Entergy's Motion].

⁷ NRC Staff's Answer to Applicant's Motion for Summary Disposition of New York State Contention 17/17-A (Property Values) (Mar. 18, 2010) [NRC Staff's Answer].

⁸ State of New York's Response to Entergy's Motion for Summary Disposition on New York Contentions 17 and 17A (Mar. 18, 2010) [New York's Response].

⁹ Id. at 11-12.

¹⁰ Entergy's Motion at 10-11 (footnotes omitted) (referencing Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983); Hammond v. Norton, 370 F. Supp. 2d 226,

Citing the U.S. Supreme Court's decision in Metro. Edison Co., Entergy reasons that "NEPA does not require agencies to evaluate the effects of risk, qua risk' because 'a risk of an accident is not an effect on the physical environment."¹¹ Further, Entergy claims that NYS-17/17A is outside the scope of this proceeding because it is based on the environmental impact of prolonged on-site spent fuel storage, and environmental review of the impacts from on-site spent fuel storage in NRC proceedings is precluded by the categorical determination in NRC regulations that the license renewal of a nuclear reactor will entail "small environmental effects through dry or pool storage at all plants."¹² Therefore, Entergy argues that the issues raised in NYS-17/17A are precluded from review in this proceeding as a matter of law.

2. Entergy's Factual Argument

Entergy also insists that the two underlying bases for NYS-17/17A are not rooted in fact. First, Entergy maintains that NYS-17/17A wrongly assumes that property values around the Indian Point Energy Center (IPEC) will rise when the merely psychological "concern" linked to proximity to a nuclear power plant and dry cask storage of spent fuel abates.¹³ Entergy analogizes New York's so-called "attractive riverfront development" outcome of the no-action alternative to the "industrial heaven" no-action alternative held to be inadmissible in the Commission's USEC decision. Entergy alleges that, like the petitioners in USEC, New York has not presented to the Board a genuine dispute of material fact because New York has demonstrated no concrete evidence for its predicted outcome, which is at best dependent on the

243 (D.D.C. 2005); Soc'y Hill Owners' Ass'n v. Rendell, 210 F.3d 168, 182 (3d Cir. 2000); Tongass Conservation Soc'y v. Cheney, 924 F.2d 1137, 1144 (D.C. Cir. 1991)).

¹¹ Id. at 11-12 (citing Metro. Edison Co., 460 U.S. at 775).

¹² Id. at 12 (citing 10 C.F.R. Part 51, Subpart A, App. B, Table B-1).

¹³ Id. at 1-2, 14-17 (citations omitted).

actions of remote third parties, and at worst assumes an unlikely outcome that the IPEC site could be redeveloped by 2025.¹⁴

Second, Entergy disputes NYS-17/17A's postulate that the Indian Point "site will be cleared of all nuclear materials and facilities and will be available for development into an 'attractive riverfront development' within ten years if the LRA is denied."¹⁵ In part, Entergy reaches this position because New York's own pleadings in response to proposed new contentions based on the Waste Confidence Rule rested on the prediction that, under any scenario in this proceeding, spent fuel would not leave the IPEC site by 2025.¹⁶ Since Entergy's decommissioning program (which is not dependent on its operating license's renewal) may take up to sixty years from cessation of operations at IPEC, Entergy claims that NYS-17/17A's reliance on conclusion of operations by 2025 has no genuine rooting in fact.¹⁷ Additionally, Entergy finds no factual basis for New York's expert's assertion of these facts because New York's expert has been "told to assume" certain future outcomes to reach his conclusions.¹⁸

Entergy represents that the NRC Staff's Draft Supplemental Environmental Impact Statement (Draft SEIS) acknowledges New York's claim that cessation of operations at Indian Point may lead to an increase in property values, but ultimately concludes that this may be insufficient to make up for the loss in local tax revenues resulting from the plant's termination.¹⁹ Entergy reasons that NYS-17/17A is moot because the NRC Staff has already addressed and

¹⁴ Id. at 14-16 (referencing USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 466-69 (2006)).

¹⁵ Id. at 2 (citing Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 182 (3d Cir. 2000); USEC, CLI-06-10, 63 NRC at 466-69). See also id. at 14-17 (citations omitted).

¹⁶ Id. at 14 n.66.

¹⁷ Id. at 16 (citations omitted).

¹⁸ Id. at 14-15 & nn.68-70.

¹⁹ Id. at 17-18 (citations omitted).

adequately analyzed the heart of NYS-17/17A in its Draft SEIS (even though there is no requirement for it to do so) in part because the NRC Staff has determined that the amount of property value increase upon denial of license renewal does not offset the lost tax revenues from the shutdown of Indian Point.²⁰

Thus, Entergy insists that there is no genuine dispute over material facts and concludes that without the presence of the requisite genuine dispute, summary disposition of NYS-17/17A is appropriate.²¹

C. NRC Staff's Answer

The NRC Staff states that it is in agreement with Entergy's position that there exists no genuine dispute of material fact over NYS-17/17A and urges the Board to grant Entergy's Motion as a matter of law. As justification for its position the NRC Staff offers three reasons that parallel the line of reasoning presented by Entergy.²²

First, the NRC Staff asserts that its Draft SEIS moots NYS-17/17A since it addresses the license renewal's predicted impact on property values near Indian Point. Thus, the NRC Staff further claims that NYS-17/17A incorrectly classifies the discussion of property values in the Draft SEIS as an omission without challenging the adequacy of the NRC Staff's analysis in the Draft SEIS.²³

Second, the NRC Staff labels the aspect of NYS-17/17A relating to the environmental impacts of spent fuel storage as a Category 1 issue that has been addressed in a generic rulemaking and promulgated as part of 10 C.F.R. Part 51, Appendix B, Table B-1.²⁴ Therefore,

²⁰ Id. at 18-19 (citations omitted).

²¹ Id. at 14-15.

²² NRC Staff's Answer at 8-17.

²³ Id. at 9-11 (citations omitted).

²⁴ Id. at 11-12 (citations omitted).

the NRC Staff contends that environmental review of the specific issue raised in NYS-17/17A (the impact of license renewal on property values) is precluded in this proceeding by operation of 10 C.F.R. § 2.335 as an impermissible challenge to NRC regulations. Accordingly, the NRC Staff urges that NYS 17/17A should be dismissed as a matter of law.²⁵

Third, the NRC Staff argues that an analysis of the impact on adjacent property values of a license renewal for the Indian Point facility is not mandated by NEPA. In support of this argument the NRC Staff cites to NRC and Federal precedent, which it alleges have repeatedly confirmed the inadmissibility of environmental contentions based on lowered property values due to fear of living close to a nuclear power plant, because this issue is based solely on psychological concerns and thus has no physical connection to the effect of license renewal on the environment.²⁶

Fourth, the NRC Staff also asks the Board to interpret NYS-17/17A as alleging an impact “that flow[s] from the independent actions of third persons in response to the action under consideration,” which is distinguishable from those “reasonably foreseeable impacts that may result from a major federal action” that the NRC Staff is obliged to consider under NEPA. According to the NRC Staff, since the factual hypothesis raised in NYS-17/17A is dependent on the possibility that third parties will redevelop the site upon the possible denial of Entergy’s LRA, the potential changes in property values are too speculative to require analysis under NEPA.²⁷

Finally, the NRC Staff suggests that New York has provided no factual support for NYS-17/17A’s premise that the Indian Point site will be redeveloped within ten years upon cessation

²⁵ Id. at 12 (citations omitted).

²⁶ Id. at 13-15 (citing Metro. Edison Co., 460 U.S. at 772-73, 778; Taubman Realty Group, Ltd. P’ship v. Mineta, 320 F.3d 475, 481 (4th Cir. 2003); James v. TVA, 538 F. Supp. 704, 709 (E.D. Tenn. 1982); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 109 n.26 (1998); Babcock & Wilcox Co. (Pennsylvania Nuclear Services Operations, Parks Township, PA), LBP-94-12, 39 NRC 215, 218-19 (1994); Metro. Edison Co. (Three Mile Island Unit 1), CLI-82-6, 15 NRC 407 (1982)).

²⁷ Id. at 15-16 (citations omitted).

of operations to trigger an increase in the value of surrounding property, since both NRC regulations and Indian Point's Draft SEIS contemplate a sixty-year decommissioning period.²⁸

Therefore, the NRC Staff asks the Board to conclude that: (1) the issues raised in NYS-17/17A are outside the scope of this proceeding; (2) even if the issues raised by NYS 17/17A were within the scope of this proceeding, they have been rendered moot by the Draft SEIS; and (3) that there is no genuine dispute over material fact presented by NYS-17/17A. Accordingly, the NRC Staff urges that these contentions should be dismissed as a matter of law.²⁹

D. New York's Response

New York categorizes Entergy's Motion as a motion for reconsideration of the Board's previous decisions admitting NYS-17/17A rather than a motion for summary disposition alleging the absence of a genuine dispute of material fact.³⁰

First, New York argues that NYS-17/17A is within the scope of license renewal proceedings because NEPA requires analysis of socioeconomic impacts of proposed federal actions and that 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 includes "land use" as one of the socioeconomic impacts that must be evaluated in a license renewal applicant's Environmental Report (ER).³¹ Moreover, referencing its expert's report, New York asserts that NYS-17/17A alleges an impact rooted in material fact since its predicted rise in property values upon denial of license renewal is dependent on factors like "nuisance and disamenity," not merely "risk of an accident or even aversion."³² Thus, New York says that NYS-17/17A does not contravene the Supreme Court's holding in Metro. Edison Co., since it does not seek

²⁸ Id. at 16-17 (citations omitted).

²⁹ See id. at 18.

³⁰ New York's Response at 2.

³¹ Id. at 2 (citations omitted).

³² Id. at 6 (citing March 2010 Supplemental Declaration of Stephen Sheppard, Determinants of Property Values at 2 (Mar. 18, 2010) [hereinafter Sheppard Report]).

evaluation of risk itself. Rather the contention centers around the environmental impact of license renewal on property values surrounding the IPEC site.³³

New York avers that Entergy concedes that there is an impact on property values from the operations at Indian Point, but that Entergy's ER (and in turn, the NRC Staff's Draft SEIS) only addresses the positive impacts of license renewal while ignoring the negative impacts of license renewal on property values. This one-sided impact analysis, according to New York, violates both the letter and spirit of NEPA.³⁴ Likewise, regarding Entergy's assertion that any Indian Point decommissioning will take longer than NYS-17/17A predicts, New York claims that NEPA compels Entergy to conduct an analysis of the environmental impacts of the no-action alternative for the decommissioning period, and that such a period would not necessarily last the full sixty years that Entergy anticipates given the site-specific conditions at Indian Point. New York then suggests that the potential for a property value increase that could approach \$1 billion would "tip the scale in favor of decommissioning within the minimum time allowed rather than at the leisurely schedule" suggested by Entergy.³⁵

New York also challenges Entergy's characterization of NYS-17/17A's "reliance on 'speculative' future actions" since, for the purpose of this proceeding, we must assume that off-site storage for spent fuel will be available by 2025.³⁶ New York asserts that until the Commission decides on the pending certification of contentions related to the viability of the Waste Confidence Rule, it must be permitted to rely on the categorical determination by the Commission regarding the expected date that spent fuel will be removed from the IPEC site.³⁷

³³ Id. at 6-7.

³⁴ Id. at 6-9 (citations omitted).

³⁵ Id. at 11-13 (citations omitted).

³⁶ Id. at 9-10.

³⁷ Id. (citations omitted).

In addition, New York attempts to distinguish its no-action alternative from that proffered in the USEC proceeding for two reasons. First, New York argues that (unlike the petitioner in USEC) it seeks “to preserve the status quo and Entergy . . . seeks to alter it” since Indian Point Units 2 and 3 are scheduled to return to a different use upon expiration of their current operating licenses unless the proposed license renewal is granted.³⁸ Second, New York represents that NYS-17/17A is also different from the contention in USEC since NYS-17/17A does not depend on the speculative result of an “attractive riverfront development,” but rather that it (and New York’s expert, Dr. Sheppard) has only forecasted “some combination of mixed use riverfront development,” which is a challenge to the proposition in Entergy’s ER that a likely result in the event of no license renewal would be abandonment of the IPEC site.³⁹ New York adds that its expert “was not asked to make any finding as to the highest and best use of the site following decommissioning” in arriving at his conclusions that the IPEC site will be developed for a specific type of use and, regardless of that, Entergy did not attempt to dispute New York’s expert’s prediction that abandonment would not occur if the license of Indian Point Units 2 and 3 was not renewed.⁴⁰

Finally, New York contends that the NRC Staff’s Draft SEIS does not moot NYS-17/17A because the Draft SEIS only makes passing reference to the positive impacts that would result if the Indian Point licenses are not renewed. Accordingly, New York argues that the Draft SEIS does not fill the omission asserted in NYS-17/17A that the requisite analysis of the positive impacts on land use is missing.⁴¹

³⁸ Id. at 10-11 (citations omitted).

³⁹ Id. at 11.

⁴⁰ Id. at 11 & n.5.

⁴¹ Id. at 13-15 (citations omitted).

III. Board Decision

The Board finds that NYS 17/17A is within the scope of this proceeding and that there remains a genuine dispute over a material fact regarding the socioeconomic environmental impacts of license renewal on property values adjacent to the IPEC site. Therefore, we hereby deny Entergy's Motion for Summary Disposition.

A. NYS-17 is Within the Scope of this Proceeding

At the outset, we reiterate our reasoning on the admissibility of NYS-17 that we articulated in LBP-08-13. Table B-1 of 10 C.F.R. Part 51, Subpart A, Appendix B (Table B-1) deems "the impact on offsite land use during the license renewal term . . . a Category 2 environmental issue that is within the scope of this proceeding,"⁴² and states that "significant changes in land use may be associated with population and tax-revenue changes resulting from license renewal."⁴³ The regulation did not, as argued by Entergy, limit consideration of the impact on land use within the vicinity of the plant to tax-driven land-use changes. Accordingly, because Entergy's ER did not take into account "the impact on real estate values that would be caused by license renewal or nonrenewal," we admitted NYS-17 as a contention of omission.⁴⁴ Entergy has not presented any new legal argument or factual information to change our conclusion that the issues raised by NYS-17/17A are within the scope of this proceeding.

We are not persuaded by Entergy's comparison of this contention to one asking for an assessment of risk or fear of living near a nuclear power plant. NYS-17/17A does not seek an evaluation of risk or fear. Rather, this contention seeks an assessment of the impact of the no-action alternative to license renewal directly on property values themselves. Although Entergy concedes that tax-driven impacts are the kinds of socioeconomic impacts it is required to

⁴² LBP-08-13, 68 NRC 43, 115 (2008).

⁴³ Id. at 116 (quoting 10 C.F.R. Part 51, Subpart A, App. B, Table B-1).

⁴⁴ Id.

evaluate,⁴⁵ it is not apparent that tax-driven impacts are necessarily less tied to the physical environment than the impact on property values to render the latter any less within the scope of this proceeding than tax-driven changes.

Moreover, we find Entergy's claim that New York has demonstrated no "reasonably close causal relationship" to the physical environment since "the causal chain between non-renewal of the IPEC operating licenses and the alleged property value effect is 'too attenuated'"⁴⁶ to be a question of fact that is appropriate for resolution at an evidentiary hearing. New York asserts facts in support of its contentions in the form of an expert's declarations and associated reports that non-renewal of the Indian Point licenses will have a significant impact on adjacent land values.⁴⁷ This potential evidence goes directly against statements in Entergy's ER and the NRC Staff's Draft SEIS that non-renewal will not have a significant impact.⁴⁸ Since

⁴⁵ See LBP-08-13, 68 NRC at 114 ("Entergy maintains . . . that an applicant in a license renewal proceeding need only analyze impacts from population growth related to the plant or from the public services that local governments provide to encourage development using the tax payments from the plant.").

⁴⁶ Entergy's Motion at 11-12 (quoting Metro. Edison Co., 460 U.S. at 775).

⁴⁷ See, e.g., State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement, Supplemental Declaration of Stephen C. Sheppard, "Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation" at 1 (Feb. 26, 2009) ("[T]here are significant additional burdens imposed on off-site property values if license renewal is approved."); New York State Notice of Intention to Participate and Petition to Intervene and Supporting Declarations and Exhibits, Declaration of Stephen C. Sheppard, "Potential Impacts of Indian Point Relicensing on Property Values" at 6 (Nov. 29, 2007) ("The result indicates that the assertion that the impacts of extended licensing of the plant would be non-existent or undetectable cannot be accepted as scientifically valid.").

⁴⁸ Indian Point Energy Center License Renewal Application, Appendix E, Environmental Report at 4-40 to 4-43 [hereinafter Entergy's ER] ("[T]he impact to tax-driven land use changes from the continued payment of PILOT and property taxes from IP2 and IP3 is expected to be SMALL due to pre-established land use patterns and controls to guide land use development. Therefore, mitigation measures are not warranted."); Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment, Main Report, NUREG-1437, at 8-29 to 8-30 (Supp. 38, Vol. 1 Dec. 2008) (ADAMS Accession No. ML083540594) [hereinafter Draft SEIS] ("The NRC staff concludes that the 9 socioeconomic impacts of plant shutdown would likely be SMALL to MODERATE (MODERATE effects for the Hendrick Hudson

“reasonable minds could differ as to the import of the evidence”⁴⁹ proffered for these opposing propositions, we continue to believe that there exists a genuine dispute of material fact on this issue.

Similarly, we find unavailing Entergy’s comparison of Dr. Sheppard’s declarations and reports (NYS-17/17A’s factual support) to the inadmissible contention raised in the USEC proceeding. As New York points out, Dr. Sheppard assumes neither a specific result in the form of the “attractive riverfront development” nor the acts of third parties.⁵⁰ Rather, NYS-17/17A (through Dr. Sheppard) challenges the prediction in Entergy’s ER that the IPEC site would be abandoned if the licenses for Indian Point Units 2 and 3 were not renewed. New York instead predicts that a likely possibility would be an “attractive riverfront development.”⁵¹ Unlike the speculative alternative sought to be evaluated in USEC (an industrial heaven), New York posits a factual estimate in support of NYS-17/17A by a purported expert that directly contests the prediction in Entergy’s ER of what the status quo would look like if the no-action alternative was selected.⁵² Therefore, we find that the Sheppard declaration provides support for the existence of a genuine issue of material fact.

We agree with Entergy that proffered NEPA contentions relating to on-site spent fuel storage are outside the scope of this proceeding due to the Waste Confidence Rule (codified as 10 C.F.R. § 51.23),⁵³ whose continuing viability we recently certified to the Commission.⁵⁴ In

Central School District, Village of Buchanan, Town of Cortlandt, and the Verplanck Fire District).”).

⁴⁹ Pilgrim, CLI-10-11, 71 NRC ___, ___ (slip op. at 13) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 250-51 (1986)).

⁵⁰ See New York’s Response at 9-13.

⁵¹ Id. at 11.

⁵² Cf. USEC, CLI-06-10, 63 NRC at 468-69.

⁵³ See Entergy’s Motion at 13-14 & n.66; New York’s Response at 9-10 & n.4.

making that certification we did not admit contentions regarding the Waste Confidence Rule and we emphasized that the Waste Confidence Rule remains a binding regulation unless and until the Commission takes action to modify or withdraw it.⁵⁵ Accordingly, for the time being, New York may rely on the timetable set in the Waste Confidence Rule for disposal of waste.

Unlike the Waste Confidence Rule, however, the issue of the length of the decommissioning period is not a finding by the Commission and therefore it may be challenged in this proceeding. Under the existing regulations, the decommissioning period may last up to sixty years after cessation of operations and any time for decommissioning requested beyond that period is subject to Commission approval “when necessary to protect public health and safety.”⁵⁶

We believe that New York may, but does not have to, rely on the time for decommissioning outlined in Part 50. Moreover, as New York points out, decommissioning activities may not be conducted until significant environmental impacts have been reviewed,⁵⁷ and we continue to believe that the effect on land use near a licensed site is an environmental impact that is within the scope of this proceeding.⁵⁸ New York’s forecast is that the effects on property values from the no-action alternative will be large (which depends on New York’s own assumptions of which decommissioning scenario is likely after cessation of operations rather than the full time period afforded to Entergy in Part 50).⁵⁹ On the other hand, Entergy calculates

⁵⁴ Licensing Board Memorandum and Order (Certification to the Commission of a Question Relating to the Continued Viability of 10 C.F.R. § 51.23(b) Arising From Clearwater’s Motion for Leave to Admit New Contentions) (Feb. 12, 2010) (unpublished).

⁵⁵ Id. at 22, 26-27.

⁵⁶ 10 C.F.R. § 50.82(a)(3).

⁵⁷ New York’s Response at 12 (referencing 10 C.F.R. § 50.82(a)(6)(ii)).

⁵⁸ Cf. LBP-08-13, 68 NRC at 115-16.

⁵⁹ New York’s Response at 11-12; see also New York State Notice of Intention to Participate and Petition to Intervene (Nov. 30, 2007) at 169-74.

that any land-use impacts will be small and does not specifically address these specific kinds of impacts.⁶⁰ Therefore, we continue to find that this issue presents a genuine issue of material fact.

B. The Draft SEIS Does Not Render NYS-17/17A Moot

The Draft SEIS, issued in December 2008, contains a section evaluating the “tax-revenue-related impacts,” which concludes that “there would be no tax-revenue-related land use impacts during the license renewal term beyond those currently being experienced.”⁶¹ This conclusion rests on the NRC Staff’s findings that: (1) Entergy had no construction plans related to license renewal during the license renewal period, (2) the assessed value of the IPEC reactors would not increase, and (3) revenue to nearby towns during the license renewal period from Indian Point Units 2 and 3 “would remain relatively unchanged.”⁶² The Draft SEIS’s section on socioeconomic impacts contains the following evaluation:

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 (Levitan and Associates, Inc. 2005). 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.⁶³

New York submitted NYS-17A as a contention based on the Draft SEIS, which we admitted because we found that it asserted that the Draft SEIS suffered from the same

⁶⁰ See LBP-08-13, 68 NRC at 115-16 (citing Entergy’s ER § 4.18.4).

⁶¹ Draft SEIS at 4-40 to 4-41.

⁶² Id. at 4-41.

⁶³ Id. at 8-29 to 8-30.

deficiencies as Entergy's ER.⁶⁴ We did not address Entergy's arguments that the Draft SEIS moots both NYS-17 and NYS-17A because Entergy had not filed a motion for summary disposition at that time and we declined to dismiss the contentions for mootness sua sponte.⁶⁵ The instant Motion explicitly argues that NYS-17/17A is moot due to the Draft SEIS.⁶⁶ We disagree.

Entergy claims that the Draft SEIS contains exactly what NYS-17/17A complained was missing from Entergy's ER because the Draft SEIS evaluates "the property value impacts within the context of the no-action alternative."⁶⁷ Further, Entergy maintains that since NYS-17 was outside the scope of this proceeding in the first place, the argument that the NRC Staff's experts cited in the Draft SEIS used faulty methodology remains inadmissible because there is no requirement for the NRC Staff (and applicants in general) to address this type of impact in an environmental impact statement.⁶⁸ The NRC Staff contends that the Draft SEIS moots NYS-17 (and thus renders NYS-17A inadmissible) because it examines precisely what New York alleged was missing in Entergy's ER and because NYS-17A does not "challenge the adequacy of the Draft SEIS discussion of property values."⁶⁹ New York claims that the Draft SEIS does not moot the omissions alleged in NYS-17/17A because the treatment by the NRC Staff in the Draft SEIS, which New York deems "at best, a passing reference," contains none of the requisite analysis

⁶⁴ See Licensing Board Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) at 8 (unpublished).

⁶⁵ Id.

⁶⁶ Entergy's Motion at 17-19.

⁶⁷ Id.

⁶⁸ Id. at 17-18.

⁶⁹ NRC Staff's Answer at 10.

under NEPA since it explains neither the meaning behind “some increases in tax revenue” nor the methodology used to achieve its conclusions.⁷⁰

We do not decide here whether or not the NRC Staff’s analysis in its Draft SEIS is adequate as a matter of fact. Because we viewed NYS-17A as alleging that the passing reference to property values in the Draft SEIS was an insufficient analysis under NEPA, we admitted NYS-17A insofar as it claimed the same deficiencies as NYS-17.⁷¹ In our judgment, the alleged facts from New York, Entergy, and the NRC Staff present a genuine dispute over an issue of material fact. Therefore, we believe that summary disposition is inappropriate here.

⁷⁰ New York’s Response at 13-15.

⁷¹ See Licensing Board Order (Ruling on New York State’s New and Amended Contentions) (June 16, 2009) at 8 (unpublished).

IV. Conclusion

For the foregoing reasons, the Board denies Entergy's Motion for the Summary Disposition of New York's Contention NYS-17/17A.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁷²

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA, by Edward R. Hawkens for/

Dr. Kaye D. Lathrop
ADMINISTRATIVE JUDGE

/RA, by Edward R. Hawkens for/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 22, 2010

⁷² Copies of this Order were sent this date by Internet e-mail to: (1) Counsel for the NRC Staff; (2) Counsel for Entergy; (3) Counsel for the State of New York; (4) Counsel for Riverkeeper, Inc.; (5) Manna Jo Green, the Representative for Clearwater; (6) Counsel for the State of Connecticut; (7) Counsel for Westchester County; (8) Counsel for the Town of Cortlandt; (9) Mayor Alfred J. Donahue, the Representative for the Village of Buchanan; and (10) Counsel for the New York City Economic Development Corporation.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (DENYING ENTERGY'S MOTION FOR THE SUMMARY DISPOSITION OF NYS CONTENTION 17/17A) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Sherwin E. Turk, Esq.
Beth N. Mizuno, Esq.
David E. Roth, Esq.
Brian Harris, Esq.
Andrea Z. Jones, Esq.
Karl Farrar, Esq.
Brian Newell, Paralegal

Administrative Judge
Lawrence G. McDade, Chair

Administrative Judge
Richard E. Wardwell

Administrative Judge
Kaye D. Lathrop
190 Cedar Lane E.
Ridgway, CO 81432

Joshua A. Kirstein, Law Clerk

William C. Dennis, Esq.
Assistant General Counsel
Entergy Nuclear Operations, Inc.
440 Hamilton Avenue
White Plains, NY 10601

Andrew M. Cuomo, Attorney General
John J. Sipos, Assistant Attorney General
Mylan L. Denerstein, Deputy Assistant Attorney
General, Division of Social Justice
Janice A. Dean, Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
State Street
Albany, New York 12224

Docket Nos. 50-247-LR and 50-286-LR
 MEMORANDUM AND ORDER (DENYING ENTERGY'S MOTION FOR
 THE SUMMARY DISPOSITION OF NYS CONTENTION 17/17A)

Kathryn M. Sutton, Esq.
 Paul M. Bessette, Esq.
 Martin J. O'Neill, Esq.
 Mauri T. Lemoncelli, Esq.
 Counsel for Entergy Nuclear Operation, Inc.
 Morgan, Lewis & Bockius, LLP
 1111 Pennsylvania Avenue, NW
 Washington, DC 20004

Joan Leary Matthews, Esq.
 Senior Attorney for Special Projects
 New York State Department
 of Environmental Conservation
 625 Broadway, 14th Floor
 Albany, New York 12233-5500

Michael J. Delaney
 Vice President, Energy Department
 New York City Economic Development
 Corporation (NYCEDC)
 110 William Street
 New York, NY 10038

Robert D. Snook, Esq.
 Office of The Attorney General
 State of Connecticut
 55 Elm Street
 P.O. Box 120
 Hartford, CT 06141-0120

Arthur J. Kremer, Chairman
 New York Affordable Reliable Electricity
 Alliance (AREA)
 347 Fifth Avenue, Suite 508
 New York, NY 10016

Stephen C. Filler, Board Member
 Hudson River Sloop Clearwater, Inc.
 303 South Broadway, Suite 222
 Tarrytown, NY 10591

Daniel E O'Neill, Mayor
 James Siermarco, M.S.
 Liaison to Indian Point
 Village of Buchanan
 Municipal Building
 236 Tate Avenue
 Buchanan, NY 10511-1298

Manna Jo Greene, Environmental Director
 Hudson River Sloop Clearwater
 112 Little Markey Street
 Poughkeepsie, NY 12601

Thomas F. Wood, Esq.
 Town of Cortlandt
 Daniel Riesel, Esq.
 Jessica Steinberg, J.D.
 Counsel for the Town of Cortlandt
 Sive, Paget & Riesel, P.C.
 460 Park Avenue
 New York, NY 10022

Nancy Burton, Esq.
 Connecticut Residents Opposed to
 Relicensing of Indian Point (CRORIP)
 147 Cross Highway
 Redding Ridge, CT 06876

Docket Nos. 50-247-LR and 50-286-LR
MEMORANDUM AND ORDER (DENYING ENTERGY'S MOTION FOR
THE SUMMARY DISPOSITION OF NYS CONTENTION 17/17A)

Elise N. Zoli, Esq.
Goodwin Proctor, LLP
Exchange Place
53 State Street
Boston, MA 02109

Justin D. Pruyne
Assistant County Attorney, Litigation Bureau
Of Counsel to Charlene M. Indelicato, Esq.
Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601

John LeKay
Heather Ellsworth Burns-DeMelo
Remy Chevalier
Bill Thomas
Belinda J. Jaques
FUSE USA
351 Dyckman Street
Peekskill, New York 10566

Susan H. Shapiro, Esq.
Westchester Citizens' Awareness Network
(WestCan), Citizens Awareness Network,
(CAN), et al
21 Pearlman Drive
Spring Valley, NY 10977

Philip Musegaas, Esq.
Deborah Brancato, Esq.
Riverkeeper, Inc.
828 South Broadway
Tarrytown, NY 10591

Richard L. Brodsky
Assemblyman
5 West Main Street
Suite 205
Elmsford, NY 10523

Sarah L. Wagner, Esq.
Legislative Office Building, Room 422
Albany, NY 12248

[Original signed by Linda D. Lewis]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of April, 2010