

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF
THE ATOMIC SAFETY AND LICENSING BOARD'S DECISION
ADMITTING NEW YORK STATE CONTENTIONS 35 AND 36
ON SEVERE ACCIDENT MITIGATION ALTERNATIVES (LBP-10-13)

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2)(i) and (ii), the NRC Staff ("Staff") respectfully requests that the Commission grant immediate interlocutory review of the Atomic Safety and Licensing Board's ("Board") Memorandum and Order of June 30, 2010,¹ insofar as the Board admitted New York State ("NYS") Contentions 35 and 36.² In particular, the Staff requests review of the Board's Order requiring Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") to provide "final" Severe Accident Mitigation Alternative ("SAMA") cost-benefit analyses for Indian Point Units 2 and 3 ("IP2" and "IP3") prior to license renewal, and requiring the Staff to *either impose the cost-beneficial SAMAs as a backfit to the plant's current licensing basis ("CLB") as a condition precedent to license renewal, or provide a "rational basis" for not doing*

¹ *Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13* ("Memorandum and Order (Ruling on the Admissibility of New York's New and Amended Contentions 12B, 16B, 35, and 36)"), 71 NRC ____ (June 30, 2010) ("Order").

² See "State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis" (March 11, 2010) ("SAMA Reanalysis Contentions"). The State of New York ("New York" or "State") simultaneously filed 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" (March 11, 2010).

so – which the Board ruled was necessary for the NRC to meet its “hard look” obligation under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321, and its obligation to provide a “rational” basis for its decisions under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* See LBP-10-13, slip op. at 28-30 and 35.

As set forth below, the Staff respectfully submits that the Board’s ruling on NYS Contentions 35 and 36 reaches a legal conclusion that constitutes a fundamental departure from established law, and/or presents a substantial and important question of law with respect to (a) the information needed and factors that must be addressed in considering severe accident mitigation alternatives (“SAMAs”) in license renewal proceedings, (b) the Board’s conflation of 10 C.F.R. Part 54 license renewal requirements and Part 51 environmental reviews with 10 C.F.R. Part 50 regulations governing backfits to an operating reactor’s CLB, (c) the effect of the Commission’s generic determination that the radiological impacts of license renewal, including severe accidents, are “small”, and (d) the clear and fundamental principle that, under 10 C.F.R. Part 54, there is no regulatory requirement that SAMAs, which are unrelated to aging management, are to be imposed as a condition for license renewal.

Moreover, interlocutory review of the Board’s decision is warranted under 10 C.F.R. §§ 2.341(f)(2)(i) and (ii), in that the decision threatens the Staff with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the Board’s final decision. In this regard, the Board’s decision (a) would fundamentally affect the Staff’s ongoing and future review of SAMA analyses in this and other license renewal proceedings, and (b) would require that the Staff undertake extensive, time-consuming and costly backfit analyses as a condition precedent to license renewal, or provide a detailed explanation – beyond the type of clear and rational explanation it has already provided – as to

why such backfits need not be imposed.³ Further, the Board's decision affects the basic structure of this license renewal proceeding in a pervasive and unusual manner, in that it would require that the proceeding be held open for many years until the Staff has completed its backfit analyses and CLB backfit determinations for each of the Applicant's cost-beneficial SAMAs, and all litigation concerning the Staff's backfit analyses and determinations has concluded.

For all of these reasons, as more fully discussed below, the Staff respectfully submits that immediate interlocutory review of the Board's Order is warranted.

BACKGROUND

This proceeding concerns an application to renew the operating licenses for IP2 and IP3 for an additional period of 20 years, which Entergy filed on April 23, 2007. As required by 10 C.F.R. §§ 51.53(c) and 54.23, Entergy submitted an "Environmental Report" ("ER") as part of its license renewal application ("LRA"). On May 11, 2007, the NRC published a notice of receipt of the LRA,⁴ and on August 1, 2007, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.⁵

On November 30, 2007, petitions for leave to intervene were filed by various petitioners, including the State of New York.⁶ In its petition, New York filed numerous contentions, including

³ Similarly, the Board's decision threatens the Applicant with serious and irreparable harm, in that it could require this license renewal proceeding to be held open for an indefinite period, until the Applicant has completed its "final" cost-benefit analyses and the Staff has completed extensive backfit analyses and reached backfit determinations for each of the items on the "final" slate of cost-beneficial SAMAs. The requirements and time involved in conducting such analyses are discussed in Section III, *infra*.

⁴ "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).

⁵ "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).

⁶ See "New York State Notice of Intention to Participate and Petition to Intervene" ("New York Petition" or "NY Petition") (Nov. 30, 2007).

Contentions 12 and 16, which challenged certain aspects of the Applicant's SAMA analysis.⁷ On July 31, 2008, the Board ruled on the petitioners' standing to intervene and the admissibility of their contentions,⁸ finding, *inter alia*, that NYS Contention 12 was admissible as filed, and NYS Contention 16 was admissible, in part.⁹

On December 22, 2008, the Staff issued Draft Supplement 38 to the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" ("GEIS"), NUREG-1437 (May 1996), in which the Staff provided an evaluation of the site-specific environmental impacts of license renewal for IP2 and IP3.¹⁰ The Draft SEIS included an evaluation of the environmental impacts of postulated accidents (DSEIS Chapter 5) – in which the Staff considered (a) the environmental impacts of "design-basis accidents" ("DBAs") (DSEIS § 5.1.1), (b) the environmental impacts of "severe accidents" (DSEIS § 5.1.2), and (c) the Applicant's analysis of severe accident mitigation alternatives (DSEIS § 5.2). Therein, the Staff observed that in the GEIS, the Commission had generically determined that the environmental impacts of postulated accidents (including severe accidents) related to license renewal for all nuclear power plants – including Indian Point – are "SMALL"; further, the Staff determined that there are no site-specific impacts related to DBAs or severe accidents for IP2 and IP3 beyond those discussed in the GEIS (DSEIS at 5-3 – 5.4).¹¹ Finally, the Staff reviewed Entergy's SAMA

⁷ NYS Contention 12 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; NY Petition at 140-45; NYS Contention 16 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. *Id.* at 163-67.

⁸ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC 43 (2008).

⁹ *Indian Point*, LBP-08-13, 68 NRC at 100-02 and 110-13. With respect to Contention 16, the Board admitted issues pertaining to population projections, the air dispersion module in the MACCS2 code, and the predicted geographic distribution of radioactive doses.

¹⁰ "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 (Dec. 2008) ("Draft SEIS" or "DSEIS").

¹¹ See GEIS, § 5.5, at 5-114 – 5-115. The GEIS discussion of the environmental impacts of

analyses (as instructed in the GEIS), and concluded as follows:

The staff reviewed Entergy's [SAMA] analysis and concluded that the methods used, and the implementation of those methods, were sound. The treatment of SAMA benefits and costs support the general conclusion that the SAMA evaluations performed by Entergy are reasonable and sufficient for the license renewal submittal. Although the treatment of SAMAs for external events was somewhat limited, the likelihood of there being cost-beneficial enhancements in this area was minimized by improvements that have been realized as a result of the IPEEE process and inclusion of a multiplier to account for external events.

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 appropriate. 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. On February 27, 2009, New York filed contentions challenging the Draft SEIS, including Amended Contentions 12-A and 16-A.¹² On June 16, 2009, the Board admitted Amended Contentions 12-A and 16-A (in part),¹³ and consolidated them with NYS Contentions 12 and 16.¹⁴

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

postulated accidents included explicit consideration of Indian Point. *See, e.g.*, GEIS at 5-14, 5-15, 5-17, 5-22, 5-29, 5-34, 5-36, 5-38, 5-40, 5-43, 5-45, 5-47, 5-52, 5-85, 5-87, 5-88, and 5-97.

¹² "State of New York Contentions Concerning NRC Staff's Draft Supplemental Environmental Impact Statement," filed February 27, 2009 ("DSEIS Contentions").

¹³ "Order (Ruling on New York State's New and Amended Contentions)" (June 16, 2009), at 3-7.

¹⁴ Nowhere in the State's DSEIS contentions did the State challenge the Staff's conclusion (DSEIS at 5-10).that "none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation" and "[t]herefore, they need not be implemented as part of the license renewal pursuant to 10 CFR Part 54."

utilized by Entergy in its MACCS2 code SAMA analyses.¹⁵ 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.¹⁶ On December 11, 2009, the Applicant submitted its SAMA Reanalysis, using revised meteorological data inputs.¹⁷

On March 11, 2010,¹⁸ the State filed NYS Amended Contentions 12B and 16B, and new NYS Contentions 35 and 36. On April 5, 2010, the Staff and Applicant filed responses in which they, *inter alia*, opposed the admission of Contentions 35 and 36;¹⁹ and, on April 12, 2010, the State filed a reply to the Staff's and Applicant's Answers.²⁰ On June 30, 2010, the Board issued its Order (LBP-10-13), admitting in part, and rejecting in part, NYS Contentions 35 and 36.²¹

¹⁵ See "Summary of Telephone Call Held on November 3, 2009, Between [NRC] and [Entergy], Concerning Meteorological Data Used for the [SAMA] Analysis" (Nov. 17, 2009) (Agencywide Documents Access and Management System ("ADAMS") Accession No. ML093170168); "Summary of Telephone Call Held on November 9, 2009, Between [NRC] and [Entergy] Concerning Meteorological Data Used for the [SAMA] Analysis" (Nov. 17, 2009) (ADAMS Accession No. ML093170171).

¹⁶ See Letter from Paul Bessette, Esq. to the Board (Nov. 17, 2009), enclosing Letter from Fred Dacimo, Vice President/License Renewal (Entergy) to NRC Document Control Desk (Nov. 16, 2009) (ADAMS Accession No. ML093340049).

¹⁷ See Letter from Fred Dacimo, Vice President/License Renewal (Entergy Nuclear Northwest), to NRC Document Control Desk (Dec. 11, 2009) (ADAMS Accession No. ML093580089).

¹⁸ The Board afforded additional time for the State to file its additional SAMA contentions. See "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 [SAMAs])" (Jan. 22, 2010); "Order (Extending Time within Which to File New Contentions)" (Feb. 24, 2010).

¹⁹ See (1) "NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 [SAMA] Reanalysis" (Apr. 5, 2010) ("Staff Answer"); and (2) "Applicant's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis" (Apr. 5, 2010) ("Entergy's Answer").

²⁰ "State of New York's Combined Reply to Entergy and NRC Staff Answers to the State's New and Amended Contentions Concerning the December 2009 [SAMA] Reanalysis" (Apr. 12, 2010).

²¹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13 ("Memorandum and Order (Ruling on the Admissibility of New York's New and Amended Contentions 12B, 16B, 35, and 36)"), 71 NRC ____ (June 30, 2010) ("Order").

DISCUSSION

I. Applicable Legal Standards

A. Standard for Interlocutory Review

In accordance with 10 C.F.R. § 2.341(f)(2),²² the Commission may grant interlocutory review of a Board decision, where a party demonstrates that the issue for which it seeks review:

(i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or

(ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.²³

The Commission has stated that it “disfavors review of interlocutory Board orders, which would result in unnecessary ‘piecemeal interference with ongoing Licensing Board proceedings.’”²⁴

Nonetheless, the Commission has clearly indicated that it will undertake interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2), where a party demonstrates that it is threatened with

²² As a general matter, the Commission may undertake review of a final or partial initial decision issued by a Board, pursuant to 10 C.F.R. § 2.341(b)(4)(i)-(v); in particular, pursuant to § 2.341(b)(4)(ii), (iii) and (v), such review may be undertaken “giving due consideration to the existence of a substantial question” that “a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law,” that “a substantial and important question of law, policy, or discretion has been raised,” or that “any other consideration [exists] which the Commission may deem to be in the public interest.” See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-15, 63 NRC 687, 690 (2006) (accepting review of a Partial Initial Decision under §§ 2.341(b)(4)(iii) and (v), and affirming and supplementing the Board’s resolution of a novel environmental issue); accord, *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001) (accepting review under former § 2.786(b)(4)(ii), where the interpretation of a regulation involved a question of law that was raised before and had the potential to be raised again in other proceedings).

²³ In addition, the Commission has indicated that it “may review a Board ruling pursuant to the inherent supervisory powers it exercises over agency adjudications.” *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-34 (2008) citing *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 4-5, nn.11-19 (2007) (*sua sponte* review may be undertaken, *inter alia*, to consider a “significant issue” that “may affect multiple pending or imminent licensing proceedings”, to provide guidance to the Board, or in other cited circumstances); *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 20-21 (2006) (*sua sponte* review may be undertaken to address “novel questions of potentially broad application”).

²⁴ *Pilgrim, supra*, CLI-08-2, 67 NRC at 33-34, citing, *inter alia*, *Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007).

"serious and irreparable harm" that could not, as a practical matter, be alleviated through reversal of the Board's action at the end of the proceeding.²⁵ Similarly, the Commission has indicated it will undertake interlocutory review of a Board action that may have a "pervasive or unusual" effect on the "basic structure of a proceeding."²⁶

B. Standards Governing the Admission of Late-Filed Contentions in a License Renewal Proceeding.

The standards governing the admissibility of contentions filed after the initial deadline for filing (*i.e.*, "late-filed contentions") are well established. In brief, the admissibility of late-filed contentions in NRC adjudicatory proceedings is governed by 10 C.F.R. § 2.309(f)(1) (establishing the general admissibility requirements for contentions), and either 10 C.F.R. § 2.309(f)(2) (new and timely contentions) or 10 C.F.R. § 2.309(c) (non-timely contentions). *See, e.g., Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006).

As pertinent here,²⁷ pursuant to 10 C.F.R. § 2.309(f)(1), 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:

²⁵ *Pilgrim, supra*, CLI-08-2, 67 NRC at 35-36, *citing Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) (potential release of safeguards information); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (disclosure of privileged information); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002) (Board's planned inquiry into the internal financial affairs of a federally-recognized Indian Tribe).

²⁶ *Pilgrim, supra*, CLI-08-2, 67 NRC at 35. *See also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 & n.15 (2002) (challenge to the basic structure of a proceeding involving a two-step hearing for construction and operating authority); *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992) (an order consolidating an informal subpart L proceeding with a formal subpart G proceeding affected the "basic structure" of the proceeding a "pervasive and unusual manner").

²⁷ The Staff had opposed the admission of NYS Contentions 35 and 36 on the grounds, *inter alia*, that they fail to satisfy the timeliness and good cause requirements of 10 C.F.R. §§ 2.309(c) and 2.309(f)(2). *See Staff Answer* at 30-35. While the Staff does not waive its arguments concerning those matters, the Staff does not here seek interlocutory review of the Board's rulings on those issues.

* * *

(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;

* * *

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

10 C.F.R. § 2.309(f)(1); emphasis added. The Board in this proceeding has previously addressed the purpose for the contention filing requirements in § 2.309(f)(1), stating 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 (emphasis added; footnotes omitted);²⁸ 10 C.F.R.

§ 2.309(f)(1)(i)-(vi). Indeed, the Commission has emphasized that contentions should only be admitted if they satisfy the contention admissibility standards – and the Commission has undertaken *sua sponte* review where a Board’s decision to admit a contention could result in a “completely unnecessary exercise”:

In our view, further exploration of either of the areas suggested by the Board may well be a completely unnecessary exercise and inconsistent with our longstanding goal of ensuring that agency proceedings are conducted efficiently and focus on issues

²⁸ 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).

germane to the proposed actions under consideration. The Commission stated in its 1998 policy statement that it intended to "monitor its proceedings to ensure that they are being concluded in a fair and timely fashion." We further stated that we would "take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication."

Vermont Yankee, CLI-07-01, 65 NRC at 9 (Commissioners Merrifield and McGaffigan, concurring) (emphasis added).

II. The Board's Admission of NYS Contentions 35 and 36 Is Based on A Fundamental Error of Law.

The Board's admission of NYS Contentions 35 and 36 constitutes a significant error of law, based on an erroneous view of the license renewal regulatory process. Moreover, as discussed in Section III, *infra*, this error (a) threatens to have a serious irreparable impact on the Staff (and Applicant) which, as a practical matter, could not be alleviated through a later appeal, and (b) affects the basic structure of this – and other – license renewal proceedings in a pervasive and unusual manner.

A. Contentions 35 and 36 Fail to Raise a Material Issue Within the Scope of This License Renewal Proceeding.

Contentions 35 and 36, as filed by New York, assert as follows:

NYS 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.²⁹

²⁹ Supplemental Contentions at 13 (capitalization omitted; emphasis added).

NYS 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.³⁰

NYS Contention 35 identified nine specific SAMAs (IP2-09, IP2-21, IP2-22, IP2-53, IP2-62, IP3-07, IP3-18, IP3-19, and IP3-53) which the Applicant or Staff had found to be “potentially cost-beneficial”,³¹ it asserted that the Applicant should be required to “finalize” its SAMA calculations by completing its planned “engineering project cost-benefit analysis”; and it asserted that the Commission “must”, as a matter of law, impose those SAMAs as backfits to the current licensing basis³² as a pre-condition to license renewal.³³ In turn, NYS Contention 36 asserted that nine other SAMAs (IP2-28, IP2-44, IP2-54, IP2-60, IP2-61, IP2-65, IP3-55, IP3-61, and IP3-62) must be imposed as backfits to the CLB as a pre-condition to license renewal, since those SAMAs had now been found to be “substantially” cost-beneficial.³⁴ The language and

³⁰ *Id.* at 36 (capitalization omitted; emphasis added).

³¹ Supplemental Contentions at 22-23.

³² The term “current licensing basis” or “CLB” is defined in 10 C.F.R. § 54.3(a) as “the set of NRC requirements applicable to a specific plant and a licensee’s written commitments for ensuring compliance with and operations within applicable NRC requirements and the plant-specific design basis (including all modifications and additions to such commitments over the life of the license) that are docketed and in effect [at the time of the license renewal application]. . . .” The CLB “represents an ‘evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.’” *Florida Power and Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001), *citing* Final Rule, “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,473 (May 8, 1995).

³³ *See, e.g.*, Supplemental Contentions at 14-16, 23, 25, 28, 34, 39, 40, 42, and 46.

³⁴ Supplemental Contentions at 48-49.

meaning of NYS Contentions 35 and 36 were clear: In the State's view, only by imposing the finally-determined slate of cost-beneficial SAMAs as backfits to the CLB,³⁵ can the Commission satisfy its legal obligations under NEPA and the APA.

1. NEPA Does Not Require the Imposition of SAMAs

Plainly, Contentions 35 and 36 were premised on a flawed reading of NEPA and failed to raise a material issue in dispute contrary to 10 C.F.R. § 2.309(f)(1). Both the Staff and Applicant opposed the admission of these contentions, citing, *inter alia*, the Supreme Court's seminal decision in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 339 (1989) – where the Court held that NEPA is a procedural statute that does not impose any obligation upon an agency to take any particular action, such as mitigation of environmental impacts.³⁶ Thus, while NEPA requires federal agencies to take a “hard look” at the environmental impacts of major federal actions that could significantly affect the human environment, it does not mandate any specific outcome or any course of action to mitigate environmental impacts.³⁷

³⁵ Entergy identified certain SAMAs as potentially cost-beneficial in its ER, and the Staff identified several other potentially cost-beneficial SAMAs in its Draft SEIS. All of these SAMAs (with one exception), along with certain additional SAMAs, were identified as potentially cost-beneficial in Entergy's December 11, 2009, Reanalysis. See Staff Answer at 15 (listing each SAMA, where it was identified as potentially cost-beneficial, and where it is addressed in Contentions 35 and 36). Significantly, the State does not claim that Entergy's SAMA Reanalysis omits any potentially cost-beneficial SAMA.

³⁶ See Staff Answer at 17-18; Applicant's Answer at 16-17. In *Methow Valley*, the Court considered whether NEPA required the Forest Service to include a fully developed mitigation plan in an EIS for a proposed ski resort and to implement that mitigation plan. The Court held that “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). The Court found 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. The Court found no requirement in NEPA “that action be taken to mitigate the adverse effects of major federal actions,” ruling that “it would be inconsistent with NEPA's reliance on procedural mechanisms — as opposed to substantive, result-based standards — to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” *Id.* at 353.

³⁷ *Methow Valley*, 490 U.S. at 339; *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)); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998); *Hydro Resources, Inc.* (P.O. Box 777, Crownpoint, New Mexico 87313), LBP-06-19, 64 NRC 53 (2006).

Both the Staff and Applicant pointed to numerous cases in which this doctrine has been followed;³⁸ and, indeed, the Commission and its Boards (including the Board in this very proceeding) have repeatedly rejected contentions asserting that NEPA requires the implementation of mitigating actions, as distinct from the consideration of environmental impacts. *See, e.g., 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).*³⁹

In its decision, the Board took pains to recognize that NEPA does not require the NRC to impose a backfit to redress potential environmental impact⁴⁰ – and it struck from the contentions the State’s assertion that such a backfit was required under NEPA. LBP-10-13, slip op. at 29. At the same time, however, the Board re-cast NYS Contentions 35 and 36 – which had plainly demanded the imposition of a backfit under NEPA – to require that the Staff either (a) impose each SAMA that is finally determined to be cost-beneficial as a Part 50 backfit on the CLB, as a condition precedent to license renewal, or (b) provide a “sufficient” explanation or “rational” basis for its determination not to do so. *Id.* at 28-29, 34-35. No basis exists in NEPA

³⁸ See Staff Answer at 17-19; Applicant’s Answer at 17-19.

³⁹ *Accord, Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), “Order (Granting Motion for Leave to File New Contentions and Denying Their Admission)” (Feb. 25, 2010), unpublished, slip op. at 6-7, 13; Indian Point, LBP-08-13, 68 NRC at 201 n.1038 (citing Methow Valley in limiting the admissibility of Clearwater Contention EC-3).*

⁴⁰ Indeed, the Board had recognized the significance of the *Methow Valley* decision in an earlier decision, ruling on the admissibility of other contentions. There, 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.

Indian Point, LBP-08-13, 68 NRC at 201 n.1038.

to support that conclusion.⁴¹

2. The APA Does Not Require Backfits or Further Explanations.

In requiring the Staff to provide a “sufficient” explanation or “rational” basis for not imposing cost-beneficial SAMAs as a backfit to the CLB,⁴² the Board apparently relied on the APA’s requirement that the agency provide a statement of the “reasons or basis” for its findings and conclusions in an adjudicatory proceeding. See 5 U.S.C. § 557(c)(3)(A). At the heart of the Board’s decision, however, there appears to lurk a lingering concern that the NRC is somehow obliged to impose backfits on the CLB as a condition for license renewal; moreover, in requiring the Staff to provide a “sufficient” explanation for not imposing a backfit, the Board appears to voice a presumption that cost-beneficial SAMAs must be imposed as a condition of license renewal, placing the onus on the Staff to “explain” any decision not to impose such backfits. See LBP-10-13, slip op. at 28, 35. Significantly, however, unless such a requirement is related to managing the effects of aging, neither the license renewal regulations in 10 C.F.R. Part 54

⁴¹ See 10 C.F.R. § 54.29; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 388 n.77 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-03-17, 58 NRC 221, 244 (2003). In *McGuire*, the Commission upheld the rejection of a SAMA contention, where the Draft SEIS stated that the SAMA at issue “appear[ed] to be cost-beneficial,” and it was therefore “unclear what additional result or remedy would prove meaningful to the Intervenor.” *McGuire/Catawba*, CLI-02-28, 56 NRC at 388. Further, the Commission cited the Draft SEIS’s conclusion 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.” *Id.* at 388 n.77. The Commission concluded:

The “need for plant design and procedural changes will be resolved as part of GSI-189 and addressed [for McGuire and Catawba] and other ice condenser plants as a current operating license issue.” See, e.g., McGuire Draft SEIS at 5-29. Thus, the 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.; emphasis added.

⁴² See, e.g., LBP-10-13, slip op. at 17, 18, 25, 29, 30.

nor any other regulation (including the regulations in 10 C.F.R. Part 51) requires the imposition of backfits to the CLB as a condition of license renewal.⁴³ Moreover, here (as in numerous other license renewal proceedings), the Staff provided a detailed and rational explanation of why SAMA-based backfits to the CLB are not required for license renewal – which the Board appears to have altogether disregarded.

In this regard, the Staff had explained that (a) SAMAs, by definition, address mitigation alternatives for “severe accidents”;⁴⁴ (b) the probability of occurrence of severe accidents is so low that they are excluded from the spectrum of design basis accidents (“DBAs”) postulated for a plant;⁴⁵ (c) the CDFs for severe accidents at IP2 and IP3 are quite low;⁴⁶ (d) the Commission has determined, as a generic matter, that the impacts of DBAs are of “SMALL” significance, and the probability-weighted radiological consequences of severe accidents, for all plants, are “SMALL”;⁴⁷ (e) no significant, new information has been identified that would remove IP2 and IP3 from these generic determinations;⁴⁸ and (f) none of the Applicant’s SAMAs relate to aging

⁴³ New York had cited various guidance documents in support of these contentions, including NUREG/BR-0058, Rev. 4, “Regulatory Analysis Guidelines of the [NRC]” (Sept. 2004) (ADAMS Accession No. ML0428201921) and NUREG-1555, Supp. 1, “NRC Environmental Standard Review Plan for Severe Accident Mitigation Alternatives” (“SRP”) (Oct. 1999) (ADAMS Accession No. ML003702019). Supplemental Contentions at 14, 26, 29-30. None of those documents supports the admission of these contentions, and the Board did not rely on them in its decision – although it did not explicitly exclude them from the contentions, as admitted..

⁴⁴ See GEIS, § 5.4 (“Severe Accident Mitigation Design Alternatives (SAMDA)s”); Tr. at 853-54 (Turk).

⁴⁵ Tr. at 853-54 (Turk). See generally, GEIS, § 5.3.2 (“Design Basis Accidents”) and § 5.3.3 (“Probabilistic Assessment of Severe Accidents”). See also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 260 (2001) (extremely unlikely external events are excluded from a reactor’s design basis).

⁴⁶ As stated in the Draft SEIS, the baseline core damage frequency (“CDF”) for all of the postulated internally-generated severe accidents at Indian Point combined, is approximately 1.79×10^{-5} per year for IP2, and 1.15×10^{-5} per year for IP3. Entergy performed separate assessments of the CDF from external events, and accounted for the potential risk benefits associated with such events by multiplying the internally-initiated CDFs by a factor of approximately 3.8 for IP2 and 5.5 for IP3. Draft SEIS at 5-5. The CDFs for each specific initiating event are provided in Table 5-3. See Draft SEIS at 5-6,

⁴⁷ 10 C.F.R. Part 51, App. B., Table B-1 (“Postulated Accidents”); GEIS, § 5.5.1 (“Impacts from Design-Basis Accidents”), and § 5.5.2 (“Impacts from Severe Accidents”).

⁴⁸ Draft SEIS, § 5.1.1 at 5-3, § 5.1.2 at 5-4,

management, and thus need not be implemented as a condition of license renewal.⁴⁹ The Board provided no reason for finding this explanation to be insufficient; rather, it simply required something more, apparently requiring the Staff to complete its backfit analyses and, with that information in hand, either impose the backfits as a pre-condition to license renewal or “explain” why it is not doing so. In fact, however, as stated above, the Staff had already provided a sufficient and rational explanation for its conclusions regarding the potentially cost-beneficial SAMAs discussed in the Draft SEIS.⁵⁰

To be sure, the Draft SEIS was issued before the Applicant submitted its December 2009 SAMA Reanalysis – at which time the Applicant revised its cost-benefit estimates for some SAMAs and identified additional, potentially cost-beneficial SAMAs. The Staff expects to address the SAMA Reanalysis in its Final SEIS, currently scheduled to be issued by August 31, 2010. As set forth in Section III *infra*, Commission review of the Board’s decision in LBP-10-13 prior to publication of the Final SEIS could provide important guidance to the Staff in completing

⁴⁹ See Draft SEIS, § 5.2.6 at 5-10. In particular, the SRP states that the Staff should review 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. Further, “[a]ny mitigation should be described along with the estimated benefit-cost ratio”; “the mitigative measures considered and committed to by the applicant” should be described. Further, if SAMAs were not considered previously for the plant, a conclusion should be reached as to whether the applicant completed a comprehensive, systematic effort to identify and evaluate the potential plant enhancements to mitigate the consequences of severe accidents, the robustness of its conclusion relative to certain critical assumptions in the analysis, and confirmation 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. While this language suggests that the Staff may identify other mitigation alternatives as appropriate or warranted, the SRP (a guidance document) does not and cannot establish a regulatory requirement that an applicant must implement any SAMAs that have been determined to be cost-beneficial.

⁵⁰ In addition to citing NEPA and the APA, Contentions 35 and 36 cited *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989), the Council on Environmental Quality’s (“CEQ”) regulations at 40 C.F.R. § 1502.14, and 10 C.F.R. § 51.53(c)(3)(ii)(L). The Board did not rest its decision on those authorities and did not discuss their applicability – and it is unclear whether the Board intended to exclude those references as support for the contentions, as admitted. The State’s reliance on those authorities, however, was misplaced. In *Limerick*, the court nowhere indicated that SAMAs must be implemented as license conditions. Similarly, the CEQ regulations do not require the NRC (an independent regulatory agency) to impose SAMAs as license conditions. See *generally*, 10 C.F.R. § 51.10(a). New York’s reliance on 10 C.F.R. § 51.53(c)(3)(ii)(L) was similarly misplaced; that regulation requires the Staff to “consider” SAMAs in its EIS if SAMAs were not considered for the plant previously – but nothing in that regulation requires either a “final” determination of the SAMAs once they have been considered, or the imposition of potentially cost-beneficial SAMAs as license conditions.

its review of the Applicant's SAMA analyses, and would benefit all parties by defining the proper scope for any further litigation on NYS Contentions 35 and 36.

3. "Final" Cost-Benefit Analyses Are Not Required.

Finally, there is no basis for the Board's view that a "final" cost-benefit analysis must be provided by the Applicant as a pre-condition for issuance of a decision on SAMAs in this proceeding. Because NEPA imposes no obligation on the NRC to mitigate adverse environmental impacts, it provides no basis for the NRC to compel the Applicant, as a condition for license renewal, to conduct detailed project-engineering analyses so as to reach a "final" determination of cost-beneficial SAMAs, where the Applicant has already identified any such SAMAs as "potentially cost-beneficial" in its SAMA analyses.⁵¹

The Applicant's identification of its potentially cost-beneficial SAMAs establishes the complete range of SAMAs that might be considered cost-beneficial for the plant; indeed, neither the State nor the Board expressed any concern that some plausible SAMA had not been identified. Although detailed project-engineering analyses might result in a refinement of the cost/benefit ratio of the SAMAs which had been found to be "potentially cost-beneficial", or the deletion of certain SAMAs as no longer cost-beneficial, they would not result in the identification of any other cost-beneficial SAMAs. Moreover, inasmuch as none of the SAMAs are related to managing the effects of aging, the additional analyses would not provide a regulatory basis for imposing any of those SAMAs as a backfit to the CLB as a pre-condition to license renewal. See *McGuire/Catawba*, CLI-02-28, 56 NRC at 387-88 and n.77 (rejecting an assertion that a refined SAMA analysis was required, where the Draft SEIS already found the mitigative

⁵¹ As the Staff explained during oral argument, the term "potentially cost-beneficial" derives from regulatory guidance, issued by the Nuclear Energy Institute and endorsed by the Staff. Tr. 865-67 (Turk). See (1) "Severe Accident Mitigation Alternatives (SAMA) Analysis – Guidance Document," NEI 05-01, Rev. A, (Nov. 2005); and (2) "Final License Renewal Interim Staff Guidance LR-ISG-2006-03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses" (Aug. 2007), at 1 (ADAMS Accession No. ML071640133). The NEI guidance states that "[s]ince the SAMA analysis is not a complete engineering project cost benefit analysis, the SAMAs that are cost beneficial after the Phase 2 analysis and sensitivity studies are only **potentially** cost-beneficial." NEI 05-01 at 33 (emphasis in original); Tr. 866-67 (Turk).

measure (backup hydrogen control capability) was a potentially cost-beneficial SAMA). As the Commission later stated in the *McGuire/Catawba* proceeding, no further analysis was required because the SAMA had already been determined to be potentially cost-beneficial:

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. . . . ⁵²

Further, as the Commission recently explained, "[t]he question is not whether there are 'plainly better' atmospheric dispersion models or whether the SAMA analysis can be refined further." *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear

⁵² *McGuire/Catawba*, CLI-03-17, 58 NRC at 431 (italics in original; emphasis added; footnotes omitted).

Power Station), CLI-10-11, 71 NRC ____ (Mar. 26, 2010)(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. at 39. Here, New York did not allege that additional SAMAs should have been identified as potentially cost-beneficial, nor did it allege that any significant errors were made in the Applicant’s SAMA Reanalysis. Accordingly, the State failed to establish that any purpose would be served by further analysis, and Contention 35 failed to raise a material issue in dispute.

B. The Board’s Decision Improperly Conflates Part 54 License Renewal Determinations with Part 50 Backfit Reviews.

In requiring that the Staff either order the imposition of backfits to the CLB as a pre-condition to license renewal, or provide a “sufficient” explanation of why it declined to do so, the Board improperly imported into this license renewal proceeding a wholly unrelated and separate issue, which clearly – and in the Board’s own terms – relates to the current licensing basis for IP2 and IP3. In doing so, the Board improperly conflated two wholly different types of proceedings, without any basis in the Commission’s license renewal regulations.

In adopting its license renewal regulations, the Commission endorsed the principle that “issues that are material as to whether a nuclear power plant operating license may be renewed should be confined to those issues that are uniquely relevant to protecting the public health and safety and common defense and security during the renewal period.”⁵³ Other issues “that are

⁵³ Final Rule, “Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991).

relevant to both current plant operation and operation during the extended period must be addressed now within the present license term rather than at the time of renewal,” which would assure that safety or security issues pertinent to current reactor operations are not left unresolved until a licensee seeks license renewal and the Commission issues its renewal decision. *Id.*, 56 Fed. Reg. at 64,946. Thus, if the Staff were to take action to impose any backfits on the CLB that are not uniquely related to the period of extended operations, it would do so as part of its regulatory oversight of the current operating licenses.

This conclusion is consistent with established license renewal principles. The Commission has observed that while it could, “in theory” “undertake duplicative reviews of issues that are relevant to both ongoing operation during the current license term and extended operation beyond the current term, this would be wasteful of the Commission’s resources.” *Id.* at 64,947. Accordingly, issues that “have relevance to the safety and security of current plant operation” are to be excluded from the scope of license renewal:

[W]ith the exception of age-related degradation unique to license renewal and possibly some few other issues related to safety only during extended operation, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation Continuing this regulatory process in the future will ensure that this principle remains valid during any renewal term if the regulatory process is modified to include age-related degradation unique to license renewal.

*Id.*⁵⁴ The Commission concluded, “the NRC’s decision should normally be limited to whether actions have been identified and have been or will be taken to address age-related degradation unique to license renewal and whether the relevant [NEPA] requirements, as set forth in 10 CFR part 51, have been met.” *Id.* at 64,960-61; emphasis added.⁵⁵

⁵⁴ In promulgating its license renewal regulations, the Commission also announced a second principle – that “each plant’s current licensing basis must be maintained during the renewal term, in part through a program of age-related degradation management for systems, structures, and components that are important to license renewal as defined in the final rule.” 56 Fed. Reg. at 64,947.

⁵⁵ As the Commission has explained, “[i]n establishing its license renewal process, the

The Board's requirement that the Staff must either impose cost-beneficial SAMAs on the CLB or provide a "sufficient" or "rational" explanation of why it has not done so, ignores the fact that if any non-aging management-related backfits are found to be important, they would be important with respect to the current operating licenses under 10 C.F.R. Part 50, rather than as a requirement that is uniquely applicable to the period of extended operations. The Board's importation of this issue into the license renewal proceeding creates precisely the type of duplicative review with the NRC's ongoing regulatory activities that the Commission sought to avoid in promulgating its license renewal regulations – and it imposes a requirement for license renewal that was nowhere contemplated by the Commission in adopting its license renewal regulations in 10 C.F.R. Part 54.⁵⁶

III. Immediate Interlocutory Review of the Board's Decision Is Warranted.

A. The Decision Threatens to Have a Serious and Irreparable Impact On the Staff Which, As a Practical Matter, Could Not Be Alleviated Through a Petition for Review of the Final Decision.

The Board's decision would require the Staff to either undertake detailed backfit analyses of any finally-determined cost-beneficial SAMA, under the backfit regulations at 10 C.F.R. § 50.109, or provide a "sufficient" explanation of why it is not imposing such backfits. The Board failed to recognize, however, that it is no simple task to conduct a backfit analysis, and the Staff is obliged to follow strict requirements for such an analysis, as set forth in

Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis [{"CLB"}] to re-analysis during the license renewal review." *Turkey Point*, CLI-01-17, 54 NRC at 9. *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 560-61 (2005) ("Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the . . . license renewal application. Consequently, it makes no sense to spend the parties' and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging."); *Turkey Point*, CLI-01-17, 54 NRC at 10 ("Issues like emergency planning - which already are the focus of ongoing regulatory processes - do not come within NRC safety review at the license renewal stage").

⁵⁶ Moreover, other avenues exist for the State to pursue its claims, such as seeking an enforcement order under 10 C.F.R. § 2.206 or the establishment of a rulemaking proceeding under 10 C.F.R. § 2.802. *See, e.g., Millstone*, CLI-05-24, 62 NRC at 562-63. Thus, exclusion of these contentions from the license renewal proceeding does not preclude the State from pursuing its concerns.

10 C.F.R. §§ 50.109(a)(2)-(4), (c) and (e).⁵⁷ Such analyses typically require years to perform and cost many thousands, even hundreds of thousands, of dollars – generally at the Commission’s own expense.⁵⁸ Further, if allowed to stand, the Board’s decision may lead to the filing of similar contentions in other license renewal proceedings, and may require the Staff to undertake similar costly and time-consuming SAMA backfit analyses in numerous other license renewal proceedings.

In sum, the Board’s requirement that the Staff must either impose any finally-determined cost-beneficial backfits on the CLB or provide a “sufficient” explanation as to why it has not done so, will have a serious and irreparable impact on the Staff that could not, as a practical matter, be alleviated through a later appeal at the conclusion of all litigation in this proceeding.⁵⁹

⁵⁷ Under 10 C.F.R. § 50.109(a)(2), the Staff is required to conduct “a systematic and documented analysis” as described in §50.109(c), for backfits other than those imposed under §50.109(a)(4). In accordance with § 50.109(a)(3), backfits (other than backfits under § 50.109(a)(4)) may be required only when the Commission determines, based on the analysis conducted, “that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of implementation for that facility are justified in view of this increased protection.” Under § 50.109(c), the agency’s determination must include consideration of “how the backfit should be scheduled in light of other ongoing regulatory activities at the facility,” and any available information concerning, *inter alia*, (1) the specific objectives that the proposed backfit is designed to achieve; (2) the activity that would be required by the licensee to complete the backfit; (3) the potential change in risk to the public from the accidental off-site release of radioactive material; (4) the potential impact on radiological exposure of facility employees; (5) the costs of installation and the continuing costs associated with the backfit, including the cost of facility downtime or the cost of construction delay; (6) the potential safety impact of changes in plant or operational complexity, including the relationship to proposed and existing regulatory requirements; (7) the estimated resource burden on the NRC associated with the proposed backfit and the availability of such resources; (8) the potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit; and (9) whether the proposed backfit is interim or final and, if interim, the justification for imposing the proposed backfit on an interim basis. The requirements of §§ 50.109(a)(2)-(3) do not apply, and a backfit analysis is not required, where the Commission or staff determines that “a modification is necessary to bring a facility into compliance with a license or [the CLB],” or that action is necessary to ensure adequate protection of public health and safety and the common defense and security. 10 C.F.R. § 50.109(a)(4).

⁵⁸ This is particularly true here, given the purpose of the backfits at issue, where the Commission has generically found that the radiological impacts of severe accidents are “small” and there has been no suggestion that a backfit is necessary to assure adequate protection of the public health and safety.

⁵⁹ To be sure, the Board has not described what sort of “explanation” it would find adequate -- and the Staff could provide the same type of explanation it provided previously, e.g., that the SAMAs need not be imposed as backfits to the CLB because (a) they are not related to managing the effects of aging, (b) they are not necessary for adequate protection of public health and safety, and (c) they would

B. The Board's Decision Affects the Basic Structure of This License Renewal Proceeding in a Pervasive and Unusual Manner.

The Board's decision to admit NYS Contentions 35 and 36 – unlike most decisions admitting or rejecting contentions⁶⁰ – affects the basic structure of this proceeding in a pervasive and unusual manner, warranting that the Commission undertake interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii). Unlike the typical case in which a ruling to admit or deny a contention has little impact on the structure of the proceeding, the Board's importation and merger of Part 50 CLB backfit issues into this limited-scope license renewal proceeding, will have a pervasive, expansive effect on the very nature of this proceeding – producing a spiral of complex litigation that can have no possible bearing on the Commission's decision whether to grant the license renewal application at hand. Further, the Board's decision will necessitate the commencement of extensive backfit analyses of numerous SAMAs, resulting in a “completely unnecessary exercise”⁶¹ involving many years of study and pointless litigation and delay in the conclusion of this license renewal proceeding.

Further, the Board's decision to require the Staff to undertake backfit analyses of the Applicant's SAMAs and to either impose such SAMAs as a backfit to the CLB or to explain its reasons for not doing so, and its apparent intention to hold this proceeding open until the Staff complies with the Board's direction, appears to constitute an unauthorized and unwarranted intrusion into the Staff's (and the Commission's) activities outside the scope of this

not provide any substantial benefit, given the severe accidents' low probability of occurrence and the Commission's generic determination in the GEIS that the probability-weighted consequences of both DBAs and severe accidents are “small.” Such an explanation, however, does not appear to be what the Board had in mind, and indeed, the Board appears to have implicitly rejected this explanation, as evidenced by its demand that the Staff must provide a “sufficient” or “rational” explanation of any decision not to impose cost-beneficial SAMAs as backfits to the CLB.

⁶⁰ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-06, 69 NRC 128, 136-37 (2009) (if parties could “successfully invoke interlocutory review based merely on an assertion that the licensing board erred in admitting (or excluding) a contention, we would be opening the floodgates to a potential deluge of interlocutory appeals from any number of participants who lose admissibility rulings”); *Exelon Generating Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 468 (2004).

⁶¹ Cf. *Vermont Yankee*, *supra*, CLI-07-01, 65 NRC at 9.

proceeding.⁶² In similar circumstances, the Commission has granted interlocutory review of a Board's ruling under § 2.341(f)(2)(ii), where the ruling threatened to indefinitely extend a proceeding and constituted unauthorized Board oversight of the Staff's non-adjudicatory activities. *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 61-63 (2009) (reversing the Board's decision requiring the Staff to notify intervenors 30 days before the end of its review of construction activities that were scheduled to be completed in four to eight years).

Moreover, as discussed above, the Commission's license renewal regulations are based on a carefully constructed distinction between current licensing issues and the aging management issues that are unique to license renewal. 56 Fed. Reg. at 64,946. To avoid a duplication of the NRC's ongoing reactor license oversight activities, the Commission expressly limited the scope of a license renewal review to the aging management issues that are unique to license renewal. *Turkey Point*, CLI-01-17, 54 NRC at 9. The Board's decision eviscerates that distinction. Given the extensive number and range of potential backfits that would have to be assessed, the Board's decision will cause this license renewal proceeding to be transformed into a time-consuming and wide-ranging inquiry into each plant's design and other aspects of the CLB, and the Staff's reasons to impose or not impose each cost-beneficial SAMA as a backfit to the CLB – an inquiry that is wholly outside the proper scope of this license renewal proceeding. Moreover, the scope of this backfit inquiry would present ever-greater opportunities for litigation, whereby each calculation or conclusion by the Applicant or Staff could serve as the basis for still more new or amended SAMA/backfit contentions. Once set in motion, the litigation

⁶² Insofar as the Board appears to have established Staff requirements, its decision may be viewed as an impermissible intrusion into the Staff's functions. As the Commission has stated, "NRC Staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards. . . . We long have held that licensing boards do not sit . . . to supervise or direct NRC Staff regulatory reviews." *Catawba*, CLI-04-6, 59 NRC at 74 (footnotes omitted).

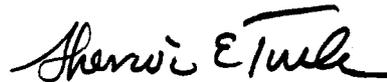
of these issues could continue indefinitely, despite the fact that it will have no material effect on the license renewal determination that the Commission will ultimately be obliged to render.

In sum, the Board's decision will introduce myriad current operating license issues into this license renewal proceeding, abrogating the Commission's carefully considered determination to limit the scope of a license renewal proceeding to specific issues that are unique to license renewal. This is precisely the unfocused and duplicative review that the Commission sought to avoid in promulgating its license renewal regulations. *Turkey Point*, CLI-01-17, 54 NRC at 9. The Board's ruling effectively transforms this license renewal proceeding into a wide-ranging examination of the current licensing basis for IP2 and IP3, with the ultimate aim of modifying the CLB as a pre-condition to license renewal. The Board's decision will have a pervasive and unusual effect in this proceeding – as well as in all other license renewal proceedings in which this issue may be raised. Interlocutory review should thus be granted, in accordance with established Commission precedent and 10 C.F.R. § 2.341(f)(2)(ii).

CONCLUSION

The Board's decision in LBP-10-13 is based on a fundamental misunderstanding of the Commission's license renewal regulatory process, and raises substantial questions of law and policy. Moreover, the decision threatens to have a serious and irreparable impact on the Staff that could not be alleviated by a later appeal, and will affect the basic structure of this proceeding in an unusual and pervasive manner. For these reasons, the Staff respectfully requests that the Commission undertake interlocutory review of the Board's decision.

Respectfully submitted,



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Dated at Rockville, Maryland
this 15th day of July 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 PETITION FOR INTERLOCUTORY REVIEW OF THE ATOMIC SAFETY AND LICENSING BOARD'S DECISION ADMITTING NEW YORK STATE CONTENTIONS 35 AND 36 ON SEVERE ACCIDENT MITIGATION ALTERNATIVES (LBP-10-13)," dated July 15, 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 15th day of July, 2010:

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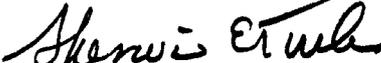
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