

RAS E-377

UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION
ON PETITION FOR INTERLOCUTORY REVIEW OF LBP-10-13

-----X
In re: Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and July 26, 2010
Entergy Nuclear Operations, Inc.
-----X

THE STATE OF NEW YORK'S AND STATE OF CONNECTICUT'S
COMBINED REPLY TO
ENERGY AND NRC STAFF PETITIONS FOR
INTERLOCUTORY REVIEW OF THE
ATOMIC SAFETY AND LICENSING BOARD'S DECISION
ADMITTING THE STATE OF NEW YORK'S
CONTENTIONS 35 AND 36 (LBP-10-13)

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for the State of New York
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PRELIMINARY STATEMENT

On June 30, 2010, the Atomic Safety and Licensing Board (“ASLB”) issued an order admitting in whole or in part four additional New York State contentions (NYS 12B, 16B, 35 & 36) and bringing the total number of admitted contentions in this proceeding to 19 (15 when combined). *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13 (June 30, 2010) (“LBP-10-13”). On July 15, 2010, Entergy and NRC Staff, in separate filings, sought the extraordinary relief of interlocutory review of the ASLB decision insofar as it partially admitted two contentions (NYS 35/36). Applicant’s Petition for Interlocutory Review of LBP-10-13 (“Entergy Petition”); NRC Staff’s Petition For Interlocutory Review of the ASLB’s Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13) (“Staff Petition”).¹

These petitions should be promptly rejected because (1) the central issue they seek to raise has long ago been resolved by the Commission and there is no reason to reconsider that decision; (2) they fail to meet either test for interlocutory review in 10 C.F.R. § 2.341(f)(2); (3) the carefully reasoned decision of the ASLB is correct; and (4) while consideration of these ill-conceived Petitions is pending, Entergy and NRC Staff will not be addressing the shortcomings in the ER and the DSEIS, delaying issuance of the FSEIS and the conclusion of this proceeding.

¹ Entergy and NRC Staff seek to reserve the right to raise in the future, as a challenge to any final decision of the ASLB, some arguments regarding Contentions 35 and 36, such as timeliness, that they are not now raising. Entergy Petition at 13, n. 62; NRC Petition at 8, n. 27. These curious efforts to preserve a second bite at the apple should they not prevail in their Petitions and ultimately lose either of these contentions at the conclusion of the hearing, only underscore why an interlocutory review of the ASLB’s Order is inappropriate, premature, and unnecessarily time-consuming and why the Commission has consistently rejected interlocutory review of the admissibility of contentions where regardless of the outcome of the review, the hearing will continue to resolve other admitted contentions. *See, e.g., Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3)*, CLI-08-7, 67 NRC 187, 192 (2008))

For more than a dozen years, the Nuclear Regulatory Commission has required that an application for license renewal must provide for “a consideration of alternatives to mitigate severe accidents” where, as here, such consideration has not been made in any previous environmental impact statement. 10 C.F.R. § 51.53(c)(3)(ii)(L). Looking past the rhetoric and mischaracterizations that permeate Entergy’s and NRC Staff’s Petitions for interlocutory review, the core of their argument is that this regulatory obligation (1) does not require an applicant to provide information sufficient to enable the NRC Staff to determine whether a particular severe accident mitigation alternative (“SAMA”) is actually cost-effective and (2) that NRC Staff is entitled to reject a clearly cost-effective SAMA without providing a rational basis for the rejection. These positions appear to be supported by a single line of argument – *i.e.*, that the SAMA analysis conducted pursuant to Part 51 and NEPA does not require either a completed analysis or that action be taken on any SAMA that is not within the narrow scope of the safety review contemplated by Part 54. This line of argument was soundly rejected by the Commission over 9 years ago. NRC’s promulgation of §§ 51.53(c)(3)(ii)(L), 51.101 and 51.103 reflects its intention to include previously unexamined SAMAs as part of a license renewal hearing process.

In addition, while both Petitions claim dire consequences will follow should Petitioners not prevail, in fact, Entergy has already committed to complete the cost-effectiveness analysis and NRC Staff has already committed to determine whether clearly cost-effective SAMAs should be implemented. Thus, Petitioners’ only real complaint is their objection to completing these tasks, as required by NEPA, at a time when the public, interested states, and the ASLB are able to contest their conclusions as part of the license renewal hearing process. Commission regulations, precedent and policy, as well as prevailing law, reject that argument. Moreover, Petitioners fail to meet the stringent requirements of 10 C.F.R. § 2.341(f)(2)(i) or (ii).

RELEVANT FACTS

On December 14, 2009, Entergy provided the ASLB and the State of New York an analysis of various measures to mitigate the environmental impacts of severe accidents at the Indian Point power reactors. NL-09-165, ML093580089 (“December 2009 SAMA Reanalysis”). That December 2009 submission replaced portions of Attachment E to Entergy’s April 2007 Environmental Report that accompanied Entergy’s license renewal application. The new SAMA analysis made several fundamental changes to the original SAMA analysis, changes that were reflected in a markedly different calculation of the benefits of the SAMAs being analyzed. The December 2009 SAMA Reanalysis substituted one year of meteorological data for the synthesized five year set of meteorological data used in the SAMA analysis that was submitted to NRC in April 2007. The use of one year of data also corrected a wind direction error contained in the initial SAMA analysis and revealed that the wind direction occurs more often in a general southerly direction towards relatively densely-populated cities and towns, thus differing substantially from the results reported in the initial SAMA analysis. The SAMA Reanalysis also appears to have recalibrated the contents of an economic cost input file, analyzed the loss of tourism and business as a base-case, incorporated revised cost estimates in certain instances (*see, e.g.*, IP2 SAMA 028; *see also* cost estimates with a dagger (“†”) symbol), and incorporated certain scenarios and mitigation measures identified by NRC Staff (2009 SAMA Reanalysis, NL-09-165, at pp. 29-31). The December 2009 SAMA Reanalysis represents a synthesis of all these changes into a single, new SAMA analysis. Most importantly, the results of Entergy’s December 2009 SAMA Reanalysis differ significantly from results presented in Entergy’s initial SAMA analysis: several SAMAs that had been identified as not cost-effective in the baseline case became potentially cost-effective, and several other SAMAs became clearly

and dramatically cost-effective. *See, e.g.*, Tables at pp. 48-49 of the State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Mar. 11, 2010).² The December 2009 SAMA Reanalysis identifies at least 18 potentially cost-effective SAMAs for the Indian Point reactors.

Both Entergy and NRC Staff concede that there is more work to be done to determine whether any SAMAs identified as "potentially" cost-effective SAMAs in the December 2009 SAMA Reanalysis are actually cost-effective. *See Applicant's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis* (Apr. 5, 2010) ("Entergy Answer") at 10 ("Entergy submitted all 16 potentially cost beneficial SAMAs for detailed engineering project cost-benefit analysis. In its Revised SAMA Analysis, Entergy reiterated that it had submitted all of the potentially cost-beneficial SAMAs for engineering project cost-benefit analysis." (footnotes omitted)); *NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis* (Apr. 5, 2010) ("NRC Staff Answer") at 23. Additionally, Entergy indicates that it is in the process of developing a plan to implement some of the cost-effective SAMAs. Entergy Answer at 12 ("As with the other SAMAs, Entergy submitted these six SAMAs for further engineering project cost-benefit analysis despite there being no requirement that these new cost-beneficial SAMAs be implemented as part of license renewal

² Because all the pleadings in this proceeding are part of the public record and the ASLB Hearing Docket and to reduce unnecessary paperwork, the States incorporate by reference the State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Mar. 11, 2010), including all attachments thereto, ML100780366; the State of Connecticut's Answer (Apr. 1, 2010), ML101100473; the 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 Severe Accident Mitigation Alternative Reanalysis (Apr. 12, 2010), ML101160415; and the transcript of the April 19, 2010 oral argument, ML101160416.

pursuant to Part 54. At IP2 and IP3, Entergy has internal engineering change request processes in place for requesting plant modifications, as part of current plant operations, and evaluating the technical, regulatory, and economic feasibility of such proposed modifications.” (footnote omitted)).

To bolster their petitions for extraordinary interlocutory review, Entergy and Staff mischaracterize the ASLB’s ruling on NYS-35 and 36. In its decision, the ASLB partially admitted NYS-35 and 36, rejecting Entergy and Staff’s “scope” arguments as well as the claim that New York could compel the implementation of particular SAMA measures. LBP-10-13 at 26-29, 34-35. Nonetheless, Entergy and NRC Staff insist that the ASLB has ordered that one or more SAMAs be implemented (*see e.g.* Entergy Petition at 1 (“the Board held that that [sic] NRC Staff “must” – as a “prerequisite” to extending the IP2 and IP3 operating licenses – impose license conditions mandating implementation of potentially cost-beneficial SAMAs” (footnote omitted)); *id.* at 13 (“The Board’s admission of NYS-35/36 rests on the mistaken conclusion that NEPA, when read in conjunction with Part 50 and Part 54, compels implementation of cost-beneficial SAMAs regardless of their nexus to aging management”); NRC Staff Petition at 12-14. The Board made no such finding. In fact, it expressly rejected the portion of each contention that sought an order requiring implementation of any particular SAMA. LBP-10-13 at 29 (“as we noted before, the NRC Staff does not have to require implementation, and an intervenor such as New York cannot demand implementation from the NRC Staff as part of a license renewal proceeding”); *see also id.* at 34 (“The Board admits NYS-36 in part for the same procedural and substantive reasons we admit NYS-35 in part”). Instead, the Board stated simply that:

the triable issue of fact established in NYS-36 is whether the NRC Staff has fulfilled its duty to take a hard look at SAMAs deemed potentially

cost-beneficial in Entergy's December 2009 SAMA Reanalysis by explaining in its record of decision why it would allow the license to be renewed without requiring the implementation of those SAMAs that are plainly cost-beneficial as a condition precedent to the granting of license renewal.

LBP-10-13 at 35.

I. COMMISSION PRECEDENT HAS ALREADY REJECTED THE FUNDAMENTAL ARGUMENT THAT UNDERLIES BOTH PETITIONS FOR INTERLOCUTORY REVIEW

The crux of Entergy and Staff's petitions is that the SAMA analysis required as part of the NEPA review required in license renewal need not be completed for any SAMA that is not within Part 54's narrow scope. The Commission has already rejected these precise arguments. In 2001, the Commission denied the Nuclear Energy Institute's ("NEI") rulemaking in which NEI, on behalf of the nuclear energy industry and joined by Petitioner Entergy, sought to have the Commission delete the requirement from 10 CFR Part 51 to consider SAMAs in operating license renewal reviews. *See* NRC, "Nuclear Energy Institute; Denial of Rulemaking", PRM 51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001). NEI and Entergy³ argued unsuccessfully in that proposed rulemaking that severe accident mitigation is within the scope of each licensee's current licensing basis and not within the scope of the technical requirements for renewal of operating licenses specified in 10 CFR Part 54, and that the provisions of Part 54 define the scope of the proposed Federal action and, therefore, the scope of the environmental review. *Id.* at 10835. Ironically, NRC Staff opposed NEI and Entergy at that time, arguing that "[t]he fact that NRC has excluded a specific aspect of the plant in conducting its safety review under Part 54 does not excuse it from considering the potential for an associated environmental impact in meeting its NEPA obligations." *See* SECY-00-0210 at 4 (Oct. 20, 2000), ML003750123. The

³ *See* Letter, Jimmy D. Vandergrift, Entergy Operations, Inc., to Secretary Annette Vietti-Cook, USNRC (Nov. 16, 1999), Re: SAMA Petition for Rulemaking, ML993350457.

Commission denied the rulemaking petition.⁴ The Commission explained:

[U]nder NEPA the NRC is charged with considering all of the environmental impacts of its actions, not just the impacts of specific technical matters that may need to be reviewed to support the action. These impacts may involve matters outside of the NRC's jurisdiction or matters within its jurisdiction that, for sound reasons, are not otherwise addressed in the NRC's safety review during the licensing process. *In the case of license renewal, it is the Commission's responsibility under NEPA to consider all environmental impacts stemming from its decision to allow the continued operation of the entire plant for an additional 20 years. The fact that the NRC has determined that it is not necessary to consider a specific matter in conducting its safety review under Part 54 does not excuse it from considering the impact in meeting its NEPA obligations.*

PRM 51-7 Rulemaking Denial, 66 Fed. Reg. at 10,836 (emphasis added). As the Commission held in rejecting the NEI rulemaking and, as Petitioners' arguments overlook, the license renewal process does not simply extend permission to operate a portion of underground pipe or a non-environmentally-qualified low-voltage cable, but results in a new operating license that authorizes the operation of the entire nuclear power plant. *See* 10 C.F.R. § 54.31 (requiring that the renewed license supersede the operating license previously in effect).

Now, Staff has done an about-face, arguing to the Commission that Part 54 does limit the scope of a NEPA review in a license renewal proceeding. For its part, this is now Entergy's third attempt to argue this issue – first in support of the PRM 51-7, then to the Board in an attempt to preclude admission of the State's contentions, and now to the Commission yet again. The Commission should not countenance these repeated attempts by Entergy to recycle arguments that the Commission has long since rejected.⁵

⁴ In fact, in support of its denial, the Commission observed that “the vast majority of environmental impacts from license renewal required to be considered by the NRC under its NEPA review (in accordance with Part 51) are not included in the analysis conducted in fulfilling the NRC's Atomic Energy Act responsibilities under Part 54.” PRM 51-7, 66 Fed. Reg. at 10,836 (internal citation omitted).

⁵ The Commission may also want to probe the internal processes at the NRC Staff that would allow it to argue in this proceeding for a position it firmly opposed only 9 years ago,

Prior Commissioners have recognized the usefulness of a thorough examination of SAMAs in license renewal. As Commissioner McGaffigan observed, “the Severe Accident Mitigation Alternative (SAMA) reviews for both the Calvert Cliffs and Arkansas Nuclear One Unit 1 plants have identified several cost beneficial enhancements for the licensee to pursue.” VR-SECY-00-0210, Commission Voting Record, Notation Vote Response Sheet (Commissioner McGaffigan’s Comments on SECY-00-0210, Oct. 31, 2000), ML010520240. If a thorough SAMA review and implementation was appropriate for such relatively remotely sited nuclear facilities, it is certainly warranted for Indian Point, the nuclear facility nearest the largest population center of any operating reactor in the United States. In the words of Commissioner McGaffigan, “Perhaps one day we will have nuclear reactor designs so safe that severe accidents will be remote and speculative and their consequences *nihil*, but that is not the case we have today in renewing the licenses of the current generation of reactors.” *Id.*

Since the Commission has already rejected the central argument upon which the Petitions are based, it should promptly also reject Entergy and NRC Staff’s attempts to ignore that precedent, particularly since, as noted below, the bases offered for revisiting and rejecting the Commission’s established policy are totally without merit.

II. NEITHER ENTERGY NOR STAFF HAS MET THE COMMISSION’S STANDARD FOR GRANTING INTERLOCUTORY APPEAL

Both Entergy and Staff acknowledge that the Commission disfavors “piecemeal” interlocutory appeals. *See* Entergy Petition at 23; Staff Petition at 7. Indeed, the Commission has frequently expressed a “general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings.’” *See Exelon Generation Co., LLC* (Early Site Permit for

particularly where the Commission rejected the position now being pressed and Staff did not acknowledge this prior resolution of the issue when taking its contrary position in its pleading to the ASLB and now in its pleading to the Commission.

the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004), quoting *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002). In essence, Staff and Entergy seek an exemption from this long-standing policy but do not come close to satisfying the heavy burden imposed by 10 C.F.R. § 2.341(f)(2).

The Commission has previously advised Entergy, in this very proceeding, that it will not accept petitions for interlocutory review based on the Board's admission of contentions. See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 129 (2009) (denying Entergy's petition for interlocutory review of the Board's decision to admit Consolidated Contention Riverkeeper EC-3/Clearwater EC-1). Entergy attempted to convince the Commission in that 2009 petition that it would be irreparably harmed by admission of the contention, that the Board's decision ventured improperly into continuing licensing basis waters, and that admission of the contention would change the proceeding in a "pervasive and unusual" manner. See Entergy's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 (Jan. 7, 2009), ML090140328. Entergy's arguments did not succeed then, and must fail now. Entergy and Staff's petitions for piecemeal interlocutory review should be rejected here because, as the Commission has already advised parties in this proceeding, "were the Commission to permit litigants to successfully invoke interlocutory review based merely on an assertion that the licensing board erred in admitting (or excluding) a contention, then the Commission would be opening the floodgates to a potential deluge of interlocutory appeals from any number of participants who lose admissibility rulings. This would eviscerate the Commission's longstanding policy disfavoring interlocutory appeals." *Indian Point, Units 2 and 3*, 69 NRC at 137.

A. Entergy and Staff have not met 10 C.F.R. § 2.341(f)(2)(i)'s "serious and irreparable harm" standard

As a factual matter, as discussed below, the completion of the engineering cost analyses by Entergy and the fundamental review Staff objects to doing (*see* Staff Petition at 23-25) are not tasks Entergy or Staff will avoid if the Commission reverses the Board's order. As discussed above, Entergy has agreed to complete the cost-effective analyses (Entergy Answer at 10) and Staff states that it will undertake this review *regardless*, and merely objects to having to do it here and now. *See* Staff Petition at 24-25 (admitting that the review will happen anyway, outside of license renewal scrutiny, and that to do it here would be "duplicative"⁶). As a practical matter, no additional burden is imposed by the Board's order. Instead, the question is one of timing: when Entergy will complete its engineering analysis and when the Staff's review of the information provided by Entergy will be done. This does not constitute irreparable harm.

Entergy and Staff argue primarily that the acceptance of these contentions will result in more work for them here and more litigation in this and other licensing proceedings. *See, e.g.*, Staff Petition at 24-25 ("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 of these issues could continue indefinitely...").⁷ The Commission has, in

⁶ There will be no duplicative review since once the review is conducted and completed in the license renewal proceeding, the NRC Staff will have made its decision on whether or not to order implementation of the clearly cost-effective SAMA.

⁷ NRC Staff raises the specter of long delays in the hearings if it has to undertake backfit type reviews before it can complete the FSEIS. NRC Staff Petition at 23-25. First, Staff offers no actual data to support just how long the delay would be. Second, the SAMA analysis, when completed by Entergy, will have essentially addressed all the back-fit criteria in 10 C.F.R. § 50.109(c). *See* Entergy Answer at 12 ("Entergy has internal engineering change request processes in place for requesting plant modifications, as part of current plant operations, and

the past, found that argument unpersuasive. *See Indian Point, Units 2 and 3*, 69 NRC at 136, (“the potential for litigation expense and delay to which Entergy refers is just the kind of burden that licensees and applicants voluntarily assume when filing applications with the Commission.”); *see also Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, Docket No. 50-213-OLA (License Termination Plan)(Dec. 5, 2001) (“A mere increase in the burden of litigation does not constitute “serious and irreparable” harm warranting interlocutory review.”), citing *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55 (1994).

Although Entergy and NRC Staff perceive major upheavals if the State of New York’s Contentions 35/36 remain admitted, their anxieties are baseless. It is difficult to see how NRC Staff could be able to make a final determination in the FSEIS as to whether any particular SAMA was cost-effective if, as it asserted in its answer in opposition to proposed contentions 35 and 36, it believes that “[a]pplicant’s identification of potentially cost-beneficial SAMAs establishes the range of SAMAs that *might* be considered cost-beneficial for the plant; . . . *further analysis could* result in a refinement of the cost/benefit ratio of those particular SAMAs, or in the deletion of certain SAMAs as no longer cost-beneficial.” NRC Staff Answer at 23 (emphasis added).

Once Entergy makes a final determination as to which SAMAs are actually cost-

evaluating the technical, regulatory, and economic feasibility of such proposed modifications”). Third, it should not be assumed that if Entergy finds a SAMA that is clearly cost-effective it will not voluntarily implement the SAMA without requiring a backfit order. *See, e.g.*, Aug. 18, 2002 letter from Duke Power relating to the two SAMAs one of which was at issue in *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373. Finally, although use of the backfit provisions of 10 C.F.R. § 50.109 provides one way for Staff to require implementation of a SAMA, both 10 C.F.R. §§ 51.103(a)(4) and 54.33(c) contemplate that a final decision on alternatives is to be made pursuant to processes of Part 51, even as to safety matters, without requiring resort to § 50.109.

beneficial, and Staff has reviewed that submittal and determined whether it is sufficient, Staff must then determine whether any of the SAMAs warrant implementation. This determination is mandated by 10 C.F.R. § 51.103(a)(4) which requires that a record of decision:

State whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. Summarize any license conditions and monitoring programs adopted in connection with mitigation measures.

Id.; see also 40 C.F.R. § 1502.14. Also, the NRC Staff's Standard Review Plan for license renewal applications directs NRC to determine whether "the mitigation alternatives committed to by the applicant are appropriate, and no further mitigation measures are warranted." Standard Review Plan for Environmental Reviews for Nuclear Power Plants – Supplement 1: Operating License Renewal (Oct. 1999) at 5.5.1-9. NRC Staff cannot complete this task if the SAMAs are only "potentially" cost-effective since, as Staff noted, further analysis could result in a "potentially" cost-effective SAMA no longer being cost-effective. Staff Answer at 23.

Entergy and Staff appear to argue that when this point is reached in the NRC Staff NEPA process - *i.e.*, when all the SAMAs that are cost-effective have been identified - the ASLB has ordered Staff to adopt one or more of these cost-effective SAMAs. Logic dictates that conclusion only through the somewhat surprising assumption that NRC Staff will not have a rational basis for deciding not to order implementation of a SAMA. Neither the ASLB nor the State are willing to accept that assumption, particularly since neither Entergy nor NRC Staff are able to cite to a single instance in which a clearly cost-effective SAMA was not implemented and no rational basis was provided for not implementing it. To the contrary, the principal NRC case cited by Entergy and NRC staff is one in which the failure to order implementation of a cost-effective SAMA at the time of license renewal was rationally supported. See *Duke Energy*

Corp., (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 388 n. 77 (2002). There, the Commission held it was reasonable for NRC Staff to postpone making a decision on whether to order implementation of a SAMA because of a pending generic review of the specific SAMA was already underway and a decision was expected shortly. Thus, there was a rational basis to allow relicensing to proceed without making the final determination on the implementation of the specific SAMA.⁸

As a contention of omission, all Contention 35 seeks is that Entergy complete the SAMA engineering analyses it has agreed to do. Nothing less is required by the operative guidelines from NRC and NEI, which Entergy purports to accept. NEI guidance requires the cost benefit analysis be advanced “to the point where economic viability of the proposed modification can be adequately gauged.” NEI 05-01(Rev. A) Severe Accident Mitigation Alternatives (SAMA) Guidance Document (“NEI 05-01”) at 28. Neither Entergy nor NRC Staff assert that point has been reached as to any of the SAMAs which are the subject of Contentions 35/36. NRC Staff guidance requires sufficient information be provided so that NRC Staff can determine whether implementation of a SAMA is “warranted.” NRC Standard Review Plan at 5.1.1-7 to 5.1.1-8. The Commission has already ruled that a SAMA contention based on requiring an applicant to provide sufficient information is admissible. “[T]he adequacy and accuracy of environmental analyses and proper disclosure of information are always at the heart of NEPA claims, if ‘further analysis’ is called for, that in itself is a valid and meaningful remedy under NEPA.” *Duke*

⁸ The contention at issue in *Catawba/McGuire* was not like the contentions in this case. The demand there was for more discussion of a SAMA that was already conceded to be cost-effective. Here, both Entergy and NRC Staff assert that more work needs to be done to be able to determine if any SAMA is cost-effective. In addition, in *Catawba/McGuire*, the issue of whether NRC Staff should decide whether it will order implementation of a cost-effective SAMA did not arise, and Duke Energy agreed to implement the second, non-generic SAMA candidate. See Letter, Gary R. Peterson, Duke Energy, to NRC (Aug. 18, 2002), ML011330373.

Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2) CLI-02-17, 56 NRC 1, 10 (2002). Nor is all this information gathering a hollow exercise, as Entergy and NRC Staff appear to believe. As the Commission held in CLI-02-17, the purpose of requiring an adequate evidentiary record related to a particular SAMA is “to ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct.” 56 NRC at 10. Implicit in the holding is that the result of the SAMA analysis is that a determination regarding implementation will be made and action of some kind will be taken.

The Staff’s own guidance confirms that the intent of the SAMA analysis is not to merely conduct a cursory review of SAMAs without considering their implementation. *See* Supplement 1 To Regulatory Guide 4.2: Preparation Of Supplemental Environmental Reports For Applications To Renew Nuclear Power Plant Operating Licenses (September 2000) at 4.2-S-50 listing the obligations of an applicant for the Environmental Report (“List plant modifications and procedural changes (if any) that have or will be *implemented* to reduce the severe accident dose consequence risk”) (emphasis added).

While the NRC Staff laments the delays it believes will be necessitated by requiring Entergy to finish its SAMA cost-effectiveness analysis for the “potentially” cost-effective SAMAs and requiring Staff to complete its analysis to determine which of the clearly cost-effective SAMAs should be implemented, Staff has no one to blame but itself for the delay. Had NRC Staff been consistent with the position it took in the NEI rulemaking and with the Commission’s resolution in that matter, it would not have asserted that Part 54 provided it with an excuse for not completing the review for, or determining implementation of, cost-effective SAMAs and would have done the work the Commission contemplated it would do as part of the license renewal process for Indian Point. Having failed to carry out its regulatory obligations,

NRC Staff should not now be heard to complain that if it were ordered to carry out its regulatory duties it would cause a delay in the proceeding.

B. Entergy and Staff have not met 10 C.F.R. § 2.341(f)(2)(ii)'s "pervasive and unusual" standard

As the Commission has already stated clearly in this proceeding and many others, the admission or rejection of contentions does not constitute serious and irreparable impact, or affect the basic structure of the proceeding in a pervasive and unusual manner. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008); *see also South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), Docket Nos. 52-012-COL, 52-013-COL (June 17, 2010); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000).

Staff relies on *Shaw Areva MOX*, a case that is not subject to broad application, in arguing for interlocutory review here. *See Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 61-63 (2009). In that case, the Commission granted the Staff's § 2.341(f)(2)(ii) petition for interlocutory appeal of an issue "deriv[ing] from the unusual (perhaps unique)" MOX proceeding that involved a Commission-sanctioned two-step licensing and hearing proceeding – a procedural structure that Commission had acknowledged would result in ASLB decisions likely to generate "pervasive and unusual" impacts on the proceeding. *Id.* at 62. Given that prior acknowledgment, it is not remarkable that the Commission granted interlocutory review under § 2.341(f)(2)(ii)'s "pervasive and unusual" standard. Moreover, the MOX ASLB was faulted for (1) "essentially hold[ing] a contention in suspended animation" when the contention was not specific enough to meet all of the contention admissibility requirements and (2) for crafting a conditional prospective litigation sanction if

Shaw and the Staff did not give intervenors advance notice of actions to be taken outside of the adjudicatory context. *Id.* at 62-63. Thus, the MOX ASLB ran afoul of Commission rulings never to admit a contention on a conditional basis or direct Staff's nonadjudicatory actions. *Id.* at 63. The Board in the instant case did no such thing. Unlike the MOX ASLB, the Board here squarely ruled on admissibility of the proffered contentions, it did not conditionally admit contentions that lacked sufficient specificity, and it did not consider or impose sanctions on Staff for its actions or inaction. It merely alerted Staff to the APA legal obligation attaching if Staff chose not to implement a clearly cost-effective SAMA: Staff will have to provide a rational basis for its decision. Even Staff does not deny this obligation. *See also* 10 C.F.R. §51.103(a)(4).

Entergy and Staff argue that this type of cost-benefit assessment has never been done in this context. Staff Petition at 23 (distinguishing this issue from a "typical case"); Entergy Petition at 2 (calling the issue "important and novel"). "[T]he mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding." *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant) Docket No. 50-400-LA, CLI-00-11 (June 20, 2000), citing *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994), *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 & nn. 16-17 (1985)).

III. IN THE EVENT THE COMMISSION ACCEPTS THE PETITIONS FOR REVIEW, IT SHOULD DENY THEM, BECAUSE THE BOARD'S DECISION IS WELL-REASONED AND SUPPORTED BY LAW

A. Part 54 And Part 51 Supports The Conclusion That The Staff Must Evaluate Cost Effective SAMAs During License Renewal Even If They Are Unrelated To Aging Management Of Passive Systems

Contention 36, as admitted, challenges the NRC Staff to establish a rational basis for the action it takes once Entergy has completed the SAMA information gathering process. To date,

the only basis NRC Staff has offered for its refusal to consider cost-effective SAMAs in the license renewal process is that under Part 54 the only safety requirements considered during the license renewal process are those related to aging management. As the ASLB held, and the prior discussion of Staff's and the Commission's clear rejection of this argument in the NEI PRM 51-7 rulemaking demonstrates, this argument is without a legal basis. It is evident from the regulatory history of the SAMA process and the regulations the Commission has promulgated to implement the SAMA requirements that SAMA, which is a creature of NEPA and Part 51, is intended to provide information upon which a decision can be made at the license renewal proceeding, particularly whether to require implementation of clearly cost-effective SAMAs regardless of their connection to aging management.

An important consideration that Entergy and NRC Staff ignore when discussing this issue is that neither Entergy nor NRC Staff claim that a clearly cost-effective SAMA can be rejected without a rational basis. Their only claim is that rejection of a cost-effective SAMA can occur outside the license renewal hearing process, without scrutiny by an independent ASLB, and without active participation by the public and state governments. However, the Commission has always expected that if a proper SAMA-based contention is raised, it can be litigated in the license renewal process even if the subject of the SAMA is not aging management.⁹

⁹ NRC Staff complains that if these contentions are admitted more issues will have to be heard in this case and other cases may also raise SAMA issues. NRC Staff Answer at 24-25. The fact that more issues that are legally required to be heard will have to be heard if Contentions 35/36 are admitted is not a valid reason to reject the contentions. While NRC Staff may favor the view that less public participation and less adjudication of legitimate issues is preferable, that is clearly not the view of the Commission. *See, e.g.,* USNRC Open Government Plan, Rev. 1 (June 7, 2010) ("nuclear regulation is the public's business, and it must be transacted publicly and candidly. The public must be informed about and have the opportunity to participate in the regulatory processes as required by law."), *quoting* USNRC Principles of Good Regulation, *available at* <http://www.nrc.gov/about-nrc/values.html#principles>. Nor was it the view of Congress when it enacted AEA § 189.

When the Commission first considered the issue of using NEPA analysis to identify additional mitigation measures that would improve safety, it did not view the process as one in which mitigation alternatives would be identified but not implemented, nor did it limit the SAMAs to be implemented to those related to aging management. Rather, it made clear that “it is also the intent of the Commission that the staff take steps to identify additional cases that might warrant early consideration of either additional features or other actions which would prevent or mitigate the consequences of serious accidents.” Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969 (Interim Policy Statement) 45 Fed. Reg. 40,101, 40,103 (June 13, 1980). SAMAs were to conclude with implementation, where warranted. Identification without implementation defeats the purpose of SAMAs.

When it adopted the GEIS as a regulation, the Commission addressed SAMAs specifically and how they were to be treated and once again did not limit the SAMA analysis or implementation of SAMAs to those related to aging management. It stated, in part:

...the Commission does not believe that site specific Level 3 PRAs are required to determine whether an alternative under consideration will provide sufficient benefit to justify its cost. Licensees can use other quantitative approaches for assigning site-specific risk significance to IPE results and judging whether a mitigation alternative provides a sufficient reduction in core damage frequency (CDF) or release frequency to *warrant implementation*.

In some instances, a consideration of the magnitude of reduction in the site specific CDF and release frequencies alone (i.e., no conversion to a dose estimate) may be sufficient to conclude that no significant reduction in off-site risk will be provided and, therefore, *implementation of a mitigation alternative is not warranted*.

Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,481 (June 5, 1996)(emphasis added). Thus, the Commission held that a determination should be made during the license renewal process, based on a cost-effectiveness

analysis, whether implementation of specific SAMAs as part of the renewed license would be warranted. The intent to include a SAMA analysis for all mitigation measures, whether or not related to aging management, and to have them implemented as part of the license renewal process where “warranted” was further discussed in the GEIS issuance and provides additional support for the proposition that cost-effective mitigation measures are expected to be implemented, absent a rational basis for not doing so. For example, the Commission determined:

[B]ecause the ongoing regulatory program related to severe accident mitigation (i.e., IPE and IPEEE) has not been completed for all plants and consideration of severe accident mitigation alternatives has not been included in an EIS or supplemental EIS related to plant operations for all plants, *a site-specific consideration of severe accident mitigation alternatives is required at license renewal for those plants for which this consideration has not been performed.* The Commission expects that if these reviews identify any changes as being cost beneficial, such changes generally would be procedural and programmatic fixes, with any hardware changes being only minor in nature and few in number.¹⁰

Id. 61 Fed. Reg. at 28,481 (emphasis added). Even the NEI guidance document, which Staff has adopted and Entergy embraces, does not draw a distinction between SAMAs related to aging management and other SAMAs. *See* NEI 05-01, Fig. 1 at 69.

These GEIS statements of consideration are manifested in the regulatory requirements adopted by the Commission which also do not limit SAMAs to aging management. First, the SAMA analysis is mandated by 10 C.F.R. § 51.53(c)(3)(ii)(L). Second, Part 54 requires compliance with Part 51. 10 C.F.R. § 54.29(b). Third, Part 54 contemplates that the analyses

¹⁰ The Commission’s expectation regarding the scope of cost-effective SAMAs may be correct for most plant sites, but Indian Point is unlike any other operating power reactor site. The total population within 50 miles of the plant is projected to grow to 19 million by 2035 and the now-corrected wind direction demonstrates that the radiation released during a severe accident is more likely to head into the heart of that population than previously projected. Thus, adverse effects from a severe accident will be greatest at Indian Point and the beneficial effects of any particular SAMA will also be greatest at Indian Point.

conducted pursuant to Part 51 can result in licensing conditions being added to the CLB:

(c) Each renewed license will include those conditions to protect the environment that were imposed pursuant to 10 CFR 50.36b and that are part of the CLB for the facility at the time of issuance of the renewed license. *These conditions may be supplemented or amended as necessary to protect the environment during the term of the renewed license and will be derived from information contained in the supplement to the environmental report submitted pursuant to 10 CFR part 51, as analyzed and evaluated in the NRC record of decision.* The conditions will identify the obligations of the licensee in the environmental area, including, as appropriate, requirements for reporting and recordkeeping of environmental data and any conditions and monitoring requirements for the protection of the nonaquatic environment.

10 C.F.R. § 54.33(c)(emphasis added).¹¹ Fourth, 10 C.F.R. §51.103(a)(4) requires that the FSEIS determine which alternatives are adopted and why others were rejected. Fifth, in PRM 51-7, the Commission has already squarely rejected the argument that Part 54 in any way limits the reach of the requirements of Part 51. *See* 66 Fed. Reg. 10,834 (Feb. 20, 2001). And, sixth, *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989), rejected any suggestion that provisions of the Atomic Energy Act would restrict the application of NEPA to an NRC proceeding. “On the basis, therefore, of the language of NEPA and AEA, the legislative history of NEPA, and the existing case law, we find no intent by Congress that the AEA preclude application of NEPA.” *Id.* at 730.

Contrary to the arguments Entergy and NRC Staff advance, at no point does the Commission confine the SAMA analysis during license renewal to SAMAs only related to aging

¹¹ Entergy’s attempt to draw a line between a condition that is “environmental” and one that is “safety” is futile. Entergy Petition at 19. The consequences of concern in a SAMA analysis are damage to the environment caused by a severe accident. Commission regulations contemplate that many safety issues are relevant to environmental concerns. *See, e.g.*, 10 C.F.R. § 51.52 (Table S-4) and Appendix B to Subpart A of Part 51, both of which deal with accidents as sources of potential adverse environmental impacts. Similarly, NRC Staff assertion that because a SAMA backfit addresses the CLB, it is necessarily outside the scope of the license renewal (Staff Petition at 23-24) ignores the clear language of 10 C.F.R. § 54.33(c).

management. Even in *Catawba/McGuire*, when confronted with the same argument advanced here - that SAMAs unrelated to aging management do not need to be considered in the license renewal process - the Commission did not adopt that line of argument but addressed the merits of a proposed SAMA unrelated to aging management and found that the ongoing generic review of the SAMA was a rational basis to not require its implementation in the license renewal process. *Id.* CLI-02-28, 56 NRC at 388 n. 77.

B. Requiring NRC Staff To Provide A Rational Basis For Its Decisions Regarding Implementation Of Clearly Cost-Effective SAMAs Imposes No Obligation Greater Than What The Law Requires

Entergy and NRC Staff argue that the Board conflated the requirements of Part 51 and Part 54 with the requirements of Part 50 by invoking the authority of 10 C.F.R. § 50.109 as a basis for the Staff to require implementation of a SAMA. While the Board identified the backfit procedure as a source of Staff authority, it did not limit the Staff to that authority. LBP-10-13 at 29 (“NRC Staff must review SAMAs under Part 51 and has the option, if necessary, to institute a backfit prior to license renewal under Part 50 as a result of its SAMA review”). Tellingly, neither Entergy nor NRC Staff deny that cost-effective SAMAs can be required to be implemented – even during license renewal if they are related to aging management – so some vehicle must exist for their implementation. Whether Staff relies on 10 C.F.R. §51.103(a)(4) or § 50.109, the SAMA review process provides the framework to develop the rational basis for whatever action NRC Staff chooses.¹² Once Entergy has submitted a completed engineering cost analyses and the clearly cost-effective SAMAs, if any, have been identified, NRC Staff will either provide a rational basis for not ordering implementation of the SAMA or will order its

¹² Neither Entergy nor NRC Staff argue, nor could they, that the ASLB erred in its holding that NRC Staff must have a rational basis for refusing to order implementation of a clearly cost-effective SAMA. *See also* 10 C.F.R. §51.103(a)(4).

implementation.¹³ Pursuant to § 50.109 the Commission “shall require the backfitting of a facility” when, and only when, it makes a determination 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.” 10 C.F.R. § 50.109(a)(3)). A properly completed SAMA analysis provides a rigorous and reliable assessment of whether § 50.109(a)(3) has been satisfied.¹⁴ Entergy and NRC Staff resist completing the SAMA analysis because they do not wish to have ASLB independent scrutiny of, and public and state government participation in, the decision making process or its conclusions. Given the Commission’s recent and frequent reaffirmations of the importance of public participation in the NRC licensing process, Entergy and Staff opposition to Contentions 35/36 is particularly flawed.

¹³ The SAMA analysis, as indicated by the regulations (10 C.F.R. §51.101(a)), the GEIS Statement of Consideration, and PRM 51-7, must be *completed* as part of the license renewal process. That includes NRC Staff deciding whether implementation of clearly cost-effective SAMAs is warranted and if not, providing a rational basis for its decision. As noted, all the work required to complete the SAMA is essentially the same as the work required to complete a backfit analysis and thus, once the SAMA analysis is completed the Staff is prepared to order implementation as a backfit if it concludes that implementation is warranted. Thus, the backfit analysis will not, as Staff suggests, result in any delay in the resolution of the license renewal process but, to the contrary, completion of the SAMA process will mean that the cost-benefit analysis is done and there will be no need to repeat it all over again in the backfit process.

¹⁴ The Petitions refer to the GEIS finding that the impact of severe accidents is “small” to justify their effort to ignore all SAMAs. Entergy Petition at 3; Staff Petition at 2, 4. Their argument ignores the fact that even if the impact is “small,” NRC regulations require that SAMAs be evaluated. It also ignores the fact that even Petitioners agree that if a SAMA is cost-effective and relates to aging management it must either be implemented or a rational basis must be provided for no implementation. Finally, as the December 2009 SAMA Reanalysis demonstrates, the SAMAs at issue here involve substantial improvements to safety. *E.g.* IP2 SAMA 054, and IP3 SAMA 061 are projected to reduce the population dose risk by 39.24% and 19.73% respectively and to have an economic benefit of over \$5.5 million and over \$4 million respectively. *Id.* at 19 and 28.

C. Entergy Has No Justification For Its Refusal To Complete The SAMA Cost-Effective Analysis As Part Of The Licensing Renewal Process

Entergy argues that in order to meet its SAMA obligations it need only do a passing cost-effectiveness analysis with the real substantive analysis reserved for its post-hearing filings:

The Board misses the key distinction between the conservatively low, conceptual implementation cost estimates that an applicant prepares for a NEPA-based SAMA analysis and subsequent internal engineering project analyses that an applicant may perform to assess the viability of implementing a particular plant modification under its current operating procedures.

Entergy Petition at 22. Not only is this a cynical and crabbed view of the purpose of NEPA, it directly conflicts with NEI guidance that the SAMA analysis must be completed “to the point where economic viability of the proposed modification can be adequately gauged” (NEI 05-01(Rev. A) at 28) and with the Commission’s statements in *Catawba/McGuire* that the purpose of SAMA review is “to ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct.” 56 NRC at 10.

Entergy and Staff’s reliance on *Methow Valley* is similarly misplaced. See Entergy Petition at 13-15; Staff Petition at 12 (both citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)). Notably, Staff relied on *Methow Valley* to make precisely the opposite point regarding NEPA in PRM 51-7 than the one it attempts to make here, and the Commission relied on *Methow Valley* in rendering its rulemaking denial.

Section 102(2)(C) of NEPA implicitly requires agencies to consider measures to mitigate those impacts when preparing impact statements. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). NRC’s obligation to consider mitigation exists whether or not mitigation is ultimately found to be cost-beneficial and whether or not mitigation ultimately will be implemented by the licensee. *Id.*

PRM 51-7, 66 Fed. Reg. at 10,836.

Moreover, the facts of this proceeding and *Methow Valley* are quite dissimilar. Unlike the current proceeding, in *Methow Valley* the Department of Interior's Forest Service had already: (1) decided mitigation measures would be implemented (490 U.S. at 345-46); (2) entered into a memorandum of understanding with the local agencies that would have to finally design and implement those mitigation measures to assure that mitigation would occur (490 U.S. at 352-53); and (3) made clear that it was only issuing a preliminary approval of the proposed project and that final agency action would occur in the future (490 U.S. at 337). Thus, the Court concluded, the Forest Service had a rational basis for its decision to not provide all the details of the mitigation measures, details that it insisted could not be provided at that early stage in the project's development. 490 U.S. at 352-53.¹⁵

In this proceeding, unlike *Methow Valley*, Contentions 35/36 do not allege that more specifics about the particular mitigation measures are needed, but rather these contentions are focused on Entergy and Staff completing the Commission-ordered process of deciding whether implementation of any SAMAs is warranted. The argument respondents unsuccessfully advanced in *Methow Valley* was that the mitigation measures that would be taken in the future were not spelled out in sufficient detail to know precisely what would be done. The Court agreed that the Forest Service had a rational basis for not, at that early stage of the proposed project, spelling out in more detail precisely how the mitigation which was to be achieved, would

¹⁵ Notably, *Methow Valley* did not hold that agency can reject implementation of cost-effective mitigation measures without a rational basis. Thus, *Methow Valley* does not provide a legal justification for Entergy or NRC to refuse to implement those specifically-identified mitigation alternatives that are significantly cost-effective and will provide a substantial increase in safety and a substantial reduction in potential adverse environmental impacts. Indeed, in *Methow Valley*, the Forest Service had already taken steps to ensure that appropriate mitigation measures were developed and implemented. And contrary to the representations in the two Petitions now before the Commission, in admitting Contentions 35/36, the Board here did not require NRC Staff to adopt any particular SAMA.

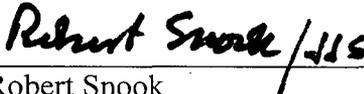
be achieved, and which regulatory authority would achieve it. Thus, *Methow Valley* does not support Petitioners' arguments, but rather represents an example of how a properly conducted NEPA analysis should result in deciding on whether or not mitigation is required. Here, the State simply seeks for the review to be completed during the relicensing proceeding so as to inform the decision by the Board. As such, *Methow Valley* is not relevant.

CONCLUSION

For the above-stated reasons, the Commission should deny Entergy and Staff's petitions for interlocutory review of LBP-10-13.



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Dated: July 26, 2010

Selected Regulatory Provisions

10 C.F.R. § 2.341(f)(2)(i), (ii)

(f) Interlocutory review.

* * *

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. A petition and answer to it must be filed within the times and in the form prescribed in paragraph (b) of this section and must be treated in accordance with the general provisions of this section. The petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory 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.

10 C.F.R. § 51.53(c)(3)(ii)(L)

§ 51.53 Postconstruction environmental reports.

* * *

(c) Operating license renewal stage.

(1) Each applicant for renewal of a license to operate a nuclear power plant under part 54 of this chapter shall submit with its application a separate document entitled "Applicant's Environmental Report--Operating License Renewal Stage."

* * *

(3) For those applicants seeking an initial renewed license and holding an operating license, construction permit, or combined license as of June 30, 1995, the environmental report shall include the information required in paragraph (c)(2) of this section subject to the following conditions and considerations:

* * *

(ii) The environmental report must contain analyses of the environmental impacts of the proposed action, including the impacts of refurbishment activities, if any, associated with license renewal and the impacts of operation during the renewal term, for those issues identified as Category 2 issues in appendix B to subpart A of this part. The required analyses are as follows:

* * *

(L) If the staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment, a consideration of alternatives to mitigate severe accidents must be provided.

10 C.F.R. § 51.71(a)

§ 51.71 Draft environmental impact statement—contents.

(a) Scope. The draft environmental impact statement will be prepared in accordance with the scope decided upon in the scoping process required by §§ 51.26 and 51.29. As appropriate and to the extent required by the scope, the draft statement will address the topics in paragraphs (b), (c), (d) and (e) of this section and the matters specified in §§ ... 51.53

10 C.F.R. § 51.90

§ 51.90 Final environmental impact statement—general.

After receipt and consideration of comments requested pursuant to §§ 51.73 and 51.117, the NRC staff will prepare a final environmental impact statement in accordance with the requirements in §§ 51.70(b) and 51.71 for a draft environmental impact statement. The format provided in section 1(a) of appendix A of this subpart should be used.

10 C.F.R. § 51.101

§ 51.101 Limitations on actions.

(a) Until a record of decision is issued in connection with a proposed licensing or regulatory action for which an environmental impact statement is required under § 51.20, or until a final finding of no significant impact is issued in connection with a proposed licensing or regulatory action for which an environmental assessment is required under § 51.21:

(1) No action concerning the proposal may be taken by the Commission which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives.

* * *

10 C.F.R. § 51.103

§ 51.103 Record of decision—general.

(a) The record of decision required by § 51.102 shall be clearly identified and shall:

(1) State the decision.

(2) Identify all alternatives considered by the Commission in reaching the decision, state that these alternatives were included in the range of alternatives discussed in the environmental impact statement, and specify the alternative or alternatives which were considered to be environmentally preferable.

(3) Discuss preferences among alternatives based on relevant factors, including economic and technical considerations where appropriate, the NRC's statutory mission, and any essential considerations of national policy, which were balanced by the Commission in making the decision and state how these considerations entered into the decision.

(4) State whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. Summarize any license conditions and monitoring programs adopted in connection with mitigation measures.

* * *

National Environmental Policy Act of 1969, Sec. 102, 42 U.S.C. § 4332

The Congress authorizes and directs that, to the fullest extent possible (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment; a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * *

(E) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * *

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

-----x
In re: Docket Nos. 50-247-LR and 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. July 26, 2010
-----x

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2010, copies of the State of New York's and State of Connecticut's Combined Reply to Entergy and NRC Staff Petitions for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting the State of New York's Contentions 35 and 36 (LBP-10-13) were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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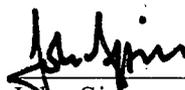
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John Sipos

Dated at Albany, New York
this 26th day of July 2010



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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July 26, 2010

Re: Indian Point License Renewal Application, Docket Nos. 50-247-LR, 50-286-LR
ASLBP No. 07-858-03-LR-BD01

Dear NRC Commissioners, Secretary Vietti-Cook, and Rulemaking and Adjudications Staff:

Enclosed for filing please find an original and two (2) copies of The State of New York's and State of Connecticut's Combined Reply to Entergy and NRC Staff Petitions for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting the State of New York's Contentions 35 and 36 (LBP-10-13) and a certificate of service. Five (5) courtesy copies are also enclosed for the Commissioners.

Copies are being served on the parties to the proceeding.

Respectfully submitted,

John J. Sipos
Assistant Attorney General

cc: service list