

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 REPLY TO STATE OF NEW YORK'S AND STATE OF
CONNECTICUT'S ANSWER TO ENTERGY'S AND NRC STAFF'S
PETITIONS FOR INTERLOCUTORY REVIEW OF LBP-10-13

Sherwin E. Turk
Counsel for NRC Staff

August 2, 2010

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On July 15, 2010, the NRC Staff ("Staff") and Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant") filed petitions seeking interlocutory Commission review of LBP-10-13,¹ insofar as the Atomic Safety and Licensing Board ("Board") admitted New York Contentions 35 and 36.² On July 26, 2010, the State of New York and State of Connecticut (collectively, "Respondents") filed a joint answer to Entergy's and the Staff's petitions for review.³ In accordance with 10 C.F.R. §§ 2.341(b)(3) and 2.341(f)(2), the Staff herein replies to their Answer. As set forth below, the Respondents' Answer is substantially unsupported.

DISCUSSION

The Staff has previously described, in detail, the errors committed by the Board in its decision to admit Contentions 35 and 36 (Staff Petition at 10-21); further, the Staff described the serious and irreparable harm threatened by the Board's decision and the pervasive and unusual

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 (1) "Applicant's Petition for Interlocutory Review of LBP-10-13" (July 15, 2010) ("Entergy Petition"); and (2) "NRC Staff's Petition for Interlocutory Review of the [Board's] Decision Admitting New York State Contentions 35 and 36 on [SAMAs] (LBP-10-13)" (July 15, 2010) ("Staff Petition").

³ "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)" (July 26, 2010) ("Answer").

effect it will have on this proceeding, such that interlocutory review is warranted under 10 C.F.R. §§ 2.341(f)(2)(i) & (ii) (*Id.* at 21-25).⁴ Nothing in the Respondents' Answer refutes this showing.

I. The Staff's Petition for Review Is Consistent With the Commission's Denial of NEI's Petition for Rulemaking and the Views Expressed in SECY-00-0210.

In their Answer, the Respondents assert that "Commission precedent has already rejected the fundamental argument that underlies both petitions for interlocutory review," citing the Commission's denial of the NEI petition for rulemaking (PRM-51-7).⁵ Further, Respondents claim that the Staff's petition for interlocutory review is somehow contrary to the Commission's decision in PRM 51-7 (*Id.* at 2, 6) and the views expressed in SECY-00-0210 (*Id.* at 6). These claims are without merit; moreover, they rest upon a flawed characterization of the Staff's petition for review, in which the Respondents claim that "[t]he 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." (*Id.*; emphasis added). Neither the Staff nor the Applicant made that assertion – and the Respondents fail to identify any statement in either petition to support their claim.

In its petition for rulemaking, NEI had requested that the regulations be amended, to delete the requirement that the NRC evaluate SAMAs as part of its NEPA review for license renewal if SAMAs had not been considered previously in a NEPA review for the plant.⁶ The Commission denied NEI's petition, finding that the NRC is obliged to "consider" SAMAs related to continued operations as part of its license renewal reviews, in order to meet its obligations

⁴ Similarly, the Applicant described the errors underlying the Board's decision (Entergy Petition at 13-23) and the reasons why the Commission should undertake interlocutory review of that decision (*Id.* at 23-25). In addition, the Applicant provided a detailed overview of the SAMA analyses it conducted, including a description of the level of analysis it has completed and its adherence to the guidance issued by the Nuclear Energy Institute ("NEI") and endorsed by the Staff (*Id.* at 7-10).

⁵ Answer at 6, *citing* "Nuclear Energy Institute; Denial of Rulemaking," PRM-51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001).

⁶ PRM-51-7, 66 Fed. Reg. at 10,835.

under NEPA.⁷ Here, consistent with that determination, all potentially cost-beneficial SAMAs were or will be considered by the Staff in the Draft and/or (forthcoming) Final SEIS, without regard to whether they relate to aging management issues.⁸ NEPA requires nothing more.⁹

Moreover, despite the Respondents' unsupported claims (Answer at 6, 7, 8, and n.5), the Staff nowhere argues that Part 54 "limit[s] the scope of a NEPA review in a license renewal proceeding" (*Id.* at 7); to the contrary, the Draft SEIS considered all potentially cost-beneficial SAMAs, without regard to whether they relate to Part 54 safety issues – and the Staff nowhere argued that less is required. This is consistent with the Staff's views expressed in SECY-00-0210.¹⁰ There, the Staff stated that while its safety review is limited under Part 54, its environmental review for license renewal is not limited, as "the vast majority of environmental impacts from license renewal required to be considered by the NRC in its NEPA review . . . are not related to the specific technical aspects of plant operation analyzed . . . under Part 54."¹¹

⁷ *Id.* at 10,836, 10,838.

⁸ See Staff Petition at 12,15-17; Draft SEIS § 5.2 at 5-4–5-10, and Appendix G at G-1–G-38. Significantly, the Staff reviewed Entergy's SAMA analysis in its Draft SEIS, and determined that Entergy's methodology and "treatment of SAMA benefits and costs support the general conclusion that [Entergy's] SAMA evaluations . . . are reasonable and sufficient" for license renewal. DSEIS at 5-10.

⁹ Further, the Commission did not say that "final" engineering cost benefit analyses are required under NEPA; to the contrary, as discussed in the Staff's Petition (at 17-19), the Commission has previously ruled that mitigation must be discussed in "sufficient detail to ensure that environmental consequences [of the action] have been fairly evaluated"; however, once the potential SAMAs have been identified, it is not necessary to inquire "whether the SAMA analysis can be refined further." *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC ____ (Mar. 26, 2010), slip op. at 39; *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).

¹⁰ SECY-00-0210, Memorandum from William D. Travers, Executive Director for Operations, to the Commissioners, "Subject : Denial of Petition (PRM 51-7) for Rulemaking to Delete the Requirement From 10 CFR Part 51 to Consider [SAMAs] in operating License Renewal Reviews" (Oct. 20, 2000) (ADAMS Accession No. ML003750123).

¹¹ SECY-00-0210, at 4; *accord*, PRM-51-7, 66 Fed. Reg. at 10,836. It should be noted that when NEI filed its petition for rulemaking, an individual plant examination ("IPE") and IPE for externally-initiated events ("IPEEE") had not been completed – and this fact weighed in the Staff's and Commission's view that SAMAs should be considered in plant-specific license renewal reviews. See 66 Fed. Reg. at 10,838; SECY-00-0210 at 5-6. In contrast, here, an IPE and IPEEE have been completed, and Entergy has implemented various cost-beneficial SAMAs based upon those studies. See Entergy's ER at E.2-2; DSEIS at G-5, G-20 *et seq.* The Staff does not assert, however, that this fact warrants the performance of a more limited SAMA evaluation than was envisioned in PRM-51-7.

II. The Respondents Fail to Refute the Staff's Showing That Interlocutory Review of the Board's Decision Is Warranted.

The Staff has described the reasons why interlocutory review of LBP-10-13 is required, including (a) the immediate and serious irreparable harm to the Staff that will result (Staff Petition at 21-22), and (b) the decision's pervasive and unusual effect on the basic structure of this proceeding (*Id.* at 19-21, 23-25). In response, the Respondents assert that the Board's decision will have no real impact, since Entergy will complete its "engineering cost analyses" anyway, and "Staff states that it will undertake this review regardless," and "admit[s] that the review will happen anyway, . . . and that to do it here would be 'duplicative.'"¹² The Respondents ignore the Staff's explanation of the requirements, costs and resources involved in a backfit analysis (Staff Petition at 21-22), but even more fundamentally, they incorrectly characterize the record: The Staff did not say that it will conduct a backfit review of Entergy's SAMAs; rather, the Staff stated that "if" any non-aging management-related SAMAs are found to be important, they would be important not just for license renewal but also for the current operating license, such that considering those issues here would be duplicative of their consideration in a backfit proceeding. See Staff Petition at 21.¹³ No basis exists for Respondents' claim to the contrary.¹⁴

¹² Answer at 10, emphasis added (*citing* Staff Petition at 24-25); *cf.* Answer at 2, and 22 n.13.

¹³ A backfit may be imposed where necessary to bring a plant into compliance with its CLB or regulatory requirements, to assure adequate protection of public health and safety – or, under 10 C.F.R. § 50.109(a)(3), where a backfit analysis shows that imposition of a backfit would result in "a substantial increase in the overall protection of the public health and safety or the common defense and security." See *generally*, NRC Management Directive ("MD") 8.4, "Management of Facility-Specific Backfitting and Information Collection" (Oct. 2004), Handbook at 8-10, 13-14.

¹⁴ The Respondents' reliance on the Standard Review Plan for license renewal environmental reviews (*see* Answer at 12, 13), is misplaced. The SRP nowhere mandates the imposition of any SAMA as a backfit requirement for license renewal. Indeed, other NRC guidance states that "[t]he Backfit Rule ordinarily does not apply in renewal of a nuclear power plant operating license under 10 CFR Part 54," and "if the NRC proposes to address safety issues outside the scope of Part 54, then any actions necessary to address such out-of-scope safety issues are subject to the Backfit Rule." NRR Office Instruction LIC-202, Rev. 2, "Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests" (May 12, 2010), at 1 (emphasis added) (ADAMS Accession No. ML092010045). Similarly, contrary to Respondents' claim, the Interim Policy Statement on Severe Accidents, "Nuclear Power Plant Accident Considerations Under [NEPA]," 45 Fed. Reg. 40,101, 40,103 (June 13, 1980) did not suggest that "SAMAs were to conclude with implementation, where warranted" (Answer at 18); rather, it indicated that severe accidents should be given "reasoned consideration," and the Staff should "identify additional cases that might warrant early consideration" of additional features or preventive or mitigative measures.

III. The Respondents Fail to Refute the Staff's Showing of Significant Errors in the Board's Decision that Warrant Its Reversal.

Despite Respondents' assertion that they must be allowed to litigate SAMAs in a "public" license renewal proceeding (Answer at 2, 17 and 22), it is clear that they have been allowed to do so. Thus, the Board has admitted two other SAMA contentions in this proceeding, as amended (NYS Contentions 12/12A/12B and 16/16A/16B), and litigation of those contentions is proceeding. What Respondents' Answer makes unequivocally clear, however, is that now, having secured the admission of NYS Contentions 35 and 36 in LBP-10-13, they will further attempt to litigate the consideration of backfit implementation issues in this proceeding. See, e.g., Answer at 12-14, 17 and n.9. This attempt not only raises an issue that is not material to license renewal, it ignores the Commission's ruling that backfit requests are "not cognizable in a license renewal adjudication"¹⁵ – and it would effectively negate the Commission's directive, in 10 C.F.R. § 50.109(d), that "[n]o licensing action will be withheld during the pendency of backfit analyses required by the Commission's rules."¹⁶ Such a result should not be allowed to stand.

CONCLUSION

For the reasons stated above and in the Staff's Petition, the Staff respectfully submits that immediate interlocutory review, and reversal, of LBP-10-13 is warranted.

Respectfully submitted,


Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of August 2010

¹⁵ *Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 97 (2007), quoting Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station) and Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-06-26, 64 NRC 225, 226-27 (2006).*

¹⁶ The Respondents' citation to 10 C.F.R. § 51.103(a)(4) (Answer at 12), is to no avail. The Commission has previously concluded, in the GEIS, that the probability-weighted consequences of severe accidents are "SMALL"; and the Draft SEIS explained that additional mitigation measures are not being adopted, in that "none of the potentially cost-beneficial SAMAs relate to adequately managing the effects of aging during the period of extended operation," and "therefore they need not be implemented as part of the license renewal pursuant to 10 CFR Part 54." DSEIS at 5-10.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S REPLY TO STATE OF NEW YORK'S AND STATE OF CONNECTICUT'S ANSWER TO ENTERGY'S AND NRC STAFF'S PETITIONS FOR INTERLOCUTORY REVIEW OF LBP-10-13," dated August 2, 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 2nd day of August, 2010:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Justin D. Pruyne, Esq.*
Assistant County Attorney
Office of the Westchester County Attorney
148 Martine Avenue, 6th Floor
White Plains, NY 10601
E-mail: jdp3@westchestergov.com
E-mail: gss1@westchestergov.com

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

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

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



Sherwin E. Turk
Counsel for NRC Staff