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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	August 2, 2010

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

Pursuant to 10 C.F.R. § 2.341(b)(3), Entergy replies to New York State's and Connecticut's (jointly, "NYS") Combined Reply to the Entergy and NRC Staff petitions for interlocutory review of LBP-10-13.[1] As shown below, NYS: (1) fundamentally misstates NEPA and Commission precedent as it applies to severe accident mitigation alternative ("SAMA") analysis; (2) conflates NEPA's and Part 51's environmental requirements with the safety requirements of Parts 50 and 54; (3) incorrectly depicts the Indian Point SAMA analysis as uniquely lacking in rigor when it is fully consistent with NRC-endorsed guidance and SAMA analyses approved by the NRC in prior license renewal applications; and (4) fails to refute the appellants' compelling showing that litigation of contention NYS-35/36 will have a pervasive and unusual effect on this proceeding, so as to warrant interlocutory review.

Importantly, NYS's arguments underscore the need for prompt Commission intervention. NYS and the Board, on the one hand, and Entergy and the Staff on the other, have diametrically-opposed views of the NRC's regulations relating to the scope of license renewal, the purpose of SAMA analyses, and the application of the backfit rule (10 C.F.R. § 50.109) that must be reconciled now by the Commission to avoid a pervasive and unusual effect on this proceeding.

[1] Entergy and Staff filed petitions for interlocutory review of LBP-10-13 ("Entergy Petition" and "Staff Petition") on July 15, 2010. NYS and Connecticut (the latter being an interested state) filed a Combined Reply on July 26, 2010.

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NYS first argues that that the Commission already has "rejected" Entergy's alleged "fundamental argument" that a SAMA analysis "need not be completed for any SAMA that is not within Part 54's narrow scope."[2] This argument incorrectly implies that Entergy (1) has not completed its SAMA analysis, and (2) must implement any cost-beneficial SAMA. Via SAMA analyses, NRC requires "that any plant changes that have a potential for significantly improving severe accident safety performance are identified and assessed."[3] Entergy has done precisely that in its SAMA analysis. To identify cost-beneficial SAMAs, Entergy followed NRC-endorsed guidance by conceptually estimating the cost of implementing each SAMA candidate to the extent that allowed it to adequately gauge the economic viability of the proposed modification.[4] Nothing in NRC regulations or guidance supports the claim that "more work needs to be done."[5]

Also, Entergy and the Staff have demonstrated that neither Part 51 nor Part 54 mandates actual *implementation* of SAMAs unrelated to aging management as a prerequisite to license renewal. In this regard, the "rational basis" that NYS repeatedly insists is missing resides firmly in two clear and settled principles. First, the Staff lacks the legal authority to order non-aging-related modifications to the Indian Point Unit 2 and Unit 3 current licensing bases ("CLBs") as a condition precedent to license renewal. Second, insofar as the Staff may require plant-specific safety enhancements unrelated to aging management, it must do so in accordance with the backfit rule and, thus, separate and apart from the license renewal process.[6]

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2 Combined Reply at 6.

3 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, slip op. at 3 (Mar. 26, 2010).

4 *See* Entergy Petition at 6-10; NEI 05-01, Rev. A, *Severe Accident Mitigation Alternatives (SAMA) Analysis, Guidance Document*, at 28-29 (Nov. 2005), *available at* ADAMS Accession No. ML060530203 ("NEI 05-01").

5 Combined Reply at 13 n.8.

6 *See Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-06-26, 64 NRC 225, 226-27 (2006) (holding that CLB backfits are "not suitable for a license renewal adjudication but perhaps suitable for consideration under 10 C.F.R. § 2.206."); NRR Office Instruction LIC-202, Rev. 2, *Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests*, at 1 (May 17, 2010) (ADAMS Accession No. ML092010045) (stating that "if the NRC proposes to address safety issues outside the [aging management] scope of Part 54 . . ., then any actions necessary to address such out-of-scope safety issues are subject to the Backfit Rule."); NUREG-1800, Rev. 1,

As such, there is no legal basis for NYS's mistaken belief that "Part 54 contemplates that the [SAMA] analyses conducted pursuant to Part 51 can result in licensing conditions being added to the CLB" as a prerequisite to license renewal.[7] NYS cites 10 C.F.R. § 54.33(c), but that provision refers to possible amendment or supplementation of CLB conditions related to a licensee's environmental monitoring, reporting, and recordkeeping obligations under 10 C.F.R. § 50.36b. NYS also cites, for the first time, 10 C.F.R. § 51.103(a)(4), a provision *not* relied upon or even cited by the Board in its ruling. Section 51.103(a)(4) refers to "practicable measures within [the NRC's] jurisdiction to avoid or minimize environmental harm from the alternative selected." Even if this provision had any discernible nexus to SAMA analysis, the fact remains that the Atomic Energy Act, as implemented by Part 54, does not confer authority on the NRC to compel an applicant to implement mitigation measures unrelated to aging management, whether through a license condition or a Part 50 backfit, as a prerequisite to license renewal.[8]

The Staff's adherence to the foregoing principles in its draft EIS is hardly an "about-face" from the position reflected in the Commission's 2001 denial of an NEI rulemaking petition.[9] In that proceeding, the Commission denied an NEI petition to abolish the requirement for SAMA reviews in Part 51 "on the belief that the requirement conflicts with the technical requirements for license renewal in 10 CFR part 54."[10] Here, Entergy and the Staff have *not* suggested that Part 54 limits the scope of a NEPA review in a license renewal proceeding.[11] Instead, they have

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Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants, at 4.1-1, 4.7-1 (Sept. 2005) (ADAMS Accession No. ML052110007) ("Any question regarding the adequacy of the CLB must be addressed under the backfit rule (10 CFR 50.109) and is separate from the license renewal process.").

7 Combined Reply at 19-20.

8 *See Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 7-10 (2001).

9 Combined Reply at 7 (*citing* Nuclear Energy Institute; Denial of Petition for Rulemaking, PRM 51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001) ("NEI Rulemaking Petition Denial")).

10 NEI Rulemaking Petition Denial, 66 Fed. Reg. at 10,835.

11 Combined Reply at 7. In fact, on page 26 of its April 5, 2010 answer to NYS-35/36, Entergy quoted *Turkey Point*: "The Commission's AEA review under Part 54 does not compromise or limit NEPA." CLI-01-17, 54 NRC at 13.

correctly explained that, consistent with NRC regulations, NEPA requires reasonable evaluation and disclosure of possible mitigation measures, *including* non-aging-related SAMAs, but not the actual implementation of those measures, as sought by NYS.[12] By providing a complete SAMA analysis, Entergy and the Staff have complied fully with the requirements of NEPA and Part 51.

This position is fully consistent with the Commission's statement in 2001 that "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.*"[13] Notably, in reaching this conclusion, the Commission cited the U.S. Supreme Court's long-standing *Methow Valley* decision,[14] whose unambivalent holding NYS refuses to accept: "NEPA imposes no substantive requirement that mitigation measures actually be taken."[15] NYS overreaches in trying to distinguish the facts underlying that case and in incorrectly arguing that the Court applied a "rational basis" test. The Court's holding remains clear, unaltered, and controlling here: NEPA requires only a "reasonably complete discussion of possible mitigation measures."[16] It does not, in this case, require implementation of SAMAs unrelated to aging management, or related Part 50 backfit analyses, as a prerequisite to license renewal.

NYS next attempts to diminish the fundamental impact of the Board's decision on this proceeding by arguing that, "[w]hile the Board identified the backfit procedure as a source of Staff authority, it did not limit the Staff to that authority."[17] But the Board's actual words refute this claim. The Board specifically admitted NYS-35/36 "as a contention of omission . . . insofar

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12 *See* Combined Reply at 18 ("Identification without implementation defeats the purpose of SAMAs.").

13 NEI Rulemaking Petition Denial, 66 Fed. Reg. at 10,836 (emphasis added).

14 *Id.* (*citing Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989)).

15 *Methow Valley*, 490 U.S. at 353 n.16.

16 *Id.* at 352.

17 Combined Reply at 21.

as it alleges that the Draft SEIS does not provide a rational basis for granting the license extension *without mandating a CLB backfit as a prerequisite for the extension*."[18]

Finally, NYS does not deny that admission of NYS-35/36 *will* have a pervasive and unusual effect on this proceeding. It is difficult to imagine a more pervasive and unintended effect than endlessly litigating CLB and backfit issues for 18 mitigation measures unrelated to aging management in the context of a license renewal proceeding. The potential for pointless, protracted litigation is truly substantial, especially given the Board's admission of two other SAMA contentions.[19] Further, as the Staff attests, backfit analyses are complex endeavors that require substantial time and agency resources.[20] Accordingly, prompt Commission review is warranted to avoid a pervasive and unusual effect on this proceeding.

Respectfully submitted,

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Dated in Washington, D.C.
this 2nd day of August 2010

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[18] LBP-10-13, slip op. at 29-30 (July 30, 2010) (emphasis added); *see also id.* at 5 (stating that "an order by the NRC Staff to implement SAMAs not dealing with aging management can be issued concurrently as part of a Part 50 CLB review"); *id.* at 28 (stating that Staff must "explain why it has not instituted a backfit to a CLB as a condition precedent to license renewal); *id.* at 29 (stating that the Staff may "institute a backfit prior to license renewal under Part 50 as a result of its SAMA review").

[19] *Cf. Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) ("The potential difficulty of unscrambling and remedying the impact of an improper disclosure in this lengthy, complex, and contentious proceeding, which spans years of litigation and has generated a massive record, presents exceptional circumstances, making immediate review appropriate. This dispute poses a discrete legal question, more easily resolved now, lest we be unable later to tailor meaningful relief.").

[20] *See* Staff Petition at 21-22.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply to the State of New York's and the State of Connecticut's Combined Reply to Entergy and NRC Petitions for Interlocutory Review of LBP-10-13," dated August 2, 2010, were served this 2nd day of August, 2010 upon the persons listed below, by first class mail and e-mail as shown below.

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