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UNITED STATES
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 March 4, 2011

STATE OF NEW YORK'S COMBINED REPLY TO THE ANSWERS OF ENTERGY AND NRC STAFF TO THE STATE'S PROPOSED AMENDED CONTENTION NYS-17B

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INTRODUCTION

The State of New York's proposed Contention 17B amends already-admitted Contention 17/17A to include the additional environmental impacts on off-site land use of spent fuel that would be generated during a period of license renewal. Essentially the same spent fuel impacts were the subject of the State's Proposed Contention 34, which the Board ruled was premature until and unless the Commission amended 10 C.F.R. § 51.23, which it did fewer than 30 days before the State filed proposed Contention 17B. *See* June 16, 2009 Order Ruling on New York State's New and Amended Contentions at 16; *see also* April 22, 2010 Memorandum and Order (Denying Entergy's Motion for Summary Disposition of NYS Contention 17/17A) at 13-14. The Commission amended § 51.23 on December 23, 2010, eliminating any finding that a high level waste repository would be available by a date certain in the future. 75 Fed. Reg. 81032, 81034 (Dec. 23, 2010) (Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation ("Temporary Storage Rule")).

Entergy and NRC Staff argue, principally, that proposed contention 17B is untimely, although filed within 30 days of the change to 10 C.F.R. § 51.23, and that the kind of socio-economic adverse environmental impacts inflicted by extended storage of spent fuel at Indian Point are beyond the scope of a license renewal proceeding, although the Board has on three other occasions expressly held that the socio-economic environmental impacts of license renewal on off-site land use are appropriate for this proceeding. Entergy and Staff[1] seek a fourth bite at this apple. As then-presidential candidate Ronald Reagan famously said: "There you go again."[2]

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[1] Staff does not object to the proposed amendment insofar as it seeks to substitute references to Staff's Final Supplemental Environmental Impact Statement (FSEIS).

[2] Presidential Campaign Debate (Ronald Reagan and Jimmy Carter) (Oct. 28, 1980).

ARGUMENT

NRC Staff and Entergy oppose the proposed amendment on the ground that "[i]n general, . . . the amended Waste Confidence Rule does not present any new or materially different information regarding spent fuel storage or removal -- particularly on a site-specific basis -- that supports admission of an amended contention and waiver request." Entergy Answer at 2; NRC Staff Answer at 2 ("aspects of Contention 17-B are not supported by materially different new information"). Accordingly, both Entergy and Staff argue that the proposed new bases are untimely pursuant to 10 C.F.R. § 2.309(f)(2). Both also allege that Contention 17B is outside the scope of this relicensing proceeding and not material. Entergy Answer at 19-23; Staff Answer at 21-26. Neither of these arguments, or the others advanced in opposition to Contention 17B, have merit. Moreover, most of the arguments made in opposition to Contention 17B have already been rejected by this Board during one or more of the serial attempts made by Staff and Applicant to dispose of Contention 17/17A. *See, e.g.*, June 16, 2009 Order (Ruling on New York State's New and Amended Contentions) at 7-8 (Entergy and Staff assert that NYS-17A is inadmissible because, *inter alia*, the State's arguments about the impacts of spent fuel storage on property values after the period of extended operation could have been raised earlier, the proposed contention raises issues that are outside the scope of the proceeding, and the contention is inadequately supported); April 22, 2010 Memorandum and Order (denying Entergy's Motion for Summary Disposition of NYS Contention 17/17A) at 11 (State's claim is within the scope and presents a genuinely disputed material issue of fact).

The regulations governing the admissibility of Contention 17B are 10 C.F.R. § 2.309(f)(2) (timeliness), and 10 C.F.R. § 2.309(f)(1) (setting forth the basic criteria that determine admissibility of all contentions).

I.

CONTENTION 17B IS BASED ON MATERIALLY DIFFERENT INFORMATION NOT PREVIOUSLY AVAILABLE AND WAS TIMELY SUBMITTED

> A new or amended contention is admissible if:
>
> (i) The information upon which the amended or new contention is based was not previously available;
>
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
>
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii). Contention 17B satisfies § 2.309(f)(2).

On February 27, 2009, the State sought leave to admit new Contention 34, which asserted "that the Draft SEIS failed to account for new and significant information that pertains to the potential environmental impacts to off-site land use resulting from the onsite storage of high level nuclear waste." June 16, 2009 Order Ruling on New York State's New and Amended Contentions at 13 (Docket Nos. 50-0247-LR and 50-286-LR). The State asserted that the October 9, 2008 (1) Waste Confidence Decision Update and (2) Temporary Storage Rule constituted new and significant information that, taken together, "mean that the NRC expects that spent fuel will remain at power reactor sites or [ISFSIs] for decades longer than anticipated, if not indefinitely." *See id.* at 14. On June 16, 2009, the Board ruled that this "information was not previously available and is materially different than information previously available." The Board denied NYS-34 on the ground that any discussion of the environmental impact of spent fuel storage was "premature" until the Commission "made a final determination vis-à-vis the waste confidence rule." *Id.* This Board has thus already resolved the question of whether the change in NRC policy constitutes information "not previously available," and "materially

different than information previously available." 10 C.F.R. § 2.309(f)(2)(i), (ii). Neither Staff nor Entergy can challenge the Board's June 16, 2009 ruling, which is law of the case. *See, e.g., Matter of Duke Energy Corp.*, 59 N.R.C. 388, 390 (June 10, 2004) (applicant conceded that Licensing Board's decision to admit a contention was law of the case).

Moreover, as a matter of substance, the change wrought by the amendment of the Waste Confidence Decision Update on December 23, 2010 provides new, and previously unavailable additional bases for Contention 17/17A. On December 23, 2010, the Commission eliminated the date certain by which a spent fuel repository would be available. Contention 17/17A had assumed, as required by the Waste Confidence Rule, that a high level waste repository would be available by 2025 and thus that spent fuel generated at the plant would be able to be removed soon after it was created. Eliminating the date certain by which spent fuel was to be removed is plainly a material change in the information previously available because it is now likely that the spent fuel generated during license renewal will remain at the site long after operations cease and the plant is decommissioned, making that spent fuel a potential disamenity independent of the presence of the reactors.

Nor can it be disputed that the proposed amendment to admitted Contention 17/17A was "submitted in a timely fashion based on the availability of the subsequent information" (10 C.F.R. § 2.309(f)(2)(iii)) since it occurred within 30 days of NRC's publishing a new Waste Confidence Rule. *See* Exhibit 9 to January 24, 2011 Declaration of AAG John Sipos, submitted in support of proposed Contention 17B (10 C.F.R. § 51.23 (new)) and July 1, 2010 Scheduling Order at 6 (ASLBP No. 07-858-03-LR-BD01). The thirtieth day fell on January 22, 2011, a Saturday. The State's filing on the following business day is timely. *See CFC Logistics, Inc.*, 58 N.R.C. 311 (Oct. 29, 2003).

This Board has already determined that a change in NRC waste confidence policy "was not previously available and is materially different than information previously available." June 16, 2009 Order at 16. It is undisputed that the State submitted its proposed amendments based on that new information within thirty days of its availability. Accordingly, the State's Contention 17B meets the requirements of 10 C.F.R. § 2.309(f)(2).

II.

CONTENTION 17B IS WITHIN THE SCOPE OF THIS PROCEEDING

In its fourth attempt to defeat Contention 17/17A, Entergy again claims that every mention of spent fuel is outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii). *See* Entergy Answer at 27-28. But the Board has already found that, "[i]n conducting its analysis of the impact of the license renewal on land-use, Entergy should have considered the impact on real estate values that would be caused by license renewal or non-renewal." July 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 83. The Board admitted Contention 17 as a contention of omission based, in part, on allegations that "the current spent fuel pools will not be able to contain the additional spent fuel generated during the renewal period, and thus dry cask storage is required," leading to "additional impacts on adjacent lands that are not analyzed in the ER." *Id.* at 79.

A. The Proposed Amendments to Contention 17/17A Seek Only to Reflect the Newly Available Information That License Renewal Will Mean Generating 20 Additional Years of Spent Fuel, Which Will Remain On-Site for At Least Ten More Years

Contention 17B is essentially identical to admitted Contention 17/17A in its first 13 paragraphs. Newly proposed paragraphs 14-28 address in more detail the implications of the December 23, 2010 final rule on off-site land use values. In sum, proposed Contention 17B adds to already-admitted Contention 17/17A only the allegation that the FSEIS is deficient in failing

to analyze the impact on off-site land values of the indefinite onsite storage of twenty additional years of spent fuel. The recycled claims by Staff and Entergy that Contention 17B is out of scope are still meritless.

It is undisputed that neither Entergy nor Staff have themselves evaluated the incremental environmental impact of a 50% increase in the volume of spent fuel that would occur as the result of license renewal. License renewal will therefore impact the date on which decommissioning will be concluded and will impact the amount of spent fuel that will have to be stored on site and how long it will take to remove it. Both of those events would have, as Dr. Sheppard has demonstrated, a profound impact on off-site land use, including reduced tax revenues for local communities. *See* January 24, 2011 Fourth Report of Dr. Stephen Sheppard at 1-6 (estimating economic costs of license renewal and associated delay in site reclamation at between $169 and $237 million). Twenty years of additional spent fuel will translate into at least 10 additional years when spent fuel will be stored on site regardless of the date by which a high level waste repository is available. *See id.* at 3 (additional ten years required to remove additional waste generated during license renewal term); *see also* Preliminary Decommissioning Cost Analysis for the Indian Point Energy Ctr., Unit 3 (document E11-1583-006) (attachment 8 to Jan. 24, 2011 Declaration of AAG John Sipos).

Entergy cites *Nuclear Mgmt. Co.*, 63 N.R.C. 727, 733 (Jun. 23, 2006) and *Oconee*, 49 N.R.C. 328, 344 & n.4 (Apr. 15, 1999) for the proposition that consideration of the impacts of spent fuel storage at the site are outside the scope of license renewal. But both cases involved an attempt to raise issues regarding the propriety of expanded on-site spent fuel storage not, as the State argues here, the *environmental impact* of extended and expanded spent fuel storage at the site. Even if Entergy is allowed to postpone decommissioning and to expand by 50% dry cask

spent fuel storage on site, the National Environmental Policy Act (NEPA) requires consideration of all potential environmental impacts of license renewal on off-site land use.

Entergy's central argument is that because both decommissioning and dry cask spent fuel storage are subject to separate licensing proceedings, the impacts they indisputably have on off-site land use are outside the scope of this proceeding. If there were any basis for that assertion, the FSEIS would not include the Chapter 6 discussion of environmental impacts of the uranium fuel cycle. The uranium fuel cycle is likewise not subject to a licensing decision in this license renewal proceeding but is nonetheless addressed. The environmental impacts of additional fuel that will be generated during any license renewal term are within the scope of this proceeding. *See* Jul. 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 79-83; Apr. 22, 2010 Memorandum and Order (Denying Entergy's Motion for Summary Disposition of NYS Contention 17/17A) at 14-15.

B. The Environmental Impacts of Spent Fuel On Off-site Land Use Are Not Category 1 Issues

Entergy also again claims that the environmental impacts of stored spent fuel during any period of license renewal are generically addressed as Category 1 issues in the GEIS that may not, therefore, be discussed now. Entergy Answer at 27-28. However, the portion of the GEIS Table to which Entergy makes reference is limited to the "on-site" environmental impact of spent fuel storage and does not address "off-site" impacts. As this Board has ruled, the impact on *off-site land use* of license renewal is *not* a Category 1 issue. July 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 82. "Pursuant to 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 ("Table B-1"), the impact on off-site land-use during the license renewal term cannot be assessed generically and, accordingly, it is a Category 2 environmental issue that is within the scope of this proceeding." *Id.* at 82. The Board therefore

"*admit[ted]* NYS-17 as a contention of omission." *Id.* at 83. The Board has already rejected Entergy's argument that there is no obligation to analyze the impact of the facility, including any spent fuel stored there, on nearby property values.

Entergy and Staff argue that there is no site-specific component to the off-site land use that the State of New York raises because the techniques used to determine such impacts are generic and all sites will incur some adverse impacts to off-site land use. But Entergy and Staff confuse the tools used to ascertain an impact, which may be the same at every site, with the *impacts* themselves, which are indisputably *not* the same for every site. As Entergy notes, the purpose of § 51.23 is to address "environmental impacts." Entergy Answer at 21. Those impacts differ from site to site, as the GEIS made clear by classifying off-site land use impacts as Category 2 issues: "land use changes may be perceived by some community members as adverse and by others as beneficial, the staff is unable to assess generically the potential significance of site-specific off-site land use impacts." NUREG-1437 ("GEIS"), Vol. 1 at 4-109.

Moreover, Dr. Sheppard demonstrates that the off-site land use impacts, which depend on a wide range of variables, are uniquely large for Indian Point because of population density and the overall potential value of the surrounding property. No single analysis could possibly ascertain the extent of off-site land use impacts at every nuclear power plant, as the GEIS clearly recognizes. Since the purpose of a "generic" finding on any environmental issue is to determine whether the *impact* is generic and since there is no single finding on off-site land use impacts that could encompass all reactor sites, the GEIS has correctly concluded, and this Board has agreed, that off-site land use impacts are site-specific considerations that are within the scope of this proceeding. *See* July 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 82.

C. *Dr. Sheppard's Analyses Support Contention 17B, Which Presents A Genuine Dispute*

In its fourth attack on the substance of Contention 17, Entergy next complains that Proposed Contention 17B "blurs the distinctions" between the outcome of the relicensing proceeding, approval of Entergy's decommissioning plan and the timing of spent fuel removal. Entergy Answer at 30-31. Entergy claims that as a consequence of this blurriness, Dr. Stephen Sheppard's analysis of the environmental impacts of the proposed action lacks "any reasoned basis or explanation." *Id.* at 31. Entergy complains that Dr. Sheppard "is similarly vague when he states that the 'basis' of his analysis is that nearby property values can be expected to increase 'when the plant has closed and the site has been reclaimed.'" *Id.* and n.147.

Entergy itself, of course, has failed to analyze the issue at all, (Jul. 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 83), and NRC Staff has failed to moot the issue, (April 22, 2010 Memorandum and Order (Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A) at 17). Entergy again fails to address the issue in any detail, alleging only that Dr. Sheppard "engages in speculation involving a host of unrelated issues that cannot serve as an adequate basis for contention admissibility." Entergy Answer at 31.

Specifically, Entergy complains that neither the State nor Dr. Sheppard defines the term "disamenity." Entergy Answer at 30. The term "disamenity" is a well-recognized technical term common in the parlance of land use scholars. *See, e.g.,* Chen and Jin, *Amenities and Disamenities: a Hedonic Analysis of the Heterogeneous Urban Landscape in Shenzhen (China)*, The Geographical Journal, Vol. 176 (Sept. 2010); Hite, Chern, Hitzhusen, and Randall, *Property Value Impacts of an Environmental Disamenity: The Case of Land Fills*, The Journal of Real Estate Finance and Economics, Vol. 22 (Apr. 12, 2000).

And, to the extent there is any lack of precision, it is directly attributable to Entergy's announced intent to try to keep Indian Point in SAFSTOR for 60 years after shutdown, a proposal yet to be subjected to NRC or public review, as well as the lack of a prediction on the date when a permanent repository will be available to receive the Indian Point spent fuel. Dr. Sheppard has simply identified some possible scenarios to illustrate the issue, whose uncertainty is not a basis for failing to address it. In his prefiled testimony Dr. Sheppard will more thoroughly analyze the implications of these uncertainties. At least two things *are* certain: (1) if Indian Point is not allowed to be relicensed, the adverse impact on local property values caused by the presence of the plant will end 20 years earlier and the adverse impact on local property values caused by the presence of spent fuel at the site will end at least 10 years earlier; and (2) neither of these impacts are discussed in the FSEIS.

Entergy also attempts to find an advantage in the fact that the future handling and disposal of the spent fuel it will generate during license renewal, as well as the timing of such handling and disposal, are unknown. At most, those uncertainties both underscore the importance of evaluating all the potential environmental impacts and the need for the kind of bounding calculations provided by Dr. Sheppard. NEPA mandates thorough decision-making and directs that each federal agency shall:

> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations

42 U.S.C. § 4332(B). Uncertainty is not a cognizable defense.

Proposed Contention 17B does not blur the distinctions between a decision on relicensing, any eventual approval of a decommissioning plan, or the timing of spent fuel

removal, as Entergy alleges. Entergy Answer at 30. To the contrary, it is Entergy that seeks to obfuscate. The State seeks only to amend its land use contention so that it reflects changes wrought by revisions to the Waste Confidence Rule. The proposed amendments to Contention 17/17A add only the allegation that the FSEIS is deficient in failing to analyze the additional impact on off-site land values of the need to store onsite spent fuel for at least 10 more years if license renewal is allowed because it will take at least an additional 10 years to remove that spent fuel from the site and the real possibility that those 10 years will occur after the plant has been decommissioned. The State does not seek to dispute, in this proceeding, the adequacy of Entergy's decommissioning plan or the method by which Entergy intends to store the excess spent fuel at the site. It does, however, properly allege that the FSEIS must analyze the environmental impacts on off-site land uses of the presence of IP2 and IP3 for an additional twenty years, including the environmental impacts of the fifty percent increase in spent fuel that will be generated during that time and the likely extended period of on-site spent fuel storage.

D. Contention 17B Does Not Challenge the Waste Confidence Rule

Entergy claims that the literal language of 10 C.F.R. § 51.23(b) specifically prohibits consideration of the off-site environmental impacts of post-operation spent fuel storage related to land use. Entergy relies on the phrase "no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, [or] environmental assessment." 10 C.F.R. § 51.23(b). However, several aspects of the literal language of the regulation refute Entergy's analysis.

The newly revised Waste Confidence Rule provides:

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and at either onsite or offsite independent spent fuel installations. Further, the Commission believes that there is reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

(b) Accordingly, as provided in §§ 51.30(b), 51.53, 51.61, 51.80(b), 51.95, and 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the reactor operating license or amendment, reactor combined license or amendment, or initial ISFSI license or amendment for which application is made, is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with the issuance or amendment of an operating license for a nuclear power reactor under parts 50 and 54 of this chapter, or issuance or amendment of a combined license for a nuclear power reactor under parts 52 and 54 of this chapter, or the issuance of an initial license for storage of spent fuel at an ISFSI, or any amendment thereto.

(c) This section does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of a reactor operating license or combined license, or a license for an ISFSI in a licensing proceeding.

10 C.F.R. § 51.23.

Entergy has conveniently omitted the limiting language that precedes the alleged ban. The FSEIS is not required to discuss the environmental impacts of stored spent fuel only to the extent those impacts are "*within the scope of the generic determination in paragraph (a)* of this section."[3] (emphasis added) But the Commission has already held, as part of the GEIS, that off-

[3] Entergy overreaches when it claims that § 51.23(b) precludes discussion of the environmental impacts of spent fuel storage. In fact, § 51.23(b) merely says that such consideration is not "required" in the FSEIS. This language is paralleled in the portion of Part 51 addressing FSEIS requirements:

> the supplemental environmental impact statement prepared at the license renewal stage *need not discuss* . . . any aspect of the storage of spent fuel for the facility

site land use impacts are Category 2 issues that *cannot* be addressed generically. July 23, 2208 Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) at 82 ("Pursuant to 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 ("Table B-1"), the impact on off-site land-use during the license renewal term cannot be assessed generically and, accordingly, it is a Category 2 environmental issue that is within the scope of this proceeding"). As Entergy reminds us, those findings are binding in this proceeding. Entergy Answer at 11-12. The findings underpinning the revised § 51.23(a) did not include the impacts that are the subject of Contention 17B. Accordingly, Contention 17B's bases are not precluded by § 51.23(b).

This conclusion is confirmed, not refuted, by the December Waste Confidence Decision Update. *See* Entergy Answer at 21 n.108 (*citing* 75 Fed. Reg. at 81041). There, the Commission confirms that site specific environmental issues not found to be Category 1 issues are to be considered in the license renewal proceeding:

> For operating license renewals, the NRC may rely on NRC's GEIS for License Renewal of Nuclear Plants, NUREG–1437, May 1996, for issues that are common to all plants and must also prepare a Supplemental EIS that evaluates site-specific issues not discussed in the GEIS or "new and significant information" regarding issues that are discussed in the GEIS. *See* 10 CFR part 51, subpart A, appendix B.
>
> Both types of licensing proceedings are supported by both generic and specific EISs. The generic determination in § 51.23(a) does play a role in the environmental analyses of the licensing and license renewal of individual NPPs; it excuses applicants for those licenses and the NRC from conducting an additional site-specific environmental analysis *only within the scope of the generic determination in 10 CFR 51.23(a).*

75 Fed. Reg. at 81041 (footnote omitted). The Commission then clarified that the generic

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> within the scope of the generic determination in § 51.23(a) and in accordance with § 51.23(b).

Id. (emphasis added). In this case New York has identified significant socio-economic adverse environmental impacts on offsite land use caused by long term spent fuel storage and the FSEIS ignores these impacts.

findings made in § 51.23(a) are limited to those findings "covered by the environmental analysis the NRC has done in this update to the Waste Confidence Decision, particularly under Findings 3, 4, and 5." *Id.* The "environmental analysis" includes no consideration of the kind of off-site land use impacts addressed by Contention 17B or by New York State's comments on the proposed Waste Confidence Update.

Entergy argues that in adopting the Waste Confidence Rule in 1984, the Commission fully considered all off-site environmental impacts, including land use impacts, and thus its conclusions about "any environmental impact" encompassed the impacts raised here by New York. Entergy Brief at 19-20. Tellingly, however, Entergy fails to provide a single pinpoint citation to any document where the Commission considered the off-site land use impacts involved here.[4] No analysis supports Entergy's implied claim that the scope of § 51.23(a) generic findings includes off-site land use impacts, which is contrary to this Board's previous rulings. *See* July 31, 2008 Memorandum and Order (Ruling on Petitions to Intervene and

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[4] In its one-paragraph discussion of non-radiological environmental impacts when it adopted the Waste Confidence Rule, the Commission noted other potential environmental issues but gave no consideration to the kind of off-site land use impacts raised here:

> the more than twenty years of experience with storing spent fuel demonstrates that storage of spent fuel for 30 years or more does not require unprecedented institutional guarantees or raise unique questions regarding finances, economics or the security of extended spent fuel storage. Further, the Commission will require all reactor licensees, 5 years before expiration of their operating license to provide a plan for managing the spent fuel prior to disposal. Moreover, the record documents referred to by UNWMG-EEI, DOE and AIF show that there are no significant non-radiological environmental impacts associated with the extended storage of spent fuels. The amount of heat given off by spent fuel decreases with time as the fuel ages and decays radioactively. No additional land needs to be devoted to storage facilities because reactor sites have adequate space for additional spent fuel pools or dry storage installations. The additional energy and water needed to maintain spent fuel storage is also environmentally insignificant.

49 Fed. Reg. at 34665.

Requests for Hearing) at 79-83; April 22, 2010 Memorandum and Order (Denying Entergy's Motion for Summary Disposition of NYS Contention 17/17A) at 13-14.

Further, the scope of the "generic determination in paragraph (a)" is limited to 60 years after plant operations cease. Without a fixed date for when a permanent repository may be available, there is an indefinite period beyond 60 years after plant shutdown for which no generic or other environmental findings are made. Entergy seeks to deflect attention from this gap by arguing that the Commission has already concluded in *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3) CLI-10-19 (July 8, 2010) slip op. at 2-3 that "licensing boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission'" (*quoting Oconee*, 49 N.R.C. at 345). But in CLI-10-19 the Commission also held that "[w]e are continuing our deliberations on the waste confidence update, and in any event will not conclude action on the Indian Point license renewal application until the rulemaking is resolved." *Id.* at 3. Thus, if the current pendency of an analysis of the environmental impact of spent fuel storage at the Indian Point site beyond 60 years after shutdown is to be analogized, as Entergy argues it should be, to the situation addressed in CLI-10-19, it also must follow that the Board should not reach a final decision on license renewal until that additional analysis is completed.

Such a result would be consistent with *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 539 F.2d 824 (1976), *vacated and remanded to determine mootness*, 434 U.S. 1030 (1978), where NRC had prepared a generic analysis of the environmental impacts of using mixed-oxide fuels for nuclear reactors but acknowledged, as it does now,[5] that a further environmental analysis was required. The Court rejected the attempt to

[5] There can be no question that the environmental impacts beyond 60 years are relevant

issue interim approval pending completion of the environmental analysis and held that a full impact analysis, including an examination of alternatives, was a *sine qua non* for proceeding with a major federal action:

> the consideration of alternatives and of special hazards to the public health, safety and welfare are vital to any impact statement, and numerous statements have been overturned for their failure to address these questions. In fact, this court has held that a consideration of alternatives is required under NEPA whenever the agency action has an environmental impact, even if no formal impact statement is filed.

539 F.2d at 824, 830 (internal citations omitted).

Entergy's enthusiasm for the Commission's holding in CLI-10-19 would mean that this Board could not conclude this proceeding until Staff has completed its environmental analysis of spent fuel storage for the period beyond 60 years after shutdown. In the alternative, the Board should conclude that there is no certainty a rule will be adopted in the near future, that the situation is not analogous to CLI-10-19 or to *Oconee*, where an amended rule was being adopted or had been ordered to be proposed, that the off-site land use environmental impacts are not imminently to be resolved,[6] and thus they are outside the scope of 10 C.F.R. Section 51.23(a) generic findings and are appropriate for consideration in this license renewal proceeding.

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and important; the Commission has directed Staff to proceed with an analysis that may lead to a rule making to amend 10 C.F.R. § 51.23. *See* SRM–SECY–09–0090, Final Update of the Commission's Waste Confidence Decision, M100915, at 2 (Sept. 15, 2010) (ML102580229). The Staff has responded. COMSECY-10-0007 and Enclosure 1, Project Plan for the Extended Storage and Transportation Regulatory Program Review - Revision 0 - June 2010 (Jun. 15, 2010) ("Project Plan for the Regulatory Program Review to Support Extended Storage and Transportation of Spent Nuclear Fuel") ("Extended Storage Review Plan") (ML101390216) in which Staff describes the task: "The staff has developed a seven-year plan for enhancing the technical and regulatory basis for extended storage and transportation by FY 2017. This would be followed by potential rulemaking activities, as warranted." *Id.* at 2. Staff also identifies the wide range of issues that remain unresolved at this time and that must be addressed before any decision can be made regarding the safety and environmental impacts of spent fuel storage at reactor sites beyond 60 years after plant shutdown. *Id.* Enclosure 1 at 10, 11, 15 and 16.

[6] *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), 53 N.R.C. 459, 470 (2001).

Entergy and Staff also argue that off-site land use impacts of expanded spent fuel generation and storage were "explicitly considered" in developing the Waste Confidence Decision Update because the State of New York raised these specific concerns in its comments on the proposed rule and the Commission did not address them in the final rule. *See* Entergy Answer at 41. Such "consideration," would violate the Commission's NEPA regulations, which require that an FSEIS include "consideration of major points of view concerning the environmental impacts of the proposed action and the alternatives, contain an analysis of significant problems and objections raised by other Federal, State, and local agencies, by any affected Indian tribes, and by other interested persons" (10 C.F.R. § 51.71(b)), and discuss and respond to any relevant responsible opposing view not adequately discussed in the DSEIS. *See* 10 C.F.R. § 51.91(3)(b).

E. The "Scope of the Proceeding" Includes Consideration of Exemptions From Commission Regulations That Are Germane To This Proceeding.

Entergy and Staff argue that in considering whether Contention 17B is within the "scope of the proceeding" (10 C.F.R. § 2.309(f)(1)(iii) this Board is prohibited from considering whether New York is entitled to exemption from 10 C.F.R. § 51.23(b)). Staff Answer at 38; Entergy Answer at 14-15.[7] That argument is contrary to well-established Commission precedent

[7] Entergy and Staff argue that no intervenor has ever obtained an exemption and that Staff guidance is directed only to applicant exemption requests. Entergy and Staff cite no authority in support of their claim that an intervenor with an interest in an exemption is not entitled to seek one. Similarly, the self-serving claim, based on Staff issued Directives, that only Staff can rule on exemptions is akin to the State's citing to directives written by another intervenor as authority for what the State seeks. It is also significant that nowhere in the staff-generated directives does it indicate Staff has exclusive authority to issue exemptions nor is there a reference to the Board having no role to play in resolving an exemption. As the subsequent discussion demonstrates, the Commission has rejected such a proposition in cases like this one, where the subject of the exemption request is an issue that is already pending in a licensing proceeding. At most those Directives indicate that NRC Staff, NRR in particular, is *entitled* to grant exemptions, not that the authority is exclusive to it. In addition, pursuant to 10 C.F.R.

holding that exemption requests and grants are subject to hearing rights before ASLB panels when the subject of the exemption is "a matter germane to a licensing proceeding . . . [and] assuming an interested party raises an admissible contention thereon." *Private Fuel Storage L.L.C.*, 53 N.R.C. 459, 467 (Jun. 14, 2001) (*PFS*);[8] *see also Duke Energy Corp.*, 54 N.R.C. 385 (Dec. 28, 2001) ("BREDL's 'exemption' argument raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing. We believe it is generally preferable for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record." *Id.* (footnote omitted)).[9]

The *PFS* holding, while arising in the context of a request by an applicant for exemption from a specific rule, applies with equal force to the State's request for an exemption here. The subject of the exemption relates to an issue directly involved in this proceeding, *i.e.*, whether the environmental impact on off-site land use of additional spent fuel generated by license renewal must be considered in deciding whether to allow license renewal. In order to assure that the issue is fully evaluated in this proceeding, the State seeks an exemption from the requirements of 10 C.F.R. § 51.23(b) that Entergy claims prevent it from presenting that issue. Entergy and Staff

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§ 2.318(b) "Any order [issued by NRC Staff] related to the subject matter of the pending proceeding may be modified by the presiding officer as appropriate for the purpose of the proceeding." *See also* 10 C.F.R. § 2.319(r) (Board authorized to "[t]ake any other action consistent with the Act, this chapter, and 5 U.S.C. 551-558").

[8] "Although there are licensing cases where the Commission denied a request for a hearing on an exemption related to licensing, these rulings rested on the intervenor's failure to raise an admissible contention, not on a general principle that the propriety of an exemption cannot be adjudicated in a licensing proceeding. *We are aware of no licensing case where we have declared exemption-related safety issues outside the hearing process altogether.*" *Private Fuel Storage,* 53 N.R.C. at 467 & n.3 (emphasis added, internal citations omitted).

[9] Should the Board believe the exemption issue is one ultimately for Commission resolution, we urge it to follow the suggestion in *Duke* and resolve the factual issues necessary for an exemption and then certify the question to the Commission, particularly if the Board also agrees that the State has made out a *prima facie* case for waiver pursuant to 10 C.F.R. § 2.335.

disingenuously argue that the State should ask Staff to grant the exemption, an exercise that, even if required, would clearly be futile, as illustrated by Staff's intransigent objection to the State's Contentions 17, 17A and 17B and their support of Entergy's Motion for Summary Disposition of Contentions 17 and 17A. Thus, pursuant to the holding in *PFS*, this Board should determine whether the State is entitled to an exemption from 10 C.F.R. § 51.23(b).

III.

CONTENTION 17B RAISES MATERIAL ISSUES AS REQUIRED BY 10 C.F.R. § 2.309(f)(iv)

Finally, Entergy argues that the off-site land use impact of spent fuel generated during license renewal and its indefinite onsite storage are immaterial because they would add only $52 million in adverse impacts, which Entergy dismisses as trivial. Entergy Answer at 45. While Entergy may not consider $52 million significant, the property owners living within 2 miles of Indian Point would likely disagree. Entergy also ignores the fact that this impact from extended spent fuel storage is cumulative with the impact from extending operation for an additional 20 years. It is the totality of these adverse impacts that the FSEIS ignores and that must be considered, on the merits, as part of the license renewal process. Entergy also reaches its conclusion about the size of the adverse environmental impact by assuming that it will be permitted to keep Indian Point in SAFSTOR for 50 years before beginning decommissioning. However, whether Entergy will be allowed to use SAFSTOR and postpone decommissioning completion for 60 years is a matter yet to be determined. *See* April 22, 2010 Memorandum and Order (Denying Entergy's Motion for Summary Disposition of NYS Contention 17/17A) at 14. It is perfectly reasonable for Dr. Sheppard, in seeking to bound the uncertainties involved, to consider the environmental impact that will occur if license renewal is allowed against the scenario where license renewal is denied *and* SAFSTOR and prolonged decommissioning are

denied - perhaps because of the enormous adverse impacts on land use values and local taxing authorities. Entergy cannot have it both ways: Either its yet-to-be-approved SAFSTOR and decommissioning plans are ripe for consideration in this proceeding, or it must allow consideration of the environmental impacts of both approval and denial of those options as they relate to spent fuel storage and environmental impacts associated with license renewal.

CONCLUSION

For the foregoing reasons, the State asks that the Board admit proposed Contention 17B in its entirety, and consolidate it with NYS 17/17A.

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March 4, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 March 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2011, copies of the State of New York's Combined Reply to the Answers of Entergy and NRC Staff to the State's Proposed Amended Contention NYS-17B, were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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