IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF NEW YORK, et al.	)	
	)	
	)	
	)	
Petitioners,	)	
	)	
v.	)	**Nos. 11-1045**
	)	**11-1051**
UNITED STATES NUCLEAR REGULATORY COMMISSION, and UNITED STATES OF AMERICA,	)	**11-1056**
	)	**11-1057**
	)	
	)	
Respondents.	)	

MOTION FOR LEAVE TO INTERVENE BY
ENTERGY NUCLEAR OPERATIONS, INC.

Pursuant to Rules 15(d) and 27 of the Federal Rules of Appellate Procedure and Circuit Rules 15(b) and 27, Entergy Nuclear Operations, Inc. ("ENOI," or, for these purposes, "Entergy") hereby moves for leave to intervene in the above-referenced proceedings.

Entergy is the operator and holder of the Nuclear Regulatory Commission ("NRC," or "Commission") operating license for the Indian Point Energy Center Units 2 and 3 nuclear plants, located in one of the petitioner states, New York, and is designated by the plant owners to act on their behalf as agent. Entergy is also the operator and holder of the NRC operating license for the Vermont Yankee Nuclear Power Plant, located in another petitioner state, Vermont, and is designated by the plant owner to act on its behalf as agent. In New York, Entergy's Indian Point facility is undergoing a license renewal proceeding before the NRC, wherein the State of New York is an adverse party. The State of New York has raised claims before the NRC and against Entergy that substantially overlap the claims it raises in this Court, and those claims currently remain pending. The State of Vermont has also been adverse to Entergy in an NRC license renewal proceeding involving Entergy's Vermont Yankee Nuclear Power Plant facility.

As a result, the relief sought in this petition would, if granted, significantly and uniquely impact Entergy's operations of these facilities. Thus, Entergy has a direct interest in this proceeding.

In further support, Entergy states the following:

1. On February 14, 2011, the States of New York, Vermont, and Connecticut filed in this Court Case No. 11-1045, pursuant to Fed. R. App. P. 15, 42 U.S.C. § 2239, 28 U.S.C. §§ 2341-2344, and 5 U.S.C. § 551 *et seq.*, purporting to challenge the NRC's Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, Final Rule ("Temporary Storage Rule"), 75 Fed. Reg. 81,032 (Dec. 23, 2010) and the agency's Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010). The various environmental groups that are the petitioners in Case Nos. 11-1051, 11-1056, and 11-1057 raise essentially similar claims.

2. The State of New York, in the ongoing NRC license renewal proceeding for Entergy's Indian Point facility, has sought to challenge the Temporary Storage Rule and the Waste Confidence Decision Update, as applied to Indian Point. New York's NRC filings on this issue are attached to this motion as Attachments 1-3. As those filings demonstrate, New York's claims before this Court substantially overlap the claims that the State has raised before the NRC in challenging Entergy's license renewal application for Indian Point. Entergy and the State of New York, in other words, are adverse with respect to the issues raised in this appeal, in a currently pending parallel administrative proceeding.

3. The State of New York's press release (Attachment 4 to this Motion), issued at the time of its Petition before this Court, describes the Temporary Storage Rule as "a regulation that would allow the use of *Indian Point* and nuclear power facilities across the nation as storage sites for radioactive waste . . . ." (emphasis added). The Press Release subsequently references Indian Point and Westchester County (where Indian Point is located) on multiple additional

occasions, and quotes representatives of two environmental organizations that are both also participants in the Indian Point NRC license renewal proceeding, both adverse to Entergy. Indeed, a representative of Riverkeeper, Inc., one of the consolidated petitioners in this case, is quoted as stating that, "We are fully behind the [New York State] Attorney General's efforts and look forward to working together to ensure that *Indian Point's* nuclear waste does not sit on the banks of the Hudson River . . . ." (emphasis added). Thus, it is clear that New York State and Riverkeeper's primary interests in this case focus on Entergy's Indian Point facility.

4. The State of Vermont has also been adverse to Entergy in the NRC license renewal proceeding for Entergy's Vermont Yankee facility. Vermont's press release (Attachment 5 to this Motion), also issued at the time of its Petition before this Court, repeatedly and exclusively references Entergy's Vermont Yankee facility. For example, as the Vermont Attorney General states, "The NRC rules assert that the environmental analysis is unnecessary because the NRC is confident that spent nuclear fuel can be stored safely at *Vermont Yankee* until 2072 . . . ." (emphasis added).

5. As the operator and holder of the NRC operating licenses for Indian Point and Vermont Yankee, Entergy will be directly impacted by this Court's review of the NRC's Temporary Storage Rule and the Waste Confidence Decision Update. If Petitioners' request for relief were to be granted and if the NRC were to determine to modify or rescind the Temporary Storage Rule and the Waste Confidence Decision Update, then Entergy's rights with respect to the license renewals for its Indian Point and Vermont Yankee facilities could be substantially and adversely affected. Entergy, therefore, has a unique, direct, and substantial interest in this proceeding.

6. Entergy also has a broader interest in the present challenge. ENOI and other entities within the Entergy family of companies own and/or operate a total of 11 nuclear facilities

at nine sites across the United States. This is the second largest "fleet" of domestic U.S. nuclear power reactors, and, to the extent that Petitioner's claims have potential generic consequences, Entergy is clearly a party whose interests would be directly implicated.

7. In general, the Courts of Appeals have evaluated intervention requests consistent with the standards of Fed. R. Civ. P. 24(a)(2). *See, e.g., Building & Construction Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004). Fed. R. Civ. P. 24(a)(2) permits intervention when the movant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

8. This Court has in the past routinely granted intervention and party status to affected NRC licensees or applicants in lawsuits brought against the NRC regarding agency rulemakings. *See, e.g., Toledo Coal. for Safe Energy v. Nuclear Regulatory Comm'n*, No. 95-1161, 1995 U.S. App. LEXIS 38540, at *1 (D.C. Cir. 1995) (identifying third party intervenor respondents in a direct challenge to an NRC rule and issuance of a certificate of compliance); *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 685 F.2d 459, 459 (D.C. Cir. 1982) (identifying utilities as respondent intervenors in a direct challenge to NRC rules regarding the generic environmental impacts of nuclear fuel cycle), *rev'd on other grounds* 462 U.S. 87 (1983).

9. Pursuant to Fed. R. App. P. 15, Entergy should be deemed to be a party to this proceeding. Numerous Petitioners in these consolidated proceedings have explicitly identified Entergy's facilities as the focus of their challenges to the NRC's rules. Entergy is responsible for property that is the subject of this action, and therefore has a direct and substantial interest in the outcome of this proceeding. The disposition of this action may as a practical matter impair or

impede Entergy's ability to protect its interests. Entergy is the only party fully capable of asserting and protecting the unique interests that it has in the subject matter of this proceeding.

WHEREFORE, for the foregoing reasons, Entergy respectfully requests that this Court grant Entergy leave to intervene in the above-captioned proceeding, with the full rights attendant thereto.

Respectfully Submitted,

s/ Brad Fagg

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25 of this Court, I hereby certify that I have this 17th day of March, 2011, served the Motion for Leave to Intervene By Entergy Nuclear Operations, Inc., its attachments, the Corporate Disclosure Statement for Entergy Nuclear Operations, Inc., and the Entry of Appearance for Mr. Brad Fagg, through the electronic filing system and via first class mail, postage prepaid, upon all the parties set forth on the attached list.

s/ Brad Fagg

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Attachment 1

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 January 24, 2011

STATE OF NEW YORK MOTION FOR LEAVE TO FILE TIMELY AMENDED BASES TO CONTENTION 17A (NOW TO BE DESIGNATED CONTENTION 17B)

Office of the Attorney General
for the State of New York
The Capitol
State Street
Albany, New York 12224

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STATE OF NEW YORK MOTION FOR LEAVE TO FILE TIMELY AMENDED BASES TO CONTENTION 17A (NOW TO BE DESIGNATED CONTENTION 17B)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(f)(2) the State of New York seeks leave to file the attached Contention 17B, which contains amended bases.[1] These amendments are a direct result of the issuance by the Commission, on December 23, 2010, of amendments to 10 C.F.R. § 51.23(old),[2] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation & Waste Confidence Decision Update (75 Fed. Reg. 81032-076) [Att. 9].[3] The bases are timely and arise out of new information not previously available that is materially different than previously available information. These amended bases also comply with the requirements of 10 C.F.R. § 2.309(f)(1).

THE NEW BASES COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. § 2.309(f)(2)

Prior to December 23, 2010, the binding rule for all nuclear power plant relicensing proceedings provided that (1) a permanent waste repository would be available for high level nuclear waste by 2025 and (2) as a generic matter, spent fuel could be stored at a reactor site for 30 years after shutdown without any significant safety or environmental problems. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), ASLBP No. 07-858-03-LR-BD01 (ML091670435), Order (Ruling on New York State's New and Amended

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[1] The only change in the Contention is to change "DSEIS" to "FSEIS."

[2] To avoid confusion and because the new Waste Confidence Rule does not take effect until January 24, 2011 (75 Fed. Reg. 81032), citations to the rule will indicate whether the "old" version or the "new" version is being referenced.

[3] The citation "[Att.___]" refers to the Attachments accompanying this motion and the declaration of AAG John Sipos.

Contentions) June 16, 2009 ("Amended Contentions Order") at 16, and Memorandum and Order (Denying Entergy's Motion for the Summary Disposition of NYS Contention 17/17A) ASLBP No. 07-858-03-LR-BD01 (ML101120094) at 13-14 ("we emphasized that the Waste Confidence Rule remains a binding regulation unless and until the Commission takes action to modify or withdraw it. Accordingly, for the time being, New York may rely on the timetable set in the Waste Confidence Rule for disposal of waste"). However, the new Waste Confidence Rule has changed the context of this Contention 17A by removing any date certain by which a high level waste repository will be available and substituting the finding that it will be ready "when necessary." 10 C.F.R. § 51.23(a) (new).

This change in § 51.23 (new) means that it cannot be assumed that spent fuel generated at Indian Point will be gone by 2025, the date by which the Commission had concluded that a high level waste repository would be available. Thus, for the first time, there is every reason to believe that spent fuel will remain at the Indian Point site following plant shutdown for an indefinite period.[4] As a result, and as more fully explained in the January 24, 2011 Declaration of Dr. Stephen Sheppard, the Indian Point site will likely become a high level nuclear waste storage facility for a substantial period of time after it ceases to be an operating nuclear power plant site. Converting the Indian Point site from a productive industrial site into a waste storage site has important, and as yet unexamined, implications for the value of land adjacent to the Indian Point site. This information was not previously available, although the State of New York believed it was essentially known when the Commission announced that many of the bases upon

[4] In the Waste Confidence Decision Update the Commission emphasizes that it is not endorsing the idea of indefinite storage of spent fuel at reactor sites (75 Fed. Reg. at 81035) but it is also not providing a date by which such spent fuel can be removed. Thus, it must be assumed

which the findings in § 51.23 were no longer valid. Because the Board did not agree and rejected proposed New York State Contention 34 (Amended Contention Order at 16), the information that spent fuel will likely remain at the site long after the plant is shutdown is newly available.

This new information is materially different than the information previously available because now Indian Point can become a high level nuclear waste storage area for an indefinite period after plant shutdown whereas that possibility had been ruled out by the previous Waste Confidence findings.

Finally, this Motion for Leave to File is timely pursuant to the terms of the Board's Scheduling Order. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) ASLBP No. 07-858-03-LR-BD01, Scheduling Order (July 1, 2010) at 6 ("A motion and proposed new contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available"). The Commission announced the new version of § 51.23 and issued its new Waste Confidence Decision Update on December 23, 2010 and made the rule change effective on January 24, 2011. 75 Fed. Reg. 81032.

Accompanying this Motion for Leave is the State of New York's Request for a Determination That The Proposed Amended Bases for Contention 17A Are Not Barred by 10 C.F.R. § 51.23(b), or That Exemption from the Requirements of 10 C.F.R. § 51.23(b) Should Be Granted, or That New York State Has Made a Prima Facie Case That § 51.23(b) Should Be Waived as Applied to New York State Contention 17B. That pleading is also timely because to

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that the wastes will be there indefinitely - *i.e.* without a definite termination of such storage.

the extent New York State seeks a waiver of portions of § 51.23(b) (new) the only applicable timeliness standard is that it be "reasonable." *Tennessee Valley Authority* (Watts Bar Unit 2) LBP-10-12 at 14 ("There being no NRC regulation that governs the timing of waiver petitions, we agree with SACE that the appropriate standard for determining whether a waiver petition is timely is reasonableness"). Filing for a waiver of the provisions of a new regulation as applied to new contention bases within 30 days of when the new regulation was adopted and on the same day as the timely filing of the proposed new contention bases are filed is inherently timely.

THE NEW BASES COMPLY WITH THE REQUIREMENTS OF 10 C.F.R. § 2.309(f)(1)

1. The Bases Are Within the Scope of License Renewal

New York State Contention 17A claims that:

> the DSEIS Fails to Address the Impact of the Continued Operation of IP2 and IP3 for Another 20 Years on Offsite Land Use, Including Real Estate Values in the Surrounding Area in Violation of 10 C.F.R. §§ 51.71(a), 51.71(d), 51.95(c)(1), and 51.95(c)(4).

This contention and its bases have already been admitted by the Board. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing) LBP-08-13 at 82-83, 68 NRC 43 (July 31, 2008) and Order (Ruling on New York State's New and Amended Contentions) (June 16, 2009) at 8. The proposed amended bases modify the reasons why license renewal will have a substantial adverse impact on offsite land use value and local tax revenues. Thus, the State's additional bases, which continue the challenge to the environmental impact statement, remain within the scope of this license renewal proceeding.

2. The Issues Raised Are Material to the Findings that the NRC Must Make to Support the Action that is Involved in this Proceeding

The NRC must ascertain the site specific socioeconomic impacts of license renewal and the socioeconomic costs and benefits of the no action alternative. 10 C.F.R. § 51.10(a); NUREG 1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS") at 4-109; 10 C.F.R. Part 51, Table B-1 of Appendix B of Subpart A. Offsite impacts on land value and tax revenue from such land are material to this relicensing proceeding, because, if the State is correct in its contention, the NRC must consider, but has not adequately considered, these impacts in determining whether to approve the proposed action and in evaluating the no action alternative. The State has demonstrated in the new bases, which are supported by the January 24, 2011 Report of Dr. Stephen Sheppard ("4th Sheppard Report") [Att. 15], that these offsite impacts are substantial. 4th Sheppard Report at 1, 6. The magnitude of the adverse offsite impact on land value and local taxes of license renewal could be as much as $237,000,000. *Id.* at 1, 6.

3. Adequate Bases Have Been Provided For the Contention

The State of New York today seeks leave to present additional bases in further support of a previously-admitted contention. These additional bases are detailed and exceed the regulatory requirement in 10 C.F.R. § 2.309(f)(1)(ii) for a "brief explanation" of the bases. The additional bases evaluate a number of possible scenarios which may arise as a result of license renewal based on the uncertainties created by the recent amendments to 10 C.F.R. § 51.23. These bases are in addition to the bases previously accepted when Contention NYS-17 was admitted.

4. A Concise Statement of Facts and Expert Opinion Support the Contention

Dr. Sheppard has offered his expert opinion that there are substantial offsite adverse impacts on land value and tax revenues that will occur if license renewal is permitted. He has supported his opinion with references to published, peer-reviewed literature that find that the presence of the kind of disamenity created by an operating nuclear power plant and by the storage of high level nuclear waste does depress local land values and, concomitantly, the tax revenues from such land. He also demonstrates that these effects increase with time and that license renewal will extend the period during which such effects will occur by at least 30 years.

5. A Genuine Dispute Exists on a Material Issue of Law or Fact

The State of New York has provided sufficient information that a genuine dispute exists with regard to several material issues of fact including: (1) whether extending the operating life of Indian Point will perpetuate depressed land values and reduced tax revenues and (2) the potential magnitude of these depressed land values. There are also material disputes of law including: (1) whether the FSEIS is required to consider the adverse impact on offsite land values and tax revenues from license renewal; (2) whether the FSEIS has provided sufficient analysis of this issue; and (3) whether all or any part of the bases are precluded by 10 C.F.R. § 51.23(b).

CONCLUSION

The State of New York respectfully requests that the Atomic Safety and Licensing Board admit the new bases for NYS Contention 17B.

Respectfully submitted,

s/
Susan L. Taylor
Assistant Attorney General

Dated: January 24, 2011

s/
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Albany, New York 12224

List of Attachments
to State of New York Motion for Leave
to File Timely Amended Bases to Contention 17A
(now to be designated Contention 17B)

Attachment 1	10 C.F.R. § 51.23 as it appeared in the January 2010 edition of the Code of Federal Regulations (referred to in the State's filing of today's date as "10 C.F.R. § 51.23 (old)").
Attachment 2	Volume 48 of the Federal Register, pages 22730-22733 (May 20, 1983), Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of the Reactors' Operating Licenses.
Attachment 3	excerpt from NUREG-0575, Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel, Volume 1, (Aug. 1979) ML022550127 including pages 4-25 – 4-27.
Attachment 4	Volume 49 of the Federal Register, including pages 34658-34688 (Aug. 31, 1984), Waste Confidence Decision.
Attachment 5	Volume 53 of the Federal Register including pages 31651-31683 (Aug. 19, 1988), Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste.
Attachment 6	Volume 55 of the Federal Register, including pages 38472-38474 (Sept. 18, 1990), Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation.
Attachment 7	excerpt from the United States Department of Energy Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Volume I – Impact Analysis, DOE/EIS-0250, February 2002, including pages 2-2 and 2-47.
Attachment 8	excerpt from an Entergy document entitled Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 2, (Enclosure 2 to NL-08-144), prepared by TLG Services, Inc. for Entergy Nuclear, October 2008, ML092260723, including pages 2-4, 9-11, 16-18, 25-27.
Attachment 9	Volume 75 of the Federal Register, pages 81032-81076, published December 23, 2010, Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation & Waste Confidence Decision Update.
Attachment 10	excerpt from an Entergy document entitled Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 3, Document E11-

List of Attachments
to State of New York Motion for Leave
to File Timely Amended Bases to Contention 17A
(now to be designated Contention 17B)

	1583-006, prepared by TLG Services, Inc. for Entergy Nuclear, December 2010, ML103550608, including pages 8-11.
Attachment 11	November 29, 2007 Declaration of Dr. Stephen C. Sheppard with accompanying report, *Potential Impacts of Indian Point Relicensing on Property Values*.
Attachment 12	February 26, 2009 Supplemental Declaration of Dr. Stephen C. Sheppard and accompanying report, *Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation*.
Attachment 13	February 9, 2010 Supplemental Comments of the State of New York submitted by the Office of the Attorney General in NRC rulemaking proceeding RIN 3150-AI47, NRC-2008-0482, NRC-2008-0404 – Waste Confidence Decision Update and Consideration of Environmental Impacts of Temporary Storage of Spent of Spent Fuel After Cessation of Reactor Operation.
Attachment 14	March 15, 2010 Supplemental Declaration of Dr. Stephen C. Sheppard and accompanying report, *Determinants of Property Values*).
Attachment 15	January 24, 2011 Report of Dr. Stephen C. Sheppard in connection with Contention 17B.
Attachment 16	December 28, 2009 Letter from John P. Boska to Entergy Nuclear Operations, Inc. regarding IP2 decommissioning funding status report, ML093450778.

Attachment 2

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 January 24, 2011

STATE OF NEW YORK

CONTENTION 17B

Office of the Attorney General
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The Capitol
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Albany, New York 12224

CONTENTION 17B

THE FSEIS FAILS TO ADDRESS THE IMPACT OF THE CONTINUED OPERATION OF IP2 AND IP3 FOR ANOTHER 20 YEARS ON OFFSITE LAND USE, INCLUDING REAL ESTATE VALUES IN THE SURROUNDING AREA IN VIOLATION OF 10 C.F.R. §§ 51.71(a), 51.71(d), 51.95(c)(1), AND 51.95(c)(4)

BASIS

1. Appendix B to Subpart A of 10 C.F.R. Part 51 requires that offsite land use impacts be evaluated in a Final Supplemental Environmental Impact Statement. Offsite land use impacts cannot be assessed generically and are thus Category 2 issues that fall within the scope of the proceeding. *See* Memorandum and Order, *In the Matter of Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) (Jul. 31, 2008) at 82. *See also Generic Environmental Impact Statement for License Renewal of Nuclear Plants* (1996) ("GEIS") § 4.7.4.2 ("Because 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. This is a Category 2 issue"). In December 2010, NRC Staff issued a Final Supplemental Environmental Impact Statement for the requested renewal of the operating licenses for Indian Point Unit 2 ("IP2") and Indian Point Unit 3 ("IP3") ("FSEIS").

2. The FSEIS's evaluation of land use impacts is deficient because it fails to adequately evaluate the positive impact on land use and land value from denial of the license extension for IP2 and IP3. *See* 10 C.F.R. §§ 51.71(a), 51.71(d), 51.95(c)(1), and 51.95(c)(4).

3. The FSEIS improperly limited its analysis of the land use impacts of relicensing to plant-related population growth or to land development driven by tax revenues generated by the plant. FSEIS at 4-45 to 4-47. This analysis is improper because "NRC regulations do not limit consideration to tax-driven land-use changes" and "the impact on real estate values that

would be caused by license renewal or non-renewal" should have been considered in an environmental analysis of relicensing IP2 and IP3. Memorandum and Order, *In the Matter of Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) (July 31, 2008) at 83.

4. Under the no-action alternative, if the licenses were not renewed, the Indian Point plants would cease operating 20 years earlier, the site would be decommissioned 20 years earlier, the quantity of spent fuel generated at the plant would be approximately 50% less than with license renewal, and the time to remove the spent fuel from the site when, and if, a high level waste repository is available would be reduced by at least 10 years.

5. The no-action alternative, by removing the operating nuclear plants and structures associated with an operating nuclear plant from the site sooner, and significantly reducing the time that spent fuel will be stored at the site, will more quickly and more substantially increase the beneficial uses for land adjacent to (within 2 miles) the Indian Point site and will therefore increase the value of that land. The FSEIS discounts some of these beneficial impacts and ignores others, without any consideration of the substantial evidence submitted by Dr. Stephen Sheppard (*see* November 29, 2007 Declaration of Stephen C. Sheppard with accompanying report, *Potential Impacts of Indian Point Relicensing on Property Values*; February 26, 2009 Supplemental Declaration of Stephen C. Sheppard and accompanying report, *Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation*; and March 15, 2010 Supplemental Declaration of Stephen C. Sheppard and accompanying report, *Determinants of Property Values*) and by reliance on a report by Levitan and Associates, which found that the "combined increase in property values and increased taxes could have a noticeable effect on some area homeowners

and business, though Levitan and Associates did not indicate the magnitude of this effect and whether the net effect would be positive or negative. " FSEIS at 8-25.

6. Extended operation of IP2 or IP3 will delay the time when adjacent lands would achieve the economic recovery that they would otherwise enjoy if IP2 and IP3 are not relicensed.

7. In addition, extending the license for an additional 20 years will require additional storage for spent fuel generated during the extended period.

8. The IP2 and IP3 spent fuel pools are not sufficient to contain the spent fuel that will be generated during the additional 20 years of operation of IP2 or IP3 and thus dry cask storage is required. *See* August 13, 2009 Entergy package submitted to NRC on decommissioning funding (ML092260736) (package containing ML092260720 and ML092260723) at 10 (estimating that 96 dry casks will be needed to store the spent fuel from IP1 and IP2 and anticipating that more casks will be needed to store the spent fuel from IP3 *even without license renewal*) [Att. 8] and Entergy Document Ell-1583-006 Preliminary Decommissioning Cost Analysis For The Indian Point Energy Center, Unit 3 (Dec. 2010) (indicating that a new spent fuel storage area will need to be developed at Indian Point to store all the IP3 spent fuel) at 10 [Att. 10].

9. This dry cask storage of high level nuclear wastes will create further impacts on the value and potential use of adjacent lands beyond the impacts of the operating nuclear plants.

10. The FSEIS contains no analysis of the environmental impact on adjacent land values that will be associated with the construction and long term operation of a dry cask storage facility at the Indian Point site of a size sufficient to handle the spent fuel from extended operation of either reactor.

11. If the licenses for IP2 and IP3 are not extended, owners and potential purchasers of land adjacent to Indian Point can contemplate that the site will be cleared of an operating nuclear plant and the structures associated with operation of the plant by 2025. *See* 10 C.F.R. § 50.82(a)(6) (precluding licensees from performing decommissioning activities that "[r]esult in significant environmental impacts not previously reviewed") and the FSEIS, which has no analysis of the substantial adverse impacts that would occur to local land values if Indian Point remains as an abandoned nuclear power plant for as much as 60 years (the outer limit of SAFSTOR) after shutdown; *see also* August 13, 2009 Entergy package submitted to NRC on decommissioning funding (ML092260736) (in which Entergy announces its intent to keep IP2 and IP3 in SAFSTOR for 60 years after shutdown) [Att. 8].

12. However, if the licenses are extended for IP2 or IP3, the site will remain as an operating nuclear plant for at least another 20 years and substantial additional quantities of spent fuel will be generated during this period, indefinitely stored in dry casks at the site as a result of license renewal. The additional spent fuel will require an additional 10 years before the license renewal spent fuel can be removed from the site. This will have an adverse impact on the value of adjacent land and its development as compared to what would occur if the licenses were not renewed.

13. Thus, the FSEIS fails to consider reasonable alternatives to mitigate offsite land use impact and fails to fully analyze the adverse impacts of license renewal on offsite land value as required by 10 C.F.R. § 51.71 such that the applicable requirements of Appendix B of Subpart A of 10 C.F.R. Part 51 have not been satisfied. 10 C.F.R. § 54.29(b).

14. On December 23, 2010, the NRC completed a lengthy rule making process involving reconsideration of 10 C.F.R. § 51.23 ("Waste Confidence Rule"). 75 Fed. Reg. 81032 (Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation). The new rule is effective January 24, 2011. *Id.*

15. The new provision abolished the date certain by which a high level waste repository would be available and replaced it with a finding that such a repository would be available "when necessary." 10 C.F.R. §51.23(a) (75 Fed. Reg. 81032, 81037).

16. The new provision also stated that "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." *Id.*

17. The State of New York submitted Supplemental Comments on the proposed waste confidence rule, which addressed the inappropriateness of attempting to make a generic finding regarding the offsite environmental impacts associated with spent fuel storage at the reactor site following shutdown of the reactor. Supplemental Comments by the Office of the Attorney General of the State of New York Concerning the Nuclear Regulatory Commission's Proposed Waste Confidence Decision Update and Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation (Feb. 9, 2010) (ML100480809) at 12-13 [Att. 13]. New York State cited the Declarations of Dr. Stephen Sheppard that were offered in this proceeding to demonstrate that such impacts would be considerable and that they were specific to each site and not generic. *Id.*

18. The new provision and the accompanying "Waste Confidence Decision Update," acknowledged the State of New York's Supplemental Comments but included no discussion of the potential impact on offsite land value of the extended storage of spent fuel at the reactor site. 75 Fed. Reg. 81032-81076.

19. The prohibition on discussion of the environmental impacts of spent fuel storage following the end of license renewal contained in 10 C.F.R. § 51.23(b) applies only to impacts that are within the scope of 10 C.F.R. § 51.23(a). 10 C.F.R. § 51.23(a) provides

> 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 storage installations. Further, the Commission believes 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.

The prohibition does not preclude a discussion of the offsite land use impacts involved here since, as noted, they are not discussed in the new § 51.23(a), are site-specific and not generic, and are therefore not within the scope of those generic determinations.

20. Adding 20 years of additional spent fuel to the spent fuel that would need to be stored if the Indian Point reactors were shutdown by 2013 and 2015 will exacerbate the adverse impact on offsite land values.

21. The FSEIS contains no discussion of the adverse impact on offsite land values of allowing additional spent fuel to be generated and stored at the plant site after the plant is shut down. Thus, the FSEIS fails to consider reasonable alternatives to mitigate offsite land use

impact as required by 10 C.F.R. § 51.71 such that the applicable requirements of Appendix B of Subpart A of 10 C.F.R. Part 51 have not been satisfied. 10 C.F.R. § 54.29(b).

22. The FSEIS also contains no discussion of the adverse impact on offsite land values of Entergy's newly announced intention to abandon the facility for 60 years to allow its decommissioning trust fund to accumulate sufficient funds. *See* August 13, 2009 Entergy package submitted to NRC on decommissioning funding (ML092260736) [Att. 8]. Although Entergy's proposal has not yet been subjected to review and has not been approved,[1] NRC Staff has concluded that it provides sufficient assurance of adequate decommissioning funding at the time of permanent termination of operations to absolve Entergy of the duty to replenish its decommissioning accounts. *See* December 28, 2009 letter from NRC Senior Project Manager John P. Boska to Entergy (ML093450778) [Att. 16]. Accordingly, all parties must assume that the site will contain a non-operating nuclear facility for a period of 60 years from the end of operations.[2]

23. The FSEIS contains no discussion of the impact on surrounding property values of a mothballed nuclear facility with stored spent waste through 2095 nor does it compare those impacts to the impacts that would result if the plant licenses were not renewed and/or if the SAFSTOR option were rejected because of its severe adverse offsite environmental impacts.

24. In the new version of 10 C.F.R. § 51.23 and the accompanying discussion of environmental impacts, the Commission fails to consider, offers no evidence regarding, and

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[1] The State reserves its right to challenge the proposal.

[2] Indeed, in 2008, Entergy assumed that the plant would remain in storage until 2064 and would not be restored to "Greenfield" condition until 2073. Enclosure 2 to NL-08-144, Preliminary Decommissioning Cost Analysis for the Indian Point Energy Center, Unit 2 (Oct. 22,

makes no findings as to the environmental impact of spent fuel storage at the reactor site beyond 60 years after plant shutdown. 75 Fed. Reg. 81032-81076.

25. In addition neither the Commission nor 10 C.F.R. § 51.23 indicates any date by which spent fuel will be removed from the plant site. *See* 75 Fed. Reg. 81032-81076.

26. Thus, for purposes of real estate development and planning by the local communities it has to be assumed, at this time, that spent fuel will remain at the site even after expiration of the longest potential time period for decommissioning the plant. *See* 10 C.F.R. § 50.82(a)(3) (specifying that decommissioning must occur within 60 years after shutdown, absent special permission for a longer period).

27. The prospect of the continued presence of the spent fuel on the site after decommissioning and evolution of the site from an electric power generating facility into a high level waste temporary storage facility will have a severe adverse impact on the value of land adjacent to the site (within a radius of 2 miles).

28. The FSEIS contains no consideration of these adverse environmental impacts or of alternatives that might be adopted to mitigate or eliminate these adverse consequences. Thus, the FSEIS fails to consider reasonable alternatives to mitigate offsite land use impact as required by 10 C.F.R. § 51.71 and therefore the applicable requirements of Appendix B of Subpart A of 10 C.F.R. Part 51 have not been satisfied. 10 C.F.R. § 54.29(b).

SUPPORTING EVIDENCE

29. An analysis of offsite land use impacts of license renewal during the time of license renewal is required by 10 C.F.R. Part 51, Subpart A, Appendix B, which identifies such

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2010) (ML092260723) at 3, 17 & n.22; *id.* at 26 [Att. 8]. Following revision of the Waste

impacts as Category 2 – that is, for that impact, "the analysis reported in the Generic Environmental Impact Statement has shown that one or more of the criteria of Category 1 cannot be met, and therefore additional plant-specific review is required." *Id.* at n.2.

30. The Commission has decided by regulation that there is no set date by which a permanent offsite high level waste repository sufficient to handle all the wastes that will have been generated by IP1, IP2, and IP3 will be available. *See* 10 C.F.R. § 51.23,

31. The NRC definition for decommission in 10 CFR 50.2 is "to remove a facility or site safely from service and reduce residual radioactivity to a level that permits (1) Release of the property for unrestricted use and termination of the license; or (2) Release of the property under restricted conditions and termination of the license."

32. The FSEIS concludes that there will be "no population-related land use impacts during the license renewal term beyond those already being experienced" and "no tax-revenue-related land use impacts during the license renewal term beyond those currently being experienced." FSEIS at 4-46 to 4-47. These are the only two land use impacts addressed. While the FSEIS examined tax benefits to local communities from continued operation of the plant beyond the current license term, it ignored the tax benefits to local communities from restoration of the value of lands adjacent to the plant if license renewal is not approved and it ignored the adverse impact on tax revenues to local communities if the Indian Point site is converted from an operating nuclear power plant to a high level nuclear waste storage facility.

33. The FSEIS did not consider the changes in property values associated with the unanticipated continuation of an operating nuclear power generation facility and the associated

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Confidence Rule, that estimate is almost certainly optimistic.

increase in dry cask storage of spent waste for the license renewal period although NRC Staff was fully apprised of substantial site specific information related to these impacts. *See Potential Impacts of Indian Point Relicensing on Property Values*, Stephen C. Sheppard, Ph.D., November 2007 (appended to Declaration of Stephen C. Sheppard, sworn to November 28, 2007) [Att. 11]; *see* also February 26, 2009 Supplemental Declaration of Stephen C. Sheppard and accompanying report, *Potential Impacts of Indian Point Relicensing with Delayed Site Reclamation* [Att. 12]; March 15, 2010 Supplemental Declaration of Stephen C. Sheppard and accompanying report, *Determinants of Property Values*) [Att. 14]; Feb. 27, 2009 State of New York Contentions Concerning Staff's DSEIS (ML 090690303); and March 31, 2009 NYS Combined Reply to Entergy and NRC Staff in Support of Contentions 12-A, 16-A, 17-A, 33 and 34 (ML090960470).

34. Relying on *The Effect of Electric Utility Power Plant Location on Area Property Value*, Glenn Blomquist, Land Economics, Vol. 50, No. 1 (Feb. 1974) at 97-100, Dr. Sheppard states that "there was a clear and statistically significant impact of [non-nuclear] power plants on property values" up to a distance of 11,500 feet from the facility. *See Potential Impacts of Indian Point Relicensing on Property Values* at p. 2 (attached to the Nov. 29, 2007 Declaration of Stephen C. Sheppard). If anything, the impact of nuclear power plants is even larger. *Id.* at 4.

35. Moreover, an analysis titled *An Interregional Hedonic Analysis of Noxious Facility Impacts on Local Wages and Property Values*, David Clark and Leslie Nieves, Journal of Environmental Economics and Management, Vol. 27 (1994) at 235-53, concludes, to a reasonable and professionally accepted degree of scientific certainty, that "the impact of nuclear generating plants is more than 3 times the impact of coal fired plants and more than 4 times the

impact of gas and oil fired generating facilities." *Potential Impacts of Indian Point Relicensing on Property Values* at 3 (attached to the November 29, 2007 Declaration of Stephen C. Sheppard). This impact is from the facility itself when compared to an alternative use that is also capable of generating employment and income. These properly done studies support the contention that a nuclear power plant may have a significant, not a small, impact on adjacent land values.

36. Data from the 2000 Census demonstrate that, at the time of that census, the total value of residential property within 2 miles of the facility was about $2.2 billion. *Potential Impacts of Indian Point Relicensing on Property Values*. *Id.* at 4. According to Dr. Sheppard's calculations, the current market value of residential property within 2 miles of the facility is slightly over $4.3 billion (an increase of 93% from the first quarter of 2000). *Id.* Professor Sheppard calculated, conservatively, that removal of the facility and its spent fuel would increase property values within 2 miles of Indian Point by $576,026,601. *Id.* Plainly, land use impacts of more than a half billion dollars cannot be considered "SMALL" or even "MODERATE."

37. Absent relicensing, the suppressed land values of adjacent property would substantially recover and would recover sooner. The FSEIS's failure to analyze the impact of relicensing on the property values of adjacent lands renders its land use impact analysis incomplete and its conclusions erroneous.

38. Absent relicensing, the volume of spent fuel at the site will be approximately 50% less, the time during which it will remain at the site is likely to be substantially less (at least 10 years) and thus the adverse impact of the site functioning as a high level nuclear waste storage facility will be diminished. August 13, 2009 Entergy package submitted to NRC on

decommissioning funding (ML092260736) (package containing ML092260720 and ML092260723) at 9 [Att. 8] and Entergy Document Ell-1583-006 Preliminary Decommissioning Cost Analysis For The Indian Point Energy Center, Unit 3 (December 2010) at 9 [Att. 10].

39. This contention is also supported by the previously submitted appended declarations and reports of Dr. Sheppard, and the Jan. 24, 2011 4th Report of Dr. Sheppard {Att. 15].

40. It is further supported by the 2002 U.S. Department of Energy Yucca Mountain Environmental Impact Statement,[3] which indicates that it will take 24 years to remove the spent wastes from existing reactors, an analysis that does not include the waste from relicensed facilities. Because there is no basis to believe that any site will have priority and because license renewal will roughly increase the waste volume by 50% but not all plants will seek or obtain license renewal, it would appear reasonable to assume that adding 20 years of spent fuel from Indian Point license renewal will add at least an additional 10 years to the length of time that spent fuel will remain on site at Indian Point.

41. The contention is also supported by the August 13, 2009 Entergy package submitted to NRC on decommissioning funding (ML092260736) (package containing ML092260720 and ML092260723) at 10 [Att. 8], which estimates that 96 dry casks will be needed to store the spent fuel from IP1 and IP2 and anticipates that more casks and cask storage areas will be needed to store the spent fuel from IP3 *even without license renewal.*

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[3] *See* Environmental Impact Statement, U.S. Department of Energy Office of Civilian Radioactive Waste Management DOE/EIS-0250 Final Volume I - Impact Analyses Chapters 1 through 15 (February 2002) at 2-2 and 2-47. Excerpts from the DOE EIS are attached to this submission [Att. 7].

42. Finally, the contention is supported by Entergy Document Ell-1583-006 Preliminary Decommissioning Cost Analysis For The Indian Point Energy Center, Unit 3 (December 2010) at 10, which indicates the need to develop a new storage area for the spent fuel from IP3.

Respectfully submitted,

s/
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Dated: January 24, 2011

s/
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Attachment 3

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 January 24, 2011

STATE OF NEW YORK'S REQUEST FOR A DETERMINATION THAT THE PROPOSED AMENDED BASES FOR CONTENTION 17A ARE NOT BARRED BY 10 C.F.R. § 51.23(b), OR THAT EXEMPTION FROM THE REQUIREMENTS OF 10 C.F.R. § 51.23(b) SHOULD BE GRANTED, OR THAT THE STATE HAS MADE A *PRIMA FACIE* CASE THAT § 51.23(b) SHOULD BE WAIVED AS APPLIED TO CONTENTION 17B

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for the State of New York
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State Street
Albany, New York 12224

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INTRODUCTION

This Board has already admitted NYS Contentions 17 and 17A, which challenge the adequacy of the Environmental Report and the Draft Supplemental Environmental Impact Statement ("DSEIS") because of their failure to consider the socioeconomic impacts on offsite land use value of relicensing Indian Point. Jul. 31, 2008 Mem. and Order Ruling on Petitions to Intervene and Requests for Hearing (LBP-08-13) at 82-83 (ASLBP No. 07-858-03-LR-BD01) ML082130436; Jun. 16, 2009 Order Ruling on New York State's New and Amended Contentions at 7-8 (admitting NYS 17-A) ML091670435. The Final Supplemental Environmental Impact Statement for Indian Point Unit 2 and Unit 3 ("FSEIS") has not changed the previous consideration of socioeconomic impacts. *Compare* Draft Supplemental Environmental Impact Statement for Indian Point Unit 2 and Unit 3 ("DSEIS") 4-40 to 4-41 and 8-29 to 8-30 *with* FSEIS at 4-45 to 4-47 and 8-24 to 8-25. This Board has also denied a Motion for Summary Disposition filed by Entergy and NRC Staff with regard to Contention 17A. Apr. 22, 2010 Mem. and Order Denying Summary Disposition on NY 17/17A at 1, 18 (ASLBP No. 07-858-03-LR-BD01) ML101120094. Finally, this Board has denied New York State's proposed Contention 34, which was based on the concept that, because the Commission had concluded that the bases for the Waste Confidence Rule, 10 C.F.R. § 51.23 (old)[1] [Att. 1], were no longer valid, then the conclusion in 10 C.F.R. § 51.23 (old), that a permanent high level waste repository would be available by 2025 was no longer valid and thus it was necessary to consider the environmental impacts of indefinite storage of spent fuel at the Indian Point site following

[1] To avoid confusion and because the new Waste Confidence Rule does not take effect until January 24, 2011 (75 Fed. Reg. 81032), citations to the rule will indicate whether the "old"

license renewal and shutdown of the plant. Jun. 16, 2009 Order (Ruling on New York State's New and Amended Contentions). In denying the admissibility of the proposed contention the Board ruled:

> At this point, the Commission has not made a final determination vis-à-vis the waste confidence rule. Therefore, it is premature to use these publications as the bases for a new contention, as the regulations now in force, specifically 10 C.F.R. § 51.23(b), do not permit "discussion of any environmental impact of spent fuel storage" at nuclear reactor sites. Accordingly, NYS-34 is an impermissible challenge to NRC regulations and must be denied.

Id. at 16.

In the wake of the revision to 51.23(a) (new), the time is now ripe for New York State to raise its concerns about the failure of the FSEIS to consider the very significant and substantial socioeconomic impacts that will occur after plant shutdown, if Indian Point is allowed to operate the plant for an additional 20 years and to create an additional 20 years of spent fuel that will be stored at the site for an undefined and indefinite period. The Commission now concludes it is unable to set a date by which such storage will end. Thus, it must be assumed that spent fuel may remain on site for a substantial period. If relicensing is allowed, the presence of the additional spent fuel generated will have a profound adverse impact on local land use value.

While this is the time to raise these concerns, it is likely that both Entergy and NRC Staff will argue that the operation of 10 C.F.R. § 51.23(b) (new) is a barrier to raising these concerns. This pleading is intended to demonstrate that no such barrier exists, and, alternatively, that if a barrier did exist, it can and should be removed to permit a full and fair consideration of significant and substantial site-specific socioeconomic impacts that are ignored in the FSEIS.

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version or the "new" version is being referenced.

ARGUMENT

I. 10 C.F.R. § 51.23(b) (new) DOES NOT BAR CONSIDERATION OF THE ENVIRONMENTAL IMPACTS OF SPENT FUEL STORAGE AT INDIAN POINT FOLLOWING SHUTDOWN OF THE PLANT

The new bases added to Contention 17A, which now comprise proposed Contention 17B, challenge the adequacy of the FSEIS because it fails to address the significant and substantial environmental impact on offsite land use that will occur if Indian Point Unit 2 (IP2) and Indian Point Unit 3 (IP3) are relicensed and additional spent fuel is generated and stored on site for an indefinite period. A portion of the bases for Contention 17B focus on the time period after the facilities are shutdown and the adverse impact that will occur as a result of the continued presence of additional spent fuel at the site. As written, 10 C.F.R. § 51.23(b) (new) limits consideration of the environmental impact of spent fuel storage at the reactor site after shutdown:

> *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 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 reactor.

Id. (emphasis added). However, neither 10 C.F.R. § 51.23(a) (new) nor the Waste Confidence Decision Update includes any discussion of the environmental impact on offsite land use and land value of the continued and indefinite storage of spent fuel at the reactor site, which is site-specific and not generic. Those impacts therefore cannot fairly be said to be "within the scope of the generic determination in paragraph (a)," which determined 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." 10 C.F.R. § 51.23(a) (new).

In fact, there is virtually no discussion of environmental impacts from spent fuel storage and certainly none related to non-radiological offsite environmental impacts in the Waste Confidence Decision Update or in 10 C.F.R. § 51.23(a) (new). Rather, the recent Waste Confidence Decision Update relies on the environmental analysis that accompanied the 1990 waste confidence findings. 75 Fed. Reg. 80132, 81035 (referencing the 1990 Waste Confidence amendments) [Att. 9]. But those amendments also failed to discuss offsite non-radiological environmental impacts, relying instead on a 1988 EA that accompanied amendments to 10 C.F.R. Part 72. 55 Fed. Reg. 38472, 38473 (Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation (Sept.18, 1990) [Att. 6] ("The Commission's conclusions with respect to safety and environmental impacts of extended storage are supported by NRC's Environmental Assessment (EA) for the 10 CFR part 72 rulemaking 'Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste' (53 FR 31651, August 19, 1988)"). However, the 1988 rulemaking also did not analyze non-radiological offsite environmental impacts from spent fuel storage but relied on an environmental analysis prepared in conjunction with earlier amendments to Part 72. *See* 53 Fed. Reg. 31651, 31657-58 [Att. 5], which relies on NUREG-0575 ("Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel," August 1979) [Att. 3]. But NUREG-0575 contains virtually no analysis of non-radiological offsite environmental impacts and certainly does not contain any analysis of the impacts on adjacent land uses and value as a result of using the former electric power generating

site as a high level nuclear waste storage facility. The entire discussion of offsite non-radiological environmental impacts of onsite spent fuel storage in NUREG-0575 consists of the following:

> **4.3.1 The Reference Case Storage Solution** Storing spent fuel has the advantage of resulting in confinement of perceived problems to a small area. As at a nuclear power plant, safeguards and safety measures can be developed to restrict access. The location of such a site near a community would produce social problems similar to those associated with siting of other nuclear-related facilities.
>
> Social impacts likely associated with independent storage facilities, will be similar to those occurring at power plants and are of three main types: (1) impacts on socially valued aspects of the natural environment, (2) impacts on the social structure, and (3) the effects of perceived danger of accidents and radiation. Changes caused by the disruption of the environment have direct impacts upon humans. The removal of the land for the site from future development, long-term demands on the water supply, and visual intrusion of cooling towers or buildings on the natural landscape will permanently affect the relationship of the residents with their environment and the development of the area.
>
> Areas where such facilities would be built would pay most of the resulting socioeconomic costs but receive few of the social benefits involved. Also, while certain items can be isolated and labeled as costs or benefits, other impacts cannot be quantified or are slow in developing, causing them to be unaccountable.

NUREG-0575 (Vol. 1 Final Generic Environmental Impact Statement on Handling and Storage of Spent Light Water Power Reactor Fuel Executive Summary and Text (August 1979)) at 4-26 (fn. omitted) (ML055220127) [Att. 3].

It is not surprising that the Waste Confidence Decision Update and its predecessor documents did not consider the offsite socioeconomic impacts of spent fuel storage following plant shutdown. The Commission has long concluded that such impacts are inherently site-specific and thus inappropriate for consideration as part of a generic finding. The findings of NUREG 1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants

("GEIS") support the fact the socioeconomic impacts of offsite land use are site-specific Category 2 issues. *See* 10 C.F.R. Part 51, Table B-1 of Appendix B of Subpart A. The reason the GEIS treats all offsite land use impacts as Category 2 issues is the unique nature of these impacts and their site-specific characteristics:

> Because 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. This is a Category 2 issue.

GEIS at 4-109. These site specific characteristics are no different for the period after the plant has shut down than they are for the operation period.

Since the Waste Confidence Decision Update, which is the underlying support for the § 51.23(a) (new) finding that 60 years of onsite spent fuel storage after plant shutdown will have no environmental impact, does not address the non-radiological environmental impacts that are the subject of Contention 17B, no exemption from the restrictions of § 51.23(b) (new) nor waiver of that provision should be necessary. By its terms, § 51.23(b) (new) only prohibits the discussion of environmental impacts of spent fuel storage onsite following plant shutdown to the extent those issues are generic and to the extent they are covered by the § 51.23(a) (new) generic finding. In this case, the impacts of concern in proposed Contention 17B are both not previously considered and site-specific. Thus § 51.23(b) (new) is not applicable, and the State of New York does not need to request an exemption or a waiver for Contention 17B.

II. IN THE ALTERNATIVE, THE STATE REQUESTS AN EXEMPTION PURSUNAT TO 10 C.F.R. § 51.6 OR A WAIVER PURSUANT TO 10 C.F.R. § 2.335

Should the Board disagree with the State's position in Point I that 10 C.F.R. § 51.23(b) (new) does not bar the Contention 17B, the State requests that the Board determine that New York is exempt from the requirements of 10 C.F.R. § 51.23(b) (new) insofar as Contention 17B addresses the environmental impacts of spent fuel storage at Indian Point following shutdown of the plant. *See* 10 C.F.R. § 51.6 (The Commission may grant exemptions that are authorized by law and in the public interest). Alternatively, New York asks that the Board find that New York has made a *prima facie* showing that the restrictions of § 51.23(b) (new) should be waived with regard to the portion of Contention 17B that addresses environmental impacts of spent fuel storage at Indian Point following shutdown of the plant and certify the matter to the Commission for its decision. *See* 10 C.F.R. §§ 2.335(b), (d).

A. The State Should Be Exempted From the Requirements of 10 C.F.R. § 51.23(b) (new) Pursuant to The Provisions of 10 C.F.R. § 51.6

Recognizing the difficulty of creating regulations that can accommodate all circumstances, the Commission included 10 C.F.R. § 51.6 to allow "any interested person" to seek an exemption from a specific requirement of Part 51.[2] An exemption from a requirement of

[2] There can be no doubt that New York State is interested in this issue since it involves the value of property held by New York State residents. There is also no question that New York State is a "person" within the meaning of the regulations:

> *Person* means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency . . . any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity;

Part 51 may be granted where the Commission "determines [the exemption is] authorized by law and [is] otherwise in the public interest." 10 C.F.R. § 51.6.[3] To the extent offsite land use impacts of spent fuel storage at the Indian Point site after plant shutdown are deemed to be "within the scope of the generic determination in paragraph (a)" of § 51.23 the State may not raise any environmental impacts associated with such storage in the license renewal proceeding. 10 C.F.R. § 51.23(b). The State of New York seeks exemption from that requirement.

A thorough evaluation of the potential environmental impacts of a proposed action and the environmental benefits of the "no action alternative" are requirements of NRC Regulations, 10 C.F.R. Part 51, President's Council on Environmental Quality ("CEQ") Regulations, 40 C.F.R. Part 1502, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* Thus, allowing a full discussion of offsite land use impacts on land values and tax revenues of the proposed license renewal is not only authorized but required by law. Section 51.23(b) (new) should not stand in the way.

Allowing a full analysis of offsite land use impacts of license renewal at Indian Point is

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10 C.F.R. § 2.4.

While New York is not aware that § 51.6 has been used by a state (*see, e.g.,* LIC-103, Requests for Exemption from NRC Regulations, NRC Staff, Jul. 26, 2002 (which focuses on exemption requests by applicants but does not preclude requests by other "interested persons")), it is clear that the regulation is applicable to "any interested person." ML021230148.

[3] Pursuant to 42 U.S.C. § 2201(n) the Commission may delegate its authority to any officer (which includes a hearing board). Pursuant to 10 C.F.R. § 2.4, references to the "Commission" in the rules includes those to whom the Commission has delegated authority. The Commission delegated decision-making authority to the ASLB which in turn delegated the authority to this Board. Order, Establishment of Atomic Safety and Licensing Board (10/18/07) (ML072910164).

also in the public interest. The Commission has made clear that the purpose of an environmental impact statement is to implement the obligations of NEPA:

> The National Environmental Policy Act of 1969, as amended (NEPA) 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 NEPA, and (2) all agencies of the Federal Government shall comply with the procedures in section 102(2) of NEPA except where compliance would be inconsistent with other statutory requirements. The regulations in this subpart implement section 102(2) of NEPA.

10 C.F.R. § 51.10(a). NEPA requires that every federal agency 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,

42 U.S.C. § 4332(C).

Attached to proposed Contention 17B as supporting evidence are declarations and reports prepared by Dr. Stephen Sheppard, a professor in the Economics Department at Williams College and a recognized expert in the field of the land use impacts of nearby disamenities. Dr. Sheppard has preliminarily concluded that relicensing Indian Point will have an adverse impact of hundreds of millions of dollars. The magnitude of these substantial impacts is totally ignored in the FSEIS, and the concept of adverse impacts on local land values is barely mentioned. But for the requirement contained in § 51.23(b) (new), these impacts would be part of the "detailed statement" of "environmental impacts of the proposed action" and part of the benefits of

rejecting the license renewal proposal would include the substantially increased land values and tax revenues that would follow such a decision. An analysis of the potential impacts would serve the public interest by complying with NEPA's mandate and providing a more complete evidentiary record for making the relicensing decision. The Commission has noted the value of such fully informed decisions:

> While NEPA does not require agencies to select particular options, it is intended to "foster both informed decision-making and informed public participation, and thus to ensure that the agency does not act upon incomplete information, only to regret its decision after it is too late to correct."

Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2) CLI-02-17, 56 N.R.C. 1, 10 (2002).

Exempting the State of New York from the requirement of § 51.23(b) will also serve the public interest because it will expedite the decision on Entergy's application for relicensing. By granting an exemption from the requirements of those provisions, the Board will allow the proceeding to stay on its current schedule and hearings will be held on all matters, including whether the FSEIS has properly evaluated and weighed the adverse environmental impacts of license renewal and the positive impacts of the no action alternative as they relate to offsite land use values. By contrast, if an exemption is not granted and the Board certifies the issue to the Commission pursuant to 10 C.F.R. § 2.335(b), many months will be lost waiting for a final determination from the Commission, which, if favorable to waiver, may necessitate reopening the hearings. *See, e.g., Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-10-15 (August 4, 2010) at 96 and Commission Order issued August 31, 2010 setting a briefing schedule for the certified question with final briefs due to be filed on October

15, 2010. In addition, while the issue of waiver is pending, the status of prefiled testimony, the likely *in limine* motions regarding such testimony as it relates to spent fuel storage following plant shutdown and responses thereto, proposed cross-examination and pre-trial briefs, and Board preparation for the hearing will be uncertain. *See id.* Granting an exemption now will provide certainty and ensure efficiency with no injury. *See* 10 C.F.R. § 2.341 (allowing petitions for review); *see also Global Laser Enrichment* (Docket Number 70-7016 GE-Hitachi Global Laser Enrichment LLC Request For Exemption From 10 CFR §§ 51.60(a) and 70.21(h) To Allow Early Submittal Of An Environmental Report (December 8, 2008) ML090350200, Attachment at 6) (citing improved hearing efficiency as a public interest basis for approval of exemption under § 51.6).

Thus, the State of New York urges the Board to use the authority of 10 C.F.R. § 51.6 to exempt it from the requirements of 10 C.F.R. § 51.23(b) (new), to the extent it precludes discussion of the offsite land use impacts of spent fuel stored at the Indian Point site following plant shutdown.

B. Waiver of the Restrictions Contained In 10 C.F.R. §51.23(b) (new) Is Warranted

Should the Board determine that an exemption from the restrictions of § 51.23(b) (new) is not warranted, the State of New York urges the Board to determine that New York State has made a *prima facie* case for waiver of the restrictions as they apply to the issue of the impact of license renewal on offsite land use impacts and tax revenues from those lands. The process for seeking waiver of a regulation is set forth in 10 C.F.R. § 2.335(b) and provides, in relevant part:

> A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or regulation or any provision thereof,

> of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.

The Commission has also expanded on these regulatory requirements:

> for us to grant an exemption or waiver of section 50.47(a)(1) and thereby permit the adjudication of emergency-planning issues in this proceeding, we must first conclude under our regulations and case law that (i) the rule's strict application "would not serve the purposes for which [it] was adopted;" (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;" (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities"; and (iv) a waiver of the regulation is necessary to reach a "significant safety problem."[4] The use of "and" in this list of requirements is both intentional and significant. For a waiver request to be granted, all four factors must be met.

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3) CLI-05-24, 62 NRC 551, 559-60 (2005) (footnotes omitted); *see also Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1and 2) LBP-10-15 (August 4, 2010) at 9; *Tennessee Valley Authority* (Watts Bar Unit 2) LBP-10-12 (Memorandum And Order (Denial of Petition to Waive 10 C.F.R. §§ 51.53(b), 51.95(b), 51.106(c) in the Watts Bar Operating License Proceeding) (July 29, 2010) at 3.

The ASLB in its recent decision in the *Diablo Canyon* case has defined the *prima facie*

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[4] The issue in the *Dominion* case involved safety. When applied to an environmental issue, as here, it would be reasonable to require a showing that the environmental impact is

requirement as follows:

> a *prima facie* case is defined as "1. The establishment of a legally required rebuttable presumption. 2. A party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favor." Black's Law Dictionary 1310 (9th ed. 2009). The Appeal Board has stated that "[*p*]*rima facie* evidence must be legally sufficient to establish a fact or case unless disproved," *Diablo Canyon*, ALAB-653, 16 NRC at 72, and that, in the context of waiver petitions, "[w]e have found that a *prima facie* showing . . . is one that is 'legally sufficient to establish a fact or case unless disproved,'" *Seabrook*, ALAB-895, 28 NRC at 22 (quoting *Diablo Canyon*, ALSB-653, 16 NRC at 72). Thus, the existence (or not) of a *prima facie* case is determined based on the sufficiency of the movant's assertions and informational/evidentiary support alone.

Diablo Canyon, LBP-10-15, at 40-41.

1. Strict enforcement of the requirements of 10 C.F.R. § 51.23(b) (new) in this proceeding will not serve the purposes of the regulation and will exclude consideration of special circumstances not considered in the rulemaking

When the Commission first adopted the version of 10 C.F.R. § 51.23 (old) that included a generic finding on the safety and environmental impacts of spent fuel storage at reactor sites following plant shut down it described the purpose of its endeavor as:

> The Commission also stated that in the event it determined that on-site storage of spent fuel would be necessary or appropriate after the expiration of facility licenses, it would propose a rule addressing the environmental and safety implications of such storage.

49 Fed. Reg. 34658 (Waste Confidence Decision (Aug. 31, 1984)) [Att. 4]. One of the purposes of § 51.23 (new) is to address the "environmental . . . implications of such storage."[5] However,

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"significant."

[5] In *Diablo Canyon,* the ASLB rejected the argument that the only purpose of generic rules is to expedite the NEPA process. "We reject the implication that the sole purpose of the Part 51 rules is simply to expedite the NEPA process and to apply the generic determinations without exception. *See id.* Instead, as the NRC Staff stated, the purpose of these regulations is to apply generic determinations where the generic determinations are appropriate." *Diablo*

as previously set forth, the substantial site-specific environmental implications of long term storage of spent nuclear fuel at Indian Point have not been evaluated, explicitly or by implication, in either the Waste Confidence Decision Update, including earlier versions, or in the FSEIS in this case.

Those substantial site-specific impacts are outlined in the declarations provided by Dr. Sheppard. They demonstrate that allowing Indian Point to operate for an additional 20 years, generating additional spent fuel that will remain at the site, will cause substantial damage to the value of the real estate surrounding the Indian Point facility.

2. The offsite land use impacts identified by Dr. Sheppard are unique to Indian Point and its unique location

The offsite land use impacts identified in Dr. Sheppard's declarations are specific to the Indian Point site and do not apply to other sites. They are focused on the demographics of this area. In his initial report, Dr. Sheppard focuses on the unique characteristics of the area surrounding Indian Point to identify the extent and magnitude of these site-specific impacts:

> In order to obtain a general estimate of the magnitude of property value impacts, I have made use of data available from the 2000 Census for the region around the Indian Point generating facility, making appropriate adjustments as described below.
>
> A conservative estimate of property value impacts can be obtained by applying the impact estimated by Blomquist discussed above. His analysis suggested that there are no impacts on property values beyond 11,500 feet, and that up to that distance moving 10% further away from the power plant would increase the value of the property by 0.9%.
>
> According to the 2000 Census, there are 32,427 persons living in Census Block Groups whose center is within 2 miles of the Indian Point facility. Within this area there are 12,933 housing units. The area around Indian Point and the

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Canyon, LBP-10-15, at 41 (reference omitted).

associated census block groups are illustrated in Figure 1 below. The block groups are shaded blue with darker shades indicating more dwelling units. Of these dwellings, 6886 units are owner occupied units whose collective value in 2000 was $1,425,552,500 (over $1.4 billion). There were 5468 renter-occupied properties, whose average median contract monthly rent was about $750 per month. I approximate the value of the rental properties by calculating the discounted present value of the stream of rents that can be earned, and this produces an estimated value of rental; property in the area of $816,613,800 (nearly $817 million). Combining these indicates that as of the 2000 Census the total value of residential property within 2 miles of the Indian Point facility was about $2,242,166,300 ($2.2 billion).

* * *

Property values have continued to increase with the overall market, and the Office of Federal Housing Enterprise Oversight (OFHEO) tracks the course of house prices in every state and many metropolitan areas in the US. Using the index for the state of New York indicates that on average house prices have increased 93% from the first quarter of 2000 to the first quarter of 2007. Therefore the current market value of residential property within 2 miles of the Indian Point plant is approximately equal to $4,327,380,959 (over $4.3 billion).

For each Census block group, I calculated the percentage increase in distance from the Indian Point plant that would be required to move the block group to be 11,500 feet away from the plant. This is a very conservative estimate, based on Blomquist's study, of how far away from the plant properties would have to be to be free of impact from the plant. To be particularly certain that I obtain a minimum estimate of the impact, I excluded those houses in the block group that actually contain the plant, since these are not typical of the sample in a way that would make application of Blomquist's results scientifically valid in all circumstances.

The resulting calculations indicate that removal of the impacts of the Indian Point Nuclear plant would increase property values by $576,026,601 (over $500 million). This is clearly, sufficient to alter the decisions about land use made by the owners of the most affected properties. The result indicates that the assertion that the impacts of extended licensing of the plant would be non-existent or undetectable cannot be accepted as scientifically valid.

November 29, 2007 Declaration of Stephen Sheppard (to which is attached *Potential Impacts of Indian Point Relicensing on Property Values*) at 4-6 ("2007 Sheppard Decl. and Report") [Att.

11].

These site-specific characteristics are further discussed in a supplemental declaration submitted by Dr. Sheppard in which he identifies the kind of localized market considerations that must go into a determination of the land use and land value impacts for any particular site, particularly where the analysis is focused on the hypothetical that the disamenity at issue will be removed and the task is to ascertain what positive impact that removal will have on land use and land value. March 15, 2010 Supplemental Declaration of Stephen C. Sheppard at 5-6 [Att. 14].

As early as 1983, then-NRC Commissioner Victor Gilinsky filed a separate statement of dissent when the Commission proposed adoption of what is now the Waste Confidence Rule in which he observed "[w]hile I agree that there is no obstacle in principle to extended on-site storage, I think it is clear that each power reactor site will have to be examined in detail." 48 Fed. Reg. 22730, 22733 (May 20, 1983) [Att. 2]. The Commission itself recognized at that time the site-specific nature of the measures needed to deal with spent fuel storage following reactor shutdown by proposing, what is now 10 C.F.R. §50.54(bb), a provision that requires each licensee to submit, no later than 5 years before expiration of the operating license, a site-specific plan for how the spent fuel will be managed on the site following reactor shutdown and until such time as the fuel is sent for reprocessing or off-site disposal. *Id.* at 22732.

As noted above, the findings of the GEIS for license renewal support the fact the socioeconomic impacts of offsite land use are site-specific Category 2 issues. *See* 10 C.F.R. Part 51, Table B-1 of Appendix B of Subpart A. Thus, the issue in this Petition is not whether the offsite impacts identified by Dr. Sheppard are site-specific – they are – but whether these site-specific impacts should be allowed to be considered in this license renewal proceeding. The

State urges the Board to conclude the State has made a *prima* facie case that they should be.

While it is true that conceptually offsite land use impacts *could* be impacted at other plant sites, that does not turn the impact into a generic one any more than the fact that air quality during refurbishment could be an environmental impact at all plants but it is nonetheless a Category 2 issue because it will vary depending upon site-specific considerations. 10 C.F.R. Part 51, Appendix B to Subpart A, Table B-1. Dr. Sheppard has provided substantial evidence that unique characteristics in the vicinity of Indian Point make the magnitude of the offsite land use impacts substantial and warrant their consideration in this license renewal proceeding.

3. The offsite land use impacts identified by Dr. Sheppard are significant and substantial

Dr. Sheppard has identified the magnitude of the socioeconomic impacts that will occur if Indian Point is relicensed and if spent fuel is allowed to be stored at the site for years after the plant is shutdown. His preliminary estimates indicate that if the plant is relicensed it will postpone for at least 30 years the recovery of over $500 million of land value for the land adjacent to the plant. *See* United States Department of Energy Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Volume 1 – Impact Analyses, Chapters 1 through 15 (DOE/EIS-0250) Feb. 2002, [Att. 7] (evaluating the then proposed Yucca high level waste repository and scenarios for delivery of spent fuel casks either by truck or rail and assuming 24 years to remove waste from existing reactors without license extension) and October 22, 2008 Entergy decommissioning submission (NL-08-144, Enclosure 2) (ML092260723) at 10 (calculating 28 years needed to remove the spent fuel already generated at

the site) [Att. 8].

As Dr. Sheppard's January 24, 2011 Report demonstrates, license renewal will extend by at least 30 years (20 for the license renewal period plus at least 10 additional years to remove the additional spent fuel generated during license renewal) the time before the property adjacent to the Indian Point site can regain its full value of more than $500 million. The cost of this delay to those land owners and to the local taxing authority will be hundreds of millions of dollars. All that value will be lost to a wide group of property owners within 2 miles of Indian Point by allowing Indian Point to be relicensed, an impact that dwarfs the asserted positive socioeconomic impacts from tax revenues paid by Entergy to local governments, on which the FSEIS relies in its analysis of socioeconomic impacts. FSEIS at 8-24 to 8-25. Since the FSEIS concedes that these socioeconomic impacts are relevant to the relicensing decision, it is significant that denial of relicensing will boost the socioeconomic benefits to local taxing authorities as well as provide substantial increased land value to thousands of private property owners, underscoring the environmental significance of the post-plant operation offsite land use issue that, but for an exemption from, or a waiver of, the requirements of 10 C.F.R. §51.23(b) (new) may not be available for consideration in the relicensing decision.

4. The Commission has suggested that Waiver of 10 C.F.R. § 51.23(b) (new) may be appropriate

As noted above, the Commission has recently completed its reevaluation of its previous Waste Confidence decision. Waste Confidence Decision Update RIN 3150-AI47 and NRC-2008-0482 Consideration of Environmental Impacts of NRC-2008-0404 Temporary Storage of Spent Fuel After Cessation of Reactor Operation (75 Fed. Reg. 81032). The State of New York

submitted extensive comments in that proceeding including Supplemental Comments By The Office Of The Attorney General Of The State Of New York Concerning The Nuclear Regulatory Commission's Proposed Waste Confidence Decision Update And Consideration Of Environmental Impacts Of Temporary Storage Of Spent Fuel After Cessation Of Reactor Operation (Feb. 9, 2010) ("NYS Supplemental Comments") [Att. 13]. New York and other commenters noted that there were numerous site-specific impacts associated with the anticipated long term storage of spent fuel at reactor sites after plant shutdown. NYS Supplemental Comments at 7-13. The State specifically identified the Declarations of Dr. Stephen Sheppard regarding the impact on offsite land use values which continued storage of spent fuel will have. *Id.* at 12-13 ("Dr. Sheppard has identified site-specific environmental issues which are relevant to the indefinite storage of spent fuel at reactor sites. . . . Dr. Sheppard identified substantial impacts on the land use and land values surrounding the Indian Point site in the event that license renewal is not allowed and the plant is promptly decommissioned and the spent fuel removed to a waste disposal site by 2025 (land values will increase) and in the event that spent fuel is stored indefinitely at the site (land values will remain depressed for the indefinite future").

In response to comments about potential site-specific environmental impacts associated with storage of spent fuel at the reactor site after plant shutdown, the Commission suggested that 10 C.F.R. § 2.335 might offer a vehicle to allow the review of site-specific impacts. *See, e.g.,* 75 Fed. Reg. at 81044 ("10 CFR 2.335(b) provides that a party to an adjudicatory proceeding may petition for the waiver of the application of the rule or for an exception for that particular proceeding"); *id.* at 81050 ("The Commission already has a rule, 10 CFR 2.335, that allows a party to an adjudicatory proceeding to seek a waiver or exception to a rule where its application

would not serve the purposes for which the rule was adopted"). These general statements were then applied specifically to the State of New York and its concerns that there were site-specific environmental issues that were not being addressed by the Waste Confidence Rule.

> The Attorney General is correct that there may be some issues that cannot be addressed through a generic process like the Waste Confidence Decision. The Commission has long recognized this, even in cases where issues are resolved through a generic rulemaking. Site-specific circumstances may require a site specific analysis; the Commission has provided for these situations through its regulations in 10 CFR 2.335, which allows parties to adjudicatory proceedings to petition for the waiver of or an exception to a rule in a particular proceeding.
>
> * * *
>
> If the State believes that there are site-specific issues associated with the Indian Point license renewal proceeding, the State should seek a waiver of the rule through that proceeding using the procedures in 10 CFR 2.335. But the potential that one or more sites might not fall under the generic determination in the Waste Confidence Decision and Rule is not sufficient reason for the Commission to require to a site-specific analysis for all sites. The 10 CFR 2.335 waiver process is intended to address the circumstances that the Attorney General claims are present at Indian Point; and the adjudicatory proceeding for the Indian Point license renewal, not this rulemaking, is the proper venue to raise these issues.

75 Fed. Reg. at 81057.

Thus, the new bases offered for Contention 17A and this Petition are in part a direct response to the Commission's invitation, as articulated in the Waste Confidence Decision Update. Obviously, New York State does not assert that the Commission has already ruled that such a petition should be granted, but it has certainly recognized that the issues raised here by New York State and raised before the Commission in the Waste Confidence proceeding are the type of site-specific issues for which waiver may be appropriate.

CONCLUSION

For the reasons stated, New York State requests that the Board find that the socioeconomic issues raised by the amended bases of Contention 17A are not barred by § 51.23(b) (new). In the alternative, the State asks that if they are barred by § 51.23(b) (new), the Board find that the State is entitled to an exemption from the requirements of that section pursuant to § 51.6. Finally, the State asks that if the socioeconomic issues are barred by § 51.23(b) (new) and an exemption is not granted, the Board find that the State has made a *prima facie* case pursuant to § 2.335(b) that the provisions of § 51.23(b) (new) should be waived and certify the matter to the Commission.

Respectfully submitted,

s/
Susan L. Taylor
Assistant Attorney General

Dated: January 24, 2011

s/
John J. Sipos
Assistant Attorney General
Office of the Attorney General
of the State of New York
The Capitol
Albany, New York 12224

Attachment 4

SCHNEIDERMAN CHALLENGES FEDS' NEW PLAN TO DUMP NUCLEAR WASTE AT INDIAN POINT FOR 60 YEARS POST-CLOSURE

A.G. Sues Nuclear Regulatory Commission for Authorizing Nuke Plants to Dump Radioactive Wastes onsite for 60 Years After Closure, Without Mandated Review

Schneiderman: Whether For or Against Re-Licensing Indian Point, We Can All Agree that Environmental, Public Health & Safety Risks Should Be Assessed Before Dumping Waste There After Plant is Closed

[En Español]

BUCHANAN – New York Attorney General Eric T. Schneiderman today announced that he is suing the federal Nuclear Regulatory Commission (NRC) for approving a regulation that would allow the use of Indian Point and nuclear power facilities across the nation as storage sites for radioactive waste for at least 60 years after their closure. The NRC's approval would allow the long-term storage of nuclear waste without completing the federally required review of the public health, safety and environmental hazards such storage would pose. Attorney General Schneiderman is leading a coalition of state attorneys general, including Connecticut and Vermont's, in calling on the federal government to conduct necessary impact studies before deciding that nuclear waste should be stored onsite.

"Whether you're for or against re-licensing Indian Point, we can all agree on one thing: Before dumping radioactive waste at the site for at least 60 years after it's closed, our communities deserve a thorough review of the environmental, public health, and safety risks such a move would present," said **Attorney General Schneiderman**. "This is not just a safety and environmental issue, but also one that could affect property values in Westchester, and I am committed to forcing the feds to take the hardest look possible at the risks of long-term, onsite storage, before they allow our communities to become blighted and our families, properties, and businesses threatened by radioactive waste dumps for generations to come."

In the lawsuit filed today, Attorney General Schneiderman challenges both a NRC rule amending federal regulations and its "Waste Confidence Decision Update" – both issued on December 23, 2010 – as violating two federal laws, the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA). The APA is a federal law that governs the way in which federal administrative agencies may propose and establish regulations, while the NEPA is a federal law requiring federal government agencies to study the environmental impacts of proposed federal agency actions.

The Attorney General charges that the NRC violated the two federal laws when it found – without conducting the necessary studies – that no significant safety or environmental impacts will result from storing highly radioactive nuclear wastes onsite at the more than 100 operating reactors around the country, including from the three Indian Point reactors in Westchester County, for 60 or more years after the reactors are closed.

Attorney General Schneiderman further charges that the NRC violated these laws when it found "reasonable assurance" that sufficient, licensed, off-site storage capacity will be available to dispose of nuclear power plant waste "when necessary." Efforts to site the only nuclear waste storage facility in the United States, the Yucca Mountain Repository in Nevada, were suspended in 2010 and no replacement facility has yet been identified.

The Attorney General argues in the lawsuit that full compliance with the APA and NEPA require the NRC to conduct a site-by-site analysis of the potential for environmental, health and safety impacts. An analysis of this type, if conducted thoroughly and objectively, would identify any environmental, health and safety risks related to long-term, onsite storage of radioactive waste at each site, as well as those mitigation measures (such as increased groundwater monitoring, reinforced containment structures, or repair of leaking spent fuel pools) needed to fully address them.

Paul Gallay, Executive Director and Hudson Riverkeeper, said, "We applaud Attorney General Schneiderman for challenging a decision by the NRC that defies science, logic and common sense. Last month, we filed an action with Hudson River Sloop Clearwater which faulted the NRC for its plans for allowing the storage of this hazardous waste at Indian Point. We are fully behind the Attorney General's efforts and look forward to working together to ensure that Indian Point's nuclear waste does not sit on the banks of the Hudson River, wreaking further havoc on our environment for decades to come."

Manna Jo Greene, Environmental Director of Hudson River Sloop Clearwater, said, "The NRC's failure to study the impacts of allowing our communities to become radioactive waste sites for generations to come is both outrageous and dangerous. The potential environmental, health and safe threats posed by long-term, onsite storage of large amounts of nuclear waste may be an inconvenient truth for the NRC, but it is very real for many New Yorkers. We applaud Attorney General Schneiderman for challenging the NRC's blatant and reckless disregard for the well-being of our communities."

Since taking office, Attorney General Schneiderman has fought to put the health and safety of New Yorkers first. In January, he filed a lawsuit against a Pennsylvania-based power plant for violating the Clean Air Act and threatening New York's air quality. Earlier this week, Schneiderman led a coalition of state attorneys general in calling on the U.S. House of Representatives to keep critical environmental regulations protecting New Yorkers from mercury and other toxins hazardous to human health and the environment.

The lawsuit, filed in the United States Court of Appeals for the District of Columbia Circuit, asks the Court to invalidate the rule and remand it back to NRC with a directive that the Commission fully comply with the APA and NEPA.

The NRC is a federal government agency, headed by five Commissioners, established by the Energy Reorganization Act in 1974 as a successor to the disbanded United States Atomic Energy Commission. The Commission's responsibilities include reactor safety and security, reactor licensing and renewal, radioactive material safety, security and licensing, and spent fuel management (storage, security, reprocessing, and disposal).

This matter is being handled by Assistant Attorneys General Janice Dean and John Sipos of the Attorney General's Environmental Protection Bureau and Assistant Solicitor General Monica Wagner, under the supervision of Executive Deputy Attorney General for Social Justice, Janet Sabel.

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Attachment 5

THE STATE OF VERMONT

OFFICE OF
THE ATTORNEY GENERAL

Press Releases

Vermont Joins Challenge Of Nuclear Regulatory Commission Rules On Storage Of Spent Nuclear Fuel

CONTACT: William H. Sorrell, Attorney General, (802) 828-3173

February 15, 2011

Citing the need for the United States Nuclear Regulatory Commission (NRC) to evaluate environmental risks associated with long-term onsite storage of spent nuclear fuel at locations such as the Vermont Yankee Nuclear Power Station, Attorney General William Sorrell joined New York and Connecticut today in the filing of a lawsuit against the NRC in the U.S. Court of Appeals for the D.C. Circuit. The lawsuit challenges two decisions by the NRC—the "Temporary Storage Rule" and its accompanying "Waste Confidence Decision Update." "The public has a right to know how long-term storage of spent nuclear fuel will affect the environment, particularly when it is occurring at nuclear power plants that were never designed to be long-term storage facilities of spent nuclear fuel," said Attorney General Sorrell. "Calling this a 'temporary' storage rule does not reflect reality when the rule allows spent nuclear fuel to be stored within Vermont's borders for several generations to come," he added.

The NRC rules claim that there would be "no significant impact" on the environment, despite allowing spent nuclear fuel to be stored onsite at power plants such as the Vermont Yankee Nuclear Power Station for as long as 60 years after the plants cease operating. The NRC rules assert that the environmental analysis is unnecessary because the NRC is confident that spent nuclear fuel can be stored safely at Vermont Yankee until 2072 (60 years from the end of the current license), or, if the plant is relicensed, until 2092. The lawsuit challenges the enactment of these rules.

Governor Peter Shumlin voiced his support for today's action: "The continued storage of spent nuclear fuel on the banks of the Connecticut River, without any real plan for long-term disposal, is unacceptable. We strongly disagree with the Nuclear Regulatory Commission's process and rule regarding nuclear waste management and fully support the Attorney General's efforts on behalf of Vermonters."

The suit asks the court to vacate the new rules and send the matter back to the NRC for a site-specific analysis of potential environmental impacts associated with onsite storage of spent nuclear fuel.

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Website consulting provided by The National Association of Attorneys General.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF NEW YORK, et al.	)	
	)	
	)	
	)	
Petitioners,	)	
	)	
v.	)	**Nos. 11-1045**
	)	**11-1051**
UNITED STATES NUCLEAR REGULATORY	)	**11-1056**
COMMISSION, and UNITED STATES OF	)	**11-1057**
AMERICA,	)	
	)	
Respondents.	)	

CORPORATE DISCLOSURE STATEMENT FOR
ENTERGY NUCLEAR OPERATIONS, INC.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of this Court, Entergy Nuclear Operations, Inc. hereby represents that it is the operator and holder of the NRC operating license for the Indian Point Energy Center Units 2 and 3 nuclear plants, located in New York, and the Vermont Yankee Nuclear Power Plant, located in Vermont. Petitioner further represents as follows:

> Entergy Nuclear Operations, Inc. is a wholly owned subsidiary of Entergy Nuclear Holding Company #2, which in turn is a wholly owned subsidiary of Entergy Corporation. Entergy Corporation is the only publicly held corporation in this chain of ownership and, through its subsidiary, owns more than 10% of Entergy Nuclear Operations, Inc.

Respectfully submitted,

s/ Brad Fagg

Brad Fagg
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Attorneys for
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Dated: March 17, 2011

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

Case Caption: State of New York, et al.

v.

U.S. Nuclear Regulatory Commission

Case No: 11-1045

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

○ Appellant(s)/Petitioner(s) ○ Appellee(s)/Respondent(s) ◉ Intervenor(s) ○ Amicus Curiae

Entergy Nuclear Operations, Inc.

Names of Parties

Names of Parties

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.
Names of non-member attorneys listed above will not be entered on the court's docket.
Applications for admission are available on the court's web site at http://www.cadc.uscourts.gov/