

additional information at some point in the future is far too remote to offer any reliable basis upon which to defer review in this matter while holding hearings on these numerous other contentions next year.³ The Board's decision is thus pervasive and unusual in its effect on this proceeding, because it seeks to compel further actions by Entergy and the Staff—including the conduct of additional cost analyses and implementation of SAMAs—that are not required under controlling law or long-standing NRC regulatory practice. It also raises novel questions of potentially broad application, which, as the Staff notes, has prompted the Commission to take review in the past.⁴

That, however, is hardly the only adverse and unacceptable result of the Board's decision, as it also threatens Entergy with immediate serious and irreparable harm. This proceeding is approaching four years in length, and evidentiary hearings on the 14 remaining admitted contentions are not scheduled to take place until mid-2012.⁵ Thus, unless it grants Entergy's petition, the Commission will not review the Board's decision for years (likely not until 2013).

That delay threatens Entergy with immediate, irreparable, and serious injury. There are, of course, significant financial costs associated with protracted litigation. More fundamentally, the uncertainty as to whether Entergy's renewal application will be granted makes business decisions extremely difficult. The uncertainty also complicates decisions on fuel procurement insofar as it bears on Entergy's ability and willingness to enter into contracts for the sale of the plant's power beyond its current expiration date.

In addition to those harms, the looming prospect for further delay created by the Board's ruling threatens to immediately and irreparably harm the public interest. The findings of a just-released study performed by Charles River Associates at the request of the New York City

³ See *id.* at 10-11.

⁴ See NRC Staff Answer at 9 n.36. See also *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), CLI-10-27, 72 NRC ___, slip op. at 8-9 (Sep. 30, 2010).

⁵ See Licensing Board Amended Scheduling Order (June 7, 2011) (unpublished); see also NRC Staff Answer at 2 & n.8.

Department of Environmental Protection confirm that conclusion.⁶ The study found that, even if the Indian Point renewed licenses are ultimately granted by the NRC, significant delay in the conclusion of the license renewal process threatens grid reliability:

Our analysis indicates that given the current prospects for new capacity in New York, resource adequacy will fall below acceptable levels at that point unless new generation is constructed. For planning purposes, the critical piece of information is not when the IP3 unit is scheduled to retire, but rather when Entergy announces its intention, *or a final regulatory decision concerning the fate of the plants is made*. It is unlikely that a private market participant would commit capital and resources to the development of new resources without knowing with certainty if and when IPEC would retire. Similarly, a public or quasi-public entity cannot reasonably be expected to seek new sources of energy and capacity necessary to maintain reliability without definitive knowledge of IPEC's future status.⁷

Because time is of the essence, the Commission should review the Board's ruling now—especially given the uncertainty that already poses a tangible threat to private and public interests alike.

II. THE STAFF ALREADY HAS TAKEN A HARD LOOK AT ENTERGY'S SAMA ANALYSIS—NO FURTHER ENGINEERING COST ANALYSES ARE NEEDED

The Board's ruling requires Entergy to submit additional information on the estimated cost of implementing potentially cost-beneficial SAMAs, purportedly to provide the Staff with "sufficient information" to complete its hard look under NEPA and make an "informed decision" on Entergy's application.⁸ As the Staff correctly explains, its Final Supplemental Environmental Impact Statement ("FSEIS") already satisfies the Staff's NEPA obligations by thoroughly reviewing Entergy's implementation cost estimates and, based on that review, finding them to be reasonable.⁹ NEPA requires only that the NRC "provide a reasonable mitigation alternatives

⁶ Charles River Assocs., *Indian Point Energy Center Retirement Analysis* (Aug. 2, 2011), available at http://www.nyc.gov/html/dep/pdf/energy/final_report_d16322_2011-08-02.pdf.

⁷ *Id.* at 17 (emphasis added).

⁸ See LBP-11-17, slip op. at 15-17, 18.

⁹ For a detailed discussion of the manner in which Entergy prepared its SAMA implementation cost estimates, including supporting citations to the record, see pages 20-22 of the Applicant's Consolidated Memorandum in Opposition to New York State's Motion for Summary Disposition of Contention NYS-35/36 and in Support of Its Cross-Motion for Summary

analysis, containing reasonable estimates.”¹⁰ Thus, the Board’s view that detailed engineering project cost analyses must be performed and then evaluated by the Staff in its FSEIS lacks a legal basis. Indeed, in the *Pilgrim* proceeding, the Commission cited NEI 05-01 (the NRC-approved guidance on which Entergy’s SAMA analysis is based) for the notion that “detailed cost estimates often are not necessary to gauge the economic viability of a particular SAMA candidate.”¹¹

In the end, an “EIS need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation of the project.”¹² Entergy considered several hundred SAMA candidates and identified 22 of them as being potentially cost-beneficial through a process that has been carefully scrutinized by the NRC’s technical staff.¹³ As the Staff also correctly notes, neither the Board nor New York has provided any reason to conclude that further analysis will identify any *additional* SAMAs as cost-beneficial—the only relevant inquiry here.¹⁴

Furthermore, there is nothing remotely “uninformed” about the Staff’s actions.¹⁵ As codified in Part 51, the NRC already has determined that the probability-weighted consequences of

Disposition (Feb. 3, 2011). The Staff reviewed the bases for Entergy’s cost estimates and also compared the cost estimates to estimates developed previously for similar mitigation measures, including estimates developed as part of other licensees’ SAMA analyses. Where Entergy’s original implementation cost estimates appeared high, or revised cost estimates contained in its December 2009 revised SAMA analysis resulted in certain SAMAs becoming non-cost-beneficial, the Staff requested and obtained from Entergy additional information and justification for the values. See NUREG-1437, Supp. 38, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Vol. 3, App. G at G-34 to G-40 (Dec. 2010) (“FSEIS”).

¹⁰ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) CLI-10-22, 72 NRC ___, slip op. at 9 (Aug. 27, 2010) (internal quotation marks omitted).

¹¹ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC ___, slip op. at 39 n.151 (Mar. 26, 2010).

¹² *Lee v. U.S. Air Force*, 354 F.3d 1229, 1245 (10th Cir. 2004); see also *Pilgrim*, CLI-10-11, slip op. at 37 (stating that an EIS is not a “research document,” and that “while there ‘will always be more data that could be gathered,’ agencies ‘must have some discretion to draw the line and move forward with decisionmaking’”) (citing and quoting *Town of Winthrop v. FAA*, 535 F.3d 1, 11-13 (1st Cir. 2008)); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003) (“NRC adjudicatory hearings are not EIS editing sessions.”).

¹³ See FSEIS, Vol. 3, App. G at G-30, G-43 to G-44 (noting that initial set of 231 candidate SAMAs for IP2 and 237 candidate SAMAs for IP3 were identified, and identifying those specific SAMAs determined to be potentially cost-beneficial based on Entergy’s cost-benefit evaluations).

¹⁴ See *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) CLI-09-11, 69 NRC 529, 533 (2009) (“The ultimate concern here is whether any additional SAMA should have been identified as potentially cost-beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis.”).

¹⁵ LBP-11-17, slip op. at 17.

a severe accident are small for *all* plants.¹⁶ None of the cost-beneficial SAMAs cited by New York is necessary to protect the public health and safety or, in view of the NRC's generic analysis of severe accidents, to ensure that the consequences of severe accidents are small.¹⁷

III. THE BOARD'S RULING SIMPLY OVERLOOKS THE AUGMENTED LEGAL AND TECHNICAL EXPLANATIONS CONTAINED IN THE STAFF'S FSEIS

The Board avers that it is "left with no explanation at all" for why the Staff has decided not to require implementation of these cost-beneficial SAMAs.¹⁸ But the Board ignores the FSEIS's augmented explanation of why the implementation of cost-beneficial SAMAs is not a required condition for license renewal. As the Staff has explained both in prior pleadings and in its Answer, the FSEIS fully explains the legal and technical bases for the Staff's conclusion that the cost-beneficial SAMAs in question need not be implemented as a condition to license renewal.¹⁹

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Dated in Washington, D.C.
this 16th day of August 2011

¹⁶ 10 C.F.R. § 51.53(c)(3)(ii)(L); *see also id.* Pt. 51, Subpt. A, App. B, Tbl. B-1.

¹⁷ *See* FSEIS, Vol. 1, at 5-3 to 5-4, 5-11 to 5-12; NRC Staff Answer at 23-24; 10 C.F.R. § 50.109(a).

¹⁸ LBP-11-17, slip op. at 16.

¹⁹ *See* NRC Staff's (1) Cross-Motion for Summary Disposition, and (2) Response to New York State's Motion for Summary Disposition, of Contention NYS-35/36 (Severe Accident Mitigation Alternatives) at 12-28 (Feb. 7, 2011); NRC Staff Answer at 21-25.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC COMMISSION**

In the Matter of)	Docket Nos. 50-247-LR and
ENTERGY NUCLEAR OPERATIONS, INC.)	50-286-LR
(Indian Point Nuclear Generating Units 2 and 3))	
	August 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply to the NRC Staff's Answer to Entergy's Petition for Review of LBP-11-17" were served this 16th day of August, 2011, upon the persons listed below, by first class mail and e-mail as shown below.

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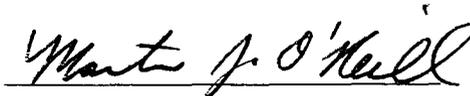
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