UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
BOSTON EDISON COMPANY and ENTERGY NUCLEAR GENERATION COMPANY	)	Docket No. 50-293
	)	
	)	(License No. DPR-35)
(Pilgrim Nuclear Power Station)	)	
	)	

ANSWER OF BOSTON EDISON COMPANY AND ENTERGY NUCLEAR GENERATION COMPANY TO PETITION FOR LEAVE TO INTERVENE AND SUMMARY RELIEF, OR IN THE ALTERNATIVE, REQUEST FOR A HEARING, OF THE MASSACHUSETTS ATTORNEY GENERAL

I. INTRODUCTION

In a filing dated February 16, 1999, the Massachusetts Attorney General ("Attorney General"), on behalf of the Commonwealth of Massachusetts, moved to intervene in the captioned proceeding and petitioned "for summary relief or, in the alternative, for a hearing."[1] The filing was submitted in response to the NRC's "Notice of Consideration of Approval of Transfer of Facility Operating License . . ." in the above docket published in the Federal Register on January 26, 1999 (64 Fed. Reg. 3,984). That notice reflected the December 21, 1998 request by Boston Edison Company ("Boston Edison") the owner of the Pilgrim Nuclear Power Station ("Pilgrim"), and Entergy Nuclear Generation Company ("Entergy Nu-

[1] "Motion of the Massachusetts Attorney General for Leave to Intervene and Petition for Summary Relief or, in the Alternative, for a Hearing," dated February 16, 1999 (hereinafter "Mass. Pet.").

clear") (collectively "Applicants") for authorization to transfer Boston Edison's ownership and license interests in Pilgrim to Entergy Nuclear.[2]

As set forth in this answer, the Applicants demonstrate that the Attorney General's petition should be denied for failure to submit a valid issue for hearing in accordance with the Commission's pleading requirements because:

1. The petition impermissibly attacks Commission rules and regulations by advocating stricter requirements than those imposed by its regulations.

2. The petition fails to set forth facts or expert opinion in support of its alleged issues, as required by NRC pleading requirements, its claims being based instead on speculation and conjecture.

3. The petition fails to provide information to show that a genuine dispute exists on a material issue of law or fact relevant to findings that the NRC must make to grant the application for license transfer.

II. BACKGROUND

On December 21, 1998, Boston Edison and Entergy Nuclear submitted their License Transfer Application requesting the Commission's consent to the transfer of Boston Edison's operating license and materials license for Pilgrim Nuclear Power Station to Entergy Nuclear. License App. at 1. The transfer is being undertaken by Boston Edison, pursuant to a purchase and sale agreement with Entergy Nuclear, as part of the divestiture of all of its generating assets pursuant to the restructuring of the electric utility industry in conformance with agreements with the regulatory authorities in Massachusetts.

To demonstrate reasonable assurance of funds necessary to cover the estimated operating costs of Pilgrim, the Applicants submitted estimates for total annual operating costs for

[2] Request for "Transfer of Facility Operating License and Materials License, and Proposed License Amendment," dated December 21, 1998 (hereinafter "License App.").

the first five years of Entergy Nuclear's ownership and the sources of funds to cover those costs, as called for by 10 CFR § 50.33(f)(2). License App. at 4-6. To satisfy the Commission's financial qualification regulations for newly-formed entities, 10 C.F.R. § 50.33(f)(3), the Applicants included information concerning Entergy Nuclear's relationship with its owner, Entergy Corporation, and Entergy Corporation's ability to meet its obligation to provide additional financial assurance of up to $50 million to Entergy Nuclear. License App. at 4, 6.

As part of the agreement to sell Pilgrim, Boston Edison will deposit funds into the decommissioning trust fund for the plant sufficient to prepay the decommissioning funding required for Pilgrim in accordance with NRC regulations. License App. at 8. Allowing for the regulatory authorized rate of return on the decommissioning trust funds, this amount will grow to an amount sufficient to decommission Pilgrim by the time of the expiration of the Pilgrim operating license. Id. at 9. Such prepayment of decommissioning obligations is specifically allowed for in the Commission's regulations. 10 C.F.R. § 50.75(e)(1).

There is no question that the December 21, 1998 request for authorization meets the NRC requirements in 10 CFR § 50.33(f) and § 50.75 concerning Entergy Nuclear's financial qualifications to pay operational costs and fund decommissioning for Pilgrim. Indeed, the Attorney General's petition concedes as much. See Mass. Pet. at 7.

III. LEGAL LIMITATIONS ON THE ADMISSION OF ISSUES

In order to be permitted to participate as a party in a licensing proceeding, a petitioner must submit at least one valid "issue" that meets the requirements of 10 C.F.R. § 2.1306(b)(2). For a petitioner's issues to be admitted, the petitioner must:

> (i) "Demonstrate that such issues are within the scope of the proceeding on the license transfer application,"

> (ii) "Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,"
>
> (iii) "Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and"
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> (iv) "Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact."

Id. The failure of an issue to comply with any one of these requirements is grounds for dismissing the issue.[3]

The requirements for the admission of issues under Subpart M are essentially the same as the Subpart G requirements for the admission of contentions. Compare 10 C.F.R. § 2.714(b)(2). Both sets of requirements serve to maintain the efficiency of proceedings by eliminating litigation over issues that simply have no bearing on the Commission's ultimate decision under its regulations. As stated by the Appeal Board in Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), the purpose of 10 C.F.R. § 2.714 is to ensure "that the proposed issues are proper for adjudication in the particular proceeding." The same consideration applies with equal or greater force in proceedings under Subpart M which was promulgated specifically to increase the efficiency and speed of license transfer proceedings. See Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,722 (1998). Therefore,

[3] See Boston Edison Company, Pilgrim Nuclear Power Station, Notice of Consideration of Approval of Transfer of Facility Operating License and Materials License and Issuance of Conforming Amendment, and Opportunity for a Hearing, 63 Fed. Reg. 68,801, 68,802 (1998) ("requests [for a hearing] must comply with the requirements set forth in 10 C.F.R. § 2.1306"); 10 C.F.R. § 2.1306(b) (requirements are mandatory).

precedent under Subpart G on the admission of contentions should generally apply to Subpart M proceedings regarding the admission of issues.

Directly relevant to considering the petition here are the last two requirements of 10 C.F.R. § 2.1306(b)(2) as well as the second requirement as it relates to the general proscription, discussed first below, that bars challenges in licensing proceedings to established NRC rules and regulations.

A. Issues May Not Challenge Statutory or Regulatory Requirements

Commission regulations and precedent establish that issues put forth for consideration may not attack Commission rules or regulations. This requirement is subsumed in 10 C.F.R. § 2.1306(b)(2)(ii) of Subpart M, which states expressly that a petitioner's issues must be "relevant to the findings the NRC must make to grant the application for license transfer," 10 C.F.R. 2.1306(b)(2)(ii) (emphasis added). Subpart G similarly requires that contentions or issues must be "material" to the granting or denial of a license application -- that is, their "resolution . . . would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. 33,168, 33,172 (1989) (10 C.F.R. Part 2, Statements of Consideration) (emphasis added). This requirement of materiality precludes the litigation of arguments over what NRC requirements or policy ought to be, for such arguments are irrelevant to whether an application meets the existing requirements for the issuance of the license. See Peach Bottom, ALAB-216, 8 AEC at 21, n.33 (quoting Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 401 (1973)).[4]

[4] Section 2.1329(b) states that "[t]he sole ground for a waiver [of a rule or regulation] shall be that, because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." (Emphasis added). This is a high standard. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 238-39 (1998).

Therefore, Commission precedent has long held that a licensing contention which collaterally attacks a Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 89 (1974). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." Peach Bottom, ALAB-216, 8 AEC at 20. Similarly, "licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." Douglas Point, ALAB-218, 8 AEC at 85.[5] This policy avoids wasteful duplication of effort, id., and also avoids regulatory inconsistency.

Thus, a contention which "advocate[s] stricter requirements than those imposed by the regulations" is "an impermissible collateral attack on the Commission's rules" and must be rejected.[6] Likewise, contentions may not challenge a generic determination established by Commission rulemaking.[7] As stated recently in this regard by the Commission in conjunction with the decommissioning of Yankee Rowe:

> Despite the NRC's 1988 generic review of the DECON-SAFSTOR choice, Petitioners seek to revisit that choice case-by-case, basing their objections on essentially the same factors that the Commission weighed when concluding that either SAFSTOR or DECON was a reasonable decommissioning choice. But Petitioners' approach unreasonably "would require

[5] Accord Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 85-86 (1985).

[6] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); accord Private Fuel Storage, LBP-98-7, 47 NRC at 179; see also Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991).

[7] Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plants, Units 1 and 2), LBP-93-1, 37 NRC 5, 30 (1993).

> the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding. Significantly, the Supreme Court has found agency reliance on prior determinations to be perfectly acceptable, even when the statute before it plainly calls for individualized hearings and findings."

Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996) (citations, quotations and footnotes omitted).

B. Issues Must Be Supported by Sufficient Factual Basis

Subpart M also requires a petitioner seeking to intervene to:

> Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues.

10 C.F.R. § 2.1306(b)(2)(iii). This requirement is virtually identical to that of section 2.714(b)(2)(ii) of Subpart G.

Under these rules, a petitioner may not file vague, unparticularized contentions or issues. Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Station, Units 1 and 2), CLI-98-25, 48 NRC __, slip op. at 25 (1998). Nor may it base a contention on mere speculation, see Yankee Nuclear, CLI-96-7, 43 NRC at 267, or a bald, conclusory allegation. Private Fuel Storage, supra note 4, LBP-98-7, 47 NRC at 180 (citing Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980)). Thus, a statement "that simply alleges that some matter ought to be considered" is also not sufficient. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993), review declined, CLI-94-2, 39 NRC 91 (1994).

Furthermore, the mere citation of an alleged factual basis for a contention or issue is not sufficient. Rather, a petitioner is obligated "to provide the [technical] analyses and expert

opinion" or other information "showing why its bases support its contention." Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 284, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995). Where a petitioner has failed to do so, "the licensing board may not make factual inferences on [the] petitioner's behalf." Id. (citing Palo Verde, supra note 6, CLI-91-12, 34 NRC 149). Similarly, expert opinion alleged to provide the basis for a contention "is not to [be] accept[ed] uncritically:"

> [A]n expert opinion that merely states a conclusion (e.g., the application is "deficient," "inadequate," or "wrong") without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention.

Private Fuel Storage, supra note 4, LBP-98-7, 47 NRC at 181.

C. Issues Must Be Supported by Sufficient Information to Show that a Material Dispute Exists with the Applicant

Subpart M requires a petitioner to "[p]rovide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.1306(b)(2)(iv). This requirement is identical to that of section 2.714(b)(2)(iii) of Subpart G. Under Subpart G, an intervenor is required to " state the applicant's position [in the application] and the petitioner's opposing view." 54 Fed. Reg. at 33,170. If the petitioner does not believe the application addresses a relevant issue, the petitioner is "to explain why the application is deficient." Id.; see also Palo Verde, CLI-91-12, 34 NRC at 155-56.

Thus, a contention that does not directly controvert a position taken in the application is subject to dismissal, Private Fuel Storage, LBP-98-7, 47 NRC at 181; see Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC

370, 384 (1992), as is a contention that mistakenly claims that a licensee failed to address a relevant issue in the application. Private Fuel Storage, LBP-98-7, 47 NRC at 181. Further, an allegation that some aspect of an application is "inadequate" or "unacceptable" must be supported by facts and a reasoned statement of why the application is unacceptable. Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 512 (1990). A contention must include facts or documents that produce doubt about the adequacy of a specific portion of the application or that provide supporting reasons that tend to show some specific omission from the application. Id. at 521 n.12.

IV. THE ATTORNEY GENERAL'S ISSUES FAIL TO MEET NRC PLEADING REQUIREMENTS

The Attorney General's petition seeks to raise two issues in accordance with the requirements of 10 C.F.R. § 2.1306. These are "whether the Commission, under the unique facts of this case and the state of electric power restructuring in New England, may appropriately find that the proposed licensee, Entergy [Nuclear], is likely to have adequate financial resources to ensure: 1) the continued safe operation; and 2) the safe decommissioning of the Pilgrim unit if the costs exceed estimates." Mass. Pet. at 3. This delineation of the purported issues is, however, no more than a broad restatement of the Commission's regulatory requirements and does not provide a concise statement of the specific challenges which the Attorney General seeks to have litigated.[8] The Attorney General does go on in its petition to raise vague, generalized claims – insufficiently supported by fact or expert opinion – con-

[8] Contentions are required to be reasonably specific to put the other parties on notice as to what issues they will have to defend against or oppose. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). Therefore, typically, contentions in NRC licensing proceedings state directly the position of the petitioner with respect to the issues raised by the contention, unlike the Attorney General's statement of the issues here, quoted above. See, e.g., Private Fuel Storage, supra, LBP-98-7, 47 NRC 142.

cerning the adequacy of Entergy Nuclear's five year cost-revenue projections and decommissioning prefunding. The Attorney General's claims with respect to each must be dismissed, however, for 1) improperly challenging NRC regulatory requirements, 2) lack of adequate factual basis, 10 C.F.R. § 2.1306(b)(2)(iii), and 3) failure to establish that a genuine dispute exists on a material issue of law or fact relevant to the granting or denial of the license transfer application, 10 C.F.R. § 2.1306(b)(2)(iv).

A. Alleged Inadequacy of Financial Qualifications for Operations

The Attorney General claims that the Commission is in no position to find "that Entergy [Nuclear] is likely to have the financial capability to meet the ongoing capital and expense obligations associated with the ownership of Pilgrim." Mass. Pet. at 6-7. Entergy Nuclear has, however, demonstrated its financial qualifications, per the Commission's regulations, as an independent entity, and the Attorney General has provided no basis to challenge Entergy Nuclear's demonstration of financial qualifications. In the December 21, 1998 Application, the Applicants set forth the expenses associated with the operation of Pilgrim for the first five years of Entergy Nuclear's ownership and further identified the sources of revenues that would be used to cover these costs. License App. at 6. This showing was made in accordance with the express provision of 10 C.F.R. § 50.33(f)(2) which requires a non-"electric utility" license applicant to demonstrate that it possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs. Specifically:

> The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs.

10 C.F.R. § 50.33(f)(2).[9]

The Attorney General readily acknowledges that "cost and revenue projections," such as those provided by the Applicants, "are alternative means of satisfying financial qualification for entities that do not qualify as 'electric utilities' under 10 C.F.R. § 50.2." Mass. Pet. at 7. But despite its acceptability under NRC regulations, the Attorney General goes on to claim that "such analyses may not be adequate here." Id. Therefore, this issue must be dismissed as an impermissible collateral attack on Commission regulations for advocating stricter requirements than those imposed by the regulations. Indeed, the Commission has determined after thoroughly considering the impact of restructuring on its financial qualification requirements that "its regulatory framework is generally sufficient, at this time, to address restructurings and reorganizations that will likely arise as a result of electric utility deregulation."[10] The Attorney General's petition ignores both the provisions of the regulations and the Commission's determination that its regulations are sufficient to deal with electric utility restructuring.[11]

Specifically, the regulations, as reflected above, provide for non-"electric utility" applicants to establish financial qualifications by five year cost and revenue projections, such as

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[9] Furthermore, to satisfy the Commission's financial qualification regulations for newly-formed entities, 10 C.F.R. § 50.33(f)(3), the Applicants included information concerning Entergy Nuclear's relationship with its owner, Entergy Corporation. Specifically, the Application provides that Entergy Nuclear will provide at the time of closing "additional financial assurance up to fifty million dollars, either through a parent, associate or affiliate company guarantee, letter of credit or similar financial arrangement," which funds would be available, if necessary, to meet Entergy Nuclear's "expenses and obligations to safely operate and maintain the plant." License App. at 6; see also id. at 4.

[10] See Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,076 (1997).

[11] Indeed, the entire tenor of the Attorney General's petition, that Entergy Nuclear is not financially qualified because it is not backed by state rate setting authorities, challenges the very premise underlying the restructuring of the electric utility industry, which presumes the eventual demise of traditional cost-of-service ratemaking, and its acceptance could essentially preclude nuclear plants from such restructuring.

those provided by the Applicants. This interpretation of the regulation is confirmed by the NRC's recently approved Standard Review Plan.[12] Moreover, the Commission has recently followed this approach in finding that Great Bay Power Corporation is financially qualified to hold an ownership interest in the Seabrook Plant.[13] Thus, NRC regulations, guidelines and practice all point to the fact that cost and revenue projections such as those provided by the Applicants are sufficient to establish financial qualifications for operations. By seeking to require a greater showing here, the Attorney General is collaterally attacking NRC regulations, contrary to the long line of NRC precedent discussed in Section III.A above. Accordingly, this proposed issue must be dismissed.

Moreover, the Attorney General provides nothing more than pure speculation to support his claim that the financial showing provided by the Applicants is inadequate. He states that "given uncertainties in the competitive New England generation market, such analyses [as those provided by the Applicants] may not be adequate here." Mass. Pet. at 7 (emphasis added). The Attorney General, however, provides no facts or expert opinion to support his claim. He simply asserts that "[t]he electric power market in New England is in the midst of

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[12] In an SRM dated December 9, 1998, the Commission approved issuance of the "Standard Review Plan on Power Licensee Financial Qualifications and Decommissioning Funding Assurance." See "Staff Requirements -- SECY-98-153 -- Update of Issues Related to Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry," Dec. 9. 1998. Although not yet released in final form, the Draft SRP expressly provides for the submission of five-year cost-revenue projections which constitute one of several acceptable methods by which non-"electric utility" applicants can demonstrate financial qualifications under 10 C.F.R. § 50.33(f)(2). See Draft SRP at 9-10, attached to SECY-98-153, "Update of Issues Related to Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry," June 29, 1998. The December 9, 1998 SRM did not make any substantive change to these provisions of the Draft SRP.

[13] North Atlantic Energy Services Corporation and Great Bay Power Corporation (Seabrook Station, Unit No. 1), Docket No. 50-443, Exemption Order at 3-4 (Jan. 22, 1997), 62 Fed. Reg. 5,492, 5,493 (1997); see also North Atlantic Energy Services Corporation and Great Bay Power Corporation (Seabrook Station, Unit No. 1), Docket No. 50-443, Exemption Order at 5 (July 23, 1997), 62 Fed. Reg. 40,549, 40,550 (1997).

profound change," id. at 7, but never explains how the changes in the market will affect Entergy Nuclear or Pilgrim. [14]

The affidavit accompanying the Attorney General's petition also asserts that the premature retirement of four nuclear units in New England indicates that Pilgrim "will face increasing competitive pressure and may not operate through the term of [its] license[]" and that "[t]his increases the likelihood that a deficiency may exist at some time in the future for Entergy [Nuclear's] share of operating expenses for Pilgrim." Affidavit of Timothy Newhard, ¶ 11 (hereinafter "Newhard Aff."). But this is not sufficient to show a material dispute with the Applicants even assuming that the hurdle of impermissibly challenging Commission regulation could be overcome. 10 C.F.R. § 2.1306(b)(2)(iv). First, Mr. Newhard's claim that Pilgrim will suffer the same fate as the prematurely retired nuclear units in New England is an invalid analogy, in that he does not explain in any way how Pilgrim is like those units. If a petitioner contends that an application is inadequate on the basis of an analogy between the applicant's facility and a proposed benchmark facility, the petitioner must establish that the benchmark is valid to show that the analogy raises a genuine dispute on a material issue of fact with the applicant. Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 32 (1996); Yankee Nuclear, CLI-96-7, 43 NRC at 267 (petitioner must show "logical relationship" with alleged analogy). Such was clearly not done here.

[14] The affidavit accompanying the petition echoes the assertion that the New England power market is "in the midst of profound change," Affidavit of Timothy Newhard, at ¶ 9, but it does not even claim that the change will affect Pilgrim. Id. An expert opinion that does not even assert a deficiency in the application, Private Fuel Storage, LBP-98-7, 47 NRC at 181; see Comanche Peak, LBP-92-37, 36 NRC at 384, let alone provide a "reasoned basis or explanation for [an implied] conclusion," Private Fuel Storage, supra, cannot serve as a basis for an admissible issue.

Second, Mr. Newhard's assertion is merely conclusory; he jumps from his statement regarding the prematurely retired units to his claim that "a deficiency may exist at some time in the future for Entergy [Nuclear's] share of operating expenses . . . for Pilgrim," Newhard Aff. at ¶ 11, without providing any analysis, logic, or facts to support his conclusion and without even addressing the Applicants' cost and revenue projections. The mere citation of an alleged factual basis in a petition and a supporting affidavit does not suffice. The petitioner must provide information and analyses to show why its bases support its contention. Georgia Tech, LBP-95-6, 41 NRC at 284; Private Fuel Storage, LBP-98-7, 47 NRC at 181. Conclusory statements, even by an expert, are similarly insufficient. Id. Moreover, contentions that do not even controvert the facts or analysis provided by an application are inadmissible as well. Id.; see also Comanche Peak, LBP-92-37, 36 NRC at 384.

In short, the Attorney General's claim that the cost-revenue projections provided by the Applicants are inadequate to satisfy the Commission's regulations because of changes in the New England power market is wholly speculative and must be dismissed. See Yankee Nuclear, CLI-96-7, 43 NRC at 267; Private Fuel Storage, LBP-98-7, 47 NRC at 180-81. The affidavit's claim that the early retirement of other nuclear units in New England makes the application's cost-revenue projections for Pilgrim inadequate is also speculative and unsupported by facts or analysis. The affidavit has failed to provide sufficient information to show that a genuine dispute exists on a material issue of law or fact relevant to findings that the NRC must make to grant the license transfer application. 10 C.F.R. § 2.1306(b)(2)(iv). Moreover, the Attorney General's assertion that the Applicants must provide more than is called for by the regulations is a collateral challenge to the regulations which raises issues not

"relevant to the findings the NRC must make to grant the application for a license transfer." 10 C.F.R. § 2.1306(b)(2)(ii). For all these reasons, this issue must be dismissed.

B. Alleged Inadequacy of Decommissioning Funding

The Attorney General also claims that the Commission "is in no position to find that Entergy [Nuclear] is capable of discharging its responsibility for the decommissioning of Pilgrim" in that, according to the Attorney General, decommissioning prefunding is not sufficient to assure the availability of decommissioning funding in this case. Mass. Pet. at 6. In support of his position, the Attorney General offers two basic arguments: (i) decommissioning costs could increase faster than expected and (ii) Pilgrim might shut down early. Newhard Aff. at ¶ 10; see Mass Pet. at 6. The Attorney General and his affiant, however, provide no facts, analysis, or explanation to support their conclusory arguments, which moreover represent an impermissible collateral attack on the NRC's decommissioning prefunding regulations.

1. Impermissible Challenge to NRC Regulations

The Attorney General's claim that prefunding will be an insufficient means to meet Entergy Nuclear's decommissioning obligations constitutes a direct challenge to the decommissioning funding regulations the NRC has imposed on non-rate regulated licensees to ensure adequate funding. Compare 10 C.F.R. § 50.75(e)(1)(i) with 10 C.F.R. § 50.75(e)(1)(ii) (external sinking fund available only to licensees with guaranteed income streams). The NRC's decommissioning regulations identify the minimum amount of decommissioning funding required to show reasonable assurance that sufficient funds will be available for decommissioning, 10 C.F.R. §§ 50.75(b)(3) and (c), and expressly provide that prepayment is one of the "acceptable" methods of providing this funding. 10 C.F.R. §§ 50.75(b)(3) and

(e)(1)(i). Indeed, prefunding has long been recognized by the Commission as a more stringent requirement than setting aside monies over time from ratepayers of regulated electric utilities.[15]

As part of the sale of Pilgrim, Boston Edison will prepay the balance of its decommissioning obligation into the Pilgrim Decommissioning Trust and Provisional Trust such that the amount in the trusts will grow by the time the Pilgrim license expires in 2012 to an amount that will equal or exceed the NRC's minimum requirement, as allowed under the Commission's new decommissioning funding rules, 10 C.F.R. § 50.75(e)(1)(i). License App. at 8-10. The Attorney General does not take issue with the fact that this prepayment of funds is in accordance with the NRC's regulatory provisions providing for the prepayment of decommissioning funds. In fact, he specifically acknowledges that NRC regulations provide that "decommissioning prefunding" is an "alternative means" of satisfying NRC decommission funding requirements. Mass. Pet. at 7. Nevertheless, the Attorney General maintains that "[a]bsent an inquiry into the financial situation likely to be confronting Entergy [Nuclear] some ten or twenty years hence, the Commission . . . is in no position to find that Entergy [Nuclear] is capable of discharging its responsibility for the decommissioning of Pilgrim." Mass. Pet. at 6. Thus the Attorney General's claim is simply a disagreement with current Commission regulations and cannot serve as the basis for an admissible issue in a license transfer hearing. See Section III.A, supra.

[15] E.g., Regulatory Analysis on Decommissioning Financial Assurance Implementation Requirements for Nuclear Power Reactors, in SECY-98-164 (July 2, 1998), at 34-35; see also Policy Options for Nuclear Power Reactor Financial Qualifications in Response to Restructuring of the Electric Utility Industry, SECY-97-253 (October 24, 1997), at 2-3.

Further, the concerns raised by the Attorney General (and in the Newhard affidavit) with respect to the general adequacy of decommissioning cost estimates and premature plant shutdown have been expressly addressed by the Commission. The 1986 baseline decommissioning cost estimates set forth in 10 C.F.R. § 50.75(c) as the basis for calculating the NRC's required minimum for decommissioning funding includes a 25% contingency factor in order to account for uncertainty and unforeseen changes in costs.[16] The NRC also requires its licensees to adjust their decommissioning cost estimates annually and to file biennial reports with the NRC to show that their plant decommissioning funds are likely to be sufficient at the time of decommissioning. 10 C.F.R. §§ 50.75(b) and (f)(1).

Further, the NRC specifically considered the possibility that power plants might shut down early when it promulgated its new decommissioning funding regulations. 62 Fed. Reg. 47,588, 47,591-92 (1998) (Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, Proposed Rule). The Commission rejected a proposed alternative requiring accelerated funding for utility licensees to cover the possibility of early shutdown, but stated that non-rate regulated licensees would, in effect, "have to 'accelerate' funding by getting 'up-front' forms of financial assurance." Id. at 47,592. The Commission was also aware that some plants had not operated for their full 40-year license terms but nonetheless thought its current regulations governing plant shutdowns, 10 C.F.R. § 50.82, "[struck] the best balance between level of assurance and cost." Id. Thus, under the regulations, the possibility of early shutdown is adequately addressed by non-rate regulated licensee up-front decommissioning

[16] See Report on Waste Disposal Charges, Changes in Decommissioning Waste Disposal Costs at Low-Level Waste Burial Facilities, NUREG-1307, Rev. 8 (December 1998) at 4, Table 3.1 This table reflects that a 25% contingency is included in the January 1986 costs of $105 million (for the reference PWR) and $135 million (for the reference BWR) set forth in the regulations at 10 C.F.R. § 50.75(c).

funding.[17] In fact, the regulations put non-rate regulated licensees like Entergy Nuclear, which have prepaid their decommissioning obligations, in a stronger position regarding potential early shutdown than rate regulated licensees making annual deposits into an external sinking fund.[18]

In short, the Commission has established prepayment as one of the acceptable methods for providing reasonable assurance of decommissioning funding and, in the course of doing so, has made policy determinations concerning the specific concerns raised by the Attorney General. Therefore, under the long line of precedent discussed in Section III.A, supra, the Attorney General cannot use this license transfer proceeding as a forum to challenge the regulation allowing prepayment or the related policy determinations. Hence, this issue must be dismissed.

2. Failure to Provide a Sufficient Factual Basis or to Show a Material Dispute

Wholly apart from being an impermissible challenge to NRC regulations, this issue must also be dismissed for failure to provide a factual basis or sufficient information to show a genuine dispute with the Applicants on a material issue of law or fact. 10 C.F.R. § 2.1306(b)(2)(iii) & (iv). For a petitioner's challenge to a licensee's decommissioning cost estimate to be admissible, the petitioner must not only provide a factual basis to challenge the adequacy of the estimate but a sufficient factual basis to claim as well that "there is not rea-

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[17] See also 63 Fed. Reg. 50,465, 50,470 (1998) (Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, Final Rule) (rejecting "requiring accelerated funding for all plants . . . to cover the possibility of premature shutdown at some plants").

[18] As discussed infra, even if Pilgrim were to shut down early, decommissioning need not commence at that time and the prepayment for decommissioning would continue to grow to fully cover – without any additional payments – all of Pilgrim's decommissioning costs. Such would not be the case for plants whose decommissioning obligations are not prepaid.

sonable assurance that the amount will be paid." Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996); see also Yankee Nuclear, CLI-96-7, 43 NRC at 260. Here, the Attorney General has done neither.

First, the Attorney General and his affiant, Mr. Newhard, provide no explanation to support the allegation in the affidavit that actual decommissioning costs may be higher than the Applicants' estimates of those costs. The affidavit merely speculates that "[i]n the event that . . . costs escalate faster than expected, a deficiency could exist," Newhard Aff. at ¶ 10, and concludes that "[i]t is not evident at this time that Entergy [Nuclear] would have the ability to fund such a deficiency." Id. Nowhere are there any facts or explanation to show why the Applicants' estimate is too low. In fact, the proposed decommissioning prefunding meets the level of funding required for Pilgrim based on the NRC's cost formula set forth in the regulations at 10 C.F.R. § 50.75(c), see License App. at 8-9, which as discussed includes a 25% contingency factor to account for uncertainty and unforeseen changes in costs.[19] If a petitioner asserts that an application is deficient, it must indicate why. Turkey Point, LBP-90-16, 31 NRC at 512. Even an expert opinion drawing a conclusion must "provid[e] a reasoned basis or explanation for that conclusion" to enable the Commission "to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention." See Private Fuel Storage, LBP-98-7, 47 NRC at 181. Neither the Attorney General nor Mr. Newhard has done so here,[20] so this issue must be dismissed.

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[19] Moreover, the NRC recently issued a revision to NUREG-1307 showing that the cost of low level waste disposal resulting from decommissioning might be decreased for a plant the size of Pilgrim by as much as $187 million. See NUREG-1307 at 2, 5; 10 C.F.R. § 50.75(c). Thus, in fact, the prefunding commitment in the Boston Edison/Entergy Nuclear transaction is highly conservative.

[20] Moreover, other than describing Mr. Newhard as a "financial analyst" for the Office of the Attorney General, the affidavit provides no indication as to the affiant's expert qualifications or credentials with respect to the issues here.

In addition to the foregoing, the Attorney General has not provided any factual basis whatsoever to show a lack of reasonable assurance that Entergy Nuclear would pay any shortfall should the current estimate prove low at some later date. As also discussed above, the NRC requires licensees to adjust their decommissioning cost estimates annually and to file biennial reports with the NRC to show that the plant's decommissioning fund is likely to be sufficient at the time of decommissioning. In short, the Attorney General's assertion that the current cost estimate is inadequate as a basis for prepayment is utter speculation that does not began to approach the Commission's standard for challenging decommissioning funding estimates. See Yankee Nuclear, CLI-96-1, 43 NRC at 9; Yankee Nuclear, CLI-96-7, 43 NRC at 260, 267. Hence this issue is patently inadmissible.

Further, Mr. Newhard's allusion in his affidavit to the possibility that Pilgrim might shut down early, Newhard Aff. at ¶¶ 8, 10-11, also fails to provide sufficient information to show a material dispute with the Applicants. 10 C.F.R. § 2.1306(b)(2)(iii) and (iv). Mr. Newhard provides speculative analogies with other nuclear plants to suggest that Pilgrim might shut down early and that New England is somehow to be distinguished from other parts of the country. But Mr. Newhard presents no specific facts or even a specific opinion concerning Pilgrim to suggest that it will shut down early. He states only that four nuclear units in New England -- each of which had associated costly regulatory compliance problems -- have been shut down prematurely, but he does not demonstrate in any way (aside from being located in New England) that Pilgrim is like any of those plants. Newhard Aff. at ¶¶ 8, 10-11.[21] If a petitioner contends that an application is inadequate on the basis of an analogy

[21] As an aside, four other nuclear units have already applied for license extensions and others are preparing such applications. See, e.g., Calvert Cliffs, supra, CLI-98-25, 48 NRC __; Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC __ (1998); Wayne Barber, Nuclear Key to Utility Group's Future, Southern Says in Talks on Renewal, Inside NRC, August 31, 1998, at 12.

between the applicant's facility and a proposed benchmark facility, the petitioner must establish that the benchmark is valid. Yankee Nuclear, LBP-96-15, 44 NRC at 32; Yankee Nuclear, CLI-96-7, 43 NRC at 267 (petitioner must show "logical relationship" with alleged analogy). Mr. Newhard has not come close here, in that he has not even made a factual comparison between Pilgrim and the shutdown plants. Again Mr. Newhard has not provided a "reasoned basis or explanation for [his] conclusion," regarding Pilgrim. Private Fuel Storage, LBP-98-7, 47 NRC at 181. Hence, this speculative claim must be dismissed.

Thus, the Attorney General's claim regarding early shutdown is again entirely speculative, see Yankee Nuclear, CLI-96-7, 43 NRC at 267, and does not show a lack of reasonable assurance that the required amount will be paid. See Yankee Nuclear, CLI-96-1, 43 NRC at 9. Moreover, even if Pilgrim were to shut down early, decommissioning need not commence at that time,[22] and the decommissioning fund could continue to grow and be available for any decommissioning that takes place after 2012. In this regard, the NRC regulations expressly allow the credit for projected earnings using a 2 percent annual real rate of return "through the projected decommissioning period." 10 C.F.R. § 50.75(e)(1)(i). Hence, the Attorney General's claim that Entergy Nuclear might not meet its decommissioning funding obligations -- despite its full compliance with NRC regulations -- is based on groundless speculation and must be dismissed.

V. THE ATTORNEY GENERAL'S REQUEST FOR SUMMARY RELIEF MUST BE DENIED

In lieu of acting on its request for a hearing – for which, as shown above, there is no basis – the Attorney General asks for summary relief which in his view would obviate any

[22] Decommissioning must be completed within 60 years of permanent shutdown, i.e., by 2059 if Pilgrim were to shut down today. 10 C.F.R. § 50.82(a)(3).

need for a hearing. The relief that he requests is for the Commission to approve the license transfer "only on the condition that Entergy Corporation, the parent company, agrees to remain contingently responsible for required safety and decommissioning expenditures in the event of default by Entergy [Nuclear]." Mass. Pet. at 8. There is no basis for the granting of such relief and the Commission should deny it outright.

The Attorney General suggests no legal or regulatory basis for his request, and there is none. In effect, despite his protestations to the contrary, id. at 7, the Attorney General is looking for an ironclad guarantee of Entergy Nuclear's funding of its prospective financial obligations for the Pilgrim plant. He seeks such a guarantee by Entergy Corporation "to assure . . . that existing protections associated with being a rate-regulated "electric utility" ([Boston Edison's] circumstance) will not be eliminated." Id. at 8-9. However, as recognized by the Commission in Yankee Nuclear, CLI-96-7, 43 NRC at 262, the NRC regulation requiring reasonable assurance of decommissioning funds "does not contemplate" an "ironclad" or "absolute guarantee of such funds."[23] Rather, the "regulation was intended only to require 'reasonable assurance of funds for decommissioning.'" Id. (emphasis in original). Similarly, the showing required for establishing financial qualifications under 10 C.F.R. § 50.33(f) is one of "reasonable assurance," not "absolute certainty" or assurance "beyond doubt." 10 C.F.R. § 50.33(f)(1) and (2); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 18 (1988) (quoting Coalition for the Environment v. NRC, 795 F.2d 168, 175 (D.C. Cir. 1986)). Furthermore, NRC regulations simply do not require that licensees be rate-regulated utilities. See 10 C.F.R. §§ 50.33(f),

[23] In point of fact, prepayment as would occur in conjunction with the proposed transfer, would provide greater assurance than reliance on future payments, even if made by a rate-regulated electric utility, as discussed earlier.

50.75(e)(1)(i). The regulations require that prospective licensees demonstrate their financial qualifications through the specific measures which the rules describe. Entergy Nuclear has made that demonstration. Thus, the Attorney General's requested relief is an attempt to challenge, through this license transfer proceeding, NRC policy and requirements concerning financial qualifications and decommissioning funding. Such is not permissible under long-standing NRC case precedent. Peach Bottom, ALAB-216, 8 AEC at 21 n.33; McGuire, ALAB-128, 6 AEC at 401.

CONCLUSION

In consideration of the foregoing, the Applicants respectfully request the Commission to deny the Attorney General's petition for leave to intervene and for summary relief, or in the alternative, request for a hearing, in that the Attorney General has failed to submit a valid issue in accordance with the pleading requirements of 10 C.F.R. § 2.1306(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Answer of Boston Edison Company and Entergy Nuclear Generation Company to Petition for Leave to Intervene and Summary Relief, or in the Alternative, Request for a Hearing, of the Massachusetts Attorney General, were served upon the persons listed below by e-mail, with a conforming copy deposited in the U.S. mail, first class, postage prepaid, this 26th day of February, 1999.

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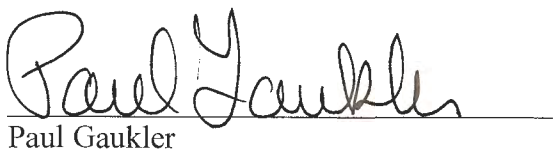

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