

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-10-30

MEMORANDUM AND ORDER

I. INTRODUCTION

In separate petitions before us, Applicant Entergy Nuclear Operations, Inc. (Entergy) and the NRC Staff seek interlocutory review of the Atomic Safety and Licensing Board decision LBP-10-13.¹ The Board's decision admitted two new and two amended contentions filed by the State of New York. Entergy and the Staff seek review of LBP-10-13 only to the extent that the Board admitted the new contentions, now consolidated as contention NYS-35/36. New York and the

¹ *Applicant's Petition for Interlocutory Review of LBP-10-13* (July 15, 2010) (Entergy Petition); *NRC Staff's Petition for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13)* (July 15, 2010) (Staff Petition). See also LBP-10-13, 71 NRC ____ (June 30, 2010) (slip op.).

State of Connecticut oppose the petitions.² As outlined further below, we deny the petitions because they do not meet the interlocutory review standard.

II. BACKGROUND

Pursuant to NRC regulations, Entergy's Environmental Report for the Indian Point license renewal application included a Severe Accident Mitigation Alternatives (SAMA) analysis, outlining the costs and benefits of potential mitigation measures to reduce severe accident risk or consequences.³ In response to Staff requests for additional information, Entergy provided clarifications and revisions of the analysis.⁴ In November 2009, Entergy acknowledged in a letter to the Staff that there was a discrepancy in the wind direction inputs to the code used for the SAMA analysis.⁵ Entergy therefore committed to correct the wind direction inputs and accordingly "re-analyze the SAMAs for both units," including revising the estimates of offsite population dose and offsite economic costs.⁶ Shortly thereafter, Entergy submitted its reanalysis with the corrected wind direction inputs.⁷

² *The State of New York's and the State of Connecticut's Combined Reply to Entergy and NRC Staff Petitions for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting the State of New York's Contentions 35 and 36 (LBP-10-13)* (July 26, 2010).

³ See 10 C.F.R. § 51.53(c)(3)(ii)(L); Applicant's Environmental Report, Section 4.21 & Attachment E.

⁴ See Reply to Request for Additional Information Regarding License Renewal Application – Severe Accident Mitigation Alternatives Analysis (Feb. 5, 2008) (ADAMS accession no. ML080420264); Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, Supplemental Reply to Request for Additional Information Regarding License Renewal Application – Severe Accident Mitigation Alternatives Analysis (May 22, 2008) (ML081490336).

⁵ See Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, Entergy Nuclear Operations Inc., Telephone Conference Call Regarding Met Tower Data for SAMA Analysis (Nov. 16, 2009) (ML093340049).

⁶ *Id.* at 1.

⁷ Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC, License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data (Dec. 11, 2009) (ML093580089) (December 2009 Reanalysis).

Subsequently, New York submitted two new contentions, NYS-35 and NYS-36, challenging Entergy's December 2009 Reanalysis.⁸ Both contentions claimed that the revised SAMA analysis violates the National Environmental Policy Act (NEPA), the President's Council on Environmental Quality's regulations, the NRC SAMA regulation, or federal case law.⁹

NYS-35 claimed that Entergy has not sufficiently completed the cost-benefit analysis for nine specific mitigation measures – or “SAMAs” – identified in the December 2009 Reanalysis as “potentially cost-beneficial.”¹⁰ NYS-35 centered on Entergy's stated intention to conduct an additional analysis – an “engineering project” cost-benefit analysis – to consider further the costs and benefits of SAMAs currently identified as “potentially” cost-beneficial.¹¹ New York argued that without completing the “engineering project” cost-benefit analysis to determine ultimately which, if any, of these nine SAMAs are “finally determined to be cost-effective,” the December 2009 Reanalysis does not satisfy NEPA and related environmental regulations.¹² As proffered, NYS-35 additionally claimed that any of these SAMAs ultimately found “sufficiently cost-effective[] must be added as license conditions before a new and extended operating license can be issued.”¹³

⁸ See *State of New York's New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives Reanalysis* (Mar. 11, 2010) (New Contentions) at 13-50. See also *State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives* (Mar. 11, 2010). In addition to the new contentions, NYS-35 and NYS-36, New York also submitted two amended contentions, NYS-12B and NYS-16B, which are not at issue in this decision.

⁹ See, e.g., New Contentions at 13, 36 (citing 10 C.F.R. § 51.53(c)(3)(ii)(L), and *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d. Cir. 1989)).

¹⁰ See *id.* at 13, 15-17, 22-35.

¹¹ See, e.g., *id.* at 15, 23-25.

¹² See *id.* at 13. See also *id.* at 15-17, 22-35.

¹³ See *id.* at 13.

NYS-36 focused on nine other SAMAs, asserting that the December 2009 Reanalysis shows these “for the first time, to have *substantially* greater benefits in excess of their costs.”¹⁴ More specifically, New York claimed that these SAMAs now have a “margin of benefit over cost [that] is so high that there is little chance that even a more complete cost estimate will be able to eliminate the substantial benefit.”¹⁵ NYS-36 went on to claim that the December 2009 Reanalysis violates NEPA and related regulations because although the reanalysis shows these SAMAs “to have substantially greater benefits in excess of their costs . . . [they] are not being included as conditions” of the proposed renewed license.¹⁶ New York argued that the Administrative Procedure Act requires agencies to provide a “rational basis for actions taken by it,” but that the reanalysis fails to provide a “rational basis” for not committing to implement “clearly cost-effective SAMAs.”¹⁷

In LBP-10-13, the Board admitted the two new contentions as consolidated contention NYS-35/36.¹⁸ The Board admitted the contentions only in part, however, stressing that the “NRC Staff does not have to require implementation [of SAMAs], and an intervenor such as New York cannot demand implementation . . . as part of a license renewal proceeding.”¹⁹ The Board therefore rejected as outside the scope of this Part 54 license renewal proceeding any portion of the contentions “demanding implementation” of cost-beneficial SAMAs.²⁰

Nonetheless, the Board went on to reason that the Staff has the “option” to impose, “prior to license renewal,” additional conditions to an applicant’s current licensing basis (CLB) as

¹⁴ See *id.* at 36 (emphasis added).

¹⁵ *Id.* at 46. See also *id.* at 37.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 40-41.

¹⁸ LBP-10-13, 71 NRC at ___ (slip op. at 26-30, 34-36).

¹⁹ *Id.* at ___ (slip op. at 29).

²⁰ See *id.* at ___ (slip op. at 29, 34).

a backfit under 10 C.F.R. Part 50, and that “as a result of its SAMA review,” the Staff could “choose to impose such conditions that are necessary to protect the environment . . . under a Part 50 backfit procedure.”²¹ Under this reasoning, the Board found NYS-35 admissible “insofar as it alleges that the Draft SEIS [Supplemental Environmental Impact Statement] does not provide a rational basis for granting the license extension without mandating a CLB backfit” of any SAMAs that in “any final analysis” are “classified as cost-effective.”²² In addition, given that Entergy intends to perform further engineering cost analysis, the Board admitted “the portion of NYS-35 calling for completion of the cost-benefit analysis to determine which SAMAs are cost-beneficial to implement.”²³ The Board also admitted NYS-36 in part, finding a “triable issue of fact . . . whether the NRC Staff has fulfilled its duty to take a hard look [under NEPA] at SAMAs deemed potentially cost-beneficial in Entergy’s December 2009 [] Reanalysis by explaining in its record of decision why it would allow the license to be renewed without requiring implementation of those SAMAs that are plainly cost-beneficial as a condition precedent to the granting of license renewal.”²⁴

III. ANALYSIS

Pursuant to 10 C.F.R. § 2.341(f)(2), we may, at our discretion, grant a party’s request for interlocutory review of a Board decision. We grant interlocutory review only in “extraordinary circumstances.”²⁵ A petition for interlocutory review will be granted only if the party seeking review demonstrates that the issue for which it seeks review:

²¹ See *id.* at ___ (slip op. at 28-29). See also 10 C.F.R. § 50.109 (regulation governing the backfitting of a facility).

²² LBP-10-13, 71 NRC ___ (slip op. at 29-30).

²³ *Id.* at ___ (slip op. at 29).

²⁴ *Id.* at ___ (slip op. at 35).

²⁵ See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009) (citation omitted).

- (i) threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.²⁶

Entergy and the Staff both argue that the Board's decision improperly imports Part 50 operating reactor oversight issues – going to the Indian Point reactors' current licensing basis – into a NEPA analysis and a Part 54 license renewal proceeding.²⁷ These arguments are not without force. Portions of the Board's decision appear problematic, and may warrant our review later in the proceeding. But the “mere potential for legal error” in a contention admissibility decision is not a ground for interlocutory review.²⁸

We find unconvincing the Staff's and Entergy's claims that the Board's decision will result in a pervasive, unusual impact on the proceeding. We do not read LBP-10-13, a decision on contention admissibility, to *require* the Staff either to impose license conditions or to undertake formal Part 50 backfit analyses for the “potentially cost-beneficial” SAMAs identified in contention NYS-35/36. The Board has admitted a consolidated contention challenging the adequacy of the NEPA SAMA analysis. To the extent that the contention may call for further “explanation” of the SAMA analysis conclusions, we see no unusual or pervasive impact on the proceeding. Similarly, to the extent that the Board has admitted the issue of whether the current SAMA cost-benefit estimates are sufficient for the NEPA analysis, we can discern no “extraordinary” impact on the proceeding. We have long held and recently reiterated – in this

²⁶ See 10 C.F.R. § 2.341(f)(2).

²⁷ See, e.g., Entergy Petition at 3-6, 13-20; Staff Petition at 12-16, 19-21.

²⁸ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

very proceeding – that “increased litigation delay and expense do not justify review of an admissibility decision.”²⁹

Nor has Entergy or the Staff demonstrated an immediate, serious, and irreparable harm that cannot be reversed on appeal, if warranted, following the Board’s final decision. The Staff states that it already provided the Board with a “detailed and rational explanation of why SAMA-based backfits to the CLB are not required for license renewal.”³⁰ The Staff’s concern is that while it “could provide the same type of explanation it provided previously,” the Board “appears to have implicitly rejected this explanation.”³¹ If the Board in fact ultimately rejects the Staff’s arguments, the Staff will have the opportunity to appeal the final decision.³²

²⁹ See CLI-09-6, 69 NRC at 133.

³⁰ See Staff Petition at 15.

³¹ See *id.* at 22-23 n.59.

³² Entergy additionally suggests that while the Board’s decision may not provide “grounds for interlocutory review,” it raises novel questions of law that may adversely impact other proceedings involving SAMA issues, and therefore may warrant Commission *sua sponte* review under our exercise of inherent supervisory authority over adjudicatory proceedings. See Entergy Petition at 24-25. We decline to take *sua sponte* review, and note further that unreviewed Board decisions lack precedential effect. See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998). See also CLI-09-6, 69 NRC at 138 (parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority).

IV. CONCLUSION

For the reasons provided above, we *deny* the Entergy and Staff petitions for interlocutory review of the Board's ruling in LBP-10-13, without prejudice to Entergy's and the Staff's ability to file petitions for review following a final order by the Board.³³

IT IS SO ORDERED.³⁴

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of November, 2010

³³ Because we deny the petitions for interlocutory review, we need not rule on New York's request for an oral argument before the Commission. *See The State of New York's Request for Oral Argument on the Merits of Entergy and Staff's Appeal Should the Commission Accept Interlocutory Review* (Aug. 12, 2010).

³⁴ Commissioner Apostolakis did not participate in this matter.