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July 27, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of

POWER AUTHORITY OF THE
STATE OF NEW YORK and
ENTERGY NUCLEAR FITZPATRICK LLC,
ENTERGY NUCLEAR INDIAN POINT 3 LLC,
and ENTERGY NUCLEAR
OPERATIONS, INC.

(James A. FitzPatrick Nuclear Power Plant
and Indian Point Nuclear Generating
Unit No. 3)

Docket Nos. 50-333-LT
and 50-286-LT

**ANSWER OF POWER AUTHORITY OF THE
STATE OF NEW YORK, ENTERGY NUCLEAR
FITZPATRICK LLC, ENTERGY NUCLEAR INDIAN POINT 3
LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. TO
MOTION TO INTERVENE, PETITION FOR SUMMARY
RELIEF, AND REQUEST FOR HEARING OF NUCLEAR
GENERATION EMPLOYEES ASSOCIATION, WILLIAM
CARANO, THOMAS PULCHER, AND RICHARD WIESE, JR.**

Pursuant to 10 C.F.R. § 2.1307(a), Applicants Entergy Nuclear FitzPatrick LLC,
Entergy Nuclear Indian Point 3 LLC and Entergy Nuclear Operations, Inc. ("ENO")
(collectively "Entergy Applicants") and the Power Authority of the State of New York
("the Authority") file this answer opposing the "Motion of Nuclear Generation Employees
Association and William Carano, Thomas Pulcher, and Richard Wiese, Jr., for Leave to
Intervene, and Petition for Summary Relief, or, in the Alternative, for a Hearing" ("NGEA
Pet.") filed by the Nuclear Generation Employees Association and Mssrs. Carano,
Pulcher, and Wiese (collectively "NGEA") with the Commission on July 17, 2000.

Template = SECY-037

SECY-02

NGEA describes itself as an unincorporated association of non-represented employees. NGEA Pet. at 3.¹

The Entergy Applicants and the Authority (collectively “Applicants”) submit that the Commission should deny NGEA’s request for hearing and petition to intervene. NGEA may not participate in this proceeding by asserting the economic interests of its members, that is, their concerns about their salaries and benefits following the proposed license transfer. Those asserted economic interests fall well outside the scope of the issues properly before the Commission on the pending license transfer applications. As the NGEA itself recognizes, such claims raise employment issues which likely will be asserted in the state courts. In short, NGEA has failed to demonstrate standing, has failed to set forth at least one admissible issue and has not demonstrated sufficient reason for the NRC to stay its licensing action. See 10 C.F.R. §§ 2.1306 and 2.1308²

NGEA’s petition is, itself, proof of the disconnect between their concerns and the license transfer issues before this Commission. Other than requesting a delay and a hearing, the petition fails to specify the substantive relief it wants the Commission to order. Nor does it ever articulate what its members want in terms of employment guarantees. The reason is obvious: to articulate the requested relief (such as greater

¹ Applicants have no independent knowledge of the NGEA’s organization or the extent of its membership. Solely for ease of reference in responding to this petition, Applicants will refer to NGEA and its asserted membership as “NGEA” and “NGEA’s members.” Applicants do not recognize the NGEA’s right to represent its asserted members with respect to employment interests. See Joint Declaration of William Carano, Thomas Pulcher, and Richard Wiese, Jr., ¶ 30.

² Applicants note that petitioner Richard Wiese on July 18, 2000, filed a Deviation Event Report with the FitzPatrick corrective action program which incorporated by reference the issues raised in the NGEA Petition. That Deviation Event Report, together with a similar Deviation Event Report entered into the IP3 corrective action program, are being evaluated as required by those programs.

assurances on salary and benefits) would only highlight how far removed that relief is from the issues before the Commission on the pending license transfer applications.

I. BACKGROUND

This proceeding concerns applications filed on May 11 and 12, 2000, by Applicants to transfer the facility operating license for the James A. FitzPatrick Nuclear Power Plant ("FitzPatrick") from the Authority to Entergy Nuclear FitzPatrick LLC and ENO and to transfer the facility operating license for the Indian Point Nuclear Generating Unit No. 3 ("IP3") from the Authority to Entergy Nuclear Indian Point 3 LLC and ENO. This transfer is being undertaken by the Applicants pursuant to a Purchase and Sale Agreement between the Authority and Entergy Nuclear FitzPatrick LLC and Entergy Nuclear Indian Point 3 LLC. No physical changes or operational changes to either FitzPatrick or IP3 are being proposed in the applications. See 65 Fed. Reg. 39,953, 39,954 (2000) (FitzPatrick); 65 Fed. Reg. 39,954, 39,955 (2000) (IP3).

Under Section 5.7 of the Purchase and Sale Agreement (Enclosure 4 to the license transfer applications), the Entergy Applicants have agreed to provide employment benefits to the non-union employees transferred as a result of the sale of the units (including NGEA's asserted members) which are at least as good as the benefits that these employees now enjoy with the Authority. The Entergy Applicants have agreed to retain for at least one year after the closing all current employees of the Authority who devote all or substantially all of their working time to support nuclear operations at the Authority. For a period of at least one year after the closing, the Entergy Applicants have agreed to provide such employees with at least the same base pay that they receive at the Authority and a benefits package that is substantially comparable to the benefits package that they

have at the Authority. In effect, the Entergy Applicants have offered the Authority's at-will employees, including NGEA's asserted members, guarantees on jobs, salaries and benefits that they do not currently enjoy.

The Applicants have also gone to significant lengths to continue the employees' pension benefits. All of the Authority's employees are members of the New York State Employees Retirement System ("NYSERS"). Although employees transferring from the Authority by law cannot remain members of the NYSERS (since they will no longer be public employees), the Entergy Applicants have agreed in the Purchase and Sale Agreement to provide a pension plan that, to the extent permitted by law, is identical in all material respects with the NYSERS plan in effect on the date of the closing. By so doing, the Entergy Applicants have committed to provide Authority employees who transfer with pension benefits which, when added to such employees' NYSERS pension benefits, will be equal to the benefits such employees would have received had they remained at the Authority.

The Entergy Applicants have also agreed, subject to applicable law, to provide to those transferring employees retiring within three years of the closing a retiree health and life insurance program that is identical in all material respects to the Authority's retiree health and life insurance benefit. Employees transferring are materially better off on this point because at the Authority there is no guarantee that such benefits will remain in place for any period of time. The Purchase and Sale Agreement establishes a deferred compensation plan (401(k)) for employees transferring to the Entergy Applicants that for a period of one year will provide the same investment options with the same administrator (T. Rowe Price) the employees currently have at the Authority. In addition the Entergy

Applicants will provide a company match in the 401(k) plan with a value equivalent to what Authority employees received.

The Authority has made repeated efforts to inform its employees about the proposed sale of its nuclear facilities. As early as December 1999, the Authority established an electronic mailbox where employees could send their questions and receive responses. The Authority's Intranet site contains a discrete Human Resources section devoted to Entergy Sale Information, including the full text of the employment provisions of the Purchase and Sale Agreement as well as an extensive list of questions and answers relating to these provisions. In addition, shortly after the announcement of the Agreement in March 2000, the Authority established a weekly newsletter on its Intranet site devoted entirely to topics associated with the transition of employees from the Authority to the Entergy Applicants. Both before and after the announcement of the Agreement, the Authority's Executive Vice President of Human Resources and Corporate Services and other senior Authority and Entergy Applicants executives met on several occasions with employees of each nuclear facility and with its nuclear generation staff located at headquarters to explain and answer questions about the employment provisions of the proposed sale.

On June 28, 2000, the NRC published a "Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment, and Opportunity for a Hearing" in the Federal Register concerning the Fitzpatrick and IP3 license transfer applications. 65 Fed. Reg. at 39,953, 39,954. In a filing dated July 17, 2000, NGEA moved to intervene in the license transfer proceedings and petitioned the Commission for "summary relief, or, in the alternative, for a hearing." NGEA Pet. at 1.

NRC license transfer proceedings are governed by the requirements in Subpart M of 10 C.F.R. Part 2. 10 C.F.R. § 2.1300; see also 65 Fed. Reg. at 39,954, 39,955. To intervene as of right in a Subpart M NRC license transfer proceeding, a petitioner must demonstrate “standing” and must set forth at least one admissible contention or issue (“issue”). Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 340 (1999). NGEA’s petition fails to meet either of these NRC requirements, and therefore NGEA should be denied intervention.

II. NGEA’S INTERESTS DO NOT CONSTITUTE STANDING UNDER THE ATOMIC ENERGY ACT

NGEA’s petition fails to demonstrate that it has standing under the Atomic Energy Act (“AEA”). To intervene as of right in an NRC license transfer proceeding, a petitioner must first demonstrate that it has standing. See AEA § 189a, 42 U.S.C. § 2239(a). For a petitioner to demonstrate standing in a Subpart M license transfer proceeding, the petitioner must:

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (the grant of an application), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the “zone of interests” protected by the governing statute(s).
- (2) specify the facts pertaining to that interest.

GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, slip op. at 2-3 (May 3, 2000); see also 10 C.F.R. §§ 2.1306 and 2.1308. An alleged injury that is “conjectural or hypothetical” cannot form the basis for standing under NRC regulations.

International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998).

NGEA's petition should be dismissed at the threshold because its asserted interests do not meet the Commission's test for standing. NGEA claims to be an unincorporated association of the Authority's management employees that have no "written employment contract" and are "not protected by any union contract." NGEA Pet. at 6. NGEA members are, simply put, "at-will" employees who hope to use this license transfer as the vehicle for obtaining workplace guarantees they are not currently enjoying, such as job security and a prohibition on diminishing their current salaries, benefits, and retirement plans. See id. at 3.

NGEA's petition cannot disguise the fact that the only interests and injuries it asserts are the economic interests of its members in maintaining their current level of pay and benefits. NGEA's petition admits that its interest in this proceeding stems from its desire to assure that the proposed transfer will "not adversely affect their salaries, benefits, pensions, working conditions, safety culture, professional roles, and attrition rates." Id. at 9. NGEA outlines the benefits that its members currently enjoy as Authority employees, including

competitive corporate salaries, membership in the New York State and Local Retirement Systems pension plan ("NYSERS"), medical and dental benefits, vision and hearing care, cancer protector care, flexible spending account for pre-tax funding of health and dependent care expenses, life insurance, deferred compensation, ordinary death benefit, disability benefit, load provisions, sick and medical leave (including accrual thereof), short and long term disability, vacation and holiday leave (including accrual thereof), tuition reimbursement, and other benefits ... include[ing] full continuing lifetime health coverage and life insurance.

Id. at 12. NGEA members are concerned that they may not be guaranteed these benefits for life, and would like to use the Commission to help them maintain their substantial employment benefits.

A. NGEA's Asserted Interests Fail to Establish any Concrete and Particularized Injury-In-Fact

NGEA's asserted interests fail to meet the NRC's test for standing because they fail to identify any particularized and concrete injury-in-fact to any member of NGEA. NGEA's only concerns are its members' fears that the new plant owners and operator have not provided indefinite guarantees of the employment benefits for NGEA's members, but have only guaranteed those benefits for one to three years. As a result, NGEA asserts without support that:

the transition to Entergy will *not* be nearly "seamless," it will *not* result in equivalent pay and benefits for NGEA members, and it will *not* make petitioners whole in numerous material respects.

NGEA Pet. at 12 (emphasis in original). However, NGEA fails to identify any single instance in which an NGEA members' employment benefits will be reduced by the Entergy Applicants. Rather, NGEA speculates that the benefits will be reduced in the future because they are not guaranteed. There is no support for this conjecture. In fact, NGEA concedes that Entergy has "promised that it was 'absolutely committed to employing the [Authority's] 1700 nuclear employees at the same salary, benefits, and pensions' that they presently receive." Id. at 11 (emphasis in original). NGEA admits that Entergy has, in fact, guaranteed all existing salary levels and benefits for a full year after closing. See id. at 13.

NGEA offers no facts to support its asserted fears that the Entergy Applicants may not fulfill these commitments. Instead it offers only speculation about possible future

events, conjectures which do not meet the Commission's test for standing, as articulated in Oyster Creek. See Oyster Creek, CLI-00-06, supra, slip op. at 3. NGEA has failed to identify any "concrete and particularized injury (actual or threatened)" that is not "conjectural or hypothetical." NGEA's fears do not demonstrate a concrete and particularized injury-in-fact as is required to demonstrate standing.

B. NGEA's Asserted Employment Benefit Interests are Outside the "Zone of Interests" of the Atomic Energy Act

In order to establish standing under NRC regulations and case law, the petitioner must demonstrate that its asserted injury "is arguably within the zone of interests protected or regulated by the [Atomic Energy Act]." Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 8 (1998); see also Oyster Creek, CLI-00-06, supra, slip op. at 3. NGEA has failed to make that showing.

The "zone of interests" that the Atomic Energy Act protects and regulates does not include employment benefits. The employment benefits that NGEA seeks to protect are purely economic interests, ones that fall outside the "zone of interests" that the Atomic Energy Act protects and regulates. See Quivira, CLI-98-11, supra, 48 NRC at 10-11.³ As the Commission held in a previous case, "[m]erely because one may be injured by a particular agency action, then, 'does not necessarily mean one is within the zone of interests to be protected by a given statute.'" Quivira, CLI-98-11, supra, 48 NRC at 11 (emphasis in original). Because NGEA's asserted interests are outside of the "zone of

³ One exception to this rule is where a person owns an NRC-licensed facility. Even though a co-owner's property interest in the nuclear power plant is an "obvious economic interest," and not a human health and safety interest, a co-owner's interest in an NRC facility has been found to be "an AEA-protected interest in licensing proceedings involving their facility." North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 263 (1999). However, NGEA's members are not co-owners of FitzPatrick and IP3, and have no property interest in the plants.

interests” protected and regulated by the Atomic Energy Act, the Commission should dismiss NGEA’s petition for lack of standing.

C. NGEA’s Inferences of Potential Safety Concerns are Too Conjectural to Establish Standing

NGEA’s generalized attempt to connect its members’ employment benefits to a generalized safety concern at the nuclear power plants is similarly insufficient to establish standing. NGEA first states that its members’ “collective cooperation in and acceptance of the transfer of facility licenses to a new operating entity is an absolute prerequisite to continued safe operation of those facilities.” NGEA Pet. at 6. However, NGEA fails to further explain or provide any basis for this assertion, rendering it nothing more than the type of hypothetical conjecture and speculation that is insufficient to establish standing. In a similar vein, NGEA states that the alleged adverse effects on employment benefits of which it speculates may “perhaps even stimul[at] a mass defection of personnel directly responsible for the health and safety of nuclear operations.” *Id.* at 7. However, NGEA fails to show that any nuclear plant employees are, in fact, considering a “mass defection” and similarly fails to establish how the loss of benefits will result in an impact on nuclear safety. Thus, NGEA’s unsubstantiated allegations fall well short of the Commission’s requirements for a “concrete and particularized injury” that is not “conjectural or hypothetical.”

Similarly insufficient to establish standing is NGEA’s attempt to invoke the interests of the Commission, because a petitioner may not base his standing on the interests of a third party, absent that third party’s agreement to be represented. Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2) ALAB-413, 5 NRC 1418, 1421 (1977) (third party interests cannot be used as a basis for standing under the AEA). After

conceding that “it is not the Commission’s role to insure narrow economic interests” of the type that have been raised by NGEA, the petitioner asserts that “the Commission *is* interested in assuring that, once the transfer occurs, there will be sufficient management personnel, and appropriate working conditions, so as to assure continued safe operation of the facilities.” NGEA Pet. at 9 (emphasis in original). However, the Commission’s interests in the proceeding cannot be relied on by a third-party petitioner to establish that petitioner’s standing. Watts Bar, ALAB-413, supra, 5 NRC at 1421. Moreover, NGEA fails to explain why the Commission would require a hearing to address its interests, rather than relying on its comprehensive inspection and enforcement authority.

NGEA’s passing remarks regarding safety and its reference to the Commission’s, rather than NGEA’s, interests in the license transfer are woefully inadequate to establish NGEA’s standing to intervene in this proceeding.

D. NGEA Fails to Establish the Redressability of its Alleged Injury

NGEA’s petition does not address the requirement that its alleged injury would be redressable by a “favorable decision”, which from NGEA’s standpoint is presumably a denial of the license transfers. NGEA’s claimed injury is that its members’ employment benefits might be adversely affected by the transfer of the facilities from the Authority to the Entergy Applicants. A denial of the license transfers would do nothing to cure this injury. As NGEA’s petition admits, the employment benefits of its members will be guaranteed for at least one year after the transfer. NGEA Pet. at 13-14. If the transfers are denied, they remain at-will employees of the Authority. As such, they have no guarantees of employment or employment benefits. De Petris v. Union Settlement Assoc., 86 N.Y.2d 406, 657 N.E.2d 269 (1995); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d

919 (1987). Unlike Nine Mile Point, *supra*, where denial of the application would have prevented the asserted injury (“an ill-funded license transfer”), CLI-99-30, *supra*, 50 NRC at 341, here a “favorable decision” denying the transfers would do nothing to advance NGEA’s position. Thus, NGEA does not and cannot explain how any requested order by the Commission will provide its members with the employment guarantees and benefits that they apparently seek.

III. NGEA’S ISSUES FAIL TO MEET NRC PLEADING REQUIREMENTS

NGEA’s petition fails to set forth at least one admissible issue as required by the Commission’s rules for license transfer proceedings. See 10 C.F.R. § 2.1306. To demonstrate that issues are admissible under Subpart M, a petitioner must:

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.

Oyster Creek, CLI-00-06, *supra*, slip op. at 6-7; 10 C.F.R. § 2.1306. Failure of an issue to comply with any one of these requirements is grounds for dismissing the issue.⁴ Each issue proposed by NGEA fails to comply with at least one of the Commission’s requirements for an admissible issue, and therefore all should be rejected.

⁴ See 65 Fed. Reg. at 39,954 (FitzPatrick), 65 Fed. Reg. at 39,955 (IP3) (“requests [for a hearing] must comply with the requirements set forth in 10 CFR 2.1306”); 10 C.F.R. § 2.1306(b) (requirements are mandatory).

NGEA identifies seven issues to be considered for admission in a hearing before the Commission. NGEA Pet. at 21-22. None of the seven issues proposed by NGEA is admissible under the Commission's rules for license transfer proceedings.

The first issue, "Rights/Benefits," is inadmissible because it attempts to raise concerns that fall outside the scope of this license transfer proceeding. NGEA's first proposed issue states:

What rights, benefits, and mechanisms of enforcement will actually apply to petitioners upon consummation of the proposed transactions, and how will they materially depart from those now applicable to petitioners?

Id. at 21. NGEA fails to allege any NRC requirements that are, or may be, violated by Applicants' actions, and instead is just asking for clarification as to what its members' employment benefits will be under the new owners and operator.

NGEA's first proposed issue should be rejected as an impermissible discovery request to Applicants for more information about its members' future employment benefits. NRC case law clearly establishes that discovery is not available to assist a petitioner in framing contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, recons. denied, ALAB-110, 6 AEC 247, aff'd CLI-73-12, 6 AEC 241 (1973). In fact, discovery is not available under the Subpart M license transfer process. 10 C.F.R. § 2.1317 (hearing docket is the only discovery in Subpart M proceeding).

This issue should also be rejected because it is outside the scope of this proceeding. In order to be admissible in a license transfer proceeding, an issue must "fall within the scope of the proceeding." Oyster Creek, CLI-00-06, supra, slip op. at 6. The tests for approval of a license transfer application are whether: "(1) the proposed

transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.” Id. at 1; 10 C.F.R. § 50.80. The “rights, benefits, and mechanisms of enforcement” of employment benefits that NGEA’s members will receive after the transfer in no way implicate the Entergy Applicants’ qualifications to hold a license, or otherwise allege any inconsistencies with the Commission’s regulations. See 10 C.F.R. § 50.80. NGEA itself suggests that the appropriate forum to litigate NGEA’s employment benefits may be the New York state judicial system which NGEA asserts will likely clarify the “rights and benefits of petitioners, and the obligations of the applicants” NGEA Pet. at 21. This Subpart M license transfer proceeding is not the proper place to litigate NGEA’s employee benefits concerns.

The second issue, “Obligations,” is inadmissible because it too attempts to raise concerns that fall outside the scope of this proceeding. NGEA’s second proposed issue states:

What obligations will the transferor and/or transferees have to petitioners vis-a-vis such rights and benefits?

NGEA Pet. at 21. NGEA’s concern is finding out the details of the employment benefits that will be enjoyed by NGEA’s members after the transfer. Simply put, this issue merely rephrases the first, and must be rejected for the same reasons. First, this issue does not raise any real dispute for litigation, and the discovery it seeks is not available to assist in framing an issue. Prairie Island, ALAB-107, supra, 6 AEC at 192. Second, the issue is also outside the scope of this license transfer proceeding. NGEA identifies no problems with the Entergy Applicants’ compliance with the requirements of 10 C.F.R. § 50.80. A Subpart M license transfer proceeding is not the appropriate forum for employee benefits

litigation. NGEA's second issue must be rejected as outside the scope of a license transfer proceeding.

The third issue, "Morale," is inadmissible both because it attempts to raise concerns that fall outside the scope of this license transfer proceeding, and because its alleged concerns are too vague and unparticularized to form a litigable issue. This issue states:

What impact will (are) changes in the rights and benefits of petitioners have (having) on morale among the nuclear generation management unit, and will (are) operations and regulatory performance be (being) adversely affected?

NGEA Pet. at 22. Like the first issue, NGEA's attempt to litigate its members' employment benefits is beyond the scope of this proceeding. Second, NGEA's concern about its members' "morale" is too vague to constitute a litigable issue in a Subpart M proceeding. The Commission has established that it "will not accept 'the filing of a vague, unparticularized' issue ..." for litigation in Subpart M proceedings. Oyster Creek, CLI-00-06, supra, slip op. at 7. NGEA fails to identify any NRC regulation requiring a certain level of "morale" among employees. In fact, NGEA fails to identify in this issue any NRC requirement that is, or may be, violated by the Applicants. Long-standing NRC case law establishes that to be admissible an issue must put the other parties "sufficiently ... on notice so that they will know at least generally what they will have to defend against or oppose." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). NGEA's vague concerns about employee "morale," connected to no NRC requirement, do not put Applicants on notice as to what would be litigated. NGEA's third issue must therefore be rejected.

The fourth issue, “Attrition,” is inadmissible both because it requests to litigate issues outside the scope of this proceeding and because it provides no particularized demonstration of a reasonable basis to believe that Applicants will violate legal requirements. NGEA describes this issue as follows:

What impact will (are) changes in the rights and benefits of petitioners have (having) on attrition among the nuclear generation management unit, and will (are) increased attrition rates adversely affecting operations and regulatory performance?

NGEA Pet. at 22. As with the previous issues, NGEA’s attempt to litigate employee rights and benefits, including alleged effects on employee attrition rates, is outside the scope of this proceeding, and should therefore be rejected. In addition, NGEA provides no specific facts to support its prediction of increasing attrition rates and decreasing employment benefits after the transfer. Commission case law clearly establishes that such “[g]eneral assertions or conclusions will not suffice” to support admission of an issue. Oyster Creek, CLI-00-06, supra, slip op. at 7.

Nor does NGEA provide any basis that would support its claim that Entergy Applicants will violate the Commission’s safety regulations. NGEA argues that “increased attrition rates [will] adversely affect[] operations and regulatory performance.” NGEA Pet. at 22. NGEA ignores the fact that the Commission has specific regulatory requirements, and that FitzPatrick and IP3 have technical specifications that govern staffing and training. See, e.g., 10 C.F.R. § 50.54(m); FitzPatrick and IP3 Technical Specifications (“Tech Specs”) §§ 6.2.1, “Facility Management and Technical Support,” 6.2.2, “Plant Staff,” 6.3, “Plant Staff Qualifications”; FitzPatrick Tech Specs § 6.4, “Retraining and Replacement Training”; IP3 Tech Specs § 6.4, “Training”. Applicants are required by law to comply with the Commission’s staffing requirements in 10 C.F.R. §

50.54(m) as well as the technical specifications that are part of the FitzPatrick and IP3 operating licenses. The Commission addressed this issue in rejecting a similar proposed issue in the Oyster Creek proceeding. There, the Commission made clear to the petitioners that:

For key positions necessary to operate a plant safely, the Commission has regulations requiring specific staffing levels and qualifications. See 10 C.F.R. § 50.54(m). Other than those specific positions, the licensee has a responsibility to ensure that it has adequate staff to meet the Commission's regulatory requirements. If a licensee's staff reductions or other cost-cutting decisions result in its being out of compliance with NRC regulations, then ... the agency can and will take the necessary enforcement action to ensure the public health and safety. The [license transfer] application does not on its face suggest any likelihood of a ... lapse in compliance with NRC safety rules.

Oyster Creek, CLI-00-06, supra, slip op. at 22-23. Licensing boards have held that "to gain the admission of a contention founded on the premise [that a licensee] will not follow [regulatory] requirements, ... Petitioners must make some particularized demonstration that there is a reasonable basis to believe [the licensee] would act contrary to [the regulation's] explicit terms." General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 164 (1996) (emphasis added) (compliance with technical specifications is treated the same as compliance with regulations); see also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 34 (1999). NGEA has failed to make the required showing.

The Commission has already considered and rejected a similarly unsupported attrition-based issue in a license transfer proceeding. In doing so, the Commission stated:

In any event, the Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff. Once again, [the petitioner] does not explain why the NRC inspection oversight process is insufficient to

monitor the health-and-safety ramifications of [the applicant's] management decisions.

Oyster Creek, CLI-00-06, supra, slip op. at 34. NGEA's attrition-based issue should similarly be rejected here.

NGEA's fifth issue, "Replacements," is inadmissible for the same reasons as the fourth. Its fifth proposed issue states:

In view of markedly increased attrition, can replacement nuclear generation management personnel be secured in sufficient time so as not to compromise operations and regulatory performance during hiring, qualification, and certification periods for new personnel?

NGEA Pet. at 22. However, NGEA again ignores the Commission's clear requirements on staffing of key positions necessary to operate a plant safely, see 10 C.F.R. § 50.54(m), and the technical specifications on staffing that are part of the operating licenses for FitzPatrick and IP3. FitzPatrick and IP3 Tech Specs §§ 6.2.1, "Facility Management and Technical Support," 6.2.2, "Plant Staff," 6.5.1, "Plant Operating Review Committee." NGEA also ignores the NRC inspection and oversight process, and fails to explain why that process is insufficient to monitor the health and safety ramifications of the Entergy Applicants' management decisions, see Oyster Creek, CLI-00-06, supra, slip op. at 34, including management decisions involving "replacement of nuclear generation management personnel." See NGEA Pet. at 22. NGEA fails to articulate any basis to justify its allegation that the Entergy Applicants will violate the Commission's legal requirements and the applicable technical specifications in making management decisions regarding replacement of management personnel. NGEA's fifth issue must be rejected for asserting that Entergy will violate the Commission's safety regulations without making the "particularized showing" required to establish an admissible issue.

The sixth issue, “Workforce Size and Structure,” suffers from similar deficiencies.

The issue, according to NGEA , poses the following question:

What plans exist to cut the size or alter the structure of the existing nuclear generation workforce at FitzPatrick and Indian Point 3, and what impact will any such cuts or restructuring have on petitioners and on nuclear operations and regulatory performance generally?

NGEA Pet. at 22. As it did before, NGEA ignores the Commission’s requirements on staffing of key positions necessary to operate a plant safely, see 10 C.F.R. § 50.54(m), and the Applicants’ legally binding technical specifications on staffing in the FitzPatrick and IP3 operating licenses. FitzPatrick and IP3 Tech Specs § 6.2.2, “Plant Staffing.” NGEA also never explains why the NRC inspection and oversight process is insufficient to monitor the health-and-safety ramifications of the Entergy Applicants’ management decisions, see Oyster Creek, CLI-00-06, supra, slip op. at 34, including management decisions involving “cut[ting] the size or alter[ing] the structure of the existing nuclear generation workforce” See NGEA Pet. at 22. NGEA fails to make any particularized demonstration that there is a reasonable basis to believe that the Entergy Applicants will violate the Commission’s legal requirements and the applicable technical specifications in making management decisions regarding “the size or ... structure of the ... nuclear generation workforce” NGEA also fails to address the Commission’s determination that “so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff.” Oyster Creek, CLI-00-06, supra, slip op. at 34.

“Decommissioning Liability,” the seventh issue, is inadmissible because it falls outside the scope of this license transfer proceeding. This proposed issue states:

Does the treatment of decommissioning liabilities under the Agreement pose an unreasonable added risk to transferred employees of loss of pay, benefits, and rights insofar as such treatment may be contrary to IRS regulations and/or the Commission's requirements in 10 C.F.R. Section 50.75 and may result in substantial tax liabilities for the new operators?

NGEA Pet. at 22-23 (emphasis added). Here, NGEA proposes to litigate an asserted connection between employee benefits and decommissioning liabilities. NGEA also proposes to litigate unidentified IRS regulations and potential tax liabilities related to decommissioning funding. These concerns are outside the scope of this Subpart M license transfer proceeding, and therefore violate the Commission's requirement that to be admitted an issue must "fall within the scope of the proceeding." Oyster Creek, CLI-00-06, supra, slip op. at 6. As with the first issue, NGEA's concern with its members' employment benefits is outside the scope of this proceeding. See supra, pp. 12-13. Likewise, NGEA's concerns regarding Applicants' compliance with unidentified "IRS regulations" and unspecified "tax liabilities," NGEA Pet. at 22-23, are similarly "far beyond the scope of this proceeding." Cf. Oyster Creek, CLI-00-06, supra, slip op. at 25. Furthermore, NGEA's assertions that Applicants' treatment of decommissioning funding "may be contrary to IRS regulations" and "may result in substantial tax liabilities," NGEA Pet. at 22-23, are wholly unsupported by any "facts or expert opinions which support the petitioner's position ...," contrary to the Commission's Subpart M pleading regulations. 10 C.F.R. § 2.1306. As such, NGEA's sweeping allegations regarding decommissioning funding are precisely the type of "[g]eneral assertions or conclusions [that] will not suffice" for an admissible issue in a Subpart M proceeding. See Oyster Creek, CLI-00-06, supra, slip op. at 7.

IV. NGEA'S REQUEST TO STAY THIS PROCEEDING PENDING THE OUTCOME OF A THREATENED BUT UNFILED NEW YORK STATE COURT LAWSUIT SHOULD BE DENIED

The Commission should reject NGEA's petition to stay the NRC license transfer proceeding. NGEA states in its petition that it will "file[] imminently" in "the New York state court" a lawsuit regarding "the rights and benefits of petitioners, and the obligations of the applicants." NGEA Pet. at 21. In light of this threatened, but as yet unfiled, litigation, NGEA "request[s] that the captioned [NRC] license transfer proceedings be summarily stayed pending a decision by the New York court as to rights, obligations, and liabilities of the parties." Id.

NGEA's request to stay this NRC license transfer proceeding pending the outcome of its threatened New York state court lawsuit is directly contrary to Commission case law. In the Nine Mile Point license transfer proceeding, the Commission affirmatively rejected requests to suspend that proceeding to await the outcome of license transfer-related litigation before a state public service commission, noting that a "multi-forum situation is especially common in license transfer proceedings involving nuclear power plants." Nine Mile Point, CLI-99-30, supra, 50 NRC at 343. The Commission reiterated its well-established position that:

the potential for an action by a state or local regulatory agency that will affect a facility seeking an NRC license normally is not sufficient reason for this agency to stay its licensing action pending the outcome of any proceeding to impose additional requirements Rather, it is the prerogative of the other governmental entity asserting jurisdiction to take whatever action it deems appropriate to enforce its ... authority.

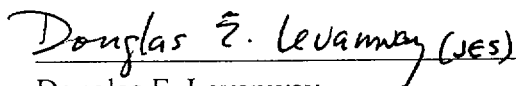
Id. at 344 (citing Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 269 (1982) (footnote and citations omitted), aff'd, City of West Chicago v. NRC, 701

F.2d 632 (7th Cir. 1983)). The same result should apply where the "potential for an action" is by a court rather than a regulatory agency.

V. CONCLUSION

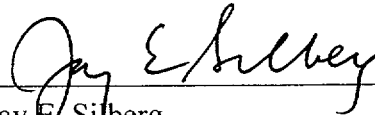
For the foregoing reasons, Applicants respectfully request the Commission to deny NGEA's petition for leave to intervene and for summary relief, or in the alternative, request for a hearing, because NGEA has failed to demonstrate standing and NGEA has failed to submit at least one admissible issue.

Respectfully submitted,



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Dated: July 27, 2000

Document #: 965140

July 27, 2000

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	
POWER AUTHORITY OF THE)	
STATE OF NEW YORK and)	
ENTERGY NUCLEAR FITZPATRICK LLC,)	
ENTERGY NUCLEAR INDIAN POINT 3 LLC,)	Docket Nos. 50-333-LT
and ENTERGY NUCLEAR)	and 50-286-LT
OPERATIONS, INC.)	
)	
(James A. FitzPatrick Nuclear Power Plant)	
and Indian Point Nuclear Generating)	
Unit No. 3))	

CERTIFICATE OF SERVICE

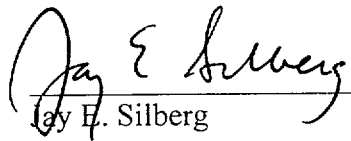
I hereby certify that copies of the foregoing "ANSWER OF POWER AUTHORITY OF THE STATE OF NEW YORK, ENTERGY NUCLEAR FITZPATRICK LLC, ENTERGY NUCLEAR INDIAN POINT 3 LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. TO MOTION TO INTERVENE, PETITION FOR SUMMARY RELIEF, AND REQUEST FOR HEARING OF NUCLEAR GENERATION EMPLOYEES ASSOCIATION, WILLIAM CARANO, THOMAS PULCHER, AND RICHARD WIESE, JR." were served on the persons listed below by electronic mail, this 27th day of July, 2000.

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