

Before the
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

[REDACTED VERSION]

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.**

**Docket Nos. 50-333-LT
and 50-286-LT
(consolidated)**

ASLBP No. 01-785-02-LT

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

January 10, 2001

**CITIZENS AWARENESS NETWORK, INC.'S REVISED CONTENTION ON
FINANCIAL QUALIFICATIONS ISSUE IN THE LICENSE TRANSFERS FOR JAMES A.
FITZPATRICK AND INDIAN POINT UNIT 3 NUCLEAR POWER STATIONS PER
COMMISSION MEMORANDUM & ORDER, NOVEMBER 27, 2000**

On July 31, 2000, the Citizens Awareness Network, Inc. [CAN] filed a Request for Hearing and Petition to Intervene in the review of license transfer applications for the James A. FitzPatrick ["FitzPatrick"] and Indian Point Unit 3 ["Indian Point 3" or "IP3"] nuclear reactors. By Memorandum & Order CLI-00-22 ["M&O"], the Nuclear Regulatory Commission granted CAN's petition on the basis of standing and the admissibility of at least one issue. In addition to admitting CAN's contention on the decommissioning issue, the Commission ordered the Applicants (the Power Authority of the State of New York ["NYPA"], Entergy Nuclear FitzPatrick, LLC ["ENF"], Entergy Nuclear Indian Point, LLC ["ENIP"], and Entergy Nuclear Operations, Inc. ["ENO"]) to release redacted materials to CAN. On the basis of the proprietary

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information, the Commission invited CAN to submit a revised contention on the financial qualifications of the Entergy applicants to safely operate FitzPatrick and IP3.

Pursuant to the Commission's invitation and 10 CFR §§ 2.1306, 2.1308, and 2.1329(b), CAN hereby requests that the NRC admit this additional issue to the hearing on the license transfer applications in order to review the financial qualifications of ENF, ENIP, and ENO to safely operate the FitzPatrick and Indian Point 3 reactors. In support of this request, CAN has provided the attached declaration of Edward Smeloff ["Smeloff Declaration"], attached hereto as Exhibit 1, and further sets forth as follows:

THE LICENSE TRANSFER APPLICATIONS DO NOT PROVIDE ADEQUATE FINANCIAL ASSURANCE FOR THE SAFE OPERATION OF FITZPATRICK AND INDIAN POINT 3 BECAUSE THE APPLICATIONS DO NOT DEMONSTRATE AN APPROPRIATE MARGIN BETWEEN ANTICIPATED OPERATING COSTS AND REVENUE PROJECTIONS, AND THE ENTERGY APPLICANTS DO NOT PROVIDE EVIDENCE OF ACCESS TO SUFFICIENT RESERVE FUNDING.

As set forth herein below, the Entergy applicants do not show sufficient financial qualifications to assure the safe operation of FitzPatrick and Indian Point 3. Per 10 CFR § 50.33 (f), as non-electric utilities, the Entergy applicants' filings must be able to demonstrate financial assurance that the potential licensees will be able to meet reasonably estimated operating costs for FitzPatrick and Indian Point 3. CAN recognizes that the Commission does not require absolute certainty with regard to financial assurance and qualifications. CAN does not dispute that Applicants have filed the necessary documents required by 10 CFR § 50.33. However, CAN dispute is that what the applications offer to demonstrate financial qualifications is seriously insufficient, outdated, and/or significantly flawed in a number of respects: anticipated

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cost-and-revenue projections leave too little margin; recent property tax agreements with local communities are unreviewed and potentially outdate and make the Entergy companies' financial outlooks even more pessimistic; the assumptions regarding future capacity factors for the reactors are unrealistic and unsupported, and do not provide sufficient assurance that ENF and/or ENIP will meet revenue projections; reserve funding and sureties are insufficient to make up for the potential shortfalls, and are of questionable credibility; and the post-2004 revenue projections are based on flawed assumptions regarding prices for power in the Northeast's new deregulated markets.

Applicants' inadequate financial assurances create a number of scenarios that could compromise the safety of FitzPatrick and/or Indian Point 3 which could affect the public and worker health and safety, as well as CAN and its representative members. Because ENF and ENIP are not rate-regulated utilities,¹ they must rely solely on their fixed-rate agreements with NYPA to provide operating revenues until 2003 (in the case of FitzPatrick) and 2004 (in the case of IP3); after termination of that agreement, the Entergy applicants are reliant on revenues in the highly volatile and evolving Northeast energy market, which introduces additional uncertainties. ENF and ENIP's uncertain cost-and-revenue projections, minimal projected profit margins, and shared responsibilities for the facilities and fuel payments make the continued operation of the reactors financially dependent upon each other.

For instance, should either Entergy company not make a profit, the other company could become liable to make up the deficit in order not to default on their shared contractual obligations with NYPA. Continued revenue shortfalls, without the ability to repay on the credit agreements

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offered by Entergy Global Investments ["EGI"] and Entergy Investments Ltd. ["EIL"], could permanently deplete the amount of reserve funding available within a few years.² The inability of ENF and ENIP to rely on a combination of sufficient profits and reserve funding would force ENF and/or ENIP to cut costs on organization and maintenance, because of their contractual obligations and other fixed costs. Given the pressure to avoid to avoid the above scenarios, ENF and ENIP could be forced to cut back preventive maintenance and corrective action programs. This could also lead to a combination of compromised safety systems, degraded material conditions, maintenance backlogs, and/or operator workarounds. As a result, if either reactor suffers an extended outage or an accident, ENF and/or ENIP could go bankrupt, leaving the other reactor with insufficient revenues for continued operation. Any of these scenarios, or combinations thereof, could affect the public and worker health and safety.

In support of the above, CAN further sets forth herein below as follows:

**A. ENF and ENIP's Property Tax Agreements with Local
Municipalities Are Not Considered in Applicants' Cost Projections.**

On November 15, 2000 and December 4, 2000, the Entergy applicants announced agreements with local communities in Oswego and Westchester counties (respectively) to make

¹ As defined in 10 CFR § 50.2.

² This is a reasonable possibility if FitzPatrick and/or IP3 are not able to meet the projected capacity factors, regardless of an accident or single long outage at either reactor. As set forth below, Applicants do not sufficiently justify the anticipated capacity factor for IP3, and the annual deviations in capacity of FitzPatrick demonstrate significant uncertainty that the projections are reasonable and that shortfalls are possible, if not likely. Furthermore, if the supplemental funding from EGI and EIL is not available as promised, either because ENF and/or ENIP have already depleted the amounts agreed to or because EGI and/or EIL lack sufficient stability to fulfill their obligations, the Entergy companies could be left without sufficient funding to operate the reactors safely.

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payments in lieu of property taxes for FitzPatrick and Indian Point 3. It is not clear whether property taxes or payments in lieu thereof were contemplated when the license transfer applications were submitted on May 12, 2000, but there is no indication that they were. These agreements commit ENF to paying a total of \$7.28 million each year to communities near FitzPatrick, and commit ENIP to paying approximately \$9 million each year to communities near IP3.³

If, as appears to be the case, these costs were not anticipated when the license transfer applications were submitted, they further undermine the Entergy applicants' ability to demonstrate financial assurance. These increased costs could cause a significant decrease in anticipated profit margins in most years (particularly for FitzPatrick, with its lower revenue estimates), and in one year in particular could actually cause one of the reactors to operate in a deficit. It is possible that the Entergy applicants may have included estimates of property tax payments in the "Administrative & Other" costs section of the cost-and-revenue projections, which would be standard business practice. However, the projections in that line show no sign that the estimates were accurate, if they were made at all.⁴ In either case, it is impossible to determine whether Applicants's cost-revenue projections in the applications are still accurate or whether ENF and ENIP's financial picture has already changed.

³ See Exhibit #3 ("Pact would settle taxes") and Exhibit #4 ("Entergy reaches tax accord on Indian Point III"), respectively.

⁴ The projected "Administrative & Other" costs are virtually equivalent in the applications, differing only in that FitzPatrick's costs are approximately [] each year. In reality, ENF's payments to local municipalities are roughly \$1.7 million less than ENIP's each year through 2004, at which point ENIP's become approximately \$280,000 less each year. Therefore, even if Applicants did anticipate some sort of property tax expense when they filed the applications, it is not clear whether those estimates accurately anticipated the current reality.

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Furthermore, because these agreements were announced after the NRC staff published its Safety Evaluation Reports and Orders approving the license transfers (November 9, 2000), this information, although relevant, has not been reviewed by NRC.⁵ Because of the significant impact on Applicants' cost-and-revenue projections – which in turn potentially affects the public and/or worker health and safety – Applicants should be required to make supplemental filings incorporating the new information and explaining any further changes to the cost-and-revenue projections that were submitted with the applications in May, 2000.

B. Applicants' Revenue Projections Are Based on Unreasonable Assumptions.

Applicants' Power Purchase Agreement imposes a requirement that FitzPatrick and Indian Point 3 be run at average annual capacity factors of 85%; if ENF and/or ENIP do not satisfy this requirement,⁶ they will face penalties. The Entergy applicants' revenue projections are also based on maintaining output at 85% average annual capacity. Applicants supply no supporting information for this assertion, but merely claim that they "expect" the facilities to perform at that level, "[b]ased on FitzPatrick's [and IP3's] current operating performance and the performance of Entergy's other nuclear plants." *See FitzPatrick application at page 7, and IP3 application at page 7.* As supported by the Smeloff Declaration, CAN submits that Applicants' projections are not supported by the operating histories of IP3 and FitzPatrick, and

⁵ Per a December 27, 2000 phone conversation with Entergy's counsel, Mr. Levanway, it was confirmed that Applicants have made no supplemental filings with NRC relating to the new agreements or revised cost-revenue projections.

⁶ As established on dates two years and approximately four years following the closing date of the sale.

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that the uncertainties facing ENF and ENIP undermine the financial assurances offered in the applications.⁷

Because the Entergy applicants are newly formed entities, CAN believes that NRC must look back farther than three years in order to determine whether the five-year projections are reasonable. Neither FitzPatrick nor IP3 has been able to sustain the operating levels relied on in the applications for more than two or three years at a time; in fact, in some years, operating levels have been significantly below the levels required by the Entergy companies in order to generate sufficient revenues and satisfy their contractual obligations. Between 1994-99, IP3's and FitzPatrick's average capacity factors were 52.3% and 80.7% respectively.⁸ This level of performance – particularly for IP3 – is so far below that assumed by the Entergy applicants that it would severely compromise the revenues to cover ENIP and ENF joint and several liabilities, as well as the reserve funding available to FitzPatrick – if it did not force both reactors into premature shutdown. Thus, the Applicants' assumption of an 85% capacity factor is

⁷ Since ENF, ENIP, and ENO are newly-formed entities, applicants are at pains to explain why the performance of Entergy's other reactors is relevant and how their rationale satisfies NRC's higher assurance requirements for newly-formed entities. Applicants' arguments are not persuasive. Insofar as Entergy has an established record as a nuclear operator, it is almost exclusively through its electric utility subsidiaries, with all the additional financial assurance of rate-making and cost recovery. However, ENF and ENIP are not electric utilities and, as illustrated by Enclosure 7, "Organization Chart," the Entergy applicants are part of a new non-utility arm of Entergy's nuclear business, the track record of which has not been established. ENF and ENIP's reliance on continued operation to cover operating costs and on creditors for reserve funding – rather than guaranteed rates and the ability to return to ratepayers for cost recovery – would require different business and operations strategies than Entergy has built its experience upon thus far.

⁸ See NRC Info Digest, NUREG 1350, Vol. 12, Ed. 2000. Available at http://www.nrc.gov/NRC/NUREGS/SR1350/V12/sr1350v12.html#_1_58

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unreasonable. As supported by Mr. Smeloff, it would be more reasonable to project a 75% average capacity factor, especially for newly-formed entities in the nuclear industry.

However, assuming a 75% average capacity would, on a five-year basis, leave the applicants virtually no retained earnings. *See Declaration of Mr. Smeloff at paragraph 10.* It should also be noted that, if applicants do not satisfy the 85% capacity factor requirement, the imposition of financial penalties by NYPA will further cloud ENF and ENIP's projections. CAN believes that these uncertainties confronting Applicants' ability to operate FitzPatrick and IP3 and generate revenues at the required levels undermine the financial assurances offered in the applications. Overestimating performance levels could lead to the depletion of reserve funding within the five-year term projected in the applications, and create a situation in which ENF and ENIP have very little to no reserve funding available as FitzPatrick and IP3 become fully reliant on the potentially volatile wholesale energy market for generating revenues.

C. Applicants' Cost-and-Revenue Projections Are Not Adequate to Cover Common Increases in Operating Costs.

The Entergy applicants' ability to provide adequate financial assurance is also called into question by the Operation & Maintenance cost projections submitted in the applications. As supported by the Smeloff Declaration, ENF's and ENIP's anticipated annual operating costs are on the low end of those common in the nuclear industry. Because Operation & Maintenance costs can be reasonably expected to increase by 15% or more, potentially for years at a time,⁹ applicants' projections must be analyzed for

⁹ See Smeloff Declaration at footnote #3.

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both increased operating expenses and decreased capacity factors, particularly since it is reasonable to expect that these two conditions could go hand in hand. As Mr. Smeloff indicates, although in itself it might not be a fatal flaw in the applications, ENF and ENIP have not demonstrated that they could withstand a combination of reasonable increases in operating costs and reasonable decreases in capacity factors.¹⁰ CAN believes that, especially because ENF, ENIP and ENO are newly formed entities, the NRC should evaluate the applications considering multiple factors to assess whether the applications provide a reasonable level of financial assurance that FitzPatrick and IP3 can be operated safely for the terms of the licenses. In fact, while 10 CFR 50.33 (f)(2) requires applicants to submit cost-revenue projections for only five years, that filing must demonstrate “the applicant possesses or has reasonable assurance of obtaining the funds necessary *to cover estimated operation costs for the period of the license*” (emphasis added).

D. The Supplemental Funding Available to ENF and ENIP Does Not Offer Adequate Financial Assurance to Protect the Public and Worker Health and Safety.

In order to insure that ENF and ENIP can cover operating costs in the event of revenue shortfalls, the Entergy applicants offer evidence of supplemental funding in the form of credit arrangements with two other Entergy subsidiaries: (1) a credit agreement with Entergy Global Investments, Inc. [“EGI”], to provide \$20 million each to ENF and ENIP as a Working Capital Credit Line; and (2) a Credit Agreement with Entergy International Ltd. [“EIL”] for a total of \$50 million to be shared by ENF and ENIP. As

¹⁰ As noted by Mr. Smeloff, the NRC Staff’s evaluation of the applications considers these

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evaluated by Mr. Edward Smeloff, these credit arrangements would only be able to support a six-month outage at a single facility or eight months of outage time between the two reactors. *See Exhibit #1, Declaration of Edward A. Smeloff.* CAN disagrees with the applicants that this amount of funding is sufficient to assure the safe operation of FitzPatrick and IP3. Outages of greater than six-month duration are common in the nuclear industry, and frequently approach a year or longer.¹¹ As supported by Mr. Smeloff's attached declaration, and particularly because ENF and ENIP are newly-formed entities which are not electric utilities, CAN believes that the applicants do not provide evidence of adequate supplemental funding to satisfy the financial assurance provisions of 10 CFR § 50.33 (f).

Furthermore, the credibility of the credit arrangements with EGI and EIL have not been clearly established by the applications. In order to be considered evidence of financial assurance, the credit agreements must be readily available to be used when needed. However, as indicated by Mr. Smeloff in his declaration, that requirement is not clearly supported by the available evidence in the applications:

"... the license transfer provides insufficient information about reliability of letters of credit provided by Entergy Global Investments Inc. and Entergy International Ltd. LLC. ... Given the companies have interlocking fiduciary interests it is not clear that the issuers of the lines of credit have conducted a due diligence examination of the business plans of ENF and ENIP. Second, the information provide by ENF and ENIP about the financial

factors separately, but did not consider them together.

¹¹ "In the past 15 years, at least 23 nuclear power plants have been shut down for a year or longer while their owners repaired broken safety equipment." *See CAN Hearing Request, etc., July 31, 2000, Exhibit 3C at page 8.* It should be noted that 23 reactors comprises nearly 25% of US reactors, and that both FitzPatrick and IP3 are among those that have been susceptible to such extended outages. Also, the recent outage at Indian Point 2 exceeded the duration that ENF and ENIP could be expected to survive.

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background of Entergy Global Investments, Inc and Entergy International Ltd LLC is minimal and hardly adequate to determine their capability of meeting the terms of the lines of credit. ... To know whether these assets are liquid and available to back up the lines of credit more information is needed about the underlying assets, preferably though an audited financial statement. It is, therefore, impossible to determine whether these companies have the liquidity and capability to meet their commitments to ENF or ENIP.”

This lack of certainty with regard to the availability of supplemental funding further undermines the ability of the applications to satisfy financial assurance requirements.

The possibility that ENF and/or ENIP would need to draw on those agreements and then find that the required funds are not available could compromise safety at FitzPatrick and/or IP3.

E. The Entergy Applicants’ Market Revenue Projections Have not Been Evaluated to Determine Whether Their Assumptions about Market Prices Are Reasonable. Market Factors in ENF and ENIP’s Market Areas Could Introduce Significant Uncertainty and Prevent the Companies from Meeting their Revenue Requirements, Thereby Undermining Applicants’ Ability to Offer Adequate Financial Assurance

Beginning in 2004, the Entergy applicants will need to begin generating revenues through the wholesale energy market, and beginning in 2005 all of ENF’s and ENIP’s revenues must come from wholesale market sales. The applications are extremely vague on the sources of revenue for ENF and ENIP, referring only to a general business strategy to “pursue other firm contracts or sell any uncommitted power on the market in New York.” The applications indicate in a footnote that ENF and ENIP’s projected market rates are based on “independent market studies, Entergy Power Marketing Group analyses and scenarios related to varying market conditions.” See IP3 application at page7. However, none of the supporting documentation is offered to evaluate these projections, and NRC Staff has not evaluated the Entergy companies’ estimates to

determine whether they are credible. Although NRC Staff separately refers to an analysis of levels of demand for electricity, Staff's evaluation is inconclusive with regard to Entergy's market price estimates: "it is difficult to predict the direction of prices likely to be paid for FitzPatrick [or IP3] power in its market area." See SERs at page 6. Staff's evaluation acknowledges the difficulty in effectively predicting market prices in the next several years. In agreeing with Staff, what this then requires is a deeper investigation of applicants' financial reserves, since the market is so labile. To determine the credibility of Entergy's projections, the NRC would have to review the analyses and reports referred to in the applications.

This question is fundamental to determining whether the applications offer adequate financial assurance of the continued safe operation of the reactors. At issue is not only the years projected, but ENF and ENIP's ability to offer adequate financial assurance "for the period of the license," as required by 10 CFR § 50.33 (f)(2). Following the period projected, ENF and ENIP must still make payments to NYPA under the Facilities and Fuel contracts for two years. Thus ENF and ENIP's market revenues must be able to sustain a similar level of expenses beyond the period projected. However, there are significant forces which cloud the business outlooks for the wholesale energy market which affect ENF and ENIP's ability to offer adequate financial assurance. Based on projected increases in supply in the Entergy applicants' key markets, recent developments with regard to utility deregulation in California and New York, and evidence presented in another recent Subpart M proceeding, CAN believes that Applicants assumptions about ENF's and ENIP's market revenues must be reviewed in greater detail. These uncertainties are reasonable to assume, and CAN believes the Commission must review their impact on the

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cost-revenue projections supplied to determine whether the applications satisfy the financial
assurance requirements of 10 CFR § 50.33 (f)(2).

As noted at page 9 above, 10 CFR § 50.33 (f)(2) requires that license transfer applicants
demonstrate financial assurance that they will be able “to cover estimated operation costs *for the
period of the license*” (emphasis added). Meeting the five-year projection filing requirement does
not, in itself, satisfy the requirement that applicants’ projections are reasonable, nor that simply
on the basis of the five years projected, applicants have demonstrated assurance that they will be
able cover estimated costs on an ongoing basis. The Commission, in fact, supported this
reasoning in its Memorandum & Order CLI-99-06 regarding the request by New England Power
Company [“NEP”] for a hearing on the license transfer applications for Montaup Electric
Company [“MEC”] and Little Bay Power Corporation [“Little Bay”]:

Section 50.33 (f)(2) nowhere declares that the proffering of five-year projections
will, per se, prove adequate in any and all cases. To the contrary, the rule
contains a “safety valve” provision explicitly reserving the possibility that, in
particular circumstances, and on a case-by-case basis, additional protections may
be necessary. See 10 C.F.R. 50.33 (f)(4) (to ensure adequate funds for safe
operation, NRC may require “more detailed or additional information” if
appropriate). As we detail below, NEP is entitled to argue that this case calls for
additional financial qualification measures beyond the five-year projections and
that the applicants therefore have not met their burden under section 50.33 (f)(2)
to satisfy Commission financial qualification measures.

As support for the argument admitted, NEP’s expert submitted information from (1) estimates of
increased generation capacity in the region by the New England Energy Pool [“NEEPOOL”], and
(2) financial information submitted by Little Bay’s parent companies, BayCorp. Holdings Ltd.
[“BayCorp”] and Great Bay Power Corporation [“Great Bay”]. NEP presented evidence that
planned new generation in the region amounted to potentially double the current supply of

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electricity in New England. Also, the financial statements showed that Great Bay, a 12.1% co-owner and –licensee of Seabrook, had failed to generate a profit every year since its incorporation (the previous 2.75 years), and that Great Bay's liquid assets had been reduced by 54% (\$15 million) in the previous 1.75 years. Similar to ENF and ENIP, Great Bay's and Little Bay's revenue sources consist entirely of wholesale energy market sales. On the basis of the evidence provided, the Commission determined that NEP's contention was admissible and demonstrated a material dispute of law (regarding interpretation of the requirements of 50.33 (f)(2)) and fact (regarding the credibility of Little Bay's revenue projections).

Little Bay and Great Bay's revenue sources consist entirely wholesale market sales as do the present applicants. ENF and ENIP will face a similar situation beginning in 2004.¹² ENF will begin selling 69% of its capacity on the wholesale market. In ENF's market areas,¹³ the New York Independent System Operator ["NYISO"] indicates that 5,559.9 MW of new generation are planned to be in service by 2003; by 2005 when ENF must generate all of its revenue through the wholesale market, planned new generation totals 6,564.9 MW. In ENIP's market areas,¹⁴ planned new generation totals 13,108.3 MW by 2003, and 18,428.3 MW by 2005. While all of the planned new generation will probably not be completed, it is reasonable to assume that a large portion of it will, with the potential to substantially increase supply of electricity in New York's

¹² There is, in fact, more at stake in the present proceeding because Little Bay and Great Bay only possess a combined 15% of a single reactor, whereas the Entergy applicants here would each have responsibility for an entire reactor.

¹³ Niagara Mohawk Power Corp. ["NMPC"] and New York State Electric & Gas ["NYSEG"] service territories.

¹⁴ Consolidated Edison and NYPA service territories.

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wholesale market.¹⁵ In its hearing request and subsequent reply to Montauk and Little Bay, NEP describes a similar situation in New England, with approximately 30,000 MW of new generation planned. The potential for large increases in supply and competition could make the basis for ENF and ENIP's projected market revenues highly uncertain. Furthermore, ENF and ENIP will be entering the market at a later date than many of their competitors, potentially undermining their ability to acquire stable contracts. NEP's expert witness points to Securities & Exchange Commission filings by BayCorp. describing financial risks of its wholesale nuclear generation business:

Bay Corp has never reported an operating profit for any year since its incorporation. The Company's business strategy is to seek purchasers for its share of the Seabrook Project electricity output at prices, either in the short-term market or pursuant to medium or long-term contracts, significantly in excess of the prices currently available in the short-term wholesale electricity market. Sales at current short-term rates do not result in sufficient revenue to enable BayCorp to meet its cash requirements for operations, maintenance and capital-related costs. Great Bay's ability to obtain such higher prices will depend on regional, national and worldwide energy supply and demand factors that are beyond the control of Great Bay. There can be no assurance that Great Bay will ever be able to sell power at prices that will enable it to meet its cash requirements.

... In the past, wholesale sellers of electric power, which typically were electric utilities, frequently entered into medium or long-term power sale contracts providing for prices in excess of the prices available in the short-term market, which includes contracts of one year or less in duration. In recent years, increased competition in the wholesale electric power market, reduced growth in the demand for electricity, low prices in the short-term market and the uncertainty associated with deregulation of the industry have reduced the willingness of wholesale power purchasers to enter into medium or long-term contracts and have reduced the prices

¹⁵ A November 2000 report by the New York State Energy Planning Board, *Report on the Reliability of New York's Electric Transmission and Distribution System*, estimates that total current generation capacity in the state is approximately 34,400 MW. As of December 12, 2000 the NYISO indicates a total of 32,373 MW of new generation and interconnections planned by 2005. See Exhibit #5.

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obtainable from such contracts. *See Exhibit #5B NEP Response, etc., Exhibit 1 at pages 3-5.*

It is reasonable to expect that New York's evolving wholesale energy market will duplicate many of these conditions, with large amounts of increased generation, new interconnections with New England's market, and political and regulatory uncertainties unfolding in the process of deregulation (see below). If ENF and ENIP are not able to acquire stable medium or long-term contracts, they could find themselves in a situation without the financial security to safely operate the reactors. The NRC must review Applicants' projections in greater detail to determine whether this is a likely possibility. CAN submits that, if it is, the applications do not provide adequate financial assurance for the safe operation of FitzPatrick and IP3.

Staff also refers to dramatically increased wholesale electric rates in other US electric markets over the past several months as an indication of assurance in Applicants' projections. *See SERs at page 6.* However, there is no reason to believe that, three to five years from now, the current experience in markets like California will prevail in New York. Political leaders in California are in the process of requiring dramatic reform in the state's energy market, which could involve the imposition of rate caps and other regulations to control the rise in market rates. *See Exhibit #6, "Energy summit generates optimism."* Furthermore, as a result of the situation in California, pressure is also building among state officials in New York to ensure that prices do not rise as they have in California. *See Exhibit #7, "Lawmakers heated over energy plans."* The Entergy companies' market revenue projections must be reviewed to determine their basic assumptions about the market structure and regulatory environment. Those assumptions will have significance to whether ENF and ENIP's revenue projections are reasonable. There is a

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genuine dispute concerning the credibility of Entergy's revenue projections, which are
unreviewed and based on an unpredictable market. The NRC has to do a more in-depth analysis
to determine the credibility of these newly formed entities' projections and whether they can
provide adequate financial assurance to justify the license transfer.

Because fundamental aspects of the proposed transaction leave ENF and ENIP unable to
provide adequate financial assurance of continued safe operation, the Commission should dismiss
the license transfer applications. Major portions of the agreements between NYPA and the
Entergy companies would have to be renegotiated in order to sufficiently protect the public
health and safety.

Alternative Conditions to Be Considered for Approval of the License Transfer

Applications

Should the Commission determine that it would be more prudent to impose license
conditions rather than dismiss the application, the following conditions would address the major
flaws and insufficiencies in the proposed transaction as it stands:

- 1) The Commission should require that the level of supplemental funding in the form of
letters of credit or sureties provided by Entergy and/or its other subsidiaries be sufficient to cover
a one-year shutdown for extensive maintenance at each reactor. As discussed in Mr. Smeloff's
declaration and Exhibit 5 (*Request for Hearing by New England Power, Inc. ...*), CAN believes
the level of supplemental funding must be able to cover both the increased maintenance costs and

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other contractual financial commitments during that period. The Applicants should be required to propose estimates, with an opportunity for comment by CAN in the course of the proceeding.

2) In the alternative, Entergy Corp. or any of its other subsidiaries should be prevented from absorbing any retained earnings of ENF and ENIP (or Entergy Nuclear Investment Co. #1 and #2) until such a 1-year reserve is established and placed in escrow until needed. One of the principal flaws in the existing applications is that, although there are years where it seems possible for ENF and/or ENIP to make a profit, it is unclear on what schedule those earnings are to be absorbed by the parent company. Thus, it is not clear whether ENF and ENIP have the ability to build up a sufficient reserve of earnings with which to afford unanticipated maintenance needs or extended shutdowns. Since the Entergy applicants cannot return to ratepayers for such cost increases, this means that the future operation of FitzPatrick and IP3 could rely on a strictly hand-to-mouth business plan, with its only assurance a combination of paltry loans insufficient to cover a single extended maintenance outage as are experienced commonly in the nuclear industry. As part of this condition, it would also be necessary to require that Entergy, Entergy Global Investments, and/or Entergy Investments provide supplemental funding equivalent to that in Condition #1 above until the reserve is established, or in case it cannot be.

3) In another alternative, the Commission could require that NYPA continue its obligation to insure the safe operation of FitzPatrick and IP3. While CAN acknowledges that this arrangement would be unconventional, it would be no more unconventional than the arrangements NYPA and the Entergy companies have proposed with regard to decommissioning and the decommissioning trust fund. However, while the Commission is essentially being asked to bend its regulations on decommissioning to shield NYPA and Entergy from liabilities –

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potentially at the expense of the Commission's future authority and the public health and safety
– requiring that NYPA take responsibility for ensuring adequate funds for the continued safe
operation of FitzPatrick and IP3 would preserve the integrity of the Commission's financial
assurance requirements and the public health and safety. Furthermore, inasmuch as the revenue
limitations and uncertainties imposed on ENF and ENIP by the existing agreements are due in
part to NYPA's interests, NYPA should be required to accept some of the financial risks in
ensuring that the public health and safety is not compromised.

Request that CAN's Revised Contention Be Treated According to 10 CFR § 2.1306 (c)(3)

CAN believes that the applicable rule for filing of this revised contention is 10 CFR §
2.1306 (c)(3)¹⁶ and that this filing should not be treated as a late-filed contention. Per phone
conversations with the Presiding Officer, CAN was given indication that this revised contention
might be treated as a late-filed contention, which imposes higher standards for admissibility. If
the late-filed contention standard is applied, CAN satisfies it because the issues that CAN has
raised are based on new and unreviewed information that has come to light since the submission
of the applications and the NRC Staff's Safety Evaluation Reports ["SERs"]. This new
information, which was provided to CAN in proprietary financial documents recently supplied
by the Applicant and the NRC Staff, casts an even greater shadow over the Entergy applicants'
ability to offer adequate financial assurances, and which would potentially provide the basis for a

¹⁶ 10 CFR § 2.1306 (c) establishes three options for determining whether hearing requests and
intervention petitions have been filed in a timely fashion. Subparagraphs (1) and (2) set
schedules based on dates of notice in the Federal Register and Public Document Room,

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late-filed contention. In particular, through Exhibits 3 and 4 and other published news accounts, CAN has learned of significant financial commitments which the Entergy applicants have incurred through agreements with local communities. Because these commitments were incurred after NRC Staff completed their evaluation of the applications, and because it is unclear whether these expenses estimated accurately (or at all) when the applications were submitted, CAN has good cause for raising its concerns at this time.

CAN also satisfies the other elements of the Commission's late-filing standard in 10 C.F.R. § 2.1308(b). First, there are no other means by which CAN can protect its interests, because the NRC licensing proceeding is the only forum available for vindicating CAN's right to protection of health and safety under NRC regulations. Nor are there any other parties to this proceeding who will represent CAN's interests. Second, CAN's participation can reasonably be expected to assist in the development of a sound record. CAN has obtained the expert assistance of Edward Smeloff, whose declaration is submitted in support of this filing. Mr. Smeloff is prepared to testify in this proceeding. [Verify this with Ed.] His testimony would follow the lines of the issues he has described in his declaration. Finally, although the admission of this contention be expected to broaden and/or lengthen the proceeding somewhat, this consideration must be weighed against the fact that the new issue is based on documents that were unavailable to CAN until very recently. CAN's statutory right to a hearing under the Atomic Energy Act cannot be infringed by the application of this element of the standard, where CAN's delay in introducing new issues is due solely to the Applicants' and staff's delay in producing

respectively. Subparagraph (3) provides flexibility for special circumstances, allowing until "Such other time as may be provided by the Commission."

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information. On that basis, CAN believes this filing would satisfy the requirements of 10 CFR § 2.1308 (b) for untimely filing of hearing requests.¹⁷

However, CAN does not believe it is appropriate to apply § 2.1308(b). In authorizing CAN to submit a revised contention on the basis of confidential information released by the Applicants under protective agreement, there is nothing in CLI-00-22 which contemplates holding this filing to anything but the Commission's "usual specificity requirements." *See CLI-00-22 at page 24.* In fact, through a footnote to the above, the Commission specifically indicates the rationale for allowing CAN to submit a revised contention, acknowledging the special circumstances that warrant an exception to Subpart M's normal requirements for timely filing and review of hearing requests:

... in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to petitioners when framing their issues, *it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.* Id.

Were § 2.1308 (b) applied here, it is possible that it would restrict the scope of admissibility to only those portions of CAN's contention dealing with the new information currently unreviewed by NRC. However, the Commission's order specifically deals with confidential information reviewed by NRC but previously unavailable to CAN.¹⁸ The Commission clearly felt it was important for CAN to have the opportunity to review the confidential information and submit specific, well-documented contentions challenging the adequacy of the Entergy companies' cost-

¹⁷ 10 CFR § 2.1308 (b) states, in part, that "Untimely hearing requests or intervention petitions may be denied unless good cause for failure to file on time is established."

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and-revenue projections. Therefore, CAN believes the filing of this revised contention should be
considered timely, and that the applicable rule is § 2.1306 (c)(3).

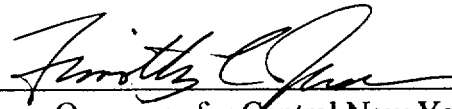
CONCLUSION

For the reasons set forth above, CAN requests the additional issue stated above
be admitted to the proceeding created by CLI-00-22 already in progress.

DATED at Syracuse, New York, this 10th day of January, 2001.

Respectfully submitted:

CITIZENS AWARENESS NETWORK, INC.

BY: 
Timothy L. Judson, Organizer for Central New York-CAN

BY: _____
Deborah B. Katz, Executive Director of CAN

pro se for CAN

Citizens Awareness Network, Inc.
c/o P.O. Box 3023
Charlemont, MA 01339-3023
(413) 339-5781

cc: Office of Secretary;
Service List

¹⁸ At the risk of redundancy, it is important to acknowledge that, prior to receiving the
unredacted applications, it was impossible for CAN to file a properly specific and well-
documented contention on the issues in question

Exhibit #1

[REDACTED VERSION]

Resume and Declaration of Edward A. Smeloff Director of the Pace Law School Energy Project

EDWARD A. SMELOFF

Executive Director

Pace Energy Project

78 North Broadway, E-House

White Plains, NY 10603

Telephone: (914) 422-4221

FAX: (914) 422-4180 – e-mail: esmeloff@law.pace.edu

Since June 1997 Mr. Smeloff has been the executive director of the Pace Energy Project. The project is located at Pace University Law School in White Plains, New York. The Pace Energy Project is an advocacy organization involved in energy policy issues including utility restructuring, global climate change, promotion of renewable energy technologies and research in environmental externalities. Pace advocates on behalf and represents coalitions of environmental and consumer groups in multiple states, including New York, New Jersey, Pennsylvania and Florida.

In his capacity as executive director, Mr. Smeloff is responsible for overall program strategy, program administration, fundraising and supervision of professional and support staff. He acts as liaison with energy policy makers at the federal, state and local levels of government. Specific responsibilities include:

- Establishing and maintaining good working relationships with environmental, consumer and other public interest groups to advocate for specific legislative and regulatory policies to advance the use of energy efficiency and renewable energy technologies.
- Providing guidance and direction to project staff to assure that environmental and consumer interests are adequately represented in policy and operating decisions made by the PJM and New York Independent System Operators.
- Identifying opportunities to promote the cost-effective application of distributed technologies (including solar and fuel cells) through regulatory proceedings (e.g. interconnection standards) and via negotiations with utility distribution companies.
- Providing general direction for research into policy mechanisms (e.g. ecological tax reform, property and casualty insurance incentives, securitization of energy efficiency loans) to promote the utilization of energy efficiency technologies at lowest possible social costs.
- Supervising the development and implementation of *The Power Scorecard*, an analytic methodology for evaluating and rating the environmental quality of power supplies with the goal of increasing demand for environmentally superior products in competitive electricity markets.
- Interacting as needed with elected and appointed officials, representatives of business and industry and the press regarding the goals and objectives of the Energy Project.
- Communicating, orally and in writing, with a wide variety of groups, including private foundations, federal and state utility regulators and other public officials.
- Managing a staff of attorneys, economists and policy analysts, including prioritizing and organizing work.

From January, 1987 through June, 1997 Mr. Smeloff served on the elected Board of Directors of the Sacramento Municipal Utility District (SMUD), the fifth largest publicly

owned utility in the United States. During that time he served as Board President, Vice President, Chair of the Board's Policy and Fiscal Committees and chair of the utility's task force on renewable energy development. While President of the Board of Directors, immediately following the closure of the utility's nuclear plant by Sacramento's voters, he oversaw the development of a recovery plan that emphasized investments in energy efficiency measures, a diversified portfolio of power purchases, the development of three local cogeneration facilities and the installation of two fuel cells and over 4 megawatts of photovoltaics. His experience at SMUD includes overseeing:

- Resource planning, financial management and operations for an electric utility serving over 460,000 customers.
- The implementation of state-of-the-art programs in customer service, information management systems and employee safety.
- Innovative project financing of three natural gas fired cogeneration projects located at major industrial facilities in Sacramento.
- Development of plans to open up the retail electricity market in Sacramento while assuring the recovery of the utility's stranded costs and continued support for public purpose programs.
- An economic development program that resulted in the retention of several major industrial customers in Sacramento in the recruitment of several major new companies to Sacramento including Packard Bell, Apple and JVC.
- Plans to install 10 MW of photovoltaics in Sacramento by 2002 along with the recruitment of a new advance thin film photovoltaic manufacturing facility to Sacramento.
- The installation of electric vehicle recharging infrastructure in public parking lots and at light rail stations.

From 1992 through 1997 Mr. Smeloff served as SMUD's representative to the California Institute for Energy Efficiency (CIEE), a collaborative effort of the University of California and the state's electric and gas utilities. CIEE was formed to conduct medium-term research and development of energy efficiency technologies and applications. As the President of the Institute's governing board he provided policy guidance during California's restructuring of the electric utility industry.

Mr. Smeloff is the author of Reinventing Electric Utilities: Competition, Citizen Action and Clean Power, published by Island Press. The book addresses the fundamental issues related to the restructuring of the electric utility industry in a manner that is accessible to the general citizenry.

He currently serves on the Board of Directors of the Center for Resource Solutions, the Northeast Energy Efficiency Partnerships and the Northeast Sustainable Energy Association. He also was appointed by the County Administrator of Westchester County to serve on the Westchester County Public Utility Service Agency. In addition he serves on an advisory panel to the New York State Energy Research and Development Agency that is responsible for oversight and evaluation of energy efficiency and renewable energy programs.

DECLARATION OF EDWARD A. SMELOFF

Under penalty of perjury, Edward A. Smeloff states as follows:

1. I am executive director of the Pace Law School Energy Project, a research and advocacy organization working to develop and support sustainable energy policies based in White Plains, New York. The Energy Project is part of the Pace University School of Law, a non-profit educational institution incorporated in the state of New York.
2. The purpose of this affidavit is to offer an analysis of the financial qualifications of the Entergy Nuclear Fitzpatrick, LLC ("ENF") and the Entergy Nuclear Indian Point, LLC ("ENIP") to safely operate the Fitzpatrick and Indian Point 3 nuclear power plants. In particular, I will address the possibility that the applicants will not have sufficient sources of funds to safely operate the Fitzpatrick and Indian Point 3 nuclear power plans.
3. I am qualified by training and experience to evaluate the financial qualifications of the Applicants in this proceeding, ENF and ENIP to safely operate the Indian Point 3 and Fitzpatrick nuclear power plants. I have a masters degree in public administration from the University of Southern California including training in capital budgeting and financial analysis. A copy of my curriculum vitae is attached.
4. I have also participated in interventions by the Pace Law School Energy Project in numerous regulatory proceedings in New York and New Jersey on behalf of consumer and environmental organizations. Since 1997, I have served as the executive director of the Energy Project responsible for the supervision of all activities of the project. The project has produced and published numerous analyses and studies regarding the electricity industry. One such study that I initiated, supervised the research and edited was a September, 1997 economic analysis of the potential early retirement of the Salem Nuclear Generating Station.
5. I have previous significant experience in evaluating the financial qualifications of an applicant to operate a nuclear power plant as a member of the Board of Directors of

the Sacramento Municipal Utility District. In that capacity I had responsibility for review of budgets for the Rancho Seco nuclear generating station, authorization of the issuance of revenue bonds to support the operations of the nuclear plant and other facilities of the utility and communications with financial rating agencies including Moody's, Standard and Poors and Fitch regarding the financial situation of the Sacramento Municipal Utility District. From January 1986 to June 1997, I served on the Board of Directors of the Sacramento Municipal Utility District, a municipal electric utility based in Sacramento, California that owned and operated a nuclear power plant. For two years I served as President of the Board of Directors. As a Director of the utility I was responsible for oversight of all operations of the utility, including operations at the Rancho Seco Nuclear Generating Station.

6. As a result of an overcooling incident on December 26, 1985 and subsequent regulatory actions taken by the Nuclear Regulatory Commission, the Rancho Seco Nuclear Generating Station was out of operation for 26 months. During that period of time the ongoing operating and maintenance cost and the cost of repairs to the facility totaled \$410 million.
7. In June, 1989 the electorate of Sacramento County voted to close the Rancho Seco Nuclear Generating Station. Following that vote the Sacramento Municipal Utility District invited proposals for transfer of the ownership of the facility to any interested and qualified party. Quadrex Corp., a publicly traded California corporation that provided low-level radioactive waste disposal services, was the only party to offer to purchase and operate the plant. I participated in the due diligence process to determine whether the operating license should be transferred to Quadrex. The review included an analysis of Quadrex's assets and creditworthiness, projections of the costs of operating, maintaining and repairing the Rancho Seco nuclear power plant and projections of revenue Quadrex would obtain both through the sale of electricity back to the Sacramento Municipal Utility District and into the California wholesale market.
8. After three months of negotiations with Quadrex and extensive review of the company's financial and technical capabilities to operate the nuclear plant the Board

of Directors of the Sacramento Municipal Utility District determined that Quadrex had insufficient working capital to safely operate the plant.¹

9. Neither ENIP nor ENF qualifies as an electric utility as defined under 10 CFR 50.2. Therefore, these applicants for a nuclear operating license must demonstrate that they meet the financial requirements for a non-utility nuclear operator. A non-utility applicant is required to demonstrate its financial qualifications to cover the operating costs for the period of the license. Specifically they must demonstrate annual operating costs and sources of funds for the first five years of facility operations. For ENIP and ENF there are two sources of funds that they assert will assure the financial integrity of operations. The first source of funds is revenues from the sale of electricity. Those revenues are defined under power purchase agreements with the New York Power Authority through 2004 for Indian Point 3 and through 2003 for Fitzpatrick. Following those dates revenues will be obtained through sales into the wholesale market. The second source of revenues for plants operation are letters of credit with affiliate Entergy companies, Entergy Global Investments, Inc and Entergy International Ltd. LLC.
10. The most critical factor in revenue projections is the capacity factor of the plant, that is, the number of hours that the plant produces electricity compared to the number of hours the plant is unavailable for production. Because the fixed operating costs of a nuclear plant are relatively high compared to other plants, it is crucial for their financial viability that they operate as many hours as they can safely do so. Under the take or pay contracts with the New York Power Authority, ENF and ENIP only obtain revenues when the plants operate.
11. The other critical factor for the financial viability of a nuclear plant is the cost of operations and maintenance. The operations and maintenance costs are driven largely by labor costs, which can vary significantly at nuclear plants. Reducing the workforce at the nuclear plants can lower labor costs. But doing so can also increase long term safety risks by reducing preventative maintenance at the plants. Often, labor costs at a nuclear plant increase during times when repairs or improvements are made. At Rancho Seco the labor force fluctuated between 800 and 1500 employees

¹ Subsequently, Quadrex filed for bankruptcy.

and contractors. Therefore, it is important in looking at the financial viability of the operations at a nuclear power plant to perform sensitivity analyses both of costs and revenues.

12. A sensitivity analysis varies key variables to determine the sensitivity of outcomes to changes in those variables. For the purpose of determining whether the applicants have the financial capability to safely operate the Fitzpatrick and Indian Point 3 nuclear plant the two key variables that need to be tested through sensitivity analyses are the capacity factor and the cost of operations and maintenance. The applicants have assumed in their financial analysis that the Fitzpatrick and Indian Point 3 power plants will operate at a capacity factor of 85 percent over the next five years. They have also provided in their redacted applications forecasts of operations and maintenance costs. Entergy has estimated that the operation and maintenance cost for Indian Point 3 would average [] per kilowatt hour from 2001 through 2005. For Fitzpatrick, Entergy estimates those costs at [] per kilowatt hour for the same period.
13. These forecasts about operation and maintenance costs are forward-looking statements. As such they may be influenced by factors that could cause actual outcomes to be materially different than anticipated. In order to determine the effects of key factors on these projections, the applicants should have performed sensitivity analyses as part of their application. The Nuclear Regulatory Commission staff did perform sensitivity analyses on the capacity factor and on the revenue projections based on the market price of electricity. One analysis assumed 10 percent reduction in capacity factor. The NRC staff concluded that with all other variables held constant that ENF would have the financial capability to maintaining the plant in a safe manner. In a separate sensitivity analysis the NRC staff found that the revenues for Fitzpatrick could be reduced by 12 percent and still break even. For Indian Point 3, the staff found that revenues could decline by 17 percent and still break even.
14. In my professional opinion, the assumptions used by the NRC staff did not the cover the spectrum of foreseeable contingencies in the performance and cost of operations and maintenance for the plants. The NRC staff should have looked at both a lower capacity factor and higher operation and maintenance costs. First, the assumed

capacity factor of 85% is not consistent with past experience at Fitzpatrick and IP3. The average capacity factor for Indian Point 3 over the past six years has been 52.3 percent with the plant operating at less than a 75 percent capacity factor for four out of the last six years. The average capacity factor for Fitzpatrick has been 80.7 percent over the past six years with the plant operating at less than a 75 percent capacity factor for three of the last six years. In addition, the projections of future operation and maintenance costs at the plants are toward the low end of what can be reasonably expected. For example, at the two unit Salem Nuclear Generating Station (2212 megawatts of capacity) operation and maintenance expenses averaged \$130 per kilowatt of capacity for the five year period of 1992 to 1996. That represents operation and maintenance expense nearly [] than those assumed for Indian Point 3 and [] for Fitzpatrick.

15. In my professional judgment a reasonable sensitivity analysis of the financial performance of the Fitzpatrick and Indian Point 3 nuclear power plants would use a capacity factor of 75 percent² and a and a 15 percent increase in operation and maintenance expenses for each of the plants.
16. Under this sensitivity scenario neither Indian Point 3 nor Fitzpatrick would produce net income during the next [] of operation.³ While this erosion of net revenues is not, by itself, a fatal flaw in the application, it raises significant doubts about the level of operating reserves or working capital that will be available to the applicants in the event that retained revenues are not available for an extended plant outage. This issue is discussed below in paragraph 18.
17. A key question regarding the financial qualifications of the applicants is whether they will have sufficient funds to withstand an extended outage at one or both of the nuclear plants. According to ENF's and ENIP's applications, fixed operating expenses during an extended shutdown of either nuclear plant would be paid for by retained earnings or by lines of credit with other Entergy affiliate companies. The

² The average capacity factor for Indian Point 3 over the past six years has been 52.3 percent with the plant operating at less than a 75 percent capacity factor for four out of the last six years. The average capacity factor for Fitzpatrick has been 80.7 percent over the past six years with the plant operating at less than a 75 percent capacity factor for three of the last six years.

³ Fitzpatrick would not produce net revenues if operation and maintenance costs were increased by just [] with a capacity factor of [].

total amount available under these lines of credit is \$90 million (\$20 million each for Indian Point 3 and Fitzpatrick from Entergy Global Investments Inc. and \$50 million from Entergy International Ltd. LLC that could be used for either or both facilities)⁴. This working capital including the lines of credit would cover the fixed operating expenses for a [] month outage at either facility or a total of [] months of outages at both facilities.⁵

18. In my professional opinion, this constitutes an inadequate operating reserve. Outages of more than six months are common in the nuclear industry.⁶ It is prudent to require operating reserves significantly greater than those proposed by ENF and ENIP in their applications for license transfer. As the applicants begin to reach the limit on their line of credit they will find themselves in a position whether they will be unable to obtain the capital necessary to take actions to protect public health and safety at the facilities.
19. I have also found that the license transfer provides insufficient information about reliability of letters of credit provided by Entergy Global Investments Inc. and Entergy International Ltd. LLC. The purpose of the letters of credit is to provide ENF and ENIP will an source of funds they can call upon when needed to meet fixed operation and maintenance costs at the nuclear facilities. Letters of credit are routinely provided by financial institutions to businesses following a due diligence review of their business plans. Letters of credit are backed up by the financial assets of the lending institution and are credible to the extent that those assets are assured. There are several flaws with the lines of credit that ENF and ENIP obtained. First, the lines of credit are not with well known financial institutions but with affiliate Entergy companies. Given the companies have interlocking fiduciary interests it is not clear that the issuers of the lines of credit have conducted a due diligence examination of the business plans of ENF and ENIP. Second, the information provide by ENF and ENIP about the financial background of Entergy Global

⁴ Page 8 of Application for Transfer of Facility Operating License

⁵ This information was revealed for the first time in the unredacted version of the applications for license transfer (page 9)

⁶ From 1994 through 1999 licensed nuclear power plants in the United States experienced outages of six months or longer 40 times. Outages extending longer than 12 months occurred 19 times during these six years. Information Digest 2000 Edition (NUREG 1350, Vol. 12)

Investments, Inc and Entergy International Ltd LLC is minimal and hardly adequate to determine their capability of meeting the terms of the lines of credit. Financial statements for Entergy Global Investments Inc. and Entergy International Ltd. LLC are included as enclosure 9 to the May 12, 2000 application. This enclosure consists of two pages. One is labeled Entergy International Ltd. LLC Consolidated Statements of financial position. The other is labeled Entergy Global Investments, Inc. Balance Sheet. The cash and cash equivalents of Entergy International is reported to be [] and the cash and cash equivalents for Entergy Global Investments is []. Other assets of these two companies are reported only in the most general terms. To know whether these assets are liquid and available to back up the lines of credit more information is needed about the underlying assets, preferably though an audited financial statement. It is, therefore, impossible to determine whether these companies have the liquidity and capability to meet their commitments to ENF or ENIP. Additional due diligence by the Nuclear Regulatory Commission staff is required to provide reasonable assurance that these funds would be available when needed. Preferably, the Commission should require that a line of credit be established with a traditional financial institution rather than with an interlocking entity.

20. Pursuant to 10 CFR 50.33(f) a non-electric utility must demonstrate it has a reasonable assurance of obtaining funds to cover estimated operating costs for the period of the license. The applicants have provided estimates of revenues and costs for the period of 2000 to 2005. While the applicants are not required to provided detailed costs beyond 2005 they have, in fact, provided no additional information about the potential deregulated market conditions from 2006 to the end of the operating licenses. Market conditions since the deregulation of the electric utility industry have been extremely volatile. During times of surplus capacity wholesale market prices approach the short-term marginal costs of new gas-fired combined cycle power plants which has been as low as 2 cents per kilowatt hour when natural gas prices are around \$2.50 per million BTUs. On the other hand price have risen to 15 cents per kilowatt hour and higher during periods of scarcity. In New York applications for new combined cycle power plants have been filed with the New York

siting board that have the potential to double the generating capacity in the state. Not all of this new capacity will be built. But if a significant proportion is constructed it will exert strong downward pressure on wholesale market prices. While the NRC should not expect that applicants for nuclear operating licenses have a crystal ball that can forecast future market conditions, it should expect that there will be discussion of these issues as part of a demonstration of the applicants' financial qualifications.

ENF and ENIP should be required to provide the NRC with this information

21. Given the reasonable possibility that there will be little if any retained earnings from the operation of the Fitzpatrick and Indian Point 3 nuclear power plants from 2001 to 2005 and the uncertainty as to the credibility of the letters of credit from the two affiliate Entergy companies the NRC has insufficient basis to find that the applicants have demonstrated adequate financial qualifications to assure the safe operation of the Fitzpatrick and Indian Point 3 nuclear power plants. In addition, ENF and ENIP have failed to demonstrate that they have reasonable assurance of obtaining the funds necessary to operate the plant safely beyond 2005.

I declare that the foregoing facts are true and correct to the best of my knowledge, and that the opinions expressed above are based on my best professional judgment.

Signed under the pains and penalties of perjury, this 10th day of January, 2001.

Edward A. Smeloff