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April 3, 2001

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U. S. Nuclear Regulatory Commission
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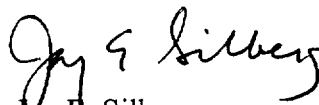
SUBJECT: James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No 3; Docket Nos. 50-333-LT and 50-286-LT (consolidated)
NYPA/Entergy Companies' Final Statement of Position (Non-Proprietary Version)

Ladies and Gentlemen:

Pursuant to 10 CFR § 2.1322(c), Entergy Nuclear FitzPatrick, LLC, Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear Operations, Inc. and the Power Authority of the State of New York file the enclosed NYPA/Entergy Companies' Final Statement of Position (Non-Proprietary Version) in the above captioned proceeding.

Please note that a proprietary version of the NYPA/Entergy Companies' Final Statement of Position is being filed concurrently with this submittal. That filing contains information that is requested to be withheld from public disclosure pursuant to 10 CFR 2.790(a)(4) and 10 CFR 9.17(a)(4).

Very truly yours,


Jay E. Silberg

Counsel for the Power Authority of the State of
New York, Entergy Nuclear FitzPatrick, LLC,
Entergy Nuclear Indian Point, LLC and Entergy
Nuclear Operations, Inc.

Enclosure:

NYPA/Entergy Companies' Final Statement of Position
(Non-Proprietary Version)

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DOCKETED
USNRC
April 3, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

01 APR -5 P3:19

Before the Commission

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

NYPA/ENTERGY COMPANIES' FINAL STATEMENT OF POSITION
(NON-PROPRIETARY VERSION)

Pursuant to the Commission's directive¹ and 10 CFR § 2.1322(c), Entergy Nuclear FitzPatrick LLC ("ENF"), Entergy Nuclear Indian Point 3 LLC ("ENIP")², and Entergy Nuclear Operations, Inc. ("ENO") (collectively "Entergy Companies") and the Power Authority of the State of New York ("NYPA") (collectively "NYPA/Entergy Companies") hereby submit their final statement of position on the issues on which an oral hearing was held on March 13 and 14, 2001 in this proceeding.

¹ 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; Indian Point, Unit 3), CLI-00-22, 52 NRC 266 (2000) ("Commission Order").

² ENF and ENIP are collectively referred to herein as the "Entergy Owners."

I. PROCEDURAL ISSUES

A. PROCEDURAL HISTORY

On May 11 and 12, 2000, NYPA and the Entergy Companies filed applications (the “Applications”)³ for NRC consent to the transfer of the facility operating license for the James A. FitzPatrick Nuclear Power Plant (“FitzPatrick” or “JAF”) from NYPA to ENF and ENO, and the transfer of the facility operating license for the Indian Point Nuclear Generating Unit No. 3 (“Indian Point 3” or “IP3”) from NYPA to ENIP and ENO. These transfers implemented a Purchase and Sale Agreement among NYPA, ENF and ENIP for FitzPatrick and Indian Point 3.

On June 28, 2000, the Commission issued a “Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment, and Opportunity for a Hearing” with respect to each facility.⁴ The Commission received petitions to intervene and requests for hearing from individuals or entities wishing to address or oppose one or both of the license transfer applications, including Citizens Awareness Network, Inc. (“CAN”); the Town of Cortlandt together with the Hendrick Hudson School District (collectively “Cortlandt”); Westchester County; Local 1-2 of the Utility Workers of America (“the Union”); and the Nuclear Generation Employees Association, together with William Carano, Thomas Pulcher and Richard Wiese, Jr. (collectively “the Association”). NYPA/Entergy Companies filed responses opposing the petitions to intervene. In the Commission Order, issued on November 27, 2001, the Commission granted the petitions to intervene by CAN,

³ NYPA filed non-proprietary versions of the Applications on May 11, 2000. The Entergy Companies filed proprietary versions of the Applications on May 12, 2000. The proprietary versions include certain sensitive business information of the Entergy Companies.

⁴ 65 Fed. Reg. 39,953 (FitzPatrick) (2000); 65 Fed. Reg. 39,954 (Indian Point 3) (2000).

Cortland, and the Association, and granted Westchester County government participant status. (Prior to the issuance of the Commission Order, the Union had withdrawn from the proceeding.)

1. Admission of Decommissioning Issue

Issue 2, admitted by the Commission's Order,⁵ relates to the decommissioning funds for the Indian Point 3 and FitzPatrick facilities:

Whether the transfer Applicants' plan for handling decommissioning funds for the FitzPatrick and Indian Point nuclear plants – whereby control of the decommissioning funds will remain with [NYPA] but responsibility for decommissioning the plants will reside with the Entergy companies – provides reasonable assurance of adequate decommissioning funding, within the meaning of 10 C.F.R. §§ 50.75(b) and 50.75(e)(1)(vi).⁶

As explained by the Commission, this issue was based on assertions by the Association concerning NYPA's retention of the decommissioning funds for the FitzPatrick and Indian Point 3 facilities after the transfer of the facilities to the Entergy Companies. The Association challenged the lawfulness of the arrangement under 10 CFR § 50.75 and questioned whether this arrangement was equivalent to other decommissioning funding assurance methods defined in the regulations.⁷ The Commission also found that CAN had raised related issues: whether NRC approval of the transfers would deprive the Commission of authority to require NYPA to conduct remediation under decommissioning, and whether, under these circumstances, NYPA would no longer have access to the decommissioning trust

⁵ Another issue admitted by the Commission (Issue 1) was later dismissed based on the withdrawal from this proceeding of Cortlandt, the issue's sponsor. See Memorandum and Order (Approving Withdrawal of Cortlandt/Hendrick Hudson School District), dated December 22, 2000, LBP-00-34, 52 NRC 361 (2000).

⁶ Commission Order, 52 NRC at 319.

⁷ Id. at 301-02.

fund for the remediation it would need to complete.⁸ The Commission went on to observe that “[t]hese issues relate to the admitted issue involving 10 C.F.R. § 50.75, supra, and CAN may address them at the hearing in that context.”⁹ Thus, when the Association withdrew from this proceeding in January 8, 2001, Issue 2 was retained by the Presiding Officer,¹⁰ even though the general rule in NRC proceedings is that when an intervenor withdraws from a proceeding, the issues or contentions that the intervenor sponsors are dismissed.¹¹

2. Admission of Financial Qualifications Issue

With respect to several financial qualifications issues raised by CAN and Cortlandt, the Commission (1) admitted Cortlandt’s issue regarding the potential joint and several liability obligations of ENIP for ENF;¹² (2) declined to admit Cortlandt’s issue regarding the potential inability of ENIP, as a limited liability corporation, to meet its obligations;¹³ (3) declined to admit Cortlandt’s issue regarding the adequacy of a \$50 million line of credit;¹⁴ and (4) declined to admit CAN’s issue regarding the sufficiency of \$90 million in supplemental funding the Entergy Companies would rely on to meet contingencies at FitzPatrick and Indian Point 3.¹⁵ The Commission Order, however, directed that the Entergy Companies make available to CAN and Cortlandt, pursuant to a protective order, the Entergy

⁸ Id. at 302, n. 25.

⁹ Id.

¹⁰ On November 28, 2000, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel appointed Administrative Judge Charles Bechhoefer to be the Presiding Officer in this proceeding. “Designation of Presiding Officer,” 65 Fed. Reg. 75,976 (2000).

¹¹ See LBP-00-34, supra n. 5, 52 NRC at 363.

¹² Commission Order, 52 NRC at 297. This issue, referred to as Issue 1, was dismissed based on the withdrawal from this proceeding of the issue’s sponsor. See n. 5, supra.

¹³ Commission Order, 52 NRC at 298.

¹⁴ Id. at 297, n. 18.

¹⁵ Id. at 299-300.

Companies' confidential financial data contained in the proprietary versions of the Applications.¹⁶ The Commission Order authorized CAN and Cortlandt "to submit a properly formulated and supported financial qualifications issue" challenging the Entergy Companies' "cost-and-revenue projections" within 20 days after entry of a protective order.¹⁷ The Commission Order warned that "[t]he Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b)), and will not consider claims rejected in the course of this opinion."¹⁸

On January 10, 2001, after receiving the Entergy Companies' proprietary information, CAN filed a revised financial qualifications issue:

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.¹⁹

CAN's bases for this issue were summarized by the Presiding Officer as five separate sub-issues.²⁰

¹⁶ Id. at 300.

¹⁷ Id.; see also id. at 320, n. 67. On December 15, 2000, Cortlandt notified the Commission that it was withdrawing from this proceeding.

¹⁸ Id. at 319.

¹⁹ Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications Issue in the License Transfer for James A. FitzPatrick and Indian Point Unit 3 Nuclear Power Stations per Commission Memorandum & Order, November 27, 2000, dated January 10, 2001 ("CAN Revised Contention").

²⁰ CAN's claims in its Revised Contention, as paraphrased by the Presiding Officer, are as follows:

(A) the property tax agreements with local municipalities are not considered in cost projections;

(B) the revenue projections are based on unreasonable assumptions--in particular, the projected average annual capacity factor of 85% for each reactor is not supported by the operating histories of either reactor;

Footnote continued on next page

NYPA/Entergy Companies filed a response opposing the admission of CAN's Revised Contention.²¹ The Presiding Officer, however, admitted a financial qualifications issue (Issue 3) comprised of some of the claims raised by CAN in its Revised Contention. As admitted and labeled by the Presiding Officer, Issue 3 consists of subparts B.i,²² B.ii,²³ C²⁴ and D²⁵ of CAN's Revised Contention.

Footnote continued from previous page

(C) the revenue projections are not adequate to cover common increases in operating costs--as supported by its expert's declaration, the anticipated annual operating costs are on the low end of those common in the nuclear industry, and because operation and maintenance costs in his opinion can reasonably be expected to increase by 15% or more annually, potentially for years at a time, the licensees' projections for both reactors--FitzPatrick and Indian Point 3--must be analyzed for both increased operating expenses and decreased capacity factors;

(D) the supplemental funding available to the Licensees (assertedly, credit arrangements with two other Entergy subsidiaries) does not provide adequate financial assurance to protect the public and worker health and safety; specifically, according to CAN's expert, the credit arrangements would only be able to support a limited outage at a single facility or a slightly longer outage time between the two reactors (both less than one year), whereas, in the past 15 years, at least 23 nuclear power plants have been shut down for a year or longer (with the recent outage at Indian Point 2 exceeding the duration that either reactor involved here could survive); and

(E) the Licensees' market revenue projections have not been evaluated (presumably by the NRC Staff) to determine whether their assumptions about market prices are reasonable; market factors in the market areas for each reactor could introduce significant uncertainty and prevent the companies from meeting their revenue requirements, thereby undermining the licensees' ability to offer adequate financial assurance. In particular, CAN asserts that the five-year revenue projections submitted by the licensees are inadequate in light of the regulatory requirement set forth in 10 C.F.R. § 50.33(f)(2) that licensees provide estimated operating costs "for the period of the license".

Memorandum and Order (CAN's Revised Contention on Financial Qualifications), LBP-01-04, 53 NRC ____ (February 5, 2001) ("LBP-01-04"), slip op. at 4-5.

²¹ NYPA/Entergy Companies' Response to Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications, dated January 24, 2001.

²² Subpart B.i challenges the validity of the capacity factor assumed by the Entergy Companies in the license transfer applications. LBP-01-04, slip op. at 9-10.

²³ Subpart B.ii raises the "legal question" whether the Entergy Companies should be required to submit estimates for receipts and operating costs over the life of the license rather than for only 5 years. *Id.* at 10-12.

²⁴ This subpart of Issue 3 asserts that the Entergy Companies' cost and revenue projections are not adequate to cover common increases in operating costs. *Id.* at 12-14.

²⁵ As accepted by the Presiding Officer, subpart D of Issue 3 alleges that the limited liquidity of Entergy Global Investments, Inc. and Entergy International Ltd., LLC's assets undermines ENF and ENIP's ability to demonstrate reasonable financial assurance, as required by 10 C.F.R. § 50.33(f). *Id.* at 17.

3. Pre-hearing Submittals on Issue 2

As provided for in the Commission Order, the orders of the Presiding Officer, and the regulations,²⁶ NYPA/Entergy Companies²⁷ and CAN²⁸ filed their initial statements of position on Issue 2 (decommissioning) on January 12, 2001. On February 1, 2001, NYPA/Entergy Companies filed their response to CAN's initial statement of position,²⁹ and CAN filed its response to NYPA/Entergy Companies' initial statement of position.³⁰ In addition to the parties, the NRC Staff filed a brief on the decommissioning issue on February 26, 2001.³¹ No proposed questions were filed by either party, even though the Subpart M regulations allow the filing of such questions and the Notice of Oral Hearing specified dates by which such questions needed to be filed.

4. Pre-hearing Submittals on Issue 3

Pursuant to the schedule set by the Presiding Officer³² and 10 C.F.R. § 2.1322(a)(1), NYPA/Entergy Companies submitted their Initial Written Statement of Position on Issue 3

²⁶ See 10 CFR § 2.1321(a); Commission Order, 52 NRC at 320; Memorandum and Order (Filing Schedule and Procedures), LPB-00-32, 52 NRC 345 (November 30, 2000); Memorandum and Order (CAN Motion for Schedule Change and Change of Hearing Location), dated December 22, 2000.

²⁷ NYPA/Entergy Companies' Initial Statement of Position, dated January 12, 2001. This statement of position was supported by the Written Direct Testimony and Affidavit of George W. Collins ("Collins Test.") and the Written Direct Testimony and Affidavit of Joseph T. Henderson ("Henderson Test.").

²⁸ The Citizens Awareness Network, Inc. Statement on Issue #2 Admitted for Hearing by Commission Order CLI-00-22, dated January 12, 2001 ("CAN Issue 2 Statement"). CAN provided no written testimony in support of its statement of position.

²⁹ NYPA/Entergy Companies' Response to Citizens Awareness Network, Inc.'s Statement of Position, dated February 1, 2001. Since CAN provided no direct testimony on Issue 2, no factual rebuttal of CAN's position was included in NYPA/Entergy Companies' filing.

³⁰ Citizen Awareness Network's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated February 1, 2001 ("CAN Issue 2 Response"). Again, CAN provided no testimony in support of this filing.

³¹ NRC Staff's Brief Regarding NRC Authority Over Decommissioning Expenditures by the Power Authority of the State of New York, dated February 26, 2001 ("Staff Brief").

³² LBP-01-04, supra, slip op. at 20; Notice of Oral Hearing (February 13, 2001), 66 Fed. Reg. 10,921 (2001).

(CAN's Revised Contention on Financial Qualifications) on February 26, 2001.³³ Also on that date, CAN filed its initial statement of position on Issue 3.³⁴

On March 5, 2001, NYPA/Entergy Companies submitted their response to CAN's initial statement of position on Issue 3.³⁵ Also on that date, NYPA/Entergy Companies filed a motion to strike certain portions of CAN Issue 3 Statement and supporting testimony.³⁶ For its part, CAN filed on March 5, 2001 its response to NYPA/Entergy Companies' initial statement of position.³⁷ Finally, on March 11, 2001, CAN filed its response to NYPA/Entergy Companies' Motion to Strike.³⁸

No proposed questions to the witnesses were filed by either party.

B. PROCEDURAL RULINGS BY THE PRESIDING OFFICER WARRANTING REVIEW BY THE COMMISSION

The oral hearing on Issues 2 and 3 was held in White Plains, New York, on March 13-14, 2001. During the course of the hearing (the first of its kind under Subpart M to 10

³³ NYPA/Entergy Companies' initial statement of position was supported by the Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications ("Green and Kansler Test."), dated February 23, 2001.

³⁴ The Citizens Awareness Network, Inc.'s Initial Written Statement of Position on Issue #3 Admitted for Hearing by Order of the Presiding Officer, February 5, 2001 ("CAN Issue 3 Statement"). CAN's Issue 3 Statement was supported by the Testimony of Edward A. Smeloff ("Smeloff Test.") and the Testimony of David A. Lochbaum ("Lochbaum Test.")

³⁵ NYPA/Entergy Companies' Response to CAN's Initial Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated March 5, 2001. This filing was supported by the Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications ("Green & Kansler Rebut. Test.").

³⁶ NYPA/Entergy Companies' Motion to Strike Portions of CAN's Initial Statement of Position on Issue 3 and Supporting Testimony ("Motion to Strike"), dated March 5, 2001.

³⁷ The Citizens Awareness Network, Inc.'s Response to NYPA/Entergy Companies' Initial Written Statement of Position on Issue 3 and Supporting Direct Testimony of Barrett E. Green and Michael R. Kansler, dated March 5, 2001 ("CAN Issue 3 Response"). CAN's Issue 3 Response was supported by the Rebuttal Testimony of Edward A. Smeloff ("Smeloff Rebut. Test."), dated March 5, 2001.

³⁸ The Citizens Awareness Network, Inc.'s Response to NYPA/Entergy Companies' Motion to Strike Portions of CAN's Initial Statement of Position on Issue 3 and Supporting Testimony, dated March 11, 2001.

CFR Part 2), the Presiding Officer made several rulings on procedural issues that were clearly erroneous and prejudicial to NYPA/Entergy Companies, and which if allowed to stand would set a troubling precedent for future Subpart M proceedings. Therefore, NYPA/Entergy Companies urge the Commission to review and reverse these rulings and exclude from its consideration any evidence that may have been improperly admitted into the record as a result of them.

1. Admission of Unjustifiably Late Issues

The Commission found that CAN's financial qualifications issue, as originally proposed, was deficient because it lacked specificity and was proffered without backup support.³⁹ However, because CAN did not have access to proprietary financial information on the Entergy Companies' anticipated costs and revenues, the Commission authorized CAN to file a revised financial qualifications issue after it had received access to the proprietary information.⁴⁰ Thus, the only financial qualifications questions that would be admissible as part of CAN's revised issue would be those arising from the Entergy Companies' proprietary information made available to CAN.⁴¹

Thus, CAN was only entitled to submit a revised financial qualifications contention, if it was properly formulated and supported by the proprietary information made available to CAN pursuant to the Commission Order. The option of filing a revised financial

³⁹ Commission Order, 52 NRC at 300.

⁴⁰ Id.

⁴¹ There could be no good cause for admitting issues that CAN had failed to raise in its Petition if they could have been propounded at that time, based on non-proprietary information. Such issues would, by definition, be untimely and rejectable under the Commission rules set forth in 10 C.F.R. § 2.1308(b). According to those rules, "[u]ntimely hearing requests ... may be denied unless good cause for failure to file on time is established." Thus, absent good cause, it is not necessary to examine the other factors for considering whether to admit a late filed contention set forth in 10 CFR § 2.1308(b).

qualifications contention on a basis other than the proprietary information was not available to CAN, absent an explicit showing of compliance with the late-filing rules of 10 C.F.R. § 2.1308(b).

In ruling on the admissibility of CAN's Revised Contention, the Presiding Officer failed to apply the Commission's directive, and accepted for litigation several issues that were raised for the first time in CAN's Revised Contention but were based on information that had been available in the non-proprietary version of the Applications. In so doing, the Presiding Officer unnecessarily and improperly expanded the scope of this hearing.

An example was the Presiding Officer's erroneous rulings is the admission of Issue 3.D, which "asserts that the supplemental funding available to [the Entergy Companies] does not offer adequate financial assurance to protect the public and worker health and safety."⁴² NYPA/Entergy Companies opposed admission of this issue as untimely because the information on which it is based was set forth in the non-proprietary versions of the Applications: CAN challenges the credit agreements being made available to the Entergy Companies as insufficient because they only support a six-month outage at a single facility or a somewhat longer outage time between the two reactors. CAN Revised Contention at 16-17. CAN, however, knew the amount of the Entergy Companies' supplemental funding from the day the Applications were filed; in fact, CAN quoted this information in its original Petition when it claimed that "maintenance outage costs for two reactors can easily exceed the \$90 million available to FitzPatrick and Indian Point 3" in supplemental funding. CAN Petition at 55. Therefore, CAN's concern regarding the adequacy of the supplemental funding was

⁴² LBP-01-04, slip op. at 14; see n. 20 supra.

not based on the proprietary information provided by the Entergy Companies, and should have been rejected as an unjustified late claim.⁴³

The Presiding Officer, however, ruled the issue admissible. He acknowledged that “[t]his sub-issue may to some extent rely on information available other than through the proprietary information. But the issue as a whole can be better understood after reference to the proprietary data. . . . Indeed, because one crucial aspect of the issue was, as conceded by the Licensees, only available through the proprietary data, I am not prepared to reject the issue as a whole for untimeliness or to require it to meet the more-stringent standards applicable to late-filed issues.”⁴⁴

The Presiding Officer’s laxness in admitting issues for litigation at the hearing sets a troubling precedent which, if followed, will subvert the intent of the streamlined Subpart M procedures.

2. Motion to Strike

In their Motion to Strike, NYPA/Entergy Companies asked the Presiding Officer to strike certain portions of CAN’s Issue 3 Statement and supporting testimony. The pleadings and testimony that NYPA/Entergy Companies moved to have stricken sought to introduce new allegations, largely relating to the safety of plant operations. These allegations were

⁴³ In addition, the Commission had already ruled in this proceeding that questions regarding the sufficiency of supplemental funding do not constitute grounds for a hearing. Commission Order, 52 NRC at 299-300.

⁴⁴ LPB-01-04, slip op. at 16. The “crucial aspect” of the issue, according to the Presiding Officer, was “knowledge of the cash and cash equivalents of EGI and EIL.” *Id.* However, such information was “crucial” only because the Presiding Officer transformed CAN’s contention, which dealt with the adequacy of the amounts available from EGI and EIL to support a six month outage of both units, into an issue about the liquidity of EGI and EIL’s holdings. *See id.* at 15, 16. Indeed, at the hearing CAN abandoned the “liquidity” issue as framed by the Presiding Officer and reverted to what its contention had been all along, i.e. the adequacy of the funding offered by EGI and EIL. *See* Hearing Transcript (“Tr.”) 320-23.

outside the scope of the admitted financial qualifications issue,⁴⁵ were irrelevant or immaterial to the issues in this proceeding,⁴⁶ were at variance with explicit directives of the Commission with respect to what issues are admissible,⁴⁷ and were matters that had already been excluded by the Commission from this proceeding.⁴⁸

At the hearing, after oral argument,⁴⁹ the Presiding Officer denied the motion, suggesting that safety is the underlying basis for all regulations,⁵⁰ and further indicating that

⁴⁵ CAN Issue 3 Statement contained numerous attempts by CAN to raise new issues, primarily related to the safety of plant operations. CAN asserted, for example, that safety “may be sacrificed” because of a purported \$600 million debt resulting from the sale of the units. CAN Issue 3 Statement at 5; see also *id.* at 8. Similarly, CAN asserted that NYPA/Entergy Companies “fail to demonstrate that the two plants can be operated safely for their license terms” because of the financial arrangements that were made to finance decommissioning and the continued operation of the reactors. *Id.* at 6. CAN also alleged that “there is ample evidence that financial pressure can quickly erode the safety of nuclear reactors and create a workforce culture where willingness to conduct needed maintenance and training is undermined by an awareness of tight profit margins.” *Id.* at 9.

Likewise, CAN and its witnesses also improperly sought to introduce safety arguments through broad references to a 1996 NRC Staff evaluation of conditions at the Maine Yankee plant. *Id.* at 10-11. CAN asserted that, as allegedly was the case at Maine Yankee, the “financial pressure to generate electricity” would result “in violation of safety standards.” *Id.* at 11.

Much of the testimony filed by CAN’s witness David Lochbaum also dealt with safety concerns wholly irrelevant to the admitted financial qualifications issue. Mr. Lochbaum sought to raise new issues regarding (1) potential safety concerns arising from “failure to achieve” assumed performance levels (Lochbaum Test. ¶ 10); (2) possible “disincentives for plant workers to freely report potential safety problems” (*Id.* ¶ 11); (3) the “increased likelihood of worker errors” (*Id.* ¶ 12); and (4) an increasing “risk to persons living in close proximity to the facilities” (*Id.* ¶ 13.) Likewise, testimony by CAN’s witness Edward Smeloff indicated that the NYPA/Entergy Power Purchase Agreements “act as an inducement” to avoid required maintenance activities. See Smeloff Testimony, Question 13.

⁴⁶ As aptly summarized by counsel for the Staff, the substance of Issue 3 is whether NYPA/Entergy Companies have satisfied the financial qualifications regulation. This issue can be examined “without going to the next underlying basis step and inquiring into the safety aspects of the degree or not that the regulation has been satisfied. . . . [Once you establish that the regulation has been satisfied, you don’t] then go into the safety aspects, because in a sense you are . . . raising an issue as to whether . . . satisfaction of the regulation . . . adequately addresses the safety issue on which the regulation is based. So . . . the staff’s view would be that . . . introducing matters as to the safety significance after you have passed the financial qualifications step is irrelevant to this proceeding. Tr. 27-28

⁴⁷ CAN’s safety allegations would be inadmissible as vague and speculative, and were so held when CAN attempted to raise them at the start of this proceeding. See Commission Order, 52 NRC at 313.

⁴⁸ For example, the allegations that cost-cutting due to financial pressures would impact plant safety were initially raised as proposed issues by CAN, and were rejected by the Commission for lack of adequate support or basis. Commission Order, 52 NRC at 313.

⁴⁹ Tr. 9-36.

⁵⁰ Tr. 14.

even if the evidence proffered involved the safety of any plant anywhere in the country, it would be appropriate to receive such evidence and the triers of fact would not need to give much weight to those matters if they did not have much relevance.⁵¹

The Presiding Officer also declined to strike an entirely new contention first raised by CAN in a footnote of its Issue 3 Statement which alleged deficiencies in the license transfer applications' failure to discuss relationships between the Entergy Companies.⁵² CAN acknowledged in the footnote itself that this was a "late filed contention," and reiterated this admission at the hearing.⁵³ Yet, the Presiding Officer ruled that the lateness in raising the issue "goes to the irrelevance to the particular -- or weight to be given on the particular point."⁵⁴ This concededly untimely material, however, should have been stricken.

The rulings by the Presiding Officer on the Motion to Strike were clearly erroneous in that he impermissibly expanded the bounds of admissible evidence at a Subpart M hearing way beyond the scope of the admitted contentions.⁵⁵ This result defeats the purpose of

⁵¹ The following exchange occurred at the hearing on this issue:

MR. SILBERG: . . . [I]f you take that expansive view, then you have completely vitiated the whole purpose of narrowing the hearing to specific contentions. Under that theory, which you're propounding as a matter of argument, I hope, any issue dealing with the safety of any plant anywhere in the country would be relevant for us to hear today with respect to the financial assurances of the Entergy Companies to run these two plants.

JUDGE BECHHOEFER: Well, would not that -- even though true, it doesn't mean that trier of fact has to give much weight to those if they don't have much relevance.

Tr. 14-15.

⁵² CAN Issue 3 Statement at 12, n.5.

⁵³ Tr. 25-26.

⁵⁴ Tr. 34.

⁵⁵ In support of his ruling denying the Motion to Strike, the Presiding Officer cited two ASLB decisions that denied motions to strike. See Tr. 10, 32-33. The cases cited, however, involved circumstances very dissimilar from those presented here, and provide no authority for declining to strike the materials filed by CAN. In Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit No. 2), LBP-74-60, 8 AEC 277, 299-301 (1974), concededly irrelevant matters were intertwined with testimony considered

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empowering the Presiding Officer to strike "irrelevant, immaterial or unreliable" materials, which is to prevent such materials from "detract[ing] from the value of the record."⁵⁶ The Presiding Officer's ruling is also contrary to the specific instructions of the Commission in this proceeding, which directed that unacceptable submissions should be stricken from the record:

All parties should keep their pleadings as short, and as focused on the admitted issues, as possible. The Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b)), and will not consider claims rejected in the course of [CLI-00-22]. Redundant, duplicative, unreliable, or irrelevant submissions are not acceptable and will be stricken from the record. See 10 C.F.R. § 2.1320(a)(9).⁵⁷

As a result of the Presiding Officer's rulings, the record of this proceeding is laden with irrelevant matter, and became further cluttered by the admission of the oral testimony of Mr. Lochbaum, who testified (by telephone) at some length at the hearing on the generic

Footnote continued from previous page

relevant, thus the Board declared itself "reluctant to make a word-by-word, line-by-line determination of which parts of the rambling narrative should be stricken." *Id.* at 300. No such intertwining existed here, see Exhibits 1 through 3 to the Motion to Strike, and in any event here the Presiding Officer was not acting as a finder of fact (as was the Board in *Diablo Canyon*), so he was not in a position to decide on the weight of the materials in the record.

Also inapposite is the other case cited by the Presiding Officer, *Florida Power and Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-85-29, 22 NRC 300 (1985). There, the applicant had moved to strike affidavits which did not establish the competence of the affiants to testify. The Board denied the motion because there would be opportunities for the applicants to challenge the qualifications of the affiants at the evidentiary hearing, and also because the affidavits consisted in large part of material quoted and paraphrased from technically competent and helpful Staff discussions. *Id.* at 305. Thus, the *Turkey Point* case differed from the situation here in two material respects: (1) the contents of the affidavits there were relevant to an admitted contention, and (2) the deficiencies in the intervenor's filing could be addressed at a subsequent hearing.

⁵⁶ Streamlined Hearing Process for NRC Approval of License Transfers ("Streamlined Hearing Process"), 63 Fed. Reg. 66,721, 66,724 (1998) (citation omitted).

⁵⁷ Commission Order, 52 NRC at 319 (emphasis added).

safety issues outlined in his written testimony.⁵⁸ Again, the Presiding Officer's rulings significantly undercut the objectives of Subpart M proceedings.

3. Ability of Parties to Suggest Questions at the Hearing

At the end of his examination of CAN's witness Lochbaum, the Presiding Officer invited the parties to suggest questions for him to propose to the witness.⁵⁹ Counsel for NYPA/Entergy Companies objected to this invitation as not contemplated by, and inconsistent with, Subpart M procedures.⁶⁰ The Presiding Officer overruled the objection, and allowed the parties to propose questions for Mr. Lochbaum and other witnesses who testified at the hearing.⁶¹

Allowing questions to be raised from the floor is inappropriate and in violation of the language and purpose of Subpart M regulations. Subpart M was intended to create an efficient and informal process that protects the rights of the parties yet give due account to the need for expeditious decisions on license transfer applications.⁶² One method to achieve this goal is to have streamlined hearings that exclude cross-examination, unless the Commission orders otherwise. See 10 CFR § 2.1322(d).

In place of cross-examination, Subpart M contemplates questions from the Presiding Officer. Subpart M allows parties two opportunities to propose, in writing, questions for the Presiding Officer to ask at the hearing: first, when filing written rebuttal testimony;⁶³ and

⁵⁸ Tr. 72-98.

⁵⁹ Tr. 76.

⁶⁰ Tr. 77-82.

⁶¹ See Tr. 82, 94, 373-85.

⁶² Streamlined Hearing Process, 63 Fed. Reg. at 66,722.

⁶³ 10 CFR § 2.1322(a)(2)(ii).

second, within 7 days of the filing of the rebuttal testimony.⁶⁴ These opportunities for parties to submit questions cannot be expanded, for the first sentence of the regulation that controls parties' participation in a Subpart M hearing indicates that such participation is granted "[u]nless otherwise *limited* by this subpart or by the Commission."⁶⁵

In addition to being inconsistent with the language of the regulations, the Presiding Officer's ruling is contrary to the Commission's intent in providing for the submittal of written questions in advance of the hearing, which was to avoid extending the hearings because of the objections and interruptions associated with examination by the parties.⁶⁶

Considerations of due process and efficient hearing management also dictate that these kinds of questions should not be allowed. First, there is the possibility of unfair surprise: a party can decide (as CAN did in this case) not to file any written questions in advance, and then produce a list of questions at the hearing for which the witness has not had the opportunity to prepare.⁶⁷ Second, the party sponsoring the witness does not have the

⁶⁴ 10 CFR § 2.1322(a)(4). Both of these opportunities were pointed out to the parties in the Notice of Oral Hearing, 66 Fed. Reg. 10,921 (2001).

⁶⁵ 10 CFR § 2.1322(a) (emphasis added). The Presiding Officer cited 10 CFR §§ 2.1320(a)(3) and 2.1322(b) as his authority to entertain questions posed at the hearing by the parties. His reading, however, is inconsistent with 10 CFR § 2.1322(a) and misinterprets the regulations. 10 CFR § 2.1320(a) generally sets forth the powers and responsibilities of the Presiding Officer, which come into play before, during and after the hearing. One of these responsibilities, set forth in subsection (a)(3), is to "[q]uestion participants and witnesses, and entertain suggestions as to questions which may be asked of participants and witnesses." This responsibility, however, has two parts, to be discharged at different times: one, to ask questions *at the hearing*; and two, to entertain suggestions as to such questions, which is to be carried out *in advance of the hearing*. That section says nothing about empowering the Presiding Officer to entertain questions for the witnesses from the parties *at the hearing*.

10 CFR § 2.1322(b) allows the Presiding Officer to conduct questioning at the oral hearing "using either the Presiding Officer's questions or questions submitted by the participants or a combination of both." However, in referring to questions *submitted* by the parties, the Commission was clearly referring to questions *previously submitted in writing* by the parties pursuant to the immediately preceding subsection of the regulation, 10 CFR § 2.1322(a).

⁶⁶ See Streamlined Hearing Process, 63 Fed. Reg. at 66,276.

⁶⁷ This is not to say that CAN deliberately adopted this strategy. CAN's representative indicated that he had understood there would be no opportunities for questions by the parties at the hearing. Tr. 83-84.

opportunity to provide a fuller record at the hearing, since redirect testimony is not allowed in Subpart M proceedings. Finally, the ability to raise questions from the floor tends to lead to irrelevant questioning and disorderly presentations that detract from the record.⁶⁸

For these reasons, NYPA/Entergy Companies submit that the procedures followed at the hearing on this matter were flawed and need to be addressed by the Commission, both to ensure that a fair decision is reached on the instant case and to set guidelines for the conduct of future proceedings.

II. STATEMENT OF POSITION ON ISSUE 2

The history of Issue 2 and the arguments raised by the parties with respect to the adequacy of the decommissioning funding arrangements for Indian Point 3 and FitzPatrick suggest that the Commission has before it five sub-issues with respect to those arrangements: (a) whether the decommissioning funding method proposed by NYPA/Entergy Companies is permissible under 10 CFR §50.75; (b) whether the amounts available now and in the future are adequate for the decommissioning of the facilities; (c) whether those amounts would be available when needed to carry out the decommissioning tasks; (d) whether the NRC retains sufficient authority under the proposed arrangements to enforce the obligations of NYPA and the Entergy Companies with regard to decommissioning; and (e) whether there are other issues that need to be considered with regard to decommissioning assurance. The statement of position that follows is organized in accordance with these issues.

A. ACCEPTABILITY OF PROPOSED DECOMMISSIONING METHOD

1. NRC regulations in 10 C.F.R. § 50.75(e)(1)(vi) define, as an acceptable method for providing decommissioning funding assurance for nuclear reactors:

⁶⁸ See, e.g., Tr. 377-380.

Any other mechanism, or combination of mechanisms, that provides, as determined by the NRC upon its evaluation of the specific circumstances of each licensee submittal, assurance of decommissioning funding equivalent to that provided by the mechanisms specified in paragraphs (e)(1)(i) through (v) of this section.

2. The methods specified in paragraphs (e)(1)(i) through (v) of 10 C.F.R. § 50.75 include prepayment, external sinking funds, sureties, guarantees, insurance or contractual obligations by the licensee's customers. The decommissioning funding method chosen for Indian Point 3 and FitzPatrick meets the reasonable assurance standard and provides at least equivalent assurance to other decommissioning funding assurance mechanisms set forth in 10 C.F.R. § 50.75(e)(1)(i) – (v).
3. The NYPA/Entergy Companies' applications for the transfer of the facility operating licenses for the Indian Point 3 and FitzPatrick facilities were based upon compliance with the decommissioning funding assurance method of 10 C.F.R. § 50.75(e)(1)(vi). See Applications. Under the contractual agreements between NYPA and the Entergy Companies, NYPA remains the beneficiary of each of the decommissioning funds established for the two plants under trust agreements with the Bank of New York, until certain events occur. Under each plant's decommissioning agreement, NYPA has contractual decommissioning responsibility with respect to the plant until license expiration, a change in the tax status of the plant's decommissioning fund, or any early dismantlement of the

plant, at which time NYPA would have the option to terminate its decommissioning responsibility. Collins Test. at ¶11; Tr. 59 (Collins).⁶⁹

4. The amounts currently held by the decommissioning funds for FitzPatrick and Indian Point 3 meet the NRC minimum funding levels, thus the present mechanism provides equivalent assurance to prepayment, notwithstanding the holding of the funds by NYPA. Application at 14; Collins Test. at ¶6.
5. The fully funded decommissioning funds provide at least equivalent assurance to parent-company guarantees, third-party guarantees or sureties. Application at 14.
6. The equivalence finding of 10 C.F.R. § 50.75(e)(i)(vi) is required to be based upon a determination by the NRC. The NRC Staff has thoroughly examined the decommissioning funding mechanism adopted by NYPA/Entergy Companies in this proceeding and has made a reasoned and supported equivalence determination. That determination is based upon the commitments in the Application and the additional conditions required by the NRC Staff. See, generally Safety Evaluations (“SERs”)⁷⁰ at 8-14.
7. CAN argues against the NRC’s approval of the license transfers because they would “set dangerous precedents for future license transfer proceedings.” CAN Issue 2 Statement at 2, 9, 12, 15-16. However, under 10 C.F.R. § 50.75(e)(1)(vi), the NRC Staff must review “the specific circumstances of each licensee

⁶⁹ According to the Staff Counsel, there is some precedent for transferring a nuclear power plant facility license while retaining the decommissioning trust, either temporarily or permanently. See Tr. 142-44.

⁷⁰ Safety Evaluations by the Office of Nuclear Reactor Regulation, Transfer of Facility Operating Licenses from the Power Authority of the State of New York to Entergy Nuclear Indian Point 3, LLC, Entergy Nuclear FitzPatrick, LLC, and Entergy Nuclear Operations, Inc., Docket Nos. 286, 333, November 9, 2000.

submittal.” Therefore, unless another licensee comes forward with the same “specific circumstances,” the NRC’s approval of these transfers can have no precedential value. In addition, the Commission in this proceeding specifically excluded “inquiry into issues affecting the entire nuclear industry.” Commission Order, 52 NRC at 296. CAN’s allegedly “dangerous precedent” is by definition an issue that affects not “an individual license transfer adjudication”, but rather “the entire nuclear industry”, and is therefore inappropriate here.

8. The NRC Staff determinations support the conclusion that the decommissioning funding mechanisms established by NYPA/Entergy Companies meet the requirement of 10 C.F.R. § 50.75(e)(1)(vi):
 - (a) The amount of the decommissioning trust funds meets the requirements of the prepayment decommissioning funding assurance using the formulas in 10 C.F.R. § 50.75(c). SER at 9.
 - (b) Because of NYPA’s status as a corporate municipal instrumentality and a political subdivision of the State, a trust held by NYPA could provide more assurance than trusts held by an investor-owned utility. SER at 10, 12.
 - (c) The additional conditions which required NYPA to make two additional modifications to the decommissioning trust agreement regarding NRC enforcement rights against NYPA and limitations on trust termination provide additional assurance for decommissioning funding, as does NYPA’s waiver of rights to challenge NRC jurisdiction and the allocation of rights and responsibilities between NYPA and the Entergy Owners. SER at 11. [NYPA: need to check what is meant in last clause]
 - (d) The trustee’s fiduciary duties, the pre-funded character of the decommissioning funds and similarities with third-party guarantees provide additional assurance of the availability of decommissioning funds when needed. SER at 12.
 - (e) The seven conditions included in the orders approving the license conditions, including those added as conforming license conditions, together with the Bank of New York continuing to hold the decommissioning trusts, as trustee, provide reasonable assurance of decommissioning funding. SER at 12-14.

9. Each of these conditions, limitations and commitments is incorporated in the orders approving the license transfers. Order Approving Transfer of License and Conforming Amendment, Docket No. 50-286, 65 Fed. Reg. 70,843 (November 28, 2000); Order Approving Transfer of License and Conforming Amendment, Docket No. 50-333, 65 Fed. Reg. 70,845 (November 28, 2000).
10. CAN argues that the decommissioning funding methodology adopted by NYPA/Entergy Companies and approved by the NRC Staff does not satisfy the prepayment methodology described in 10 C.F.R. § 50.75(e)(1)(i) because (a) the funds are not in the possession of the Entergy Owners, and (b) the NRC does not have the same type of direct regulatory authority over NYPA that it would have, had NYPA remained a licensee.⁷¹ However, nothing in the language of 10 C.F.R. § 50.75(e)(1)(i) requires that the fund be in the possession of the Entergy Companies, and the fund has “accumulated to the level required by the NRC for decommissioning,” as shown in the Applications at 16 and the SER at 9, thus the prerequisite for prepayment is met. Also, the NRC in determining that the decommissioning funding methodology selected by NYPA/Entergy Companies complied with 10 C.F.R. § 50.75(e)(1)(vi) was only required to determine that the methodology provide “assurance of decommissioning funding equivalent to that provided by” prepayment and the other methodologies described in 10 C.F.R. § 50.75(e)(1)(i) – (v). The method chosen under (e)(1)(vi) does not have to be identical to any of the ones specified in (e)(1)(i) – (v).

⁷¹ CAN Issue 2 Statement at 5-6; CAN Issue 2 Response at 9. The argument over the degree of NRC authority over NYPA is addressed below.

11. CAN cites (CAN Issue 2 Statement at 7-8) § 3.2.4 of the Regulatory Analysis issued in conjunction with the final rule on decommissioning financial assurance, SECY-98-164, “Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors” (July 2, 1998) and asserts that nothing in that section contemplates the possibility of a decommissioning trust fund being held by another company or entity that is not a parent or affiliated company. Since that section does not purport to catalog the financial assurances that can be used to comply with 10 C.F.R. § 50.75(e)(1)(vi), CAN’s citation is not relevant. By definition, “any other mechanism, or combination of mechanisms” authorized by that provision is not intended to only cover those mechanisms specified in other provisions of the rule. CAN also complains that the NRC is “bending the Commission’s rules” and “unjustifiably compromis[ing] the guidance of previous Staff evaluations”, CAN Issue 2 Statement at 9. However, CAN, fails to recognize that the “previous Staff evaluations” are not the regulatory provision and do not even address the regulation with which the NYPA/Entergy Companies are complying.
12. CAN also argues that the NYPA/Entergy Companies’ methodology does not satisfy 10 C.F.R. § 50.75(e)(1)(iii) (“surety method, insurance, or other guarantee method”) because NYPA is not regulated or licensed as a surety company.⁷² However, as noted above, the NYPA/Entergy Companies’ methodology need only provide assurance “equivalent” to another approved methodology, not identical to

⁷² CAN Issue 2 Statement at 6; CAN Issue 2 Response at 10-11. CAN irrelevantly asserts that NYPA is not “an acceptable trustee under NRC regulations.” CAN Issue 2 Response. However, NYPA is *not* the trustee under the arrangement here; the Bank of New York, an entity authorized to act as trustee, is.

it. Also, the decommissioning funds here exist in actual funds set aside and held by a trustee (the Bank of New York) as compared to the promise embodied in a surety, guarantee or insurance contract to pay money at some future time.

Applications at 16. Thus, the NYPA/Entergy mechanism of a fully funded trust provides at least as much financial assurance as the use of a surety, guarantee or insurance mechanism.⁷³

B. SUFFICIENCY OF AMOUNT AVAILABLE

13. The minimum amount of money required to demonstrate reasonable assurance of funds for decommissioning is specified by the formula set forth in 10 C.F.R. § 50.75(c).
14. At the time of the closing of the sale of the units and as of the present time, the amount of money in each of the decommissioning funds exceeds the required minimum amounts established by NRC. Application at 13-15; Collins Test. ¶6.
15. As long as the decommissioning funds continue to be held as they now are, the trusts and any income they earn will continue to grow tax-free. Collins Testimony at ¶17; see generally Henderson Test.
16. CAN does not dispute the adequacy, under NRC rules, of the amounts held in the trusts. CAN Issue 2 Response at 5.

⁷³ CAN also incorrectly claims that the agreement is not a surety because it is “neither open-ended nor does it have a set term.” CAN Issue 2 Response at 10. NYPA’s responsibility with respect to the units is to hold and disburse funds for the decommissioning of the two facilities until NYPA transfers the respective decommissioning funds to the Entergy Owners or until the decommissioning of the respective unit has been completed in accordance with NRC regulation and guidance. SER at 11-12.

C. AVAILABILITY OF FUNDS FOR DECOMMISSIONING

17. The funds for decommissioning the Indian Point 3 and FitzPatrick facilities are held in a Master Decommissioning Trust, comprised of a separate fund for each facility. Application at 11; Collins Test. at ¶5.
18. The Master Decommissioning Trust was (prior to the transfer of the facilities), and continues to be (following the transfer) administered by The Bank of New York. Application at 13. The Bank's fiduciary duties require that it hold and expend the funds for the purpose of decommissioning the Indian Point 3 and FitzPatrick units. Collins Test. at ¶5.
19. NYPA, after the transfer of the units to the Entergy Companies, remained the beneficiary under the trust agreement and retained the obligation that the funds remain at all times committed to the decommissioning of the units. Application at 2, 11; Collins Test. at ¶8. On the occurrence of specified events, NYPA may elect to transfer its interest in either or both funds to the respective Entergy Owners. These events are the expiration of the operating license, early dismantlement of the unit, or the funds becoming taxable. Application at 2, 11; Collins Test. at ¶11.
20. Regardless of whether NYPA or the Entergy Owners holds the funds, a variety of contract, trust and license limitations referenced in the Application assure the funds will be available for decommissioning, with at least the same degree of assurance as the other mechanisms specified in 10 C.F.R. § 50.75(e). For example:
 - (a) The Trust Agreement limits the use of assets in the funds to decommissioning expenses of the units as defined by NRC. Application at 12; Collins Test. ¶16.

- (b) The Trust Agreement permits no contribution of property to the trusts other than liquid assets. Application at 12.
 - (c) The Trust Agreement prohibits investments in securities of NYPA or Entergy companies and limits investments in entities owning nuclear power plants. Id.
 - (d) No disbursements from the funds may be made until the trustee has first given the NRC 30 days written notice of the payment and no disbursements may be made if the trustee receives prior written objection from the NRC. Id.; Collins Test. at ¶9.
 - (e) No material modification can be made to the trust without NRC's prior written consent. Application at 12, 13; Collins Test. at ¶9.
 - (f) NYPA's interest in the trusts can only be transferred to the licensed owner of the unit responsible for decommissioning. Application at 13.
 - (g) Finally, NYPA as a corporate municipal instrumentality and political subdivision of the State of New York, has a strong public interest in protecting the interests of its citizens, as well as its bondholders and ratepayers. Id.
21. NYPA is not obligated to pay more for decommissioning than the amount in the decommissioning funds. Under certain circumstances, the amount that NYPA has agreed to pay for decommissioning may be decreased, if for example Entergy were to acquire units adjacent to FitzPatrick (i.e., the Nine Mile Point units) or to Indian Point 3 (i.e., Indian Point Units 1 and 2). Application at 2; Collins Test. at ¶12.
22. If, in the future, NRC requirements call for additional moneys to be deposited, the Entergy Owners would be obligated to make such contributions to separate decommissioning funds to be created by the Entergy Owners to meet such requirements. Collins Test. at ¶14; Tr. 48-50 (Collins).

D. NRC'S ABILITY TO ENFORCE DECOMMISSIONING OBLIGATIONS

23. In addition to the commitments set forth in the Applications and implemented prior to closing, NYPA agreed to make further modifications to the

decommissioning trust agreement to provide further assurance with respect to decommissioning financing, which modifications were effected prior to the license transfers:

- (a) A provision stating that the provisions or purpose of the trust agreement may be enforced by NRC against NYPA and the Trustee with respect to disbursement of the trust funds to the extent necessary to ensure compliance with or satisfaction of NRC's decommissioning requirements.
- (b) A provision prohibiting NYPA from terminating any fund established under the Master Trust except after obtaining written consent from the Director, Office of Nuclear Reactor Regulation or the Director, Office of Nuclear Material Safety and Safeguards.

SER at 11; Collins Test. at ¶9.

- 24. NYPA further agreed in writing to waive any right to deny, contest or challenge the NRC's jurisdiction over NYPA with respect to the Indian Point 3 and FitzPatrick plants to the extent that there may arise in the future any matter warranting action by the Commission to ensure compliance with NRC's decommissioning requirements regarding the disposition and use of the amounts accumulated in the decommissioning trust funds and retained by NYPA. This waiver applies until NYPA transfers the respective decommissioning funds to the Entergy Owners or until the decommissioning of the respective unit has been completed in accordance with NRC regulation and guidance, whichever occurs first. SER at 11-12.
- 25. NYPA further agreed in writing that, for purposes of compliance with NRC requirements, sole responsibility for decommissioning the Indian Point 3 and FitzPatrick units rests with the Entergy Owners, and NYPA's responsibility under NRC jurisdiction with respect to the units is limited solely to the holding and

disbursement of funds for the decommissioning of the two facilities. This commitment applies for the same duration as the waiver described in the preceding paragraph. Id.

26. The mechanisms described in the preceding paragraphs provide the NRC adequate control over the expenditure of decommissioning funds by NYPA. Staff Brief at 8.
27. CAN asserts that NYPA could potentially hold the trust fund for 75 years or more, thus increasing uncertainty because of NYPA's no longer being an NRC licensee. CAN Issue 2 Response at 9. The period during which the decommissioning funds might remain in the hands of the trustee (the Bank of New York, not NYPA) is irrelevant. The same period of time may exist whether the trust is a "NYPA trust" or an "Entergy Companies" trusts. The money still remains in the hands of the trustee, is still dedicated to the decommissioning of the units, and cannot be disbursed if the NRC objects. The additional conditions imposed by the NRC on NYPA in connection with the transfer and the additional commitments agreed to by NYPA in connection with the transfer grant the NRC Staff the authority that they believe is necessary and appropriate to assure that the decommissioning funding of the units is adequately assured. See SERs at 12-14.
28. In contrast to CAN's unsupported allegations that the issue of NRC authority over the decommissioning funding is unresolved or open to question, the NRC has in fact spelled out in detail the controls and authority that will exist with respect to the decommissioning funds and, to the extent necessary to assure that those funds are properly used, with respect to NYPA. The SERs devote the better part of

four, single-spaced pages to the conditions and commitments that the NRC has deemed necessary and appropriate to reasonably assure the adequacy of decommissioning funding so as to protect the public health and safety. SERs at 11-14. These include an amendment to the decommissioning trust agreement stating that the provisions or purpose of the trust agreement may be enforced by the NRC against NYPA and the trustee with respect to the disbursement of the trust funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements. Id. at 11. These also include a waiver by NYPA of any right to deny, contest or challenge the Commission's jurisdiction over NYPA with respect to the two transferred facilities to the extent that there may arise any matter warranting NRC action to ensure compliance with NRC decommissioning requirements regarding the disposition and use of the amounts accumulated in the decommissioning trust funds and retained by NYPA. Id.

29. Moreover, the NRC Staff has analyzed the authority of the Commission over decommissioning expenditures by NYPA after the transfer of the operating licenses from NYPA to ENF and ENIP – apart from the above described commitments and license transfer conditions – and has concluded that the Commission has broad authority over any person, including non-licensees, with regard to conduct within the scope of the Commission's subject matter jurisdiction, which includes the expenditure of funds for decommissioning nuclear facilities.⁷⁴ Accordingly, the Commission has the authority to issue orders against

⁷⁴ Staff Brief at 4-6. See also Tr. 148-50.

NYPA if it is necessary to control expenditures from the JAF and IP3 decommissioning trusts.⁷⁵

30. In addition, the Staff has determined that the Commission would have the ability to bring an action under the Trust Agreement to enforce its provisions, both under a specific provision (Section 10.11) in the Agreement giving the NRC enforcement authority and as intended third-party beneficiary under the agreement.⁷⁶

E. OTHER ISSUES

31. CAN complains that the conditions the NRC has imposed on NYPA “do not address environmental considerations nor clean up consequences potentially required of NYPA.”⁷⁷ CAN also alleges “mishandling and illegal dumping of radioactive materials in local communities, leading to potentially hazardous levels of off-site contamination.”⁷⁸ These allegations have already been rejected by the Commission in this proceeding; CAN sought to raise off-site remediation issues in its initial petition, and the Commission rejected CAN’s attempt to raise this issue.⁷⁹ Since the Commission has already ruled that “the [decommissioning]

⁷⁵ Staff Brief at 5-6.

⁷⁶ Id. at 9-10.

⁷⁷ CAN Issue 2 Statement at 9.

⁷⁸ Id. at 5 (footnote omitted). The bases cited for these allegations include a 1994 newspaper article about non-radioactive discharges from Indian Point 3 (Ex. 6 to CAN Request for Hearing), which discharges are obviously outside the scope of NRC’s radiological decommissioning responsibilities; a 1993 local newspaper article about gaseous discharges which CAN does not even allege are beyond NRC-permitted release limits (Ex. 7 to CAN Request for Hearing); and a 1994 article from a publication entitled Peace News about off-site shipments of sewage sludge, again not even alleged to be inconsistent with NRC regulatory requirements. These articles are not relevant to this proceeding and provide no support to CAN’s position on Issue #2.

⁷⁹ Commission Order, 52 NRC at 306-08.

trust cannot be used for off-site remediation”,⁸⁰ CAN’s attempt to reintroduce the off-site remediation issue is improper.⁸¹

32. CAN cites to Schedule 5.13 of the Purchase and Sales Agreement as a source of remediation liabilities retained by NYPA.⁸² However, Schedule 5.13 deals with non-radiological remediation issues, i.e., “a spill of turbine oil which occurred in 1989 adjacent to the turbine pad at IP3”. Non-radiological remediation issues are outside the scope of decommissioning as defined by NRC regulations and are therefore beyond the scope of this proceeding.⁸³ CAN also suggests that the NRC issue an environmental impact statement in connection with the license transfer.⁸⁴ Again, this issue has already been raised, and rejected by the Commission.⁸⁵
33. CAN seems to be concerned with NYPA’s financial strength, citing NYPA’s “participation in an increasingly volatile and competitive energy market” as imperiling NYPA’s future bond ratings.⁸⁶ In fact, NYPA’s bond ratings have recently been increased. In July 2000, Fitch raised NYPA’s long-term debt rating from AA- to AA and in November 2000, Moody’s Investors Service raised its

⁸⁰ Id. at 308.

⁸¹ “The Commission . . . will not consider claims rejected in the course of this opinion.” Id. at 319.

⁸² CAN Issue 2 Statement at 10.

⁸³ Commission Order, 52 NRC at 308, n. 52, citing 10 C.F.R. § 50.2 (“*Decommission*” means to remove a facility or site safely from unrestricted use and reduce residual radioactivity to a level”)

⁸⁴ CAN Issue 2 Statement at 11, 17-18.

⁸⁵ Commission Order, 52 NRC at 308-309.

⁸⁶ CAN Issue 2 Statement at 7.

long-term debt rating for NYPA from Aa3 to Aa2⁸⁷. In any case, NYPA's financial strength is irrelevant. The money is already set aside in a decommissioning trust fund. The fund is held by the trustee (the Bank of New York), not by NYPA, and money cannot be released from the fund if the NRC objects in writing.

34. CAN makes a number of allegations on tax issues. After asserting without support that the NYPA/Entergy Companies' decommissioning funding arrangement was occasioned in part by "uncertainties and unresolved questions regarding the tax status of the decommissioning fund", CAN observes that "NYPA has agreed to retain the decommissioning trust fund (pending a favorable IRS ruling on its tax status.)"⁸⁸ CAN provides no basis for this claim. Neither NYPA, the Entergy Companies, nor anyone else has requested such an IRS ruling in connection with these transfers. Nor is NYPA's agreement to retain the decommissioning trust fund in any way linked to "a favorable IRS ruling on its tax status."⁸⁹
35. CAN also launches misdirected attacks on the tax treatment of the decommissioning arrangement. According to CAN, the "relevant question" is "whether it is legal for NYPA to use tax status to function as a tax shelter for the ENF and ENIP." CAN's Issue 2 Response at 13, n.9; see also Tr. 154-157.

⁸⁷ The Bond Buyer, November 27, 2000 at 37 (quoting Moody's as "prais[ing] NYPA for its strong competitive position, well-maintained finances, and focused strategic plan, and not[ing] that since 1995 the agency has reduced its long-term debt by more than 40%").

⁸⁸ CAN Issue 2 Statement at 2.

⁸⁹ See Tr. 103-08.

However, even if that were the relevant question, this proceeding would not be the right forum to address it. NRC jurisdiction does not extend to taxes.

36. CAN also confuses the tax consequences of the transfer of decommissioning trust funds in connection with nuclear power plant acquisitions, which create no liability on the purchaser, see Henderson Test., p. 3, with the tax on the income from the trust assets, which is zero as long as NYPA retains the trust, but which would be subject to tax if the trusts were transferred to the Entergy Owners. See id., p. 2-3; Collins Test. at ¶17.
37. The last issue raised by CAN is NYPA's alleged conflict of interest between the possibility for retaining a surplus after funding the decommissioning of FitzPatrick and Indian Point 3 and its duty to protect "the public health and safety through, if at all possible, complete site clean-up at license termination." CAN Issue 2 Response at 15. CAN asserts that the existing arrangement "provides an incentive for NYPA to permit Entergy to do the cheapest decommissioning NRC regulations will allow so that NYPA will get the maximum benefit from the surplus decommissioning funds." CAN Issue 2 Response at 16-17. However, no such conflict exists because the NRC must approve the decommissioning plan and the expenditures thereunder, and decommissioning has to be performed in accordance with NRC standards regardless of costs. Tr. 60-61 (Collins).
38. CAN's confusion is due, in part, to its misperception that the funds in the decommissioning trust funds can be used for purposes other than radiological decommissioning in accordance with an NRC approved plan. CAN castigates NYPA/Entergy Companies for not addressing "remediation" responsibilities as

part of decommissioning, including activities such as cleanup of “off-site contamination in excess of permitted levels.” CAN Issue 2 Response at 3-5; Tr. 51-53, 109-116, 119-121. But there is no evidence of any “off-site contamination in excess of permitted limits” or any radioactive contamination requiring remediation,⁹⁰ and the contamination for which NYPA is retaining responsibility under § 5.13 of its agreement with the Entergy Companies is non-radioactive.⁹¹

39. The Commission has also made it clear that the decommissioning trust funds “are set aside in trust specifically and exclusively dedicated to the purpose of decommissioning the plant sites; the trusts cannot be used for offsite remediation.”⁹² Thus, the alleged conflict of interest, if existing, is not cognizable in a license transfer proceeding.⁹³

III. STATEMENT OF POSITION ON ISSUE 3

As indicated above, the Presiding Officer admitted a financial qualifications issue (Issue 3) containing portions of CAN’s Revised Contention. Issue 3 contained four sub-issues:

- A. The validity of the 85% capacity factor assumed by the NYPA/Entergy Companies in the Applications.⁹⁴

⁹⁰ See Tr. 121.

⁹¹ As noted at the hearing, the environmental liabilities retained by NYPA are specifically addressed in the Purchase and Sale Agreement in Schedule 5.13. Those are non-radiological responsibilities, and therefore, again, outside the scope of NRC’s decommissioning jurisdiction. See Tr. 112.

⁹² Commission Order, 52 NRC at 307-08.

⁹³ See Tr. 116-17.

⁹⁴ LBP-01-04, supra, slip op. at 9-10.

- B. The validity of the plant operating cost projections submitted by the NYPA/Entergy Companies with the Applications.⁹⁵
- C. The extent to which the liquidity of the assets held by Entergy Global Investments, Inc. (“EGI”) and Entergy International Ltd., LLC (“EIL”) may undermine the ability of ENIP and ENF to demonstrate reasonable financial assurance.⁹⁶
- D. Whether the license transfer applications should have been supported by estimates of receipts and operating costs over the life of the licenses rather than for only the first five years of post-transfer operation.⁹⁷

In the discussion that follows, NYPA/Entergy Companies’ position on each of these four sub-issues is set forth separately.

[* * * *]

IV. CONCLUSIONS

For the above stated reasons, the NYPA/Entergy Companies submit that the Commission should issue a written opinion pursuant to 10 CFR § 2.1331(a) dismissing the

⁹⁵ Id. at 12-13.

⁹⁶ Id. at 16.

⁹⁷ Id. at 10-12.


issues raised by CAN and upholding the licenses transfers for IP3 and JAF to the Entergy Companies.

April 3, 2001

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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
(consolidated)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NYPA/Entergy Companies' Final Statement of Position (Non-Proprietary Version)" were served on the persons listed below by electronic mail, with conforming copies by U.S. mail, first class, postage prepaid, this 3rd day of April, 2001.

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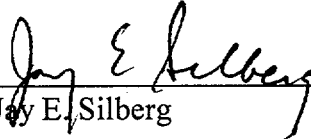
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