

DOCKETED
USNRC
April 19, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

01 APR 24 A11:41

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:

Consolidated Edison Company
of New York, Inc.,
Entergy Nuclear Indian Point 2, LLC,
and Entergy Nuclear Operations, Inc.

(Indian Point Nuclear Generating
Units 1 and 2)

Docket Nos. 50-003-LT
50-247-LT

APPLICANTS' ANSWER TO
CITIZENS AWARENESS NETWORK, INC.'S REVISED PETITION
FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

I. INTRODUCTION

Pursuant to 10 CFR § 2.1307(a) and the Commission's Memorandum and Order, CLI-01-08, 53 NRC __ (March 6, 2001), Consolidated Edison Company of New York, Inc. ("Con Edison"), Entergy Nuclear Indian Point 2, LLC ("ENIP2") and Entergy Nuclear Operations, Inc. ("ENO") (collectively, "Applicants")¹ submit this answer to "Citizens Awareness Network Inc.'s Contentions Challenging the License Transfer Applications for Indian Point Nuclear Generating Unit Nos. 1 and 2" ("Revised Petition")² filed on April 9, 2001. As further discussed below,

¹ ENIP2 and ENO will be collectively be referred to herein as the "Entergy Companies."

² In its cover letter, CAN refers to its filing as "Request for Hearing and Petition for Leave to Intervene." Since CAN's April 9, 2001 filing amounts to a revised version of its original petition to intervene, we use the designation "Revised Petition" to refer to it.

Citizens Awareness Network, Inc. ("CAN") has failed to raise any admissible issues that require adjudication in this Subpart M proceeding. Its Revised Petition must accordingly be denied.

II. BACKGROUND

On December 12, 2000, Applicants filed a request for NRC approval ("Application") of the direct transfer of the Indian Point Nuclear Generating Station Unit 1 ("Unit 1 or "IP1") Facility Operating License DPR-5, and the Indian Point Nuclear Generating Station Unit 2 ("Unit 2" or "IP2") Facility Operating License DPR-26, both currently held by Con Edison as owner of Unit 1 and owner and operator of Unit 2. Following approval of the proposed transfer, ENIP2 would assume title to both facilities. ENO would become responsible for the maintenance of Unit 1 and the operation and maintenance of Unit 2. As discussed in the Application, the proposed transfer will have no effect on plant equipment or operating procedures. No physical alterations to either Unit 1 or Unit 2 are being proposed as a part of the license transfer process, and virtually all of the operating personnel at the stations will be transferred to the new licensees.

On January 29, 2001, the Commission issued a "Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments, and Opportunity for a Hearing" concerning the Application.³ On February 20, 2001, CAN petitioned to intervene in the license transfer proceeding, seeking to oppose the NRC granting its consent to the license transfers.⁴ CAN's petition, however, failed to set forth any issue that would be appropriate for

³ 66 Fed. Reg. 8,122 (2001).

⁴ "Citizens Awareness Network's Request for Hearing and Petition to Intervene in the License Transfers for Indian Point Nuclear Generating Unit Nos. 1 and 2," dated February 20, 2001 ("CAN's February 20, 2001 Petition"). As noted in Applicants' response to CAN's February 20, 2001 Petition, Applicants do not contest that CAN has standing to participate in this proceeding.

litigation and did not provide any factual support for its allegations.⁵ Instead, CAN's petition consisted of essentially two arguments: (1) that this proceeding should be suspended or terminated, and (2) that CAN should be given more time to articulate an admissible issue, and that it should be given access to proprietary materials filed by the Entergy Companies with the Application in order to be able to frame such an issue.

In its March 6, 2001 Memorandum and Order, the Commission rejected the first argument, but directed that the Entergy Companies make available to CAN and Cortlandt,⁶ pursuant to suitable confidentiality agreements, the Entergy Companies' financial data contained in the proprietary versions of the Application. Both CAN and Cortlandt were authorized to file, within 20 days of the parties' entering into confidentiality agreements, new or revised issues "challenging the Entergy companies' financial or technical qualifications to own and/or operate the Indian Point 1 and 2 facilities." CLI-01-08, supra, slip op. at 7.

The Entergy Companies and CAN entered into such an agreement on March 13, 2001 and the confidential information was supplied to CAN.⁷ CAN's Revised Petition was therefore due to be filed on April 4, 2001, but pursuant to CAN's motion for an extension of time, the filing deadline was extended until April 9, 2001. CAN's Revised Petition was filed on that date.

⁵ CAN did identify several areas of concern relating to the safety of IP2's operations, which are restated in CAN's Revised Petition. However, as discussed below, none of these assertions sets forth an admissible issue in this proceeding.

⁶ On February 20, 2001, the Town of Cortlandt, New York and the Hendrick Hudson School District (collectively "Cortlandt") filed their joint Petition for Leave to Intervene, Request for Hearing, and Request for Additional Time.

⁷ A similar confidentiality agreement was executed with Cortlandt on March 21, 2001, and Cortlandt submitted additional proposed issues on April 12, 2001. Applicants are filing a separate response to Cortlandt's submittal.

III. PROCEDURAL ISSUES RAISED BY CAN'S REVISED PETITION

A. NEED FOR SUBPART G HEARING

CAN's Revised Petition claims that a Subpart G type hearing must be granted to address the "special issues" raised by IP2's safety concerns (Revised Petition at 24), or at least a "broad-ranging" Subpart M proceeding must be instituted (*id.* at 31). There is, however, no basis for holding such a hearing, since the usual Subpart M procedures are sufficient to provide a full and fair examination of the issues that CAN seeks to raise, should any of them be admitted for adjudication. Furthermore, as discussed below, none of these "special issues" is appropriate for consideration in this proceeding.

CAN's request for a Subpart G type of hearing is based on its assertion that its seeking to raise a number of safety issues (discussed below) "implicates a more detailed hearing process than is provided under 10 CFR Subpart M. It needs the intensive investigatory power that cross examination of evidence and witnesses provides." *Id.* at 31. The short answer to CAN is that Subpart M was adopted for precisely the present type of circumstances. Only a few months ago the Commission considered and denied an identical request by CAN to hold a Subpart G hearing in the Indian Point 3/FitzPatrick license transfer proceeding:

CAN's interpretation of the appropriate scope of Subpart M proceedings is, in our view, overly restrictive. Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial, and indeed this expectation has been fulfilled. However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) – a prediction that has also been fulfilled. For that reason, when promulgating Subpart M, we expressly declined to adopt the nuclear industry trade organization's suggestion that we limit the scope of Subpart M proceedings to financial matters. We deny CAN's motion for essentially the same reason. The nature of

Petitioners' financial and technical allegations do not call for an alteration in the usual Subpart M process.

Power Authority of the State of New York (James A. FitzPatrick Nuclear Power Plant, Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290-91 (2000) (hereinafter "Indian Point 3"), (footnotes omitted). The reasoning of the Commission in Indian Point 3 is equally applicable here. There is neither basis nor need for a Subpart G proceeding to address the issues that CAN seeks to raise.

CAN alternatively seeks what it calls "a broad-ranging Subpart M proceeding," in which there will be "a broad-ranging consideration" of safety issues involving IP2. Revised Petition at 31-32. It is unclear what CAN means by a "broad ranging" Subpart M hearing. If CAN means adoption of procedures, such as cross examination, not generally contemplated by Subpart M, CAN's request should be denied for the reasons discussed above with respect to the Subpart G argument. Assuming, however, that CAN is seeking a hearing that considers issues other than financial qualifications, the answer - as suggested by the Commission in Indian Point 3 - is that technical issues can be fully examined in a Subpart M proceeding if they meet the requirements for admissibility. CAN has failed to demonstrate that Subpart M procedures are not adequate should its contentions be admitted. As will be seen, there is no need for the type of "broad-ranging" hearing to which CAN refers, because none of the matters CAN proposes for hearing constitutes an admissible issue.

B. REQUEST FOR INDEPENDENT SAFETY ANALYSIS INVESTIGATION

CAN also asserts that, prior to giving its approval to the IP1/IP2 license transfers, the NRC must have "dispatched and completely reviewed" an Independent Safety Analysis ("ISA") of IP2. Revised Petition at 29. The ISA that CAN contends is needed would investigate "at least one third of all safety back up systems" of the plant in order to determine "the competency and

accuracy of IP 2's programs." *Id.* at 20-21. Fundamentally, this request — focused on operational safety issues — exceeds the permissible scope of this proceeding.⁸ CAN cites no case, regulation or other authority in support of its request, which is not surprising because there is none. Indeed, CAN has previously raised this issue on at least two occasions, and the Commission has rejected it both times as beyond the scope of a license transfer proceeding.

Most recently, in Indian Point 3, the Commission turned down CAN's request that the Commission arrange for an independent safety review of the Indian Point 3 and James A. FitzPatrick reactors. The Commission wrote:

We decline to do so for the same reasons we gave in *Vermont Yankee* when rejecting CAN's similar issue:

An inquiry such as the one CAN advocates would go considerably beyond the scope of our inquiry in this proceeding, i.e., AmerGen Vermont's qualifications to own and operate the Vermont Yankee plant. We also note that Region I's overall performance in overseeing Vermont Yankee is far outside the scope of a license transfer proceeding. CAN does not explain how any action taken with respect to this license transfer, whether it be denial of the license or the imposition of conditions on the transferee, could remedy CAN's broad complaints that NRC's Region I has abdicated its oversight responsibilities.

Indian Point 3, CLI-00-22, 52 NRC at 318, quoting Vermont Yankee, CLI-00-20, 52 NRC at 171 (footnote omitted).

⁸ CAN alleges, without support, that such an independent investigation is necessary because of Region I's alleged "chronic, systemic mismanagement of the Northeast reactors" that has allowed and continues to allow dangerous conditions at New England and Northeast nuclear reactor sites, including IP2. *Id.* at 28. Examination of Region I's performance, however, would be "far outside the scope of a license transfer proceeding." Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 171 (2000) (hereinafter "Vermont Yankee").

In addition to the out-of-scope nature of its request that the NRC order an ISA, and the complete lack of basis for that request, there is no support for CAN's contention that approval of the license transfers herein should be held up until the ISA has been performed. Even if there were to be such an investigation, the Commission has already ruled in this proceeding (as well as in several others) that pendency of an investigation or another proceeding involving the same or another plant cannot be used as the basis to suspend pending adjudications, particularly in license transfer cases. CL-01-08, supra, slip op. at 4; see also, Indian Point 3, CLI-00-22, 52 NRC at 289-90; Niagara Mohawk Power Corp. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 343 (1999); Consolidated Edison Co. of NY (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 177 (1975); Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-6, 13 NRC 443, 446 (1981). Therefore, the performance of safety reviews of IP2 by the Commission or the NRC Staff, assuming that they were initiated, would be no bar to the completion of Commission action herein.

C. INCORPORATION BY REFERENCE OF CORTLANDT'S CONTENTIONS

At the outset of its Revised Petition, CAN indicates that it "also supports, and incorporates by reference and republishes as its own, the requests, motions, and contentions of the Town of Cortlandt and the Hendrick Hudson School District ['Cortlandt']." Revised Petition at 1.⁹ Such incorporation by reference, however, is legally ineffective to secure CAN access to this proceeding. While the Commission's regulations allow parties admitted into a proceeding to provide testimony and examination on issues raised by other parties, each party must independently meet the threshold requirements for participation, including a demonstration of

⁹ CAN has sought to embrace Cortlandt's issues even prior to Cortlandt's submittal of its new and revised issues, which occurred on April 12, 2001.

standing and submittal of at least one admissible issue. See, e.g., GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000) (hereinafter “Oyster Creek”); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1431-32 (1982). Thus, to the extent that CAN is seeking to be admitted into this proceeding by “republishing” as its own Cortlandt’s contentions, such a course of action is unavailing. CAN’s petition to intervene must rise or fall on its own, regardless of what action the Commission takes on Cortlandt’s proposed issues.

IV. CAN’S REVISED PETITION FAILS TO MEET THE ADMISSIBILITY REQUIREMENTS FOR SUBCHAPTER M PROCEEDINGS

CAN’s Revised Petition does not satisfy the requirements for the identification of issues in Subpart M proceedings. Nowhere in CAN’s filing is there a specific statement of the issues that CAN is proposing,¹⁰ or of the facts or expert opinion that support those issues.¹¹ Instead,

¹⁰ When addressing the admissibility of issues in a Subpart M proceeding, the Commission must consider whether the issues sought to be litigated are:

- (i) Within the scope of the proceeding;
- (ii) Relevant to the findings the Commission must make to act on the application for license transfer;
- (iii) Appropriate for litigation in the proceeding; and
- (iv) Adequately supported by the statements, allegations, and documentation required by 10 CFR § 2.1306(b)(2)(iii) and (iv).

10 CFR § 2.1308(a)(4).

¹¹ Under 10 CFR § 2.1306(b)(2), a petitioner must:

(2) Set forth the issues sought to be raised and

- (i) Demonstrate that such issues are within the scope of the proceeding on the license transfer application,
- (ii) Demonstrate that such issues are relevant to the findings the NRC must make to grant the application for license transfer,

Footnote continued on next page

there is a rambling discourse in which broad assertions are made without the support of specific facts or expert opinions.¹² For that reason alone, CAN's Revised Petition should be dismissed. See, e.g., Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 131-32 (2000); Indian Point 3, CLI-00-22, 52 NRC at 295; see also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (hereinafter "Seabrook"). In addition, CAN's allegations in the three areas of apparent concern to it – IP2's operational safety, the financial qualifications of the Entergy Companies, and radiological remediation – raise matters that are not germane to this license transfer proceeding. Therefore, CAN's Revised Petition is fatally deficient and should be denied on the grounds of failure to raise an admissible issue.

A. THE SAFETY ISSUES THAT CAN ATTEMPTS TO RAISE ARE IRRELEVANT TO THIS LICENSE TRANSFER PROCEEDING

Two-thirds of CAN's Revised Petition is devoted to enumerating the alleged safety issues that it seeks to have examined. However, the issues that CAN proposes (which, in many cases,

Footnote continued from previous page

- (iii) Provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issues and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely to support its position on the issues, and
- (iv) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

See also Indian Point 3, CLI-00-22, 52 NRC at 295; Oyster Creek, CLI-00-06, 51 NRC at 203.

¹² For example, in support of its financial qualification allegations – which should be at the core of CAN's hearing request in this Subpart M proceeding – all that CAN offers is a January 10, 2001 affidavit filed by Edward Smeloff in connection with the Indian Point 3 license transfer proceeding. That document is for the most part, if not entirely, irrelevant to the issues here.

are the same ones it unsuccessfully attempted to introduce in other license transfer cases) lie outside the scope of this proceeding and must be rejected.¹³

The Commission has clearly defined the framework for acceptable issues in this proceeding: CAN and Cortlandt were authorized to file new or revised issues “challenging the Entergy companies’ financial or technical qualifications to own and/or operate the Indian Point 1 and 2 facilities.” CLI-01-08, slip op. at 7, emphasis added. CAN, however, acknowledges up front that the safety problems it alleges “have resulted in severely eroded safety margins and other problems, which the NRC must resolve no matter who is the licensee.” Revised Petition at 7 (emphasis added). Thus, by CAN’s own admission, the alleged operational safety problems at IP2 do not go to the Entergy Companies’ financial or technical qualifications, but are alleged plant operation concerns whose resolution is independent of whether the license is transferred. Under well-established Commission precedent, operational safety issues are outside the scope of a Subpart M license transfer proceeding. Indian Point 3, CLI-00-22, 52 NRC at 310-11; Vermont Yankee, CLI-00-20, 52 NRC at 169.¹⁴ Therefore, the safety concerns alleged by CAN do not constitute appropriate issues for consideration.

Indeed, all the safety concerns raised by CAN are unquestionably matters as to which CAN alleges deficiencies in the ongoing IP2 operations, with no link whatsoever to changes in

¹³ The first requirement for the introduction of issues as part of a hearing request is that the issues be “within the scope of the proceeding on the license transfer application.” 10 CFR §2.1306(b)(2)(i).

¹⁴ In ruling that operational concerns such as those raised by CAN here do not present appropriate issues for a Subpart M license transfer proceeding, the Commission in Vermont Yankee made essentially the same observation as CAN: “Operational issues of this kind will remain the same whether or not the license is transferred.” Vermont Yankee, CLI-00-20, 52 NRC at 169.

technical qualifications that might result from the transfer to the Entergy companies.¹⁵ They include allegations of:

1. Pressure by management to achieve IP2's restart in January 2001 "at all costs." Revised Petition at 9.¹⁶
2. Failure to "accurately maintain or update the IP2 FSAR." *Id.* at 15.¹⁷
3. "[E]xtensive lapses in worker training, procedures and organization." *Id.*¹⁸
4. A "chilled" work atmosphere. *Id.*¹⁹
5. Problems with untimely or improper disposition of Condition Reports. *Id.* at 16.
6. A "culture of non-compliance." *Id.* at 17.

All of these matters are regulatory inspection and oversight issues more appropriately addressed in the 10 C.F.R. § 2.206 process.

¹⁵ In addressing these allegations, Applicants do not concede that there is any merit to CAN's claims regarding Con Edison's current or past management of IP2 operations. The discussion provided here is only intended to demonstrate that CAN's safety claims are outside the scope of this proceeding. While CAN maintains that Con Edison "has failed to resolve fundamental problems" at IP2, it is important to emphasize that the NRC has permitted the restart following the steam generator replacement and has found that the plant can be safely operated while it addresses the identified areas in which performance improvements are needed.

¹⁶ The irrelevance of this particular claim is compounded by its being based on allegations of similar behavior by a different licensee, the Power Authority of the State of New York, in connection with its sale of the Indian Point 3 and James A. FitzPatrick reactors to Entergy. Revised Petition at 9-10.

¹⁷ In Indian Point 3, the Commission rejected a similar challenge by CAN to the status of the FSARs for Indian Point 3 and James A. FitzPatrick because it was an operational issue outside the scope of a license transfer proceeding. Indian Point 3, CLI-00-22, 52 NRC at 310-11.

¹⁸ Challenges to the qualifications of plant personnel were dismissed in Indian Point 3 as raising operational issues. *Id.* at 309-10.

¹⁹ In Vermont Yankee, CAN unsuccessfully sought to raise an issue regarding chilled work atmosphere, albeit in the context of post-license transfer conditions. The proposed issue was rejected by the Commission because "[s]peculation about chilling effects and demoralization of the work force does

Footnote continued on next page

The only safety allegation raised by CAN that could even arguably be considered relevant to the proposed license transfers is the claim that ENO is not technically qualified to operate IP2 because it will be relying on the existing plant staff to do so, and the technical qualifications of that staff have become “compromised” by alleged failures of current management. Id. at 13-16. However, CAN provides no facts in support of this bald allegation and fails to show how this represents a deficiency uniquely created by the proposed transfer. In addition, CAN raised a similar claim in Indian Point 3, where it sought to impeach Entergy’s technical qualifications by claiming that alleged technical and administrative problems at the plant were an indication of the lack of qualifications of the existing plant staff. The Commission rejected CAN’s attempt to turn alleged technical problems into transferee technical qualification issues, noting that “any ongoing operational deficiencies at nuclear power plants subject to a license transfer must be addressed regardless of the transfer.” Indian Point 3, CLI-00-22, 52 NRC at 311 n. 56.

The Commission’s conclusion in Indian Point 3 is particularly valid here, since CAN has raised all the above listed safety concerns, including personnel qualifications, in its December 4, 2000 petition for enforcement action against Con Edison under 10 CFR § 2.206. See Exhibit 2A to CAN’s February 20, 2001 Petition.²⁰ CAN’s petition for enforcement has been accepted for

Footnote continued from previous page

not suffice to trigger our hearing process.” Vermont Yankee, CLI-00-20, 52 NRC at 170 (footnote omitted).

²⁰ CAN’s Section 2.206 petition requests that the IP2 license be suspended due to “persistent and pervasive negligent management;” that NRC investigate apparent misrepresentation of material facts by the utility; that the NRC determine whether “insufficient” engineering calculations relied on to ensure adequacy of key systems were due to “lack of rigor and thoroughness or a result of deliberately misleading information.” The petition also requests that no license transfer requests be approved for IP2 until management can demonstrate that the UFSAR backlog and maintenance requirements are updated, and workers have been retrained to the complete and revised UFSAR..

review by the Director of the Nuclear Reactor Regulation. 66 Fed. Reg. 15,301 (2001). Thus, the alleged safety issues raised by CAN are already being examined “regardless of the transfer” and there is neither basis nor need for examining them here.

A separate set of safety allegations by CAN is directed at the impact of the license transfer on the NRC’s regulatory role. CAN argues that allowing Con Edison to transfer the license for IP2 to another operator would “undermine the NRC’s ability to enforce its regulations under utility deregulation” because “operators such as Consolidated Edison would be able to operate reactors in violation of NRC regulations and then transfer the licenses to another company when the burden of operating and maintaining the reactor became too great.” Revised Petition at 7. CAN goes on to ask rhetorically “what incentives would other utilities or licensees who plan to sell reactors have to continue a proper program of maintenance and fulfill regulatory commitments” if the NRC were to approve the transfer of the IP2 reactor in its current condition. Id. CAN claims that by approving the IP2 transfer the NRC “sets a precedent for the entire nuclear industry that non-compliant reactor operation will not only be tolerated, it will be rewarded.” Id. at 8. Finally, CAN warns that “[t]his may be the NRC’s last opportunity to ensure that IP2 is brought within regulatory compliance.” Id. at 11.

Hyperbole aside, there are numerous flaws in CAN’s argument. First, it is founded on the faulty premise that allowing the license transfer to proceed would somehow cause the NRC to discontinue its oversight function and would prevent the agency from assuring that any deficiencies affecting IP2 plant operations will be corrected, regardless of who the licensee is. Second, CAN postulates the counter-intuitive argument that the transfer would set a precedent such that a plant owner planning to sell its facility will have no incentive to operate well or correct problems that might affect the safety of operations. Third, the prediction that allowing a

license transfer to occur would be viewed by the industry as “rewarding” non-compliant behavior by the transferor is unfounded and speculative. Finally, all of these arguments add up, at best, to a generic concern about industry deregulation and the possible impact of the transfer of the license of an allegedly “troubled” reactor and about the NRC’s ability to discharge its regulatory duties. An individual license transfer proceeding is not the appropriate forum for raising such a generic policy concern. See, e.g., Indian Point 3, CLI-00-22, 52 NRC at 295-96.

B. CAN’S PROPOSED FINANCIAL QUALIFICATION ISSUES ARE INADMISSIBLE

CAN’s Revised Petition proposes three issues regarding the financial qualifications of the Entergy Companies to own and operate IP1 and IP2:

1. The Entergy Companies have provided insufficient cost-and-revenue projections, since projections for only 4 ½ years are provided (second half of 2001 through 2005). Revised Petition at 32-33.
2. The assumption of an 85% average capacity factor is unrealistic. Id. at 34-36.
3. Entergy’s cost projections are too low to account for the problems that Entergy would inherit with its purchase of the plant, since Entergy appears to have assumed that those can be resolved with an investment that is much lower than that spent by other reactors that have run into similar difficulties. Id. at 36-38.

None of these claims raises an admissible issue in this proceeding.

1. The Entergy Companies’ Five-Year Financial Projections Are Adequate

CAN contends that the five-year (2001-2005) projections provided by the Entergy Companies pursuant to 10 CFR § 50.33(f)(2) are deficient in that they extend only for 4½ years,

since the 2001 figures are only for approximately the last half of the year.²¹ Revised Petition at 32-33. Applicants have requested that the Commission review its application on a schedule that will permit closing to occur by May 11, 2001. The projections provided by the Entergy Companies cover the intended period of operations by the transferee in 2001 and therefore meet regulatory requirements.

In any event, CAN does not allege that the Entergy Companies' projections are substantively insufficient to provide reasonable assurance of financial qualifications just because they are five months too short. In the absence of any such claims, CAN's challenge to the length of the five-year cost and revenue projections does not raise a genuine dispute on a material issue of fact or law and should be rejected. 10 CFR § 2.1306(b)(2)(iv).

2. CAN Has Failed to Effectively Challenge the Entergy Companies' Capacity Factor Assumptions

CAN challenges the Entergy Companies' revenue projections for IP2 because they are based on an 85% average annual capacity factor for the reactor during the five-year period 2001-2005. Revised Petition at 34-36. CAN bases its challenge on two claims: (1) The assumed capacity factor is inconsistent with the historic performance of IP2, which in the period 1994-99 had an average 66.2% annual capacity factor, *id.* at 34, and (2) IP2 has gone through several recent extended outages and "it appears that Con Edison has been unable to address fundamental problems at the reactor and there is no reason to assume that Entergy would not have to go

²¹ 10 CFR § 50.33(f)(2) requires that a license applicant submit estimates "for total annual operating costs for each of the first five years of operation of the facility," as well as indicate the source of funds to cover these costs. A license transfer applicant satisfies the NRC's financial qualifications rule if it provides a cost-and-revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs. Vermont Yankee, CLI-00-20, 52 NRC at 176.

through another extended outage in order to resolve the wide array of problems that continue to plague Indian Point 2.” *Id.* at 35.²²

In questioning the 85% capacity factor assumption, CAN cites but does not controvert the Entergy Companies’ explanation in the Application that the projected 85% capacity factor is based “on the performance of Entergy’s other nuclear power plants.” *Id.* at 34. As noted above, Subpart M requires a petitioner to “[p]rovide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.” 10 CFR § 2.1306(b)(2)(iv). An issue that does not *directly* controvert a position taken in the application is subject to dismissal. Private Fuel Storage, L.L.C. (Interim Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998); see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Accordingly, CAN’s challenge to the 85% capacity factor assumption by the Entergy Companies must be dismissed.²³

3. CAN Raises no Valid Challenge to the Entergy Company’s Cost Projections

CAN questions the Entergy Companies’ cost projections because they do not allocate enough funds to the “expenses to take on the project of restoring the reactor to regulatory compliance and resolving the organizational and personnel problems the Entergy Companies would inherit under the proposed sale.” Revised Petition at 36. CAN acknowledges that the

²² CAN claims, without further explanation or support, that “the Entergy companies’ cost-and-revenue projections should at least be tested for a one-year outage at Indian Point 2.” Revised Petition at 35. Since this assertion is not backed up by any facts, documents or expert testimony, it must be disregarded. Vermont Yankee, CLI-00-20, 52 NRC at 170.

²³ With respect to CAN’s allegations that Con Edison “has been unable to address fundamental problems at the reactor” and that “there is no reason to assume that Entergy would not have to go through another extended outage,” both claims are obviously nothing but the unsupported speculation by CAN, and as such do not present any issues that require consideration in this proceeding. Oyster Creek, CLI-00-6, 51 NRC at 208.

Entergy Companies have allocated up to \$50 million to resolving the plant's "problems." Id. However, CAN asserts that such a level of expenses "is hopelessly inadequate" because "[r]eactors that have faced similar difficulties to those that currently plague IP2 have routinely spent several times more than the Entergy companies seem to have budgeted." Id. at 36-37.

CAN offers no facts or expert opinion assessing how much more should the Entergy Companies have allocated in their budgets for the costs of resolving IP2's alleged "problems." Instead, CAN provides the affidavit and testimony in the Indian Point 3 proceeding of its expert, who testified about the costs incurred at the Rancho Seco and Salem 1 and 2 plants in connection with outages at those plants. Id. at 37 n. 29. That testimony is irrelevant, since it does not address whether the conditions at Rancho Seco and Salem were in any way comparable to those alleged to exist at IP2, nor does it provide any correlation between the costs of addressing the "problems" at those other plants and those allocated by the Entergy Companies for IP2. For the same reason, the references in the same footnote to the costs of the "recovery" efforts at the Millstone and Clinton plants are totally irrelevant and are, moreover, supported only by newspaper articles whose accuracy and probative value are at best questionable. In short, CAN's attack on the cost estimates in the Application exemplifies the "vague, unparticularized" issue, "unsupported by alleged fact or expert opinion and documentary support" that the Commission has repeatedly ruled inadmissible. Oyster Creek, CLI-00-6, 51 NRC at 203.²⁴

²⁴ CAN also attempts to demonstrate that the revenues from IP2's operation would be insufficient to meet costs assuming the one-year outage CAN contends would be necessary to resolve the plant's "problems." Revised Petition at 36-38. There is no need to respond to that allegation, since it is based on CAN's unsupported argument that such an outage should be evaluated.

C. CAN HAS RAISED NO ADMISSIBLE ISSUES WITH RESPECT TO THE RADIOLOGICAL DECOMMISSIONING OF THE INDIAN POINT REACTORS

10 CFR § 50.75 requires a power reactor licensee to demonstrate how it will provide reasonable assurance that funds will be available for the decommissioning of the reactor. Pursuant to 10 CFR § 50.75(b), the licensee is required to provide decommissioning funding assurance by one or more of the methods described in 10 CFR § 50.75(e). The Entergy Companies propose to satisfy this requirement, for both Units 1 and 2, by holding \$430 million in trust. The Commission has held that sufficient assurance of decommissioning funding is demonstrated by a showing of compliance with 10 CFR § 50.75. Seabrook, CLI-99-6, 49 NRC at 217.

CAN does not challenge the adequacy of the method of decommissioning funding provided by the Entergy Companies, or the sufficiency of the amounts in the funds to comply with NRC decommissioning funding requirements. Instead, CAN alleges that approval of the license transfer would leave Con Edison without the means to accomplish the remediation of offsite radiological materials which CAN alleges exist, and would leave the NRC without the authority to oversee Con Edison's disposition of those materials. Revised Petition at 39-43. It is unclear how these allegations relate, if at all, to decommissioning funding issues except to the extent that CAN may claim that the funds in the decommissioning trust should be made available for offsite radiological remediation. However, the funds in decommissioning trusts are specifically and exclusively dedicated to the purpose of decommissioning the plant sites, and cannot be used for offsite remediation. Indian Point 3, CLI-00-22, 52 NRC at 307-08; see also 10 CFR §§ 50.82(a)(8)(i)(A) and 50.2 (definition of "decommission").

The source of CAN's concern is a provision in the Asset Purchase and Sale Agreement ("APSA") between ENIP2 and Con Edison under which Con Edison retains liability for the

radiological decommissioning of materials deposited offsite during Con Edison's period of ownership of IP1 and IP2. Revised Petition at 40. CAN points, in particular, to the releases of radioactive materials resulting from the steam generator tube leak that occurred at IP2 on February 15, 2000, liability for which is specifically retained by Con Edison under the APSA. Id. at 40-42.

CAN's only claim with respect to offsite radiation releases associated with the operation of IP1 and IP2 are those resulting from the February 15, 2000 incident. As to those releases, CAN cites the finding by the NRC Augmented Inspection Team ("AIT") that investigated the event that only 1.7 curies of radionuclides were released, and concedes that "a release of 1.7 curies would pose no greater threat to the public health and safety than many routine batch releases of radioactive gases and liquid tritium." Id. at 41. Thus, there is no basis for any claim that there is any radioactive contamination offsite, let alone any that requires remediation. CAN offers nothing other than its speculation that, since under the APSA Con Edison specifically retained liability for remediation of releases from the February 15, 2000 incident, this "raises the question of whether the Augmented Inspection Team was able to estimate the size and nature of the releases accurately." Id. This is, of course, pure speculation and as such inadmissible as the basis for an issue in this proceeding. See, e.g., Indian Point 3, CLI-00-22, 52 NRC at 305.²⁵

²⁵ The provision in the APSA under which Con Edison retains liability for radioactive releases arising from the February 15, 2000 incident, limits Con Edison's liability to ENIP2 for such releases to the extent such liabilities are "in excess of the proceeds or benefits recoverable by or paid or unavailable to Buyer under any insurance policies, including those transferred to Buyer pursuant to section 2.02(a)(xii), or pursuant to the Price-Anderson Act[.]" Revised Petition at 40. From this clause, CAN infers that the parties "have gone so far as to anticipate claims against Entergy in excess of what is recoverable from the IP2 insurance policies or ENIP2's Price Anderson indemnity." Id. at 42. This conclusion is mere speculation on CAN's part. All that the cited clause accomplishes is avoid double recovery by ENIP2 – from insurance coverages and Con Edison – for the same potential liability, no matter how remote. The existence of this clause says nothing about whether the parties anticipated that there would be any liability in excess of insurance coverages.

Finally, CAN asserts without explanation or citation of supporting authority that should the Commission allow the license transfer to take place, the agency's authority over Con Edison with respect to the remediation of offsite radioactive releases "would be compromised" because "the NRC would no longer have direct regulatory authority over Consolidated Edison once ConEd is released from the IP2 license." Revised Petition at 39. However, the Commission has asserted that it has broad authority under section 161 of the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2201, to issue orders "as it may deem necessary . . . to govern any activity authorized pursuant to this Act . . . in order to protect the public health and safety and minimize danger to life or property." According to the Commission Staff, the Commission's authority extends over any person, including licensees and non-licensees, with regard to conduct within the scope of the Commission's subject matter jurisdiction.²⁶ Remediation of radioactive contamination is an area within the Commission's subject matter jurisdiction. Thus, according to the Staff's interpretation of the governing statute, the Commission retains authority to oversee remediation of offsite radioactive materials should such oversight ever become necessary.

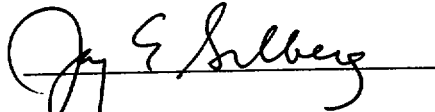
²⁶ See NRC Staff's Brief Regarding NRC Authority Over Decommissioning Expenditures by the Power Authority of the State of New York (February 26, 2001), Docket Nos. 50-333-LT and 50-286-LT, quoting Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664 (1991), where the Commission stated that its statutory authority to issue orders under section 161 of the AEA "is not limited solely to licensees" but "is extremely broad, extending to any person who engages in conduct within the Commission's subject matter jurisdiction." *Id.*

V. CONCLUSION

For the reasons set forth above, CAN's request for a hearing and its petition for leave to intervene fail to raise litigable issues and should be denied.²⁷

April 19, 2001

Respectfully submitted,



Douglas E. Levanway
WISE, CARTER, CHILD and CARAWAY
P.O. Box 651
Jackson, MS 39205-0651
Tel: (601) 968-5524
Fax: (601) 968-5519
email: del@wisecarter.com

John Fulton
ENTERGY NUCLEAR GENERATING CO.
600 Rocky Hill Road
Plymouth, MA 02360

Jay E. Silberg
Matias F. Travieso-Diaz
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037-1128
phone: (202) 663-8063
fax: (202) 663-8007
e-mail: jay.silberg@shawpittman.com
Counsel for Entergy Nuclear Indian Point 2,
LLC and Entergy Nuclear Operations, Inc.

Brent L. Brandenburg
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.
4 Irving Place - Suite 1830
New York, NY 10003

Mark J. Wetterhahn
David A. Repka
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502
phone (202) 371-5703
fax (202) 371-5950
e-mail: Mwetterh@winston.com
Counsel for Consolidated Edison Company
Of New York, Inc.

²⁷ Clearly, an agreement (such as the APSA) between two private parties cannot affect the Commission's jurisdiction. Thus, CAN's allegation cannot rise to a matter suitable for litigation in this proceeding.

BEFORE THE COMMISSION

Docket Nos. 50-003-LT
50-247-LT

**Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail to: ogclt@nrc.gov)**

Mark J. Wetterhahn
David A. Repka
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502
e-mail: Mwetterh@winston.com

Brent L. Brandenburg
Consolidated Edison Company
of New York, Inc.
4 Irving Place - Suite 1830
New York, NY 10003
(e-mail: brandenburgb@coned.com)

Timothy L. Judson
Mark Jacobs
Deborah B. Katz
Citizens Awareness Network, Inc.
162 Cambridge Street
Syracuse, NY 13210
(e-mail: cnycan@rootmedia.org)

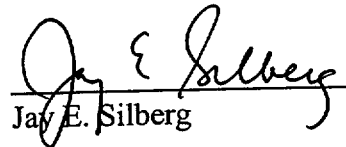
Thomas F. Wood
Town of Cortlandt
153 Albany Post Road
Buchanan, NY 10511
(e-mail: tfwesq.@aol.com)

Douglas E. Levanway
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205-0651
(e-mail: del@wisecarter.com)

John Fulton
Entergy nuclear generating co.
600 Rocky Hill Road
Plymouth, MA 02360
(e-mail: jfultol@entergy.com)

Paul V. Nolan
5515 North 17th Street
Arlington, VA 22205-2207
(e-mail: pvnppv@aol.com)

Nancy T. Bocassi
Hendrick Hudson School District
61 Trolley Road
Montrose, NY 10548
(e-mail: nbocassi@henhud.lhric.org)


Jay E. Silberg