RAS E-567

UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE COMMISSIONERS
KRISTINE L. SVINICKI, WILLIAM D. MAGWOOD, IV,
GEORGE APOSTOLKIS, AND WILLIAM C. OSTENDORFF AND
CHAIRMAN GREGORY B. JACZKO

ON APPLICATION BY ENTERGY
FOR INTERLOCUTORY APPEAL FROM LBP-11-17

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64
	August 11, 2011

THE STATE OF NEW YORK AND THE STATE OF CONNECTICUT'S JOINT ANSWER IN OPPOSITION TO ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-11-17

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Petitioner-Intervenor State of New York and Interested Governmental Entity State of Connecticut respectfully submit this joint answer in opposition to Entergy's petition for interlocutory review of the Atomic Safety and Licensing Board's decision LBP-11-17 granting New York's motion for summary disposition of combined NYS Contention 35/36 and denying Entergy and NRC Staff's separate cross-motions for summary disposition. The Board's well-reasoned decision, which applied settled law and NRC regulations to the specific facts developed by the parties concerning a severe accident at an Indian Point reactor, does not merit interlocutory review. Entergy's petition mischaracterizes or ignores applicable statutes and regulations and Commission rulings and rehashes its previous unsuccessful attempt at interlocutory review of the Board's earlier decision LBP-10-13 admitting Contentions 35/36. The petition should be summarily denied.

PRELIMINARY STATEMENT

The Nuclear Regulatory Commission ("NRC") has made clear that severe accident mitigation alternatives (or "SAMA") analyses must be conducted for nuclear power plant license renewals, and that a full record of the costs and benefits of potentially feasible alternatives is required. NRC regulations plainly require the Staff to state whether NRC has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. 10 C.F.R. § 51.103(a)(4). NRC regulations also authorize renewed operating licenses to be supplemented by conditions necessary to protect the environment that are derived from the environmental impact review that takes place during the license renewal process. 10 C.F.R. § 54.33(c).

NRC Staff's December 2010 Final Supplemental Environmental Impact Statement ("FSEIS") contains neither a full record of costs and benefits, nor a commitment to taking all

practicable measures to minimize environmental harm or a rational explanation under NRC regulations or the Administrative Procedure Act (or "APA") of why it is not adopting such measures. As such, the FSEIS violates established law, entitling the State of New York to summary disposition of Combined Contention 35/36 pursuant to 10 C.F.R. §§ 2.710 and 2.1205.

NRC Staff is obligated to conduct a site-specific severe accident mitigation alternatives analysis as part of its environmental obligations under the National Environmental Policy Act (or "NEPA") during the review of a facility's license renewal application, unless Staff previously conducted such an analysis for the facility. 10 C.F.R. § 51.53(c)(3)(ii)(L); 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 ("alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives."); 10 C.F.R. § 51.71(d); *see also* NUREG-1555 Standard Review Plans for Environmental Reviews of Nuclear Power Plants Supplement 1 (October 1999) at 5.1.1-1 ("This environmental standard review plan (ESRP) directs the staff's analysis and assessment of the severe accidents for the applicant's plant . . . . The intent is to identify additional cases that might warrant either additional features or other actions that would prevent or mitigate the consequences of serious accidents.").

The SAMA analysis for Indian Point identifies at least 9 mitigation alternatives which appear to be cost-effective but for which cost analyses have not been completed. NRC Staff's FSEIS fails to require completion of these cost analyses as part of the license renewal process. The SAMA analysis for Indian Point also identifies at least 9 additional mitigation alternatives where, based on cost analyses to date, benefits substantially out-weigh cost. The FSEIS does not even consider requiring implementation of any of the 9 SAMAs, nor does it offer a rational explanation for such inaction – as required by NRC regulations and the Administrative Procedure Act.

In the FSEIS, NRC Staff refuses to require completion of the cost analyses for potentially cost-effective SAMAs and refuses to consider requiring implementation of any SAMAs that are already shown to be substantially more beneficial than their cost. This legally indefensible position is based on the argument that, because the alternatives do not involve managing the effects of aging of non-moving parts, NRC Staff is barred from requiring a complete SAMA analysis and barred from ordering implementation of cost-effective SAMAs in deciding whether Entergy should be granted a new operating license allowing extended operation for an additional 20 years, for Indian Point Unit 2 ("IP2") and Indian Point Unit 3 ("IP3"). This position is contrary to: NRC regulations, cases, and guidance; long-standing Commission precedent; Council on Environmental Quality ("CEQ") regulations; federal courts rulings; and NEPA. As such, it is indefensible under the Administrative Procedure Act.

New York Contentions 35/36 have been based on a simple concept: NRC Staff has the authority, pursuant to 10 C.F.R. §§ 51.103(a)(4)("State whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted") and 54.33(c)("[license] conditions may be supplemented or amended as necessary to protect the environment during the term of the renewed license and will be derived from information contained in the supplement to the environmental report submitted pursuant to 10 CFR part 51"), to order implementation of clearly cost-effective severe accident mitigation alternatives. The limitations imposed on the "safety review" by 10 C.F.R. § 54.30(b) do not apply to limit the scope of either of these sections which are applicable to NRC's obligations under NEPA. Further, 10 C.F.R. § 54.29(b) requires the Staff to affirmatively certify that the conditions of 10

C.F.R. Part 51 have been satisfied before a renewed operating license may be issued pursuant to Part 54.

Entergy's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 (July 29, 2011)("Entergy 2011 Petition") is based on the insupportable assertion that NRC does not have the authority to require implementation of clearly cost-effective SAMAs and thus Entergy neither needs to complete the cost analysis of potentially cost-effective SAMAs nor does NRC Staff have to provide a rational basis for not ordering implementation of clearly cost-effective SAMAs. Indeed, Entergy's Petition assumes that federal statutes and regulations actually prohibit NRC from exercising authority to implement cost-effective SAMAs. In its attempt to avoid LBP-11-17, Entergy's Petition distorts the Licensing Board's holding, ignores the Administrative Procedure Act and its requirements, and misstates the relevant law and regulations.

PROCEDURAL HISTORY

Admission of Contentions NYS-35 & 36

Following Entergy's submittal of a SAMA reanalysis in December 2009 (Entergy NL-09-165, License Renewal Application – SAMA Reanalysis Using Alternate Meteorological Tower Data (Dec. 14, 2009), Attachment 1, ("December 2009 SAMA Reanalysis")), New York filed Contentions 35 & 36 which challenged the SAMA reanalysis and its conclusions for the Indian Point reactors.[1] Entergy and NRC Staff opposed admission of these contentions, arguing that neither NRC regulations nor NEPA compels implementation of clearly cost-beneficial SAMAs, and that Entergy's SAMA analysis was sufficiently complete to enable NRC Staff to

[1] State of New York's Motion For Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives (Mar. 11, 2010) ML100780366.

carry out all of its NEPA responsibilities.[2] On June 30, 2010, the Atomic Safety and Licensing Board ("ASLB") rejected these arguments and issued an order admitting, in part, and combining, Contentions NYS-35 & 36. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-10-13, 71 N.R.C. __, (June 30, 2010) ("LBP-10-13"). It held:

> [T]he adequacy and accuracy of environmental analyses and proper disclosure of information are always at the heart of NEPA claims. If 'further analysis' is called for, that in itself is a valid and meaningful remedy under NEPA." [Citing *McGuire/Catawba*, CLI-02-17, 56 NRC at 10] Moreover, if the benefit to cost ratio is glaringly large for a potentially cost-beneficial SAMA, the NRC Staff must, as a prerequisite to extending the license, impose implementation of that SAMA as a license condition or, in the alternative, explain why it is not requiring implementation of that SAMA. The failure to do either of these alternatives would be to act arbitrarily and capriciously.

Id., at 28.

Entergy and Staff's First Petition for Interlocutory Appeal

On July 15, 2010, Entergy and NRC Staff, in separate filings, sought the extraordinary relief of interlocutory review of the ASLB's LBP-10-13 decision insofar as it partially admitted these two contentions, now consolidated as NYS-35/36.[3] The States of New York and Connecticut opposed the petitions.[4]

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[2] Applicant's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis (Apr. 5, 2010) ML101450328; NRC Staff's Answer to State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 5, 2010) ML100960165; Transcript of April 19, 2010 Oral Argument before the Atomic Safety and Licensing Board, ML101160416; and Joint Motion for Correction of Transcript of April 19, 2010 Prehearing Telephone Conference (May 14, 2010) ML101440230.

[3] Applicant's Petition for Interlocutory Review of LBP-10-13 ("Entergy 2010 Petition"); NRC Staff's Petition for Interlocutory Review of the ASLB's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13) ("Staff 2010 Petition").

[4] The State of New York and the State of Connecticut's Combined Reply to Entergy and NRC Staff Petitions for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting the State of New York's Contentions 35 and 36 (LBP-10-13) (July 26, 2010)("States' 2010 Combined Reply") ML102110086.

The Commission denied Entergy and Staff's petitions on November 30, 2010, reminding Entergy and Staff that interlocutory appeal is only for "extraordinary circumstances" and finding "uncompelling the Staff's and Entergy's claims that the Board's decision will result in a pervasive, unusual impact on the proceeding." *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-10-30, 72 N.R.C. ___ (Nov. 30, 2010)("CLI-10-30"). In rejecting interlocutory review, the Commission made clear that the "burden" which would be imposed on Entergy and NRC Staff if New York prevailed on Contentions NYS-35/36 was not so substantial as to warrant interlocutory review:

> To the extent that the contention may call for further "explanation" of the SAMA analysis conclusions, we see no unusual or pervasive impact on the proceeding. Similarly, to the extent that the Board has admitted the issue of whether the current SAMA cost-benefit estimates are sufficient for the NEPA analysis, we can discern no "extraordinary" impact on the proceeding.

CLI-10-30, at 6. The next month, when NRC Staff issued the FSEIS, it made no effort to provide "further explanation" for refusing to order Entergy to submit sufficiently complete SAMA analyses for potentially cost-beneficial SAMAs in order to permit a determination to be made whether implementation of the SAMA was warranted, or for refusing to order implementation of clearly cost-beneficial SAMAs. Rather, the FSEIS repeated NRC Staff's legally insupportable argument that it has no legal authority under either Part 51 or Part 54 to order implementation of a clearly cost-beneficial SAMA as a condition for approval of a license renewal application.

Summary Disposition Motions

In light of NRC Staff's continued refusal to follow NEPA, the APA, NRC regulations, CEQ regulations, and NEI and NRC Staff guidance regarding SAMA, on January 14, 2011, the State of New York moved for summary disposition of NYS-35/36 challenging the NRC Staff's

December 2010 Final Supplemental Environmental Impact Statement (FSEIS), (1) for failing to require completion of cost analyses for the SAMAs that appear to be cost-beneficial and (2) for failing to either require Entergy to implement mitigation alternatives when the benefits of those alternatives substantially outweigh costs or, in the alternative, for NRC Staff to provide a rational basis for why implementation of a clearly cost-beneficial SAMA was not required as a condition to Entergy's proposed renewed license.[5]

In response to New York's motion, Entergy and NRC Staff each filed cross-motions for summary disposition on NYS-35/36, raising the same unsuccessful arguments they had raised twice previously, insisting, even in the face of 10 C.F.R. § 51.103(a)(4) and § 54.33(c), that no regulation or guidance document provides NRC Staff with the legal authority to require implementation of cost-beneficial SAMAs. Connecticut filed an answer supporting New York's motion for summary disposition.[6] The relevant facts that supported the admission of NYS-35/36 in 2010 are the same as the undisputed facts upon which New York, Entergy, and NRC Staff relied in their 2011 cross-motions for summary disposition.

The Board's Summary Disposition Order

On July 14, 2011, the Board granted New York's summary disposition motion and denied Entergy and NRC Staff's cross-motions, observing the distinction between Part 54 and Part 51, and making clear that it was "not directing the implementation of any SAMA." *Entergy*

[5] State of New York's Motion for Summary Disposition of Consolidated Contention NYS-35/36 (Jan. 14, 2011) ML110270252.

[6] NRC Staff's (1) Cross-Motion for Summary Disposition, and (2) Response to New York State's Motion for Summary Disposition, of Contention NYS-35/36 (Severe Accident Mitigation Alternatives) (Feb. 7, 2011) ML110400012; Applicant's Consolidated Memorandum in Opposition to New York State's Motion for Summary Disposition of Contention NYS-35/36 and in Support of Its Cross-Motion for Summary Disposition (Feb. 3, 2011) ML110460187; Response of Attorney General of Connecticut in Support of New York's Motion for Summary Disposition of Consolidated Contention NYS-35/36 (Feb. 3, 2011) ML110400479.

Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-11-17, 74 N.R.C. __, slip op. (July 14, 2011) ("Order" or "LBP-11-17"). Instead, the Board concluded, as a matter of law, that "the FSEIS does not articulate a rational basis for not requiring Entergy to complete its SAMA review and for not requiring the implementation of cost-beneficial SAMAs prior to the relicensing of Indian Point Units 2 and 3." LBP-11-17 at 16-17. The Board held that

> under NRC Regulations, the APA, and NEPA, Entergy's licenses cannot be renewed unless and until the NRC Staff reviews Entergy's completed SAMA analyses and either incorporates the result of these reviews into the FSEIS or, in the alternative, modifies its FSEIS to provide a valid reason for recommending the renewal of the licenses before the analysis of potentially cost effective SAMAs is complete and for not requiring the implementation of cost-beneficial SAMAs.

LBP-11-17, at 17. The Board was also careful to note that it was not holding that NRC Staff was required to order a backfit under 10 C.F.R. § 50.109, but, rather, that "NRC Staff has the authority to require implementation of non-aging management SAMAs through its CLB backfit review under Part 50 or through setting conditions of the license renewal." LBP-11-17, at 11 (fn. omitted).[7]

[7] Because all the pleadings in this proceeding are part of the public record and the ASLB Hearing Docket and to reduce unnecessary paperwork, the States incorporate by reference the State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Mar. 11, 2010), including all attachments thereto, ML100780366; the State of Connecticut's Answer (Apr. 1, 2010), ML101100473; the State of New York's Combined Reply to Entergy and NRC Staff Answers to the State's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 12, 2010), ML101160415; the transcript of the April 19, 2010 oral argument, ML101160416, as amended ML101440230; States' 2010 Combined Reply, ML102110086; State of New York's Motion for Summary Disposition of Consolidated Contention NYS-35/36 (Jan. 14, 2011), ML110270252; and State of New York's Combined Reply to Entergy and Staff Cross-Motions for Summary Disposition on NYS Combined Contentions 35 and 36 Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Feb. 23, 2011) ML110660425.

The Instant Petition for Interlocutory Appellate Review

On July 29, 2011, Entergy filed a petition requesting interlocutory review, arguing, as it did in its previous 2010 request for interlocutory review, that there is no legal authority (1) to require, in a license renewal proceeding, that non-aging related SAMAs be sufficiently analyzed to determine whether their implementation is warranted or (2) to require a rational basis to reject implementation of clearly cost-beneficial SAMAs. Entergy again argues that 10 C.F .R. Parts 51 or 54 *prohibit* the relief New York sought and the Licensing Board granted. Entergy 2011 Petition. Entergy's brief does not address the APA's requirements, but focuses on mischaracterizations of selected NRC regulations.

Although the Board's ruling denied NRC Staff's cross-motion for summary disposition, NRC Staff did not file a Petition seeking interlocutory review of LBP-11-17.

ARGUMENT

I. THE BOARD'S DECISION REQUIRES NOTHING MORE THAN NRC REGULATIONS REQUIRE

A. The Board's Order Appropriately Seeks NRC Staff's Compliance With 10 C.F.R. § 51.103(a)(4)

The Board correctly stated that "a federal agency, such as the NRC, would be acting arbitrarily and capriciously if it did not look at relevant data and sufficiently explain a rational nexus between the facts found in its review and the choice it makes as a result of that review." LBP-11-17, at 11-12.[8] The Commission acknowledged as much in 10 C.F.R. § 51.103(a)(4), which requires NRC Staff in "its record of decision ... [to s]tate whether the Commission has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted." The

[8] Citing *ShieldAlloy Metallurgical Corp. v. Nuclear Regulatory Comm'n*, 624 F.3d 489, 492-93 (D.C. Cir. 2010).

Board's decision merely requires Staff to do what NRC regulations require it to do. With due respect to the Board, this finding is not "profound" as Entergy characterizes it, nor is it "unique" or "unusual." Entergy Petition, at 7, 8. Although Entergy would have the Commissioners think otherwise, *id.*, at 7, requiring compliance with a regulation promulgated by the NRC Commissioners is not "contrary to law." The Board's function is to see that parties meet regulatory requirements; this noncontroversial finding is squarely within the Board's authority as a delegated presiding officer.

B. Part 54 Explicitly Authorizes Implementation of Modifications to the Plant's Current Licensing Basis When Warranted by the Part 51 Analysis

As the Board correctly stated, NRC Staff "has the authority to require implementation of non-aging management SAMAs through its CLB backfit review under Part 50 *or* through setting conditions of the license renewal." LBP-11-17, at 11(emphasis added). Contentions 35/36 are based on the latter authority which arises from Part 54 and Part 51:

> Each renewed license will include those conditions to protect the environment that were imposed pursuant to 10 CFR 50.36b and that are part of the CLB for the facility at the time of issuance of the renewed license. *These conditions may be supplemented or amended as necessary to protect the environment during the term of the renewed license and will be derived from information contained in the supplement to the environmental report submitted pursuant to 10 CFR part 51*, as analyzed and evaluated in the NRC record of decision.

10 C.F.R. § 54.33(c)(emphasis added). Entergy's attempt to parse § 54.33(c) such that the words "these conditions" restrict the reach of the emphasized portion of the provision to only previously imposed conditions disregards the plain language of the regulation. Entergy's argument also ignores the clear statement that the previously imposed conditions "may be supplemented or amended as necessary" based on information developed in the FSEIS prepared for license renewal "pursuant to 10 CFR part 51."

Notwithstanding these clear statements of legal authority to order implementation of substantially cost-beneficial SAMAs as part of the license renewal process, Entergy persists in arguing that "the Board plainly erred in ruling that the FSEIS lacks an adequately-stated and rational basis for not requiring implementation of cost-beneficial SAMAs." Entergy Petition, at 14. Entergy seeks to limit the Board's and the Commission's authority. The Board's decision requires no more than what the Commission's regulations already require of NRC Staff.

As Entergy points out, the Commission has, on more than one occasion, stated that changes to the current licensing basis that are not age-related may not be undertaken as part of the *safety* review in license renewal. *See, e.g.*, Entergy Petition, at 3, n.7, 9-11; 10 C.F.R. § 54.29.[9] However, its arguments go too far. Entergy argues, in at least two contexts, that once the license renewal process has begun, there is a blackout on implementation of any cost-effective safety improvements that could mitigate the consequences of severe accidents.

First, it appears to say that during the pendency of a license renewal application, NRC Staff is prohibited from using its authority under 10 C.F.R. § 50.109 to order the backfit of any accident mitigation measure that does not arise from age-related degradation. Entergy 2011 Petition, at 9-11. Entergy's arguments make no sense since there is nothing about a license

[9] Entergy devotes considerable space to arguing that a "backfit" under 10 C.F.R. §50.109 is not a requirement for license renewal. Entergy 2011 Petition, at 9-11. Since neither New York nor the Board has asserted that §50.109 does impose a backfit requirement on license renewal, Entergy's "straw person" arguments are irrelevant. In addition, in each of the cases cited and the statements of consideration, the context in which the statements were made is that a backfit is inapplicable in the context of a "safety" review and/or that a backfit is not a precondition to license renewal for the purpose of imposing a "safety" requirement. In none of those instances are the statements quoted by Entergy made in the context of the NEPA review nor in light of the provisions of §§ 51.103(a)(4) or 54.33(c). In fact, the statements of consideration cited from 1990 and 1995 occurred before NRC had adopted the SAMA obligations now contained in 10 C.F.R. § 51.53(c)(3)(ii)(L). *See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses – Final Rule*, 61 Fed. Reg. 28467, 28480 (June 5, 1996).

renewal process that is inconsistent with NRC Staff independently, based on information made available to it from the SAMA process or elsewhere, ordering a backfit.[10]

Second, Entergy also appears to make the argument that since the Commission will examine severe accident responses in the wake of the multi-reactor tragedy in Japan, the Commission should now somehow affirmatively excuse NRC Staff from meeting its existing statutory and regulatory obligations here, and should instead suspend any ongoing efforts under existing regulations – apparently including both 10 C.F.R. §§ 50.109 and 54.33(c) – to implement measures to mitigate severe accidents. Entergy 2011 Petition, at 8, n.23. This suggestion does not withstand even cursory analysis. A severe accident in Japan should not be the basis to suspend ongoing efforts to mitigate the effects of severe accidents in the United States.

Entergy intimates that Contentions 35/36 import Part 50 reactor oversight issues into Part 51 and Part 54. As Entergy well knows, however, that simply is not the case. Contrary to Entergy's view, the Board did not order any backfits, and did not order NRC Staff to order any backfits. The site specific SAMA anlaysis for the Indian Point reactors could and should take place as part of the NEPA review in the license renewal proceeding for those facilities. The Commission has long acknowledged that the AEA and NEPA contemplate separate NRC reviews of proposed licensing actions. *Florida Power & Light Co.* (Turkey Point Nuclear

[10] The Board's reference to §50.109 is a recognition of the Commission's policy that a "backfit" may be ordered at any time, including during license renewal. *Nuclear Power Plant License Renewal*, 56 Fed. Reg. 64943, 64949 (Dec. 13, 1991) ("When specific actions are identified, the Commission, through its regulatory programs, can modify the licensing bases at operating plants at *any time* to resolve the new concern. This process of determinations concerning backfitting of evolving requirements to plants already licensed is guided by the provisions of the backfit rule." (emphasis added)).

Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 13 (July 19, 2001); *Limerick Ecology Action v. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729-31 (3d Cir. 1989).

> While the aging issues the NRC considers in its Part 54 safety review may overlap some environmental issues it considers in its Part 51 review, the two inquiries are analytically separate: one (Part 54) examines radiological health and safety, while the other (Part 51) examines environmental effects of all kinds. Our aging-based safety review does not in any sense "restrict NEPA" or "drastically narrow[] the scope of NEPA."

Florida Power & Light Co., 54 N.R.C., at 13.

Entergy cites case law that fails to offer support for its arguments on this issue. In a recent analysis of the SAMA issue, the Commission substantially undercut the position Entergy urges the Commission to adopt here. *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 N.R.C. __ (Mar. 26, 2010), includes the following:

> From its SAMA analysis, Entergy identified seven potentially cost-effective SAMAs. ... Because none of the seven potentially cost-effective SAMAs bear on adequately managing the effects of aging, none need be implemented as part of the license renewal *safety review*, pursuant to 10 C.F.R. Part 54.

Id., slip op., at 7, n.26 (emphasis added and internal citation omitted). New York agrees that the SAMAs are not developed as part of the "safety review" and cost-effective SAMA implementation does not occur as part of the "safety review." In *Pilgrim*, the Commission confirmed that the implementation of SAMAs must occur through the NEPA process and Part 51, just as the GEIS Statement of Considerations and Interim Policy statement on severe accidents under NEPA contemplated. New York further notes that the Commissioners did not adopt or incorporate the overly-broad statement contained in NRC Staff's Pilgrim FSEIS that "SAMAs [that] do not relate to adequate managing of the effects of aging during the period of extended operation" .... "do not need to be implemented as part of the license renewal pursuant to

10 CFR Part 54." NUREG-1437, Supplement 29, Volume 1, Executive Summary, at p. xx (ML071990020). And, in any event, the Commissioners' 2001 decision concerning NEI's PRM 51-7 petition refutes NRC Staff's position. *Nuclear Energy Institute; Denial of Petition for Rulemaking*, 66 Fed. Reg. 10834 (Feb. 20, 2001) discussed in detail below.

The decision in *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2) CLI-02-28, 56 N.R.C. 373, 388, n.77 (Dec. 18, 2002), reinforces the statement in *Pilgrim*. In *McGuire/Catawba*, the Commission observed first that the issue of implementation of the proposed SAMA was already the subject of a generic issues process and, that for that reason, it did not need to require implementation of the SAMA in the particular case. Thus, unlike the position NRC Staff advances here, the Commission there offered a rational basis for why implementation as part of the license renewal process is not required – not because there can never be such a requirement, but because another process was already in place that was focused on the particular SAMA at issue and the outcome of which would determine whether implementation was "warranted." Thus, although the Commission noted that NEPA did not mandate it to implement any particular alternative, a proposition with which New York does not take issue, unlike in the instant case, the Commission decision rested on a rational basis for not requiring implementation at the time of license renewal. Entergy and NRC Staff have not offered any similar rational basis for their refusal to implement the clearly cost-effective SAMAs identified in NYS-35/36.

C. Entergy Has Admitted That Its Cost-Benefit Analyses Are Not Complete, and the Board Has the Authority to Require a Full Record

Entergy's Petition argues that its cost-benefit analyses are "not incomplete for purposes of Part 51." Entergy Petition, at 16. Entergy says it has supplied NRC Staff with "sufficient facts" such that Staff can explain its decision. *Id.*, at 17. The Board disagreed with Entergy.

finding that the requisite analyses had not been completed. Notably, elsewhere, Entergy has admitted that it has not, in fact, completed its cost-benefit analysis of mitigation alternatives which, to date, it refers to as "*potentially* cost beneficial" SAMAs (emphasis added). NRC Staff's FSEIS acknowledges that Entergy has not completed the cost-benefit analysis for all of its SAMAs (FSEIS Volume 1 at 5-12, indicating that final analyses may not have been done) and Entergy has admitted to the absence of a completed cost analysis for its potentially cost-beneficial SAMAs. *See* December 2009 SAMA Reanalysis, Attachment 1, at 32.

Entergy's position is not that it has done additional analyses since its December 2009 SAMA Reanalysis which rendered "potentially" cost beneficial measures actually cost beneficial; rather, Entergy's position is that "potentially" is good enough. The Board, understandably, did not agree. A partially-completed SAMA analysis is particularly inappropriate for Indian Point where the adverse consequences of a severe accident place the population within 50-miles around Indian Point, a population projected (by Entergy's calculations) to reach more than 19 million people by 2035, and surrounding extensive real estate development, infrastructure, and unique historical and cultural sites, at grave risk. If there is any place where a full SAMA analysis should occur and where cost-effective SAMAs should be implemented where there is no rational basis not to implement them, it is this site with its two 1,000 MW reactors and densely-packed spent fuel pools.

Notwithstanding its own arguments, Entergy does agree that it will complete the analyses. Entergy's Answer to New York State's New and Amended Contentions Concerning Entergy's December 2009 Revised SAMA Analysis (Apr. 5, 2010) at 10 (footnotes omitted) ML101450328 ("Although technically not related to adequately managing the effects of aging during the period of extended operation, Entergy submitted all 16 potentially cost beneficial

SAMAs for detailed engineering project cost-benefit analysis."). Therefore, it cannot be said that NRC Staff would be imposing a "new and unique substantive obligation" on Entergy even if it did impose mitigation measures; Entergy would merely be doing work sooner than later. It appears that what Entergy hopes to do is side track and delay the analysis of severe accident mitigation measures, removing that review from this statutorily-mandated (Atomic Energy Act, 42 U.S.C. § 2239(a)) proceeding, deny intervenors their procedural rights under the Atomic Energy Act to pursue these issues, and remove that review from the independent analysis of an Atomic Safety and Licensing Board.

II. THE COMMISSION HAS ALREADY REJECTED THE FUNDAMENTAL ARGUMENT THAT UNDERLIES ENTERGY'S PETITION FOR INTERLOCUTORY REVIEW

The crux of Entergy's petition is that the SAMA analysis required as part of the NEPA review required in license renewal need not be completed for any SAMA that is not within Part 54's narrow safety review scope. The Commission has already rejected this precise argument. In 2001, the Commission denied the Nuclear Energy Institute's ("NEI") petition for rulemaking in which NEI, on behalf of the nuclear energy industry and joined by Petitioner Entergy, sought to have the Commission delete the requirement from 10 CFR Part 51 to consider SAMAs in operating license renewal reviews. *See Nuclear Energy Institute; Denial of Rulemaking*, PRM 51-7, 66 Fed. Reg. 10,834 (Feb. 20, 2001). NEI and Entergy[11] argued unsuccessfully in that proposed rulemaking that severe accident mitigation is within the scope of each licensee's current licensing basis and not within the scope of the technical requirements for renewal of operating licenses specified in 10 C.F.R. Part 54, and that the provisions of Part 54 define the

[11] *See* Letter, Jimmy D. Vandergrift, Entergy Operations, Inc., to Secretary Annette Vietti-Cook, USNRC (Nov. 16, 1999), Re: SAMA Petition for Rulemaking, ML993350457.

scope of the proposed Federal action and, therefore, the scope of the environmental review. *Id.*, at 10835. NRC Staff opposed NEI and Entergy at that time, arguing that "[t]he fact that NRC has excluded a specific aspect of the plant in conducting its safety review under Part 54 does not excuse it from considering the potential for an associated environmental impact in meeting its NEPA obligations." *See* SECY-00-0210 at 4 (Oct. 20, 2000), ML003750123. The Commission denied the rulemaking petition.[12] The Commission explained:

> [U]nder NEPA the NRC is charged with considering all of the environmental impacts of its actions, not just the impacts of specific technical matters that may need to be reviewed to support the action. These impacts may involve matters outside of the NRC's jurisdiction or matters within its jurisdiction that, for sound reasons, are not otherwise addressed in the NRC's safety review during the licensing process. In the case of license renewal, it is the Commission's responsibility under NEPA to consider all environmental impacts stemming from its decision to allow the continued operation of the entire plant for an additional 20 years. The fact that the NRC has determined that it is not necessary to consider a specific matter in conducting its safety review under Part 54 does not excuse it from considering the impact in meeting its NEPA obligations.

PRM 51-7 Rulemaking Denial, 66 Fed. Reg., at 10836 (emphasis added). As the Commission held in rejecting the NEI rulemaking and, as Petitioner's arguments overlook, the license renewal process does not simply extend permission to operate a discrete portion of underground pipe or a non-environmentally-qualified low-voltage cable, but results in a new operating license that authorizes the operation of the entire nuclear power plant. *See* 10 C.F.R. § 54.31 (requiring that the renewed license supersede the operating license previously in effect).

This is now Entergy's *fifth* attempt to argue this issue – first in support of the PRM 51-7, then to the Board in an attempt to preclude admission of New York's contentions, then to the

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[12] In fact, in support of its denial, the Commission observed that "the vast majority of environmental impacts from license renewal required to be considered by the NRC under its NEPA review (in accordance with Part 51) are not included in the analysis conducted in fulfilling the NRC's Atomic Energy Act responsibilities under Part 54." PRM 51-7, 66 Fed. Reg. at 10836 (internal citation omitted).

Commission in an earlier attempt at seeking interlocutory review, then in its Motion for Summary Disposition, and now to the Commission yet again. The Commission should not countenance these repeated attempts by Entergy to recycle arguments that the Commission has long since rejected. Prior Commissioners have recognized the usefulness of a thorough examination of SAMAs in license renewal. As Commissioner McGaffigan observed in PRM-51-7, "the Severe Accident Mitigation Alternative (SAMA) reviews for both the Calvert Cliffs and Arkansas Nuclear One Unit 1 plants have identified several cost beneficial enhancements for the licensee to pursue." VR-SECY-00-0210, Commission Voting Record, Notation Vote Response Sheet (Commissioner McGaffigan's Comments on SECY-00-0210, Oct. 31, 2000), ML010520240. If a thorough SAMA review and implementation was appropriate for such relatively remotely-sited nuclear facilities, it is certainly warranted for Indian Point, the nuclear facility nearest the largest population center of any operating reactor in the United States. In the words of Commissioner McGaffigan, "Perhaps one day we will have nuclear reactor designs so safe that severe accidents will be remote and speculative and their consequences *nihil*, but that is not the case we have today in renewing the licenses of the current generation of reactors." *Id.*

Since the Commission has already rejected the central argument upon which Entergy's Petition is based, it should also reject Entergy's attempts to ignore that precedent, particularly since, as New York noted during the litigation to date on Contentions 35/36, the bases offered for revisiting and rejecting the Commission's established policy are without merit.

III. ENTERGY CONTINUES TO MISAPPREHEND THE STATES', AND THE BOARD'S, POSITION ON NEPA

Despite New York's having previously briefed this issue three times (once in support of admission of Contentions 35/36, once in opposition to the previous petition for interlocutory review, and once in support of summary disposition and in opposition to cross-motions for

summary disposition), Entergy continues to mischaracterize New York's legal position and to assert that New York has asserted that NEPA mandates implementation of specific mitigation measures. New York has not argued this, and has made that clear on numerous occasions.[13] Instead, New York has argued (and the Board has agreed) that the interplay of NRC's regulations, including 10 C.F.R. §§ 51.103(a)(4) and 54.33(c)), NEPA, and the APA require NRC Staff to receive SAMA analyses that are sufficiently complete to determine whether the SAMA warrants implementation and then to either require implementation of clearly cost-effective SAMAs or provide a rational basis for why NRC Staff is not requiring implementation.

Numerous NRC issuances confirm what is required to produce a legally valid SAMA analysis, including Statements of Consideration and NRC Staff guidance documents. The history of the SAMA process, spelled out in the State's Motion for Summary Disposition of Consolidated Contention NYS-35/36, at pp. 20-22, demonstrates the Commission's intent that the SAMA process be used to make decisions about whether a SAMA provides sufficient benefits to "warrant implementation." *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28467, 28481 (June 5, 1996). Other NRC guidance documents also contain similar statements focused on using the SAMA analysis to facilitate decisions, including Supplement 1 to NRC Regulatory Guide 4.2 (Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Licenses) at 4.2-S-50 (noting that one of the ER obligations is to list "plant modifications . . . (if any) that have or will be implemented to reduce the severe accident dose consequence risk"); NRC NUREG 1555,

[13] *See* State of New York's Combined Reply to Entergy and NRC Staff Answers to the State's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternative Reanalysis (Apr. 12, 2010) at 5-9, ML101160415; State of New York's Combined Reply to Entergy and Staff Cross-Motions for Summary Disposition on NYS Combined Contentions 35 and 36 Concerning the December 2009 Severe Accident Mitigation Alternatives Reanalysis (Jan. 14, 2011) at 2-3, ML110660425.

Supplement 1 (Standard Review Plans for Environmental Reviews of Nuclear Power Plants (Oct. 1999)) at 5.1.1-8 to 5.1.1-9, noting that the NRC Staff review of the SAMA analysis should conclude with a finding as to whether "further mitigation measures are warranted" or whether "no further mitigation measures are warranted;" and NEI 05-01 (Rev. A) Severe Accident Mitigation Alternatives (SAMA) Guidance Document (Nov. 2005) at 28 (noting the SAMA cost analysis should be completed "to the point where economic viability of the proposed modification can be adequately gauged"). Entergy continues to ignore this guidance and assert, without analysis, that doing an incomplete SAMA cost analysis conforms to NEI and NRC guidance because, in Entergy's view, NRC has no legal authority to require implementation of a SAMA and thus there is no reason to complete the SAMA analysis.[14]

Entergy again attempts to rely on *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) to support its position that NEPA is not action-forcing. Entergy Petition, at 2. Such an interpretation is curious, when *Methow Valley* itself states that

> [t]he sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "'hard look' at environmental consequences," Kleppe, 427 U.S. at 410, n. 21, and that provide for broad dissemination of relevant environmental information.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989)) (reference to citation omitted). Ironically, in *Methow Valley*, the Forest Service *did* impose mitigation measures. *Id.*, at 345-46.

Moreover, the United States Supreme Court has reiterated, more recently than in *Methow Valley*, that NEPA is *not* merely an academic exercise, as Entergy would have it, but instead

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[14] Entergy's citation to NRR Office Instruction LIC-202, Rev. 2, Procedures for Managing Plant-Specific Backfits and 50.54(f) Information Requests (May 17, 2010), a document generated *after* the State filed NYS Contentions 35/36 and after the Board held oral argument on the contentions' admissibility, does nothing more than express the view NRC Staff were arguing, unsuccessfully, in opposition to Contentions 35/36.

imposes actual obligations on federal agencies to ensure that environmental considerations have been adequately analyzed, made public, and integrated into the final agency action.

In *Department of Transportation v. Public Citizen,* a unanimous Supreme Court quoted favorably from CEQ regulations stating that "NEPA's purpose is not to generate paperwork, even excellent paperwork, but to foster excellent action" and that "the primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and *actions* of the Federal Government." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 768-769 (2004), *quoting* 40 C.F.R. §§ 1500.1(c) and 1502.1 (2003)(emphasis added). Entergy would have the Commission believe that NEPA and the NRC's NEPA-based regulations can never, and should never, result in any ameliorative measures being taken to alleviate environmental harm from its project and that NEPA is merely intended to "generate paperwork." *Id.* Such a position finds no support in Supreme Court, or any other, jurisprudence under NEPA.[15] What Entergy ignores is the obligation that NEPA *and* the APA place on a federal agency to justify its decisions; if NRC Staff requires no mitigation alternatives, then NEPA, APA, and NRC's regulations require NRC

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[15] It is well-established that the Atomic Energy Act does not itself authorize NRC to consider or require implementation of any environmental conditions. *New Hampshire v. Atomic Energy Comm'n,* 406 F.2d 170 (1st Cir.) *cert. denied,* 395 U.S. 962 (1969). But for NEPA, NRC would have no environmental authority:

> The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates.

Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n, 449 F.2d 1109, 1112 (D.C. Cir. 1971)(footnote omitted)(emphasis added); *see also Tennessee Valley Authority* (Phipps Bend Nuclear Plant, Units 1 and 2), ALAB-506, 8 N.R.C. 533 (Nov. 9, 1978) (the NRC has the authority to examine costs and benefits, and may impose environmental conditions on a permit or license following a NEPA review).

Staff to justify its decision. An agency is free, under NEPA or its own regulations, to require implementation of alternatives to mitigate environmental harms resulting from a major federal action if it so chooses. It is not clear here whether NRC Staff will choose to do so, but if it did, it would be well within its rights under NEPA, the APA, and NRC regulations.

IV. ENTERGY HAS NOT DEMONSTRATED THAT INTERLOCUTORY REVIEW IS WARRANTED

A. 10 C.F.R. § 2.341(f)(2) is Inapplicable

Pursuant to 10 C.F.R. § 2.341(f)(2), interlocutory review is to be granted only under the extraordinary circumstances (particularly when, as here, it is not preceded either by Board referral or a certified question), and only when it threatens the party with "immediate and serious irreparable impact" which cannot be redressed by review at the end of the case or "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.341(f)(2)(i-ii); CLI-10-30, at 5. Entergy fails to satisfy this standard. As the Commission has stated before, requiring "further explanation" of the SAMA analysis conclusions, does not result in unusual or pervasive impacts on the proceeding, nor does the litigation of the sufficiency of the SAMA cost-benefit estimates have an extraordinary impact on the proceeding. CLI-10-30, at 6. The Board has now found that further "explanation" of the SAMA analysis conclusion and a more complete cost-benefit estimate for certain potentially cost-beneficial SAMAs are required. Since the prospect of such a finding has already been ruled to be an insufficient basis for interlocutory review, Entergy is merely asking again, without justification, for the very relief it was previously denied.

In addition, nothing has changed since the Commission rejected the first request for interlocutory review. Since the Board's summary disposition ruling, NRC Staff has made no indication whether it intends to "either incorporate[] the result of these [SAMA] reviews into the

FSEIS or, in the alternative, modif[y] its FSEIS to provide a valid reason for recommending the renewal of the licenses before the analysis of potentially cost-effective SAMAs is complete and for not requiring the implementation of cost-beneficial SAMAs." LBP-11-17, at 17. NRC Staff's affirmative decision not to seek interlocutory review of LPB-11-17 suggests Staff is prepared to take some action in compliance with that decision.[16]

Thus, to date, the Board's ruling has had no impact on this proceeding or on Entergy, and Entergy has not explained what obligations are imposed on Entergy at this time. Entergy Petition at 7. It is difficult to see how Entergy can claim an "immediate and serious irreparable impact" or an "unusual or pervasive" impact on the proceeding when the Summary Disposition ruling imposes an obligation on NRC Staff, not on Entergy.[17] Indeed, as discussed above, even before the Board admitted New York's contentions, Entergy itself represented that it would refer the potentially cost beneficial SAMAs "for detailed engineering project cost-benefit analysis." Since the Board admitted Contentions 35/36 in June 2010, Entergy has not disclosed a single document that it has designated as relevant to those two contentions. Moreover, NRC Staff has not disclosed any summaries of meetings or conferences that it has convened with Entergy about Contentions 35/36.[18] Accordingly, New York understands that Entergy and NRC Staff have not

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[16] Staff apparently will file an "Answer" to Entergy's Petition in which Staff will support interlocutory review and request that the Board's decision be overturned. If NRC Staff believed the Board's order created a problem for NRC Staff, it is difficult to understand why Staff did not file its own Petition, which could have preserved for Commission review any unique arguments Staff advanced in support of its rejected Cross-Motion for Summary Disposition. The State reserves the right to request permission to file a responsive pleading to the Staff's answer.

[17] If Staff actions impose obligations on Entergy which Entergy is unwilling to accept as legitimate costs of obtaining a license to operate the two Indian Point reactors for an additional 20 years, Entergy can then file a contention challenging the NRC Staff action.

[18] *See* State of New York Statement of Undisputed Material Fact, at ¶¶ 4, 5; August 11, 2011 declaration of Teresa Manzi, at ¶¶ 2-3.

taken action — since June 2010 — to review further cost benefit calculations for the twenty potentially cost beneficial SAMAs.

At this time, action on Entergy's petition is founded on speculation about what action NRC Staff will take in response to LBP-11-17. Thus, even if the issues involved here might justify interlocutory review, which New York believes they clearly do not, it is premature and unwarranted for the Commission to grant interlocutory review at this time.

B. 10 C.F.R. § 2.341(b)(1) is Inapplicable

Perhaps recognizing the weakness in its claim that interlocutory review of the LBP-11-17 is appropriate, Entergy also argues that the Board's Order is a full or partial initial decision within the meaning of 10 C.F.R. § 2.341(b)(1). Entergy Petition, at 6. However, since the Board has merely identified for NRC Staff the steps needed to conform the FSEIS to the legal requirements of NEPA, the APA, and Commission regulations, and has left it to Staff to determine how to do that, the Board's Order is not an Initial Decision, full or partial, on the request for license renewal within the meaning of 10 C.F.R. § 2.341(b)(1).[19]

[19] Entergy also requests that the Commission exercise its supervisory authority to take review of a matter even if the requirements for interlocutory review set forth in 10 C.F.R. § 2.341(f)(2) are not met. Entergy Petition, at 7. Just as Entergy has ignored the Commission's clear message in its prior rejection of interlocutory review of precisely the same matters for which Entergy again seeks review, it also ignores the Commission's prior admonition in this case that "parties should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority." CLI-10-30, at 7, n.32 (citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-6, 69 N.R.C. 128, 138 (2009)).

CONCLUSION

For the above-stated reasons, the States of New York and Connecticut respectfully request that the Commission deny Entergy's Petition for interlocutory review.

Respectfully submitted,

Dated: August 11, 2011

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UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 11, 2011

DECLARATION OF TERESA MANZI

Pursuant to 28 U.S.C. § 1746, Teresa Manzi hereby declares as follows:

1. I am a legal assistant in the office of the Attorney General for the State of New York, counsel for petitioner-intervenor State of New York in this proceeding.

2. I have reviewed each of Entergy's mandatory disclosures in this proceeding since the Board admitted the State of New York's Contentions 35 & 36, which challenge Entergy's Severe Accident Mitigation Alternatives ("SAMA") reanalysis and conclusions, on June 30, 2010.

3. As of its thirtieth update, dated August 4, 2011, Entergy has not disclosed any document which it has designated as relevant to the Contentions 35 or 36.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 11, 2011.

s/ Teresa Manzi
Teresa Manzi

UNITED STATES
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION
ON ENTERGY'S PETITION SEEKING
INTERLOCUTORY REVIEW OF LBP-11-17

In re:	Docket Nos. 50-247-LR; 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 11, 2011

THE STATE OF NEW YORK'S REQUEST
FOR ORAL ARGUMENT ON THE MERITS OF
ENTERGY'S PETITION FOR REVIEW
SHOULD THE COMMISSION ACCEPT INTERLOCUTORY REVIEW

The Commissioners currently have before them Entergy's petition for interlocutory appellate review of the Atomic Safety and Licensing Board's July 14, 2011 LBP-11-17 Order granting the State of New York's motion for summary disposition on Contentions 35 and 36 concerning Severe Accident Mitigation Alternatives and denying Entergy and NRC Staff's cross-motions for summary disposition.[1] On July 29, 2011, Entergy filed a petition seeking interlocutory review of the LBP-11-17 Order.[2] The States of New York and Connecticut filed an Answer in opposition to Entergy's Petition on August 11, 2011.[3] NRC Staff indicated that it

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[1] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-11-17, 74 N.R.C. __ Memorandum and Order (Ruling on Motion and Cross-Motions for Summary Disposition of NYS-35/36) (July 14,2011).

[2] Entergy Nuclear Operations, Inc., *Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contentions NYS-25/36* (July 29, 2011).

[3] The State of New York and the State of Connecticut's Joint Answer in Opposition to Entergy's Petition for Interlocutory Review of LBP-11-17 (Aug. 11, 2011).

will also file an Answer to Entergy's position on August 11, 2011.[4]

While the State of New York does not believe that the Entergy Petition raises issues that merit the extraordinary interlocutory review, should the Commission find that the procedural conditions of 10 C.F.R. §§ 2.341 (b), (f) have been met for interlocutory review, or should the Commission review the Petition pursuant to its supervisory powers, the State of New York respectfully requests that the Commission allow oral argument before the Commissioners concerning the merits of the appeal pursuant to 10 C.F.R. § 2.343 prior to any decision on the merits.

Respectfully submitted,

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Dated: August 11, 2011

[4] Nuclear Regulatory Commission, *NRC Staff's Motion for a Three Day Extension of Time to File its Answer to Applicant's Petition for Review* (Aug. 4, 2011).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE COMMISSIONERS
KRISTINE L. SVINICKI, WILLIAM D. MAGWOOD, IV,
GEORGE APOSTOLKIS, AND WILLIAM C. OSTENDORFF AND
CHAIRMAN GREGORY B. JACZKO

ON APPLICATION BY ENTERGY
FOR INTERLOCUTORY APPEAL FROM LBP-11-17

In re:	Docket Nos. 50-247-LR and 50-286-LR
License Renewal Application Submitted by	ASLBP No. 07-858-03-LR-BD01
Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.	DPR-26, DPR-64 August 11, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2011, copies of (1) the State of New York and the State of Connecticut's Joint Answer in Opposition to Entergy's Petition for Interlocutory Review of LBP-11-17; (2) the State of New York's Request for Oral Argument on the Merits of Entergy's Petition for Review Should the Commission Accept Interlocutory Review; and (3) the Declaration of Teresa Manzi were served upon the following persons via U.S. Mail and e-mail at the following addresses:

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Dated at Albany, New York
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