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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.	)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3)	)	August 16, 2011

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

Earlier in this proceeding, the Commission expressly recognized that "portions of the Board's decision appear problematic, and may warrant our review later in the proceeding."[1] That time has now come. Indeed, the Joint Answer of New York State and Connecticut (jointly, New York) only confirms the necessity of immediate review of the Board's plainly erroneous ruling.

New York's attempt to avoid that review by claiming that "nothing has changed" since Entergy's earlier appeal not only overlooks crucial facts, but also fails to refute Entergy's showing that the Board's decision—a final and definitive ruling on the merits—threatens irreparable harm by leaving Entergy in an uncertain and untenable position that only the Commission can (and should) redress now.[2] And it ignores that the Board's decision unacceptably leaves this entire proceeding in limbo. Immediate review is thus not only appropriate, but also imperative.

On the merits, New York does not (and cannot) credibly dispute that as a matter of law:

- Severe accident mitigation alternative ("SAMA") analysis is strictly a National Environmental Policy Act ("NEPA")-derived requirement;
- The duty to consider mitigation alternatives is grounded in NEPA's "rule of reason;"
- Neither NEPA nor the Commission's NEPA-based regulations in 10 C.F.R. Part 51 require that any mitigation alternative be implemented;

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1 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-30, 72 NRC _, slip op. at 6 (Nov. 30, 2010).

2 All references herein to Entergy are to Entergy Nuclear Operations, Inc., the applicant in this matter.

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- The environmental review required by NEPA and Part 51 is "analytically separate" from the aging-management safety review required by Part 54; and

- Part 54 does not impose requirements on a licensee that go beyond what is necessary to adequately manage aging effects during the renewed license term.

The Board's decision contravenes those fundamental principles and the controlling precedent that compels their application here. And it threatens irreparable harm to Entergy and consumers alike, not to mention the public's interest in grid reliability and stability. The Commission should therefore grant immediate review and reverse the Board's decision.[3]

I. THE BOARD'S DECISION WARRANTS IMMEDIATE REVIEW

New York can only attempt to diminish the need for immediate review of the Board's ruling by dubbing it "noncontroversial."[4] But there is nothing ordinary about a ruling that departs from settled legal precedent, Commission policy, and long-standing regulatory practice in such a profound way. To argue otherwise, New York must ignore not only controlling legal precedent of the U.S. Supreme Court and the Commission, but also years of consistent regulatory practice in which the Commission has approved—for over 50 reactors—license renewal applications without requiring implementation of any SAMAs identified as cost-beneficial.

Further, New York's attempt to minimize the need for immediate review by downplaying the legal flaws of the Board's ruling ignores the irreparable harm threatened by that ruling—harm that amply warrants the Commission's immediate review. As an initial matter, the Board's grant of summary disposition of Consolidated Contention NYS-35/36 has definitively terminated this proceeding and closed the record such that no hearing will ensue on this specific matter.

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[3] Given that this is the fourth round of briefing related to this contention, Entergy respectfully submits that the oral argument requested by New York is unnecessary to the Commission's resolution of the merits of this appeal.

[4] The State of New York's and the State of Connecticut's Joint Answer in Opposition to Entergy's Petitions for Interlocutory Review of LBP-11-17 at 10 (Aug. 11, 2011) ("Joint Answer"). New York's semantic portrayal of the Board's ruling as "noncontroversial" rests on the single, flawed premise that the Board's decision "merely requires Staff to do what NRC regulations require it to do." *Id.* However, no provision in the patchwork of statutes and regulations cited by the Board requires further action by Entergy and/or the Staff—and certainly not the conduct of further engineering cost analyses or changes to the plants' current licensing bases to implement the SAMAs at issue, as New York (and the Board) would have it.

If left to stand, the Board's ruling leaves Entergy and the proceeding in a limbo of sorts. In particular, the Board's ruling exposes Entergy to the threat that, even if Entergy prevails on the merits in the hearings on the 14 remaining contentions, license renewal ultimately will be nixed by the Board. The Staff has made clear that, "*unless otherwise directed by the Commission*, the Staff is not inclined to expend agency resources on actions which the Staff firmly believes are not required by NRC regulations."[5] But this will not pass muster with the Board.[6] Therefore, Entergy, which seeks to obtain its renewed operating licenses (one of which expires in 2013) in a timely fashion, now finds itself at an impasse that only the Commission can and should redress now.

II. NEW YORK DOES NOT AND CANNOT JUSTIFY THE BOARD'S DEPARTURE FROM SETTLED AND CONTROLLING LAW

The operative portion of the Board's decision (Section V.B.) rests on two flawed premises—neither of which is addressed by the Joint Answer. First, the Board concludes that the Staff necessarily cannot take the "hard look" at Entergy's SAMA analysis required by NEPA because Entergy must develop more detailed, engineering project cost analyses for those SAMAs identified as cost-beneficial in its analysis and the FSEIS.[7] Second, it concludes that, because the Staff has "the option and the duty" to pursue modifications to Indian Point's current licensing bases at *all* periods during normal and extended operations through the backfit procedure in Section 50.109 (or, purportedly, to impose license conditions pursuant to Part 54), any failure to invoke that authority as part of *this license renewal proceeding* violates the law.[8]

New York argues that the "interplay" of NRC regulations—including 10 C.F.R. §§ 51.103(a)(4) and 54.33(c), NEPA, and the Administrative Procedure Act ("APA")—justify the

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5 NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36 at 11 n.39 (Aug. 11, 2011) ("NRC Staff Answer") (emphasis added).

6 *See* Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 & 3), LBP-11-17, slip op. at 17 (July 14, 2011) (stating that "Entergy's licenses cannot be renewed unless and until" the Staff takes the actions directed by the Board).

7 *See id.* at 15-16; NUREG-1437, Supp. 38, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3 (Dec. 2010) ("FSEIS").

8 *Id.* at 16.

Board's ruling below.[9] That is not so. The SAMA implementation cost estimates prepared by Entergy in accordance with NRC-approved guidance and reviewed by the Staff in the FSEIS are the *final* cost estimates for purposes of the SAMA analysis required by NEPA and Part 51.

And, contrary to New York's claim, those estimates are sufficient for purposes of NEPA. "NEPA requires the NRC to provide a 'reasonable' mitigation alternatives analysis, containing 'reasonable' estimates."[10] In the *McGuire/Catawba* proceeding, the Commission, when faced with circumstances materially indistinguishable from those here, unequivocally held that "NEPA requires no more."[11] Importantly, neither New York nor the Board identifies any reason to believe that the conduct of more refined cost analyses would identify any additional cost-beneficial SAMAs, which, in the Commission's words, is the "ultimate concern" here.[12]

New York also argues that NEPA, the APA, and NRC regulations somehow conjoin to require implementation of cost-beneficial SAMAs or a new and alternative explanation as to why implementation is not required. But the cited statutes and regulations, viewed singly or collectively, compel no such action by Entergy and/or the Staff. That is so for several reasons.

First, neither NEPA nor the NRC's Part 51 regulations impose any substantive requirement that mitigation measures, including SAMAs, be implemented. Any contrary argument conflicts with binding Supreme Court and Commission precedent and must be rejected as a matter of law.[13]

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9 Joint Answer at 19.

10 *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) CLI-10-22, 72 NRC _, slip op. at 9 (Aug. 27, 2010).

11 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003). Specifically, in this case, as in *McGuire/Catawba*, the NRC already has determined that the probability-weighted radiological consequences of severe accidents are small for all plants. Further, based on its review of Entergy's SAMA analysis, the Staff has concluded that the treatment of SAMA benefits and costs support the general conclusion that the SAMA evaluation is reasonable and sufficient for the license renewal submittal. FSEIS, Vol. 1 at 5-4 to 5-13.

12 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station) CLI-09-11, 69 NRC 529, 533 (2009). Thus, contrary to the Board's suggestion, there would be no material "gain in information" (LBP-11-17, slip op. at 15) for purposes of NEPA associated with detailed engineering cost analyses that would necessarily not identify any *additional* SAMAs as cost-effective.

13 *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989); *McGuire/Catawba*, CLI-03-17, 58 NRC at 431; *Hydro Res., Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 426-27 (2006) ("[A] mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." (internal quotation marks omitted)). New York's attempt to avoid the force of *Methow Valley* fails. Specifically, New York ignores that the Supreme Court reversed the Ninth Circuit's holding that the Forest Service had a legal duty to require implementation of any

Second, New York's reading of *McGuire/Catawba* (CLI-02-28) is erroneous, as the Commission's statements in that case make clear that SAMA-related backfits with no nexus to aging management are addressed through Part 50 current licensing basis (*i.e.*, backfit) procedures, irrespective of whether the SAMA at issue is the subject of an ongoing generic safety review.[14]

Third, New York accords undue significance to the Commission's use of the adjective "safety" in a statement contained in footnote 26 of *Pilgrim* Order CLI-10-11.[15] The Commission's use of "safety" merely reflects the fact that the review conducted under Part 54 is a safety review, albeit one focused exclusively on aging-management issues.

Finally, the NRC Staff's reviews under Part 51 and Part 54 are "analytically separate."[16] NEPA and Part 51 require reasonable evaluation and disclosure—not implementation—of mitigation measures. Part 54, in turn, does not impose requirements on a licensee that go beyond what is necessary to adequately manage aging effects.[17] If the NRC proposes to address safety issues outside the aging management scope of Part 54, then any actions necessary to address such out-of-scope safety issues are subject to the backfit rule and are not cognizable in a license renewal adjudication.[18] Nothing in law or policy permits the additional requirements urged by New York and imposed by the Board here.

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mitigation measures discussed in its EIS. *See Methow Valley*, 490 U.S. at 359. Relatedly, in the 2001 NEI rulemaking petition denial cited by New York, the Commission—explicitly citing *Methow Valley*—stated that "NRC's obligation to *consider* mitigation exists whether or not mitigation is ultimately found to be cost-beneficial and *whether or not mitigation ultimately will be implemented by the licensee*." Nuclear Energy Institute; Denial of Petition for Rulemaking, 66 Fed. Reg. 10,834, 10,836 (Feb. 20, 2001) (emphasis added). The Commission did not "reject" the arguments made here by Entergy or otherwise suggest that implementation of cost-beneficial SAMAs is compulsory.

[14] *See Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 388 n.77.

[15] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, slip op. at 7 n.26 (Mar. 26, 2010) ("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.").

[16] *Fla. Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 13 (2001).

[17] *See* Final Rule: Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,490 (May 8, 1995).

[18] *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 96-97 (2007); *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-06-26, 64 NRC 225, 226-27 (2006).

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION
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	)	50-286-LR
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	)	August 16, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply to the Joint Answer of New York State and Connecticut to Entergy's Petition for Review of LBP-11-17" were served this 16th day of August, 2011, upon the persons listed below, by first class mail and e-mail as shown below.

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