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.	)	
(Indian Point Nuclear Generating Units 2 and 3)	)	
	)	April 9, 2014

ENTERGY'S REPLY TO NEW YORK STATE ANSWER TO ENTERGY AND STAFF PETITIONS FOR REVIEW REGARDING CONTENTIONS NYS-8 AND NYS-35/36

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(b)(3), Entergy Nuclear Operations, Inc. ("Entergy") replies to New York State's ("New York") combined answer to Entergy's and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff's Petitions for Review of several Atomic Safety and Licensing Board ("Board") orders related to contentions NYS-8 (Transformers) and NYS-35/36 (SAMA Cost Estimates).[1] As demonstrated below, New York's answer cannot obscure the clear factual and legal errors underlying the Board admissibility and merits rulings under appeal. Indeed, many of New York's arguments are misdirected, insofar as they fail to address the actual grounds for Commission review discussed in the Entergy and Staff Petitions.

II. ARGUMENT

A. The Board Clearly and Materially Erred in Admitting NYS-8

In its Petition, Entergy argues that the Board's 2008 decision to admit NYS-8 is legally erroneous in view of the contention admissibility requirements of 10 C.F.R. § 2.309(f) and the Commission's rejection of a materially-indistinguishable contention in the *Seabrook* license

[1] *See* State of New York's Answer to Entergy and NRC Staff Petitions for Review of Atomic Licensing Board Decisions [] (Mar. 25, 2014) ("New York Answer"). The relevant Board orders include LBP-08-13, LBP-10-13, LBP-11-17, and LBP-13-13.

renewal proceeding (in CLI-12-5).[2] New York argues, in principal part, that the "expert opinion" of Mr. Paul Blanch (the same declarant relied upon by the *Seabrook* petitioners) provided sufficient support for its contention, and that "significant differences" exist between the *Indian Point* and *Seabrook* transformer contentions, expert declarations, and supporting documents.[3] New York's arguments lack merit and inaccurately portray the documents at issue.

Contrary to its claims, neither the contention as originally proffered nor Mr. Blanch's initial declaration amplified upon New York's conclusory statements that "[t]ransformers function without moving parts or without a change in configuration or properties," and that failure to properly manage transformer aging "may compromise" plant safety.[4] Further, as illustrated by Attachment 1 to Entergy's Petition, there are no material, substantive differences between the contentions, Blanch declarations, and supporting documents submitted in the *Indian Point* and *Seabrook* proceedings. In *Seabrook*, the Commission found that Mr. Blanch had asserted, "without more," that "[t]ransformers function without moving parts or without a change in configuration or properties," and had raised only "general concerns" concerning the failure to properly manage aging of transformers.[5] The Commission thus held that "Mr. Blanch's

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2 *See* Applicant's Petition for Review of Board Decisions Regarding Contentions NYS-8 (Electrical Transformers), CW-EC-3A (Environmental Justice), and NYS-35/36 (SAMA Cost Estimates) at 9-12 (Feb. 14, 2014) ("Entergy Petition").

3 New York Answer at 5-7, 10-14.

4 *Id.* at 6. New York claims that it "offered additional support for NYS-8 at the hearing on contention admissibility on March 10, 2008." *Id.* at 9. However, the statements cited by New York related to transformer operation were made by counsel during oral argument and thus do not constitute expert opinion. Further, prior to the oral argument, the Board made clear that the oral argument was intended only to clarify the parties' positions, as set forth in their previously-submitted pleadings, *not* "to supplement the already voluminous record." Board Order (Scheduling Oral Argument on the Admissibility of Contentions) at 4 (Feb. 29, 2008) (unpublished).

5 *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 318 (2012). New York argues that the Seabrook intervenors' error-ridden "plagiarism" of the Indian Point transformer contention and Blanch declaration rendered their contention inadmissible. New York Answer at 12. That is not true. The Commission rejected the Seabrook transformer contention because it was based on conclusory statements. *Seabrook*, CLI-12-5, 75 NRC at 320. The Commission noted that the clerical errors cited by New York as "significant differences" had been clarified at the Seabrook oral argument on contention admissibility, and that in considering the matter on appeal, the Commission "construed the petition and the Blanch declaration in favor of [the Seabrook intervenors]." *Id.* at 319 n.113.

conclusory statement that transformers are passive components is not adequate as a basis for the contention."[6] The same result would have obtained here but for the Board's clear error.

New York seeks to avoid these facts by incorrectly claiming that Entergy and Staff did not "take issue" with Mr. Blanch's declaration.[7] Entergy and the Staff opposed the admission of NYS-8 for failing to meet the NRC's contention admissibility standards, including the contention support requirements in 10 C.F.R. § 2.309(f)(1)(v) and (vi).[8] They disputed as factually unsupported the claims—made by New York *and* Mr. Blanch—that transformers function without a change in configuration or properties, and that transformer failures may result in design basis accidents that exceed applicable NRC exposure limits.[9] Thus, nothing in New York's reply diminishes Entergy's argument that the Board erred in admitting NYS-8.

B. <u>The Board Clearly and Materially Erred in its Merits Decision on NYS-8</u>

New York principally argues that in resolving NYS-8 in its favor, the Board afforded greater weight to New York's evidence, and that no reversible error lies in that action.[10]

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[6] *Id.* at 320 (emphasis added). New York also claims that it cited a draft NRC request for additional information ("RAI") as support for its contention, and that the draft RAI "can be interpreted to conflict with Staff's guidance that transformers need not be age managed." New York Answer at 7. Both Entergy and the NRC Staff explained in their answers why that is not the case, and the Board did not discuss the draft RAI in LBP-08-13. *See*, *e.g.*, Answer of Entergy Nuclear Operations, Inc. Opposing New York State Notice of Intention to Participate and Petition to Intervene at 72 (Jan. 22, 2008) ("Entergy 2008 Answer"), *available at* ADAMS Accession No. ML080300149. The draft RAI sought additional information for the *scoping* determination regarding offsite power sources associated with recovery from a station blackout event for Indian Point. *Id.* Notably, in CLI-12-5, the Commission specifically concluded that the *same* draft RAI (which the *Seabrook* intervenors also cited) provided "no support … for the argument that a transformer is a 'passive component' and should be subject to an aging management review [("AMR")]." *Seabrook*, CLI-12-5, 75 NRC at 321-22.

[7] New York Answer at 6. Ironically, New York neglects to mention that its own petition to intervene did not explicitly cite the Blanch Declaration as supporting evidence for NYS-8. *See* New York State Notice of Intention to Participate and Petition to Intervene at 103-05 (Nov. 30, 2007), *available at* ADAMS Accession No. ML073400187.

[8] New York asserts that "neither Entergy nor NRC Staff cited or discussed the 1997 Grimes Letter, which contains Staff's guidance on transformers, in their oppositions to the State's Petition to Intervene." New York Answer at 8. But New York also did not discuss that document in its petition to intervene, so it is unclear how it can now claim that Mr. Blanch challenged the 1997 Grimes Letter. *See id.* at 8-9. In any case, at the contention admissibility stage, it was New York's burden to proffer a sufficiently-supported contention, *not* Entergy's or the Staff's burden to "demonstrate the validity" of NRC guidance. *See id*. at 8, 14.

[9] *See*, *e.g.*, Entergy 2008 Answer at 69-73. In fact, during the March 10, 2008 oral argument on contention admissibility, Entergy counsel reiterated Entergy's position that neither New York nor Mr. Blanch had provided *any* support or explanation for the statement that transformers perform their intended functions without a change in configuration or properties. *See* Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 215:6-24 (Mr. Bessette) (Mar. 10, 2008).

[10] *See* New York Answer at 17-18.

However, that argument presupposes that the Board fully considered and understood all of Entergy's and Staff's testimony and evidence. It plainly did not, as evidenced by its misplaced agreement with New York that transformers are merely "effective conduits with constant characteristics" or "channel[s] for the flow of electricity."[11] Entergy's and the Staff's experts convincingly established, through technically sound testimony, that transformers perform their intended function via a readily monitorable change in their electromagnetic properties or state.[12]

In short, the Board misunderstood the concepts of electricity, voltage, and current, particularly as they relate to transformer operation and the Part 54 concept of "properties."[13] As Dr. Dobbs fully explained, a transformer's internal magnetic field and terminal voltages and currents are properties of the transformer that change as it performs the *active* function of *transforming* input voltage and current to some other form or value of voltage and current.[14] The Board failed to recognize this critical and incontrovertible scientific fact.[15] Consequently, it

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[11] *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-13-13, 77 NRC __, slip op. at 206, 211, 216-17, 255 (Nov. 27, 2013).

[12] *See* Entergy Petition at 14-22; NRC Staff's Petition for Commission Review of LBP-13-13 in Part (Contentions NYS-8 and CW-EC-3A), and LBP-11-17 (Contention NYS-35/36) at 15-21 (Feb. 14, 2014) ("NRC Staff Petition"), *available at* ADAMS Accession No. ML14045A088.

[13] Entergy expert Dr. Steven Dobbs (who holds degrees in physics, electrophysics, and electrical engineering and has taught courses that covered the theory and operation of transformers) explained that electricity is a fundamental entity of nature consisting of positive and negative charges, the movement of which produces a magnetic field. *See* Testimony of Applicant Witnesses Roger Rucker, Steven Dobbs, John Craig, and Thomas McCaffrey Regarding Contention NYS-8 (Electrical Transformers) at 33 (A51) (Mar. 30, 2012) ("Entergy Testimony") (ENTR00091). He further explained that electricity (*i.e.*, charge) can and does exist everywhere without voltage and current, which result from the separation of charge and are *not* properties of electricity. Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 4344:23-4346:10 (Dobbs) (Dec. 13, 2012) ("Dec. 13, 2012 Tr.").

[14] Entergy Testimony at 109 (A118) (ENTR00091). Specifically, a transformer manipulates its internal magnetic field to accomplish its voltage/current transformation function, whether it is stepping up or stepping down voltage, or providing isolation between circuits. Dec. 13, 2012 Tr. at 4398:25-4400:16 (Dobbs). The transformer's varying internal magnetic field and terminal voltages/currents are properties of a transformer (not the "electrical power" being transformed) because they are inherent to its description and necessary to its operation. Entergy Testimony at 31 (A47).

[15] Contrary to the Board's statement, a transformer does not "passively capture" magnetism in its core and "passively induce" electrical current in the secondary coil. *Indian Point*, LBP-13-13, slip op. at 216. Rather, the electrical energy at the primary circuit is actively transformed into magnetic energy in the transformer core, and that magnetic energy is actively transformed into different electrical energy at the secondary circuit. *See*, *e.g.*, NRC Staff's Testimony of Roy Mathew and Sheila Ray Concerning Contention NYS-8 (Transformers) at 22 (A29) (Mar. 22, 2012) (NRC000031). As such, there is no valid technical basis for the Board's conclusion that the *voltage/current transformation* that occurs in a transformer resembles the movement of water through a pipe or current through a cable. *See* Entergy Testimony at 13 (A24), 42 (A60), 65-72 (A77-A78), 76-77 (A85) (ENTR00091).

erroneously dismissed key Entergy and Staff arguments as "ultimately collaps[ing] under [its] finding that transformers do not change properties or state during operation."[16]

Also, contrary to New York's argument, the Board's decision is not consistent with the Commission-endorsed principles set forth in the Statement of Considerations ("SOC") for the 1995 license renewal rule.[17] In fact, the Board significantly strayed from the long-standing guidance provided in the 1995 SOC, particularly as it relates to the concepts of "active," "passive", "functional degradation", and component "monitorability."[18] For example, the 1995 SOC emphasizes the Commission's "focus on managing the *functionality* of systems, structures, and components … as opposed to identification and mitigation of aging mechanisms."[19] It does not discuss the need to "track incremental degradation" to "predict impending failure" for components that perform active functions—the new test devised by the Board in LBP-13-13.[20]

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16 *Indian Point*, LBP-13-13. slip op. at 253. The Board also disregarded Dr. Dobbs' detailed explanation of the similarities between transformers and those electrical components that are specifically excluded from AMR in Part 54. Specifically, Dr. Dobbs provided detailed comparative analyses (including illustrations) of transformers and AMR-excluded components (particularly transistors, which he viewed as a good analogue). *See* Entergy Testimony at 41-49 (A60-A64), 73-86 (A80-A95) (ENTR00091) (including the figures and exhibits referenced therein). He also explained why transformers are unlike AMR-included components. *See id.* at 65-73 (A77-A79). The Board dismissed that exercise (which it requested upon admitting NYS-8) as "nearly meaningless." *Indian Point*, LBP-13-13. slip op. at 252. Yet the Board embraced Dr. Degeneff's severely flawed analogies of transformers to pipes and electrical cables, among other "passive" components. *See id.* The Commission should not make the same mistakes on appeal.

17 *See* New York Answer at 20-26. Language in the SOC addressing a regulation, having been endorsed by the Commission itself, is entitled to "special weight." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988).

18 As discussed in the 1995 SOC, an active function is one for which "the parameter of concern (required function), including any design margins, can be directly measured or observed." Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461, 22,471 (May 8, 1995) ("1995 SOC") (NYS000016). Passive functions (*e.g.*, structural integrity) generally are verified indirectly, by confirmation of physical dimensions or component physical condition. *Id.* Functional degradation refers to "degraded component performance or condition" that potentially results in "loss of functionality." *Id.* at 22,488. As the Commission reiterated in *Seabrook*, "[f]unctional degradation resulting from the effects of aging on *active* functions is more readily determinable, and existing programs and requirements are expected to directly detect the effects of aging." *Seabrook*, CLI-12-5, 75 NRC at 316 (quoting 1995 SOC at 22,472) (emphasis in original). With respect to transformers and the AMR-excluded electrical components listed in Section 54.21(a)(1)(i), the components' ability to perform their intended functions can be directly observed or verified at the components' terminals. *See* Entergy Testimony at 80-86 (A91-95) (ENTR00091); Dec. 13, 2012 Tr. at 4391:22-25 (Dobbs). In contrast, for example, and contrary to the Board's statement on page 255 of LBP-13-13, monitoring fluid pressure alone is not necessarily indicative of a pipe's ability to perform its intended function at higher pressures or under accident conditions, if, for example, unacceptable wall thinning has occurred in the pipe. *See* Entergy Testimony at 42 (A60).

19 1995 SOC, 60 Fed. Reg. at 22,488 (emphasis added).

20 *Indian Point*, LBP-13-13, slip op. at 255. New York's claim that the "the Board uses the term 'incremental' interchangeably with the term 'functional'" (New York Answer at 23-24) is irrelevant, because the Board misunderstood and departed from the concepts of active function and functional degradation, as explained in the 1995 SOC and later NRC guidance.

Finally, New York incorrectly contends that the Board's decision presents no substantial policy questions because it "carries no precedential weight."[21] New York misses the point. The Board's unprecedented conclusion that transformers perform passive functions and require AMR under Part 54 departs from nearly two decades of consistent NRC regulatory practice. In this regard, it raises significant issues with respect to the regulatory uniformity and consistency that are hallmarks of the NRC's Part 54 license renewal AMR process. Further, future license renewal applicants that exclude transformers from their AMRs might face contentions similar to NYS-8.

C. The Board's Rulings Concerning NYS-35/36 Are Ripe for Commission Review

NYS-35/36 concerns the adequacy of Entergy's implementation cost estimates for potentially cost-beneficial severe accident mitigation alternatives ("SAMAs") and the Staff's rationale for not requiring SAMA implementation as part of license renewal. New York claims that Entergy must meet the interlocutory review standards to obtain Commission review of the Board's rulings on NYS-35/36.[22] This is not correct.

Commission precedent (CLI-00-24) dictates that "parties should assert any claims of error which relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not."[23] The Board's Partial Initial Decision addressed the other two New York contentions (NYS-12C and NYS-16B) that challenged the adequacy of Entergy's SAMA analysis and the Staff's review thereof.[24] Given the Board's disposition of those contentions in LBP-13-13, and its previous decision (LBP-11-17) granting summary disposition of NYS-35/36, which also is discussed in LBP-13-13 (see pages 8-10), no other SAMA contentions remain. Thus, the Board's rulings related to NYS-35/36 are now ripe for review.[25]

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21 New York Answer at 36.

22 *Id.* at 38, 42-44, 47.

23 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353 (2000).

24 *See Indian Point*, LBP-13-13, slip op. at 260-313.

25 New York criticizes Entergy for stating "without citation that NYS-35/36 was originally part of Track One," because "NYS-35/36 was already decided—that is, it was not on Track One—before the separate tracks came into being." New

New York argues that CLI-00-24 is inapplicable here because it "explicitly excepted" from immediate review "matters already finally decided by the Commission in an interlocutory order."[26] It further asserts that "NYS-35/36 has been [finally decided], at least insofar as the Commission has made clear that it is not ripe for review until the Board issues a final (not partial) decision."[27] New York's logic is flawed. In its previous two Orders (CLI-10-30 and CLI-11-14) concerning NYS-35/36, the Commission only declined to grant interlocutory review of the Board's admissibility and summary disposition rulings.[28] It did not "finally decide" the matter. In fact, the Commission stated in both Orders that its denial of interlocutory review was without prejudice to Entergy's and the Staff's ability to file petitions for review following a final order by the Board.[29] It also stated that "[o]ur rules of practice permit parties to file a petition for review of licensing board full *or partial* initial decisions, *both of which we consider to be final*."[30] LBP-13-13 is the final Board order that renders the Board's prior NYS-35/36 rulings now ripe for review.

New York further argues that the Staff's "active administrative review" of Entergy's May 2013 engineering project-level cost estimates[31] renders the petitions for review "unripe."[32] That

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York Answer at 43 n.201. However, the Board created a separate hearing track (Track 2) when it deferred hearings on contentions NYS-25, NYS-26B/RK-TC-1B, NYS-38/RK-TC-5, and RK-EC-8 pending issuance of the NRC Staff's second Safety Evaluation Report ("SER") Supplement and the Final Supplemental Environmental Impact Statement ("FSEIS") Supplement. *See Indian Point*, LBP-13-13, slip op. at 22-23. If NYS-35/36 had proceeded to hearing, then it clearly would have been addressed with the Track 1 contentions (which included SAMA contentions NYS-12C and NYS-16B), because its resolution was not tied to the issuance of the Staff's SER or FSEIS Supplements.

26 New York Answer at 44.

27 *Id.*

28 *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-10-30, 72 NRC 564 (2010); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-11-14, 74 NRC 801 (2011).

29 *See Indian Point*, CLI-10-30, 72 NRC at 569; *Indian Point*, CLI-11-14, 74 NRC at 813-14.

30 *Indian Point*, CLI-11-14, 74 NRC at 810 (citations omitted; emphasis added).

31 *See* NL-13-075, Letter from F. Dacimo, Entergy, to NRC Document Control Desk, License Renewal Application Completed Engineering Project Cost Estimates for SAMAs Previously Identified as Potentially Cost-Beneficial (May 6, 2013) ("NL-13-075"), *available at* ADAMS Accession No. ML13127A459. Contrary to New York's claim, Entergy's May 2013 engineering project-level cost estimates for implementing certain SAMAs do not constitute "another revised SAMA analysis." New York Answer at 37. As clearly stated on page 2 of Attachment 1 to NL-13-075, Entergy submitted more refined cost estimates only in response to the Board's ruling in LBP-11-17 that "Entergy's licenses cannot be renewed unless and until the NRC Staff reviews Entergy's completed SAMA analyses" (but expressly reserved its right to appeal that Board decision). The underlying SAMA analysis was not revised.

32 New York Answer at 44, 46.

argument also lacks merit. As a legal matter, the reviewability of the Board's NYS-35/36 rulings is not contingent upon the completion of the Staff's review of Entergy's May 2013 engineering project-level cost estimates. The relevant inquiry, as discussed above, is whether those rulings relate to the subject matter of the Board's Partial Initial Decision, such that Entergy and the Staff may or must assert any claims of error now (as they have done in their respective Petitions).

New York also claims that it would be "a waste of resources" to truncate the Staff's review of the May 2013 project-level cost estimates.[33] The opposite is true. The Commission could obviate the Board's and parties' expenditure of additional resources by granting review of the Board's previous rulings and appropriately dismissing NYS-35/36 as a matter of law.

D. <u>The Board Clearly and Materially Erred in Admitting NYS-35/36</u>

The Board clearly erred in ruling that NYS-35/36 was a timely, admissible contention. In its answer, New York cites various changes to the inputs and results associated with the December 2009 revised SAMA analysis to support its timeliness argument.[34] But New York cannot escape the fact that NYS-35/36 presents purely legal issues that could have been raised at the outset of the proceeding based on Entergy's *original* 2007 SAMA analysis.[35] New York's oblique references to "a new cost-benefit picture" and a "materially different SAMA landscape" do not mask the untimely filing of its contention.[36] Finally, contrary to New York's claim, Entergy and the Staff have addressed in their Petitions "the more relevant question[s] posed by NYS-35/36."[37] They are whether NEPA and Part 51 require: (1) further detailed engineering project-level cost estimates for

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33 *Id.* at 47.

34 *See id.* at 48-49.

35 Those legal issues are: (1) whether Entergy's original implementation cost estimates for potentially cost-beneficial SAMAs are adequate under the National Environmental Policy Act ("NEPA"), and (2) whether the NRC Staff's explanation for not requiring implementation of those SAMAs as a condition of license renewal is adequate under NEPA. *See* Entergy Petition at 52.

36 New York Answer at 50.

37 *Id.* at 51.

SAMA implementation, and (2) some further Staff explanation of the NRC's decision not to require implementation of SAMAs as part of license renewal.[38]

E. The Board Clearly Erred in Granting New York's Motion for Summary Disposition of NYS-35/36 and Denying Entergy's and Staff's Cross-Motions

Much of New York's answer is devoted to rebutting an argument on which Entergy and the Staff do not rely in seeking Commission reversal of the Board's NYS-35/36 rulings. Specifically, New York claims that "[t]he crux of the petitions for review is that the SAMA analysis mandated as part of the NEPA review required in license renewal need not be completed for any SAMA not within Part 54's aging management provisions."[39] In actuality, the "crux" of Entergy's and the Staff's appeals is that Entergy's SAMA analysis is complete, and NEPA provides no legal basis for the additional actions deemed necessary by the Board in LBP-11-17.[40]

In short, Entergy's and the Staff's Petitions fully explain why NEPA and 10 C.F.R. Part 51—the sources of the SAMA analysis requirement—do not require additional project-level cost estimates or further explication of the Staff's rationale for not requiring SAMA implementation as a condition for license renewal.[41] In doing so, Entergy and the Staff refute New York's claim of the purported "symmetry between a SAMA analysis and a backfit analysis."[42]

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38 *See* Entergy Petition at 54-57; NRC Staff Petition at 47-57.

39 New York Answer at 53. New York also falsely asserts that Entergy and NRC "resist completing the SAMA analysis" to avoid Board and public scrutiny of the analysis. *Id.* at 61. Entergy's SAMA analysis is complete. In addition, through the normal administrative channels (*e.g.*, submission of comments on the draft SEIS) and the adjudicatory process, New York and the Board have closely scrutinized the Indian Point SAMA analysis and related submissions.

40 *See* Entergy Petition at 54-57; NRC Staff Petition at 47-57.

41 New York states that in *Catawba/McGuire* (CLI-02-28), "the Commission addressed the merits of a proposed SAMA unrelated to aging management and found that the ongoing generic review of the particular SAMA was a rational basis to not require its implementation in the license renewal process." New York Answer at 60. As Entergy noted in NL-13-075 (Att. 1 at 10-11), the Commission is conducting a comprehensive safety review of all U.S. power reactors that involves a review of requirements and guidance associated with severe accident mitigation measures. That ongoing generic review provides further justification for not requiring implementation of SAMAs as part of license renewal.

42 New York Answer at 64. The backfit rule is an Atomic Energy Act-derived requirement that centers on protection of the public health and safety. It creates a process, separate and distinct from license renewal, by which the NRC may require safety-based measures after initial licensing. Absent an "adequate protection" or "compliance" exception, the NRC may order a facility backfit only if it is cost-justified and achieves "a substantial increase in the overall protection of the public health and safety or the common defense and security." 10 C.F.R. § 50.109(a)(3), (a)(4)(i)-(iii). SAMA analysis, in contrast, is a NEPA-derived requirement intended to identify additional mitigation measures that might

The NRC's analysis of backfits is conducted as part of its Part 50 reactor oversight process rather than as part of its Part 54 license renewal reviews.[43] Moreover, as a strictly procedural statute, NEPA does not authorize the NRC Staff to require implementation of cost-beneficial SAMAs, whether via a backfit or some other procedure.[44]

III. CONCLUSION

New York's attempts to buttress the Board's clearly erroneous rulings fail. As discussed above and in Entergy's and the Staff's Petitions, there are numerous independent reasons for the Commission to review and reverse the relevant Board rulings on NYS-8 and NYS-35/36.

Respectfully submitted,

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further reduce the already-SMALL severe accident risk and, thus, "is not a safety review performed under the Atomic Energy Act." *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 57 (2012).

[43] *See* Entergy Petition at 57-58; NRC Staff Petition at 53; *Pilgrim*, CLI-12-1, 75 NRC at 57 ("Through our reactor oversight process, including generic safety issue reviews, we revisit whether additional mitigation measures should be imposed as a safety matter under 10 C.F.R. Part 50."). 10 C.F.R. § 54.33(c) does not authorize the Staff to require implementation of the SAMAs identified by Entergy as potentially cost-beneficial. *See* Entergy Petition at 57 n. 286. New York's overbroad reading of that provision strains credulity, as Section 54.33(c) refers only to supplementation or amendment of "those conditions to protect the environment that were imposed pursuant to 10 CFR 50.36b and that are part of the [current licensing basis] for the facility at the time of issuance of the renewed license." It is not a catch-all provision under which the Staff may impose license conditions to require implementation of SAMAs.

[44] *See* Entergy Petition at 58; NRC Staff Petition at 46-54. New York's reliance on 10 C.F.R. § 51.103(a)(4) is misplaced. The Commission issued that regulation, among others in Part 51, to assist it in implementing NEPA. Thus, any argument that it authorizes or compels implementation of SAMAs runs counter to controlling judicial and Commission precedent. *See*, *e.g.*, *Mass. v. NRC*, 708 F.3d 63, 81 n.27 (1st Cir. 2013) ("To the extent Massachusetts seeks to impose a substantive requirement that the NRC must require certain mitigation measures under NEPA, that is foreclosed by the fact that NEPA is not outcome driven."); *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 488 (2012) (holding that NEPA "neither requires nor authorizes the NRC to order implementation of mitigation measures analyzed in an environmental analysis").

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the "Entergy's Reply to New York State Answer to Entergy and Staff Petitions for Review Regarding Contentions NYS-8 and NYS-35/36" were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Lance A. Escher

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