UNITED STATES OF AMERICA **DOCKETED 06/21/01**
NUCLEAR REGULATORY COMMISSION **SERVED 06/21/01**
RELEASED TO THE PUBLIC 07/19/01

COMMISSIONERS

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-01-14

MEMORANDUM AND ORDER [*]

TABLE OF CONTENTS

BACKGROUND . . . . -1-

DISCUSSION . . . . -3-

I. FINANCIAL QUALIFICATIONS ISSUES . . . . -3-
- A. Background . . . . -3-
- B. The Commission's Examination of Presiding Officer's Admissibility Rulings . . -7-
- C. Applicants' Motion to Strike . . . . -8-
- D. Analysis . . . . -13-
  - 1. Overview . . . . -13-
  - 2. Subissue A: Whether Entergy FitzPatrick's and Entergy Indian Point's Property Tax Agreements with Local Municipalities Were Considered in Applicants' Cost Projections . . . . -17-
  - 3. Subissue B: Whether Applicants' Revenue Projections Are Based on Unreasonable Assumptions . . . . -17-
    - a. Admissibility . . . . -17-
    - b. Merits . . . . -19-
      - (1) The Appropriateness of Applicants' Estimated Capacity Factor . . . . -19-
      - (2) The Effect on Costs if the Capacity Factor Target is Missed and Underproduction Penalties Are Imposed . . . . -25-
      - (3) The Need for Financial Qualifications Information (Cost-and-Revenue Projections) Beyond Entergy's Proffered 5-Year Projections . . . . -36-
  - 4. Subissue C: Whether Applicants' Cost-and-Revenue Projections Are Adequate to Cover Common Increases in Operating Costs . . . . -42-
    - a. Admissibility . . . . -42-
    - b. Merits . . . . -44-
  - 5. Subissue D: Whether the Supplemental Funding Available to Entergy FitzPatrick and Entergy Indian Point Offers Adequate Financial Assurance to Protect the Public and Worker Health and Safety . . . . -47-
  - 6. Subissue E: The Entergy Applicants' Market Revenue Projections Have Not Been Evaluated to Determine Whether Their Assumptions about Market Prices Are Reasonable. Market Factors in Entergy FitzPatrick's and Entergy Indian Point's Market Areas Could Introduce Significant Uncertainty and Prevent the Companies from Meeting their Revenue Requirements, Thereby Undermining Applicants' Ability to Offer Adequate Financial Assurance . . . . -54-

---

[*] At the request of the Transferee, certain financial data have been redacted in order to protect proprietary information. *See* CLI-01-16 (issued July 19, 2001).

7. CAN's Proposed Conditions . . . . -57-
8. Additional Commission Observations . . . . -57-

II. DECOMMISSIONING FUNDING ISSUES . . . . -58-
A. Compliance with 10 C.F.R. § 50.75(e)(1)(vi) . . . . -61-
B. The Commission's Post-Transfer Regulatory Authority over PASNY . . . . -72-
C. Entergy's Financial Ability to Pay Potential Capital Gains Tax . . . . -77-
D. Precedential Effect of Creating an Exception to 10 C.F.R. § 50.75(e)(1) . . . . -78-
E. PASNY's Conflict of Interest . . . . -79-
F. CAN's Proposed Conditions . . . . -81-

III. OBSERVATIONS REGARDING THE SUBPART M HEARING PROCESS . . . . -82-
A. Role of the NRC Staff . . . . -82-
B. Presiding Officer's Accepting Oral Questions from, and Allowing Dialogue between, the Parties at the Hearing . . . . -83-

CONCLUSION . . . . -85-

BACKGROUND

In this proceeding, the Power Authority of the State of New York ("PASNY" or "transferor") seeks the Commission's authorization to transfer the operating licenses of both the Indian Point Nuclear Generating Unit No. 3 ("Indian Point 3") and the James A. FitzPatrick Nuclear Power Plant ("FitzPatrick"). PASNY wishes to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point 3 plant to Entergy Nuclear Indian Point 3, LLC ("Entergy Indian Point") and Entergy Nuclear Operations, Inc. ("Entergy Nuclear Operations"),[1] respectively. Similarly, PASNY wishes to transfer its ownership interest in, and operating/maintenance responsibility for, the FitzPatrick plant to Entergy Nuclear FitzPatrick, LLC ("Entergy FitzPatrick") and Entergy Nuclear Operations, respectively.[2]

---

[1] Entergy Nuclear Operations "is an entity ... formed to operate ... Indian Point 3 and FitzPatrick.... [Entergy Nuclear Operations] will operate, but will not own, [these] ... plants." Response to NRC Request for Additional Information Regarding License Transfer Application, dated July 14, 2001, Response to Question 1. This and all other Responses to NRC Staff Requests for Additional Information are incorporated into the license application. *See Power Authority of the State of New York* (Indian Point Nuclear Generating Unit No. 3), Order Approving Transfer of License and Conforming Amendment, 65 Fed. Reg. 70,843, 70,845 (Nov. 28, 2000); *Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant), Order Approving Transfer of License and Conforming Amendment, 65 Fed. Reg. 70,845, 70,847 (Nov. 28, 2000) (collectively "Staff Orders").

[2] *See* License Transfer Applications, filed May 11 and 12, 2000. Entergy Corporation is the parent company to all three Entergy transferees. *See* both Staff Orders, 65 Fed. Reg. at 70,843 (Indian Point 3) and 70,845 (FitzPatrick). Entergy Corporation also currently owns and operates six other nuclear plants through various subsidiaries: Arkansas Nuclear One Units 1 and 2, Grand Gulf Nuclear Station, River Bend Station, Waterford 3 Steam Electric Station, and Pilgrim Nuclear Power Station. *See, e.g.*, both Applications at 6; FitzPatrick Safety Evaluation Report ("SER"), dated Nov. 9, 2000, at 2 (nonproprietary version entered into the Record following p. 167 of the March 13-14, 2001, Hearing Transcript ("Tr."), and identified as Staff Exh. 1); Indian Point 3 SER, dated Nov. 9, 2000, at 2 (nonproprietary version entered into the Record following Tr. 167, and identified as Staff Exh. 2).

On November 9, 2000, the NRC Staff approved the two transfers in an administrative action that ran parallel to the instant adjudication.[3] PASNY and the Entergy transferees (collectively "Applicants") consummated the transfers on November 21, 2000, and the NRC Staff amended the licenses on that same day to reflect the change in licensees. As we noted earlier in this proceeding, however,

> Neither the [S]taff's approvals, nor the closing of the sale affects the instant adjudicatory proceeding. The purpose of this proceeding is to resolve whether, for the reasons raised by the petitioners, the Commission should disapprove the transfers and require the applicants to return the plant ownership to the *status quo ante* or modify the license notwithstanding the staff's orders and the applicants' actual consummation of the sale.[4]

On November 27, 2000, the Commission issued CLI-00-22, in which we granted four petitions to intervene (or participate) submitted by five entities, all of whom sought to oppose one or both of the license transfer applications. Subsequent to our issuance of CLI-00-22, three of the five entities opposing the transfers withdrew from the case,[5] leaving only Westchester County and the Citizens Awareness Network ("CAN") still in the case and only CAN's issues still in contention.

In CLI-00-22, we set the case for hearing and instructed the Chief Judge of the NRC's Atomic Safety and Licensing Board Panel to appoint a Presiding Officer to conduct the hearing and develop the record. We found CAN's decommissioning funding issues admissible (in part),

---

[3] *See* Staff Orders, 65 Fed. Reg. at 70,844-45 (Indian Point 3), 70,847 (FitzPatrick).

[4] *See* CLI-00-22, 52 NRC 266, 286 n.1 (2000), citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 82-83 (2000).

[5] *See Power Authority of the State of NY* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), LBP-00-34, 52 NRC 361 (Dec. 22, 2000) (approving withdrawal of the Town of Cortlandt and the Hendrick Hudson School District); *Power Authority of the State of NY* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), LBP-01-05, 53 NRC 136 (2001) (approving withdrawal of Nuclear Generation Employees Association).

and we also gave CAN the opportunity to review certain proprietary financial information of the three Entergy companies (collectively "Entergy") so that CAN could formulate adequately supported financial qualifications issues. Our financial qualifications rule requires Entergy to submit 5-year cost-and-revenue data demonstrating its financial qualifications to operate and maintain the plants safely.[6]

After reviewing the proprietary data, CAN submitted a 5-part issue regarding financial qualifications, portions of which the Presiding Officer admitted.[7] On March 13-14, 2001, the Presiding Officer conducted a hearing on the admitted portions of CAN's two issues involving financial qualifications and the decommissioning funds. Based on our review of the entire record, we reject CAN's challenges to the license transfer applications and do not disturb the NRC Staff's approval of those applications.

DISCUSSION

I. FINANCIAL QUALIFICATIONS ISSUES

A. Background

CAN argued in its Petition to Intervene that neither FitzPatrick nor Indian Point 3 has ever met, on a sustained basis, the revenue generation standards required under the Purchase and Sale Agreement, and that Entergy must therefore provide additional assurance of its financial wherewithal to operate and maintain the plants in a manner that protects the health and safety of both the plants' workers and the public.[8] Although CAN acknowledged that it had provided no affidavits, supporting documents or other evidence to support this argument, it claimed that this

---

[6] *See* 10 C.F.R. § 50.33(f)(2)).

[7] *See Power Authority of the State of NY* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), LBP-01-04, 53 NRC 121 (2001) (admitting CAN's revised issue on financial qualifications).

[8] *See* CAN's Petition to Intervene, dated July 31, 2000, at 55.

deficiency was excusable. CAN reasoned that Applicants' own exclusion of certain financial information from the publicly available versions of the two license transfer applications had precluded CAN from comparing the anticipated operating costs with the anticipated revenues and thereby assessing Entergy's ability to plan for maintenance outages or to build up sufficient funds for unexpected outages.[9]

In CLI-00-22, we ruled that "CAN's claim of revenue shortfalls essentially challenges the Entergy companies' cost and revenue projections -- precisely the kind of challenge we have, in prior cases, indicated would be acceptable if based on sufficient facts, expert opinion or documentary support."[10] We then concluded that "CAN's explanation regarding the unavailability of relevant data entitles it to gain access to the data ... before being held to our usual specificity requirements."[11] We therefore authorized CAN to review Entergy's proprietary cost-and-revenue information, subject to a protective order, and then to submit one or more properly formulated and supported financial qualifications issues.[12]

After reviewing the Entergy companies' proprietary cost-and-revenue data, CAN submitted a new financial qualifications issue (with five subissues):

> The license transfer applications do not provide adequate financial assurance for the safe operation of FitzPatrick and Indian Point 3 because the applications do not demonstrate an appropriate margin between anticipated operating costs and revenue projections, and the Entergy applicants do not provide evidence of access to sufficient reserve funding.
>
> > A. [Entergy FitzPatrick's and Entergy Indian Point's] Property Tax Agreements with Local Municipalities Are Not Considered in Applicants' Cost Projections.

---

[9] *See* CAN's Reply Brief, dated Jan. 31, 2000, at 18.

[10] *See* 52 NRC at 300, citing both *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207, 208 (2000), and *North Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219-21 (1999).

[11] *See id.* (footnote omitted).

[12] *See id.*

> B. Applicants' Revenue Projections Are Based on Unreasonable Assumptions [particularly concerning the two plants' capacity factors].[13]
>
> C. Applicants' Cost-and-Revenue Projections Are Not Adequate to Cover Common Increases in Operating Costs.
>
> D. The Supplemental Funding [letters of credit] Available to [Entergy FitzPatrick and Entergy Indian Point] Does Not Offer Adequate Financial Assurance to Protect the Public and Worker Health and Safety.
>
> E. The Entergy Applicants' Market Revenue Projections Have Not Been Evaluated to Determine Whether Their Assumptions about Market Prices Are Reasonable. Market Factors in [Entergy FitzPatrick's and Entergy Indian Point's] Market Areas Could Introduce Significant Uncertainty and Prevent the Companies from Meeting their Revenue Requirements, Thereby Undermining Applicants' Ability to Offer Adequate Financial Assurance.[14]

In support of its positions on these issues, CAN offered affidavits from its two witnesses, Messrs. Edward A. Smeloff and David A. Lochbaum, as expert testimony.[15]

The Applicants opposed the admission of CAN's new issue, arguing generally that all or part of it (1) fell outside the scope of the language in CLI-00-22 permitting submission of revised issues, (2) was untimely submitted, and/or (3) failed to meet the Commission's regulatory requirements for admissibility of issues. In support of their arguments, Applicants submitted an Affidavit by Mr. Barrett E. Green, a financial planning document relating to estimates of property tax expenses, and financial information regarding two Entergy subsidiaries (Entergy Global

---

[13] The term "capacity factor" refers to "the ratio of the ... electricity generated, for the period of time considered, to the energy that could have been generated at continuous full-power operation during the same period." *See* "Glossary of Nuclear Terms," found at http://www.nrc.gov/NRC/EDUCATE/GLOSSARY.

[14] CAN also proposed three license conditions. *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 15-18. However, as we find no merit in any of CAN's arguments regarding financial qualifications, we need not address its proposed conditions.

[15] Applicants have not challenged the expertise of Mr. Lochbaum. However, earlier in the proceeding, Applicants did challenge the expertise of CAN's Mr. Smeloff. At the hearing, however, Applicants expressly stated that they were not challenging Mr. Smeloff's qualifications as an expert witness. See Tr. at 208 (Mr. Silberg)). We therefore consider the issue waived.

Investments, LLC ["EGI"] and Entergy International Limited ["EIL"]) that had agreed to provide supplemental funding to Entergy FitzPatrick and Entergy Indian Point in the form of letters of credit.[16]

In LBP-01-04, the Presiding Officer rejected Applicants' arguments that CAN's issues fell outside what the Commission contemplated in CLI-00-22 or were untimely:

> the Commission perceived access to proprietary data as necessary to formulate a contention challenging the cost and revenue projections of the Licensees, but not requiring that proprietary data be actually incorporated into the contention itself. Although certain aspects of the contention could perhaps have been formulated earlier on the basis of non-proprietary information, [CAN] could not have formulate[d] the entire issue or ... determined whether certain of its claims incorporated therein are meaningful without at least having had access to the proprietary data.[17]

The Presiding Officer then turned to Applicants' third argument -- the admissibility of the individual subissues. He rejected CAN's property-tax and market-price claims (all of subissue A and most of E) but admitted CAN's claims that Entergy should be required to submit estimates for receipts and operating costs "for the period of the license" rather than for "the first five years of operation"[18] and CAN's claim that Entergy's cost-and-revenue projections are implausible (subissues B, C, D, and a small portion of E).

Below, we discuss at length the merits of CAN's financial qualifications claims. First, though, we consider a number of threshold procedural matters.

B. The Commission's Examination of Presiding Officer's Admissibility Rulings

Applicants, in their Final Statement of Position, seek Commission review of several (but not all) of the Presiding Officer's admissibility rulings in LBP-01-04 regarding admitted subissues

---

[16] *See* both Applications at 8.

[17] *See* 53 NRC at 126.

[18] Both quoted phrases are found in 10 C.F.R. § 50.33(f)(2). Regarding the confusion as to whether CAN actually raised this issue, *see* note 110, *infra*.

within Issue 3.[19] The Commission's procedural rules governing license transfer adjudications (Subpart M) do not expressly provide a procedural vehicle by which to challenge a Presiding Officer's admissibility rulings, and in that respect they differ from our other adjudicatory procedural rules (*e.g.*, Subparts G and L) where some admissibility rulings may be contested through an interlocutory appeal or a petition for review.[20] An unusual confluence of circumstances in this particular proceeding, however, renders appropriate our consideration of the admissibility rulings as to *all five* subissues.

In the initial stages of this proceeding, CAN did not have access to the proprietary versions of the FitzPatrick and Indian Point 3 license transfer applications, so it was unable to submit timely and properly supported issues regarding financial assurance. To rectify this problem, we instructed Entergy to provide CAN with access to those proprietary versions. At the same time, we instructed our Chief Judge to appoint a Presiding Officer. *See* CLI-00-22. Consequently, the responsibility for ruling on the admissibility of CAN's financial assurance issues fell to the Presiding Officer rather than to us. When promulgating the Subpart M rules, however, we had assumed that we would *ourselves* decide the admissibility of any issues in the first instance,[21] and thus did not include in Subpart M a provision permitting Commission appellate review of a Presiding Officer's admissibility rulings.

---

[19] *See* Applicants' Final Statement of Position, dated April 3, 2001, at 9-11. Applicants refer specifically to Subissue D only, but are essentially reiterating the general argument that they made earlier as to Subissues B, D and E. *See* Applicants' Response to CAN's Contention on Financial Qualifications, dated Jan. 24, 2001, at 9-11 (Subissue B), 15-16 (Subissue D), and 17-20 (Subissue E).

[20] *See generally* 10 C.F.R. §§ 2.714a (Subpart G interlocutory appeals), 2.786(b) (Subpart G petitions for review), 2.1205(o) (Subpart L interlocutory appeals), 2.1253 (Subpart L petitions for review).

[21] *See* 10 C.F.R. § 2.1308(d)(1).

In these circumstances, we believe that Applicants, CAN and Westchester County are all entitled to the same Commission examination of the admissibility of CAN's revised financial assurance issues as we provided for CAN's other issues in CLI-00-22. Therefore, we review *infra* each of the Presiding Officer's admissibility rulings in LBP-01-04 regarding financial qualifications.[22] For the most part, we reach the same result as the Presiding Officer.

C. Applicants' Motion to Strike

Shortly before the hearing, Applicants filed a Motion to Strike nine statements in CAN's Initial Written Statement of Position on Issue #3 and the supporting expert testimony of Messrs. Smeloff and Lochbaum.[23] Applicants argued that CAN's Initial Statement of Position contained numerous attempts to raise new issues and arguments, all unrelated to CAN's Revised Issue 3 [24] and that the new issues impermissibly addressed the safety of plant operations -- not a matter before the Presiding Officer and the Commission in this proceeding.[25] At the hearing,

---

[22] In a more recent license transfer proceeding involving Indian Point Units 1 and 2, we avoided this problem by giving petitioners time both to review the proprietary version of the transfer application and then to provide revised issues -- all prior to our threshold admissibility rulings and to our designating a Presiding Officer. *See Consolidated Edison Co. of NY* (Indian Point Nuclear Generating Units Nos. 1 & 2), CLI-01-08, 53 NRC 225, 228, 230-31 (2001).

[23] *See* Applicants' Motion to Strike, dated March 5, 2001, at 6-10. *See also* Applicants' Final Statement of Position, dated April 3, 2001, at 11.

[24] *See* Applicants' Motion to Strike, dated March 5, 2001, at 6; Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 24, 2001, at 13.

[25] Applicants, in their Motion to Strike at 12 n.45, had objected to the following CAN arguments, all of which Applicants consider outside the scope of the admitted issues:

(1) safety "may be sacrificed" because of a purported $600 million debt resulting from the sale of the units (*see* CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 5; *see also id.* at 8);

(2) Applicants "fail to demonstrate that the two plants can be operated safely for their license terms" because of the financial arrangements that were made to finance decommissioning and the continued operation of the reactors (*see id.* at

(continued...)

the Presiding Officer denied Applicants' Motion to Strike, reasoning that the arguments were sufficiently tied to the admitted financial issues in this proceeding -- all of which were themselves grounded in concerns about safe operation, maintenance and decommissioning of the plants.[26] Applicants, in their Final Statement of Position, lodge a *de facto* appeal reiterating their Motion to Strike.

First, although one of CAN's statements (Statement 2, *supra* note 25) does little more than restate Entergy's obligation to demonstrate financial qualifications to operate Indian Point 3

---

[25](...continued)
6);

> (3) "there is ample evidence that financial pressure can quickly erode the safety of nuclear reactors and create a workforce culture where willingness to conduct needed maintenance and training is undermined by an awareness of tight profit margins." *See id.* at 9.

Similarly, Applicants referred to purportedly new issues that one of CAN's witnesses, Mr. Lochbaum, had raised:

> (4) potential safety concerns arising from "failure to achieve" assumed performance levels (*see* Testimony of David A. Lochbaum, dated Feb. 23, 2001, at 3-4 ¶ 10);
>
> (5) possible "disincentives for plant workers to freely report potential safety problems" (*see id.* at 4 ¶ 11);
>
> (6) the "increased likelihood of worker errors" (*see id.* at 4-5 ¶ 12);
>
> (7) an increasing "risk to persons living in close proximity to the facilities" (*see id.* at 5 ¶ 13); and
>
> (8) discussion, at the hearing, of numerous "generic safety issues outlined in his written testimony" (*see* Tr. 72-98).

Likewise, Applicants cited testimony by CAN's expert witness, Mr. Smeloff, that

> (9) the Power Purchase Agreements "act as an inducement" to avoid required maintenance activities (*see* Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 6 ¶ 13).

[26] *See* Tr. 31-33.

and FitzPatrick safely, and is therefore unobjectionable, the remaining eight statements raise specific safety questions arising out of a shortage of funds. But a concern for safety constitutes the foundation of our financial qualifications rule.[27] If the applicants are found to have met our rule, no further inquiry is necessary. We therefore agree with Applicants that the statements should have been struck from the record as irrelevant, and we reverse the Presiding Officer's ruling to the contrary.[28]

Next, Applicants seek reversal of the Presiding Officer's purported decision not to strike a late-filed contention which CAN offered for the first time in a footnote to its February 26th Initial Statement of Position on Issue #3, *i.e.*, that the license transfer applications (and the SERs)[29] were deficient for failing to discuss relationships among various Entergy companies, particularly regarding the parent company's absorbing of Entergy FitzPatrick's and Entergy Indian Point's

---

[27] *See Gulf States Util. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994). *See also* Final Rule, "Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants," 49 Fed. Reg. 35,747, 35,749 (Sept. 12, 1984) ("The Atomic Energy Commission, in drafting the [original financial qualifications] rule, must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or to take safety 'shortcuts' that one in good financial shape").

[28] Our decision to strike the 8 statements has had no bearing, as a practical matter, on our merits decision because CAN never developed these statements to the point where they might have required merits review.

[29] The conditions, limitations and commitments contained in these SERs were subsequently incorporated into the Staff Orders cited at note 1, *supra*.

retained earnings.[30] Applicants complain that the Presiding Officer incorrectly ruled that the lateness of this contention went to the weight it should be given rather than its admissibility.[31]

After examining the entire segment of the transcript dealing with this matter, we conclude that the Presiding Officer in actuality did not rule against Applicants. He stated no fewer than four times that he was *not* admitting any late-filed issues.[32] We agree with the Presiding Officer's repeated rulings on admissibility of the late-filed issue. Indeed, CAN itself acknowledged twice that it was belatedly raising the issue[33] and only *at the hearing* did it seek to have the new issue considered for admission under our criteria for late-filed issues as set forth in 10 C.F.R. § 2.1308(b).[34] Even then, CAN did not seriously attempt to satisfy our late-filing

---

[30] Regarding the applications, see CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 12 n.5:

> [T]he applications do not explain the financial and legal relationships between [Entergy FitzPatrick] and [Entergy Indian Point] and other Entergy companies described in the organizational chart submitted as Enclosure 7 to the applications. Important matters, such as the disposition of profits and/or retained earnings from [Indian Point 3] and FitzPatrick, or the apparent "cross-funding" of [Entergy FitzPatrick] and [Entergy Indian Point] through Entergy Nuclear Holding Cos. #1 and #2. This information is necessary to understand how [Entergy FitzPatrick] and [Entergy Indian Point]'s joint and several liabilities will be dealt with, as well as on what basis [Entergy FitzPatrick] and [Entergy Indian Point] will be able to rely on retained earnings to fund the operation of the reactors. These deficiencies should have been noted by the Staff under the filing requirements of § 50.33(f)(3)(i).

Regarding the SER, see Tr. 26 (Mr. Judson: "the staff did not propose a condition on the license transfer requiring that the Entergy Companies notify the NRC before the parent company absorbs any retained earnings").

[31] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 13, citing Tr. 34.

[32] *See* Tr. 33 (twice), 34, 36.

[33] *See* CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 12 n.5; Tr. 25-26 (Mr. Judson).

[34] *See* Tr. 25-26 (Mr. Judson).

standards -- particularly the most important element of good cause. CAN argued merely that it had raised the issue "with adequate specificity"[35] and that the NRC Standard Review Plan recommends a staff investigation of the same issue.[36] Such assertions do not come close to satisfying the late-filing requirements of Subpart M.[37] Accordingly, we affirm the Presiding Officer's ruling from the bench rejecting this late-filed issue and, like the Presiding Officer, we decline to consider it.

Finally, Applicants complain that the Presiding Officer ruled that it would be appropriate to admit into evidence information involving "the safety of any plant anywhere in the country."[38] Although we agree with Applicants that such matters are irrelevant,[39] we do not construe the record as suggesting that the Presiding Officer ever admitted such issues.

D. Analysis

1. Overview

Many of CAN's financial-qualifications subissues are interrelated. Although we will analyze and resolve these subissues individually, we believe that the reader can better understand CAN's overall position if we spell out not only the single subissues (which we summarized above and address in detail in the succeeding sections of the "Financial

---

[35] *See* Tr. 25 (Mr. Judson).

[36] *See* Tr. 26 (Mr. Judson).

[37] *See* CLI-00-22, 52 NRC at 319 ("The Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b))"); *Consolidated Edison Co. of N.Y.* (Indian Point Nuclear Generating Units Nos. 1 and 2), CLI-01-08, 53 NRC 225, 229-30 (2001) (applying to late-filed issues the Commission's rule, 10 C.F.R. § 2.1308(b), regarding late-filed petitions to intervene). *Cf. North Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 222-23 (1999) (regarding late-filed petition to intervene).

[38] *See* Applicants' Final Statement of Position, dated April 3, 2001, at 13.

[39] *See* p. 44 and note 136, *infra*.

Qualifications" portion of this order) but also the interrelationships among those subissues. The interrelationships involve the following cost and revenue concepts: capacity factor (a key determinant of a plant's revenue),[40] credit lines (a source of funds to operate and maintain the plants during periods when current and retained revenue is unavailable), operating and maintenance ("O&M") expenses (a key component in a plant's costs), and penalties (imposed under power purchase agreements) for failing to achieve certain capacity-factor targets (a potentially key component in a plant's costs).

These concepts fit together in the following way: Ordinarily, a rate-deregulated plant's revenue comes from the sales of electricity -- either on the open market or via power purchase agreements. The plant's sales revenue for a particular period is calculated by multiplying the unit price for a megawatt hour (MWh) of electricity by the number of MWh of power sold. The number of MWh of power sold is in turn computed by multiplying the size of the unit (measured in megawatts) by both its capacity factor (the percentage of total plant capacity actually used during the period to produce electricity) and the number of hours in that period.[41] The plant's

---

[40] *See* note 13, *supra*, defining "capacity factor."

[41] *See* Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 8 ¶ 17 (entered into the Record following Tr. 186, and identified as Licensee Exh. 3).

CAN argues that we should give less weight to the testimony of Entergy's expert witnesses -- Messrs. Green and Kansler -- because they cannot reasonably be expected to evaluate the financial qualifications issues in a way unfavorable to their employer Entergy. *See* Tr. 194 (Mr. Judson). The same argument seemingly applies as well to Applicants' witnesses regarding the decommissioning funding issue -- Messrs. Collins (an employee of PASNY) and Henderson (Vice President and General Tax Counsel for Entergy). We are aware of the longstanding legal axiom, in both this Commission and the courts, that a decisionmaking body may accord less relative weight to a witness who is an employee of a party than to a witness with no such financial ties. *See generally Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, 655 (1985) (emphasis added), *aff'd*, ALAB-818, 22 NRC 651 (1985), *rev'd on other grounds*, CLI-86-13, 24 NRC 22 (1986); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979);

(continued...)

revenue pays for the plant's O&M expenses, decommissioning costs, and any underproduction penalties imposed under power purchase agreements. If the revenue exceeds these costs, the remainder is profit to the plant's owners. If the costs exceed the revenue, then the owners must make up the difference through such approaches as drawing down their lines of credit or their retained earnings.

CAN criticizes Applicants for failing to address what CAN believes is a realistic scenario: a relatively low 75-percent capacity factor combined with a 15-percent annual increase in operating and maintenance ("O&M") expenses.[42] CAN asserts that the low revenues (due to the plants' achieving a mere 75-percent capacity factor) and the rising O&M costs could combine to

---

[41](...continued)
Tavoulareas v. Piro, 759 F.2d 90, 115 n.30 (D.C. Cir. 1985), *vacated in part on other grounds on reh'g*, 763 F.2d 1472 (D.C. Cir.), *modified en banc on other grounds*, 817 F.2d 762 (D.C. Cir.), *cert. denied*, 484 U.S. 870 (1987). But this axiom does not mean that we should discount such testimony altogether. As always, the key to evaluating expert testimony is its logic and persuasiveness. In this proceeding, as in others involving expert witnesses, we have taken into account the financial interests of the witnesses.

[42] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 4-5 ¶¶ 14-16; CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 9; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 8 ¶ 20 (entered into the Record following Tr. 192, and identified as CAN Exh. 2); Tr. 270 (clarifying that the 15-percent figure was intended to be an average annual figure rather than a cumulative 5-year figure).

CAN directs similar criticism at the Staff's SERs. However, we disregard this criticism because the caliber of the Staff's SERs is not at issue in a license transfer adjudication. *See generally Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995) ("in adjudications, the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns"); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 213 (1998) ("Adjudications are not the appropriate forum for resolving complaints about NRC staff conduct"). For the same reason, we disregard CAN's other criticisms of the Staff's SERs. *See* CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 7, 12 n.5.

prevent Entergy from financially withstanding extended outages at one or both plants -- even with its currently available credit lines.[43]

Further, CAN looks to the capacity factor not only as a subissue in its own right, directly affecting the revenue stream of the two plants, but also as a factor that could exacerbate the costs of those plants.[44] Specifically, CAN is worried about the penalty clauses that appear in two of Entergy's three power purchase agreements with PASNY. Under these agreements, Entergy FitzPatrick and Entergy Indian Point agree to sell PASNY all of FitzPatrick's output through 2003, 31 percent of FitzPatrick's output in 2004, and all of Indian Point 3's output through 2004.[45] However, if either plant operates below an 85-percent capacity factor, the power purchase agreements entitle PASNY, with certain exceptions, to extract a penalty from these Entergy companies. CAN asserts that, with only a 75-percent capacity factor, the Entergy companies would incur penalties so significant that they might not be able profitably to operate the plants.[46] CAN similarly claims that the Entergy companies would find themselves without adequate financial resources if either suffered a 6-month outage (and the resulting penalties) prior to

---

[43] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 6, ¶¶ 17; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 8 ¶ 20. *See generally* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 3-4.

[44] *See, e.g.*, CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 27.

[45] *See* both Applications at 6; both SERs at 3-4.

[46] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 6, ¶¶ 17; CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 3, 7, 10; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 6 ¶¶ 12-13; CAN's Response to Applicants' Initial Statement of Position on Issue 3, dated March 5, 2001, at 3, 12.

November 21, 2002 -- even if the average capacity factor were 85 percent or higher for the duration of the 5-year period ending December 31, 2005.[47]

CAN's underlying concern is that Entergy might sacrifice safe operation and maintenance if net revenues (revenue less expenses) fall too low.[48] Where (as here) an adjudication goes to hearing, it is Applicants' burden to show, by a preponderance of the evidence, that they meet our safety standards -- in this case, our financial qualifications rule.[49] As we have cautioned in the past, however, we do not expect "absolute certainty" in the financial arena; it is enough for Applicants to rely on "plausible assumptions and forecasts."[50] With this general background in mind, we turn now to CAN's specific issues.

2. Subissue A: Whether Entergy FitzPatrick's and Entergy Indian Point's Property Tax Agreements with Local Municipalities Were Considered in Applicants' Cost Projections

The Presiding Officer rejected this subissue on the ground that

> [t]he [tax] payment amounts, which will affect the adequacy of projected revenues and hence the overall contention, will only affect the adequacy of revenue projections in a minimal way. Thus, this sub-issue does not warrant separate adjudication, although the bottom-line payment amounts must be considered in assessing the overall adequacy of revenue and cost projections.[51]

---

[47] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, *passim* (entered into the Record following Tr. 192, and identified as CAN Exh. 3); Tr. 268-69.

[48] *See* Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 6 ¶ 13; CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 19; CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 13; CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 27; Tr. 23.

[49] *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 47, 63 (2001); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 421 (1980).

[50] *See Seabrook*, CLI-99-6, 49 NRC at 222. We reiterated that same caution at the outset of this adjudication. *See* CLI-00-22, 52 NRC at 300.

[51] *See* LBP-01-04, 53 NRC at 127.

CAN has not challenged this ruling.

We agree with the Presiding Officer's *de minimis* finding. We also find support in Applicants' uncontroverted rebuttal statements that they in fact did include the estimated costs of the property tax settlements in the computation of the transferees' expected costs and that those estimated costs were **xxxxxxxxxxxxxxxxx** the $16.28 million in actual tax settlement costs to which CAN referred.[52]

3. Subissue B: Whether Applicants' Revenue Projections Are Based on Unreasonable Assumptions

a. Admissibility

The Presiding Officer ruled that this second sub-issue raised two admissible questions -- one factual and one legal. The factual question concerns the reasonableness of the 85-percent capacity factor assumed by Applicants.[53] The legal question concerns whether the Entergy companies should be required to submit estimates for revenue and O&M costs over the life of the licenses or instead for only the first 5 years following the transfer.[54]

Regarding the factual question, CAN had argued that Applicants' estimated capacity factor of 85 percent is significantly higher than the capacity factors actually achieved for either reactor from 1994 through 1999 -- 52.3% at Indian Point-3 and 80.7% at FitzPatrick. CAN had asserted that the Commission should assume no more than a 75% capacity factor -- a level at

---

[52] *See* Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 24, 2001, at 8; Affidavit of Barrett E. Green, dated Jan. 22, 2001, at 2 ¶¶ 3-4, appended to Applicants' Jan. 24th Response, *supra*. CAN, in its Reply Brief, could have challenged Applicants' statements, but chose not to do so.

[53] *See* both Applications at 7.

[54] *See* LBP-01-04, 53 NRC at 128-30. Regarding the confusion surrounding CAN's intention to raise this issue, see note 110, *infra*.

which neither reactor could operate profitably.[55] The Applicants challenged this subissue on the ground that it was late-filed, and the Presiding Officer rejected that challenge for the reasons stated in p. 6 of this order, *supra*. We agree with the Presiding Officer's ruling and adopt it as our own.

Regarding the legal question, the Presiding Officer pointed out that,

> [u]nder 10 C.F.R. § 50.33(f)(2), an applicant for an operating license (including organizations such as [Entergy FitzPatrick and Entergy Indian Point]) must submit "information that the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs *for the period of the license"* (emphasis supplied) [but that t]he section goes on to require that an applicant submit "estimates for total annual operating costs for each of the first five years of operation of the facility." In addition, a "newly formed entity organized for the primary purpose of . . . operating a facility" must include certain additional information (10 C.F.R. § 50.33(f)(3)), and the Commission may request such a newly formed entity [such as Entergy FitzPatrick and Entergy Indian Point] to submit additional or more-detailed information, including "information regarding a licensee's ability to continue the conduct of the activities authorized by the license." 10 C.F.R. § 50.33(f)(4).[56]

The Presiding Officer rejected Applicants' claim that CAN's challenge to the use of 5-year economic projections is impermissible, untimely, and a collateral attack on NRC regulations. He concluded that section 50.33(f)(2) itself "appears to support the view advanced by CAN, particularly since [Entergy FitzPatrick and Entergy Indian Point] appear to be newly formed entities organized primarily for operating the reactors in question." [57] The Presiding Officer also relied on our ruling in *Seabrook* that 5-year projections are not always decisive:

> Section 50.33(f)(2) nowhere declares that the proffering of 5-year projections will, *per se*, prove adequate in any and all cases. To the contrary, the rule contains a "safety-valve" provision explicitly reserving

---

[55] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 7; Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 5, ¶ 14.

[56] *See* LBP-01-04, 53 NRC at 128-29.

[57] *See id.* at 129.

> the possibility that, in particular circumstances, and on a case-by-case basis, additional protections may be necessary. *See* 10 C.F.R. § 50.33(f)(4) (to ensure adequate funds for safe operation, NRC may require "more detailed or additional information" if appropriate).... [The Intervenor] is entitled to argue that *this case* calls for additional financial qualification measures beyond 5-year projections and that the Applicants therefore have not met their burden under section 50.33(f)(2) to satisfy Commission financial qualification requirements.[58]

The Presiding Officer also concluded that CAN's claim was a challenge not to section 50.33(f)(2) itself, but only to Applicants' interpretation of that rule. We agree with the Presiding Officer's ruling on the admissibility of this legal question, and we adopt it as our own.

b. Merits

(1) The Appropriateness of Applicants' Estimated Capacity Factor

CAN asserts that the actual capacity factors for the Indian Point 3 and FitzPatrick reactors in recent years have been so far below Applicants' prospective capacity factor estimate of 85 percent[59] that they undermine the estimate. Specifically, CAN claims that Indian Point 3's average capacity factor for the years 1994-99 was only 52.3% and that FitzPatrick's average capacity factor for that same period was only 80.7%. CAN also points out that Indian Point 3 operated at a capacity factor of less than 75 percent for 4 of the last 6 years and that FitzPatrick operated below 75 percent for 3 of the last 6 years. Based on these figures, CAN urges the Commission to assume, for purposes of determining financial qualifications, no more than a 75% capacity factor for the two plants. The conclusion and gravamen of CAN's argument is that such a 75-percent capacity factor would result in the unprofitable operation of both reactors and in the depletion of Entergy's reserve funding -- especially when paired with (i) what CAN

---

[58] *See id.*, quoting CLI-99-6, 49 NRC at 220.

[59] *See* both Applications at 7.

considers unrealistically low cost projections and (ii) the potential penalties for underproduction of electricity.[60]

Applicants dispute CAN's numbers, supporting arguments and ultimate conclusion. Applicants respond that they based their 85-percent capacity-factor projections on "recent performance of the [Indian Point] 3 and FitzPatrick facilities [under PASNY's management], the historic performance of [other] units owned by the Entergy Corporation ... and affiliated companies, and the extent to which, based on judgment and experience, it is reasonable to expect that [Entergy Nuclear Operations] will be able to improve on the performance of nuclear generation assets after acquiring them."[61] More specifically, Applicants assert that Indian Point 3 has attained average capacity factors of 92 percent during the last 3 years (1998-2000) and 93 percent during the last 2 years, and that FitzPatrick achieved average capacity factors of 83 and 89 percent during those same two periods.[62] In further support of Entergy's ability to attain or

---

[60] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 6-8; Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 5, ¶ 14; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered pages 6-7 ¶¶ 14-15; CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 28. We discuss these two paired factors in sections I.F.3 (pp. 42 *et. seq.*) and I.F.2.b(3) (pp. 25 *et seq.*) of this order, respectively.

[61] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 3; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 5 ¶ 11. Given that Entergy Nuclear Operations is a new company and thus has no "experience," we assume that Applicants intended to refer to the experience of other Entergy organizations.

[62] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 6 ¶ 13; Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 3 ¶ 9. *See also* FitzPatrick SER at 4 (listing FitzPatrick's capacity factors for 1998 and 1999 as 73.2 and 93.9 percent, respectively); Indian Point 3 SER at 4 (listing Indian Point 3's capacity factors for 1998 and 1999 as 89.8 and 85.99 percent,

(continued...)

exceed 85-percent capacity factors at these two plants, Applicants point to the average capacity factor of all Entergy nuclear plants of 85.5 percent in the last 2 years and 85.7 in the last 3 years.[63] Finally, Applicants express confidence that Entergy's proven ability both to operate nuclear plants safely and efficiently and to integrate new plants into its system[64] will result in the projected 85-percent capacity factors for FitzPatrick and Indian Point 3.[65]

In determining the merits of this subissue, we accord great weight to the recent capacity factors of the two plants.[66] This is because these numbers reflect not only the recent condition of the plants but also the recent caliber of work expended by the same employees who will, in

---

[62](...continued)
respectively).

We note that the agency has subsequently revised FitzPatrick's 1999 capacity factor to 93.5 and Indian Point 3's 1999 capacity factor to 86.0. *See* "NRC Information Digest," NUREG-1350 (Vol. 12, Oct. 2000), found at the NRC website at http://www.nrc.gov/NRC/NUREGS/SR1350/V12/sr1350v12.html.) We also note that Applicants' 93-percent figure for Indian Point 3 is inconsistent with the two-year average of 87.9 percent as calculated from the numbers in NUREG-1350.

[63] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 7 ¶ 15.

[64] *See* note 2, *supra*.

[65] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at paragraph. 6-7 ¶ 14 and p. 8 ¶ 16.

[66] In addition to Applicants' 2- and 3-year figures, Applicants point out that the capacity factors for Indian Point 3 and FitzPatrick were 95.1 and 97.2 percent, respectively, for the 41 days in 2000 that Entergy actually owned the plants. *See* Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 5 ¶ 10. We decline to rely on capacity factors for so short a period.

the future, be performing the plants' day-to-day operation and maintenance.[67] We find this information considerably more relevant than the capacity factors at other Entergy (or non-Entergy) nuclear plants that may be in quite different physical condition and operated by a quite different caliber of labor force. Entergy has made no meaningful attempt to equate FitzPatrick and Indian Point 3 with other plants in these two respects. And although we find some assurance in the past successes of the three Entergy Applicants' parent and affiliates (as reflected in Entergy's second and third arguments) and also in the Entergy companies' ability to benefit from each other's experiences, our assurance is lessened by the fact that Entergy Operations Inc. (operator of Entergy's fleet in the South) is not the designated operator of either FitzPatrick or Indian Point 3.[68] Regardless, any such assurance would hardly be enough to offset a history of low capacity factors for the two plants at issue here.

---

[67] The Entergy Applicants have represented that they will retain most of the two plants' current labor force. *See* both Applications at 2 ("Upon closing, all employees within [PASNY's] Nuclear Generation Department, and certain other employees supporting the Nuclear Generation Department, will become employees of" Entergy Nuclear Operations); Indian Point 3 Application at 17 ("Personnel currently responsible for providing technical support will continue to do so after the transfer"); FitzPatrick Application at 15 (same); Tr. 259 (Mr. Kansler: "I agree that the people primarily operating these plants are still ex-NYPA [*i.e.*, ex-PASNY] people.... So, yes, it's all ex-NYPA people").

[68] *See* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 28. CAN concurs that we should at least "give some weight to [Entergy's capacity factor] record at the other plants they've owned"). *See* Tr. 258 (Mr. Smeloff). *See also* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 28 ("Entergy's record at its reactors in Region IV ... is not as relevant as the operating history of the reactors being transferred").

Messrs. Green and Kansler (Entergy's witnesses) raise a fourth justification -- that their estimate of an 85-percent capacity factor falls almost exactly in the middle of the capacity factors of plants nationwide. *See* Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 4 ¶ 10. We do not find this reference to the experience at all other United States plants instructive on the issue of the appropriate capacity factor for an individual plant. *See* note 136, *infra*.

Turning then to the proffered capacity factors themselves, we are faced with a choice between two sets of "recent" capacity-factor averages as proxy for future capacity factors: CAN's figures reflecting a 6-year period and Applicants' reflecting 2- and 3-year periods. We believe that Applicants make by far the stronger case for their proxies.

Applicants explain that the higher performance levels during the last 2 and 3 years are the result of plant improvements during PASNY's prolonged self-imposed outages in the early-1990s,[69] recent PASNY management changes, and PASNY's recently-demonstrated ability to execute a 38-day refueling outage at FitzPatrick and a 40-day refueling outage at Indian Point 3 (both of which were significantly shorter than previous outages at the respective plants).[70] Applicants further explain that they anticipate no maintenance outages similar in duration to those of the early- and mid-1990s.[71]

In our view, these facts and explanations provide strong support for Applicants' position that the more recent 2- and 3-year periods are better indicators of the two plants' future

---

[69] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 6 ¶ 13. *See also* Tr. 72 (Mr. Lochbaum: Indian Point 3 had a 0-percent capacity factor in 1994), 302 (Mr. Smeloff: FitzPatrick had 100-percent downtime and a 0-percent capacity factor in 1992, and Indian Point had a 13.6-percent capacity factor in 1993); CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 28-29 (Indian Point 3 had a 0-percent capacity factor in 1994 and was shut down for more than two years between 1993 and 1995; FitzPatrick was shut down for more than one year between 1991 and 1992).

[70] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 8 ¶ 16. *See generally* Tr. 259 (Mr. Kansler: PASNY "in the past three years, at both plants have [*sic*] shown remarkable improvement in running its plant [*sic*]"), 260 (Mr. Kansler: PASNY "ran these units well for the past three years.... [and] did a very good job bringing these units up to snuff"); Tr. 350 (Mr. Kansler, making similar statements).

[71] *See* Tr. at 254-55.

performance than a 6-year period containing weaker management and much longer outages. CAN gives us no reason to doubt any of these facts and explanations. Nor does it offer any other justification why CAN's own 6-year period provides the better proxy for future capacity factors. CAN merely says that, "[b]ecause the Entergy applicants are newly formed entities, CAN believes that NRC must look back farther than 3 years in order to determine whether the 5-year projections are reasonable."[72] CAN provides no support in the record or in logic for this unsubstantiated "belief." For the reasons set forth above, we find Entergy's projected 85-percent capacity factor-- based on recent developments at FitzPatrick and Indian Point 3 -- more plausible than CAN's 75-percent projection.

(2) The Effect on Costs if the Capacity Factor Target is Missed and Underproduction Penalties Are Imposed

Even if CAN's capacity-factor predictions were to prove accurate, such a development would make no difference to Entergy's financial qualifications unless one or both of two further events transpired: (1) the financial penalties resulting from the reduced capacity factor would lower the available retained earnings and credit lines to the point that the plants could not be safely operated and maintained, or (2) the loss of revenue resulting from the reduced capacity factor would have the same effect. We consider the penalties question first.[73]

We find that the record provides an insufficient basis to justify CAN's concern that the penalties from failure to meet the capacity-factor target have a realistic likelihood of jeopardizing Entergy's financial ability to operate and maintain the plants safely. Applicants convincingly assert that, even applying CAN's estimated 75-percent capacity factor (and CY2000 average

---

[72] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 7. (The context of CAN's statement makes clear that CAN is referring to capacity factor projections rather than the 5-year cost-and-revenue projections.)

[73] We address the loss-of-revenue question in our discussion of Subissue C, beginning at p. 42 of this order, *infra*.

prices), Indian Point 3 would still earn **$xxxx** million in net revenue during the 5-year period of 2001-2005, and FitzPatrick during the same period would lose only $**xxx** million -- an amount easily covered by a $20 million credit line available from EGI.[74] Applicants further point out that, even were FitzPatrick to suffer this hypothetical **$xxx** million loss, it would still incur no penalties.[75]

CAN does not challenge Applicants' dollar figures, as such, or the calculations underlying them.[76] These uncontroverted figures give us confidence in the conservatism of Applicants' projected capacity factor. Also, for the reasons set forth below, we find the "penalty" hypothetical offered by Applicants more convincing than a corresponding "penalty" hypothetical offered by Mr. Smeloff, CAN's expert witness, concerning Indian Point 3 (or his more general arguments regarding FitzPatrick).

Entergy, in its hypothetical, provides convincing *plant-specific* justifications for the assumption of only a 30-40 day refueling outage every two years and occasional shorter maintenance-related outages. Entergy initially explains why it foresees no lengthy outages for time-consuming non-routine maintenance matters such as replacement of steam generators,

---

[74] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 5; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 11-12 ¶ 20; Applicants' Response to CAN's Initial Statement of Position on Issue 3, dated March 5, 2001, at 5; Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 5 ¶ 12; Tr. 345-49 (Mr. Green).

[75] *See* Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 12 ¶ 20.

[76] *See* Tr. 250-51 (Mr. Smeloff).

reactor vessels and core shrouds at the two plants.[77] Next, Entergy explains that its estimated length of refueling outages at the FitzPatrick and Indian Point 3 plants (days numbering in the mid-30's, declining over 5 years to about 30 days)[78] is generally consistent with Indian Point 3's and FitzPatrick's recent refueling outages of 38 and 40 days, respectively.[79] Finally, Entergy calculates that it could reach its 85-percent capacity factor target even if it had 18 days of routine maintenance outages (over and above a 36-day refueling outage, during which it would also perform maintenance) in refueling years and 54 days of routine maintenance outages in non-refueling years.[80] We find these three plant-specific explanations persuasive, and CAN has given us no reason to question them.[81]

By contrast, only a small portion of Mr. Smeloff's Indian Point 3 hypothetical is based on facts and argument specific to that plant, and that portion either is unsupported by record evidence or ignores the record evidence supportive of Entergy's position. The remainder of the Smeloff hypothetical appears to rest on unjustified surmise. Because the Smeloff hypothetical serves as a centerpiece of CAN's "penalty" issue, we consider each of the hypothetical's elements in some detail.

---

[77] *See* notes 89 and 118, *infra*.

[78] *See* Tr. 243 (Mr. Green). *See also* Tr. 244 (Mr. Kansler, referring to "a 36-day outage").

[79] *See* note 70, *supra*.

[80] *See* Tr. 244-45 (Mr. Kansler). As noted *supra*, Entergy plans to refuel these plants every two years (Tr. 245, Mr. Kansler) -- hence the distinction between the refueling and non-refueling years.

[81] Entergy also offers the following non-plant-specific justification for its hypothetical: the shortening of the refueling outage period will result in significant part from applying to these two plants the lessons already learned at the other nuclear plants run by Entergy affiliates. *See* Tr. 246 (Mr. Kansler).

Six-Month Outage at Indian Point 3. In the first portion of the hypothetical, Mr. Smeloff poses an example in which he claims Entergy could find itself without sufficient funds to operate and maintain the plants safely. Mr. Smeloff assumes a 6-month outage at Indian Point 3 occurring prior to November 21, 2002. He argues that Entergy would have to pay contractual penalties to PASNY if the capacity factor falls under 80 percent during the first 2 years of PASNY's power purchase agreement with Entergy (a period which extends to November 21, 2002). Mr. Smeloff calculates that Entergy's penalties "would probably exceed $45 million assuming the cost of replacement power at $53.74 per megawatt hour" -- the annual average price of electricity in the year 2000 for the area of New York State serviced by the Indian Point 3 plant.[82]

Mr. Smeloff also seeks to bolster his 6-month figure by referring cryptically at the hearing to "the guideline that there be sufficient funds to go through a six-month period of time."[83] We assume that Mr. Smeloff means to refer here to the 6-month outage posited in NUREG-1577. Mr. Smeloff, however, never explains why the 6-month outage reference from NUREG-1577 accurately reflects a likely outage period for Indian Point 3. Moreover, Mr. Smeloff misreads the language of NUREG-1577. Contrary to his view, it does not establish a standard that a plant have sufficient cash to pay O&M costs during a 6-month outage. Rather, it provides merely that a transferee can satisfy our financial qualifications requirements by *either* filing adequate cost-and-revenue projections for a five-year period, *or* holding a sufficiently high bond rating, *or*, "if an

---

[82] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered page 2 ¶¶ 3-5; Tr. 250-52 (Mr. Smeloff), 269 (Mr. Smeloff), 279 (Mr. Smeloff, positing a $48 million penalty for Indian Point 3).

[83] *See* Tr. 257 (Mr. Smeloff).

applicant cannot meet these criteria, ... [submitting] information on cash or cash equivalents ... sufficient to pay fixed operating costs during an outage of at least 6 months."[84]

In other words, under the guidance set out in NUREG-1577, the NRC Staff does not consider an applicant's financial wherewithal to handle a 6-month outage unless the Staff first concludes that the applicant's cost-and-revenue projections (or its bond rating) are inadequate. No such inadequacy is present here. We find below (at pages 36-47) that Entergy has submitted plausible 5-year projections upon which we can rely. Neither our financial qualifications rule nor the guidance document to which Mr. Smeloff referred suggests a further requirement to set aside funds to cover a 6-month outage.

The record in this proceeding, in any event, does not persuade us of the probability of a 6-month outage at Indian Point 3. Mr. Smeloff points out that, within the last 6 years, 23 plants with a 75-percent or lower capacity factor have had outages of at least 6 months.[85] His references to the experiences at other plants are not helpful in informing our consideration of what to expect at Indian Point 3 -- especially given CAN's failure to support adequately its 75-percent capacity assumption (*see* immediately preceding section). CAN and Mr. Smeloff offer other, similar industry-wide numbers to support their position that a 6-month outage is reasonable to anticipate at Indian Point 3. [86] These supporting data fail for the same reason as a

---

[84] *See* "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577 (Rev. 1, March 1999) at 5.

[85] *See* Tr. 247-48, 268-69 (both Mr. Smeloff).

[86] For instance, CAN notes that, during the last 15 years, nearly a quarter of the nation's nuclear power plants have been shut down for a year or more, that there were 40 six-month outages at nuclear plants in the United States from 1994 through 1999, and that 19 twelve-month outages occurred during that same 6-year period. *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 10 n.11; Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 6 n.6. *See also* Declaration of Edward A. Smeloff, dated Jan. 31, 2001, at ¶ 9 (listing numerous outage times at various reactors -- including

(continued...)

basis for Mr. Smeloff's argument. CAN's historical data show merely that outages of 6 months (or more) are possible, not that such outages are particularly likely at Indian Point 3.[87]

Finally, Mr. Smeloff relies on two bases that do specifically relate to Indian Point 3. His first plant-specific basis is his assertion that the plant could not, from the perspective of cash flow, survive a 6-month outage occurring prior to November 21, 2002. Again, however, he offers no evidence for his underlying premise that Indian Point 3 is currently vulnerable to such an extended outage. His second plant-specific basis is that both FitzPatrick and Indian Point 3 have already experienced back-to-back outages, each of which exceeded one year.[88] But the record suggests that, during those shutdowns, PASNY successfully addressed the same kinds of problems that CAN indicates could lead to future major maintenance outages. We find persuasive Mr. Kansler's following testimony on this matter:

> [T]hese plants ... have already been through long shutdowns in the past [and] have addressed a lot of those issues [*i.e.*, those that would lead to lengthy maintenance outages], so that the probability in our mind that we're going to run up against a six-month outage is extremely low.... [A] six-month shutdown. Sure, the possibility exists, but we don't foresee what's going to drive us into that situation over the next five years.[89]

---

[86](...continued)
simultaneous outages of multiple-unit reactors -- that far exceed 6 months). *See also* Tr. 247-48 and 268-69 (where Mr. Smeloff notes that 23 plants have experienced outages of at least 6 months in the last 6 years). CAN and Mr. Smeloff also offer 12 examples of utilities having two or more plants out of service simultaneously. *See* Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered pages 9-10 ¶ 22.

[87] To the extent Mr. Smeloff claims that the difference between an 85% capacity factor and a 75% capacity factor over a five-year period equates to 6 months of plant downtime (*see* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 29), we find his assertion flawed in that it rests on data for other plants and is thus not sufficiently tied to Indian Point 3 to help us in our deliberations (*see* note 136 and accompanying text at p. 44, *infra*). Also, as discussed in the preceding section of this order, CAN has not demonstrated that we should use its 75-percent capacity factor estimate rather than Applicants' 85-percent figure.

[88] *See* Tr. 248.

[89] *See* Tr. 254-55. *See also* the written and oral testimony of Messrs. Green and
(continued...)

Mr. Smeloff does not address how PASNY's curative work affects the likelihood of a lengthy outage.

$20 million net loss at Indian Point 3. In the second portion of Mr. Smeloff's Indian Point 3 hypothetical, he states that he has calculated at more than $100 million Entergy Indian Point's lost revenue as a result of his supposed 6-month outage, and that, after taking into account certain offsetting reductions in costs, Entergy Indian Point would suffer a net loss in income of more than $20 million.[90] But Mr. Smeloff acknowledges that he has "not estimated" the cost reductions to which he refers; instead, he states merely that he is "confident" that the overall income loss for Indian Point 3 would exceed $20 million.[91] In this respect, a crucial portion of his hypothetical rests on sheer conjecture.

Also, Mr. Smeloff's lost-income argument is unclear in several respects. He does not specify what offsetting costs he has in mind, other than fuel and income taxes.[92] Nor is it clear how he arrives at his $100+ million figure for lost revenues.[93] And it is uncertain whether Mr. Smeloff is here referring to a reduction of $20 million in what would otherwise be a net income of about $**xx** million[94] (thereby yielding a revised net income of $**xx** million), or whether he is

---

[89](...continued)
Kansler, cited at note 118, *infra*.

[90] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered page 3 ¶ 6.

[91] *See id.* at unnumbered page 3 ¶ 6.

[92] *See id.* at unnumbered page 3 ¶ 6.

[93] **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx** *See* Tr. 278 (Mr. Smeloff).

[94] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered
(continued...)

instead referring to a reduction so large that it would more than offset all net income and leave a net deficit in excess of $20 million. In addition, it is unclear whether either of these revised numbers (+$**xx** million or -$20 million) includes any penalties under the power purchase agreements. It is CAN's responsibility to ensure that its arguments and statements are clearly and cogently presented.[95] Its failure to meet this responsibility precludes our determining the reasonableness of either the calculations in this second portion of the Smeloff hypothetical or their underlying cost assumptions. They therefore cannot be weighed in CAN's favor when determining whether the preponderance of the evidence supports CAN's position.

Equally important regarding penalties, we lack the information necessary to determine whether the assumptions underlying Mr. Smeloff's Indian Point 3 hypothetical are consistent with the complex penalty provisions of the power purchase agreement.[96] Indeed, we have reason to

---

[94](...continued)
page 3 ¶ 6.

[95] *See Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 297-98 (1994) (and authority cited therein).

[96] The complexity of the penalty provisions is reflected in the following detailed description from the Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 9-11 ¶ 18. *See also* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 4-5; Tr. 346-49 (Mr. Green). Given the significance of the penalty issue in this proceeding, we quote in full the description found in Messrs. Green's and Kansler's Direct Testimony:

> There are three PPAs [power purchase agreements] between the Entergy companies and [PASNY]. The first PPA is between [Entergy Indian Point] and [PASNY] for 100% of [the Indian Point 3 plant's] output from the closing until December 31, 2004 and is priced at $36/MWh [megawatt hour] ("ENIP PPA"). The second PPA is between [Entergy FitzPatrick] and [PASNY] for a portion of [the FitzPatrick plant's] output from the closing until December 31, 2004 and is priced at $32/MWh ("ENF PPA1"). The power sold under the ENF PPA1 ranges from 45.45% to 30.9% of [the FitzPatrick plant's] output depending upon the year. The third PPA is between [Entergy FitzPatrick] and [PASNY] for the balance of [the FitzPatrick plant's] output from closing until December 31, 2003 and is priced at $29/MWh ("ENF PPA2"). ENF PPA2 is for all of [the FitzPatrick plant's] output

(continued...)

[96](...continued)
not sold under ENF PPA1.

ENIP PPA and ENF PPA1 contain provisions that potentially impose financial penalties if the plants operate below an average capacity factor of 85%. ENF PPA2 does not contain any such provisions, and there are no performance obligations or penalties under ENF PPA2. Under ENIP PPA and ENF PPA1, if one of the plants operates below 85%, the relevant Entergy company [Entergy FitzPatrick and Entergy Indian Point] must pay [PASNY] the difference between the PPA price and the market price to the extent of the shortfall. Should such a shortfall occur, the financial obligation would be calculated by subtracting the PPA price from the market price in every hour that the unit was not operating or operating at reduced capacity. That set of data would be weighted averaged and the weighted average amount that [PASNY] paid above the PPA price would be multiplied times the supply shortfall in MWh. If the average amount that [PASNY] paid above the PPA price was negative (*i.e.*, if [PASNY] was able to purchase replacement energy on the open market at an average price lower than the PPA price), there would be no financial obligation since [PASNY] had not suffered a financial loss and did not need to be made whole.

The capacity factor financial penalties are based on averaging capacity factor over two periods – period one, running from the date of closing of the sale of the plants to the second anniversary of the closing date (November 21, 2000 to November 21, 2002 or 2 years), and period two, which runs from the day after the end of period one until December 31, 2004 (November 22, 2002 to December 31, 2004 or 2 years and 40 days). These periods roughly correspond to the two-year operating cycle of the units which includes one planned refueling outage for each unit in each period. There are only two points in time when [Entergy FitzPatrick and Entergy Indian Point] would potentially become obligated to make a payment to [PASNY], the end of period one (November 21, 2002) and the end of period two (December 31, 2004).

The ENIP PPA and ENF PPA1 also allow up to a 5% carryover from period one to period two, both positive and negative. This means that if a plant operates as low as 80% capacity factor in period one, then no financial "true up" (payment to [PASNY]) will be required until the end of period two. If the capacity factor in period two exceeds the guaranteed 85% level, then excess generation in period two will count toward the deficit in period one. Should a plant operate below 80% in period one, the relevant Entergy company would incur an obligation to pay [PASNY] the financial true up for the capacity factor deficit below 80% at the end of period one.

If generation in period one exceeds the guaranteed level, then that excess generation (up to 5%) will carry over to period two. Therefore if a unit operates at 90% capacity factor in period one, that unit can operate at 80% capacity factor in period two without incurring a financial obligation to [PASNY]. Operation above 90% capacity factor in period one does not carry over into period two. However, the additional revenues associated with operation above an 85% capacity factor are significant and would improve overall

(continued...)

doubt CAN's assumptions. Its statement that "Applicants' Power Purchase Agreement imposes a requirement that FitzPatrick and Indian Point 3 be run at average capacity factors of 85% [and] if [they] do not satisfy this requirement, they will face penalties"[97] suggests a simplistic reading of the quite complex penalty provisions of the power purchase agreements, in view of the agreements' many exceptions. Mr. Smeloff's testimony (both written and oral) does not provide sufficient details to persuade us otherwise.

Mr. Smeloff also argues that he considers it quite possible for the loss in income at Indian Point 3 to be significantly greater than suggested by his hypothetical $20 million figure, due to his use of a "very conservative" price per megawatt hour of $53.74. He explains that the price of electricity for the first 2 months of 2001 exceeded $95 per megawatt hour and that prices in this part of New York State typically rise even higher during the summer.[98] Mr. Smeloff's argument ignores Entergy's practice of conducting its planned outages during periods of slack demand and low market prices.[99] This practice would reduce both the likelihood and the amount of a penalty because "a large portion of the market prices that would be averaged into any shortfall calculation will come from lower price periods during which the planned outages are

---

[96](...continued)
financial performance (higher net income and retained earnings) above the projections presented in the application.

In summary, a plant can operate below an 85% capacity factor for all or part of the five-year period and not incur a financial penalty if (a) the plant operates above the 85% capacity factor to an extent that offsets the shortfall, or (b) the average market price is below the PPA price during the periods when the plant operates below an 85% capacity factor.

[97] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 6 (footnote omitted).

[98] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered page 3 ¶¶ 7.

[99] *See* Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 5 ¶ 13.

conducted."[100] We also do not understand how Mr. Smeloff can conclude that his $53.74 price figure is "very conservative," given that he acknowledges this as the area's "*average* price for the year 2000."[101]

FitzPatrick. In addition to his hypothetical regarding the Indian Point 3 plant, Mr. Smeloff also addresses the FitzPatrick plant, although in much more general terms. He explains that the average price of electricity in FitzPatrick's part of New York State is currently (*i.e.*, in January and February, and perhaps early March of 2001) $40.00 per megawatt hour -- $8.00 higher than the rate specified in the FitzPatrick power purchase agreement. He does not calculate the penalties and lost revenue that would result from a 6-month outage at that plant. Rather, he argues that "it is reasonable to assume that [FitzPatrick] could suffer substantial penalties for production shortfalls,"[102] and also that, due to the interlocking nature of the two plants' letters of credit, the FitzPatrick plant could experience cash-flow problems if it has a 75-percent capacity factor at the same time as Indian Point 3 experiences an extended outage.[103] He further notes that Entergy's experts have not analyzed the cash flow of either plant in the event that there are simultaneous extended outages at both.[104]

Mr. Smeloff fails to offer any calculations in support of his conclusions, nor does he offer any justification why we should consider the current electricity rates for January and February

---

[100] *See id.* at 5 ¶ 13.

[101] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered page 3 ¶ 7 (emphasis added). *See also* Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 6 ¶ 13 (indicating that the average price for electricity from Indian Point 3 for 2000 was $53.74 per megawatt hour).

[102] *See* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered pages 3-4 ¶ 8.

[103] *See id.* at unnumbered pages 4 ¶ 9.

[104] *See id.* at unnumbered page 4 ¶ 10.

(and perhaps early March) to be an appropriate proxy for the *average annual* rates. The electricity rates in New York State are higher in the winter and summer than in the spring and fall.[105] And as Applicants point out, "a large portion of the market prices that would be averaged into a shortfall computation under the [power purchase agreements] will come from lower price periods during which scheduled plant outages will be conducted [and] the most recent (2000) average prices for [FitzPatrick] are well below the peaks cited by Mr. Smeloff."[106]

Further, the power purchase agreements' penalty provisions permit Entergy to average certain overproduction periods (*i.e.*, 2-year periods when the capacity factor exceeds 85 percent) with underproduction periods, so that the failure to achieve the 85-percent goal at FitzPatrick during a particular 2-year period will not necessarily result in a penalty. Moreover, a multi-year average capacity factor of less than 85 percent at FitzPatrick would not trigger a penalty if the average market price is less than the power purchase agreement price during the period when the plant operates below an 85-percent capacity factor.[107] It is unclear from the record whether Mr. Smeloff takes either of these factors into account when reaching his conclusions regarding FitzPatrick (just as it was unclear whether he took such complexities into account in his "penalty" arguments regarding Indian Point 3).

---

[105] *See* Tr. 254 (Mr. Green: Electricity demand "is probably slightly higher in the summer on air conditioner load than it is in the winter on heating load. But it is not surprising to me that the January/February price for power in New York is relatively high compared to an average price for power in New York").

[106] *See* Applicants' Response to CAN's Initial Statement of Position on Issue 3, dated March 5, 2001, at 6; Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 5 ¶ 13.

[107] *See* Direct Written Testimony of Messrs. Green and Kansler, quoted at note 96, *supra*. *See also* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 5.

(3) The Need for Financial Qualifications Information (Cost-and-Revenue Projections) Beyond Entergy's Proffered 5-Year Projections

There can be no doubt that Applicants have provided all the 5-year projected cost-and-revenue data required by 10 C.F.R. § 50.33(f)(2) -- a step which would, in most instances, resolve the question whether an applicant had demonstrated financial qualifications. Given the Commission's holding in *Seabrook*, quoted *supra* at 19, there can likewise be no doubt that the Commission has the authority to seek further financial qualifications information from applicants in those unusual instances in which we believe the 5-year projections are inaccurate or insufficient. The question here is whether this proceeding qualifies as one of those unusual instances in which an applicant's 5-year data does not provide us the requisite "reasonable assurance" that the transferees can obtain the funds necessary to operate and maintain the two plants during the remaining periods of their respective licenses.[108] Were we to conclude that the 5-year projections are either inaccurate or insufficient to provide this assurance, then we could require further information and, if appropriate, impose conditions on the license transfer.

CAN asserts that, under the particular facts surrounding these applications, the 5-year data provides insufficient assurance of the Entergy companies' financial qualifications.[109] CAN requests that Applicants be required to submit cost-and-revenue data through the year 2008, due to the fact that Entergy's $106 million annual contractual obligations to PASNY (for the purchase of the facilities and fuel) continue through 2007.[110] According to CAN, the inclusion of

---

[108] *See* 10 C.F.R. § 50.33(f)(2). Applicants and CAN appear to agree on this point. *See* Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 24, 2001, at 22; CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 9, 13.

[109] *See* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 15-16.

[110] *See* CAN's Written Statement of Position on Issue 3, dated Feb. 26, 2001, at 14;
(continued...)

the year 2008 would show the impact of the payments for facilities and fuel on Entergy's projections for the years 2001-2007.[111]

We do not see how the additional data which CAN requests would assist the financial qualifications inquiry in this proceeding. Any projected data for the outlying years 2006-2008 would, at least in the current factual situation, be so speculative as to be unworthy of our reliance. At the hearing, CAN said much the same thing.[112] Applicants would have us impose an absolute bar on the use of projected data beyond the regulatorily specified 5-year period.[113] We do not go so far. Determinations of "how speculative is too speculative" need to be made on a case-by-case basis.

---

[110](...continued)
CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 16; Tr. 203-04.

There has been considerable confusion as to whether CAN has gone so far as to argue that the Commission should require Applicants to submit cost-and-revenue data for *each remaining year* in the lives of the two licenses. Applicants and the Presiding Officer believe that CAN does present this argument. *See* Applicants' Written Statement of Position on Issue 3, dated Feb. 26, 2001, at 10, 20; LBP-01-04, 53 NRC at 128. CAN denies that it has done so, but claims instead that it was asserting merely that the 5-year projections and other evidence of financial qualifications "must be strong enough to show that the applicant is likely to have sufficient funds not only during the period projected, but in fact for the remaining period of the license in question." *See* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 39. *See also* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 15. Under the circumstances, we do not need to resolve this matter -- for CAN either never raised or has withdrawn the issue as Applicants and the Presiding Officer understood it.

[111] *See* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 16.

[112] *See* Tr. 196 (CAN's Mr. Judson: "[T]o project more than five years down the road I think would be speculative, and I think we've actually agreed ... with the applicants about that in this proceeding"), 204-05 (Mr. Judson: "[D]etailed cost and revenue projections for the remaining period of the licenses [*i.e.*, after 2005] we thought was ... too speculative").

[113] *See* Applicants' Written Statement of Position on Issue 3, dated Feb. 26, 2001, at 16-18.

When we set the time period at 5 years for our projected cost-and-revenue data requirement, we recognized that such projected data becomes less and less credible the further one predicts into the future.[114] We also recognized that, if the projections proved inaccurate or did not reflect the situation at a plant after the 5-year period, then our reactor safety oversight program likely would reveal safety-related effects from a financial shortfall and we could respond accordingly.[115]

CAN also requests that Applicants determine if and when they may need to plan for potentially large maintenance expenses (such as steam generator replacement) and/or outages at the plants.[116] CAN justifies this request on the ground that "the material condition of key reactor equipment and systems could change" during the period 2001-2007.[117] Applicants' expert witness, Mr. Kansler, has already addressed this request, informing both CAN and the

---

[114] *Cf.* Tr. 197-98 (Mr. Wood [of the NRC Staff]: "I think one way to look at those five-year projections is that they are a surrogate for the longer term of the license.... [B]ecause of the unreliability of projections farther out than five years or so, those were taken by the Commission when they promulgated the rule as ... the only really meaningful piece of information that you could get to make that longer term determination").

[115] *See generally GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000), citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 306-07 (1997) ("in the end, NRC inspections and enforcement actions go a long way towards ensuring compliance with our requirements"); *id.* at 209, 210, 212, 214; Summary of and Response to Comments, preceding "Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry," 62 Fed. Reg. 44,071, 44,073 (Aug. 19, 1997) ("the NRC continues to believe that its primary tool for evaluating and ensuring safe operations at its licensed facilities is through its inspection and enforcement programs"). *See also* Tr. 198 (Mr. Wood: "I think the Commission also recognized that the financial qualifications requirements aren't viewed in a vacuum, that there are other parts of the Commission's programs, the reactor oversight program, that also gets to what happens if those projections are not borne out down the road").

[116] *See* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 16-17; Tr. 204.

[117] *See* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 16.

Commission on the record that they foresee no major maintenance expenses or outages during the remaining lives of these plants:

> [T]he steam generators ... have been replaced. Albeit 12 years old, ... those generators are very healthy and they're maintained very healthy, [*sic*] so we don't see any reason why those generators would have to be replaced over the remaining life of the units.... [T]he vessel is good for the end of life through the license termination as it exists, using the existing methodology that the NRC recommends.... [T]he vessel internals are good for the life of the plant to the end of the license as long as we stay within the guidelines of the vessel internals program. So, right now, we see no reason why any of those three major components would cause a long outage or require replacement or anything different than the current programs that are already in place through the end of the license for both units.[118]

Next, CAN criticizes Applicants for failing to discuss either the volatility of the deregulated market or the risk that construction of new power plants in New York State would exert a strong downward pressure on wholesale electricity prices.[119] In support of its criticism, CAN refers the Commission to many proposed new generation and interconnection facilities that could, in the next few years, greatly supplement New York State's currently available electric supply -- by roughly 19,000 and 25,000 megawatts by 2003 and 2005, respectively.[120] CAN also alludes to political and regulatory uncertainties inherent in deregulation.[121] Further, CAN points to Entergy's late arrival in the New York State market and suggests that this could undermine its ability to

---

[118] *See* Tr. 221. *See also* Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 13 ¶ 24 (entered into the Record following Tr. 186, and identified as Licensee Exh. 4); Tr. 220 (Mr. Green: no projected steam generator, core shroud or reactor vessel replacements during the period 2005-2008).

[119] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 7, ¶ 20; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 12, ¶ 24; CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 12, 16.

[120] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 14-15 and n.15.

[121] *See* CAN's Response to Applicants' Written Statement of Position on Issue 3, dated March 5, 2001, at 16.

obtain stable contracts.[122] CAN therefore asks the Commission to review Applicants' projections to determine the likelihood of such political and regulatory uncertainties, market volatility, price drops and difficulty in obtaining stable contracts.[123]

We do not consider such general concerns sufficient to undermine the adequacy of the 5-year data as an indicator of Entergy's financial qualifications to operate and maintain the plants for the duration of their licenses. We explained to CAN earlier in this proceeding that "[c]hallenges to Entergy's financial qualifications 'ultimately will prevail only if [they] can demonstrate relevant *uncertainties significantly greater* than those that usually cloud business outlooks.'"[124] The market volatility and potential power plant competition on which CAN relies do not rise above the level of the usual business uncertainties to which we alluded in CLI-00-22 and CLI-99-6.

Moreover, CAN's argument about market volatility necessarily applies in one fashion or another to *all* license transfers to non-utilities in the current deregulated market and so would *ipso facto* render any such prospective transferee's 5-year data insufficient to demonstrate financial qualifications. The exception would therefore swallow the rule, at least insofar as it applies to the increasingly common non-utility owners and operators of nuclear power plants.

The risks of political and regulatory uncertainty, new interconnections and new generating facilities are always risks for sellers of electricity. As we stated in *Seabrook*, the Commission "will accept financial assurances based on *plausible assumptions and forecasts*, even though the possibility is not insignificant that things will turn out less favorably than

---

[122] *See id.* at 15.

[123] *See id.* at 16.

[124] *See* CLI-00-22, 52 NRC at 300, quoting *Seabrook*, CLI-99-6, 49 NRC at 221-22 (emphasis added).

expected. Thus, the mere casting of doubt on some aspects of proposed funding plans is not itself sufficient to defeat a finding of reasonable assurance."[125]

CAN, however, argued at the hearing that its evidence satisfies *Seabrook*'s "significantly greater uncertainty" test, by posing the possibility that higher costs and lower revenue (due to a lower-than-85% capacity factor) could place Entergy FitzPatrick and Entergy Indian Point in a financial deficit.[126] CAN goes on to argue that "if a business can't tolerate more than one adverse circumstance going on at the same time in terms of its projections, that actually is more clouded than most business outlooks."[127] This argument is not without force as an abstract matter but, as we rule in this order, CAN has not shown that any of the adverse circumstances on which it relies (*i.e.*, higher costs, lower revenue, and inability to line up stable sales contracts) are likely to occur. Consequently, CAN has failed to undermine what we find in this order to be Applicants' "plausible assumptions and forecasts."[128]

4. Subissue C: Whether Applicants' Cost-and-Revenue Projections Are Adequate to Cover Common Increases in Operating Costs

a. Admissibility

This subissue is based on the premises that Applicants' estimated O&M costs are "on the low end of those common in the nuclear industry,"[129] that those costs can reasonably be expected to increase annually by at least 15 percent[130] and, accordingly, that Applicants'

---

[125] *See* CLI-99-6, 49 NRC at 222 (emphasis added).

[126] *See* Tr. 206-07 (Mr. Judson).

[127] *See* Tr. 207-08 (Mr. Judson).

[128] *See* CLI-99-6, 49 NRC at 222.

[129] *See* LBP-01-04, 53 NRC at 130.

[130] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 4-5 ¶¶ 14-16 (recommending use of a 15-percent cost increase when performing a sensitivity (continued...)

projections must be analyzed to take into account the combined effects of these increased operating expenses and the decreased capacity factors (the latter of which was discussed in Subsection I.D.3, *supra*).[131] CAN does not appear to assert that Applicants' projections are necessarily invalid, only that the Commission should conduct a sensitivity analysis to evaluate Applicants' ability to withstand what CAN believes is a reasonable increase in O&M costs (*i.e.*, a 15-percent increase).[132] CAN's expert witness, Mr. Smeloff, also asserts that FitzPatrick's and Indian Point 3's O&M cost estimates should be raised closer to the level of Salem Nuclear Generating Station's costs.[133] In response, Applicants characterized the subissue as vague and

---

[130](...continued)
analysis); Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 8 ¶ 20 (same) (entered into the Hearing Transcript immediately following p. 192 and identified as CAN Exh. 2); Tr. 270 (Mr. Smeloff, clarifying that the 15-percent figure was intended to be an average annual figure over a 5-year period rather than a cumulative 5-year figure). *Accord* LBP-01-04, 53 NRC at 130.

[131] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 8-9. *See also* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 4, ¶¶ 14-15; CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 11; CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 9; CAN's Response to Applicants' Initial Written Statement of Position on Issue 3, dated March 5, 2001, at 12. *Accord* LBP-01-04, 53 NRC at 130.

[132] Some of CAN's submissions suggest that it challenges Applicants' cost estimates. *See* CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 9 (the two plants' "projected [O&M] costs could reasonably be expected to increase by 15% over the levels projected, potentially for years at a time"). In the main, however, CAN appears to focus on the need for a sensitivity analysis. *See* CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 12. *See also* CAN's Response to Applicants' Initial Written Statement of Position on Issue 3, dated March 5, 2001, at 9 ("CAN plainly has not contended that the Entergy Companies' cost projections are *invalid*, but merely that, for purposes of establishing the Applicants' financial qualifications, their projections must be analyzed for both increased operating expenses and decreased capacity factors" (internal quotation marks omitted)), 10-11 ("CAN and Mr. Smeloff have not argued that the operating cost levels projected are invalid, but merely that [the two plants] should reasonably be able to withstand adverse circumstances potentially outside of the Entergy companies' control"). However, even if CAN were asserting that the Applicants' cost projections were invalid because of a failure to assume a15-percent increase, CAN fails to support this assertion.

[133] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered page 5,
(continued...)

speculative, and also insufficiently detailed in that it lacked any basis for the 15-percent increase claim and failed to analyze the two plants' past cost-and-revenue experiences.

The Presiding Officer concluded that this subissue came down to a dispute between CAN's and Applicants' experts as to how predicted cost increases must be calculated and that the subissue was therefore admissible.[134] Our review of the hearing transcript confirms the Presiding Officer's conclusion that this issue boils down to a dispute between the parties' experts and therefore raises a "genuine dispute with the applicant on a material issue of ... fact."[135] Therefore, we concur with the Presiding Officer's ruling on this subissue's admissibility.

b. Merits

Given our rulings in the preceding section regarding capacity factors, we find no need to consider the combined effects of a 10-percent capacity factor decrease (from 85 percent down to 75 percent) and a 15-percent annual cost increase. We therefore consider the cost increase issue alone and, here too, rule against CAN.

We are unpersuaded by CAN's comparisons to the industry average for O&M costs. The industry average for O&M costs is not particularly germane to these same two plants. Such costs can vary greatly from plant to plant, or from region to region. Mr. Smeloff and CAN have given us no sound reason why we should consider as relevant the O&M costs at the Salem plants which have never been operated by either PASNY or an Entergy company, or why those plants' O&M costs from 1992 to 1996 are indicative of similar kinds of expenses that FitzPatrick

---

[133](...continued)
¶ 14; CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 11; Tr. 188, 267-68 (both Mr. Smeloff).

[134] *See* LBP-01-04, 53 NRC at 130-31.

[135] *See* 10 C.F.R. § 2.1306(b)(2)(iv).

and Indian Point 3 will incur under Entergy's ownership and management subsequent to the year 2000.[136]

We also find that CAN and Mr. Smeloff offer no basis to support their own estimate of a 15-percent annual increase in O&M costs (other than comparisons to the Salem plant's O&M

---

[136] Both parties repeatedly attempt to bolster their respective arguments on both O&M costs and capacity factor by alluding to situations at other power plants. *See* CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 10-11 (referring to Maine Yankee); Testimony of David A. Lochbaum, dated Feb. 23, 2001, at 2-3 ¶ 9 (referring to the 6-year capacity factor performance of the overall nuclear power plant industry in the United States) and 4 ¶¶ 10-11 (Maine Yankee) (inserted into the Hearing Transcript immediately following p. 66); Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 8 ¶ 19 (Salem), unnumbered page 4 ¶ 7 (Rancho Seco) and unnumbered page 7 ¶ 16 (Rancho Seco); Rebuttal Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated March 2, 2001, at 8 ¶ 16 (River Bend); Tr. 23 (Mr. Judson, referring specifically to Maine Yankee and also referring more generally to "examples in the industry that show that under similar circumstances safety can be compromised"), 70-72 (Mr. Lochbaum, referring to the 6-year capacity factor performance of the overall nuclear power plant industry in the United States), 72-73 (Mr. Lochbaum, referring to Maine Yankee), 74 (Mr. Lochbaum, referring to River Bend), 76 (Mr. Lochbaum, referring to Maine Yankee), 85-89 (Mr. Lochbaum, referring to the 6-year capacity factor performance of the overall nuclear power plant industry in the United States), 89-93 (Mr. Lochbaum, referring to Maine Yankee), 249 (Mr. Smeloff, referring to Salem and Rancho Seco), 257 (Mr. Smeloff, referring to Rancho Seco), 267 (Mr. Smeloff, referring to Salem), 269 (same), 270 (same), 288-90 (Mr. Smeloff, referring to Salem and Rancho Seco), 351 (Mr. Kansler, referring to Salem); 360 (Mr. Smeloff, referring to Salem); CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 29 & 31 (referring to industry-wide outage experience), 33 (Maine Yankee), 35 (Rancho Seco, Salem and Indian Point 2), 36 (Salem); Applicants' Final Statement of Position, dated April 3, 2001, at 43-44 (referring to historic and current industry O&M costs), 44 (referring to River Bend), 45 (referring to Salem).

For the same reasons as enunciated in the text, we find these references unhelpful to our analysis of the instant license transfer applications. Neither party established an adequate foundation for drawing comparisons to these other plants (*e.g.*, a party discussing major anticipated expenses at Indian Point 3 might point out that another nuclear plant's steam generators are the same make and age as those at Indian Point 3, have about the same number of hours of use, and need replacement). As Applicants themselves pointed out at the hearing, "[w]e should not expect the Commission to have to wade through safety issues that relate to other plants in other places of the country that do not relate directly to the matters that you have admitted in this case." Tr. 15-16 (Mr. Silberg).

costs).[137] Rather, we find (as did the NRC Staff in its SERs) that the Applicants' "projected expenses fall in line with [the two plants'] historical trends."[138] Moreover, neither Mr. Smeloff nor CAN contests Applicants' calculations that indicate both FitzPatrick and Indian Point 3 would make a profit even if their O&M costs increased 15 percent annually during the 2001-2005 period.[139] Indeed, Mr. Smeloff concedes the point when he states that Mr. "Green's assertion

---

[137] *See, e.g.*, CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 36-38, where CAN claims to justify its 15-percent figure but instead merely challenges Entergy's O&M calculations and explanations.

[138] *See* both SERs at 6. We also find (as did the Staff) that the anticipated upward pricing pressure in the Northeastern United States would suggest an increase in the two plants' revenues that would partially or wholly offset any cost increase (assuming other factors such as capacity factor remained the same). *See* both SERs at 6, stating:

> [In] the North American Electric Reliability Council (NERC) [10-Year] Reliability Assessment for 1998 through 2007, dated October 1998[,] ... NERC predicts that the Northeast Power Coordinating Council ... which includes [Indian Point 3 and FitzPatrick] will see generating capacity margins dropping from 17.3% in 1998 to 5.0% in 2007. Such a trend would indicate that market prices are subject to upward pricing pressure. Therefore the staff finds that the applicants' assumptions for market prices are reasonable, as shrinking generating capacity margins should cause market prices of electricity to increase in the area, assuming other factors remaining equal [*sic*].

And we further find that, even if electricity rates in the areas which FitzPatrick and Indian Point 3 serve were to increase at a rate lower than Entergy anticipates, the plants could still be operated and maintained consistent with the protection of the public health and safety. *See* Indian Point 3 SER at 6 (concluding that Indian Point 3 could incur a 17-percent drop in revenue and still break even); FitzPatrick SER at 6 (concluding that Indian Point 3 could incur a 12-percent drop in revenue and still break even); both SERs at 7.

[139] *See* Applicants' Written Statement of Position on Issue 3, dated Feb. 26, 2001, at 7 ¶ 16; Written Direct Testimony of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 17 ¶ 28. *Cf.* Indian Point 3 SER at 6 (concluding that Indian Point 3 could incur a 17-percent drop in revenue and still break even); FitzPatrick SER at 6 (concluding that Indian Point 3 could incur a 12-percent drop in revenue and still break even).

that [the two plants] could each withstand a 15% increase in O&M costs is only true if such an increase were to occur without a drop in capacity factor."[140]

Finally, we find no merit in CAN's argument that Entergy's need to finance the debt which paid for the two plants will impair its ability to pay for O&M costs. CAN ignores the critical fact that Entergy included its interest expenses in its cost-and-revenue projections and showed that total revenues less interest expenses would still leave enough funds to cover O&M costs.[141]

The long and short of the matter is that we find Entergy's cost analysis more persuasive than the corresponding analysis offered by CAN. We see no basis in the cost evidence presented prior to and at the Hearing that would justify rejecting or modifying the license transfers at issue here.

5. Subissue D: Whether the Supplemental Funding Available to Entergy FitzPatrick and Entergy Indian Point Offers Adequate Financial Assurance to Protect the Public and Worker Health and Safety

In this subissue, CAN claims that the supplemental funding available to Entergy FitzPatrick and Entergy Indian Point offers inadequate financial assurance to protect the public and worker health and safety.[142] Such funding comprises (1) a credit agreement with Entergy Global Investments, Inc. ("EGI") to provide $20 million each to Entergy FitzPatrick and Entergy Indian Point as a working capital credit line, and (2) a credit agreement with Entergy International

---

[140] *See* CAN's Response to Applicants' Initial Written Statement of Position on Issue 3, dated March 5, 2001, at 11.

[141] The NRC Staff confirmed Applicants' conclusion. *See* both SERs at 5 (where "Interest Expense" is a line item). We also note that Applicants' inclusion of interest expenses in their 5-year cost-and-revenue projections is consistent with the Commission's own inclusion of interest expenses in its term "operation costs" in 10 C.F.R. § 50.33(f).

[142] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 9.

Ltd. ("EIL") for a total of $50 million to be shared by Entergy FitzPatrick and Entergy Indian Point.[143]

CAN 's expert, Mr. Smeloff, points out that these credit lines represent one of only two financial sources from which Entergy FitzPatrick and Entergy Indian Point companies can pay for the plants' fixed operating expenses during an extended outage.[144] He claims that this level of funding would support only relatively short outage at a single facility or a slightly longer collective outage for the two reactors -- too small an operating reserve, in Mr. Smeloff's view.[145] CAN notes that, during the last 15 years, nearly a quarter of the nation's nuclear power plants have been shut down for a year or more,[146] that there were 40 six-month outages at nuclear plants in the United States from 1994 through 1999, and that 19 twelve-month outages occurred during that same 6-year period.[147] CAN and Mr. Smeloff also offer 12 examples of utilities having two or

---

[143] *See, e.g.*, both SERs at 7.

CAN, in its Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 12-14, argues for the first time that the supplemental funding arrangements (*i.e.*, letters of credit from EGI and EIL) are irrelevant to the financial qualifications issue in this proceeding. CAN raises this issue quite late in the proceeding and does not attempt to satisfy the Commission's late-filing requirements set forth in 10 C.F.R. § 2.1308(b). *See* note 37, *supra*.

[144] The other source is retained earnings.

[145] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 9-10; Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 5-6 ¶¶ 17-18; CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Contentions, dated Jan. 31, 2001, at 18; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered page 9 ¶ 21. *Cf.* Rebuttal Testimony of Edward A. Smeloff, dated March 5, 2001, at unnumbered page 4 ¶ 9 ("If cash from the EIL line of credit is necessary to maintain the workforce at IP3 during an extended outage it would not be available for [Entergy FitzPatrick] if the capacity factor falls significantly below what has been forecast").

[146] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 10 n.11.

[147] *See* Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 6 n.6. *See also* Declaration of Edward A. Smeloff, dated Jan. 31, 2001, at ¶ 9, listing numerous outage times at various reactors (including simultaneous outages of multiple-unit reactors) that

(continued...)

more plants out of service simultaneously.[148] Regarding the insufficiency of such an operating reserve, CAN also relies on Entergy FitzPatrick's and Entergy Indian Point's status as newly formed entities that are not public utilities.[149]

CAN further claims that the credibility of the credit arrangements have not been clearly established, and points to the possibility that the transferees could "need to draw on those agreements and then find that the required funds are not available could compromise safety at FitzPatrick and/or [Indian Point] 3."[150] CAN and Mr. Smeloff assert that both EIL and EGI's fiduciary interests are closely intertwined with those of Entergy FitzPatrick and Entergy Indian Point. They also argue that it is unclear from the two license transfer applications whether EIL and EGI performed due diligence examinations of Entergy FitzPatrick's and Entergy Indian Point's business plans, or whether EIL and EGI have sufficiently large and sufficiently liquid assets to meet the terms of the credit lines, especially as neither is a well-known financial institution. CAN and Mr. Smeloff suggest the need for audited financial statements to determine

---

[147](...continued)
far exceed the maximum outage for which EGI's and EIL's funds would cover.

[148] *See* Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered pages 9-10 ¶ 22.

[149] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 10. Presumably, CAN finds this status significant because Entergy FitzPatrick and Entergy Indian Point cannot rely on either New York Public Service Commission or the Federal Energy Regulatory Commission to assure reimbursement of its costs. *Cf. id.* at 18 ("the Entergy applicants cannot return to ratepayers for ... cost increases").

[150] *See id.* at 11; CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 13.

the answers to these questions; they also propose that the Commission require a line of credit with a traditional financial institution (rather than with an interlocking entity).[151]

Applicants respond that the Commission has already ruled that questions regarding the sufficiency of supplemental funding do not constitute grounds for a hearing, "on the ground that NRC rules do not mandate supplemental funding."[152] According to Applicants, there is no reason "why CAN should fare better the second time around with this previously rejected contention."[153] In the alternative, Applicants claim that the issue was based on non-proprietary versions of the applications and should therefore be rejected as untimely.[154] Finally (and in apparent contradiction to its immediately preceding argument), Applicants acknowledge that Mr. Smeloff's knowledge of the cash and cash equivalents of EGI and EIL arises from the proprietary data made available to CAN, but claim that Mr. Smeloff has misread the financial statements and that, contrary to his claim, the actual cash and cash equivalent amounts available to EIL and EGI are more than sufficient to support the lines of credit.[155]

The Presiding Officer first concluded that

---

[151] *See* CAN's Revised Contention on Financial Qualifications Issue, dated Jan. 10, 2001, at 10-11; CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 14-15; Declaration of Edward A. Smeloff, dated Jan. 10, 2001, at unnumbered pages 6-7 ¶ 19; Testimony of Edward A. Smeloff, dated Feb. 26, 2001, at unnumbered pages 11 ¶ 23; CAN's Initial Written Statement of Position on Issue #3, dated Feb. 26, 2001, at 13-14; Tr. 314-15 (Mr. Smeloff).

[152] *See* Applicants' Response to CAN's Contention on Financial Qualifications, dated Jan. 24, 2001, at 15, quoting CLI-00-22, 52 NRC at 300.

[153] *See* Applicants' Response to CAN's Contention on Financial Qualifications, dated Jan. 24, 2001, at 15.

[154] *See id.* at 15-16.

[155] *See id.* at 16; Affidavit of Barrett E. Green, dated Jan. 22, 2001, at unnumbered pages 2-3 ¶ 5.

> [t]his sub-issue may to some extent rely on information available other than through the proprietary information. But the issue as a whole can be better understood after reference to the proprietary data. As set forth by CAN, its arguments on this sub-issue "are based in part on the financial statements of EGI and EIL, which were not available to CAN prior to" CLI-00-22.[156]

The Presiding Officer relied in part on Applicants' acknowledgment that one crucial aspect of the issue was only available through the proprietary data.

Second, the Presiding Officer examined the nature of the subissue and concluded that it did not "focus solely on the *amount* of supplemental funding required so as to be barred by the prohibitions of CLI-00-22."[157] Indeed, he found that the subissue focused only incidentally on the amount of supplemental funding and instead primarily sought "to determine the adequacy of supplemental funding in the context of the [Entergy FitzPatrick's] and [Entergy Indian Point's] asserted status as non-electrical utilities that are newly formed entities and their ability to demonstrate the validity of projected operations and maintenance ... costs in the context of cost and revenue projections."[158]

Finally, the Presiding Officer concluded that "[t]he crucial unresolved question in this sub-issue is the difference of opinion between Mr. Smeloff and Mr. Green, both of whom appear to be qualified experts, on the *limited liquidity* of EGI and EIL's assets."[159] He therefore admitted for litigation the issue of the extent to which the limited liquidity of EGI and EIL's assets undermines

---

[156] *See* LBP-01-04, 53 NRC at 132,quoting CAN's Reply to Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 31, 2001, at 16.

[157] *See* LBP-01-04, 53 NRC at 132 (emphasis added).

[158] *See id.* 132.

[159] *See id.* 132 (emphasis added).

Entergy FitzPatrick's and Entergy Indian Point's ability to demonstrate reasonable financial assurance, as required by 10 C.F.R. § 50.33(f).[160]

Our rules do not contemplate hearings on supplemental funding questions. As we stated earlier in this proceeding, "the sufficiency *vel non* of the $90 million supplemental funding does not constitute grounds for a hearing"[161] because the funds are "not [, strictly speaking,] required by our rules [and the issue] therefore lies outside the bounds of our license transfer process -- which focuses on whether [the transferee] meets the required financial and technical qualifications."[162] Given that our regulations do not require supplemental funding as part of a showing of financial qualifications, we do not see why the creditworthiness of the guarantor would be any more germane than the amount of the supplemental funding guarantee itself (an issue we rejected earlier in this proceeding). As we have already concluded that Applicants' cost-and-revenue projections provide us the requisite assurance of the Entergy applicants' financial qualifications, we need not consider Entergy's promise of supplemental funds as part of our financial qualifications inquiry.

In any event, we do not share CAN's concerns that Entergy will prove unable to make good on its supplemental funding commitment.[163] Based on the uncontradicted representations of Mr. Barrett (one of Applicants' expert witnesses), EIL's and EGI's cash and cash equivalents are valued at an amount many times higher than the amounts of the lines of credit which they

---

[160] *See id.* 132-33.

[161] *See* CLI-00-22, 52 NRC at 299.

[162] *See id.* at 300 n.22, quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 178 (2000).

[163] We reject, however, Applicants' assertion that CAN presented this argument for the first time at the hearing. *See* Applicants' Final Statement of Position, dated April 3, 2001, at 57. To the contrary, CAN raised the argument in its Revised Contention on Financial Qualifications on January 10th. *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 10.

support.[164] And, contrary to CAN's view, Entergy commits liquid funds. Entergy expert Barrett E. Green indicated that the vast majority of the assets held by EIL and EGI are in commercial paper, about 10 percent are in a mutual fund, and about 2 percent are in a note receivable from an affiliate company.[165] Mr. Green represents, without contradiction from CAN, that the commercial paper and the mutual fund are highly liquid (with the daily commercial paper market averaging $150 billion[166]) and that the proceeds from their redemption would be available on or close to the *same day* as the sale.[167] Given the ready marketability of mutual fund shares and commercial paper, we have no reason to believe that EIL and EGI would be unable to provide funds in a timely manner to Entergy FitzPatrick and Entergy Indian Point if called upon to do so.

As additional protection, since Entergy FitzPatrick and Entergy Indian Point have proffered the guarantee whether or not it is mandated by our regulations, the NRC Staff has imposed a license condition prohibiting Entergy from diminishing or voiding these guarantees.[168] We presume that the transferees will comply with the requirements of their licenses.[169]

---

[164] *See* Affidavit of Barrett E. Green, dated Jan. 22, 2001, at unnumbered pages 2-3 ¶ 5.

[165] *See* Attachment 3 ("Cash and cash equivalents holdings of Entergy International Ltd., LLC and Entergy Global Investments, Inc.") to Affidavit of Barrett E. Green, dated Jan. 22, 2001.

[166] *See* Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 17 ¶ 29.

[167] *See* Applicants' Initial Written Statement of Position on Issue 3 (CAN's Revised Contention on Financial Qualifications), dated Feb. 26, 2001, at 7-8 ¶¶ 17-19; Written Direct Testimony and Joint Affidavit of Barrett E. Green and Michael R. Kansler on CAN's Revised Contention on Financial Qualifications, dated Feb. 23, 2001, at 17-18 ¶ 29 (the domestic commercial paper has same-day liquidity, the European commercial paper has a two-day settlement period, and the mutual fund has same-day liquidity).

[168] *See* Staff Orders, 65 Fed. Reg. at 70,845 (Indian Point 3), 70.847 (FitzPatrick). *See also* both SERs at 7.

[169] *See, e.g.*, *Private Fuel Storage, L.L.C.* (ISFSI), CLI-01-09, 53 NRC 232, 235 (2001); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207

(continued...)

Moreover, Applicants aver that these funds are dedicated specifically to the potential needs of FitzPatrick and Indian Point 3 and would therefore be unavailable to other Entergy entities.[170]

In short, as a legal matter, the amount and liquidity of Entergy's supplemental funds are irrelevant to this litigation because our rules do not require such funds to be set aside.[171] As a practical matter, Entergy has in fact committed supplemental funds, a voluntary commitment that appears meaningful and, if necessary, enforceable by virtue of the Staff's license condition. We see no basis for further inquiry into the supplemental funds matter.

---

[169](...continued)
(2000); *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 400 (1995); *Northern Ind. Pub. Serv. Co.* (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974); *Virginia Elec. and Power Co.* (North Anna Power Station, Units 3 and 4), LBP-74-56, 8 AEC 126, 148 (1974).

[170] *See* Applicants' Answer to CAN's Request for Hearing, dated Aug. 10, 2000, at 26 n.20. *See also* CLI-00-22, 52 NRC at 299.

[171] *See* CLI-00-22, 52 NRC at 300 (concluding that "NRC rules do not mandate supplemental funding" and that "[t]he parent company guarantee is supplemental information and not material to the financial qualifications requirements of 10 C.F.R. § 50.33(f)(2)").

6. Subissue E: The Entergy Applicants' Market Revenue Projections Have Not Been Evaluated to Determine Whether Their Assumptions about Market Prices Are Reasonable. Market Factors in Entergy FitzPatrick's and Entergy Indian Point's Market Areas Could Introduce Significant Uncertainty and Prevent the Companies from Meeting their Revenue Requirements, Thereby Undermining Applicants' Ability to Offer Adequate Financial Assurance

CAN here asserts that neither the Staff nor Applicants have adequately evaluated Entergy's market revenue projections for the two plants (i) in light of significant uncertainty in the market such as utility deregulation and planned new generation and also (ii) in light of Applicants' providing revenue data for only 5 years (instead of for the full period remaining on the two licenses). CAN acknowledges the difficulty in predicting market prices but nonetheless seeks a "deeper investigation of applicant's financial reserves," which CAN alleges its own expert witness has done.[172]

According to Applicants, CAN's claim should be rejected as untimely because CAN relies only on publicly available testimony given in another licensing proceeding involving market volatility in New England, publicly-available energy generation projections in New York State, and news accounts of deregulation effects in California -- all of which could have been cited without access to proprietary data. Applicants further claim that, even if the subissue is ruled to be timely, the NRC Staff has already performed a detailed analysis of Entergy's market projections. Applicants fault CAN both for failing to provide any specific criticism of the NRC Staff's methodology and for asserting nothing more than its preference for a more thorough review of the facts.[173]

---

[172] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 12.

[173] *See* Applicants' Response to CAN's Revised Contention on Financial Qualifications, dated Jan. 24, 2001, at 17-20.

The Presiding Officer first noted that he had already admitted (in Subissue 2) the question whether financial projections of the Entergy companies should extend for 5 years or for the remaining term of the license (a legal interpretation of 10 C.F.R. § 50.33(f)). The Presiding Officer then found unpersuasive Applicants' argument that this subpart of the contention be considered late-filed, and hence inadmissible, due to the use of publicly available information. Again, he explained that, "even though this information may have been available at the time the original contention was filed, proprietary information provided by the Licensees was arguably necessary for CAN to assess the adequacy of [Applicants'] and Staff's projections."[174]

However, the Presiding Officer ultimately rejected this subissue for lack of the requisite specificity. He ruled that the projections and estimates sought by CAN

> are so speculative, subjective, and uncertain that there is no assurance that the figures could reflect accurately [Applicants'] situation in the future [and that], even if I accepted CAN's position with respect to the need for a further analysis of the projected market conditions, CAN has not stated what aspects, nor a methodology for projecting these figures in the Staff's report that it regards as inadequate.[175]

We agree with the Presiding Officer's rejection of this subissue. Moreover, we would add that, at p. 41 of this order, we considered and rejected CAN's "uncertainty" argument.

---

[174] *See* LBP-01-04, 53 NRC at 133.

[175] *See id.*

7. CAN's Proposed Conditions

CAN also proposed three license conditions which would, according to CAN, address its concerns regarding financial qualifications.[176] However, as we find no merit in any of CAN's arguments regarding financial qualifications, we need not address its proposed conditions.

8. Additional Commission Observations

Although we have confidence in the NRC Staff's ability to evaluate license transfer applications and to assess the financial qualifications of the transferees, we would also note that such review is not the agency's only line of defense in matters of financial qualifications. We continue to view our inspection and enforcement programs as the major vehicles by which to ensure plant safety.[177] Moreover, the team that prepared the financial qualifications portions of

---

[176] *See* CAN's Revised Contention on Financial Qualifications, dated Jan. 10, 2001, at 17-19:

> Should the Commission determine that it would be more prudent to impose license conditions rather than dismiss the application, the following conditions would address the major flaws and insufficiencies in the proposed transaction as it stands:
>
> 1) The Commission should require that the level of supplemental funding in the form of letters of credit or sureties provided by Entergy and/or its other subsidiaries be sufficient to cover a one-year shutdown for extensive maintenance at each reactor....
>
> 2) In the alternative, Entergy Corp. or any of its other subsidiaries should be prevented from absorbing any retained earnings of [Entergy FitzPatrick] and [Entergy Indian Point 3] (or Entergy Nuclear Investment Co. #1 and #2) until such a 1-year reserve is established and placed in escrow until needed.... As part of this condition, it would also be necessary to require that Entergy, Entergy Global Investments, and/or Entergy Investments provide supplemental funding equivalent to that in Condition #1 above until the reserve is established, or in case it cannot be.
>
> 3) In another alternative, the Commission could require that [PASNY] continue its obligation to insure the safe operation of FitzPatrick and [Indian Point] 3....

[177] *See* authority cited at note 115, *supra*. *See also* Tr. 330-31, 334-36 (all Mr. Wood).
(continued...)

the FitzPatrick and Indian Point 3 SERs likewise is keeping abreast of licensees' financial condition by both reading their annual reports and financial statements[178] and also following the trade press,[179] and this team will notify the Commission if problems arise.[180] (As Mr. Robert Wood of the NRC Staff correctly stated at the hearing, "severe financial distress from any of the licensees is something that's not going to be hidden from view very long."[181]) Finally, if the Commission notes that financial problems are compromising the safety of the plant and the public, we will require the plant to take corrective action and, if it does not or cannot comply, we can shut down the plant.[182]

II. DECOMMISSIONING FUNDING ISSUES

As part of their transfer agreements, Applicants have created an unusual arrangement whereby PASNY would keep the decommissioning funds after transferring the FitzPatrick and Indian Point 3 plants to the Entergy companies.[183] (Ordinarily, a transferee would receive a decommissioning fund along with the nuclear plant with which it was associated.) By leaving the funds with PASNY (a state entity exempt from Federal taxes), Entergy seeks to avoid any risk of

---

[177](...continued)
Regarding the Commission's confidence in its inspection and enforcement programs, *see generally* the authority cited in note 115, *supra*.

[178] *See* Tr. 334, 381, 384 (all Mr. Wood).

[179] *See* Tr. 334, 335, 337 (all Mr. Wood).

[180] *See* Tr. 381 (Mr. Wood).

[181] *See* Tr. 335.

[182] We note that the NRC Staff and Entergy agree on this point. *See* Tr. 307-09 (Mr. Wood); 329-43 (Messrs. Green and Wood), 333 (Mr. Green).

[183] *See, e.g.*, both SERs at 2, 8. The arrangement appears, however, not to be unique. *See* Tr. 142-44 (Mr. Hom). It is similar to arrangements used in the transfer of the Crystal River, Three Mile Island-1 and Public Service Electric and Gas Company's holdings in Hope Creek, Peach Bottom Units 1 and 2, and Salem Units 1 and 2. *See id.*; FitzPatrick Application at 14 n.4; Indian Point 3 Application at 16 n.4.

having to pay capital gains tax on the funds. The funds for decommissioning each of the two facilities are currently held in a Master Decommissioning Trust, comprising a separate fund for each facility and administered by the Bank of New York as trustee.[184] The funds may be spent *only* on decommissioning activities for the two facilities.[185] PASNY may transfer either fund to the Entergy companies at the expiration of the operating license, or upon the dismantlement of the unit, or if the funds become taxable.[186] Under the terms of the decommissioning agreement between PASNY and the Entergy companies, PASNY's decommissioning obligations are limited to the amounts in the funds, though the total amount PASNY has agreed to pay for decommissioning may decrease if Entergy acquires nuclear power plants adjacent to either Indian Point 3 or FitzPatrick.[187]

In CLI-00-22, we admitted two of CAN's issues regarding this arrangement: whether NRC approval of the transfers will deprive the Commission of authority to require PASNY to conduct "remediation" during decommissioning, and whether, under those circumstances, PASNY would no longer have access to the decommissioning trust funds for the remediation

---

[184] *See* FitzPatrick Application at 11; Indian Point 3 Application at 12-13, 15; both SERs at 8; Applicants' Initial Written Statement of Position [on Issue #2], dated Jan. 12, 2001, at 4; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 2 ¶ 5 (entered into the Record following Tr. 42, and identified as Licensee Exh. 2); Tr. 47, 55 (both Mr. Silberg).

[185] *See* FitzPatrick Application at 11, 12, 13; Indian Point 3 Application at 13, 15; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); Applicants' Initial Written Statement of Position [on Issue #2], dated Jan. 12, 2001, at 4; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at p. 2 ¶ 5 and p. 6 ¶ 16.

[186] *See* both Applications at 2; FitzPatrick SER at 3; Indian Point 3 SER at 2; Applicants' Initial Written Statement of Position [on Issue #2], dated Jan. 12, 2001, at 4; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at p. 3 ¶ 8 and p. 4 ¶ 11.

[187] *See* FitzPatrick Application at 2, 11; Indian Point 3 Application at 2, 13; both SERs at 2, 8; Applicants' Initial Written Statement of Position [on Issue #2], dated Jan. 12, 2001, at 5, 8; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 5 ¶ 14.

which it would need to complete.[188] We noted that CAN's issues were related to another then-pending (but subsequently withdrawn) issue: whether PASNY's retention of the decommissioning funds was consistent with the requirements of 10 C.F.R. § 50.75.[189] We instructed CAN to address its own decommissioning issues in the context of that issue, and we pointed out to CAN that the decommissioning trust agreement had been modified somewhat by the NRC Staff's November 9, 2000 orders (at 6 ¶ 9).[190] For the reasons set forth below, we find that the funding arrangement here is consistent with our regulations and raises no concerns as to public health and safety. Because we find in Applicants' favor regarding CAN's decommissioning funding issue, we need not consider the series of conditions that CAN proposes as a means to mitigate its health-and-safety concerns.[191]

A. Compliance with 10 C.F.R. § 50.75(e)(1)(vi)

---

[188] *See* CLI-00-22, 52 NRC at 302 n.25. *See also* CAN's Reply Brief, dated Aug. 17, 2000, at 14. *See also* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 3. Concerning the confusion in this adjudication surrounding the definition of "remediation," see p. 71, *infra*.

[189] The Nuclear Generation Employees Association ("the Association"), in its now-withdrawn Petition to Intervene, had raised the issue whether Applicants' arrangement is consistent with the Commission's own decommissioning requirements of 10 C.F.R. § 50.75(e). According to the Association, section 50.75(e) requires the transferees to hold the decommissioning funds. The Association disputed Applicants' claim that the license transfer request meets the requirements of 10 C.F.R. § 50.75(e)(1)(vi), *i.e.*, that Applicant provide financial assurance "equivalent" to that offered by the decommissioning devices (*e.g.*, a surety or insurance arrangement) specified in the earlier portions of section 50.75(e)(1). The Association asserted that outstanding questions of tax liability limit the availability of the decommissioning funds and also that Applicants have imposed various contractual limitations upon the availability of the funds (*i.e.*, limits based upon plants owned, limits on the Authority's liability, and provisions to pay less than the full decommissioning funding). The Association also asserted that the arrangement contravenes 10 C.F.R. § 50.75(e)(1)(v), which specifies that the terms of the contract must be with the licensee's customers and must include provisions requiring the electricity buyers to pay for decommissioning.

[190] *See* CLI-00-22, 52 NRC at 302 n.25. *See also* Orders Approving Transfer of License and Conforming Amendments, Docket Nos. 50-286 and 50-333, 65 Fed. Reg. 70,843 & 70,845 (Nov. 28, 2001).

[191] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 15-18.

CAN objects to Applicants' decommissioning funding arrangement on the ground that it is dissimilar to two of the five pre-approved types of decommissioning funding arrangements which are specified in section 50.75(e)(1)(i) and (iii) and on which Applicants purportedly rely.[192] While we agree with CAN that Applicants' arrangement is dissimilar to those set out in subsections (i) and (iii), we disagree with the assumption apparently underlying CAN's argument, *i.e.*, that a funding arrangement must be identical to, or at least a very close approximation of, one or more of the pre-approved arrangements in order to merit approval under section 50.75(e)(1)(vi).[193]

Rather, as our rules state, a funding arrangement qualifies for approval under subsection (vi) if it provides a level of decommissioning funding assurance "equivalent" to the level provided by the arrangements set forth in subsections (i) through (v). Applicants may *combine* different mechanisms to achieve this required equivalence. Subsection (vi) itself plainly establishes an "equivalence" test:

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

(Emphasis added.)[194]

---

[192] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 5-9; CAN's Response to Applicants' Initial Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 10-12 (pointing out various differences between Applicants' proposed method and the methodology set forth in subsection (iii)).

[193] *See* Tr. 138 (Mr. Judson: "this doesn't satisfy the standard of prepayment in the NRC's regulations"); CAN's Response to Applicants' Initial Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 7-8 & n.5.

[194] *See also* CLI-00-22, 52 NRC at 302 ("the issue here is whether the Applicants' financial assurance arrangement is lawful ... and 'equivalent' of those otherwise prescribed in ... 10 C.F.R. § 50.75(e)(1)(i)-(v)").

Regarding combination of mechanisms, *see* "Standard Review Plan on Power Reactor (continued...)

We find that a multitude of provisions in the Applications, as conditioned by the NRC Staff, collectively give us the requisite assurance, "equivalent" to the assurance given by the particular funding devices authorized by our rules, that the decommissioning funds will be available to PASNY:[195]

> (i) The Trust agreement limits the use of the funds' assets to decommissioning expenses as defined by the NRC;[196]
>
> (ii) The Trust Agreement permits no contribution of property to the trusts other than liquid assets;[197]

---

[194](...continued)
Licensee Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577 (Rev. 1, March 1999) at 13 (contemplating that transferees would propose "[t]hird-party guarantee mechanisms ... used *in combination with* other assurance mechanisms" (emphasis added)). *See also id.*:

> As indicated in [subsection (vi)], the reviewer should evaluate other decommissioning funding assurance mechanisms or *combinations of mechanisms* proposed by licensees or license applicants on a case-by-case basis to determine that the mechanism or *combination of mechanisms* provide assurance of decommissioning funding equivalent to that provided by the funding mechanisms specified in [other subsections of section 50.75(e)(1)].

(Emphasis added.)

[195] The amount of the decommissioning trust funds meets the requirements of the prepayment decommissioning funding assurance using the formulae in 10 C.F.R. § 50.75(c). *See* both SERs at 9; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 2-3 ¶ 6. As CAN acknowledges, the sufficiency of the amount currently in the decommissioning funds is not at issue in this proceeding. *See* CAN's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 5 & n.1.

[196] *See* FitzPatrick Application at 11, 12, 13; Indian Point 3 Application at 13, 15; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); both SERs at 8, 13. *See also* Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 3-4 ¶ 9.

[197] *See* FitzPatrick Application at 12; Indian Point 3 Application at 14; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); FitzPatrick SER at 9, 13; Indian Point 3 SER at 8, 13.

(iii) The Trust Agreement prohibits investments in securities of PASNY or Entergy companies and limits investments in entities owning nuclear power plants;[198]

(iv) No disbursements from the funds may be made until the trustee has first given the NRC 30 days written notice of the payment and no disbursements may be made if the trustee receives prior written objection from the NRC;[199]

(v) No material modification can be made to the trust without NRC's prior written consent;[200]

(vi) PASNY's interest in the trusts can be transferred only to the licensed owner of the unit responsible for decommissioning and is not subject to claims of PASNY's creditors;[201]

(vii) PASNY is prohibited from terminating any trust fund established under the Master Trust without obtaining prior written consent of the NRC;[202]

(viii) Because of PASNY's status as a corporate municipal instrumentality and a political subdivision of the State, and because of New York State's pledge not to limit or alter PASNY's rights until PASNY's contractual obligations are satisfied, a trust held by PASNY could provide more assurance than trusts held by an investor-owned utility;[203] and

(ix) The Bank of New York's fiduciary duties as trustee, the pre-funded character of the decommissioning funds, the similarities with third-party guarantees, and the conditions

---

[198] *See* FitzPatrick Application at 12; Indian Point 3 Application at 14; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); FitzPatrick SER at 9, 14; Indian Point 3 SER at 9, 13-14.

[199] *See* FitzPatrick Application at 12, 13-14; Indian Point 3 Application at 14, 15; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); both SERs at 9, 14. *See also* Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 3 ¶ 9 (referring to NRC Staff modification to the Trust Agreement); Tr. 57 (Mr. Silberg).

[200] *See* FitzPatrick Application at 12; Indian Point 3 Application at 14; Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846 (FitzPatrick); both SERs at 9, 14. *See also* Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 4 ¶ 9.

[201] *See* FitzPatrick Application at 13; Indian Point 3 Application at 15; both SERs at 8. *See also* Tr. 46 (Messrs. Collins and Silberg), 47 (Mr. Silberg: "under the conditions that are established, no money can be transferred from the funds without prior notice to the NRC and cannot be transferred with NRC objections. So, presumably, NRC would not allow transfer of these funds to creditors not involved in decommissioning....").

[202] *See* Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,847 (FitzPatrick); both SERs at 11, 14.

[203] *See* both SERs at 9, 10, 12.

> included in the NRC Staff's two orders approving the license conditions (including those added as conforming license conditions) provide additional assurance of the availability of decommissioning funds when needed.[204]

These extensive protective measures satisfy us regarding the integrity and sufficiency of the PASNY-Entergy decommissioning funding arrangements. Nothing in CAN's presentation at the hearing persuades us otherwise.

First, CAN criticizes the conclusion in the NRC Staff's SERs that the arrangement is similar to a "prepayment" method (in section 50.75(e)(1)(i)).[205] (The Staff had concluded that the funds can be expected to grow to levels that will satisfy the Commission's minimum funding requirements.[206]) More specifically, CAN objects that the funds have not yet reached full value and are not being transferred to Entergy.[207] CAN seems here to be arguing that without a transfer of the funds themselves and without the funds' values reaching the amounts required under the regulations, the funds cannot strictly be said to be "prepaid."

This argument misses the mark in several respects. CAN offers no support for its assumption that either an actual transfer or a full-value fund amount is essential to "prepayment," nor do we find any such support in our "prepayment" rule (subsection (i)). Indeed, that rule plainly does not call for full-valued fund amounts. As CAN acknowledges,[208] subsection (i) expressly provides for the absence of full funding by permitting the licensee to take credit for a

---

[204] *See id.* at 9, 12-14.

[205] Ironically, CAN itself acknowledges the similarity. *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 6 ("The arrangement approximates the requirements of 50.75(e)(1)(i), but the Staff acknowledges" certain dissimilarities).

[206] *See* both SERs at 9.

[207] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 5-6.

[208] *See id.* at 5.

2-percent real rate of return on investment.[209] CAN's failure to come to grips with the 2-percent return provision undercuts its criticism of the funds' not having yet reached their full expected value. Further, CAN's argument contradicts its acknowledgment that the sufficiency of the funding amount is not at issue in this proceeding.[210]

As for CAN's complaint about the absence of actual transfer of funds to Entergy, nothing in our prepayment rules requires such a transfer. CAN is correct, of course, that the PASNY-Entergy arrangement does not meet our prepayment rule in every particular. But this does not matter. CAN's argument simply ignores the fundamental point that Applicants are seeking to qualify the funds *not* under the "prepayment" provisions of subsection (i) as such, *but rather* under the "equivalent-assurance" provisions of subsection (vi).

In a related argument concerning subsection (i), CAN asserts that the possibility of PASNY holding the trust for 75 years (even without considering license renewal) undermines any argument that the proposed methodology is the "equivalent" of the prepayment methodology referenced in subsection (i).[211] But the 75-year period is irrelevant to this license transfer proceeding because the holding period is the same whether PASNY or Entergy holds the licenses. Either way, the funds remain in a decommissioning trust and are dedicated solely to the decommissioning of the two plants.

Next, CAN criticizes the NRC Staff for concluding that the PASNY-Entergy arrangement was similar to the "surety" method of decommissioning funding (in section 50.75(e)(1)(iii)).[212] The Staff had relied on PASNY's traditionally strong bond ratings and New York State's

---

[209] *See* FitzPatrick SER at 9-10; Indian Point 3 SER at 9.

[210] *See* CAN's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 5 & n.1.

[211] *See id.* at 9. *Cf.* FitzPatrick SER at 10-11; Indian Point 3 SER at 10.

[212] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 6-7.

commitment not to disband or reorganize PASNY without first ensuring the satisfaction of all of its contractual obligations.[213] CAN acknowledges the similarities between the proposed arrangement and the "surety method, insurance, or other guarantee method" provided in subsection (iii), but nonetheless objects that PASNY does not meet the requirements of subsection (iii) by being regulated or licensed as a surety company, being a parent of the transferees, or being an appropriate Federal or state agency.[214]

CAN asserts that "[t]he fact that the future ratings of [PASNY]'s bonds rests on [its] participation in an increasingly volatile and competitive energy market is far from the level of assurance offered by the comparatively stable and conservative strategy of a licensed surety company."[215] CAN further argues, relying on a 1998 NRC Staff rulemaking analysis, that the Staff "only contemplate[d] separate or 'captive' insurers licensed as such" and assumed that "providers of financial mechanisms such as surety bonds and letters of credit [would] require[] collateral for a portion or the full amount of the mechanism."[216] CAN finds an analogy in the Staff's concern (expressed in its 1998 analysis) about the willingness of a utility to issue a guarantee for decommissioning nuclear plants once it had spun off those plants into separately incorporated companies.[217] CAN points out that PASNY has similarly divested itself of its

---

[213] *See* both SERs at 10, 12.

[214] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 6.

[215] *See id.* at 7; Tr. 141-42 (Mr. Judson).

[216] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 7, citing SECY-98-164, "Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (July 2, 1998), Attachment 5 (the Staff's regulatory analysis), § 3.2.4 ("Availability and Security of Financial Assurance Mechanisms to Supplement or Replace External Sinking Funds").

[217] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 7, citing SECY-98-164, "Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (July 2, 1998), Attachment 5 (the Staff's regulatory analysis), § 3.2.4 ("Availability and (continued...)

nuclear assets,[218] but that PASNY does not even go so far as to offer a guarantee -- instead merely agreeing to hold and make payments from the decommissioning funds.[219]

CAN's line of argument ignores several critical points. Again, Applicants' failure to meet the precise terms of an NRC-approved decommissioning funding method (here, the "surety" method) is not decisive. Applicants are not seeking approval of the arrangement under subsection (iii) and therefore do not need to satisfy all the requirements of that subsection. Also, though PASNY is not a regulated or licensed surety or parent company, the financial assurance at issue here is actually *greater* than that provided by a surety or parent -- Applicants' assurance takes the form of money that has already been deposited in the two funds, as opposed to a mere promise of a surety, guarantee or insurance policy to pay the money at some future time.[220] Finally, CAN's question about PASNY's failure to offer a "guarantee" seems to us irrelevant. The Bank of New York, not PASNY, holds the decommissioning funds, and is obliged to preserve and disburse them under specified conditions.[221]

---

[217](...continued)
Security of Financial Assurance Mechanisms to Supplement or Replace External Sinking Funds").

[218] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 7, citing SECY-98-164, "Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (July 2, 1998), Attachment 5 (the Staff's regulatory analysis), § 3.2.4 ("Availability and Security of Financial Assurance Mechanisms to Supplement or Replace External Sinking Funds").

[219] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 8-9.

[220] *See* FitzPatrick Application at 15 ("current funding level exceeds the amount needed to meet the NRC's minimum funding requirements"); Indian Point 3 Application at 16 (same). For an explanation of the calculations justifying this conclusion, *See* Response to NRC Request for Additional Information Regarding License Transfer Information, dated June 16, 2001, Response to Question 3.

[221] Further, as noted at note 42, *supra*, the NRC Staff's actions are not at issue in a license transfer adjudication.

CAN next examines subsections (i) and (iii) collectively and argues that the regulations preclude Applicants from showing that their proposed mechanism "could qualify as a combination of Prepayment and Surety mechanisms."[222] CAN argues that the reference in subsection (vi) to a "combination of mechanisms"

> require[s] separate arrangements that reinforce each other, if the applicant cannot provide a single satisfactory mechanism. For instance, if an applicant's prepayment did not satisfy financial assurance requirements, they would be required to combine it with a satisfactory insurance, guarantee or surety method.[223]

CAN's argument is not particularly clear.[224] We assume CAN means to assert that an applicant's plan must fully satisfy at least one of the standards enumerated in subsections (i) through (v) to qualify as "equivalent" assurance under subsection (vi). Such an interpretation would render subsection (vi) superfluous. It would also unduly constrain the flexibility which subsection (vi) accords to applicants in structuring their decommissioning funding methods, and would thus run counter to the Commission's intention to at least consider, on a case-by-case basis, funding assurance mechanisms not expressly permitted under subsections (i) through (v). In promulgating subsection (vi), we intended to give applicants the flexibility necessary to structure methods outside the parameters of any one of the five methods set forth in subsections (i) through (v), or to combine portions of those subsections in such a way as to provide the same end-result of funding assurance.[225]

---

[222] *See* CAN's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 7-8.

[223] *See id.* at 8 n.5.

[224] Regarding a party's duty to present its arguments clearly, *see Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 297-98 (1994) (and authority cited therein).

[225] This idea was implied in the NRC Staff's statement in NUREG-1577 regarding subsection (vi):

(continued...)

Perhaps recognizing the bankruptcy of its effort to hold Applicants to the precise terms of our approved decommissioning funding methods (subsections (i) through (v)), CAN turns directly to subsection (vi) and argues that the NRC Staff's above-cited regulatory analysis of that subsection nowhere "contemplates the possibility" of Applicants' kind of arrangement.[226] But the staff's failure to refer, in advance, to the precise arrangement later developed by PASNY and Entergy merely suggests to us that the Staff could not anticipate every kind of arrangement that license transfer applicants or decommissioning planners might submit under subsection (vi). That provision was deliberately left open-ended, and allows for innovative funding arrangements as long as they provide protections equivalent to pre-approved funding methods. Here, by a preponderance of the evidence, Applicants have shown that their arrangements provide assurance of adequate decommissioning funding.

Lastly, CAN claims that the issue it raised concerning PASNY's access to the decommissioning funds does not concern whether those funds are available for "decommissioning." CAN asserts that the issue instead focuses upon the unavailability of the

---

[225](...continued)

> Third-party guarantee mechanisms such as surety bonds or letters of credit, should guarantee the total amount of currently estimated decommissioning costs. If these mechanisms are used in combination with other assurance mechanisms, *the combined amount should at least equal current estimated decommissioning costs*.

See "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," NUREG-1577 (Rev. 1, March 1999) at 13 (emphasis added). *See also* Final Rule, "Financial Assurance Requirements for Decommissioning Nuclear Power Reactors," 63 Fed. Reg. 50,465, 50,469, 50,473 (Sept. 22, 1998).

[226] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 7, citing SECY-98-164, "Final Rule on Financial Assurance Requirements for Decommissioning Nuclear Power Reactors" (July 2, 1998), Attachment 5 (the Staff's regulatory analysis), § 3.2.4 ("Availability and Security of Financial Assurance Mechanisms to Supplement or Replace External Sinking Funds").

funds for the off-site "remediation" activities for which Entergy disclaims responsibility.[227] CAN asserts that (1) PASNY's "remediation responsibilities do not fall under the NRC regulation's rubric concerning decommissioning and (2) amendments to the Master Decommissioning Trust and the conditions NRC Staff have [*sic*] placed on the license transfer limit [PASNY] to withdrawing funds for the purpose of compensating the Entergy companies solely for the cost of decommissioning."[228]

CAN is here raising again the off-site remediation issue that we rejected earlier in this proceeding. In CLI-00-22, we held that the decommissioning "trust cannot be used for offsite remediation."[229] Given that the issue we admitted for hearing deals with on-site decommissioning funding rather than off-site remediation funding, the latter issue is beyond the scope of this proceeding.[230] It is likewise beyond the proceeding's scope because the transfers

---

[227] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 3; CAN's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 6; Tr. 51-52 (Ms. Katz), 109-11 (Mr. Judson), 113 (Ms. Katz, referring to off-site contamination and referring to PASNY's shipments of contaminated waste to a landfill).

[228] *See* CAN's Response to Applicants' Initial Written Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 4.

[229] *See* 52 NRC at 308. *See generally* Final Rule, "General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,021 (June 27, 1988) (emphasis added):

> [D]ecommissioning involves those activities necessary to remove *a facility* safely from service and to reduce residual radioactivity to a level that permits release of *the property* for unrestricted use and termination of license.
>
> * * * * * *
>
> The decommissioning rule applies to the *site, buildings and contents, and equipment* associated with a nuclear facility....

[230] *See* 52 NRC at 319 ("The Commission ... will not consider claims rejected in the course of this opinion").

themselves will not affect the extent to which any remediation money is available for withdrawal from the two decommissioning funds.[231]

We must acknowledge that CLI-00-22 was internally inconsistent regarding CAN's remediation issues. In that order, we excluded one offsite remediation issue, yet we admitted another one as a decommissioning subissue. In admitting the latter as an issue, we inadvertently failed to focus sufficiently on the *offsite* context in which the issue was being presented to us. We mistakenly assumed that CAN was using the term "remediation" as a loose synonym for "decommissioning." Although the particular language we cited in CLI-00-22 did not expressly state that the remediation at issue was offsite,[232] CAN's language preceding the cited passage did indicate that the context was offsite remediation.[233] Had we recognized the offsite context, we would not have admitted the issue -- for the reasons set forth in the section of CLI-00-22 dealing with "Lack of Provision for Offsite Remediation."[234]

B. The Commission's Post-Transfer Regulatory Authority over PASNY

CAN asserts that approval of the applications would deprive the Commission of any post-transfer regulatory authority to ensure that PASNY satisfies the NRC's requirements for

---

[231] These two rulings rejecting CAN's remediation argument should not be construed to mean either that we view CAN's concerns as insignificant or that CAN lacks remedies for its offsite remediation concerns. If CAN believes that PASNY has illegally spilled non-radioactive waste, then it may be able to approach the Environmental Protection Agency for remedial action under the "Superfund" statute. *See* Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675. Alternatively, if CAN believes that PASNY has spilled radioactive material offsite in violation of the NRC regulations in effect at the time of the spills, then CAN may file a petition under 10 C.F.R. § 2.206 seeking enforcement action.

[232] *See* CLI-00-22, 52 NRC at 302 n.25, citing Reply of CAN to Applicants' Answer to CAN's Request for Hearing and Petition to Intervene, dated Aug. 17, 2000, at 14.

[233] *See* Reply of CAN to Applicants' Answer to CAN's Request for Hearing and Petition to Intervene, dated Aug. 17, 2000, at 13.

[234] *See* 52 NRC at 307-08.

decommissioning and remediation of the site. CAN expresses this concern notwithstanding the NRC Staff's imposition of a set of license conditions requiring PASNY's acceptance of continuing NRC regulatory authority with regard to its administration of the decommissioning funds to cover Entergy's decommissioning and radiological remediation responsibilities. CAN is concerned that, even with these license conditions, the agency would still lack the same degree of direct regulatory authority over PASNY that it would have if PASNY were to remain a licensee. According to CAN, this is because the Commission's regulations do not provide for retention of authority and enforcement power over a former licensee. CAN also expresses particular concern about PASNY's continuing offsite remediation responsibility in light of Entergy's disclaimer of responsibility for cleaning up any offsite contamination that occurred during PASNY's term of ownership.[235]

The answer to CAN's concerns turns both on the conditions which the Staff's orders have imposed on Applicants and on the scope of the Commission's jurisdiction over unlicensed persons pursuant to Section 161i of the Atomic Energy Act ("AEA") to enforce such conditions.[236] We believe that the Staff-imposed conditions provide the Commission with adequate control over PASNY's expenditure of the decommissioning funds and thereby provide the degree of assurance we deem necessary. These conditions require that the relevant decommissioning trust agreements between PASNY and the trustee (the Bank of New York)

---

[235] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 3-6, 9-12.

[236] As we explained in the Statement of Considerations on the "deliberate misconduct" rule, "Section 161i of the AEA provides the Commission with broad authority to issue such regulations and orders as the Commission deems necessary to govern any activity authorized pursuant to the AEA in order to protect public health and safety." *See* Final Rule, "Deliberate Misconduct by Unlicensed Persons," 63 Fed. Reg. 1890, 1891 (Jan. 13, 1998), referring to 42 U.S.C. § 2201i. *See generally* Final Rule, "Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons," 56 Fed. Reg. 40,664, 40,666-69 (Aug. 15, 1991) (repeatedly referring to the broad and flexible authority which the AEA conferred upon the Commission").

include mechanisms for the NRC to bar disbursements, to require disbursements to satisfy NRC decommissioning requirements, and to prevent PASNY from terminating the decommissioning trust funds without the NRC's consent.[237]

We recognize, however, that imposition of such conditions may be insufficient, in and of itself, to ensure compliance if the agency lacks the post-transfer regulatory authority to enforce those conditions. We addressed the subject inferentially 9 years ago in a license transfer proceeding involving the Shoreham Nuclear Power Station. There, we imposed a condition requiring the former licensee to take back the license if the approved transferee were dissolved

---

[237] *See* Staff Orders, 65 Fed. Reg. at 70,844 (Indian Point 3), 70,846-47 (FitzPatrick):

> (7) The decommissioning trust agreement shall provide that no disbursements or payments from the trust, other than for ordinary administrative expenses, shall be made by the trustee until the trustee has first given the NRC 30 days prior written notice of the payment. In addition, the trust agreement shall state that no disbursements or payments from the trust shall be made if the trustee receives prior written notice of objection from the Director, Office of Nuclear Reactor Regulation.
>
> (9) The decommissioning trust agreement shall provide that the provisions or purpose of the trust agreement may be enforced by the NRC against [PASNY] and the trustee with respect to the disbursement of the trust funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements. The NRC shall not be a beneficiary of the trust or of any of the trust funds, unless required by law to be so for the sole purpose of enforcing the provisions or purpose of the trust agreement as set forth above.
>
> (10) [The decommissioning trust agreement shall require that] PASNY may not terminate any fund established under the Master Trust for [FitzPatrick and Indian Point 3] except after requesting and obtaining written consent from the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as appropriate.

See also both SERs at 14. In addition, Condition 8 also requires the decommissioning trust agreement to provide that the trust agreement shall not be modified in any material respect without the prior written consent of the Director, Office of Nuclear Reactor Regulation. *See* FitzPatrick Order, 65 Fed. Reg. at 70,846, and Indian Point 3 Order, 65 Fed. Reg. at 70,844. *See also* both SERs at 14; Written Direct Testimony and Affidavit of George W. Collins, dated Jan. 10, 2001, at 4 ¶ 9. Thus, once the required conditions were implemented in the trust agreements, they would remain in effect absent express NRC authorization to the contrary.

by a state court.[238] The imposition of this condition in *Shoreham* implies a continuing authority over former licensees even after they transfer their licenses to other entities.

We have also discussed such post-transfer jurisdiction in the context of our "deliberate misconduct" rule.[239] As we indicated in the Statement of Considerations for the 1991 version of that rule, our statutory authority to issue orders "is not confined to those who hold licenses from the Commission"[240] but rather is a "uniquely broad and flexible authority"[241] which extends "to any person ... who engages in conduct within the Commission's subject matter jurisdiction."[242]

---

[238] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-92-4, 35 NRC 69, 80 n.7 (1992).

[239] *See* 10 C.F.R. §§ 30.10, 40.10, 50.5, 60.11, 61.9b, 70.10, 72.12, 110.7b (all applicable to, *inter alia*, any "employee of a licensee or applicant; or any contractor (including a supplier or consultant), subcontractor, employee of a contractor or subcontractor or any licensee or applicant").

[240] *See* 56 Fed. Reg. at 40,667. *See also* 56 Fed. Reg. at 40,666 ("whether an individual holds an NRC license or not is irrelevant to th[e] inquiry" of the Commission's authority under Section 161i "to impose orders on entities that engage in particular activities"), 40,668 (the Commission's "authority is not based on whether such persons hold licenses"), 40,669 (the Commission has authority to "issue notices of violation against non-licensees 'in appropriate cases when requirements directly imposed upon non-licensees are violated").

[241] *See* 56 Fed. Reg. at 40,666, 40,668; and 63 Fed. Reg. at 1892. *See also* 56 Fed. Reg. at 40,666 ("very broad powers"), 40,667 ("exceptionally broad" authority).

[242] *See* 56 Fed. Reg. at 40,666. *See also* 63 Fed. Reg. at 1891 ("Having this enforcement authority available will help the NRC pursue redress in cases of deliberate misconduct by unlicensed persons acting within the scope of the Commission's jurisdiction"); *id.* at 1892 (quoting 56 Fed. Reg. at 40,667):

> Where Congress does not include statutory provisions governing *in personam* jurisdiction, it is appropriate to look to the scope of the subject matter jurisdiction in order to determine the scope of *in personam* jurisdiction. Since Congress did not include any specific personal jurisdiction provision in the 1954 Act, or any limitations on such jurisdiction, the NRC is authorized to assert its personal jurisdiction over persons based on the maximum limits of its subject matter jurisdiction. The agency's personal jurisdiction is established when a person acts *within the agency's subject matter jurisdiction*.

(Final emphasis added.)

Indeed, we consider this authority to extend to anyone "who engages in conduct *affecting activities* within the Commission's subject-matter jurisdiction"[243] -- including those who (like PASNY) "*have been* engaged in licensed activities."[244]

We see no reason why the rationale justifying our jurisdiction over non-licensees in the context of the "deliberate misconduct" regulations should not apply equally in the context of license transfer regulations. After all, if PASNY remains responsible for the disbursement of the decommissioning funds, PASNY would not only "affect[] activities" within our subject matter jurisdiction but would be directly "engage[d] in conduct" within that jurisdiction. Just as the Commission has the authority to "issue notices of violation against non-licensees in appropriate cases when requirements directly imposed upon non-licensees are violated,"[245] we likewise have the authority to exercise enforcement authority against PASNY if it violates any of the requirements imposed in the Staff's orders.[246] Indeed, if PASNY were to fail to comply with the conditions we imposed on the transfer approvals, we could declare the approvals null and void, and PASNY would revert to being a licensee subject to the Commission's usual authority over licensees.[247] Alternatively, we could reinstate PASNY as a licensee without removing the Entergy transferees from the licenses.[248]

Finally, even were PASNY not deemed a licensee due to a breach of these conditions, the NRC could still sue PASNY to enforce the provisions and purpose of the Trust Agreement.

---

[243] *See* 63 Fed. Reg. at 1891 (emphasis added).

[244] *See* 56 Fed. Reg. at 40,665 (emphasis added).

[245] *See id.* at 40,669 (internal quotation marks omitted).

[246] *See* Staff Orders, 65 Fed. Reg. at 70,843 (Indian Point), 70,846 (FitzPatrick); both SERs at 14.

[247] *See Shoreham*, CLI-92-4, 35 NRC at 80 n.7.

[248] *See* Tr. 148-49 (Mr. Hom).

Section 10.11 of that Agreement provides that "[t]he provisions or purpose of this Agreement [[249]] may be enforced by the NRC against the Authority and the Trustee with respect to the disbursement of the Funds to the extent necessary to ensure compliance with or satisfaction of the NRC's decommissioning requirements."[250] PASNY has agreed in writing to waive any right it may have to deny, contest or challenge the Commission's jurisdiction over PASNY with respect to either Indian Point 3 or FitzPatrick in any enforcement matter concerning disposition or use of decommissioning funds retained by PASNY. This waiver remains in effect until PASNY transfers the funds to Entergy or completion of the facilities' decommissioning, whichever occurs first.[251]

In sum, we are confident that we have sufficient post-transfer regulatory authority to ensure that PASNY satisfies the NRC's requirements for decommissioning.

C. Entergy's Financial Ability to Pay Potential Capital Gains Tax

CAN argues that Entergy may not have the financial stability to pay any capital gains tax which the Internal Revenue Service ("IRS") might impose on the decommissioning funds.[252] CAN claims that there remain "uncertainties and unresolved questions regarding the tax status

---

[249] The purpose of the Trust is "to accumulate and hold funds" for the decommissioning of FitzPatrick and Indian Point 3, "and to use such funds, in the first instance, for expenses related to" decommissioning the facilities. *See* Master Decommissioning Trust Agreement, § 2.01, as amended Nov. 21, 2000.

[250] This provision was added to the Agreement by the "First Amendment to Master Decommissioning Trust Agreement," dated Nov. 21, 2000. *See also* both SERs at 14.

[251] *See* Staff Orders, 65 Fed. Reg. at 70,843 & 70,844-45 (Indian Point 3), 70,845 & 70,847 (FitzPatrick); both SERs at 11, 13. *See also* Applicants' Initial Written Statement [on Issue #2], dated Jan. 12, 2001, at 7-8; Tr. 57 (Mr. Silberg).

[252] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 13; CAN's Response to Applicants' Initial Written Statement of Position and Written Testimony on CAN Issue #2, dated Feb. 1, 2001, at 10. *Cf.* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 2 (PASNY "has agreed to retain the decommissioning trust fund (pending a favorable IRS ruling on its tax status)").

of the decommissioning fund[s]."[253] Although the Entergy Applicants acknowledge liability for any capital gains tax on the funds, it argues that such an occurrence is "not likely under current tax law" and, in any event, would be paid by Entergy [referring here to the parent company] rather than the two trusts.[254]

We find only brief mention in the record of CAN's underlying premises that one or more of the Applicants has actually sought an IRS ruling and that PASNY's retention of the funds is somehow linked to a favorable IRS ruling.[255] Even this brief reference has been subsequently overtaken by the Applicants' statements at the hearing that they have not asked, and will not ask, for an IRS ruling.[256] For these reasons, we reject CAN's "capital gains tax" argument.

D. Precedential Effect of Creating an Exception to 10 C.F.R. § 50.75(e)(1)

CAN claims that the creation of an exception to section 50.75(e)(1) in this proceeding could set a dangerous precedent for future cases in which the transferor may not have the same degree of financial strength as PASNY.[257] We see no risk here of a dangerous precedent. In the area of decommissioning funding assurance, each transfer application is examined *on its own facts*. This will be especially true of applications seeking to use an assurance other than those specifically described in sections 50.75(e)(1)(i)-(v). Thus, a transferor less qualified than

---

[253] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 2. *See also* CAN's Response to Applicants' Initial Statement of Position and Written Direct Testimony on CAN Issue #2, dated Feb. 1, 2001, at 13-14.

[254] *See* Written Direct Testimony and Affidavit of Joseph T. Henderson, dated Jan 11, 2001, at 3 (entered into the Record following Tr. 41, and identified as Licensee Exh. 1).

[255] *See* Indian Point 3 Application at 14 n.3 ("In both of these license transfers it was anticipated that the seller would only hold the funds temporarily until favorable tax rulings were obtained"); FitzPatrick Application at 12 n.3 (same).

[256] *See, e.g.*, Applicants' Final Statement of Position, dated April 3, 2001, at 31.

[257] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 14.

PASNY may have a more difficult time gaining our approval for its retention of a decommissioning trust fund pursuant to subsection (vi). Because of the fact-driven nature of our decommissioning rulings in this proceeding, their precedential value is, as a practical matter, limited to an indication of the Commission's openness to funding arrangements not specifically enumerated in subsections (i)-(v).

In a related argument, CAN asserts that the suitability of the PASNY-Entergy arrangement presents the Commission a generic issue that would be better addressed in a rulemaking, and that we should therefore either dismiss or suspend the transfer applications pending completion of an appropriate rulemaking.[258] But issues such as transferor's retention of decommissioning funds may be addressed either in a rulemaking or adjudicatory context.[259] We expect few license transfer applications to include the kind of fund retention arrangement that we address here. Consequently, we prefer to address the fund retention issue on a case-by-case basis rather than expend the more significant resources required for a rulemaking. Moreover, the dismissal or suspension of the instant proceeding, pending a rulemaking, would result in a lengthy delay of our rulings on the FitzPatrick and Indian Point 3 transfers. Such a result would be contrary to the Commission's policy of "expeditious decisionmaking" in license transfer proceedings.[260]

---

[258] *See id.* at 15-16.

[259] It is well established that an agency's decision to use rulemaking or adjudication in dealing with a problem is a matter of discretion. *See Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 467 (1999) ("the Supreme Court has repeatedly emphasized that the choice between rulemaking and adjudication lies primarily in the informed discretion of the administrative agency") (internal quotation marks and citations omitted); *Fire Protection for Operating Nuclear Power Plants* (10 CFR 50.48), CLI-81-11, 13 NRC 778, 800 (1981), citing, *inter alia*, *NAACP v. FPC*, 425 U.S. 662, 668 (1976).

[260] *See* Final Rule, "Streamlined Hearing Process for NRC Approval of License Transfers," 63 Fed. Reg. 66,721, *passim* (Dec. 3, 1998).

E. PASNY's Conflict of Interest

CAN asks the Commission to ascertain whether the potential for PASNY to profit from the license transfer arrangement (by retaining any difference between the final amount in the funds and the amount Entergy ultimately needs to decommission the facilities) constitutes a conflict of interest with PASNY's fiduciary obligations to the ratepayers and citizens of New York. More specifically, CAN posits that, on the one hand, PASNY has a fiduciary responsibility to ratepayers and citizens of New York State for "growing" the decommissioning trust funds and being certain that it has all the funds necessary to do a complete decommissioning and cleanup of the IP3 and FitzPatrick reactor sites; on the other hand, the proposed licensing agreement provides PASNY an incentive to permit Entergy to perform the cheapest decommissioning permissible under the NRC regulations, so that PASNY will get the maximum amount of surplus decommissioning funds.[261]

CAN overstates PASNY's degree of control over the decommissioning process, in that it is not PASNY but Entergy Nuclear Operations (through its contract with Entergy Nuclear, Inc.) that dictates how decommissioning will be performed;[262] and it is Entergy Nuclear Inc. that will

---

[261] *See* CAN's Response to Applicants' Initial Written Statement of Position and Written Testimony on CAN Issue #2, dated Feb. 1, 2001, at 14-18; Tr. 156-57 (Mr. Judson); CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 8.

[262] *See* Applicants' Response to NRC Request for Additional Information Regarding License Transfer Application, dated June 13, 2000, Response to Question 4 at p. 2:

> [P]ursuant to Section 2.4 of the Decommissioning Agreements[, PASNY] and Entergy Nuclear, Inc. ("ENI") are required to enter into an agreement whereby ENI would decommission the plant.... The Entergy owners, through their authorized agent, Entergy Nuclear Operations, Inc., would at all times retain ultimate control over the decommissioning activities of ENI and its contractors ... It is contemplated that ... ENI would do the decommissioning work, including the hiring of contractors to carry out such work, subject to the ultimate control of the Entergy owners.

conduct the decommissioning.[263] PASNY's role is limited to paying for the decommissioning -- and even the minimal degree of control inherent in *that* role is diminished by the fact that the Bank of New York is trustee of the Decommissioning Fund.

CAN also raises, for the first time in its Final Statement of Position, the argument that PASNY faces a conflict of interest because it does not intend to use any excess funds for offsite remediation or to return the money to the taxpayers.[264] We fail to follow the logic of this argument (*see* note 224, *supra*) and, in any event, find it irrelevant -- given that offsite remediation and taxpayer refunds are not within the scope of this proceeding (*see* p. 70, *supra*).

F. CAN's Proposed Conditions

CAN asks the Commission to make its approval of the license transfer applications contingent upon PASNY's acceptance of three decommissioning-related conditions: (i) the decommissioning funds be transferred to Entergy FitzPatrick and Entergy Indian Point as a condition of approving the applications;[265] (ii) PASNY accept the Commission's authority regarding PASNY's offsite remediation responsibilities; and (iii) PASNY submit Schedule 5.13 and complete an Environmental Impact Statement[266] to determine the actual scope of PASNY's offsite remediation responsibilities.[267] Given our rejection of CAN's arguments on the merits of decommissioning funding assurance, we need not reach its proposed conditions. Moreover, in

---

[263] *See* both Applications at 2.

[264] *See* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 8.

[265] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 16.

[266] At the hearing, CAN clarified that it is seeking an Environmental Impact Statement to determine whether there is a need for remediation, not to determine whether the radiation levels at the off-site disposal site are illegal. *See* Tr. 128 (Mr. Judson).

[267] *See* CAN's Statement on Issue #2, dated Jan. 12, 2001, at 17-18. *See also* CAN's Final Written Statement of Position on Issues Nos. 2 and 3, dated April 3, 2001, at 11, 12.

CLI-00-22, we declined to impose CAN's proposed remediation and environmental condition.[268] We see nothing in the final record that persuades us that this ruling in CLI-00-22 was erroneous.[269]

III. OBSERVATIONS REGARDING THE SUBPART M HEARING PROCESS

The hearing in the instant proceeding was the first we have held under the Subpart M procedural rules. As would be expected with an untested set of procedures, there arose several situations which our regulations did not anticipate or in which those regulations were insufficiently clear. To assist the parties and Presiding Officers in future Subpart M proceedings, we take this opportunity to address these matters.

A. Role of the NRC Staff

Under the procedural rules set forth in Subpart M, the NRC Staff is not required to be a party in a license transfer proceeding and is required only to offer into evidence its SER(s) and to provide one or more sponsoring witnesses at the hearing.[270] In this particular proceeding, the Staff chose not to be a party.

Notwithstanding the Staff's non-party status, the Presiding Officer invited the NRC Staff to submit a brief enunciating its views on three issues: (i) to what extent does the NRC retain authority to control PASNY's decommissioning expenditures following divestiture of the two

---

[268] *See* 52 NRC at 307-09.

[269] Indeed, Applicants point out that Schedule 5.13 deals with *non*radiological remediation issues. *See* Applicants' Response to CAN's Statement of Position [on Issue #2], dated Feb. 1, 2001, at 7; Tr. 55-56, 112 (Mr. Silberg); Applicants' Final Statement of Position, dated April 3, 2001, at 30. The decommissioning funding "rule does not deal with costs of demolition of nonradioactive structures and equipment or with site restoration after termination of the NRC license. These matters are outside NRC's jurisdiction...." *See* Final Rule, "General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,038 (June 27, 1988).

[270] *See* 10 C.F.R. § 2.1316(b).

plants to the Entergy companies; (ii) whether Entergy FitzPatrick and Entergy Indian Point, as newly-formed entities, are required to submit cost-and-revenue estimates for only a 5-year period or instead for the entire life of each license; and (iii) under what circumstances should an organization be deemed a newly-formed entity.[271] The Staff filed a brief on February 26, 2001, in which it addressed the first of these issues and agreed to sponsor witnesses who would address the second and third issues at the hearing.[272]

We consider the Presiding Officer's requests to be appropriate under the circumstances. Those requests did not compromise the NRC Staff's status as a non-party, yet gave all parties the benefit of the Staff's expertise on an issue of first impression and also the Staff's familiarity with the details of the conditions it imposed on Applicants regarding this agency's continuing authority over PASNY.[273] We believe that CAN's and Applicants' arguments on these issues were more finely tuned as a result of having the benefit of the Staff's views, and that the Commission itself has benefitted from having more and better briefs on these issues.

B. Presiding Officer's Accepting Oral Questions from, and Allowing Dialogue between, the Parties at the Hearing

Twice during the hearing, the Presiding Officer invited parties to suggest questions for him to pose to witnesses.[274] He explained that his authority to solicit such questions stemmed

---

[271] *See* LBP-01-04, 53 NRC 121, 130 n.10 (2001); Unpublished Memorandum and Order (NRC Staff Participation), dated Feb. 8, 2001.

[272] *See* NRC Staff's Brief regarding NRC Authority over Decommissioning Expenditures by PASNY, dated Feb. 26, 2001, at 3 nn. 2, 3.

[273] *See* p. 73, *supra*.

[274] *See* Tr. 76, 373.

from 10 C.F.R. §§ 2.1320(a)(3) and 2.1322(b).[275] Applicants objected to soliciting questions, on the ground that such an invitation contravened both the spirit and letter of Subpart M.[276]

We do not construe our regulations as an absolute bar against attorneys or parties offering suggestions of questions at the hearing.[277] There may be unusual occasions where such suggestions are appropriate and useful. But, in our view, Applicants' concerns regarding oral questions at the March 13-14 hearing are generally well-taken. Subpart M contemplates that parties submit their questions in advance.[278] Free-form improvisation of questions by parties at the hearing has the potential to subvert Subpart M's intent to establish an informal process run by the presiding officer.

This was the first hearing conducted using the new Subpart M procedures and we appreciate that unanticipated difficulties that might arise under such circumstances. We have no doubt that, as we gain more practice using Subpart M procedures, there will be lessons learned and improvements to the process. For example, we were surprised that the parties did not avail themselves of the opportunity to submit prehearing questions to the Presiding Officer. Had the litigants posed their questions to the Presiding Officer before the hearing as Subpart M contemplates, we believe the questioning of witnesses would have been more orderly and efficient.

To ensure that Subpart M hearings run more smoothly in the future, we provide the following guidance. Parties are strongly encouraged to file prehearing questions. The parties should not be permitted to question witnesses directly at the hearing, and it will be purely a

---

[275] *See* Tr. 77-82.

[276] *See* Tr. 77-82, 84 (Mr. Silberg); Applicants' Final Statement of Position, dated April 3, 2001, at 15-17.

[277] *See* 10 C.F.R. §§ 2.1320(a)(3) and 2.1322(b).

[278] *See* 10 C.F.R. § 2.1322(a)(2)(ii).

matter of the presiding officer's discretion whether to entertain any questions posed for the first time at the hearing. To discourage parties from saving their questions until the hearing, the presiding officers should exercise sparingly their authority to entertain suggestions for questions at the hearing. One example, however, of a situation which might well justify the exercise of such authority is the emergence of unexpected information as a result of the presiding officer's questions. To the limited extent the presiding officers do choose at the hearing to entertain suggestions for questions, the presiding officers should consider permitting the parties to submit only *written* suggestions at specified times in the hearing. The Commission directs the presiding officers and parties to use these or other effective techniques to ensure the orderly conduct of hearings.

CONCLUSION

(1) The Commission *grants* in part and *denies* in part Applicant's challenges to the Presiding Officer's rulings on the admissibility of various subissues concerning Financial Qualifications.

(2) The Commission *grants* in part and *denies* in part Applicants' *de facto* appeal of the Presiding Officer's denial of their Motion to Strike.

(3) The Commission *rejects* CAN's challenges to the two license transfer applications, and *approves* issuance of the NRC Staff's transfer orders.

(4) The Commission *withholds* this order from public release for three working days, giving Applicants an opportunity to review it and to advise us if we have inadvertently included in the order any information which they consider proprietary. If, by the end of that period, Applicants have not informed us of any proprietary information in the order, the Commission *instructs* the Office of the Secretary to release the order to the public on the fourth working day following its issuance. Prior to the Commission's release of the document to the public, the

parties are not permitted to discuss the order with members of the public and must not release any part of the order to the public.

IT IS SO ORDERED.

For the Commission[279]

/RA/

____
Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of June, 2001.

[279] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of POWER AUTHORITY OF THE STATE OF NEW YORK, ET AL. (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3)	))))))))	Docket Nos. 50-333-LT and 50-286-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-01-14) have been served upon the persons listed below by electronic mail. Each party will also receive a paper copy of this document.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles Bechhoefer, Presiding Officer
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: cxb2@nrc.gov)

Steven R. Hom, Esquire
Angela B. Coggins, Esquire
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ogclt@nrc.gov)

Gerald C. Goldstein, Esquire
Arthur T. Cambouris, Esquire
David E. Blabey, Esquire
The Power Authority of the State of New York
123 Main St.
White Plains, NY 10601
(E-mail: goldstein.g@nypa.gov)

Timothy L. Judson
Central New York-Citizens Awareness Network
140 Bassett St.
Syracuse, NY 13210
(E-mail: cnycan@rootmedia.org)

Stewart M. Glass, Esquire
Senior Assistant County Attorney
Westchester County
Dept. of Law, Room 600
148 Martine Avenue
White Plains, NY 10601
(E-mail: smg4@westchestergov.com)

Docket Nos. 50-333-LT and 50-286-LT
COMMISSION MEMORANDUM AND ORDER
(CLI-01-14)

Douglas E. Levanway, Esquire
Wise, Carter, Child and Caraway
401 E. Capitol St., Suite 600
P.O. Box 651
Jackson, MS 39205-0651
(E-mail: del@wisecarter.com)

Deborah Katz, Executive Director
Citizens Awareness Network
P.O. Box 83
Shelburne Falls, MA 01370
(E-mail: can@shaysnet.com)

Jay E. Silberg, Esquire
Matias F. Travieso-Diaz, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
(E-mail: jay.silberg@shawpittman.com;
matias.travieso-diaz@shawpittman.com)

John M. Fulton, Esquire
Entergy
600 Rocky Hill Road
Plymouth, MA 02360
(E-mail: jfulto1@entergy.com)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of June 2001