UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of	)	
ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-247-LR 50-286-LR
(Indian Point Nuclear Generating Units 2 and 3)	)	

CLI-11-14

MEMORANDUM AND ORDER

Entergy Nuclear Operations, Inc. (Entergy) has filed a petition for review of a Licensing Board decision granting summary disposition of Contention NYS-35/36 in favor of the State of New York.[1] For the reasons set forth below, we find that Entergy's appeal is interlocutory in nature, and must await the Board's final decision in this proceeding. We deny the petition for review.

I. BACKGROUND

This proceeding concerns Entergy's application to renew the operating licenses for Indian Point Nuclear Generating Units 2 and 3 for an additional twenty years. In response to a

[1] *Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36* (July 29, 2011) (Petition).

notice of opportunity to request a hearing published in the *Federal Register*, several petitioners filed hearing requests. The Board admitted New York, Riverkeeper, and Hudson River Sloop Clearwater, Inc., as parties to the proceeding;[2] and the State of Connecticut, Westchester County, the Village of Buchanan, the Town of Cortlandt, and the City of New York through the New York City Economic Development Corporation, as interested governmental participants.[3] After consolidating four, the Board admitted thirteen of the initially-proposed contentions.[4] These initial admitted contentions since have been supplemented and revised, such that fourteen admitted contentions are now pending before the Board.[5]

At issue here is a consolidated version of two new contentions that New York submitted in response to a reanalysis of severe accident mitigation alternatives (SAMAs) that Entergy filed

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[2] LBP-08-13, 68 NRC 43, 217 (2008).

[3] *Id.*; Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Dec. 18, 2008), at 2 (unpublished). *See generally* 10 C.F.R. § 2.315(c). Connecticut has been involved in litigation of Contention NYS-35/36 from its inception. After the Board denied Connecticut's request for hearing, Connecticut requested to participate as an interested government with respect to a number of the admitted contentions. *Request of the State of Connecticut for an Opportunity to Participate as an Interested Government Body in Proceeding and Hearing on Relicensing of Indian Point Units 2 and 3* (Sept. 25, 2008), at 3. Connecticut supported the admission of Contention NYS-35/36, as well as New York's motion for summary disposition of NYS-35/36. *Answer of the Attorney General of the State of Connecticut to State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives* (Apr. 1, 2010), at 4-6; *Response of Attorney General of Connecticut in Support of New York's Motion for Summary Disposition of Consolidated Contention NYS-35/36* (Feb. 3, 2011), at 3.

[4] LBP-08-13, 68 NRC at 218-20. The contentions are: (1) NYS-5; (2) NYS-6/7; (3) NYS-8; (4) NYS-9; (5) NYS-12; (6) NYS-16; (7) NYS-17; (8) NYS-24; (9) NYS-25; (10) NYS-26A, consolidated with Riverkeeper TC-1A; (11) Riverkeeper TC-2; (12) Riverkeeper EC-3, consolidated with Clearwater EC-1; and (13) Clearwater EC-3. *Id.*

[5] *See infra* note 58.

after the Staff issued its draft Supplemental Environmental Impact Statement (DSEIS).[6] Last summer, the Board admitted and consolidated the two contentions, but narrowed their scope. The Board limited the single contention, NYS-35/36, to the claims that Entergy has not provided a sufficiently complete SAMA analysis for the Staff to perform the requisite "hard look" under the National Environmental Policy Act (NEPA), and that, to satisfy NEPA, the Staff must either require Entergy to implement the "plainly" cost-beneficial SAMAs by imposing them as a license condition or explain why it would not require their implementation.[7]

Entergy and the Staff each filed petitions for interlocutory review of the Board's decision admitting Contention NYS-35/36.[8] Although we noted that "[p]ortions of the Board's decision appear[ed] problematic," we found that neither Entergy nor the Staff had shown that interlocutory review was warranted.[9] We rejected as grounds for appeal the "'mere potential for

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[6] *State of New York's Motion for Leave to File New and Amended Contentions Concerning the December 2009 Reanalysis of Severe Accident Mitigation Alternatives* (Mar. 11, 2010); *Statement of David Chanin* (Mar. 11, 2010); *State of New York's New and Amended Contentions Concerning the December 2009 Severe Accident Mitigation Alternatives Reanalysis* (Mar. 11, 2010). The reanalysis was submitted one year after the Staff issued the DSEIS. *See* Letter from Fred Dacimo, Vice President, License Renewal, Entergy Nuclear Northeast, to U.S. NRC (Dec. 11, 2009) (ADAMS accession no. ML093580089); NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3, Draft Report for Comment (Dec. 2008) (ML083570036 (package)).

[7] *See* LBP-10-13, 71 NRC 673, 697-98, 702 (2010).

[8] *Applicant's Petition for Interlocutory Review of LBP-10-13* (July 15, 2010); *NRC Staff's Petition for Interlocutory Review of the Atomic Safety and Licensing Board's Decision Admitting New York State Contentions 35 and 36 on Severe Accident Mitigation Alternatives (LBP-10-13)* (July 15, 2010).

[9] CLI-10-30, 72 NRC __ (Nov. 30, 2010) (slip op. at 6-7).

legal error'" in the Board's decision and the possibility that the contention "may call for further 'explanation' of the SAMA analysis conclusions."[10] Moreover, consistent with settled Commission precedent, we did not find the potential for increased litigation delay and expense sufficient to justify review of the Board's contention admissibility decision.[11] We therefore denied the petitions without prejudice to Entergy's and the Staff's ability to seek review after the Board issued a final decision in the case.[12] The Staff subsequently revised and expanded the SAMA discussion in its final supplemental environmental impact statement (FSEIS) in response to the Board's contention admissibility decision.[13]

After the Staff revised the SAMA analysis and issued the FSEIS, New York filed a motion for summary disposition of Contention NYS-35/36.[14] Entergy and the Staff filed cross-motions for summary disposition.[15] In LBP-11-17, the Board granted New York's motion, finding that no genuine issue of material fact remained in dispute and that New York was entitled to

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[10] *Id.* at __ (slip op. at 6).

[11] *Id.* at __ (slip op. at 6-7).

[12] *Id.* at __ (slip op. at 8).

[13] *See* "Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 38, Regarding Indian Point Nuclear Generating Unit Nos. 2 and 3" (Final Report), NUREG-1437 (Dec. 2010), at 5-11 to 5-12 (ML103270072 (package)) (FSEIS).

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

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

judgment as a matter of law.[16] The Board denied Entergy's and the Staff's cross-motions.[17] Noting that Entergy plans to conduct additional cost-benefit analyses "outside of the license renewal process,"[18] the Board held that "Entergy's licenses cannot be renewed unless and until the NRC Staff reviews Entergy's completed SAMA analyses" and: (1) "either incorporates the result of these reviews into the FSEIS or . . . provide[s] a valid reason for recommending the renewal of the licenses before the analysis of potentially cost-effective SAMAs is complete";[19] and (2) either requires Entergy to implement cost-beneficial SAMAs or explains why it is not requiring Entergy to implement cost-beneficial SAMAs.[20]

Entergy now seeks review of LBP-11-17, arguing that it is the equivalent of a partial initial decision, and thus is final and reviewable.[21] Entergy also argues that in the alternative, the petition meets the standards for interlocutory review, and, failing that, asks that we exercise our supervisory authority over adjudicatory proceedings and review the Board's decision *sua sponte*.[22] The Staff filed an answer arguing that interlocutory review of LBP-11-17 is

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[16] LBP-11-17, 74 NRC __ (July 14, 2011) (slip op. at 14-17).

[17] *Id.* at __ (slip op. at 2).

[18] *Id.* at __ (slip op. at 15) (citing FSEIS at G-48).

[19] *Id.* at __ (slip op. at 17).

[20] *Id.* at __ (slip op. at 16-18).

[21] Petition at 6-7.

[22] *Id.*

appropriate.[23] New York and Connecticut oppose the petition for review, asserting that it is not ripe and does not meet the standards for interlocutory review.[24] Entergy filed separate replies to New York and Connecticut's and the Staff's answers.[25]

Also before us are New York and Connecticut's motion for leave to file a reply to the Staff's answer,[26] their motion to strike Entergy's reply to the Staff's answer,[27] and New York's request for oral argument on the merits of Entergy's petition in the event we grant review.[28] Because we deny the petition for review, New York's request for oral argument is moot.[29]

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[23] *NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36* (Aug. 11, 2011), at 6 (Staff Answer).

[24] *The State of New York and the State of Connecticut's Joint Answer in Opposition to Entergy's Petition for Interlocutory Review of LBP-11-17* (Aug. 11, 2011), at 22-24.

[25] *Applicant's Reply to the Joint Answer of New York State and Connecticut to Entergy's Petition for Review of LBP-11-17* (Aug. 16, 2011) (Entergy Reply to New York and Connecticut's Answer); *Applicant's Reply to the NRC Staff's Answer to Entergy's Petition for Review of LBP-11-17* (Aug. 16, 2011) (Entergy Reply to the Staff's Answer).

[26] *The State of New York and the State of Connecticut's Combined Motion for Leave to File a Brief Reply to NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17* (Aug. 16, 2011) (Motion to File Reply); *The State of New York and the State of Connecticut's Combined Reply to NRC Staff's Answer in Support of Entergy's Petition for Interlocutory Review of LBP-11-17* (Aug. 16, 2011).

[27] *The State of New York and the State of Connecticut's Combined Motion to Strike Entergy's Unauthorized Reply in Support of NRC's Answer to Entergy's Petition for Review* (Aug. 17, 2011) (Motion to Strike).

[28] *The State of New York's Request for Oral Argument on the Merits of Entergy's Petition for Review Should the Commission Accept Interlocutory Review* (Aug. 11, 2011).

[29] Consequently, we also need not address New York and Connecticut's request that we establish particular briefing procedures. *See* Motion to File Reply at 2.

Before we provide our reasoning for declining to take review at this time, however, we address the other two motions.

II. DISCUSSION

A. New York and Connecticut's Motion to File a Reply

New York and Connecticut argue that we should allow their reply to the Staff because the Staff's answer included information that "goes beyond the four corners of Entergy's Petition," making it "the functional equivalent of an untimely petition for review."[30] In particular, New York and Connecticut respond to the Staff's assertion that it will not comply with LBP-11-17 unless we direct it to do so, as well as the Staff's argument in favor of interlocutory review on the grounds that it will not act until we weigh in on the Board's decision.[31] New York and Connecticut point to principles of fairness, and argue that because the Staff raised these arguments for the first time in its answer, they will be unable to respond unless their reply is permitted.[32] Entergy and the Staff oppose the motion, arguing that the reply is not expressly

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[30] *Id.* at 1.

[31] *Id.* at 2.

[32] *See id.* at 1, 4.

authorized under 10 C.F.R. § 2.341.[33] The Staff maintains that the information in its answer is substantially similar to its prior filings concerning Contention NYS-35/36.[34]

We permit filings not otherwise authorized by our rules only where "necessity or fairness dictates."[35] Under the circumstances presented here, we are persuaded by New York and Connecticut's claims.[36] The Staff asserts that, absent our direction, it "is not inclined to expend agency resources on actions [that] the Staff firmly believes are not required by NRC regulations."[37] This assertion is part of a larger argument that interlocutory review is warranted.[38]

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[33] *Entergy's Answer to New York State's and Connecticut's (1) Motion to Strike and (2) Motion for Leave to File a Reply* (Aug. 18, 2011), at 3 (Entergy Answer to Motions); *NRC Staff's Answer to "The State of New York and the State of Connecticut's Combined Motion for Leave to File a Brief Reply to NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17"* (Aug. 17, 2011), at 5 (Staff Answer to Reply Motion). *See generally* 10 C.F.R. § 2.341.

[34] Staff Answer to Reply Motion at 2-3. In addition, both Entergy and the Staff take issue with New York and Connecticut's interpretation of the Staff's answer as an indication that the Staff does not intend to comply with LBP-11-17. Entergy Answer to Motions at 3; Staff Answer to Reply Motion at 3.

[35] *U.S. Department of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008). *See also AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 677 (2008).

[36] We do not consider the Staff's answer to be an "untimely petition for review," as New York and Connecticut would have it. Our rules of practice permit a party to choose whether to submit a petition for review, an answer in support of the petition, or neither (that is, the filing of a petition or answer is optional). *See* 10 C.F.R. § 2.341(b)(1)-(3). Here, the Staff chose to file an answer in support of Entergy's petition rather than filing its own petition for review.

[37] Staff Answer at 11 n.39.

[38] *See generally id.* at 8-12.

Because it relates to the Staff's position on the reviewability of the Board's decision in LBP-11-17, the Staff's statement regarding its inclination not to revise the FSEIS is presented for the first time in the Staff's answer.[39] And because it is the Staff, not the applicant, that bears the responsibility for complying with NEPA, this position was not presented in Entergy's petition for review. We therefore grant New York and Connecticut leave to file a reply, and consider their reply here.[40]

B. New York and Connecticut's Motion to Strike Entergy's Reply to the Staff's Answer

New York and Connecticut ask that we strike Entergy's reply to the Staff's answer, arguing that: (1) section 2.341(b)(3) permits the filing of a single reply brief totaling five pages, not two briefs totaling more than ten pages;[41] (2) Entergy's reply to the Staff's answer raises new claims of irreparable impact that were not raised in its petition for review; and (3) the reply improperly "embraces and restates" the Staff's arguments rather than rebuts previous

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[39] *See Oyster Creek*, CLI-08-28, 68 NRC at 677. *Cf.* 10 C.F.R. § 2.323(c) (allowing replies to motions that would otherwise be unauthorized if there are "compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply").

[40] New York and Connecticut raise one additional Staff argument to which they wish to respond. *See* Motion to File Reply at 3-4. They assert that for the first time the Staff relies on the Generic Environmental Impact Statement "small" impact finding for severe accidents as a rationale for not requiring Entergy to implement any cost-beneficial SAMAs. *Id.* at 3. *See generally* 10 C.F.R. Part 51, Subpart A, Appendix B. Because this argument goes beyond the issue that we address today—whether review is appropriate at this time—we need not consider it here.

[41] Motion to Strike at 1. In the same vein, New York and Connecticut point out that Entergy's reply to their answer exceeds the five-page limit in section 2.341(b)(3). *Id.* at 1 n.1. Although Entergy should have requested an expansion of the page limit, we will not strike Entergy's reply in this instance. Going forward, however, we expect the parties to adhere to our page-limit requirements, or timely seek leave for an enlargement of the page limitation.

arguments.[42] Entergy opposes the motion to strike.[43] Entergy asserts that section 2.341(b)(3) permits the filing of a single reply to each answer, and asserts that it appropriately elaborated on and amplified issues in its petition and in the Staff's answer.[44] The Staff also opposes the motion to strike, and raises arguments similar to Entergy's.[45]

We grant in part, and deny in part, the motion to strike. First, section 2.341(b)(3) does not, by its terms, limit the petitioning party to one reply only, but can fairly be read to permit one reply to *each* answer. Stated another way, the petitioning party may reply separately to each answer, especially considering that the answers may present different views or arguments. Second, replies need not be limited to rebuttal arguments. We have long held that a reply may not contain new information that was not raised in either the petition or answers, but we have not precluded arguments that respond to the petition or answers, whether they are offered in rebuttal or in support.[46] We therefore deny the motion to strike as to these arguments.

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[42] Motion to Strike at 1-2.

[43] Entergy Answer to Motions at 1.

[44] *Id.* at 1-2.

[45] *See NRC Staff's Answer to "The State of New York and the State of Connecticut's Combined Motion to Strike Entergy's Unauthorized Reply in Support of NRC's Answer to Entergy's Petition for Review"* (Aug. 19, 2011; corrected Aug. 22, 2011), at 1-4. The Staff suggests, however, that we may disregard the portion of Entergy's reply that discusses irreparable impact because it could be interpreted as new material that is thus outside the proper scope of a reply. *See id.* at 3-4 (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 46 (2006)).

[46] *See, e.g.*, *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004); *Sequoyah Fuels Corp.*, CLI-94-4, 39 NRC 187, 189 n.1 (1994).

However, we agree with New York and Connecticut that Entergy has exceeded the proper scope of a reply with its new material relating to its claims of "immediate and serious irreparable impact." In its petition for review, Entergy offers nothing on the threat of "an immediate and serious irreparable impact" other than a brief mention as one of the standards for interlocutory review and a conclusory statement that "serious and irreparable harm" will result from the Board's decision.[47] The Staff's answer focuses on the second interlocutory review factor under section 2.341(f)(2), arguing that the Board's decision "affects the basic structure of th[e] proceeding in a pervasive or unusual manner."[48]

In contrast, Entergy's reply raises new arguments regarding litigation costs, difficulty making business decisions, and grid reliability, all of which Entergy claims would seriously and irreparably harm Entergy and the public if we do not review the Board's decision now.[49] These arguments were not raised in Entergy's petition or the Staff's answer, and are therefore outside the appropriate scope of a reply. Accordingly, we strike the portions of Entergy's reply that discuss its "irreparable impact" claims, and do not consider them here.[50]

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[47] *See* Petition at 6-7. *See generally* 10 C.F.R. § 2.341(f)(2).

[48] Staff Answer at 8-9.

[49] *See* Entergy Reply to the NRC Staff's Answer at 1-3.

[50] Entergy's reply to New York and Connecticut's answer contains a statement regarding harm to Entergy and the public that references grid reliability. *See* Entergy Reply to New York and Connecticut's Answer at 2. New York and Connecticut did not move to strike Entergy's reply to their answer. Nonetheless, our case law is clear. As discussed above, we do not consider new material raised for the first time in a reply. *See supra* note 46. This statement therefore does not factor into our analysis of the reviewability of Entergy's petition.

C. Entergy's Petition for Review

As discussed above, Entergy argues that three separate regulatory provisions support review of the Board's decision at this time: (1) section 2.341(b)(1) – as a petition for review; (2) section 2.341(f)(2) – as a petition for interlocutory review; and (3) section 2.341(a)(2) – under our *sua sponte* review authority.[51] Entergy first argues that the Board's decision in LBP-11-17 is a *de facto* partial initial decision because the Board ordered that Entergy's licenses "'cannot be renewed'" until the Staff revises the SAMA analysis in the FSEIS to the Board's satisfaction.[52] Thus, according to Entergy, "regardless of the outcome of the forthcoming hearing on the remaining admitted contentions," the receipt of its renewed licenses is in doubt.[53] Similarly, Entergy asserts that the Board's ruling "has terminated further litigation on the merits of Contention NYS-35/36, forcing the Staff to take actions [that] are contrary to law."[54]

Our rules of practice permit parties to file a petition for review of licensing board full or partial initial decisions, both of which we consider to be final.[55] As we reaffirmed in the *Pilgrim* license renewal proceeding, a grant of summary disposition where other contentions are pending is not a final decision, and is appealable only upon a showing that the standards for

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[51] Petition at 6-7.

[52] *Id.* at 4, 7 (quoting LBP-11-17, 74 NRC at __ (slip op. at 17)).

[53] *Id.* at 7.

[54] *Id.*

[55] *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-11-10, 74 NRC __ (Sept. 27, 2011) (slip op. at 4); *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34 (2008). *See generally* 10 C.F.R. § 2.341(b)(1).

interlocutory review have been met.[56] Entergy's arguments to the contrary are unavailing.

In *Pilgrim*, we explained that the basis for our allowing immediate appellate review of partial initial decisions rests on prior Appeal Board decisions permitting review of a licensing board ruling that "'disposes of . . . a major segment of the case or terminates a party's right to participate.'"[57] The Board's decision in LBP-11-17 did neither of these things. Granting summary disposition of Contention NYS-35/36 did not terminate any party's right to participate in this proceeding. Further, not including Contention NYS-35/36, there are fourteen admitted contentions currently pending before the Board, two of which also raise SAMA-related issues.[58] The resolution of one contention, where there are fourteen other contentions pending, does not constitute the disposition of a "major segment of the case." We cannot know at this point whether the Board will resolve the remaining contentions by imposing conditions on the renewed licenses, by requiring the Staff to revise its SEIS in other capacities, or by resolving some or all of the remaining contentions in favor of Entergy. Or the Board might deny the renewed licenses after resolving one or more of the other contested issues in favor of the intervenors. In other words, the outcome of a decision on Entergy's license renewal application

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[56] *Pilgrim*, CLI-08-2, 67 NRC at 34.

[57] *Id.* at 34 n.14 (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983)).

[58] The fourteen contentions are: (1) NYS-5; (2) NYS-6/7; (3) NYS-8; (4) NYS-9/33/37; (5) NYS-12/12A/12B/12C; (6) NYS-16/16A/16B (7) NYS-17/17A/17B; (8) NYS-24; (9) NYS-25; (10) NYS-26B/Riverkeeper TC-1B; (11) Riverkeeper TC-2; (12) Riverkeeper EC-3/Clearwater EC-1; (13) Clearwater EC-3; and (14) Riverkeeper EC-8. Of these, two pertain to the SAMA review—NYS-12/12A/12B/12C, and NYS-16/16A/16B.

is undetermined.[59] The Board's decision granting New York's motion for summary disposition is not a "final" decision.

For similar reasons, we are not inclined to grant interlocutory review. A party seeking interlocutory review must show that the issue to be reviewed:

> (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
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> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.[60]

Our disfavor of piecemeal appeals leads us to grant interlocutory review only upon a showing of "extraordinary circumstances."[61] With fourteen other contentions pending before the Board, the resolution of which likely will lead to additional appeals, the situation presented here would result in the very piecemeal litigation that we wish to avoid.

Moreover, Entergy has not shown that the circumstances presented here outweigh our disfavor of interlocutory appeals. Entergy asserts that "the Board's ruling in LBP-11-17 fundamentally distorts the very fabric of the NRC's license renewal regulatory framework[, which] draws a clear line between the agency's safety review under the Atomic Energy Act . . . and Part 54 and its environmental review under NEPA and Part 51."[62] Entergy also expresses concern that the Board's decision "compel[s] further NRC Staff analysis and implementation"

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[59] *Cf. Levy County*, CLI-11-10, 74 NRC at __ (slip op. at 4-7).

[60] 10 C.F.R. § 2.341(f)(2).

[61] *See, e.g.*, CLI-09-6, 69 NRC 128, 132, 137 (2009); *Pilgrim*, CLI-08-2, 67 NRC at 35.

[62] Petition at 7.

based on "a profound reversal of NRC policy and law," when the issue is "more appropriately addressed by the Commission."[63] Similarly, the Staff claims that we should not delay in reviewing LBP-11-17 because "even if the Staff were to revise its already augmented [SEIS]," it is uncertain whether the Board would find another revision sufficient for the purposes of NEPA.[64] But these are fundamentally challenges to the Board's decision as legal error. We see no practical difference between the situation here and our earlier denial of Entergy's and the Staff's petitions for interlocutory review of the Board's decision admitting Contention NYS-35/36. Arguments raising "the mere potential for legal error" or the need for the Staff to provide additional analysis or explanation in the SEIS do not compel us to take review now.[65] Entergy will have the opportunity to raise these issues at the end of the case.[66]

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[63] *Id.* at 8.

[64] Staff Answer at 10-11.

[65] *See* CLI-10-30, 72 NRC at __ (slip op. at 6).

[66] Entergy also argues that we should take review because the Board's decision "is likely to trigger further contentions and similar rulings in other proceedings." Petition at 8 n.22. But this is a possible result of any licensing board decision. If we were to base interlocutory review on the likelihood of contentions triggered by a board's decision, we would find ourselves granting interlocutory review in virtually every case, thereby diminishing our interlocutory review standards. Additionally, Entergy argues that "one of the core issues presented in this appeal—the process by which the NRC Staff must analyze and implement specific measures for mitigating severe accidents—is directly related" to our deliberations concerning the recent nuclear events in Japan. *Id.* at 8 n.23. But this is all the more reason to decline review now. We continue to consider the nuclear events in Japan, and the agency is in the process of implementing and prioritizing actions to be taken in response to the Japan events. *See Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC __ (Sept. 9, 2011) (slip op. at 4-8) (describing the NRC's review activities relating to the events at the Fukushima Daiichi Nuclear Power Station following the March 11, 2011, earthquake and tsunami); "Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report," Commission Paper SECY-11-0124 (Sept. 9, 2011) (ML11245A127, ML11245A144) (continued. . .)

Finally, we reject Entergy's suggestion that we exercise our supervisory authority and review the Board's decision *sua sponte*. We have twice reminded the parties in this proceeding that they "should not seek interlocutory review by invoking the grounds under which the Commission might exercise its supervisory authority."[67]

Before we conclude, we note that NEPA is a procedural statute—although it requires a "hard look" at mitigation measures, it does not, in and of itself, provide the statutory basis for their implementation.[68] In granting New York's motion for summary disposition of Contention NYS-35/36, the Board was careful not to *require* that the Staff impose the cost-beneficial SAMAs as a condition on the renewal of Entergy's licenses.[69] Rather, it provided the Staff with an option to *explain* further its reasoning for not requiring implementation of cost-beneficial

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(. . .continued)

(paper and attachment); Staff Requirements—SECY-11-0124—Recommended Actions To Be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571); "Prioritization of Recommended Actions To Be Taken in Response to Fukushima Lessons Learned," Commission Paper SECY-11-0137 (Oct. 3, 2011) (ML11269A204, ML11272A203 (paper and attachment). The nexus of the events at Fukushima Daiichi to this contention is not clear. However, to the extent site-specific issues related to the Fukushima events and associated with Contention NYS-35/36 come into play, we expect to be well equipped to address any such issues at the time the Board issues its final decision in this case.

[67] CLI-10-30, 72 NRC at __ (slip op. at 7 n.32) (citing CLI-09-6, 69 NRC at 138). *See also Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000). The parties should limit their requests for our review to those set forth in our rules. In any event, the circumstances presented here are not sufficiently compelling to merit an exercise of our inherent supervisory authority.

[68] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 n.16 (1989) ("Because NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.").

[69] *See* LBP-11-17, 74 NRC at __ (slip op. at 16-18).

SAMAs in the context of this license renewal review. To the extent the Board would have the Staff elaborate on its analysis, the Board's decision, in our view, does not appear patently unreasonable.[70]

[70] *See Methow Valley*, 490 U.S. at 352-53. The Staff asserts that the Board has no authority to supervise the Staff in its regulatory review. *See* Staff Answer at 11 n.39. On this point, the Staff is correct. "[L]icensing boards lack authority to direct the Staff's *nonadjudicatory* actions." *See Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 63 (2009) (emphasis added). Here, however, we view the relevant concern not as the imposition of a particular Staff action, but rather limited to the adequacy of the discussion, in the FSEIS, of the Staff's ultimate resolution of cost-beneficial SAMAs. It would be reasonable, for example, for the Staff to indicate in its FSEIS why it believes that the cost-beneficial SAMAs are appropriately excluded. It also would be reasonable to discuss in its FSEIS whether the Staff believes that any of the cost-beneficial SAMAs may warrant further consideration as a safety matter outside the license renewal review.

III. CONCLUSION

For the reasons set forth above, we *grant in part* New York and Connecticut's motion for leave to file a reply, *grant in part and deny in part* New York and Connecticut's motion to strike Entergy's reply to the Staff's answer, *deny* Entergy's petition for review of LBP-11-17 without prejudice to Entergy's ability to seek review after the Board's final decision in this case, and *deny* New York's request for oral argument as moot.

IT IS SO ORDERED.[71]

For the Commission

[NRC SEAL] **/RA/**

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of December, 2011.

[71] Commissioner Apostolakis did not participate in this matter.