UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

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

In the Matter of	)	**SERVED 08/22/2001**
CONSOLIDATED EDISON COMPANY OF NEW YORK and ENTERGY NUCLEAR INDIAN POINT 2, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket Nos. 50-003-LT and 50-247-LT (consolidated)
(Indian Point Nuclear Generating Units 1 and 2)	)	

CLI-01-19

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding involves an application seeking the Commission's authorization for Consolidated Edison Company of New York ("ConEd") to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point Nuclear Generating Unit Nos. 1 and 2 (collectively, "the Indian Point plant") to Entergy Nuclear Indian Point 2, LLC ("Entergy Indian Point 2") and Entergy Nuclear Operations, Inc. ("Entergy Nuclear Operations"), respectively. The Indian Point plant is located in Westchester County, New York, beside the Hudson River. Its property lies partially within the Town of Cortlandt and entirely within the Hendrick Hudson School District. ConEd and the Entergy companies (collectively "Applicants") submitted both a redacted and an unredacted version of their application to the Commission on December 12, 2000, pursuant to Section 184 of the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2234,

and § 50.80 of the Commission's regulations.[1] The redacted version omitted financial information relevant to the estimated costs of the plant's operation and maintenance.

On January 29, 2001, the Commission published in the *Federal Register* a notice of the Indian Point 2 application.[2] In response to this notice, the Commission received petitions to intervene and requests for hearing from two entities wishing to oppose the license transfer application. The petitioners are Citizens Awareness Network ("CAN") and the Town of Cortlandt together with the Hendrick Hudson School District (collectively "Cortlandt").[3]

Cortlandt raised several issues and sought access to the unredacted version of the application.[4] Citing lack of access to the unredacted application, CAN raised no specific issues, but stated general concerns regarding the technical and financial qualifications of the Entergy

---

[1] *See* 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing). *See also* 10 C.F.R. § 50.80, which reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders.

[2] *See* "Consolidated Edison Company of New York, Inc.; Indian Point Nuclear Generating Unit Nos. 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments, and Opportunity for a Hearing," 66 Fed. Reg. 8122.

[3] *See* "Citizens Awareness Network's Request for Hearing and Petition to Intervene in the License Transfers for Indian Point Nuclear Generating Units Nos. 1 and 2" (Feb. 20, 2001) ("CAN's Petition") and "Petition for Leave to Intervene and Request for Hearing in the Consideration of Approval of the Proposed License Amendment and Transfer of Indian Point 2 Nuclear Power Plant Operating License and the Indian Point 1 Provisional Operating License to Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. and Request for Additional Time" (Feb. 20, 2001) ("Cortlandt's Petition").

Entergy Nuclear Operations and Petitioners CAN and Cortlandt participated in the recently completed license transfer proceeding involving the Indian Point 3 reactor. *See Power Auth'y of the State of New York* (James A. FitzPatrick Nuclear Power Plant and Indian Point, Unit 3), CLI-01-14, 53 NRC __ (June 21, 2001); CLI-00-22, 52 NRC 266 (2000) (hereinafter referred to as "*Indian Point 3*").

[4] *See* Cortlandt's Petition.

companies. CAN also requested that the proceeding be terminated or suspended[5] or that it be given access to an unredacted version of the transfer application, with appropriate confidentiality arrangements, and additional time to submit its issues. The Commission denied the motion to terminate or suspend the proceeding, but granted both CAN and Cortlandt an extension of time within which to submit or revise any issues after gaining access to the confidential portions of the transfer application. *See* CLI-01-08, 53 NRC 225.

CAN submitted its issues on April 9, 2001,[6] and Cortlandt submitted its issues on April 12, 2001.[7] Applicants filed answers and both CAN and Cortlandt filed replies.[8]

---

[5]CAN requested the Commission to suspend this proceeding until the Commission completes the *Indian Point 3* license transfer proceeding and until the NRC completes consideration of CAN's Petition for Enforcement Action pursuant to 10 C.F.R. § 2.206 concerning alleged regulatory violations and systemic mismanagement by ConEd at IP2. *See* CLI-01-08, 53 NRC 225, 228 (2001).

[6]*See* "Citizens Awareness Network, Inc.'s Contentions Challenging the License Transfer Applications for Indian Point Nuclear Generating Unit Nos. 1 and 2" ("CAN's Contentions"). Although our Subpart M rules refer to *issues*, CAN has consistently used the term "contentions." *See* 10 C.F.R. § 2.1306(b)(2).

[7]*See* "Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District" ("Cortlandt's Issues") and "Submission of Redacted Issues by Town of Cortlandt, New York and Hendrick Hudson School District" ("Cortlandt's Redacted Issues").

[8]*See* "Applicants' Answer to Citizens Awareness Network, Inc.'s Revised Petition for Leave to Intervene and Request for Hearing," (Apr. 19, 2001) ("Applicants' Answer to CAN"); "Applicants' Answer to Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District," (April 23, 2001) ("Applicants' Answer to Cortlandt"); "Proprietary Annex to Applicants' Answer to Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District," (Apr. 23, 2001) ("Applicants' Cortlandt Annex"); "Citizens Awareness Network, Inc.'s Reply to Applicants' Answer to CAN's Petition for Leave to Intervene and Request for Hearing on the License Transfer Applications for Indian Point Nuclear Generating Unit Nos. 1 and 2" (Apr. 26, 2001) ("CAN's Reply"); "Town of Cortlandt and Hendrick Hudson School District's Reply to Applicants' Answer to Submission of Issues," (Apr. 30, 2001) ("Cortlandt's Reply"); and "Proprietary Annex to Reply of Town of Cortlandt, New York and the Hendrick Hudson School District," (Apr. 30, 2001) ("Cortlandt's Annex").

The NRC Staff is not participating as a party in the adjudicatory portion of this proceeding. *See generally* 10 C.F.R. §§ 2.1316(b), (c). We consider the pleadings under Subpart M of our procedural rules. *See* 10 C.F.R. §§ 2.1300-2.1331.

For the reasons set forth below, we grant the requests for hearing of CAN and Cortlandt and we admit certain issues involving whether the Entergy companies have demonstrated their financial ability to operate and maintain the Indian Point plant safely.

II. THE LICENSE TRANSFER APPLICATIONS

ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations have filed an application seeking to transfer the ownership of the Indian Point plant to Entergy Indian Point 2, and both the operating and maintenance responsibilities for Indian Point Unit 2 ("IP2") and the maintenance responsibility for Indian Point Unit 1 ("IP1") to Entergy Nuclear Operations.[9] ConEd will transfer decommissioning funds for both plants to Entergy Indian Point 2 at the close of the sale. The responsibility for decommissioning both plants would also transfer to Entergy Indian Point 2.

The new owner and the new operator of the Indian Point plant are not "electric utilities" under our rules. Thus, they must demonstrate their financial qualifications to own and/or operate the plants. *See* 10 C.F.R. § 50.33(f). The Entergy companies have submitted 5-year cost and revenue projections in accordance with our rules.[10] Much of the material was submitted as proprietary financial information and has been withheld from public disclosure.

Upon closing, essentially all employees within ConEd's Nuclear Generation Department, and certain other employees supporting that department, will become employees of Entergy

---

[9] IP1, which ceased to operate in 1974, has been in safe shutdown mode since that time.

[10] CAN and Cortlandt dispute whether the Applicants submitted financial data for a sufficient period of time. *See* Cortlandt's Petition at 19-20; Cortlandt's Issues at 11; CAN's Contentions at 32-33. We address this issue in detail, *infra* at Section III.B.

Nuclear Operations. The application proposes neither physical changes to Indian Point plant facilities nor operational changes, but does request administrative changes to the licenses that are necessary to reflect the proposed transfers. *See* 66 Fed. Reg. at 8122.

Before deciding Petitioners' standing and the admissibility of their issues, we first address threshold procedural matters.

III. PRELIMINARY PROCEDURAL ISSUES

A. CAN's Request for a Formal Subpart G Hearing

CAN has requested a formal hearing under Subpart G of our procedural regulations rather than under Subpart M procedures that normally apply to license transfer adjudications. *See* CAN's Contentions at 24, 31-32; CAN's Reply at 5-9. CAN contends that the "special circumstances" of this case warrant a "more in-depth forum" to determine the Entergy companies' qualifications to own and operate the Indian Point plant. *See* CAN's Reply at 8. The special circumstances alleged by CAN include allegations of historical and continuing problems at IP2 and its request for an independent evaluation of the plant. CAN acknowledges that the issues it considers special are "not properly reviewable within a simple license transfer." *See* CAN's Contentions at 24.

CAN's request for a Subpart G proceeding is expressly prohibited in a license transfer proceeding. *See* 10 C.F.R. § 2.1322(d) and *Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000). As it did in the Indian Point 3 license transfer proceeding, CAN invokes 10 C.F.R. § 2.1329, which authorizes the Commission to waive a rule when, "because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted." 10 C.F.R. § 2.1329(b). *See* CAN's Contentions at 31; CAN's Reply at 6.

In the earlier case, the "special circumstances" alleged by CAN were that matters in the license transfer proceeding were not strictly financial in nature. *Indian Point 3*, CLI-00-22, 52 NRC at 290. In this case, CAN again asserts that the issues involve more than "mere financial matters" and that the hearing process needs the "intensive investigatory power" that cross-examination provides. *See* CAN's Contentions at 31. In denying CAN's earlier request, we observed that our Subpart M rules cover all license transfer issues:

> Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial ... However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) ... For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter's] suggestion that we limit the scope of Subpart M proceedings to financial matters.

Indian Point 3, CLI-00-22, 52 NRC at 290-91. We see no basis at this time for finding the Subpart M process inadequate to address CAN's proposed issues. Accordingly, we deny CAN's request for a Subpart G hearing.

In the alternative, CAN requests a "broad-ranging" hearing under Subpart M. *See* CAN's Contentions at 31. The Commission's regulations provide that the Commission, on its own motion or in response to a request from a Presiding Officer, may use additional procedures, such as a formal hearing or an opportunity to cross-examine witnesses, if necessary for "sufficient accuracy." *See* 10 C.F.R. § 2.1322(d). The regulations prohibit motions by parties for "special procedures or formal hearings." *Id.* Thus, we deny CAN's request for a "broad ranging" hearing. *See Indian Point 3,* CLI-00-22, 52 NRC at 291. The Commission will consider additional procedures if it deems them necessary as this proceeding moves forward.

B. Applicants' Submission of Financial Data

Both Cortlandt and CAN maintain that the license application is deficient because the Applicants submitted financial data only for the years 2001 through 2005.[11] As the Applicants had requested that the license transfer be effective on May 11, 2001, CAN and Cortlandt contend that the data are insufficient because Applicants provided projections for only one partial year (*i.e.*, 2001) and four full years of operation by the transferee. CAN argues that "the Entergy companies have disregarded the most basic requirement -- a simple filing requirement -- for demonstrating financial qualifications." *See* CAN's Reply at 23. Further, Cortlandt questions whether the alleged shortcoming renders the application "so patently deficient that it should be dismissed or supplemented" for failure to provide the required financial information. *See* Cortlandt's Issues at 11.

The Applicants argue that the data are sufficient under our rule, which states: "The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility." *See* 10 C.F.R. § 50.33(f)(2). The Applicants apparently believe that, since 2001 was to be the first year of operation, supplying figures for 2001 through 2005 complies with our rule. The Petitioners, on the other hand, contend that the rule requires data for five full 12-month periods after the effective date of the license transfer.

We agree with the Petitioners that the financial qualifications rule requires data for the first five 12-month periods after the proposed transfer; however, we decline to dismiss this license transfer application. An application need not be automatically rejected whenever an omission or error is found. *See In the Matter of the Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 95-96 (1995); *reconsideration denied*, CLI-95-8, 41 NRC 386, 395 (1995). The missing data can be submitted for consideration by the Presiding Officer at the adjudicatory hearing. *See id.* Dismissing this proceeding would not serve the parties' best interests, as the

---

[11] *See* Cortlandt's Petition at 19-20, Cortlandt's Issues at 11, CAN's Contentions at 32-33.

deficiency in the application can easily be cured and the focus should be on the numerous substantive matters that remain to be resolved.[12]

C. Incorporation of Issues by Reference

CAN has stated that it incorporates Cortlandt's "contentions" by reference, and Cortlandt has done the same for CAN's issues. *See* CAN's Contentions at 1, Cortlandt's Issues at 15. Applicants, however, argue that such incorporation should be rejected because each petitioner must independently meet the the threshold requirements for participation; *i.e.,* both demonstrate standing to participate and proffer at least one admissible issue. *See* Applicants' Answer to Cortlandt at 14, Applicants' Answer to CAN at 7-8.

Cortlandt has presented several admissible issues, and CAN has presented one. *See* Section IV.B., *infra*. As both Petitioners have independently met the requirements for participation, we will provisionally permit Petitioners to adopt each other's issues at this early stage of the proceeding.[13] But if the primary sponsor of an issue later withdraws from this proceeding, the remaining sponsor must then demonstrate to the Presiding Officer its independent ability to litigate this issue. A failure to do so renders the issue subject to dismissal prior to the hearing.

---

[12]We note that the Applicants have supplied the missing data to the NRC Staff and to the Petitioners.

[13]If the requests had been made later, they would have had to meet the standards for late filing of issues. *See* CLI-01-08, 53 NRC at 229-30 (applying to late-filed issues the Commission's rule, 10 C.F.R. § 2.1308(b), regarding late-filed petitions to intervene); *Indian Point 3*, 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))"). *See also Power Auth. of the State of NY* (James A. FitzPatrick Nuclear Power Plant & Indian Point Nuclear Generating Unit No. 3), LBP-00-34, 52 NRC 361, 363 (2000) ("further consideration ... of the dismissed contention, should another party seek to litigate it, would require a balancing of the factors applicable to late-filed contentions").

Under our rules governing license transfer proceedings, all participants are permitted to submit statements of position and written testimony with supporting affidavits "on the issues." *See* 10 C.F.R. §§ 2.1321(a) and 2.1322(a)(1). In promulgating these procedural rules, we did not limit parties to filing such statements and affidavits on only *their own* issues. Thus, CAN and Cortlandt are entitled to address all of the issues, whether or not they were the original sponsor.[14] The agency has permitted incorporation of others' contentions or issues in the past[15] and the practice is also consistent with that of the Federal courts.[16]

We add a cautionary note. Although we are provisionally permitting incorporation of issues by reference here, where each Petitioner has shown substantial effort in preparing its own issues, we do not give *carte blanche* approval of the practice for all contexts. For instance, we will not permit incorporation by reference where the effect would be to circumvent NRC-prescribed page limits[17] or specificity requirements.[18] Nor will we permit wholesale incorporation

---

[14] *See Indian Point 3*, LBP-00-34, 52 NRC at 363 (referring to "an intervenor [being] permitted to participate in litigation of another intervenor's issue").

[15] *See Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074 (1983); *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986) (relying on ALAB-731, *supra*).

[16] *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1326 (in WestLaw's "FPP" Library) (regarding Fed. R. Civ. P. 10(c): ("allegations in a prior effective pleading in the same action can be incorporated by reference regardless of the pleading in which the matter appears and regardless of the identity of the party who issued the pleading"); Fed. R. Civ. P. 10(c) ("Statements in a pleading may be adopted by reference in ... another pleading or in any motion").

[17] *See, e.g., Hydro Resources, Inc.*, LBP-98-5, 47 NRC 119, 121 n.1 (1998) ("Incorporating the Petitioners' hearing petition by reference is an inartful attempt to bypass [the regulation's 10-]page limitation"), *interlocutory appeal dismissed*, CLI-98-8, 47 NRC 314 (1998).

[18] *See, e.g., International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 142 n.7 (1998); *Public Serv. Co. of NH* (Seabrook Station, Units 1 and 2), LBP-89-3, 29 NRC 234, 240-41 (1989), *aff'd*, ALAB-915, 29 NRC 427 (1989); *Tennessee Valley Auth.* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976).

by reference by a Petitioner who, in a written submission, merely establishes standing and attempts, without more, to incorporate the issues of other petitioners. Further, we would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own. Our contention-pleading rules are designed, in part, "to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions."[19]

IV. DISCUSSION

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing; *i.e.*, that its "interest may be affected by the proceeding." *See* AEA § 189a, 42 U.S.C. § 2239(a). In addition, in a license transfer proceeding, the petition to intervene must raise at least one admissible issue. *See* 10 C.F.R. § 2.1306. As discussed below, both CAN and Cortlandt have demonstrated standing and have raised at least one admissible issue. We therefore set the case for hearing.

A. Standing

Applicants do not contest the standing of any of the three entities. We recently granted standing to CAN and Cortlandt in a license transfer proceeding involving another nuclear unit on the same site as the Indian Point plant. *See Indian Point 3, CLI-00-22, 52 NRC* at 293-295. We grant standing to CAN and Cortlandt in this proceeding for the same reasons.

B. Admissibility of Issues

---

[19] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, a petitioner must

> (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
> (2) demonstrate that those issues fall within the scope of the proceeding,
> (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
> (4) show that a genuine dispute exists with the applicant regarding the issues, and
> (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1306; *Indian Point 3, CLI-00-22,* 52 NRC at 295 and references cited therein. Mere "notice pleading" is insufficient under these standards; however, our requirement for specificity and factual support rather than vague or conclusory statements is not intended to prevent intervention when material and concrete issues exist. *See id*.

Our rules expressly require an intervention petitioner to state the facts or expert opinions supporting its position. *See* 10 C.F.R. § 2.1306. If an application lacks detail, a Petitioner may meet its pleading burden by providing "plausible and adequately supported" claims that the data are either inaccurate or insufficient. *See GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000).[20]

To support its proposed issues, Cortlandt relies primarily on the affidavit of its expert, George E. Sansoucy.[21] Mr. Sansoucy has used information available from public sources (*e.g.*, data from FERC-1 forms filed by Applicants) as a starting point and made assumptions within his area of expertise to interpret such information. Cortlandt has also used information -- often generated or commissioned by ConEd -- obtained from filings before other government agencies

---

[20]"[I]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief" constitute sufficient information to show that a genuine dispute exists under the Subpart G analog of 10 C.F.R. § 2.1306. *See* 10 C.F.R. § 2.714(b)(2)(iii).

[21]Applicants have not challenged Mr. Sansoucy's expertise.

which are separately considering the instant license transfer. CAN, too, has supplied extensive material, but some of it is irrelevant to a license transfer proceeding (*e.g.,* its petition under 10 C.F.R. § 2.206 and an analysis by David Lochbaum of the Union of Concerned Scientists that might serve as support in the 2.206 proceeding, but has little or no value in this license transfer proceeding). CAN has offered an affidavit by its expert, Edward A. Smeloff, but he prepared that affidavit for the *Indian Point 3* license transfer proceeding.[22] We will consider only the paragraphs of that affidavit that are of general applicability, and we will ignore any paragraph that specifically relates to the Indian Point 3 plant. CAN has also used information available in NRC publications to provide factual support for its proposed issues.

We now turn to the actual proposed issues in this case to determine whether they are admissible under 10 C.F.R. § 2.1308. Some issues we find admissible, and some not. For convenience, we have grouped related issues.

1. Financial Qualifications Issues

Both Cortlandt and CAN express strong doubts that the Entergy companies have the level of financial qualifications necessary to operate the Indian Point plant safely. *See* 10 C.F.R. § 50.33(f)(2). Cortlandt asserts that the application does not demonstrate an appropriate margin between anticipated operating costs and revenue projections, and that the Applicants do not provide evidence of access to sufficient reserve funding. Under the "financial qualifications" umbrella, Cortlandt raises numerous subissues -- some of which overlap.[23] CAN alleges more generally that Applicants' revenue projections are unreasonable and their operating and maintenance cost projections are far too low. We admit the jointly sponsored financial

---

[22]*See* "Declaration of Edward A Smeloff" (Jan. 10, 2001) 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.

[23]In Section III.B., *supra*, we considered CAN's and Cortlandt's objection that the Applicants provided only 4½ years of cost and revenue projections.

qualifications issue, limited to the bases approved in the following discussion of Petitioners' itemized claims.

a. Applicants' 85% Capacity Factor Projection

Petitioners assert that the Applicants' revenue projections are unreasonable because they rest on achieving an average annual capacity factor[24] of 85% for IP2. Cortlandt challenges this projection as "fantasy," and both Petitioners note that no supporting information for this assertion appears in the license transfer application. *See* Cortlandt's Issues at 5-6; CAN's Contentions at 34; CAN's Reply at 23-24. Citing data obtained from Federal Energy Regulatory Commission forms filed by Applicants, George E. Sansoucy, the expert retained by Cortlandt, notes that the average annual capacity factor for IP2 from 1995 through 1999 was 57.66% if no adjustment is taken for an extended shutdown. *See* Letter from George E. Sansoucy to Paul V. Nolan at p. 2, Feb. 20, 2001 ("Sansoucy Letter"). According to CAN, the NRC Staff has stated that, without taking an extended shutdown into account, the average for 1994 through 1999 was 66.1%.[25] Focusing on recent operation, CAN says that the average capacity factor for 1997-1998 was 30.7%, as IP2 suffered 17 months of outage in that 2-year period. *See* CAN's Contentions at 34-35.

CAN claims generally that ConEd has repeatedly failed to address the fundamental problems responsible for loss of production and, in light of IP2's history of being a "troubled" reactor, cost and revenue projections should be tested for a one-year outage to determine whether the Entergy companies are financially qualified to own and operate the Indian Point

---

[24]"Capacity factor" is "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 Indian Point 3,* CLI-01-14, 53 NRC at __, slip op. at 5, *citing* "Glossary of Nuclear Terms," at http://www.nrc.gov/NRC/EDUCATE/GLOSSARY.

[25]*See* CAN's Contentions at 35, *citing* the NRC website at http://www.nrc.gov/NRC/NUREGS/SR1350/V12/sr1350v12.html#_1_58.

plant. *See* CAN's Contentions at 35. CAN argues that "[t]he mere claim that Entergy's performance record at other reactors justifies their assumption that such performance would be immediately achievable at Indian Point 2 does not constitute evidence in support of these newly formed non-utilities' financial qualifications." *See* CAN's Reply at 26-27.

We recently approved a Presiding Officer's admission of a similar capacity-factor issue in *Indian Point 3*. *See Indian Point 3*, CLI-01-14, 53 NRC at __, slip op. at 18, *approving* LBP-01-04, 53 NRC at 128. We accept Cortlandt and CAN's issue for adjudication in this case as well.

In a related vein, Cortlandt also questions whether the Entergy companies' operating experience with other plants is even relevant to IP2 achieving an average plant factor of 85% in light of IP2's recent operating history. *See* Cortlandt's Issues at 7. Further, Cortlandt maintains that "[e]ven if a description of experience with other plants was provided, such experience would be totally irrelevant because it would not consider the particular capital improvements needs, or operating history of IP2, which is the sole source of Plant generated revenues." *Id.* This issue, too, warrants further inquiry at a hearing. *See Indian Point 3*, CLI-01-14, 53 NRC at __, slip op. at 21-22. Accordingly, we accept this subissue for litigation.

b. Projected Revenues

Cortlandt also disputes whether the projected revenues for operation of IP2 are reasonable and reliable. Specifically, Cortlandt claims that Applicants' estimates of costs and revenues are "facially incredible and cannot be reconciled with known information." *See* Cortlandt's Redacted Issues at 6. Citing proprietary data,[26] Cortlandt notes that the average revenue claimed by Applicants for 2002-2004 exceeds the figure calculated using an 85% capacity factor and the fixed price for electricity under contract to ConEd. *See id*. at 7. Similarly, according to Cortlandt, Applicants' revenue estimates for 2005, the first year not covered by the

[26]Specific figures will not be revealed here.

power purchase agreement with ConEd, greatly exceed the revenues available using an 85% capacity factor and Applicants' estimate of sale price per megawatt hour. *See id*. at 8. Cortlandt concludes that Applicants' projections "grossly overstate" the anticipated revenues. *See id.* As this subissue not only is backed by calculations derived from the Applicants' own data but also relates to Cortlandt and CAN's challenge to the Applicants' 85% capacity factor projection, we accept it for litigation.

c. Estimated Costs

CAN asserts generally that Applicants' operating and maintenance cost projections are far too low. CAN alleges that Applicants have not accounted for "the increased expenses to take on the project of restoring the reactor to regulatory compliance and resolving the organizational and personnel problems the Entergy companies would inherit." *See* CAN's Contentions at 36. Based only on a comparison with operations and maintenance costs in the FitzPatrick/IP3 license transfer application, CAN concludes that the Entergy companies expect to resolve the foregoing problems with a "hopelessly inadequate" additional investment of less than $50 million. *See id*. CAN has advanced no documentary support or expert opinion for its claim.[27]

Cortlandt, however, contests Applicants' estimated costs in four better documented subissues: (1) whether the estimated project costs are reasonable in light of IP2's previous operating history; (2) whether projected costs are reasonable and reliable in their own right; (3) whether the projected total operating expenses jeopardize Applicants' financial ability to operate IP2 safely;[28] and (4) whether achieving an average plant capacity factor of 85% will cause Applicants to incur additional costs for maintenance of plant safety (increased variable costs for refueling, repairs, and maintenance) in excess of those projected. *See* Cortlandt's

---

[27]As noted, *supra,* CAN submitted an affidavit its expert prepared for another license transfer proceeding. We do not find the general paragraphs of that affidavit applicable here.

[28]This subissue warrants no separate discussion, as it inheres in the first two subissues.

Issues at 7-10; Cortlandt's Redacted Issues at 6, 8-10. These interrelated subissues amount to a claim that Entergy's costs will prove higher than anticipated.

Cortlandt relies on an analysis of data available from FERC Form 1 for the years 1995 through 1999. *See* Sansoucy Letter. These figures include the costs of operation, fuel, and maintenance reported by ConEd and the estimated costs of capital to finance the purchase of the facility and nuclear fuel and fuel oil inventories.[29] Cortlandt compares these historic costs to the income expected under the proposed power purchase agreement between ConEd and Entergy Indian Point 2, and concludes that, if IP2 performs at its 1995-1999 levels, the total cost of operation may exceed the revenues obtainable under the power purchase agreement by 20% or more. *See* Cortlandt's Issues at 9. Cortlandt argues that "the financial capability of [Entergy Indian Point 2] is dependent on performance levels that the facility did not maintain during the years 1995 to 1999 or cost savings which have not been identified in the Transfer Application." *See id.*

Cortlandt also relies on proprietary data submitted by Applicants and publicly available data regarding annual operating expenses of ConEd for IP2 for 1997-1999. Cortlandt argues that Applicants do not explain why their cost estimates appear to be substantially lower than those experienced by ConEd, and why certain estimates, such as cost of fuel, do not harmonize with historic costs. *See id*. at 8-9. Cortlandt alleges that the projected cost figures are not only unsupported but also "plainly in contradiction with known historical operating data." *See* Cortlandt's Redacted Issues at 8. Cortlandt states that, according to the license transfer application, the Entergy companies anticipate being able to fund fixed operating expenses from

---

[29]Cortlandt cites the Affidavit of George Jee, page 2, Applicants' Joint Petition filed with the New York Public Service Commission, PSC Case No. 01-M-0075. *See* Cortlandt's Issues at 9. Annual capital requirements were estimated by George Sansoucy using a 10 percent cost of capital to finance the purchase over a 10-year period. *See* Sansoucy Letter, p. 2, ¶ 3. Applicants have not stated whether they will finance the purchase of the Indian Point plant.

retained earnings or by lines of credit. *See id*. at 9, *citing* license transfer application. Cortlandt contends that, in the event of an extended outage, Entergy Indian Point 2 will not be able to pay its projected fixed operating expenses from retained earnings.

We accept this subissue for adjudication, as it, like some of Cortlandt's other issues, rests on expert-backed claims that the transfer application relies on unexplained or non-credible data.

Cortlandt's final cost-based concern is whether achieving an average plant capacity factor of 85% will cause the Applicants to incur additional costs, in excess of those projected. We find that Cortlandt has not stated this proposed basis with the particularity required for consideration in a license transfer adjudication. *See* Cortlandt's Issues at 7-8. Therefore, we reject it.[30]

d. Decreasing Retained Earnings

Cortlandt contends that, under Applicants' projections, "retained earnings will be reduced drastically and possibly wiped out entirely before IP2's operating license expires." *See* Cortlandt's Redacted Issues at 2-3. Cortlandt foresees that, after 2003, a shortfall in retained earnings will require Entergy Indian Point 2 to access monies available to it under inter-company agreements. Further, Cortlandt worries that any deficiency in Entergy Indian Point 2's showing of financial strength would be exacerbated by any adverse operating events such as an extended shutdown. *See id.* at 3. Here, Cortlandt's queries are based on information contained in the license transfer application itself and questions that follow logically after considering IP2's operating history. We therefore accept this subissue for adjudication.

---

[30]Cortlandt has briefly raised the issue of whether the expiration of a collective bargaining agreement with IP2 employees in 2004 will result in costs beyond those accounted for in cost projections. *See* Cortlandt's Petition at 20. Since Cortlandt relies only on speculation to frame this issue, we decline to consider it further.

Cortlandt also raises an issue about the availability of funds under a $20,000,000 line of credit with Entergy Global Investments, Inc. Specifically, Cortlandt questions whether the lines of credit available to the Entergy companies from Entergy Global Investments and Entergy International Ltd. LLC are sufficient and reliable. *See* Cortlandt's Petition at 17-19. But "[g]iven 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..." *Indian Point 3*, CLI-01-14, 53 NRC at __, slip op. at 52. We would consider this issue only if the Entergy companies intended to rely on these credit arrangements to demonstrate their financial qualifications to own and operate the Indian Point plant. We have held that, "absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent's supplemental commitment is not material to our license transfer decision." *See Vermont Yankee*, CLI-00-20, 52 NRC at 177. *Accord Oyster Creek,* CLI-00-06, 51 NRC at 205 (adequacy of a credit line is not an issue if the credit line is not part of the financial qualifications showing, but offered merely as an additional demonstration of financial assurance). Therefore, we decline to consider the supplemental funding issue given that the Applicants do not rely on supplemental funding as a basis for financial qualification.

e. Revision of the Power Purchase Agreement

Cortlandt next inquires whether the Entergy-ConEd power purchase agreement should be revised to ensure that Entergy Indian Point 2 has adequate financial resources to cover total costs to operate in compliance with NRC requirements. *See* Cortlandt's Issues at 10. The sale of the Indian Point plant is, in Cortlandt's view, tied to a power purchase agreement with ConEd that provides for significantly below market rates for electricity; moreover, the sale of electricity is the only source of income to cover costs of operation.

We find this issue well outside the bounds of a license transfer proceeding and reject it. Enforcement or revision of a power purchase contract between private parties, even when the parties are within the regulatory authority of the NRC, is not within the jurisdiction of the NRC. While a change in such an agreement could in theory make the difference between proving an entity is financially qualified to own and operate a nuclear power plant and being unable to do so, the NRC has authority only to make a "yes or no" decision regarding financial qualifications or, at most, to give a conditional "yes" answer. Any financial conditions attached to a nuclear power plant license transfer would ordinarily be concerned with an additional sum of money or credit deemed necessary to demonstrate financial qualifications; NRC-imposed conditions normally would not direct that a particular source, such as a power purchase agreement, provide the additional funds. The remedy sought by Cortlandt lies outside the scope of this proceeding.

f. Legality of the Proposed Operating Agreement

As a "catch-all" financial issue, Cortlandt asks "whether the proposed operating agreement: A) is legal under New York State law, B) endangers [Entergy Indian Point 2's] financial ability to operate [the Indian Point plant] safely, and C) requires supplemental information." *See* Cortlandt's Redacted Issues at 3-5.

Cortlandt submits that the proposed operating agreement is unenforceable under New York State law because it "purports to indemnify" Entergy Indian Point 2 for claims that may be lodged against it. *See id*. at 4. An NRC adjudicatory proceeding is simply not the appropriate forum for examining a contractual agreement's legality under state law. To be effective, the license transfer application must be approved by the New York Public Service Commission, among other agencies. NRC's charge is to protect the health and safety of the nuclear workforce and the general population by ensuring the safe use of nuclear power. We depend on the State of New York to handle any issues -- such as contractual issues -- which are not in conflict with our jurisdiction and which are properly contested under that state's laws.

We also reject Cortlandt's assertion that the operating agreement may interfere with Entergy Indian Point 2's financial ability to operate the Indian Point plant safely. Cortlandt's assertion is too vague and speculative to serve as a basis for adjudication. *See Indian Point 3*, CLI-00-22, 52 NRC at 312. Cortlandt believes that, under the proposed operating agreement, the ability of Entergy Nuclear Operations to incur costs is "unfettered" and, consequently, Entergy Indian Point 2 is "likely" to be "embroil[ed] ...in expensive disputes." *See* Cortlandt's Redacted Issues at 4. In another apparent criticism of the agreement, Cortlandt characterizes the prepayment of expenses by Entergy Nuclear Operations and the obligation of Entergy Indian Point 2 to reimburse the former entity as "nothing more than a means for 'conveying' project revenues to [Entergy Nuclear Operations], out of the coffers of [Entergy Indian Point 2] -- a limited liability corporation, and into the hands of upstream and nonregulated affiliates of [Entergy Indian Point 2]." *See id*. The distribution of project revenues and profits is not within NRC's purview, so long as the Indian Point plant has sufficient money to operate safely and to meet decommissioning obligations. Although Cortlandt's assertions are couched in terms of jeopardy to the plant's ability to operate safely, we cannot admit an issue for adjudication based on mere conjecture. "Unsupported hypothetical theories or projections ... will not support invocation of the hearing process." *Indian Point 3*, CLI-00-22, 52 NRC at 315.

2. Technical Qualifications

The Entergy companies assert they are technically qualified to operate IP2 because existing staff and personnel will become employees of Entergy Nuclear Operations. CAN asserts that the Entergy companies are not technically qualified to operate IP2 and that the application does not acknowledge any of ConEd's special circumstances and problems; specifically, that ConEd's "history of systemic mismanagement ... has compromised the material condition, licensing and design basis, and technical qualifications of the existing personnel." *See* CAN's Contentions at 11. Further, according to CAN, a "culture of non-compliance [at IP2]

threatens occupational and public health and safety." *Id.* at 17. CAN considers it "imperative to consider the legacy problems that undermine the Entergy companies' technical qualifications" in the context of this license transfer proceeding. *See* CAN's reply at 21. CAN urges that conditions be placed on the sale to protect the health and safety of workers and the public; that the FSAR be verified; and that an independent evaluation of IP2 be required before transfer because of historical problems in NRC Region I. *See* CAN's Contentions at 16-18, 24-29.

We decline to admit this issue, as CAN's claims are not directly linked to the license transfers at issue in this proceeding. *See Indian Point 3*, CLI-00-22, 52 NRC at 309. With continuity in the workforce, any problems alleged by CAN are operational problems that, if shown to exist, will need to be remedied whether or not the license is transferred. Indeed, CAN's concerns are under review as the subject of an enforcement petition filed by CAN under 10 C.F.R. § 2.206, which provides for any person to "file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper."[31]

CAN has not squarely challenged the technical qualifications of the plant's intended employees. *See Indian Point 3, CLI-00-22, 52 NRC* at 309-310. Rather, CAN has advanced the amorphous allegation that ConEd's "systemic mismanagement" of Indian Point 2 has, in some undefined manner, "compromised the technical qualifications of existing personnel and support organizations there." *See* CAN's Contentions at 15. CAN stresses that "Entergy would be

[31]*See* CAN's "Formal Petition for Enforcement Action Pursuant to 10 CFR 2.206 to Revoke Con Edison's Operating License for Indian Point Unit 2 Due to Chronic, Systemic Mismanagement Resulting in Significant Violations of NRC Safety Regulations," Docket No. 50-247 (Dec. 4, 2000) (CAN's 2.206 Petition"). CAN's petition has been accepted for review by NRC's Director of Nuclear Reactor Regulation. *See* "License No. DPR-26, Consolidated Edison Company of New York, Inc., Receipt of Petition for Director's Decision Under 10 C.F.R. 2.206," 66 Fed. Reg. 15,301 (March 16, 2001).

relying on these same technically unqualified staff." *See* CAN's Reply at 19. CAN's claims are too broad and too vague to be suitable for adjudication.

CAN believes that verification of the FSAR and Design Basis Documentation is necessary to meet the requirements for license transfer. *See* CAN's Contentions at 24-27. Applicants maintain that ConEd updated the FSAR in 1982 and subsequently updated it pursuant to our regulations. *See* License Transfer Application, Enclosure 1, p. 15, ¶ B. This is another operational issue outside the scope of a license transfer proceeding. *See Indian Point 3*, CLI-00-22, 52 NRC at 310-11. As with CAN's other operational grievances, the NRC Staff is considering CAN's FSAR concern in conjunction with the petition CAN filed in December, 2000. *See* CAN's 2.206 Petition at 3; *see also* note 5.

Regarding CAN's request for an independent evaluation of IP2 before any license transfer, we declined to admit a similar issue espoused by CAN in *Indian Point 3* and in *Vermont Yankee*. *See Indian Point 3*, CLI-00-22, 52 NRC at 318, *citing Vermont Yankee*, CLI-00-20, 52 NRC at 171. Region I's performance in overseeing the IP2 plant is far outside the scope of a license transfer proceeding. *See Vermont Yankee* , CLI-00-20, 52 NRC at 171 and references cited therein.

3. Decommissioning Funding

Cortlandt questions whether the license transfer application contains the information required by 10 C.F.R. § 50.33(k)(1) pertaining to the adequacy of its funding for decommissioning the Indian Point plant. *See* Cortlandt's Petition at 21-23, Cortlandt's Reply at 2-4. A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e). *See* 10 C.F.R. § 50.75(a). The Commission has held that a showing of compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999). Applicants

initially proposed to meet this requirement by prepaying a deposit in an amount sufficient to cover the decommissioning costs at the time termination of operation is expected. *See* 10 C.F.R. § 50.75(e)(1)(i); License Transfer Application, Enclosure 1, p. 13, ¶ K. In determining the amount of prepayment, a licensee may take credit for projected earnings on the trust funds using up to a 2 percent annual rate of return. *See* 10 C.F.R. § 50.75(e)(1)(i).

ConEd initially proposed to transfer a total of $430 million to Entergy Indian Point 2 to fund the decommissioning trust. Cortlandt notes that the derivation of the $430 million figure is not explained in the application, but surmises that it is the present value, discounted at the rate of 2 percent real rate of return, of the calculated minimum amount of $558 million required at the expiration of the licenses in 2013. *See* Cortlandt's Petition at 21.

Cortlandt states that, based on the results of a site-specific cost study contracted by ConEd, $558 million will be insufficient, as the actual sum required for decommissioning will be $578 million.[32] In addition, ConEd apparently has committed to restore the Indian Point plant site to "Greenfield" conditions, resulting in an additional cost of $47 million. *See id*. at 22. Even though the proposed decommissioning fund will meet the NRC minimum amount, Cortlandt states that there will be a shortfall of $20 million for standard decommissioning and $67 million for restoring the property to "Greenfield" conditions. *See id.* Cortlandt suggests three additional factors that could add to the decommissioning shortfall: the total decommissioning cost is based on the assumption that the decommissioning of IP1, IP2, and IP3 will all be done by one owner; due to the uncertainty in financial markets, the decommissioning fund may not appreciate at the estimated 2 percent real growth rate; and a significant source of funding for decommissioning will no longer be available after the transfer of the licenses. *See id.* at 22-23.

---

[32] *See* Cortlandt's Petition at 21-22, *citing* Affidavit of Edward Rasmussen, annexed to Draft Supplemental Environmental Impact Statement prepared by ConEd, dated Jan. 19, 2001, with respect to the transfer of Indian Point units 1 and 2 to Entergy, pursuant to Section 70 of New York State Public Service Law.

Cortlandt's decommissioning issues, as set out in its petition, amount to an impermissible challenge to a generic decision made by the Commission in its decommissioning rulemaking. *See Seabrook*, CLI-99-6, 49 NRC at 217 n. 8.[33] In its Reply, however, Cortlandt formally requested a waiver of 10 C.F.R. § 50.75(e)(1)(i) to the extent that compliance with the minimum funding requirement described in the regulation is deemed to provide adequate assurance of the ability to decommission. *See* Cortlandt's Reply at 3. To show unique "special circumstances" supporting its waiver request, Cortlandt cites the fact that the present licensee has performed a site-specific study which purportedly documents the inadequacy of the minimum funding level established by regulatory criteria. *See id*. at 4. This study, according to Cortlandt, warrants the conclusion that application of the rule would not serve the purposes for which it was adopted. *See* 10 C.F.R. § 2.1329.

We decline to grant the rule waiver or admit Cortlandt's decommissioning issue. We conclude that our generic funding rule serves *both* purposes for which it was adopted, even in the alleged "special circumstances" of this case. The two purposes of our regulations regarding decommissioning funding are (1) to "minimize the administrative effort of licensees and the Commission" and (2) "to provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner which protects public health and safety." *See* "Final Rule: General Requirements for Decommissioning Nuclear Facilities," 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). Prior to adoption of this rule, many licensing activities concerning decommissioning had to be determined on a case-by-case basis, resulting in inconsistency and "inefficient and unnecessary administrative effort." *See id.* at 24,019. The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purposes of the rule. Using site-specific estimates, as Cortlandt

---

[33]We agree with Applicants that "Cortlandt's petition implicitly concedes that, absent a waiver of the NRC's regulatory position, it is barred from challenging the adequacy of a decommissioning funding approach that complies with the requirements of 10 C.F.R. § 50.75." *See* Applicants' Answer to Cortlandt at 8.

demands, would defeat the specific purpose of minimizing inefficient administrative effort. Indeed, in our decommissioning rulemaking we explicitly rejected the use of site-specific estimates,[34] although we recognized that site-specific cost estimates may have to be prepared for rate regulators. *See* "Final Rule: Financial Assurance Requirements for Decommissioning Nuclear Power Reactors," 63 Fed. Reg. 50,465, 50,468-69 (Sept. 22, 1998); 53 Fed. Reg. at 24,030.

Our adherence to the regulatory formulas does not mean that we do not share Cortlandt's concerns about decommissioning funds. Use of the generic formula, however, is only the first step in assuring adequate funds for decommissioning, and our rules take into account the possibility of changes over time. Five years prior to the expected end of operation, the licensee is required to submit a cost estimate for decommissioning based on an up-to-date assessment of the actions necessary for decommissioning and plans for adjusting levels of funds assured for decommissioning. This estimate would be based on a "then current assessment of major factors that could affect decommissioning costs." *See id*. "These factors could include site specific factors as well as then current information on ... disposal of waste, residual radioactivity criteria, etc., and would present a realistic appraisal of the decommissioning of the specific reactor, taking into account actual factors and details specific to the reactor and the time period." *Id.* We remain confident that our generic formula, along with our end-of-license requirements, will result in reasonable assurance of adequate decommissioning funding:

> [C]ombination of these steps, first establishing a general level of adequate financial responsibility for decommissioning early in life, followed by periodic

---

[34]Although we did not actually reach the question addressed here, we stated in an earlier license transfer proceeding that "no one would be free to argue in a license transfer case that site-specific conditions at a particular nuclear power reactor render unusable the generic projected costs calculated under our rule's cost formula." *See Seabrook*, CLI-99-6, 49 NRC at 217, n. 8.

> adjustment, and then evaluation of specific provisions close to the time of decommissioning, will provide reasonable assurance that the Commission's objective is met, namely that at the time of permanent end of operations sufficient funds are available to decommission the facility in a manner which protects public health and safety. More detailed consideration by NRC early in life ... is not considered necessary ...

Id. at 24,030-31.

Regarding the additional expense to decommission to "Greenfield" conditions, we cannot require the Applicants to provide funds above and beyond those required for standard decommissioning as defined by NRC rules. *See Indian Point 3,* CLI-00-22, 52 NRC at 303. Decommissioning funding under NRC regulations does not include costs relating to non-radioactive structures and materials beyond those necessary to terminate the NRC license. "Costs of disposal of nonradioactive hazardous wastes not necessary for NRC license termination are not included in the prescribed amounts." 53 Fed. Reg. at 24,031.

The other factors (in addition to the alleged shortfall between the generic formula and the contractor's site-specific estimate and restoring to "Greenfield" conditions) mentioned by Cortlandt do not change our analysis.[35] *See* Cortlandt's Petition at 22-24. Therefore, we decline to admit Cortlandt's issue.

4. Environmental Remediation

Cortlandt questions whether Applicants have the resources to adequately fund the environmental remediation that it believes will be required at the Indian Point plant site. Cortlandt cites a report prepared by a contractor retained by ConEd to perform an environmental site asessment for IP2. *See* Cortlandt's Petition at 25. Cortlandt states that the report identified "environmental problems" and "potential actions and remediation that may be required." *See id.* Cortlandt also refers to a pending renewal of the State Pollutant Discharge Elimination System

---

[35]Cortlandt mentions uncertainty in financial markets, unavailability of a significant source of funding, and Entergy Indian Point 2's lack of assets other than the facilities to be decommissioned.

water discharge permit for IP2 and insists that the cost of compliance with any agreement among the New York State Department of Environmental Conservation, the U.S. Environmental Protection Agency, various electric utilities, and intervenors needs to be explained before a final determination can be made regarding the adequacy of Entergy Indian Point 2's financial qualifications. *See id.* at 26.

We decline to admit these issues. The intervenors have not alleged any specific remediation that is likely to be undertaken in the next 5 years and the references to "environmental problems" are too vague to provide a basis for a litigable issue. Substantive questions relating to plant operations, such as whether environmental remediation may be necessary in the future, are not within the scope of license transfer proceedings. *See Indian Point 3*, CLI-00-22, 52 NRC at 311; *Vermont Yankee*, CLI-00-20, 52 NRC at 169; *Oyster Creek*, CLI-00-06, 51 NRC at 213. Issues addressing the sufficiency of the Applicants' 5-year cost estimates are within the scope of transfer proceedings. However, because Cortlandt failed to identify a specific environmental remediation activity that is likely to occur within the next 5 years, they have failed to raise a genuine issue about whether the Applicants' 5-year revenue projections are sufficient to cover the cost of any such remediation expense.

CAN has also raised an environmental remediation issue. CAN challenged the adequacy of the provision for remediation of radiological materials after the proposed license transfer because the purchase and sale agreement between ConEd and Entergy Indian Point 2 contains a clause whereby ConEd would retain any liability arising from a recent steam generator tube rupture event. *See* CAN's Reply at 34-37. CAN objects to this clause because CAN argues that the NRC will lose jurisdiction over ConEd if the transfer is permitted, while the clause addressing liability in the purchase and sale agreement leaves only ConEd financially responsible for remediation expenses. *See id.* Applicants assert that "there is no basis for any claim that there

is any radioactive contamination offsite, let alone any that requires remediation." Applicants Answer to CAN at 19.

CAN too has failed to raise a litigable environmental remediation issue. Like Cortlandt, CAN has not described any specific remediation that will be necessary. Further, the NRC retains enforcement authority to ensure adequate protection of health and safety and the environment irrespective of any contract provision between the parties to a transfer. Vague, unsupported issues are inadmissible. *See* 10 C.F.R. § 2.1306.

5. Radiological Emergency Response Plans

Cortlandt requests that we examine whether the application is deficient because it fails to provide a radiological emergency response plan, required by 10 C.F.R. § 50.33(g), to account for the increased population and development of the immediate vicinity of the Indian Point plant. *See* Cortlandt's Petition at 26-27. Cortlandt states that, because of the significant expansion of the communities in northern Westchester County in the last 25 years, the evacuation of the population would be more difficult than in the past. Cortlandt alleges that the application is deficient because it does not consider the *probability* that a new evacuation plan will have to be designed and *may* require significant additional expenses, "*possibly* including the construction of new and improved highways to facilitate the rapid transportation of residents away from a nuclear accident." *See id*. at 26-27 (emphasis added). We decline to accept this issue for adjudication.

In *Indian Point 3*, we rejected two similar issues. Specifically, in that case Cortlandt asked the Commission to consider the impact of the proposed transfers on the need for changes to the Emergency Evacuation Plans and the appropriateness of the proposed license transfer in view of the plant's proximity to metropolitan areas. *See Indian Point 3,* CLI-00-22, 52 NRC at 317. We noted in the earlier case that the new licensees would have to meet all of our regulatory requirements concerning emergency planning and preparedness. *See id*. We also concluded

that IP3's proximity to metropolitan areas and to locations for sporting and cultural events was not relevant to the question whether to approve the license transfer. *See id*. The same reasoning applies in the instant case. As with some of Cortlandt's other issues, its emergency response claims relate to the everyday running of the plant, not to license transfer. Moreover, Cortlandt provides nothing more than speculation that Entergy's compliance with our emergency response plan regulations will necessitate large unanticipated expenditures, rendering Entergy's 5-year cost and revenue projections unreliable.

6. Spent Nuclear Fuel Storage Capacity

Cortlandt states that IP2's spent nuclear fuel storage capacity will be fully utilized in 2004 and argues that the application is deficient because it fails to demonstrate the capacity to handle on-site nuclear waste after that time. *See* Cortlandt's Petition at 12, 24, Cortlandt's Issues at 11-14. Safe and adequate storage or disposal of spent nuclear fuel is an ongoing operational issue which must be addressed by whoever owns the plant; as such, it ordinarily falls outside the scope of a license transfer proceeding. *Oyster Creek*, CLI-00-06, 51 NRC at 213-14.

In this case, however, Cortlandt bases its challenge primarily on the anticipated *cost* of additional storage capacity rather than on the safety, environmental, or operational aspects of spent fuel storage. As support, Cortlandt points to a study performed a year ago for ConEd. *See* Cortlandt's Issues at 12. According to Cortlandt, the study estimates the cost of addressing the problem of nuclear waste at the Indian Point plant after 2004 as between $147 million and $362 million. *See* Cortlandt's Petition at 24-25. Cortlandt may have misinterpreted the figures it quoted -- Applicants claim the figures apply to the total costs incurred between unit shutdown and complete restoration of the site, not just the cost of solving the 2004 problem. *See* Applicants Answer to Cortlandt at 28, note 31. Cortlandt offers no other factual support for the implied proposition that Applicants will be unable to afford managing spent nuclear fuel in accordance with our regulations. But Applicants have provided us nothing to show that their

projected cost figures have accounted for the undefined expense of solving their admitted short-term problem of interim spent fuel storage.

We are reluctant to permit Cortlandt to transform an operational issue into one of financial qualifications. Cortlandt's issue raises no immediate health or safety concerns, as the plant will simply shut down if the Entergy companies become unable to accommodate spent fuel generated by Indian Point 2. In the past the Commission has refused to consider spent fuel storage issues in the context of license transfer proceedings. *See Vermont Yankee*, CLI-00-20, 52 NRC at 171; *Oyster Creek,* CLI-00-06, 51 NRC at 207-08. In those earlier cases, however, spent fuel issues were proffered in a purely operational context or the anticipated storage problems were too far down the time line to assume a role in the license transfer decision. Unlike those cases, the instant case presents a situation where an expense -- not quantified in the application -- will be incurred by the transferee within the carefully scrutinized 5-year period after the requested license transfer. Therefore, we admit this issue as a subissue of the financial qualifications question.

7. Compromise of NRC's Regulatory Authority

CAN asserts that approval of the license transfer would compromise NRC's regulatory authority over ConEd's continued responsibility for radiological materials and undermine NRC's ability to protect public health and safety. *See* CAN's Contentions at 39-43. CAN is concerned because, under the Applicants' Asset Purchase & Sale Agreement, ConEd retains liability for radiological materials deposited off-site under its period of ownership. If NRC approves the license transfer, contends CAN, the agency's authority over ConEd with respect to any such radiological materials would be compromised because the NRC would no longer have direct regulatory authority over ConEd after it is released from the Indian Point plant license. *See id.* at 39. CAN believes there is evidence of the need for off-site remediation because the Entergy companies have included contractual language in the purchase and sale agreement which

shields them from liability which may be associated with a steam generator tube rupture event that occurred during ConEd's stewardship of the plant. CAN is worried that ConEd may not be able to fulfill its responsibilities if it is released from its license before these matters are resolved. *See id.* at 42.

In *Indian Point 3*, CAN similarly asserted that approval of the license transfer would deprive the Commission of any post-transfer regulatory authority to ensure that the previous owner (Power Authority of the State of New York) satisfies the NRC's requirements for decommissioning and remediation of the site because the Commission's regulations do not provide for retention of authority and enforcement power over a former licensee. *See Indian Point 3*, CLI-01-14, 53 NRC at __, slip op. at 72. We examined in detail the issue of our jurisdiction over unlicensed persons and concluded that our authority extends to any person "who engages in conduct *affecting activities* within the Commission's subject-matter jurisdiction -- including those who ... *have been* engaged in licensed activities." *See id*., slip op at 74-75, and references cited therein. Similarly, we conclude here that CAN's worries about the Commission's continuing authority over ConEd are unfounded. Moreover, the circumstances raised by CAN to justify its issue are purely speculative at this point. For the foregoing reasons, we decline to consider this issue further.

8. The Public Interest

Cortlandt contends loosely that the proposed transfer is not in the public interest. Its entire basis for this issue is as follows:

> The proposed transfer will enable an investor owned utility, subject to regulation by the PSC, to transfer a generating asset (IP2) together with a defunct liability (IP1) to a wholesale electric generating company. Even more significant, the assets transferred have serious potential liabilities, both in terms of potential radiological exposure, and undisclosed environmental hazards, and the proposed transferee does not appear to have adequate financial resources to cover either ongoing expenses or decommissioning. Such a transfer is plainly not in the public interest.

Cortlandt's Petition at 28.

This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest -- other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility. Because Cortlandt's "public interest" issue seems to go beyond the NRC's statutory duties, and also lacks sufficient specificity, we decline to admit it.

V. OTHER PROCEDURAL MATTERS

A. Designation of Issues

To avoid confusion regarding the issues we have found to be admissible, we direct the parties to organize their presentations at the hearing around the following issues. All relate to the Applicants' 5-year cost and revenue projections:

1. Revenue

a. whether Entergy's' 85% capacity factor assumption is reasonable in its own right and reasonably rests on the Entergy companies' operating experience at other plants;

b. whether, even assuming an 85% capacity factor, the revenue claimed by Entergy exceeds the revenues likely to be attained, given Entergy's fixed price agreement with ConEd and Entergy's estimate of the sale price per megawatt hour; and

c. whether Entergy's projected decrease in retained earnings will leave Entergy short of necessary operational funds

2. Costs

a. whether, given fixed operating costs, Indian Point 2's historical operating expenses, and the application's asserted lack of information on cost savings, Entergy's cost estimates are too low; and

b. whether Entergy's cost estimates include appropriate amounts to resolve a shortage of spent fuel storage capacity expected to begin in 2004.

The parties should be prepared to offer prefiled testimony and exhibits containing *specific* facts and/or expert opinion in support of their positions on these issues. Parties shall keep their pleadings as short and as focused as possible. The Commission will not consider new issues or new arguments related to the admitted issues at the hearing unless they satisfy our rules for late-filed issues (*See* 10 C.F.R. § 2.1308(b)), and will not consider claims rejected in this opinion. Redundant, duplicative, unreliable, or irrelevant submissions are not acceptable and will be stricken from the record. *See* 10 C.F.R. § 2.1320(a)(9). We also direct the Intervenors to state explicitly the remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

B. Designation of Presiding Officer

The Commission directs the Chief Administrative Judge of the Atomic Safety and Licensing Board promptly to appoint a Presiding Officer for this proceeding. Until the appointment of a Presiding Officer, the parties should file any written submissions with the Office of the Secretary.

C. Notices of Appearance

If they have not already done so, each attorney or representative for each party shall, not later than 11:59 p.m. on September 4, 2001, file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). Each notice of appearance shall specify the attorney's or representative's business address, telephone number, facsimile number, and e-mail address. Any attorney or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

D. Filing Schedule

If the parties agree to a non-oral hearing, they must file their joint motion for a "hearing consisting of written comments" no later than 11:59 p.m. (Eastern Time) on September 6, 2001 (*i.e.,* 15 days from the date of this Order). *See* 10 C.F.R. § 2.1308(d)(2). We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 11:59 p.m. on September 21, 2001 (30 days after the issuance date of this Order). *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits), and all proposed questions directed to written direct testimony must be filed no later than 11:59 p.m. on October 11, 2001 (20 days after the submission of written statements of position and written testimony). *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 11:59 p.m. on October 22, 2001 (10 days after the submission of rebuttal testimony).[36]

If the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m. on October 29, 2001 (5 business days after submission of questions), at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issues designated above. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

---

[36]*See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The 7-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b) and 2.1314(c), extended by 3 days, because the period includes a Saturday and a Sunday; the period is extended one additional day because the prescribed time period ends on a Sunday.

Any party submitting prefiled direct testimony should make the sponsor of that testimony available for questioning at the hearing. The Presiding Officer will issue an order establishing the amount of time available for the initial and reply presentations of the parties. Given the expedited nature of license transfer proceedings, the Commission anticipates that the hearing will take no longer than 1 day. The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party. *See* 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b); *Indian Point 3*, CLI-01-14, 53 NRC at __, slip op. at 83-85.

Finally, all written post-hearing statements of position must be filed no later than 11:59 p.m. on November 19, 2001 (20 days after the oral hearing, pursuant to 10 C.F.R. § 2.1322(c), plus one additional day because the due date falls on a Sunday.)[37]

E. Participants in the Hearing; Service List

The parties to this proceeding will be CAN, Cortlandt, ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations. The recipients on the service list will be:

The General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1537
(E-mail: ogclt@nrc.gov)

The Secretary of the Commission
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1101 (FAX)
(E-mail: secy@nrc.gov)

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

Paul V. Nolan, Esq.
5515 North 17th Street
Arlington, VA 22205
(E-mail: pvnpvn@aol.com)

Brent L. Brandenburg, Esq.
Consolidated Edison Co. of New York
4 Irving Place, Room 1830
New York, NY 10003
(E-mail: brandenburgb@coned.com)

Douglas E. Levanway, Esq.
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205
(E-mail: del@wisecarter.com)

---

[37] *See* 10 C.F.R. § 2.1314(a).

David A. Repka, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502
(E-mail: drepka@winston.com; mwetterh@winston.com)

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

We direct the parties immediately to supplement or correct the above information to the extent that it is incomplete or inaccurate, and immediately to notify all recipients of any such changes.

Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC Staff has indicated that it will not be a party to this proceeding. Nevertheless, the Staff is expected both to offer into evidence its Safety Evaluation Report and to proffer one or more sponsoring witnesses for that document. *See* 10 C.F.R. § 2.1316(b).

F. Service Requirements

The parties have a number of options under 10 C.F.R. § 2.1313(c) for service of their filings, the preferred method of filing in this proceeding is electronic (*i.e.,* by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 11:59 p.m. of the due date under our Subpart M rules. We also require the parties to submit a single signed hard copy of any filings to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

VI. CONCLUSION

For the reasons set forth above:

1. CAN's and Cortlandt's petitions to intervene and requests for hearing are *granted*.

2. CAN's and Cortlandt's requests to cosponsor each issue admitted for hearing are *provisionally granted*, subject to a requirement that, should the primary sponsor of an issue withdraw from this proceeding, the remaining sponsor demonstrate to the Presiding Officer the ability to litigate the issue.

3. CAN's motion for a Subpart G hearing or an expanded Subpart M hearing is *denied*.

4. Cortlandt's request to dismiss the application is *denied*.

5. Cortlandt's request for a waiver regarding consideration of site-specific decommissioning funding estimates is *denied*.

6. The parties are required to inform the Commission of any court or administrative orders, settlements, or business decisions that may in any way relate to, or render moot, part or all of the instant proceeding.

IT IS SO ORDERED.

For the Commission[38]

/RA by Andrew L. Bates Acting For/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of August, 2001

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