

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION**

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| ENTERGY NUCLEAR OPERATIONS, INC.;                       | ) |                          |
| ENTERGY NUCLEAR INDIAN POINT 2, LLC;                    | ) | Docket Nos. 50-003-LT,   |
| and ENTERGY NUCLEAR INDIAN POINT 3, LLC                 | ) | 50-247-LT, and 50-286-LT |
|   | ) |                          |
| (Indian Point Nuclear Generating Unit Nos. 1, 2, and 3) | ) |                          |
|   | ) | September 15, 2008       |

**RESPONSE OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING  
WESTCAN ET AL. MOTION FOR RECONSIDERATION OF CLI-08-19**

**I. INTRODUCTION**

Pursuant to 10 CFR § 2.345, Entergy Nuclear Operations, Inc. (“ENO”) hereby files this Response opposing the “Motion for Reconsideration” filed on September 4, 2008, by Westchester Citizen’s Awareness Network (“WestCAN”), Rockland County Conservation Association, Inc. (“RCCA”), Public Health and Sustainable Energy (“PHASE”), Sierra Club – Atlantic Chapter, and New York State Assemblyman Richard L. Brodsky (collectively, “Petitioners” or “WestCAN”).<sup>1</sup> Petitioners purport to seek reconsideration of CLI-08-19,<sup>2</sup> in which the Commission denied Petitioners’ February 5, 2008 Petition to Intervene in this indirect license transfer proceeding due to Petitioners’ failure to demonstrate standing to intervene.<sup>3</sup> As the Commission noted, Petitioners were “concerned primarily that the [corporate] restructuring [of the Entergy organization] could adversely affect the ‘fiscal responsibilities and liability’ of the three Indian Point units.”<sup>4</sup>

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<sup>1</sup> See Petitioners Motion for Reconsideration of the Commission’s Dismissal of Petitioners’ Petition to Intervene (Sept. 4, 2008) (“Petitioners’ Motion”).

<sup>2</sup> *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant; James A. Fitzpatrick Nuclear Power Plant; Pilgrim Nuclear Power Station; Vermont Yankee Nuclear Power Station; Indian Point Nuclear Generating Unit Nos. 1, 2, and 3; Big Rock Point), CLI-08-19, 68 NRC \_\_\_, Slip op. (Aug. 22, 2008).

<sup>3</sup> See Petition of Westchester Citizen’s Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club – North East Chapter (Sierra Club), and Richard Brodsky (Feb. 5, 2008) (“Petition to Intervene”).

<sup>4</sup> CLI-08-19, slip op. at 5 (*quoting* Petition to Intervene at 2).

ENO opposes Petitioners' Motion because it is fatally deficient in many respects. First, Petitioners' 31-page Motion grossly exceeds the 10-page limit for such motions specified in NRC regulations. Second, Petitioners fail even to mention, much less satisfy, the Commission's "strict standard" for reconsideration of its adjudicatory decisions.<sup>5</sup> Petitioners, while improperly misrepresenting facts and rehashing arguments that either were or could have been raised earlier, fail to demonstrate that CLI-08-19 is invalid. Finally, though Petitioners style their filing as a "Motion for Reconsideration," it is anything but that. As discussed below, the Motion is, in actuality, several *other* types of procedural filings—each extremely belated and devoid of merit—all rolled into one impermissible pleading. For these reasons, ENO respectfully requests that the Commission dismiss Petitioners' Motion. Petitioners continue to lack standing to intervene in this proceeding.

## II. BACKGROUND

Before identifying the numerous procedural and substantive flaws in Petitioner's Motion, it is necessary to *accurately* recount the procedural history of this case—something that Petitioners fail to do. Indeed, in their Motion, Petitioners ignore and/or misrepresent key facts associated with the case history. Accordingly, ENO provides the following consolidated chronology of events.

On July 30, 2007, ENO filed with the NRC an "Application for Order Approving Indirect Transfer of Control of Licenses" ("Application") for six Entergy facilities in view of a now-approved corporate restructuring.<sup>6</sup> ENO filed the Application on behalf of itself and the owners of those facilities. ENO submitted supplementary supporting information on October 31 and December 5, 2007, and on January 24, March 17, April 22, and May 2, 2008.<sup>7</sup>

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<sup>5</sup> *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Pool Storage Installation), CLI-06-27, 64 NRC 399, 401 (2006).

<sup>6</sup> The six facilities are Palisades, FitzPatrick, Pilgrim, Vermont Yankee, Indian Point, and Big Rock Point.

<sup>7</sup> See CLI-08-19, slip op. at 2-3.

On January 16, 2008, the Commission published in the *Federal Register* a series of hearing notices related to these consolidated proceedings.<sup>8</sup> On February 5, 2008, in response to these *Federal Register* notices, two groups of petitioners filed timely petitions to intervene, requests for evidentiary hearing, contentions, discovery requests, requests for issuance of protective orders, and requests for the opportunity to supplement contentions related to any information produced under the protective orders. Those petitioners included: (i) the Petitioners identified above and (ii) Union Locals 369 and 590 of the Utility Workers of America, AFL-CIO (“UWUA Locals”).<sup>9</sup>

On February 12, 2008, counsel for ENO telephoned counsel of record for Petitioners and UWUA Locals to discuss a confidentiality and non-disclosure agreement, pursuant to which ENO would produce the relevant confidential commercial information to each petitioner. During the following two weeks, and through a good faith exchange of drafts, counsel for ENO and UWUA Locals negotiated such an agreement, which was fully executed on February 26, 2008.

During the same two-week period, counsel for ENO also sought to conclude a similar confidentiality and non-disclosure agreement with counsel for Petitioners. The various communications that took place between counsel for ENO and counsel for Petitioners are detailed and documented in ENO’s February 26, 2008 motion for expedited Commission approval of a protective order and an extension of time in which to file an answer to the Petition to Intervene.<sup>10</sup> In short, on February 25, 2008, counsel for Petitioners, Ms. Sarah Wagner, confirmed Petitioners’ refusal to enter into a confidentiality and non-disclosure Agreement with ENO.<sup>11</sup>

Accordingly, on February 26, 2008, ENO filed two motions with the Commission. One motion sought Commission approval of a Revised Filing Schedule that would accommodate any supplemental

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<sup>8</sup> Notice[s] of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for Hearing, 73 Fed. Reg. 2948-2958 (Jan. 16, 2008).

<sup>9</sup> See CLI-08-19, slip op. at 3-4. On June 12, 2008, UWUA Local 369 voluntarily withdrew its petition and related requests for relief. See Notice of Withdrawal of Petition to Intervene of Local 369, Utility Workers Union of America, AFL-CIO (June 12, 2008).

<sup>10</sup> See Motion of [ENO] for Expedited Approval of Protective Order and Request for Extension of Time to File Answer to WestCAN Et Al. Petition to Intervene (Feb. 26, 2008) (“Motion for Protective Order”) at 4-6 & Attach. 2.

<sup>11</sup> See Motion for Protective Order at 5-6 & Attach. 2.

contentions that UWUA Locals might file based upon their review of the confidential proprietary information.<sup>12</sup> The second motion, identified above, sought a Protective Order to govern any possession and use by Petitioners of the confidential proprietary information contained in ENO's Application relating to NewCo and Indian Point Units 1, 2, and 3, in the event Petitioners were to seek access to such information to formulate new or amended contentions. Petitioners did not file a response to ENO's Motion for a Protective Order, as permitted by 10 CFR § 2.323(c).

The Commission subsequently issued two procedural orders. On February 28, 2008, it issued an Order granting ENO's consent motion for a revised filing schedule relative to the UWUA Locals' petition, and "postpon[ing] Entergy's deadline to answer WestCAN's petition to intervene, pending further order of the Commission."<sup>13</sup> On March 19, 2008, the Commission issued another Order directing ENO to file its answer to the WestCAN Petition to intervene within 10 days of the date of the Order.<sup>14</sup>

Pursuant to the Commission's March 19 Order, ENO timely filed its Answer to the Petitioners' February 5, 2008 Petition to Intervene.<sup>15</sup> Petitioners did not file a reply to ENO's March 31 Answer, despite being permitted to do so under 10 CFR § 2.309(h)(2). On August 22, 2008, the Commission issued CLI-08-19, denying the two petitions to intervene and associated requests filed by Petitioners and UWUA Locals 590 and terminating this adjudication.

### **III. ARGUMENT**

#### **A. Petitioners' Motion Grossly Exceeds the Commission's 10-Page Limit and Should Be Denied With Prejudice on That Basis Alone**

As noted above, Petitioners have submitted a 31-page motion for reconsideration, which is more than triple the Commission's 10-page limit on motions for reconsideration as specified in 10 CFR

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<sup>12</sup> See Consent Motion of [ENO] for Expedited Commission Approval of Revised Filing Schedule and Applicant's Conforming Request for an Extension of Time to File Answer to UWUA Locals Petition to Intervene (Feb. 26, 2008).

<sup>13</sup> Commission Order, at 1 (Feb. 28, 2008) (unpublished).

<sup>14</sup> Commission Order (Mar. 19, 2008) (unpublished) ("March 19 Order").

<sup>15</sup> Answer of Entergy Nuclear Operations, Inc. Opposing WestCAN, *et al.* Petition for Leave to Intervene and Request for Hearing Concerning Indirect Transfer of Control of Licenses (Mar. 31, 2008) ("ENO Answer").

§ 2.323(e).<sup>16</sup> Such page limits “are intended to encourage parties to make their strongest arguments clearly and concisely, and to hold to all parties to the same number of pages of argument.”<sup>17</sup> As noted in the *Shearon Harris* proceeding, the Commission “expect[s] parties in Commission proceedings to abide by our current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted.”<sup>18</sup> The Commission noted that, “[i]n the future, the Commission may exercise its authority to deal more harshly with attempts to circumvent page-limit or other procedural rules.”<sup>19</sup>

ENO respectfully submits that dismissal of Petitioners’ Motion, with prejudice, is the appropriate Commission action here. Petitioners have grossly exceeded—by 21 pages—the applicable page limit. And, as discussed below, Petitioners have flouted filing deadlines by now offering extremely dilatory replies to previous ENO pleadings. These facts, coupled with the *same* Petitioners’ (and same counsel’s) recurring procedural transgressions in another pending NRC adjudication,<sup>20</sup> warrant stern action by the Commission. There is no reason, especially in this license transfer case,<sup>21</sup> for the Commission to tolerate Petitioners’ persistent, flagrant disregard of NRC procedural rules.

**B. Petitioners Have Not Met the Commission’s “Strict Standard” for Reconsideration**

In any event, the Commission should reject Petitioners’ Motion on its merits. Petitioners seeking reconsideration of a Commission decision must satisfy a “rigorous regulatory standard.”<sup>22</sup> Specifically, “[a] petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a

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<sup>16</sup> See *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 n.4 (2007) (“10 C.F.R. § 2.323(e), incorporated by reference into 10 C.F.R. § 2.341(d), incorporated by reference into 10 C.F.R. § 2.345(a)(2). The last of these regulations governs petitions for reconsideration of final orders. . . .”)

<sup>17</sup> *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001).

<sup>18</sup> *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 394 (2001).

<sup>19</sup> *Id.*

<sup>20</sup> In the *Indian Point* license renewal proceeding, the Licensing Board, citing Petitioners’ “appalling lack of candor” and repeated failure to comply with agency procedural requirements in that case, struck Petitioners’ request for hearing. See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Licensing Board Order (Striking WestCAN’s Request for Hearing), at 1 (July 31, 2008) (unpublished). The Board found that “it would be impossible for the Board to meet its responsibilities under 10 C.F.R. § 2.319 to conduct a fair, orderly, and efficient adjudicative hearing with WestCAN as a participant.” *Id.* Petitioners’ appeal of that Board Order is pending before the Commission

<sup>21</sup> When the NRC promulgated its Subpart M hearing procedures, it emphasized that its objective was to provide ““a streamlined hearing process’ [for] faster decision-making without loss of quality.” *Streamlined Hearing Process for NRC Approval of License Transfers*, 63 Fed. Reg. 66,721, 66,723 (Dec. 3, 1998).

<sup>22</sup> *Palisades*, CLI-07-22, 65 NRC at 527.

clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.”<sup>23</sup> This standard, which the Commission instituted in its 2004 revisions to Part 2, “is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier.”<sup>24</sup> In short, Petitioners “must demonstrate that the Commission has committed ‘clear’ error, must do so by raising new arguments, and must not previously have been able to make those arguments.”<sup>25</sup>

Here, Petitioners fail to acknowledge the relevant legal standard, much less show that it has been met. Petitioners have shown no compelling circumstances—no clear and material error, no decisive new information, or no fundamental misunderstanding—that warrant reconsideration of CLI-08-19. On pages 18-22 of its decision, the Commission discussed in detail the bases for its sound legal conclusion that Petitioners lacked standing to intervene in this proceeding, applying controlling legal precedent on standing developed in previous license transfer adjudications. The Commission specifically considered Petitioners’ arguments for representational standing, organizational standing, and discretionary intervention with regard to each individual joint petitioner.

The Commission does “not lightly revisit [its] own already-issued and well-considered decisions,” and will do so “*only* if the party seeking reconsideration brings *decisive new information* to [its] attention or demonstrates a *fundamental Commission misunderstanding* of a *key point*.”<sup>26</sup> Rather than presenting “new” or previously unavailable information, Petitioners merely restate and rehash the arguments presented in their Petition to Intervene or in that of the UWUA Locals—the same arguments rejected by the Commission—without showing that the Commission’s decision involved “clear and material error” or was otherwise “invalid,” as required by 10 CFR § 2.345(b).

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<sup>23</sup> 10 CFR § 2.345(b). *See also Diablo Canyon*, CLI-06-27, 64 NRC at 400-01.

<sup>24</sup> *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

<sup>25</sup> *Palisades*, CLI-07-22, 65 NRC at 527 (citation omitted).

<sup>26</sup> *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) (emphasis added).

Petitioners do provide some additional information concerning Mr. Brodsky—information which they expressly concede was “inadvertently” omitted from their Petition to Intervene.<sup>27</sup> Notwithstanding its belatedness, that information does not suffice to establish Mr. Brodsky’s standing, in that Petitioners state only that Mr. Brodsky’s office is “20 miles from Indian Point and within the Peak fatality zone.”<sup>28</sup> As CLI-08-19 and a long line of prior Commission decisions make clear, this is not sufficient to establish proximity-based standing in an indirect license transfer case.

Perplexingly, Petitioners continue to assert that their Petition to Intervene included “accompanying affidavits” as support.<sup>29</sup> As noted in the ENO Answer: “Although the Petition makes reference to “attached declarations” (Petition at 6), no declaration was attached to the Petition filed and served by Petitioners through the Commission’s EIE system.”<sup>30</sup> Petitioners, who did not file a reply to the ENO Answer, did not contest this fact, and to ENO’s knowledge, Petitioners did not ever submit any declarations or affidavits in *this* proceeding.<sup>31</sup>

Finally, insofar as Petitioners assert that the Commission misapplied its well-established test for standing, including case law precedent specific to license transfers, their arguments fail. Petitioners’ assertion that this case is “analogous” to the previous *FitzPatrick* and *Indian Point* license transfer proceedings is incorrect.<sup>32</sup> As the Commission noted, those proceedings involved *direct* license transfers;<sup>33</sup> *i.e.*, they “involved the transfer of both a *100% ownership interest* in the plant and the *operating authority* for the plant—a kind of transfer implicating more significant safety issues than are

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<sup>27</sup> Petitioners’ Motion at 9 & n.1.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> ENO Answer at 19 n.73.

<sup>31</sup> On a related note, Petitioners misleadingly suggest that they provided a “detailed expert report.” Petitioners’ Motion at 20. In reality, they merely provide, as Exhibit A to their Petition to Intervene, a copy of a report prepared by Synapse Energy Economics, Inc., dated August 7, 2002, that is available on the internet.

<sup>32</sup> Petitioners’ Motion at 10 (*citing Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 294 (2000)).

<sup>33</sup> CLI-08-19, slip op. at 20 n.68.

present here.”<sup>34</sup> Contrary to Petitioners’ outlandish claim, this case does *not* involve the “100% transfer of an operating license.”<sup>35</sup> As the Commission noted, this proceeding concerns an indirect license transfer in which “the entities currently licensed to own and operate the facilities would remain the same, and the facilities would likewise experience no physical or operational changes.”<sup>36</sup>

In conclusion, Petitioners have not shown any compelling circumstance, which could not have been reasonably anticipated, that renders CLI-08-19 invalid. There is no manifest injustice or a “good reason” for the Commission to “change its mind.”<sup>37</sup> Petitioners have not been deprived of any “statutory right to intervene.”<sup>38</sup> They simply did not properly avail themselves of their right to an *opportunity* for a hearing, because they failed to demonstrate standing to intervene.

C. Petitioners’ Other Belated “Replies” and Requests Are Both Untimely and Without Basis and Should Be Accordingly Rejected

As noted above, though styled a Motion for Reconsideration, Petitioners’ Motion is actually an amalgamation of several *other* types of impermissible pleadings. To say that Petitioners’ new requests are late is a monumental understatement. For example, Petitioners devote roughly 13 pages to rearguing their contentions,<sup>39</sup> even though the Commission ruled on the basis of Petitioners’ lack of standing. In effect, Petitioners have submitted a *very* untimely reply to the ENO Answer. Petitioners, however, waived the right to do so by not filing a reply within 7 days after service of the ENO Answer, as required by 10 CFR § 2.309(h)(2).

Petitioners next seek to strike the ENO Answer as “untimely.”<sup>40</sup> The ENO Answer, however, was timely submitted, in accordance with the filing date expressly authorized by the Commission in its

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<sup>34</sup> *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 583 (2005) (emphasis in original).

<sup>35</sup> Petitioners’ Motion at 12.

<sup>36</sup> CLI-08-19, slip op. at 3; *see also id.* at 20.

<sup>37</sup> *LES*, CLI-04-35, 60 NRC at 622 (quoting *Ahmed v. Ashcroft*, 388 F.3d 247 (7th Cir. 2004)).

<sup>38</sup> Petitioners Motion at 15-16.

<sup>39</sup> Petitioners’ Motion at 13-26.

<sup>40</sup> *Id.* at 26-28.

March 19 Order, which Petitioners simply forget or ignore. Insofar as Petitioners believe otherwise, the deadline for any related motion has long since passed.

Petitioners then ask the Commission to deny ENO's Motion for Protective Order, in effect filing a 7-month-late response to that Motion.<sup>41</sup> Under 10 CFR § 2.323(c), Petitioners were required to file any such response within 10 days after ENO's service of that motion. Petitioners also ask the Commission to compel ENO to produce proprietary documents.<sup>42</sup> As explained above, Petitioners could have, but adamantly refused to, negotiate a confidentiality and non-disclosure agreement with ENO to obtain access to such documents. Any motion seeking such action should have been submitted contemporaneously with ENO's Motion for Protective Order. Moreover, Petitioners' suggestion that Entergy proposed an "overbroad and inhibiting confidentiality agreement"<sup>43</sup> is belied by the fact that the UWUA Locals executed the same agreement and the fact that it followed a form previously approved by the Commission.<sup>44</sup>

Finally, Petitioners request leave to submit late-filed contentions.<sup>45</sup> As the basis for this request, Petitioners cite the availability of a Form 10 filing made on May 28, 2008, but fail to explain why they have waited over three months—and until the end of the proceeding—to seek leave to submit new or amended contentions. Plainly, Petitioners have not identified the information in a "timely fashion" (10 CFR § 2.309(f)(2)(iii)) or shown good cause for the proposed late-filing. Perhaps more significantly,

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<sup>41</sup> *Id.* at 28. Ironically, Petitioners claim that ENO's Motion for Protective Order was untimely. ENO, however, submitted that motion on February 26, 2008, one day after Sarah Wagner, counsel for Petitioners, confirmed her clients' categorical refusal to enter into a confidentiality and non-disclosure agreement with ENO; *i.e.*, the relevant "occurrence or circumstance from which the motion [arose]." 10 CFR § 2.323(a). Thus, the Motion was well within the 10 days for filing permitted by Section 2.323(a) and therefore timely.

<sup>42</sup> Petitioners' Motion at 30. Contrary to Petitioners' absurd claim, 10 CFR § 2.390(a) clearly exempts from public disclosure more than "trade secrets." *See* Petitioners' Motion at 16, 28-30.

<sup>43</sup> Petitioners' Motion at 27.

<sup>44</sup> *Consumers Energy Co., et al.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 420-22 (2007).

<sup>45</sup> Arguably, in their Motion, Petitioners already have attempted impermissibly to amend their proposed contentions, apparently by incorporating new arguments expropriated from UWUA Locals' pleadings. *See, e.g.*, Petitioners' Motion at 10-11, 15. Notably, Petitioners' Motion states: "Through this and our earlier pleadings, *UWUA Locals* seek to assure the Commission that the contentions presented here are well-founded and not purely "speculation." *Id.* at 13 n.3 (emphasis added). To ENO's knowledge, Petitioners' counsel never filed a notice of appearance on behalf of the UWUA Locals.

the suggestion that this information is newly available to Petitioners is not correct. Petitioners would have had access to detailed financial information regarding each of the companies involved in the license transfers, and the opportunity to submit amended contentions in March of this year, if Petitioners had simply taken advantage of the opportunity offered by ENO to access the information subject to the terms of a Commission-sanctioned form of Confidentiality Agreement. In fact, it would be a manifest injustice to ENO, if Petitioners were permitted to manufacture a basis for late-filing by refusing to accept the reasonable terms required to allow timely access to the information.

#### **IV. CONCLUSION**

For the foregoing reasons, Petitioner's Motion should be denied in its entirety. Petitioners have not met the Commission's strict standard for reconsideration, continue to lack standing to intervene, and have made numerous untimely and unsupported requests.

Respectfully submitted,

Signed (electronically) by

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Dated at Washington, DC  
this 15th day of September, 2008