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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos.	50-247-LR and
)		50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)		
)		
(Indian Point Nuclear Generating Units 2 and 3))		
)	February 10, 2009	

**ENTERGY'S ANSWER TO JOINT MOTION FOR EXTENSION OF TIME TO FILE
AMENDED/NEW CONTENTIONS BASED ON DRAFT SAFETY EVALUATION REPORT**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") hereby files this Answer to the Joint Motion Requesting Establishment of a Date Certain for the Filing of New or amended Contentions Related to the Draft Safety Evaluation Report and Audit Reports ("Motion"), dated February 5, 2009. In the Motion, the State of New York, the State of Connecticut, Riverkeeper, and Hudson River Sloop Clearwater (collectively, "Petitioners") request that the Board grant a four-week extension by establishing a filing date of March 18, 2009, for any new or amended contentions based on the NRC Staff's draft Safety Evaluation Report ("SER") with open items ("Draft SER") and Audit Reports.¹

Intervenors claim a four-week extension of time (on top of the 30 days Intervenors acknowledge is typically permitted for new and amended contentions based on newly available information) is warranted because: (1) the Draft SER is "complex and voluminous," such that additional review time will improve the quality of contentions that the Petitioners may file; (2) an "unusual confluence" of other deadlines and obligations relevant to this proceeding presents

¹ Motion at 5. As Petitioners note, numerous Licensing Boards have adopted schedules specifying that, to be considered timely filed, new contentions must be submitted within 30 days of the issuance of the Staff's review documents. *Id.* at 2. See also *Entergy Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266 n.11 (2007) (stating that "many boards, including this one, have established a general 30-day rule for the filing of [new or amended contention] motions").

“significant challenges” to Petitioners’ ability to meet the current February 17, 2009, deadline; and (3) the requested extension will not have a material impact on the schedule for completing these hearings.²

As discussed below, Entergy respectfully submits that the circumstances cited by Petitioners in support of their Motion do not constitute “unavoidable and extreme circumstances”—*i.e.*, the controlling legal test articulated by the Commission in prior NRC proceedings.³ Nonetheless, given the Board’s directive that the parties make a “real effort” pursuant to 10 C.F.R. § 2.323(b) to resolve the issues presented before a motion is filed,⁴ Entergy offered—but Petitioners rejected—a lesser, two-week extension of time.⁵ Entergy reiterates its position that a two-week extension is reasonable under the circumstances.⁶

II. DISCUSSION

A. Applicable Legal Standard: The Commission’s “Unavoidable and Extreme Circumstances” Requirement

At the outset of the parties’ Section 2.323(b) discussions, counsel clearly stated Entergy’s position that Petitioners have not satisfied the *threshold legal standard* for an extension of time. Specifically, under 10 C.F.R. § 2.307(a), the Board may grant extensions of time only for “good cause” shown. Significantly, the Commission has interpreted “good cause” to require a showing of “unavoidable and extreme circumstances.”⁷ Thus, while Entergy recognizes the broad discretion

² Motion at 2-4.

³ *Balt. Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 342-43 (1998).

⁴ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Nos. 50-247-LR and 50-286-LR, Licensing Board Memorandum and Order (Summarizing Pre-Hearing Conference) (Feb. 4, 2009) (unpublished) (“February 4 Board Order”).

⁵ As a counteroffer, Petitioners proposed a three-week extension.

⁶ Entergy’s attempt to reach a compromise with the Petitioners pursuant to 10 C.F.R. § 2.323(b) by proposing a lesser extension should not be construed as a waiver of the legal arguments set forth herein concerning application of the Commission’s good cause standard. In this regard, Entergy reserves the right to challenge future requests for extension of time on the ground that Petitioners, *inter alia*, have not shown good cause for the requested extension.

⁷ See, e.g., *Calvert Cliffs*, CLI-98-25, 48 NRC at 342 (holding that “construction of ‘good cause’ to require a showing of ‘unavoidable and extreme circumstances’ constitutes a reasonable means of avoiding undue delay in this important

committed to the Board in regulating the conduct of NRC adjudicatory proceedings, the Commission has set forth in Section 2.307 the specific standard for evaluating requested modification of time limits. As the Commission stated in its 1998 Policy Statement: "The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances."⁸

Applying this standard, licensing boards have granted extensions of time due to the unavailability of relevant documents or clearly-documented schedule conflicts involving a petitioner's designated representative or expert. For example, one Board found that the unavailability of formerly-available documents, as a result of their removal from the NRC public website and public document room following the terrorist attacks of September 11, 2001, constituted "unavoidable and extreme circumstances."⁹ In another proceeding, the Board partially granted a requested extension (granting 14 days instead of the requested 30 days) where the petitioner had identified with particularity specific schedule conflicts that hindered the ability of its designated representative and expert to assist in the formulation and preparation of contentions.¹⁰

In contrast, the Commission has denied an extension request where the NRC's process clearly afforded the petitioner adequate time to review the relevant documents and prepare and file proposed contentions. For example, in the *Combustion Engineering* proceeding, the Commission denied the Connecticut Department of Environmental Protection's ("CTDEP") request for 45

license renewal proceeding"); *Combustion Eng'g* (Windsor Site), Commission Order, 2002 WL 1009297, at *1 (N.R.C. May 10, 2002) (denying requested extension and noting that "[e]xtensions of time in our adjudicatory proceedings are ordinarily to be granted 'only when warranted by unavoidable and extreme circumstances'") (quoting *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998)); *Hydro Res., Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87210), CLI-99-1, 49 NRC 1, 3 n.2 (1999) (quoting CLI-98-12, 48 NRC at 21) ("We caution all parties in this case, however, to pay heed to the guidance in our policy statement that ordinarily only 'unavoidable and extreme circumstances' provide sufficient cause to extend filing deadlines.").

⁸ CLI-98-12, 48 NRC 18 at 21 (1998).

⁹ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-01-31, 54 NRC 242, 245-46 (2001).

¹⁰ *Duke Cogema Stone & Webster* (Mixed Oxide Fuel Fabrication Facility), No. 070-03098-ML, Licensing Board Order (Granting in Part Motion for Extension of Time) (July 3, 2001) (unpublished).

additional days (beyond the allotted 30 days) to file a formal hearing request and petition to intervene. Notwithstanding CTDEP's assertion that it is a "state agency with limited resources," the Commission found that CTDEP had long been involved in reviewing the licensee's decommissioning activities and had several months in which to review the licensee's decommissioning plan.¹¹

In this regard, a party's other personal or business obligations do not necessarily constitute "unavoidable and extreme circumstances." The asserted need to need to review a "large volume of material" is no exception.¹² Indeed, even before it articulated the current legal test, the Commission stated its expectation as follows: "While a board should endeavor to conduct the proceeding in a manner that takes account of the *special* circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations."¹³

As discussed below, none of the circumstances identified by Petitioners is "unavoidable and extreme," as required by controlling Commission precedent. Thus, the Motion does not demonstrate good cause for an extension. More fundamentally, the instant request is the latest in a series of extension requests submitted by various petitioners in this proceeding.¹⁴ Most recently, the three admitted intervenors received a 37-day extension in which to file new or amended contentions based

¹¹ *Combustion Eng'g*, 2002 WL 1009297, at *1. Here, the Petitioners had many months to review Entergy's license renewal application and to formulate proposed contentions, including safety contentions, based upon the application. This is a critical point, because "in [NRC] adjudications, the issue for decision is not whether the Staff performed well, but whether the *license application* raises any safety concerns." *Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 396 (1995) (emphasis added). Thus, the issuance of the Staff's draft or final SERs is not a *de novo* opportunity for intervenors to raise issues that they could have raised previously or to cure defects in previously-submitted contentions.

¹² See, e.g., *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), No. 50-423-LA-3, Licensing Board Memorandum and Order (Telephone Conference Call, 2/28/02), 2002 WL 432563 at *1-2 (N.R.C. Mar. 6, 2002) (unpublished) (denying request for extension in which *pro se* intervenor had alleged that the "demands and pressures" of other proceedings substantially interfered with her ability to adequately address "copious filings" submitted by the other parties as part of discovery).

¹³ *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) (emphasis added).

¹⁴ For example, at the outset of the proceeding, numerous petitioners requested and received additional time to file proposed contentions and to submit replies to Entergy's and the Staff's answers to those proposed contentions. Entergy and the NRC Staff, for their parts, responded to over 150 contentions within a very condensed time frame.

on the NRC Staff's Draft SEIS.¹⁵ When viewed in the aggregate, such extensions—especially when they are numerous and span the entire course of a proceeding—are likely to have a material adverse impact on the adjudicatory schedule. As the Commission explained in CLI-99-1: “[T]he policy statement on adjudicatory proceedings that we issued [in 1998] explicitly discourages extensions of deadlines absent *extreme circumstances*, for fear that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case.”¹⁶

B. Petitioners' Cited Bases for an Extension Do Not Satisfy the Controlling Legal Test

1. *The Size or Technical Complexity of the Draft SER is Not an Unavoidable and Extreme Circumstance Showing Good Cause for a Four-Week Extension of Time*

First and foremost, the Draft SER is not materially more “complex and voluminous” than draft SERs issued in other license renewal proceedings to date.¹⁷ As noted above, the need to review a “large volume of material” alone is not tantamount to an unavoidable and extreme circumstance. Regardless, neither the size nor extensive technical content of the SER should have come as a surprise to Petitioners. The Draft SER summarizes the NRC Staff's safety review of Entergy's extensive license renewal application, a document upon which Petitioners based and proffered numerous technical contentions. Also, the publication of the Draft SER in January 2009 was not an unforeseen event. Indeed, the January 2009 publication date has been known for many months, if not since the inception of this adjudicatory proceeding.¹⁸ Petitioners had ample time to marshal and

¹⁵ See February 4 Board Order at 2-3; Motion by New York State and Riverkeeper for Extension of Time to File Timely Contentions Related to Draft Supplemental Environmental Impact Statement (Jan. 9, 2009). Entergy opposed New York's and Riverkeeper's January 9, 2009, Motion for reasons substantially similar to those set forth herein. See Entergy's Answer to New York State and Riverkeeper Motion for Extension of Time to File Contentions Related to Draft SEIS (Jan. 12, 2009).

¹⁶ *Hydro Res.*, CLI-99-1, 49 NRC at 3 (citing CLI-98-12, 48 NRC at 21) (emphasis added).

¹⁷ Motion at 2. See, e.g., Safety Evaluation Report with Open Item Related to the License Renewal of the Beaver Valley Power Station, Units 1 and 2, Docket Nos. 50-334 and 50-412, FirstEnergy Nuclear Operating Company (January 2009) (draft SER comprising 1,047 total pages).

¹⁸ The NRC Staff posted a License Renewal Review Schedule on the NRC's website at the outset of this proceeding. See <http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html>. The Staff published its draft SER with open items on January 15, 2009, 10 days after the original target date of January 5, 2009. The January 2009 publication date has been public information for many months.

coordinate any resources necessary to review the Draft SER for purposes of formulating and filing any new or amended contentions.¹⁹ Clearly, there are no “unavoidable and extreme circumstances” warranting a doubling of the time available to do so.

2. *The Competing Obligations or Deadlines Cited by Petitioners Do Not Constitute an Unavoidable and Extreme Circumstance Establishing Good Cause for a Four-Week Extension of Time*

Second, Petitioners’ claim that an “unusual confluence” of deadlines and obligations presents “significant challenges” is similarly insufficient to demonstrate “unavoidable and extreme” circumstances.²⁰ In particular, Petitioners cite (1) the February 12, 2009, public meetings on the NRC’s draft SEIS; (2) a Presidents’ Day holiday on February 16, 2009; (3) the NRC Advisory Committee on Reactor Safeguards (“ACRS”) subcommittee meeting on March 4, 2009; and (4) the March 18, 2009, deadline for submittal of comments on the draft supplemental environmental impact statement (“Draft SEIS”).²¹ Again, the exact or approximate dates of the foregoing events have been known to Petitioners for many months. The mere fact that they occur relatively close in time to one another does not constitute an “unavoidable and extreme” circumstance—*i.e.*, good cause—as expressly required by the Commission.

As Petitioners note, under well-established NRC practice, any new or amended safety contentions are due by February 17, 2009, absent an extension.²² It is not clear how Petitioners’ participation (presumably by select representatives) in the February 12, 2009, public meetings on the Draft SEIS (a NEPA-related matter) precludes Petitioners’ compliance with the February 17, 2009,

¹⁹ Petitioners also state that the NRC Staff’s Audit Report for Plant Aging Management Program and Reviews includes an extensive list of Entergy documents reviewed by the NRC Staff during onsite audits but not taken into possession by the Staff. Motion at 2-3. Petitioners further assert that “[d]etermining which relevant documents are included in Entergy’s disclosures will take additional time, as will requesting the relevant documents and reviewing them thoroughly.” *Id.* at 3. Petitioners do not explain, however, how the alleged unavailability of the referenced documents necessarily precludes them from framing and filing particularized contentions based on the Draft SER or Audit Report now.

²⁰ Motion at 3.

²¹ *Id.* at 4.

²² *Id.* at 2.

deadline, which, notably, accounts for the intervening February 16, 2009, national holiday.²³ Petitioners' references to the March 4, 2009, ACRS meeting and the March 18, 2009, deadline for submittal of Draft SEIS comments are even less compelling. Those events will occur two to four weeks *after* any new or amended contentions based on the Draft SER are due to be filed.

Additionally, the so-called "confluence" of events cited by Petitioners is not in and of itself sufficient to meet the Commission's "unavoidable and extreme" circumstances test. It suffices to say that such "confluences" are to be expected in any complex litigation. Entergy is by no means immune to the resource-related challenges associated with concurrent or otherwise competing obligations flowing from the NRC's parallel licensing review and hearing processes. Yet, notwithstanding its *own* multitudinous responsibilities, Entergy stands ready to meet any obligations or deadlines imposed on it by NRC regulations, the Commission and its Staff, or the Licensing Board. Such demands are simply part of the NRC licensing and adjudicatory processes. All litigants—including Entergy—routinely face competing obligations and deadlines that challenge their respective resources. Such challenges are by no means "special" or "unusual" in NRC adjudications or other types of complex litigation and, as such, cannot be considered automatic grounds for what are now becoming routine requests for extensions of time.

²³ Entergy does not believe that the forthcoming Presidents' Day holiday (a one-day holiday), even when viewed in conjunction with the other events cited by Petitioners, reasonably can be construed as support for a four-week extension request. It certainly is a far cry from the more substantial December 2008-January 2009 holiday season cited by New York and Riverkeeper in their January 9, 2009, Motion. As Entergy noted in response to that Motion, even an intervening holiday season (much less a one-day national holiday) does not rise to level of "unavoidable and extreme circumstances." See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), No. 070-03098-ML, Licensing Board Memorandum and Order at 4 (Feb. 12, 2002) (unpublished) (stating that the "unavoidable and extreme circumstances" standard "effectively ties the Board's hands with respect to extending any filing deadline due to the holiday season").

3. ***There is No Basis for Petitioners' Claim that the Requested Extension Will Not Materially Impact the Hearing Schedule, or That Such a Claim is Even Relevant to Petitioners' Required Showing of Unavoidable and Extreme Circumstances***

Finally, Entergy disagrees that the requested extension will have no material impact on the schedule for completing these hearings.²⁴ Entergy reiterates its view that allowing Petitioners yet another sizable extension in an already complex proceeding may in fact adversely impact the resolution of contentions that were already admitted, the issuance of the Final SEIS and SER, the commencement of the hearing, and ultimately the conclusion of this proceeding. Moving forward, timely completion of this litigation (which, procedurally, is still in its early stages) will require close adherence to numerous schedule milestones. As noted above, the Commission has expressed concern that the "accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case."²⁵

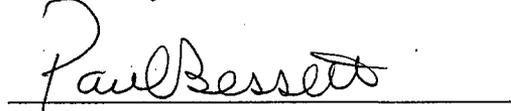
²⁴ See Motion at 3. As a threshold matter, Entergy does not believe that the Petitioners' claim that the requested extension will not have a material impact on the completion of this proceeding is even a relevant factor to be considered under the "unavoidable and extreme circumstances" standard. Nonetheless, for the reasons set forth, Petitioners' claim does not alter Entergy's conclusion that Petitioners have failed to show unavoidable and extreme circumstances.

²⁵ *Hydro Res.*, CLI-99-1, 49 NRC at 3.

III. CONCLUSION

For the foregoing reasons, Entergy respectfully submits that the Motion fails to demonstrate “unavoidable and extreme circumstances” that warrant the requested four-week extension. Notwithstanding, as a result of the parties’ Section 2.323(b) discussions, Entergy does not oppose a two-week extension of time, with a commensurate (two-week) extension of the time in which Entergy may respond to any new or amended contentions based on the Draft SER.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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ENTERGY NUCLEAR OPERATIONS, INC.)	
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)	February 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy's Answer to Joint Motion for Extension of Time to File Amended/New Contentions Based on Draft Safety Evaluation Report," dated February 10, 2009, were served this 10th day of February, 2009, upon the persons listed below, by first class mail and by e-mail.

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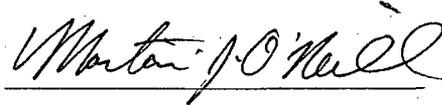
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