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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)	)	
	)	April 13, 2009

ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. TO NEW YORK STATE'S MOTION TO STRIKE ENTERGY'S CONTENTION MOOTNESS ARGUMENTS

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Entergy Nuclear Operations, Inc. ("Entergy") hereby responds to New York State's ("NYS") Motion to Strike Entergy's Mootness Argument from its March 24, 2009 Answer to the State of New York's DSEIS Contentions ("Motion"), filed on April 1, 2009. NYS requests that the Atomic Safety and Licensing Board ("Board") strike those portions of Entergy's March 24, 2009 Answer to NYS's recently-filed new and amended environmental contentions ("Answer"), in which Entergy asserts that admitted contentions NYS-9 and NYS-17 are moot as a matter of law.[1] Entergy opposes the Motion and requests that it be denied for the reasons set forth below.

In short, contrary to NYS's claim, Entergy did not submit an unauthorized *de facto* motion seeking "affirmative action by the Board."[2] Rather, Entergy presented valid claims of contention mootness in its Answer as expressly permitted by controlling Commission case law, which holds that a mooted contention of omission "must be disposed of" by the Board or appropriately "modified" by

[1] Motion at 9 (*citing* Answer of Entergy Nuclear Operations, Inc. Opposing New and Amended Environmental Contentions of New York State at 2-3, 11-12, 17-19, 27, 37-39 & 66 (Mar. 24, 2009) ("Entergy Answer")).

[2] *Id.* at 2.

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the sponsoring intervenor.[3] Accordingly, NYS's derivative arguments that Entergy's mootness claims are "untimely" and "evade" the consultation requirement of 10 C.F.R. § 2.323(b) also lack merit. Those arguments rest squarely on the erroneous premise that Entergy was required to file a motion pursuant to 10 C.F.R. § 2.323 to present its mootness claims. In any event, because NYS has suffered no clear prejudice or harm, its request to strike substantial portions of Entergy's Answer is unwarranted. Indeed, the Motion seeks extraordinary relief and already has precipitated additional filings that may very well have no material bearing on the Board's substantive contention mootness and admissibility determinations.

II. DISCUSSION

A. Entergy Neither Submitted, Nor Was Required to Submit, a "Motion" Under 10 C.F.R. § 2.323 Because NYS-9 and NYS-17 Must Be Dismissed as Moot By Operation of Law

Contrary to NYS's assertion, Entergy did not submit a "motion," *de facto* or otherwise, explicitly requesting "affirmative action" by the Board in this case.[4] Nor did Entergy have any obligation to do so. Rather, as Entergy argued in its Answer, Contentions NYS-9 and NYS-17 "must" be dismissed as moot by *operation of law*, because the NRC Staff's DSEIS has cured the "omissions" alleged therein.[5] Commission case law, including the *USEC* decision, makes this abundantly clear.[6]

In its seminal *McGuire* decision, the Commission stated categorically that, "where a contention based on an applicant's environmental report is 'superseded by the subsequent issuance of licensing-related documents' — whether a draft EIS or an applicant's response to a request for

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[3] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

[4] Motion at 2.

[5] *See* Entergy Answer at 19 (stating that "NYS-17 must be dismissed as moot"); *id.* at 37 (stating that NYS-9 "must be dismissed as a matter of law").

[6] *See USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444-45 (2006) ("*USEC*").

additional information — the contention *must* be disposed of or modified."[7] The Commission did not state that such a contention *may* be dismissed, subject only to the filing of a dispositive motion by the applicant or NRC Staff. Rather, it emphasized that it is "incumbent upon" the *intervenors* to amend their previously-admitted contention in response to new (*i.e.*, omission-curing) information supplied by the applicant or Staff.[8] Thus, the burden is on NYS to demonstrate either that its original contentions of omission are still viable, or that it has submitted specific, admissible challenges to the new information in the form of new or amended contentions.

The Commission's more recent statements in *USEC* are a logical extension of the mootness doctrine discussed in *McGuire*. In fact, quoting its ruling in *McGuire*, the Commission reiterated that, where a contention alleges the omission of particular information or an issue from an application, and the NRC Staff's draft EIS addresses the omission, the contention "is moot" and accordingly "must be disposed of or modified" as a matter of law.[9] Based on this established legal principle, the Commission made clear that "resolution of the *mooted* contention requires *no more than* a finding by the presiding officer that the matter has become moot."[10] While the Commission noted that "this *might* be accomplished through a motion for summary disposition," such a motion is not the sole and exclusive vehicle for Board disposition of a mooted contention.[11] Thus, if such action can be based solely on a finding by the presiding officer, there is no requirement that Entergy must request such action through a dispositive motion.

Indeed, other Boards have dismissed contentions of omission as moot in the absence of a dispositive motion. For example, in the *Oyster Creek* license renewal proceeding, the Board applied the mootness doctrine in rejecting a contention submitted by the intervenors as part of a motion to

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7 *McGuire*, CLI-02-28, 56 NRC at 382-83 (emphasis added).

8 *Id.* at 382.

9 *USEC*, CLI-06-9, 63 NRC at 444 (*quoting McGuire*, CLI-02-28, 56 NRC at 383).

10 *Id.* at 444-45 (emphasis added).

11 *Id.* at 445 (emphasis added).

reopen the record.[12] Citing *McGuire*, the Board stated: "As with *all* contentions of omission, if the applicant [or Staff] supplies the missing information — or, as relevant here, . . . performs the omitted analysis — the contention is moot."[13] The Board found that the applicant's docketed response to a Staff request for additional information ("RAI") provided a confirmatory fatigue analysis of the Oyster Creek recirculation nozzle, thereby curing the alleged omission.

Notably, the *Oyster Creek* Board did not require the submittal of a dispositive motion. The Board, moreover, rejected the intervenors' argument that the Board should "ignore" the applicant's RAI response because it "was not an authorized pleading."[14] In so doing, the Board found that "[n]either law nor logic supports [the intervenors'] assertion that this Board is foreclosed from considering docketed licensing material that has been submitted to the Board and that, on its face, appears to be relevant to the disposition of a pending motion."[15] On appeal, the Commission agreed with the Board, finding the intervenors' procedural argument to be "simply incorrect."[16] Citing *McGuire*, the Commission concluded that the Board "did not err" in finding that the applicant's submittal of its confirmatory analysis rendered the contention of omission moot.[17] Importantly and contrary to NYS's assertions, these principles apply to both proposed *and* admitted contentions.[18]

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12 *See AmerGen Energy Co.*, LLC (License Renewal for Oyster Creek Nuclear Generating Station), LBP-08-12, slip op. at 15-18 (July 24, 2008) ("Because AmerGen has cured the omission alleged in Citizens' newly proffered contention, the April 18 motion to reopen the record in order to add a new contention has been rendered moot. And because Citizens' motion is moot and, thus, no longer raises a litigable controversy, it fails, definitionally and functionally, to present a significant safety issue.").

13 *Id.*, slip op. at 17 (emphasis added).

14 *Id.*, slip op. at 16 n.13.

15 *Id.*

16 *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, slip op. at 25 n.72 (Nov. 6, 2008).

17 *Id.* (*citing McGuire*, CLI-02-28, 56 NRC at 383; *Entergy Nuclear Vt. Yankee L.L.C.* (Vt. Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 431 (2005)).

18 For example, in the *LES* proceeding, the Board dismissed portions of two environmental contentions as moot in its partial initial (*i.e.*, merits) decision on admitted NEPA contentions, finding that the omissions alleged by the intervenors had been cured. *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), LBP-05-13, 61 NRC 383, 410-11, 424-26 (2005), *aff'd*, CLI-05-28, 62 NRC 721, 723 (2005). In one instance, the Board found that the Staff had supplied the necessary technical explanation in response to intervenor interrogatories and in prefiled testimony. *Id.* "As a consequence, the Board conclude[d] that the omission alleged in this contention has been cured, and [that] the

NYS attempts to avoid a similar outcome here by suggesting that the Commission's discussion of the mootness doctrine in *USEC* is "*dicta*" and "not applicable outside of the circumstances local to the case."[19] These arguments lack merit. As shown above, the mootness principles set forth in *McGuire* and *USEC* are controlling and apply to *all* contentions of omission—whether proposed or admitted—and at *all* stages of a proceeding. The Commission's statements in *USEC* thus amplify on a well-established adjudicatory principle, and may not simply be dispensed with as procedurally-inapposite "*dicta*," as NYS wrongly claims.[20] Nor are the Commission's statements "equivocal."[21] When an alleged omission is cured, dismissal of the mooted contention is required as a matter of law. Even if such action requires some reflective assessment of new factual information by the Board (as the Commission acknowledged in *USEC*),[22] dismissal of a mooted contention is *not* conditional upon the filing of a dispositive motion.[23] Underscoring the weakness of NYS's position, NYS cites *no* legal authority to support a contrary conclusion.[24]

DEIS [was] no longer defective in the alleged respect." *Id.* at 411. The Board expressly applied the Commission's *McGuire* holding and did not require the filing of dispositive motions. *Id.*

19 Motion at 5-6.

20 *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, & 4), ALAB-577, 11 NRC 18, 29 (1980) ("Whether or not the Licensing Board is right in its characterization of [the Commission's] statement as *dicta*, it nonetheless must be accepted as reflecting the view of the Commission on the point at that time.").

21 Motion at 6-7.

22 *USEC*, CLI-06-9, 63 NRC at 445 n.65 ("We consider it prudent, however, for the Board to have had some documentation in hand from the applicant . . . or from the NRC Staff, in the form of an environmental impact statement, prior to considering the environmental report omission to have been cured.").

23 Notably, in another licensing proceeding, where an applicant opted to file a motion to dismiss a contention on mootness grounds, the Board rejected the motion due to the applicant's failure to comply with the certification requirement of 10 C.F.R. § 2.323(b). Nonetheless, the Board stated that, "we will, *upon our own motion*, enter an order dismissing [the contention] as moot." *Pa'ina Hawaii, LLC* (Material License Application), No. 30-36974-ML, Licensing Board Order at 2 (Jan. 25, 2007) (unpublished) (emphasis added).

24 NYS's argument that Entergy's allegedly "expansive interpretation" of *USEC* requires an unauthorized "regulatory amendment" rings hollow. Motion at 7. Contrary to NYS's claim, the Commission has broad authority to fashion its own procedural rules and, as appropriate, to develop or modify procedures through the adjudicatory process. *See, e.g.*, *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) (citations omitted) ("As a general principle, agencies have broad authority to formulate their own procedures—and the NRC's authority in this respect has been termed particularly great."); *Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256, 258 (D.C. Cir. 2000) (holding that the Commission did not abuse its discretion in adopting, in an individual adjudicatory proceeding and without resort to notice-and-comment rulemaking, the "unavoidable and extreme circumstances" test for assessing requests for extensions of time to file contentions).

B. Entergy's Mootness Arguments Have Not Caused "Manifest Injustice" or Otherwise Resulted in Any Prejudice or Harm to NYS

NYS also claims that application of the Commission's mootness doctrine here "would work a manifest injustice on intervenors."[25] This argument also lacks merit because NYS has suffered no prejudice and, as NYS acknowledges, Entergy certainly did not intend to cause any prejudice to NYS.[26] In its March 31, 2009 Reply, NYS specifically responded to Entergy's arguments concerning the mootness of admitted contentions NYS-9 and NYS-17.[27] As the *Oyster Creek* Board explained, an intervenor's "submission of a pleading discussing the import of the [asserted omission-curing information] obviate[s] any potential procedural prejudice."[28] In this regard, NYS fails to explain why a 10-day response window (per 10 C.F.R. § 2.323(c)), as opposed to a 7-day response window (per 10 C.F.R. § 2.309(h)(2)) is necessary to avert "manifest injustice."[29] Nor does it demonstrate that its substantive "right to adjudicate issues at the hearing" has been in any way curtailed.[30] In the end, the Board will decide whether NYS-9 and NYS-17 are, in fact, moot, fully informed by the respective arguments of all affected parties; *i.e.,* Entergy, NYS, and the NRC Staff. Thus, in seeking to strike Entergy's mootness claims, NYS elevates form over substance.

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[25] Motion at 7.

[26] As NYS itself acknowledges, its Motion stems from a "good faith disagreement" between the parties regarding the appropriate procedural vehicle for raising mootness claims. Motion at 2.

[27] *See* State of New York Combined Reply to Entergy Nuclear Operations, Inc., and NRC Staff in Support of Contentions 12-A, 16-A, 17-A, 33, and 34 ("Combined Reply") at 29-32 (Mar. 31, 2009).

[28] *Oyster Creek*, LBP-08-12, slip op. at 16 n.13.

[29] Clearly, NYS could have requested an extension of time from the Board in which to file its Reply, but did not raise this possibility during the parties' consultations. NYS previously has sought and received significant extensions of time in this proceeding. Curiously, NYS was able to prepare its 9-page Motion and file it on April 1, 2009, one day after it filed its Combined Reply.

[30] Motion at 7.

C. NYS's Allegations of Noncompliance with 10 C.F.R. § 2.323 are Misplaced and Irrelevant Given that Entergy Neither Filed, Nor Was Required to File, a "Motion"

Much of NYS's Motion is devoted to the notion that Entergy violated 10 C.F.R. § 2.323 by submitting an "untimely" motion and "evading" the consultation requirement.[31] These arguments are misplaced and irrelevant. As explained above, Entergy was not required to present its mootness claims as part of a dispositive motion filed pursuant to Section 2.323. Accordingly, the 10-day time limit and consultation requirement do not apply. Moreover, even if Entergy had opted to proceed via motion, a 10-day time limit does not apply to the filing of dispositive motions.[32] In any case, Entergy acted in good faith based upon its interpretation of applicable Commission case law, and certainly did not intend to "evade" or flout NRC procedural requirements or related Board directives. Finally, the approach taken by Entergy is fully consistent with the prudential considerations underpinning the Commission's mootness doctrine, which include, among other things, ensuring that there exists an "actual genuine dispute" or litigable controversy and avoiding "unnecessary additional work for the parties."[33]

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[31] *Id.* at 3-5. Again, Entergy objects to any suggestion that it has attempted to "evade" consultation with NYS, especially given the parties' mutual understanding that NYS's Motion flows from a "good faith disagreement."

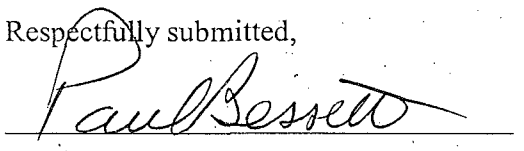
[32] 10 C.F.R. § 2.1205 (Subpart L) provides only that "motions for summary disposition may be submitted to the presiding officer by any party *no later than* forty-five (45) days before the commencement of hearing." 10 C.F.R. § 2.710 (Subpart G) states only that "[s]ummary disposition motions must be filed no later than twenty (20) days after the close of discovery." This Board has not yet established a specific deadline for filing dispositive motions. *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Nos. 50-247-LR and 50-286-LR, Memorandum and Order (Summarizing Pre-Hearing Conference) at 5-6 (Feb. 4, 2009) (unpublished) (noting that the Board would set a deadline for submission of dispositive motions later in the proceeding).

[33] *McGuire*, CLI-02-28, 56 NRC at 383; *USEC*, CLI-06-9, 63 NRC at 445 n.65.

III. CONCLUSION

For the reasons stated above, NYS's Motion should be denied. The Motion lacks an adequate basis in law or fact. Furthermore, NYS has not shown that Entergy's claims of contention mootness have resulted in prejudice or other cognizable harm to it, much less any prejudice commensurate with the extraordinary relief sought in the Motion.

Respectfully submitted,



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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)	)	
	)	April 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Answer of Entergy Nuclear Operations, Inc. to New York State's Motion to Strike Entergy's Contention Mootness Arguments," dated April 13, 2009, were served this 13th day of April, 2009 upon the persons listed below, by first class mail and by e-mail as shown below.

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