

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENERGY NUCLEAR OPERATIONS, INC.)	Docket No. 50-003-LT-2
ENERGY NUCLEAR INDIAN POINT 2, LLC, and)	50-247-LT-2, and
ENERGY NUCLEAR INDIAN POINT 3, LLC)	50-286-LT-2
)	72-51-LT
(Indian Point Nuclear Generating Unit Nos. 1, 2,)	
and 3))	
)	

NRC STAFF'S RESPONSE TO COMMISSION'S ORDER FOR
BRIEFS ON OPPORTUNITY FOR HEARING IN CONNECTION WITH EXTENSION OF
APPROVAL OF INDIRECT LICENSE TRANSFER

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INTRODUCTION

Pursuant to the Commission's Order ("Order") in the above-referenced matter, dated July 24, 2009, the U.S. Nuclear Regulatory Commission ("NRC") Staff ("Staff") hereby responds to two specific issues identified in the order.¹ The Commission requested that Entergy Nuclear Operations, Inc. and Entergy Nuclear Company (collectively "Entergy") and the Staff "file [r]esponses to Mr. Martinelli's request for a hearing ... that address whether the proposed extension ... is effectively a license amendment or change in a license condition requiring the opportunity for interested persons to request a hearing."² The Staff submits that the extension of the order approving the indirect transfer is neither a license amendment nor a change in a

¹ The Order specified that the Staff could respond "without becoming a party to any subsequent proceeding in this matter." Order at 2. Accordingly, this Staff response is submitted as a non-party response and provided to the Commission by the Staff acting in an advisory capacity.

² Order at 2. The proposed extension was granted on July 24, 2009. Order Extending the Effectiveness of the Approval of the Indirect Transfer of Facility Operating Licenses ("Extension Order"), 74 Fed. Reg. 38476 (Aug. 3, 2009) (Agency Document Access and Management System ("ADAMS") Accession No. ML091520154).

license condition that requires an opportunity for hearing and the Indirect License Transfer (“LT”) Extension Order does not otherwise trigger a hearing. The extension of time to complete an indirect license transfer is an action that is wholly within the Commission’s discretion and Mr. Martinelli is not entitled to a hearing on the LT Extension Order.³

STATEMENT OF THE CASE

On July 30, 2007, Entergy submitted an application for the indirect transfer of control for the licenses for Pilgrim Nuclear Power Station (“Pilgrim”), Vermont Yankee Nuclear Power Station (“VY”), Big Rock Point, Palisades Nuclear Plant (“Palisades”), James A. Fitzpatrick Nuclear Power Plant, and Indian Point Nuclear Generating Station Units 1, 2, and 3 (collectively “Indian Point”).⁴ The Staff published the Notices of Consideration of Approval of Applications Regarding Proposed Corporate Restructuring and Opportunity for Hearing regarding the proposed indirect license transfer on January 16, 2008.⁵ Two groups filed timely petitions to intervene on February 5, 2008.⁶ Notably, Mr. Martinelli did not seek to intervene in the proposed indirect license transfer.⁷ The Staff issued Orders on August 1 and 4, 2008,

³ Of course, the Commission may exercise its discretion to grant a hearing if it so desires.

⁴ Letter from Michael R. Kansler, President, Chief Executive Officer & Chief Nuclear Officer, Entergy, to James E. Dyer, Director, Office of Nuclear Reactor Regulation, NRC (July 30, 2007) (ADAMS Accession No. ML072220219).

⁵ 73 Fed. Reg. 2948 – 2958 (Jan. 16, 2008).

⁶ *Entergy Nuclear Operations, Inc.*, (Indian Point Units 1, 2, and 3) CLI-08-19, 68 NRC 251, 255 (2008).

⁷ The petitioners consisted of (1) Union Locals 369 and 590 of the Utility Workers of America, AFL-CIO and (2) Westchester Citizen’s Awareness Network, Rockland County Conservation Association, Promoting Health and Sustainable Energy, Sierra Club-North East Chapter, and State Representative Richard Brodsky. See *Id.* at 256.

approving the indirect transfer pending the hearing.⁸ On August 22, 2008, the Commission denied the two petitions to intervene for lack of standing.⁹

On May 15, 2009, Entergy submitted a request to extend the time to complete the transactions necessary for the indirect license transfer, stating that the additional time was necessary to obtain state and federal regulatory approvals and to secure the financing for the transactions.¹⁰ On June 3, 2009, Mr. Sherwood Martinelli sent an email to the Office of the Secretary and the Chairman of the NRC.¹¹ Mr. Martinelli requested that Entergy's request for an extension of time to complete its indirect license transfer be denied or, in the alternative, he be allowed a "FORMAL HEARING on the merits"¹² Mr. Martinelli bases his request on the premise that "[t]he NRC is not charged with making decisions based upon Economic Conditions and Entergy's desire to maximize their own profits in a spin off."¹³ Mr. Martinelli also bases his request on his belief that an extension "will create certain management team changes that

⁸ 73 Fed. Reg. 45083 (Aug. 1, 2008) (approving the indirect license transfer for all the Entergy plants except Palisades and Indian Point); 73 Fed. Reg. 45252, 45253 (Aug. 4, 2008) (approving the indirect license transfer for Palisades and Indian Point). The Federal Register Notices stated that all of the plants would be changing their names. See, e.g., 73 Fed. Reg. at 45254. The name change for Indian Point was noticed in a subsequent Federal Register notice and accompanied by a notice of opportunity for hearing. 73 Fed. Reg. 68453 (Nov. 18, 2008). No one requested a hearing regarding any of the licensees' name change.

⁹ *Indian Point*, CLI-08-19, 68 NRC at 271.

¹⁰ Letter from Michael R. Kansler, President, Chief Executive Officer & Chief Nuclear Officer, Entergy, to Document Control Desk, NRC, (May 15, 2009) (ADAMS Accession No. ML091420271). On May 29, 2009, Entergy submitted a correction to its May 15, 2009, letter that corrected a typographical error in the date for the extension request. Letter from Michael R. Kansler, President, Chief Executive Officer & Chief Nuclear Officer, Entergy, to Document Control Desk, NRC, (May 29, 2009) (ADAMS Accession No. ML091600059).

¹¹ Email from Sherwood Martinelli to Chairman of the NRC ("Martinelli's Email") (June 3, 2009, 3:41 EDT) (ADAMS Accession No. ML092080274).

¹² Martinelli's Email at *2.

¹³ Martinelli's Email at *1. Mr. Martinelli stated that the "NRC should not be in the business of granting extension of time to grant spin offs because Entergy is hoping six months would give them a more lucrative deal when the spin off is completed." *Id.* at *2.

would greatly change in a negative fashion the promises and presentations made within Entergy's license renewal applications for Indian Point, Pilgrim, and [VY]."¹⁴ On July 24, 2009, the NRC issued the LT Extension Order.¹⁵

DISCUSSION

In implementing the statutory objectives of the Atomic Energy Act of 1954 ("AEA"), the Commission is entitled to broad deference when determining the scope and limits of its statutory language. *See, e.g., Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968) (stating that the AEA created "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency"). *See also Power Reactor Dev. Co. v. Int'l Union of Elec., Radio and Machine Workers*, 367 U.S. 396, 408 (1961).

The AEA clearly and expressly identifies the types of actions that require a hearing. Section 189a.(1)(A) states that:

In any proceeding under the [Atomic Energy] Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.¹⁶

The granting of an extension of time to complete the transactions necessary for a previously approved indirect license transfer is not one of the identified actions that trigger the right to request a hearing. The Commission has held that Section 189a. "deliberately limit[s] hearing rights to those particular types of administrative actions listed in that section." *Commonwealth*

¹⁴ Martinelli's Email at *1.

¹⁵ Extension Order at 5.

¹⁶ 42 U.S.C. § 2239(a)(1)(A).

Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 94-95 (2000) (citing *United States Dep't of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 (1982)).¹⁷ If the form of Commission action does not fall with the limited categories enumerated in Section 189a.(1)(A), the Commission need not grant a hearing right. *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 326 (1996) (citing *San Luis Obispo Mothers for Peace v. NRC* (“SLO”), 751 F.2d 1287, 1315 (D.C. Cir. 1984), *reh'g on other grounds*, 789 F.2d 26, *cert. denied*, 479 U.S. 923 (1986)). The courts have agreed that hearing rights are expressly limited to the actions enumerated in Section 189a. *Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989).¹⁸ Accordingly, Section 189's hearing requirements only apply to the specifically enumerated Commission actions listed in that section — grants, suspensions, revocations or amendments of licenses or construction permits, or applications to transfer control. Extension of the period for license transfer is not one of those specifically enumerated Commission actions.

In evaluating whether an NRC action is a license amendment within the meaning of Section 189a., the courts consider whether the licensee received “greater operating authority” or the license’s current terms were altered. *In re Three Mile Island Alert*, 771 F.2d 720, 729 (3d Cir. 1985) *cert denied*, 475 U.S. 1082 (1986); *SLO*, 751 F.2d at 1314. The Commission used a similar test that a license amendment “permits a licensee to go beyond ‘existing license authority’ ... within the meaning of the [AEA].” *Perry*, CLI-96-13, 44 NRC at 327.

¹⁷ The Commission also reviewed the legislative history of Section 189a. of the AEA and stated that “Congress intentionally limited the opportunity for a hearing to certain designated agency actions.” *Zion*, CLI-00-5, 51 NRC at 96.

¹⁸ See also *Kelley v. Selin*, 42 F.3d 1501, 1514-15 (6th Cir. 1995) (stating that “not every proposed action falls under this provision; the right to automatic participation applies only when the [NRC] acts in a matter provided for in [Section] 189(a)”).

As is shown below, the LT Extension Order is not a license amendment or a change in a license condition. Accordingly, no hearing right attaches to the LT Extension Order to approve an extension of time to complete the indirect license transfer.¹⁹

I. The LT Extension Order Is Neither a License Amendment Nor a Change in a License Condition

Entergy's request for an extension of time to complete its previously approved indirect license transfer does not in any way alter the license for Indian Point or expand the operating authority of the licensee. The LT Extension Order did not modify the existing licenses or the conditions in those licenses for any of the affected plants, including Indian Point.²⁰ The only effect of the LT Extension Order is to change the date by which the transactions that effect the indirect transfer must be completed from July 28, 2009, to January 28, 2010.²¹ Accordingly, the LT Extension Order cannot and does not constitute a *de jure* license amendment.²² *Zion, CLI-*

¹⁹ Should the Commission decide to grant Mr. Martinelli a hearing, that hearing should be limited to the issue of whether the applicant provided "good cause" to grant the extension. The approval of the indirect license transfer is no longer a proper subject for hearing; it was noticed with an opportunity for hearing in August 2008 and the time for requesting a hearing on the transfer itself has long since passed. Mr. Martinelli's hearing request, by its own terms, is limited to the Extension Order. Martinelli's Email at *1. In addition, limiting the scope of any such hearing in this manner is well-supported by the case law. *Citizens Association for Sound Energy v. NRC*, 821 F.2d 725, 728 (D.C. Cir. 1987) (limiting the scope of a hearing to whether good cause existed extending the time for completion of construction).

²⁰ See LT Extension Order at 5. The July 28, 2008, Order did not alter the existing licenses or the scope of the operating authority for the affected plants. See, e.g., Order Approving Indirect Transfer of Facility Operating Licenses ("July 28, 2008, Order") (July 28, 2008) (ADAMS Accession No. ML080940343) (Indian Point Units 2 and 3); Order Approving Indirect Transfer of Facility Operating Licenses ("July 28, 2008, Order") (July 28, 2008) (ADAMS Accession No. ML080940390) (Indian Point Unit 1).

²¹ LT Extension Order at 5.

²² Changes to license conditions are a form of license amendment. License conditions are incorporated into the license. In order to alter a license condition, a *de jure* or *de facto* license amendment is required. License amendments, however, also encompass changes to the license that would not alter license conditions. For example, changes to surveillance intervals in technical specifications constitute license amendments, but not license conditions. For the purposes of evaluating Mr. Martinelli's right to a hearing, the analysis in this document that addresses license amendments also applies to changes to license conditions.

00-5, 51 NRC at 94-95. The limited alteration to the July 28, 2008, NRC Order approving the indirect license transfer, the absence of any alteration to the existing licenses for Indian Point by the LT Extension Order, and the lack of change in the scope of the operating requirements support the proposition that the LT Extension Order is not a *de facto* license amendment. *In re Three Mile Island Alert*, 771 F.2d at 729; *Perry*, CLI-96-13, 44 NRC at 327. Thus, the LT Extension Order is not a license amendment or a change to a license condition.

Moreover, the change the LT Extension Order allowed is a change that affects the licensees' parent companies, not the licensees themselves. The LT Extension Order allows the parent companies a longer period of time to complete their transactions and obtain the necessary approvals from state and other federal authorities. Accordingly, if there is any change in the ability of any entity to act, that change is in the ability of the parent companies to act; there is no change in the licensees' ability to act. The LT Extension Order did not change the licensees' ability to act because the licensees are not the entities that act in an indirect license transfer. The licensees here are passive; their parent companies are the actors. Thus, the change that the LT Extension Order makes affects the parent companies, not the licensees. Because the LT Extension Order does not give the licensees greater operating authority and does not allow them to go beyond their existing licensing authority, the LT Extension Order does not constitute a license amendment.

II. No Hearing Right Attaches to the LT Extension Order

As discussed *supra*, opportunities for hearing are limited to the enumerated NRC actions in Section 189a. of the AEA. Namely, "the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the

issuance or modification of rules and regulations dealing with the activities of licensees.”²³ As discussed in Section I, the LT Extension Order does not amend any license.²⁴ The LT Extension Order also does not grant, suspend, or revoke any license. The licenses for the plants will not be modified in any way by the LT Extension Order.

In contrast, hearing rights do attach to extensions of time to complete construction in construction permit cases. The right to a hearing for extending the time for completion in a construction permit is easily distinguished from the instant case. Section 185 of the AEA requires construction permits to state both the earliest and latest dates for completion of construction and provides that the Commission can extend the completion date upon a showing of good cause. Because construction permits state specific dates, any extension of the construction period requires an amendment of the construction permit to reflect the new date. That amendment triggers a limited hearing on the question whether the request provided good cause for the extension. *Brooks v. AEC*, 476 F.2d 924, 926 (D.C. Cir. 1973); *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 116-117 (1986); *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 and 2), CLI-82-29, 16 NRC 1221, 1230 (1982).

The date for completing the indirect license transfer, however, is not required to be part of the license and is only found in the order approving the indirect license transfer. Because the time period for completing the indirect license transfer only appears in the July 28, 2008, NRC Order approving the indirect license transfer, altering that time period only alters the terms of the previous order; it has no effect on the Indian Point operating licenses. Thus, Mr. Martinelli has

²³ 42 U.S.C. § 2239(a)(1)(A).

²⁴ LT Extension Order at 5.

no right to a hearing based on the theory that there has been an amendment to the operating license.

III. The LT Extension Order is a Proper Exercise of the Commission's Discretion

The Commission has broad discretion to determine how it will deal with a request for an extension of its order approving the indirect license transfer. The AEA and the regulations promulgated pursuant to it do not address extensions of time for indirect license transfers. As the Court has made clear, where “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984). As discussed *supra*, the AEA created a “regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objective.” *Siegel*, 400 F.2d at 783. In this instance, the statute is silent. It is therefore up to the Commission to determine how to address extensions of time for indirect license transfers based on a permissible construction of its enabling statute. *Chevron*, 467 U.S. at 842-43.

A. License Transfer Under Section 184 of the AEA

Section 184 of the AEA prohibits the direct or indirect transfer of any license issued pursuant to it, unless the Commission finds, “after securing full information,” that the transfer is in accordance with the provisions of the AEA and gives its consent in writing.²⁵ The Commission secures the “full information” the AEA requires through the licensee’s application, which is addressed by the regulations at 10 C.F.R. §§ 50.33, 50.34 and 50.80. In brief, these regulations require the applicant to provide information regarding both the financial and

²⁵ 42 U.S.C. § 2234.

technical qualifications of the proposed transferee, which the Commission then reviews.

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 133 (2000). In indirect transfers, the Commission determines whether the change in the parent companies will deleteriously affect the licensee's technical or financial qualifications. *Id.* In both its direct transfer and indirect transfer orders, the NRC routinely adds a provision that states that if the proposed transaction is not completed within a year, the order approving the transfer will become null and void, "provided, however, upon written application and good cause shown, such date may be extended by Order." The Order thus carries within it the means for extension, which means do not include hearing rights but rest solely in the Commission's discretion.

In this case, the NRC approved the indirect license transfer upon review of the technical and financial information submitted. 73 Fed. Reg. 45253 and 45255. It found that the indirect license transfer would not affect the qualifications of the licensees to continue to hold the licenses and that the indirect transfer of control was "otherwise consistent with [the] applicable provisions of law, regulations, and orders issued by the Commission." *Id.* In accordance with its practice, the NRC included the provision limiting its approval to one year unless the licensee could show good cause for an extension. The NRC determined that good cause did exist for extending the one year period and issued the LT Extension Order on July 24, 2009. LT Extension Order at 5.

The NRC has thus decided to allow for extensions of its approval of indirect license transfers upon written application and for good cause shown and did so in this case. The Commission's exercise of its discretion is supported not only by its finding of good cause for the extension, but also by its prior examination of technical and financial issues and its finding that the proposed action comports with applicable law, regulations, and Commission orders. The Commission's process for extending the period of time that the parent companies have to

complete their transactions is thus based on the “full information” the Act requires and a determination that the transfer is in accordance with the provisions of the Act. The Commission’s determination to proceed in this fashion is, therefore, a permissible construction of the AEA and has been followed in this case. It is an action wholly within the Commission’s discretion and does not include an opportunity for hearing.

B. Definition of Licenses Under the APA

In the interest of providing the Commission with a full discussion of the issues, the Staff believes that a discussion of the Administrative Procedure Act’s (“APA”)²⁶ approach to the concept of licensing is in order. Under the APA’s broad definition of license, the Commission’s original July 28, 2008, Order could be viewed as a license. That NRC Order approved the indirect license transfer subject to three conditions. The third condition states that if the corporate restructuring is not completed within a year, the Commission’s approval of the indirect license transfer will become null and void, unless the licensee makes a showing of good cause. Assuming, for the sake of argument, that the July 28, 2008, NRC Order constitutes a “license” under the APA and that the third condition in that order constitutes a license condition, it follows that the subsequent order that changed the time period for completion of the corporate transactions, changed a condition in the license and thus constitutes an amendment of that license or a change to a license condition.

Under the APA, the term “license” includes “the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”²⁷ Because the NRC approved the indirect license transfer, that approval could be viewed as a license under the APA. If the NRC’s approval in this instance constitutes a license

²⁶ 5 U.S.C. §§ 1 *et seq.*

²⁷ 5 U.S.C. § 551(8).

under the APA, changing that approval by changing the period for the licensee's parent companies to complete the indirect license transfer may be considered an amendment to that license. This raises the question whether, under the APA, the NRC's extension of its original approval order triggers a hearing under the AEA as a license amendment.

The Staff believes that the preferred, and more legally-supportable, answer is that it does not trigger a hearing. It is well-settled that the APA "does not impose any requirement of an adversary hearing before an agency; it merely specifies the procedure to be followed when a hearing is required by some other statute." *US v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969) (citing *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966) and *LaRue v. Udall*, 324 F.2d 428 (D.C. Cir. 1963)); see *Califano v. Sanders*, 430 U.S. 99, 106 (1977) (reversing court of appeals decision that read the APA as providing an independent grant of subject-matter jurisdiction).²⁸ Applying the APA's broad definition of license here, however, could have the effect of imposing the requirement of a hearing where no hearing is required by the AEA. Using the APA in this way to generate hearing rights appears to run counter to the principle that the APA does not itself provide hearing rights. *Id.*

Applying the APA definition of license to generate hearing rights would also run counter to the equally well-settled principle that the hearing provisions of Section 189a. of the AEA should be read narrowly. *Massachusetts v. NRC*, 878 F.2d at 1522; *Zion*, CLI-00-5, 51 NRC at

²⁸ The Attorney General's Manual on the APA explains:

[t]he formal procedural requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute*. The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing be held.

U.S. Department of Justice, "Attorney General's Manual on the Administrative Procedure Act" 41 (1947) (emphasis in original).

96. Moreover, an expansive reading of Section 189a. that would afford hearing rights on every Commission approval or form of permission would be impractical. As the Sixth Circuit noted in its restrictive reading of § 189a.,

[N]ot every proposed action falls under this provision; the right to automatic participation applies only when the agency acts in a matter provided for in § 189(a) [sic], which includes matters generally concerned with the licensing process If the Commission did not have such authority, and public participation were automatically required for any agency action, the public would be entitled to an unrestrained platform that would disable the Commission and effectively prevent it from taking any action.

Kelley v. Selin, 42 F.3d 1501, 1514-15 (6th Cir. 1995) (citing *Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983)).

CONCLUSION

The Commission requested that the Staff address whether the “proposed extension ... is effectively a license amendment or change in a license condition requiring the opportunity for interested persons to request a hearing.” While the Commission may, in its discretion, provide a hearing in connection with the extension of time to complete the license transfer, as shown above, the LT Extension Order is neither a license amendment nor a change in a license condition and, thus, Mr. Martinelli is not entitled to an opportunity for a hearing. In addition, the LT Extension Order does not trigger any hearing rights under Section 189a. of the AEA.

Respectfully submitted,

Signed (electronically) by
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Brian G. Harris
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 3rd day of August, 2009

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)	
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and 3))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO COMMISSION'S ORDER FOR BRIEFS ON OPPORTUNITY FOR HEARING IN CONNECTION WITH EXTENSION OF APPROVAL OF INDIRECT LICENSE TRANSFER", dated August 3, 2009, have been served upon the following by the Electronic Information Exchange, this 3rd day of August, 2009:

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²⁹ William Dennis, Esq., as Assistant General Counsel for Entergy Nuclear Operations, Inc., does not have a Notice of Appearance before the Commission, therefore a courtesy copy is being sent via e-mail.