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ADJUDICATIONS STAFF

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)	)	
	)	March 21, 2011

PETITIONERS' OPPOSITION TO ENTERGY'S MOTION TO STRIKE

Pursuant to 10 C.F.R. § 2.323(c) and the Atomic Safety and Licensing Board's ("Board") Order dated March 11, 2011,[1] Hudson River Sloop Clearwater, Inc. ("Clearwater") and Riverkeeper, Inc. ("Riverkeeper") (collectively "Petitioners") respectfully submit this joint opposition to Entergy Nuclear Operations, Inc.'s ("Entergy") Motion to Strike, dated March 4, 2011.

PRELIMINARY STATEMENT

On December 23, 2010, the Nuclear Regulatory Commission ("NRC" or "Commission") updated its Waste Confidence Decision ("WCD Update") and companion Temporary Storage Rule,[2] which recognize that waste could remain at reactor sites beyond 120 years after power generation activities cease. Based on new information contained in these rules, on January 24, 2011, Petitioners filed a joint petition to add new contentions to the above-captioned Indian Point

[1] Order (Granting New York's and Clearwater's/Riverkeeper's Motions for Extensions of Time), March 11, 2011.
[2] Waste Confidence Decision Update, NRC-2008-0482, 75 Fed. Reg. 81037 (December 23, 2010) ("WCD Update"); Consideration of Environmental Impacts of Temporary Storage Rule of Spent Fuel After Cessation of Reactor Operation, Final Rule, NRC-2008-0404, RIN 3150-AI47, 75 Fed. Reg. 81032 (December 23, 2010) ("Temporary Storage Rule").

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license renewal proceeding.[3] These contentions primarily raised concerns regarding on-site waste storage that the WCD Update either did not address or addressed inadequately based upon site-specific conditions. On February 18, 2011, Entergy and the NRC Staff each filed answers opposing the Joint Petition on various grounds.[4]

On February 25, 2011, Petitioners filed a Combined Reply to NRC Staff and Entergy's Answers in Opposition to Clearwater and Riverkeeper's Joint Motion for Leave and Petition to Add New Contentions ("Combined Reply"), which reiterates their original points and legitimately amplifies their arguments in response to issues raised by the NRC Staff and Entergy's answers.[5] The Combined Reply included a declaration of expert witness Arnold Gundersen ("Gundersen Declaration"), which amplified the statements from Mr. Gundersen contained in the Joint Petition at footnote 7.[6] Joint Petition at 35-36. Contrary to the allegations of Entergy and the NRC Staff, Petitioners' Combined Reply does not include wholly new arguments or new factual information. Furthermore, although Entergy and NRC Staff try to suggest they would have been deprived of an opportunity to respond to the Gundersen Declaration, they omit to mention that Clearwater and Riverkeeper offered Entergy that opportunity in an attempt to avoid troubling the Board with this issue.

On February 25, 2011, Petitioners also filed a Petition for Exemption from or Waiver of Restrictions Contained in 10 C.F.R. § 51.23(b) ("Waiver Petition") and a Declaration by Manna

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[3] Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc's Joint Motion for Leave to Add New Contentions Based Upon New Information and Petition to Add New Contentions (January 24, 2011) ("Joint Petition"), *available at* ADAMS Accession No. 110330089.

[4] "Applicant's Answer to Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s New Contentions Concerning the Waste Confidence Rule" (February 18, 2011) ("Entergy's Answer"), *available at* ADAMS Accession No. 110560270; "NRC Staff's Answer to Hudson River Sloop Clearwater, Inc. and Riverkeeper, Inc.'s Joint Motion and Petition to New Contentions" (February 18, 2011) ("NRC Staff's Answer"), *available at* ADAMS Accession No. ML11054070.

[5] "Combined Reply to NRC Staff and Entergy's Answers in Opposition to Clearwater and Riverkeeper's Joint Motion for Leave and Petition to Add New Contentions" (February 25, 2011).

[6] "Expert Witness Declaration of Arnold Gundersen Regarding Aging Management of Nuclear Fuel Racks" ("Gundersen Declaration"), attachment to February 25, 2011 Combined Reply.

Jo Greene ("Greene Declaration") in support thereof.[7] Although Petitioners maintain that an exemption or a waiver is not necessary because Petitioners do not actually challenge any of the Commission's rules,[8] Petitioners filed these documents out of an abundance of caution and in direct response to complaints by Entergy and the NRC Staff that Petitioners had not filed such a petition. *See* Entergy's Answer at 14; NRC Staff's Answer at 19.

During the week beginning February 28, 2011, counsel for Entergy consulted with representatives of Clearwater and counsel for Riverkeeper regarding its intention to file a Motion to Strike the Waiver Petition, Greene Declaration, Gundersen Declaration, and portions of the Combined Reply. Despite Clearwater and Riverkeeper's attempt to avoid troubling the Board by agreeing to not object if Entergy were to request an opportunity to respond to the Gundersen Declaration, Entergy filed its Motion to Strike on March 4, 2011.[9]

With its Motion to Strike portions of the Combined Reply and the Gundersen Declaration, Entergy seeks to use an arcane procedural argument to attempt to avoid adjudicating important safety issues regarding the degradation of boraflex. The grave importance of this issue has become clear at the Fukushima Daiichi reactor in Japan, where spent fuel pools have caught fire. In doing so, Entergy interprets the Commission's pleading standards in an entirely self-interested manner and mischaracterizes Petitioners' pleadings. Entergy's desperate attempts to manipulate the Commission's procedural rules in order to avoid addressing critical aging waste management issues exhibits a strong desire to avoid public adjudication of this critical safety issue. Although Petitioners were entirely agreeable to Entergy requesting an opportunity to

[7] Petition for Exemption from or Waiver of Restrictions Contained in 10 C.F.R. § 51.23(b) (February 25, 2011) ("Waiver Petition").

[8] Earlier in this proceeding, the Board admitted contentions from New York State (NYS-28), Riverkeeper (Riverkeeper EC-3), and Clearwater (Clearwater EC-1) related to the impacts of known and unknown leaks, over NRC Staff's objection that these contentions were impermissible challenges to Commission regulations. None of the parties needed to file a Petition for Waiver for these contentions to be admitted. *In the Matter of Entergy Nuclear Operations (Indian Point, Units 2 and 3)*, 68 N.R.C. 43, 192 (2008).

[9] Applicant's Motion to Strike (March 4, 2011) ("Motion to Strike").

respond to Petitioners' Combined Reply, Entergy instead chose to consume the Board's time with this inappropriate motion.

The Board should deny Entergy's motion, which inappropriately uses a procedural motion about evidence to attempt to avoid answering a waiver petition. Additionally, the Board should admit the waste contentions so that the public is offered the opportunity to see this Board adjudicate safety issues that strike at the heart of public confidence in nuclear power. Entergy's attempts to brush these issues under the rug using hostile interpretations of arcane procedural rules was never attractive, but is now wholly unacceptable.

ARGUMENT

I. LEGAL STANDARDS

At this early stage of the proceeding, Petitioners need not submit admissible evidence to support their contentions; rather, they should "provide a brief explanation of the basis for the contention," 10 C.F.R. § 2.309 (f)(1)(ii), and "provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position . . . along together with references to the specific sources and documents on which the requestor/petitioner intends to rely." 10 C.F.R. § 2.309 (f)(1)(v). These requirements "ensure that full adjudicatory hearings are triggered only by those able to proffer at least some factual and legal foundation in support of their contentions." *In the Matter of Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, 49 N.R.C. 328, 334 (1999). They are "*not* designed to erect an onerous evidentiary hurdle." *In the Matter of Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, ADAMS Accession No. ML060580677 at 44-45 n.33 (Feb. 27, 2006) (emphasis in original).

As Entergy recognizes in its Motion to Strike, entirely new factual scenarios or legal arguments may normally not be raised in a reply. *See* Motion to Strike at 4-5. It is well

established that a reply is an opportunity refute and respond to arguments presented in the opposing parties' answers and to legitimately amplify issues presented in the initial petition. *La Energy Svcs., LP. (Nat'l Enrichment Facility)*, 60 N.R.C. 223, 224 (2004). "It is [] appropriate [for the Board] to take into account any information from a reply that legitimately amplifies issues presented in the original petition." *In the Matter of Northern States Power Co. (Formerly Nuclear Management Co., LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, 68 N.R.C. 905, 919 (2008) (citing *PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2)*, 65 N.R.C. 281, 302 (2007) (noting information in Petitioner's Reply that constitutes "legitimate amplification" is appropriate)); *see also In the Matter of Nuclear Mgmt. Co., LLC (Monticello Nuclear Generating Plant)*, 62 N.R.C. 735, 742 (2005) (denying motion to strike because reply legitimately amplifies issues first raised in petition). "Further, it is proper for a reply to respond to the legal, logical, and factual arguments presented in answers, so long as new issues are not raised." *Id.* (citation omitted); *see also In the Matter of Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant)*, 63 N.R.C. 314, 372 (2006) (explaining that replies should focus on "the legal or factual arguments first presented in the original petition or raised in the answers to it.").

II. PETITIONERS' COMBINED REPLY NEITHER RAISES NEW LEGAL ARGUMENTS NOR PRESENTS NEW FACUTAL INFORMATION

Petitioners' Combined Reply does not raise new arguments or present new factual information; rather, it legitimately and appropriately responds to issues raised by NRC Staff and Entergy's answers and amplifies its original legal arguments. All this is done without adding new information to the proceeding.

A. Disputes with Aging Management Program

Entergy seeks to strike two portions of the Combined Reply relating to Petitioners' disputes with Entergy's aging management program ("AMP") for the Indian Point spent fuel pools and which reference the Gundersen Declaration. First, Entergy seeks to strike note 5 on page 7 of the Combined Reply, in its entirety. Note 5 states, in its entirety:

> Notably, Table 3.5.2-3, cited by the Staff and Entergy, deals only with aging management of the stainless steel portions of the spent fuel pool rack during the period of extended operation. It is therefore wholly irrelevant to the contentions. The other AMPs cited by Entergy (Entergy Ans. at 21) only deal with the period of extended operation and are therefore irrelevant to the contentions. Declaration of Arnold Gundersen, dated February 25, 2011, attached as Exhibit 1 ("Gundersen Waste Decl.") at ¶¶ 32-33.

Combined Reply at 7. Entergy argues that note 5 constitutes a new attempt to "reference and raise technical disputes with certain portions of Entergy's aging management program." Motion to Strike at 6.

Next, Entergy seeks to strike ¶¶ 15-37 on page 11 of the Combined Reply, which explains the importance of AMP analysis. Motion to Strike at 6-7. This section cites NRC Information Notice 2009-29, which underscores the importance of the AMP analysis, as well as the Gundersen Declaration, which shows that this analysis is particularly relevant to Indian Point. Combined Reply at 11. Entergy argues that the inclusion of the Gundersen Declaration and NRC Information Notice 2009-26 constitutes an attempt to provide "new factual support" for Petitioners' allegation that Entergy failed to provide adequate aging management plans for the period commencing 60 years after the expiration of the license. Motion to Strike at 6.

Petitioners raised their concerns with aging management in a number of places in their initial Joint Petition. In the contentions themselves Petitioners cited the "insufficient analysis of the aging management of dry casks and spent fuel pools . . . " Joint Petition at 18. Further, on page 34, Petitioners explained,

> In addition, because the casks and pools in which some of the spent fuel is already stored, and more will be stored in the future, along with ancillary equipment like the fuel cladding and the flexible boron wrapping, are long lived passive components that the licensee cannot assume will require no inspection of maintenance, the Applicant must provide an adequate aging management plan for of [sic] these components and associated equipment.

Joint Petition at 34. Petitioner also addressed their concerns with aging management on pages 35-36, noting specific examples of aging-related issues that the Final Supplemental Environmental Impact Statement concerning the license renewal of Indian Point ("FSEIS") had not addressed, and specifically identifying Mr. Gundersen as an expert witness who will offer testimony on the long-term degradation of Boraflex. Joint Petition at 35-36. Petitioners made clear that their concern stretched beyond the period of extended operation. *See, e.g.* Joint Petition at 34-35 ("Although the Commission attempts to state that it could extend the 60 year period in Finding 2 if necessary, it fails to note that it cannot do so now because it does not have sufficient safety analysis to support such an extension."). Petitioners additionally argued that Entergy "failed to put forward any aging management plan for the spent fuel storage casks, for the spent fuel pools themselves, and for associated components, such as the boron wrapping of the fuel assemblies." Joint Petition at 43.

In its answer, Entergy criticized Petitioners' for failing to point out which specific portions of the License Renewal Application (LRA) were at issue and which specific safety rule had been violated. Entergy's Answer at 16. Further, Entergy challenged Petitioners for "fail[ing] to identify the particular issues of law or fact to be raised" regarding aging management, and claimed further expert analysis or support was necessary on this issue. *Id.* Additionally, Entergy cited particular aging management plans contained in the License Renewal Application ("LRA"), and specifically pointed to table 3.5.3-3. *Id.* at 21.

Likewise, NRC Staff stated that the LRA includes discussion of aging management in spent fuel pools, and argued that because Petitioners did not specifically reference these portions of the LRA, contentions relating to aging management in spent fuel pools should not be admitted. NRC Staff's Answer at 30-31. NRC Staff further argued that aging issues beyond the license renewal period are outside the scope of the proceeding, and that Entergy did discuss aging management in its LRA, particularly in Table 3.5.2-3. *Id.* at 31.

In reply, Petitioners addressed aging management in a number of places, including note 5 on page 7 and ¶¶ 15-37 on page 11. Note 5 is a direct response to NRC Staff and Entergy's arguments that the LRA included adequate analysis of AMPs, and that table 3.5.2-3 adequately addressed the issue. In note 5 petitioners refuted these claims and reiterated claims first stated in the Joint Petition that analysis beyond the extended period of operation must be performed. Similarly, ¶¶ 15 – 37 on page 11 constitute legitimate amplification of the same argument.

Petitioners cite Information Notice 2009-26, a document that underscores the importance of performing AMP analysis, to the extent that it amplifies their argument; moreover, the Information Notice does not introduce any new factual information to the contention. Furthermore, the NRC Staff wrote the Information Notice and sent it to "[a]ll holders of operating licenses or construction permits for nuclear power reactors under the provisions of Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50," including Entergy. Therefore, neither can claim that the facts contained in the Information Notice present an unfair surprise. Petitioners used the facts in the information notice, already known to other parties, to legitimately amplify their arguments.

Note 5 on page 7 and ¶¶ 15-37 on page 11 constitute permissible responses to arguments that Entergy and NRC Staff made in their answers, as well as a legitimate reiteration of

Petitioners' view, first introduced in the Joint Petition, that aging management must be assessed beyond the period of extended operation. As demonstrated, and contrary to Entergy's assertion, Petitioners' Combined Reply did not raise any new arguments or present any new factual information that was not already known to the Staff and Entergy. Petitioners' issues with Entergy's AMP had been well documented in the Joint Petition. In the Combined Reply, petitioners directly responded to challenges from NRC Staff and Entergy, and amplified the arguments set out in their original petitions.

B. Gundersen Declaration

In its Motion to Strike, Entergy claims that the Gundersen Declaration presents new information and asks the Board to strike the declaration in its entirety and all arguments that cite to the declaration, as discussed above. Motion to Strike at 6-8. Entergy claims Petitioners are attempting to "cure the lack of factual or expert opinion support for their contentions" with "new alleged expert opinion or factual information." *Id.* at 8. However, Petitioners' Joint Petition did not lack support, and Mr. Gundersen's expert opinion does not constitute wholly new information.

Petitioners clearly identified Mr. Gundersen in their Joint Petition as an expert witness whose testimony would be offered on aging management issues. Joint Petition at 35-40. Petitioners explained that Mr. Gundersen would testify about the "long term degradation of the Boraflex or other wrapping around the fuel assemblies in the spent-fuel pool." *Id.* Petitioners also cited an e-mail in which Mr. Gundersen described his experience, bases for expertise, and the subject of his proposed testimony. *Id.* at fn.7.

Even though Petitioners were not required to submit admissible evidence at this early stage, *see Oconee*, 49 N.R.C. at 334, Entergy complained in its answer that Mr. Gundersen's

proposed testimony was not sufficiently referenced because "there [wa]s no declaration or affidavit of any sort from Mr. Gundersen attached to Petitioners' pleading." Entergy's Answer at 19. In response, Petitioners included the Gundersen Declaration with their reply. Now, Entergy protests that the Declaration should be struck in its entirety, even though parties were made fully aware of Mr. Gundersen's proposed testimony in the original petition. By criticizing Petitioners for not including a formal declaration that is not otherwise required by Commission rules, and then objecting when Petitioners responded by including the declaration, Entergy wants to have its cake and eat it too.

The Board has stated that 10 C.F.R. 2.309(f)(1)(v), requiring a "concise statement of the alleged facts or expert opinions" that support a petitioner's positions, does not demand admissible evidence. *Oyster Creek Nuclear Generating Station*, ADAMS Accession No. ML060580677 at 44-45 n.33 (Feb. 27, 2006). "It does not require the submission of an expert opinion, nor does it require that an expert opinion be submitted in the form of admissible evidence." *Id.* (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 N.R.C. 18, 22 n.1 (1998)). In the early stages of the Oyster Creek relicensing proceeding, where the Applicant objected to an expert's qualifications because the expert's memorandum did not meet the formal requirements for pleading submissions, the Board denied the applicant's motion to strike, holding that the petitioners' "statement of facts contained in the petition, coupled with the views embodied in Dr. Hausler's memorandum . . . suffice to meet the requirements of section 2.309(f)(1)(v), which is *not* designed to enact an onerous evidentiary hurdle . . . ." *Id.*

Similarly, here Mr. Gundersen and his testimony had been identified previously in Petitioners' Joint Petition. This plain reference to the expert and the subject of his testimony is sufficient to satisfy 10 C.F.R. § 2.309 (f)(1)(v)'s requirement the Petitioners provide "a concise

statement of the alleged facts or expert opinions which support the requestor's/petitioner's position . . . along together with references to the specific sources and documents on which the requestor/petitioner intends to rely." By including the Gundersen Declaration in their Combined Reply, Petitioners went far beyond the evidentiary requirements of 10 C.F.R. § 2.309 (f)(1)(v) in order to legitimately amplify their arguments. Entergy seems to object to the fact that a formal declaration had not been initially filed with the Joint Petition, but the regulations and Commission decisions make clear that such an evidentiary standard would impose too high a hurdle. Entergy's Motion to Strike is an attempt to elevate form over substance and to foreclose discussion of the critical safety issues on which Mr. Gundersen intends to testify.

C. 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c) are Irrelevant Because Reply Does Not Include New or Late-Filed Contentions

Entergy complains that Petitioners' Combined Reply did not address the criteria in 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), but these regulations are not applicable. 10 C.F.R. § 2.309(f)(2) deals with amended or new contentions. As demonstrated above, Petitioners did not amend their core contentions in their reply. They did not submit any wholly new factual or legal information. On the contrary, they merely legitimately amplified their original arguments and responded to arguments made in the answers. As such, 10 C.F.R. § 2.309(f)(2) is irrelevant.

10 C.F.R. § 2.309(c) deals with late-filed contentions. As Petitioners did not submit any new contentions in their reply, but merely amplified their original Joint Petition and responded to Entergy and the NRC Staff's answers regarding these contentions, 10 C.F.R. § 2.309(c) is also irrelevant.

D. Entergy's Motion to Strike Obstructs Fairness and Efficiency

Entergy pays lip service to principles of efficiency and fairness in its Motion to Strike, noting that fairness dictates that a petitioner may not raise new claims in a reply. Motion to Strike at 5. Here, however *Petitioners* are the only parties attempting to be fair. Even though Petitioners maintain the Combined Reply and Gundersen Declaration contain no new information, during consultations Petitioners offered to not object if Entergy were to request an opportunity to respond to the Gundersen Declaration.[10] This abundantly reasonable offer by Petitioners of a chance to respond to a reply, which is not required by Commission rules and therefore extraordinarily atypical in relicensing proceedings, presented a golden opportunity for Entergy to file an extra response and literally have the last word on the matter. Taking petitioners up on their offer would have been more than fair to Entergy and far more efficient.

Instead, Entergy filed a Motion to Strike, with an alternative request to be afforded the opportunity to respond. Furthermore, by filing a Motion to Strike, Entergy has effectively obtained an extension on its response to the Waiver Petition, something it has been consistently opposing for other parties. Petitioners, in the interest of fairness and efficiency, had already agreed to not object if Entergy requested an additional opportunity to make its argument beyond the requirements of Commission rules. Entergy responded to this olive branch not with a legitimate factual response to Petitioners' concerns, but with a motion that attempts to foreclose Petitioners' arguments from adjudication entirely. Clearly the party attempting to "unfairly deprive other participants" is Entergy, and not Petitioners. *See* Motion to Strike at 5.

III. PETITIONERS' WAIVER PETITION GREENE DECLARATION IN SUPPORT THEREOF SHOULD NOT BE STRICKEN

A. The Waiver Petition and Greene Declaration Do Not Augment Petitioners' New Contentions with Any New Information

[10] Of course, Entergy had a right to answer the Waiver Petition and argue about timeliness in that Answer.

Entergy asserts that the Board should also strike Petitioners' Waiver Petition and Greene Declaration submitted in support thereof in their entireties, because these filings also allegedly introduce new arguments and new factual information. Entergy Motion to Strike at 8-9. For the following reasons, Entergy's arguments here, as above, are not persuasive.

At the outset, Entergy improperly characterizes Petitioners' Joint Petition as "recogniz[ing] that the New Contentions are barred by the Waste Confidence Rule." *Id.* at 8. Entergy claims that "Petitioners chose to submit an 'alternative' set of safety and environmental contentions that, they asserted, should be admitted in the event that the 'Board decides that Petitioners cannot challenged duly adopted NRC rules in these proceedings.'" *Id.* Quite the contrary, Petitioners have not taken the position that the new contentions are in any way barred by the Commission's WCD Update.

Rather, by proffering contentions under a "rule invalid" scenario, Petitioners have merely set forth arguments in the alternative, which is entirely appropriate. *See, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 364 (U.S. 2005) ("Parties making alternative arguments do not forfeit either one"); *Sea Hawk Seafoods v. Exxon Corp. (In re Exxon Valdez)*, 484 F.3d 1098, 1102 (9th Cir. Alaska 2007) ("Arguing in the alternative does not invoke judicial estoppel--it is good lawyering"). In no way do Petitioners' alternative arguments constitute some sort of admission regarding whether Petitioners' new contentions improperly challenge a Commission rule.[11] Thus, in no way is the Waiver Petition an attempt to "rehabilitate" Petitioners' new contentions, as Entergy suggests, *See* Motion to Strike at 9, since the contentions continue to have legitimate bases as set forth in the Joint Petition.

[11] For example, Petitioners state in the Waiver Petition, "[t]o the extent environmental and safety impacts of spent fuel storage at the Indian Point site after plant shutdown are deemed to be 'within the scope of the generic determination in paragraph (a)' of § 51.23 (*which Petitioners' New Waste Contentions and Petitioners Reply demonstrate is not the case*). . . ." (emphasis added).

In any event, Entergy's criticisms are unfounded, since the Waiver Petition and Greene Declaration do not present new information, and, thus, Petitioners have not "pursue[d] an entirely new line of argument." *Id.* Indeed, the Waiver Petition and Greene Declaration cite to factual support demonstrating why a waiver and/or exemption is appropriate derived directly from Petitioners' Joint Petition and Combined Reply. *See* Wavier Petition at 6. As in the Combined Reply, discussed at length above, the Waiver Petition is not based on "new" facts or information, but merely demonstrates how the facts presented in the Joint Petition also satisfy the requirements for one additional alternative kind of relief. Petitioners' request for this relief is otherwise entirely appropriate.

B. The Waiver Petition Is Procedurally Appropriate

Entergy attempts to argue that Petitioners' filing of the Waiver Petition and Greene Declaration in support thereof is an inappropriate legal maneuver. Motion to Strike at 9. Entergy suggests that Petitioners have raised "an entirely new legal claim" that would lead to inappropriate delay caused by Petitioners' alleged "attempt to backstop elemental deficiencies in its original petition to intervene." *Id.* at 9-10 (quoting *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-08-19, 68 NRC 251, 262 (2008). However, Entergy's complaints are inapplicable to the instant situation.

The Board has explained the appropriateness of filing waiver petitions in this proceeding:

> We believe that the waiver regulation does not set deadlines because it anticipates that the Board will use a rule of reason in considering such petitions. In determining whether such a petition has been timely filed, this Board will consider the nature of the request, the materiality of the issue that would be implicated by granting the waiver, the delay, if any, that would result if the petition was granted, and the time elapsed between when the petitioner learned of the matters that give rise to the request and when the petition is filed. We do not believe that it is appropriate to set such a deadline in a vacuum. Instead we believe that it more

> appropriate to advise the parties to file such petitions as soon as practicable with the understanding that a failure to so may well result in the rejection of an otherwise meritorious petition.[12]

Thus, such petitions, or for that matter, requests for exemptions are not subject to specific filing time restrictions. Instead, the Board will examine the facts and circumstances surrounding specific waiver petitions to determine if it is appropriate.

Viewed in this light, Petitioners' Waiver Petition and supporting declaration are absolutely appropriate. The materiality of the issues presented in the Joint Petition is patent: the issues relating to the safety and environmental impacts of long-term on-site nuclear waste storage are integral to an informed determination regarding the appropriateness of relicensing Indian Point. Petitioners' request for the Board to consider waiving the requirements of 10 C.F.R. § 51.23(b), or granting an exemption from such requirements is a reasonable request, considering it is just one additional argument for consideration by the Board as it deliberates on the question of the admissibility of Petitioners' new waste contentions. It does not present new factual information not already presented in the Joint Petition.

Accordingly, Entergy's critique that allowing the Board to consider the Waiver Petition and Greene Declaration would lead to inappropriate delay is unfounded. *See* Motion to Strike at 9-10. In particular, Entergy speculates that allowing the Waiver Petition to stand would lead to a one month delay. *Id.* at 10. Since it is not clear when the Board will rule on the admissibility of the various newly proffered contentions filed by various parties in this proceeding, it is far from clear that consideration of the Waiver Petition would result in *any* delay. Nor would the Waiver Petition affect the "trigger date," as Entergy suggests, since Entergy's response to the Waiver Petition is not a "reply" to an FSEIS-related contention. *See* Scheduling Order at ¶ K ("if new or

[12] Memorandum and Order (Scheduling Prehearing Conference and Ruling on New York State's Motion Requesting Consideration of Additional Matters), December 18, 2008.

amended contentions are filed that are based on the FEIS, the trigger date will be the day on which the last timely Reply arising from the filing of the new or amended contentions is filed"). Ironically, for all of Entergy's protestations about delay, it is Entergy's filing of the Motion to Strike that has caused most delay, by holding up the due date for Entery's reponse to the Waiver Petition.

Moreover, Petitioners submit that the Waiver Petition was filed "as soon as practicable" in this proceeding. Clearwater's Waste Confidence Contentions filed on October 26, 2009, and Petitioners' initial Joint Petition both maintained that the WCD Update was invalid. In such a scenario, a waiver would not be necessary. Petitioners' understanding was supported by the fact that the Board admitted Riverkeeper Contention EC-3 and Clearwater Contention EC-1 (concerning the environmental impact of radioactive leaks from nuclear waste storage pools at Indian Point) without necessitating a waiver.[13] Riverkeeper Contention EC-3 asserts that the general findings in the Generic Environmental Impact Statement ("GEIS") regarding license renewal were inapplicable due to new and significant information.[14] Likewise, Petitioners anticipated that the generic findings in the GEIS, including the articulation of the generic Finding Of No Significant Impact contained in 10 C.F.R. § 51.23(b), would be inapplicable, in light of the information presented in the Joint Petition, in the "rule invalid" scenario. Only after NRC Staff responded to the Joint Petition complaining that Petitioners should have filed a waiver, *see* NRC Staff Answer at 19, did Petitioners seek to demonstrate why a waiver would, in the alternative, also be appropriate.

C. A Motion To Strike Is Inapplicable To Authorized Pleadings

[13] *See* IN THE MATTER OF ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point, Units 2 and 3), Docket Nos. 50-247-LR, 50-286-LR (ASLBP No. 07-858-03-LR-BD01), 68 N.R.C. 43, *188-194, July 31, 2008
[14] *See id.*

Entergy's claim about the Waiver Petition is not that it is an unauthorized pleading, but rather, that it is untimely. In such circumstances, a Motion to Strike is wholly inappropriate. Parties routinely argue that Motions or Petitions are untimely in their Answers. For example, Entergy has alleged that the new parts of Clearwater's proposed environmental justice contention are untimely, but it has not moved to strike the pleading that seeks their admission. Similarly, to the extent Entergy regards the Waiver Petition as untimely, it should merely answer so arguing. *See, e.g.*, *In re S. Nuclear Operating Co.*, 67 N.R.C. 85, 97-98 (Jan. 15, 2008) ("There is no explicit mention of such a motion [to strike] in the agency's rules of practice . . . . [T]he issues of the scope of EC 1.3 and the adequacy of the materials provided in support of a summary disposition response are matters the Board can consider and resolve without such a motion and without 'striking' anything. Consequently, the staff and [intervenor] arguments made in the motions to strike should have been framed in reply pleadings . . ."). Notably, by introducing a Motion to Strike, Entergy will have another bite at the apple if the Board properly denies Entergy's request. This is inherently unfair, and demonstrates why interposing a response to a Waiver Petition rather than a motion to strike, is the appropriate course that Entergy should have taken. Moreover, if this Board allows Entergy to use a Motion to Strike to object to the timeliness of a filing for which there is no set time, it will open up a Pandora' box of procedural complexity in a proceeding that is already sufficiently procedurally complex.

CONCLUSION

For the foregoing reasons, this Board should deny Entergy's Motion to Strike in its entirety.

Respectfully submitted,

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March 21, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of ENTERGY NUCLEAR OPERATIONS, INC. (Indian Point Nuclear Generating Units 2 and 3)	)))))))	Docket Nos. 50-247-LR and 50-286-LR March 21, 2011

CERTIFICATE OF SERVICE

Petitioner certifies that on March 21, 2011 copies of the enclosed " PETITIONERS' OPPOSITION TO ENTERGY'S MOTION TO STRIKE" were served on the following by first-class mail and e-mail:

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