

**UNITED STATES OF AMERICA**

**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE NUCLEAR REGULATORY COMMISSION**

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In the Matter of )

James A. Fitzpatrick 50-333 EA )

Entergy's Request for Extension to Comply )

with NRC Orders EA-12-049, EA-12-051 )

and EA-13-109 )

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November 10, 2016

**BEYOND NUCLEAR & THE ALLIANCE FOR A GREEN ECONOMY  
PETITION TO REQUEST A HEARING AND LEAVE TO INTERVENE  
ON ENTERGY'S REQUESTS FOR AN EXTENSION TO COMPLY WITH  
NRC ORDERS EA-12-049, EA-12-051 AND EA-13-109 REQUIREMENTS  
FOR THE JAMES A. FITZPATRICK NUCLEAR POWER STATION**

In accordance with 10 C.F.R § 2.309, now come Beyond Nuclear and The Alliance for a Green Economy New York (AGREE), hereinafter referenced as "the Petitioners," to file a request for a hearing and leave to intervene before the Atomic Safety and Licensing Board in the matter of Entergy's James A. FitzPatrick nuclear power station. The Petition is filed pursuant to Entergy's "Request for Extension to Comply with NRC Orders dated March 12, 2012 Modifying Licenses with Regard to Requirements Mitigation Strategies for Beyond-Design-Basis External Events and Reliable Spent Fuel Pool Instrumentation (EA-12-049 and EA-12-051)," and "Request for Extension to Comply with NRC Order EA-13-109, 'Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident

Conditions”.<sup>1</sup>

The Entergy Requests, each dated September 8, 2016, were publicly docketed to the U.S. Nuclear Regulatory Commission (NRC) Agency-wide Document Access Management System (ADAMS) on September 16, 2016. Therefore, Petitioners are providing their timely filing to request a hearing as required on or before the end of 60-day period on November 14, 2016.

### **PRELIMINARY STATEMENT**

On March 11, 2011, an extreme earthquake just off the eastern coast of Japan triggered a large destructive tsunami. The destructive earthquake caused the six-unit Fukushima Daiichi nuclear power station to experience the loss-of-offsite power from the electrical grid system knocking out the primary source of power to the nuclear power station's safety systems. With the loss of emergency standby electrical generators as a result of flooding by the tsunami, additional units experienced the complete loss of all AC power, a condition known as “station blackout.” The three General Electric Mark I boiling water reactor units that were at full power (Units 1, 2 and 3) at the time of the combined natural disaster were severely impacted by station blackout subsequently depleted emergency back-up DC power resulting in complete loss of reactor cooling and multiple safety system failures causing the three reactor cores to overheat. As a result, Units 1,

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<sup>1</sup> Entergy's “Request for Extension to Comply with March 12, 2012 Commission Orders Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events and Reliable Spent Fuel Pool Instrumentation (Order Numbers EA-12-049 and EA-12-051),” September 8, 2016, ML16252A4777 and “Request for Extension to Comply with NRC Order EA-13-109, ‘Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions,’” September 8, 2016, ML1616252A477

2 and 3 experienced severe accidents involving fuel damage, hydrogen gas explosions, core meltdowns and breaches to their GE Mark I pressure-suppression containment systems. At the time of the earthquake and tsunami, Fukushima Daiichi Units 4, 5 and 6 were shut down in a refueling and maintenance outage. Just three months prior to the accident, Unit 4 had conducted a full core offload from the reactor to its spent fuel pool that also lost electrical power to cooling capability to a large volume of still thermally hot nuclear fuel that prompted international concern of an uncontrolled nuclear waste fire outside of containment.

The severe accidents and breach of containment structures resulted in significant off site radioactive contamination to roughly 8% of Japan's land mass. A large proportion of the Japanese population and ecology have been radiologically exposed. A significant proportion of those Japanese citizens still live and work in radioactive contamination significantly in excess of public health and safety standards established by the International Commission on Radiological Protection (ICRP). Now more than five years after the accident, the multiple loss of Fukushima Daiichi's containment structures and unmitigated reactor core meltdowns still contribute to the significant radiological contamination of Japan's coastal water of the Pacific Ocean.

The Fukushima Daiichi severe nuclear accident set in motion the formation of the United States Nuclear Regulatory Commission's (NRC) Near-Term Task Force to make recommendations for U.S. reactors. The NRC Japan Lessons-Learned Project Directorate was created and expanded to the NRC Japan Lessons Division (JLD) to

prioritize the development and enforcement of an action plan for U.S. reactors with a particular focus on the Fukushima-style GE boiling water reactors with Mark I and Mark II pressure suppression containment systems still operating in the United States. This includes the James A. FitzPatrick nuclear power station in Scriba, New York.

These actions now include the Commission Orders referenced in this petition:

- 1) NRC “*Issuance of Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design-Design-Basis External Events (EA-12-049)*” dated March 12, 2012 requires operators of U.S. nuclear power stations to complete scheduled enhanced mitigation strategies intended to maintain or restore cooling capabilities to the reactor core, the containment, and the spent fuel pool in the event of beyond-design-basis external events such as occurred at Fukushima Daiichi. The Nuclear Energy Institute successfully put forward its strategy for Diverse and Flexible Mitigation Capability (FLEX) for post-Fukushima upgrades to safety functions for core cooling, containment integrity, and spent fuel cooling. The subsequent NRC Order sets forth these functions as new requirements for back fits needed to provide adequate and necessary protection to public health and safety in a three phase approach; 1) an initial phase that requires the use of installed equipment and resources to maintain or restore core cooling, containment, and spent fuel pool cooling; 2) a transition phase requires providing sufficient, portable, onsite equipment and essential consumables (i.e. fuel, oil, electricity, cooling water, etc.) to maintain or restore these functions until they can be accomplished with resources brought from off site, and; 3) a final phase that requires obtaining sufficient offsite resources to sustain those

functions indefinitely from two designated national industry stockpiles.

The Order requires the scheduled compliance for completion no later than two (2) refueling cycles after submittal of the agency's Overall Integrated Plan (OIP), or December 31, 2016 whichever comes first. Unable to achieve the scheduled compliance date as modified in its operating license, Entergy is requesting an "extension to comply" for the scheduled implementation of Order EA-12-049 from the FitzPatrick January 2017 refueling outage start-up to June 30, 2017.<sup>2</sup>

- 2) NRC "*Issuance of Order to Modify Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (EA-12-051)*," also dated on March 12, 2012 requires operators of U.S. nuclear power stations, including FitzPatrick, to complete and implement the reliable indication of the water level in spent fuel storage pools and train personnel to reliably monitor cooling water levels so as to ensure that: (1) the water level is adequate to support operation of the normal fuel pool cooling system, (2) water level is adequate to provide substantial radiation shielding for a person standing on the spent fuel pool operating deck, and (3) the water level where fuel remains covered and actions to implement make-up water addition should no longer be deferred.<sup>3</sup>

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<sup>2</sup> "Issuance of Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events (EA-12-049), March 12, 2012, ML12056A042

<sup>3</sup> "Issuance of Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (EA-12-051)," March 12, 2012, ML12054A679

The Order requires scheduled compliance for implementation no later than two (2) refueling cycles after submittal of the Overall Integrated Plan (OIP), or December 31, 2016 whichever comes first. Unable to achieve the scheduled compliance date as modified in the operating license, Entergy is requesting an “extension to comply” with Order EA-12-0051 from the FitzPatrick January 2017 refueling outage start-up to June 30, 2017.

- 3) NRC “Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (EA-13-109)” dated June 6, 2013 focuses on a series of scheduled back fits to address the vulnerability of the GE Mark I boiling water reactor containment system to severe accident conditions as demonstrated by the 100% containment failure rate for Fukushima Daiichi Units 1, 2 and 3.<sup>4</sup> The Order includes two separate scheduled implementation phases for backfitting the vulnerable pressure suppression containment systems. Phase 1 requires modifications to venting systems for the “wetwell” component of the GE Mark I and Mark II pressure-suppression containment system while Phase 2 includes modifications to the “drywell” component with severe accident capable hardened venting systems or implementation of an alternate non-prescriptive, performance-based containment strategy developed and advocated by the Nuclear Energy Institute

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<sup>4</sup> Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (EA-13-109),” June 6, 2013, ML13143A321

and subsequently adopted into Phase 2 of EA-13-109.

The Order requires the scheduled compliance for complete implementation of Phase I (a reliable severe accident capable wetwell hardened containment vent) no later than startup from the second refueling outage that begins after June 30, 2014, or June 30, 2018, whichever occurs first. Unable to achieve the scheduled compliance date in its modified operating license, Entergy is requesting an “extension to comply” with Order EA-13-109 from the January 2017 refueling outage start-up as designate in its modified operating license to June 30, 2018.

On November 18, 2015, Entergy announced its decision to permanently close the FitzPatrick nuclear power station. On March 16, 2016, Entergy certified to the NRC that it would not refuel FitzPatrick nuclear power station in preparation in preparation of the permanent cessation of power operations on January 27, 2017.

On August 18, 2016, Entergy notified the NRC of the possible sale and license transfer of the FitzPatrick nuclear power station to Exelon Generation for continued power operations and the plan to restart FitzPatrick from the January 2017 refueling outage to resume full power operations.

On September 8, 2016, Entergy submitted its “Request for Extension to Comply” with NRC Orders EA-12-049, EA-12-051 and EA-13-109. In the event of sale and license transfer, Entergy plans to resume power operations upon startup from the January 2017 refueling outage. *NRC Order EA-13-109, Section IV requires that JAF shall complete implementation of Phase 1 of the Order no later than startup from the January 2017*

*refueling outage (i.e., second refueling outage beginning after June 30, 2014), or June 30, 2018, whichever comes first.*

Entergy and Exelon have requested that the NRC expeditiously approve Fitzpatrick's sale and license transfer, stating, *"Subject to the satisfaction of all closing conditions, including receipt of all required regulatory approvals, the Applicants wish to close this transaction at the earliest practicable date and have targeted a closing on April 1, 2017. Accordingly, Entergy and Exelon Generation request that the NRC review this application on a schedule that will permit issuance of an order consenting to the transfer and approving a conforming license amendment as promptly as possible and in any event by March 1, 2017. Please note that if appropriate conditions are satisfied under the Asset Purchase Agreement, then Entergy Nuclear FitzPatrick will take such steps as necessary with the NRC to reflect the intent of the parties to operate FitzPatrick beyond January 2017. The Applicants request that the consent be immediately effective upon issuance and permit the transfer to occur up to one year after issuance or such later date as the NRC may permit."*<sup>5</sup>

It is therefore the Petitioners' understanding that if granted the extension to comply with the Orders that it is Entergy's intention to complete the January 27, 2017 refueling outage and promptly resume FitzPatrick at full power operations under the requested relaxation for compliance deadlines for the scheduled implementation of backfits incorporated into its modified operating license per Orders EA-12-049, EA-12051 and

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<sup>5</sup> ENOI and Exelon Letter, "Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment CNRO 2016-00019," August 18, 2016, ML16235A081, p. 4 of 377



EA-13-109.

The Petitioners argue that there is no authority to extend compliance for scheduled implementation of the modified license conditions per the three Orders. The licensee must either achieve compliance as imposed by the Orders in the existing modified license or receive the licensee's request to amend those license conditions which includes properly placing Entergy's requests into The Federal Register with notice of the opportunity for a hearing by any adversely impacted parties.

## **STANDING**

### **A. Legal Basis**

Pursuant to 10 CFR § 2.309, a request for hearing or petition for leave to intervene must address (1) the nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding, (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding, and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest. In determining whether a petitioner has sufficient interest to intervene in a proceeding, the Commission has traditionally applied judicial concepts of standing. *See Metropolitan Edison Co. (Three Mile Island Nuclear station, Unit 1)*, CLI-83-25, 18 NRC 327, 332 (1983) (citing *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610 (1976)). Contemporaneous judicial standards for standing require a petitioner to demonstrate that (1) it has suffered or will suffer a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy

Act of 1969 (NEPA), *etc.*); (2) the injury can be fairly traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plants), LBP-99-25, 50 NRC 25, 29 (1999).

An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating harm to its organizational interests, or in a representational capacity, by demonstrating harm to its members. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998).

To intervene in a representational capacity, an organization must show not only that at least one of its members would fulfill the standing requirements, but also that he or she has authorized the organization to represent his or her interests. *See Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426 (2002).

Standing to participate in this proceeding is demonstrated by the declarations of the organizations and individuals provided with this Petition. All of the individual Petitioners have standing within 50 miles of the FitzPatrick nuclear power station, and each one has designated one of the organizational Petitioners to represent his or her interests in this proceeding.

Because they live near the FitzPatrick nuclear power station, *i.e.*, within 50 miles, the individually-named Petitioners have presumptive standing by virtue of their proximity to the nuclear power plant. *Diablo Canyon, supra*, 56 NRC at 426-427, citing *Florida*

*Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff'd*, CLI-01-17, 54 NRC 3 (2001). In *Diablo Canyon*, the Licensing Board noted that petitioners who live within 50 miles of a proposed nuclear power plant are presumed to have standing in reactor construction permit and operating license cases, because there is an “obvious potential for offsite consequences” within that distance. *Id.* Here, Entergy seeks an “extension to comply” with NRC Orders that modified the requester’s operating license. Thus, the same standing concepts apply.

The Petitioners’ members seek to protect their lives and health by opposing the “extension to comply” with NRC Orders issued as “effectively immediately” for the FitzPatrick modified operating license. Petitioners seek to ensure that Entergy be subjected to the rules and procedures as established by the U.S. Nuclear Regulatory Commission that provide the Petitioners and their members due process in a hearing to disclose and examine the request’s risk to the public health and safety.

Further, *locus standi* is based on three requirements: injury, causation and redressability. Petitioners hereby request to be made a party to the proceeding because (1) continued operation of the nuclear reactor at FitzPatrick outside of compliance with conditions in its operating license as modified “effective immediately” by the NRC Orders presents a tangible and particular harm to the health and well-being of those members living within 50 miles of the site, (2) in order to change licensed conditions as modified and imposed by Orders directly affecting the safety of those named members and other individuals, the NRC rules and procedures require a license amendment proceeding, and (3) the Commission is the sole agency with the power to approve, to deny or to modify an operating license of a commercial nuclear power plant.

A license amendment is authorization from the NRC to continue operation of a nuclear power plant under modified license conditions. Before issuing the license amendment, the NRC staff must complete safety and environmental reviews of the request. The license amendment must comply with provisions of the Atomic Energy Act, the National Environmental Policy Act, NRC regulations and all applicable laws.

The Petitioners seek leave to intervene because they believe their public health and safety interests, and those of their members, will not be adequately represented absent this course of action and intervention, and without the opportunity to participate as full parties in a license amendment proceeding.

In short, with the opportunity for a public hearing and independent assessment of the complete plans, FitzPatrick may operate unsafely and pose an undue and unacceptable risk to the health, safety and welfare of the Petitioners' members who live, recreate and conduct their business in the vicinity of the nuclear power plant.

Attached to this Petition are individual declarations of persons with standing, along with declarations from two (2) organizations which are prepared to represent those persons, who are members respectively. Representational standing of the organizational Petitioners is established via these declarations for Beyond Nuclear and The Alliance for a Green Economy New York (AGREE) who formally wish to protect the interests of their members who reside within 50 miles of the FitzPatrick nuclear power station.

## **B. Named Petitioners**

1. Beyond Nuclear is a not-for-profit public education and advocacy organization whose mission involves the oversight of NRC's regulatory process so that it serves to protect public health, safety, property, and the environment. The organization is located at 6930 Carroll Avenue, Suite 400, Takoma Park, Maryland 20912 (Tel. [301.270.2209](tel:301.270.2209)). Beyond Nuclear has members within the Fitzpatrick 50-mile Emergency Planning Zone. Beyond Nuclear is providing the sworn affidavit and declaration of Steven Penn for representational standing in this petition. His residence, in which he has a financial interest, is located within 50 miles of the FitzPatrick Nuclear Generating Station for which Entergy Corporation has submitted a "Request for Extension to Comply" with United States Nuclear Regulatory Commission (NRC) Orders EA-12-049, EA-12-051 and EA-13-109. Mr. Penn, a member of Beyond Nuclear, resides at 162 Cambridge St., Syracuse, NY 13210. (Email: [penn@icloud.com](mailto:penn@icloud.com) /Tel. 315-383-0069). Mr. Penn's residence and primary financial assets are within 50 miles of the Fitzpatrick Nuclear Power Station. Mr. Penn's declaration expresses concern that if NRC grants Entergy's requests for an extension to comply that it could adversely affect his health, safety and life, the lives of his family, community and the environment in which he lives. Mr. Penn's declaration shows that he is reasonably concerned, and therefore Beyond Nuclear is reasonably concerned, that granting Entergy's Requests would adversely affect their interests and health and safety and all other members of Beyond Nuclear within the FitzPatrick Emergency Planning Zone, as the NRC has already found.

2. The Alliance for a Green Economy is a not-for-profit public education and advocacy organization whose activities involve the oversight of safety issues at the FitzPatrick nuclear reactor and the NRC's regulatory process so that the public understands issues related to their public health, safety, property, and the environment. The organization is located at 2013 E. Genesee St, Syracuse, NY 13210 (Tel. 315.480.1515).

[www.agreennewyork.org](http://www.agreennewyork.org). Alliance for a Green Economy's headquarters, our entire staff, one of our board members, and many of our volunteers, are located, live, and/or work within the FitzPatrick 50-mile Emergency Planning Zone. Alliance for a Green Economy is providing the sworn affidavit of Jessica Azulay Chasnoff for standing in this petition. Her residence, in which she has a financial interest, is located within 50 miles of the FitzPatrick Nuclear Generating Station for which Entergy Corporation has submitted a "Request for Extension to Comply" with United States Nuclear Regulatory Commission (NRC) Orders EA-12-049, EA-12-051 and EA-13-109. Jessica Azulay Chasnoff, Program Director of Alliance for a Green Economy, resides at 203 Bassett Street, Syracuse, NY 13210. (Email: [Jessica@allianceforagreennewyork.org](mailto:Jessica@allianceforagreennewyork.org) / Tel. 315-480-1515). Ms. Azulay Chasnoff's residence and primary financial assets are within 50 miles of the FitzPatrick Nuclear Power Station. Ms. Azulay Chasnoff's declaration expresses concern that if NRC grants Entergy's requests for an extension to comply that it could adversely affect her health, safety and life, the lives of her family, community and environment in which she lives. Ms. Azulay Chasnoff's declaration shows that she is reasonably concerned, and therefore Alliance for a Green Economy is reasonably concerned, that granting Entergy's Requests would adversely affect their

interests and health and safety and all other members of Alliance for a Green Economy within the FitzPatrick Emergency Planning Zone, as the NRC has already found.

The Alliance for a Green Economy is additionally providing the sworn declaration of Andra Leimanis who resides at 921 Maryland Avenue, Syracuse, New York 13210. Tel. 315-644-7824. Email [aleimmanis@gmail.com](mailto:aleimmanis@gmail.com). Ms. Leimanis' residence is similarly within the 50-mile Emergency Planning Zone of the FitzPatrick nuclear power station. Ms. Leimanis' declaration expresses her concern that if NRC grants Entergy's requests for an extension to comply that it could adversely affect her health, safety and life, the lives of her family, community and environment in which she lives. Ms. Leimanis' declaration shows that she is reasonably concerned, and therefore Alliance for a Green Economy is reasonably concerned, that granting Entergy's Requests would adversely affect their interests and health and safety and all other members of Alliance for a Green Economy within the FitzPatrick Emergency Planning Zone, as the NRC has already found.

The Petitioners have therefore adequately demonstrated standing to request a hearing and leave to intervene in the above captioned matter.

## **PETITION TO INTERVENE**

### ***I. Applicable Legal Standards***

#### **A. Admissibility**

The Petitioners understand that an admissible contention must provide (1) a specific statement of the legal or factual issue proposed; (2) a brief explanation of its basis; (3) a

demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings the NRC must make to support the action involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioners' position and upon which the petitioner intends to rely at hearing; and (6) sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes or, when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. See 10 C.F.R. § 2.309(f).

The Petitioners understand that while they cannot use an intervention's discovery or cross-examination as a "fishing expedition" there is no NRC requirement that they present a substantive case at the contention stage. *Entergy Nuclear Generation Co. et al. (Pilgrim Nuclear Power Station)*, ASLB Oct. 16, 2006, 2006 WL 4801142 at slip op. 85 (quoting *Oconee*, 49 NRC at 342)).

As such, "A contention may be plausible enough to meet the admission standards even if it is ultimately denied on the merits." *Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee)*, LBP-06-20, 64 N.R.C. 131, 160 (2006).

### **B. Specific Statement of the Issue of Law or Fact to be Raised or Controverted**

The petitioners must clearly identify the issue of law or fact that it will raise or dispute. 10 C.F.R. § 2.309(f)(1)(i).



### **C. Brief Explanation of the Basis of the Contention**

The “petitioner must provide some sort of minimal basis indicating the potential validity of the contention.” Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) This minimal basis need not be “an exhaustive list of possible bases, but simply enough to provide the alleged factual or legal bases in support of the contention.” Vermont Yankee, 64 N.R.C. at 147 (quoting Louisiana Energy Serv., LP (National Enrichment Facility), 60 NRC 619, 623 (2004)).

### **D. Showing that the Contention is Material to Findings that the NRC Must Make in Support of the Proposed Action**

The proffered contention must concern an issue that is “material” to the findings the NRC must make. 10 C.F.R. § 2.309(f)(1)(iv). A “material” issue is one that would make a difference in the outcome of the proceeding. 54 Fed. Red. at 33,172. “This means that there should be some significant link between the claimed deficiency and either the health and safety of the public or the environment.” Vermont Yankee, 60 NRC 548, 557 (Nov. 22, 2004).

### **E. Concise Statement of the Alleged Facts or Expert Opinions in Support of Petitioners’ Position**

A petitioner must demonstrate that a proposed contention is supported by “a concise statement of the alleged facts or expert opinions which support the . . . petitioner’s position on the issue . . . together with references to the specific sources and

documents on which [it] intends to rely.” 10 C.F.R. § 2.309(f)(1)(v). However, a Petitioner does not need to “make its case at this stage of the proceeding.” 54 Fed. Reg. at 33,170. The petitioner can simply “indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.” *Id.* Moreover, “a Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner.” *Vermont Yankee*, 60 NRC at 555 (quoting *Arizona Public Service Co. (Palo Verde Nuclear Station)*, 34 NRC, 149, 155 (Aug. 16, 1991)).

**F. Sufficient Information to Show that a Genuine Dispute Exists with the Applicant or Licensee on a Material Issue of Law or Fact NRC set forth factors relevant to determining if a genuine dispute exists when it adopted the current version of 10 C.F.R. § 2.309(f)(1)**

The Petitioners need to review the pertinent portions of the Request documentation in question and state the Requester’s position and the Petitioners’ opposing view. Where the Petitioners believe the documentation and supporting material do not address a relevant matter, it is sufficient for the Petitioner to explain why the requester’s documentation is deficient and within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

***II. Petitioners’ Contentions and Supporting Information***

**Contention 1**

**A. Entergy’s “Request for Extension to Comply with NRC Order EA-13-109,**

**‘Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions’” should be denied on procedural grounds. The request is in fact a request for a license amendment affecting public health and safety; and Entergy should therefore be required to follow the NRC’s standard rules and practices for amending its modified operating license.**

Entergy’s Request is in fact an attempt to avoid the general requirements and guidance for amending an existing license as set forth in 10 C.F.R. §§ 50.90, 50.91. Entergy’s Request should therefore be denied.

In the aftermath of the Fukushima nuclear reactor accident, the NRC issued Order EA-13-109 on June 6, 2013. The Order was issued to all operators of the General Electric Mark I and Mark II boiling water reactors and modified, i.e., amended their operating licenses. The same Order was issued to the operator of the James A. FitzPatrick Mark I boiling water reactor.<sup>6</sup>

EA-13-109 requires the FitzPatrick operator to complete “Phase 1 (reliable, severe accident capable wetwell venting system) no later than startup from the second refueling outage that begins after June 30, 2014 or June 30, 2019 whichever comes first.” EA 13-109, p. 10-11 The FitzPatrick operating license compliance date for implementation of Phase 1 requirements is scheduled prior to restart from its second

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<sup>6</sup> “Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions,” EA-13-109, June 6, 2013, ML13143A321

refueling outage on or around January 27, 2017. Entergy Request for Extension to Comply (EA-13-109) Attachment, p. 5 of 8

The Order modified, i.e., amended technical specifications in the operating license to incorporate the referenced scheduled completion and implementation of a reliable, severe accident capable hardened containment vent in the vital interest of providing adequate public safety as directed by the Order.

The Order provides the agency's clear findings to the licensee,

*"The NRC has concluded that (1) the requirement to provide a reliable HCVS to prevent or limit core damage upon loss of heat removal capability is necessary to ensure reasonable assurance of adequate protection of public health and safety, and (2) the requirement that the reliable HCVS remain functional during severe accident conditions is a cost-justified substantial safety improvement under 10 CFR 50.109(a)(3). The NRC is therefore requiring Licensee actions. In addition, pursuant to 10 CFR 2.202, the NRC finds that the public health, safety and interest require that this Order be made immediately effective."* EA-13-109, p. 10

On June 26, 2013, Entergy consented to make the scheduled modifications at FitzPatrick as required and waived the opportunity to request for a hearing, stating:

*"Pursuant to 10 C.F.R. § 2.202(a)(2), Entergy hereby submits its answer to the Order.*

*Entergy consents to Order EA-13-1 09 and does not request a hearing.”*<sup>7</sup>

Entergy Answer (EA-13-109), p.2 of 3

The Petitioners argue that Entergy consented to the referenced Order that modified the licensed condition including Fitzpatrick’s scheduled compliance. Entergy’s Answer waived its opportunity for a hearing to challenge any aspect of the Order including scheduled compliance. The licensee’s request to now change its scheduled modified license condition constitutes a request to amend the license as modified and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93- 21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96- 23, 44 NRC 143, 150 n.6 (1996).

Nothing prevents Entergy from following the rules and submitting a request for a license amendment. Because such a license amendment request involves significant hazards to public health and safety, Entergy’s Request should submit a license amendment request before Staff makes any determination on it.

Petitioners assert that once Entergy is required to follow the standard rules and practices; it can submit its request as a license amendment and the NRC can properly post it to The Federal Register with an opportunity for a hearing to permit intervention by those petitioners who meet the requirements for intervention.

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<sup>7</sup> Entergy’s Answer to the June 6, 2013, Commission Order Modifying License with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Order Number EA-13-109), June 26, 2013, ML13177A275, p. 2 of 3

The requirements to requesting a license amendment, as Entergy now seeks to avoid, are thoroughly explained in NRC NUREG-0386 Staff Practices and Procedures (6.1 Amendments to Existing Licenses and/or Construction Permits).<sup>8</sup> NUREG-0386, GM, p.536 of 796

NUREG-0386 explains,

*“General requirements and guidance for the amendment of an existing license or construction permit for production and utilization facilities are set out in 10 C.F.R. §§ 50.90, 50.91.*

*“In passing upon an application for an amendment to an operating license or construction permit, ‘the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate.’ 10 C.F.R. § 50.91. These considerations are broadly identified in 10*

*C.F.R. § 50.40. In essence, Section 50.40 requires that the Commission be persuaded, inter alia, that the application will comply with all applicable regulations, that the health and safety of the public will not be endangered, and that any applicable requirements of 10 C.F.R. Part 51 (governing environmental protection) have been satisfied. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978).” NUREG-0386, GM, p.536 of 796*

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<sup>8</sup> United States Nuclear Regulatory Commission Staff Practices and Procedural Digest, NUREG-0386, Digest 15, Office of General Counsel, General Matters (GM), ML101000014, March 31, 2010, p.536 of 796

Section 6.1.4 of the NRC's Practice and Procedures for Hearing Requirements for License/Permit Amendments further explains:

*"The Atomic Energy Act of 1954... and the regulations (10 C.F.R. § 2.105(a)(3)) require that, where a proposed amendment involves 'significant hazards considerations,' the opportunity for a hearing on the amendment be provided prior to issuance of the amendment and that any hearing requested be held prior to issuance of the amendment. An opportunity for a hearing will also be provided on any other amendment as to which the Commission, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards determines that an opportunity for public hearing should be afforded. 10 C.F.R. § 2.105(a)(3)."*

NUREG-0386, GM, p.538 of 796

NUREG-0386 clearly states,

*"A technical specification is a license condition. A license request to change that condition constitutes a request to amend the license and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150 n.6 (1996)."* NUREG-0386, GM, p.539 of 796

*"A prior hearing is not required under Section 189a of the Atomic Energy Act, as amended, for Commission approval of a license amendment in situations where the NRC Staff makes a 'no significant hazards consideration' finding. Commonwealth*

*Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-623 (1981); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 123 (1986). See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds sub nom. San Luis Obispo Mothers For Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986)."* NUREG-0386, GM, p.539 of 796

The staff is authorized to make a "*significant hazards consideration*" finding only if it finds that operation of the facility in accordance with the proposed amendment would not; 1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or 2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or, 3) Involve a significant reduction in a margin of safety. 10 CFR 50.92(c)

Given the extensive and conclusive findings in the interest of providing adequate public safety that the Commission made in formulating and issuing the Order "immediately effective," the Petitioners argue that the staff cannot properly make a "no significant hazards consideration" finding.

Entergy now seeks an extension to comply with the scheduled implementation of the referenced Order by at least one and a half (1½) years more than the terms in its modified operating license. Petitioners assert that Entergy's late request to change and extend the scheduled compliance date in its modified license is not a reasonable excuse for waiving NRC's standard practice and procedures put into place to



adequately ensure the protection of the public health and safety as is provided under the Atomic Energy Act.

Entergy's Request should therefore be denied. Entergy's request to change its modified operating license should not be expedited or excused from the open scrutiny of a formal hearing process by the adversely affect parties. Entergy should not be allowed to circumvent any adversely affected party's due process intended to ensure the protection of the public health and safety as provided under the Atomic Energy Act. Because such a license amendment request involves significant hazards as determined by the Order, a request to change the license condition should go to hearing before Staff makes any determination on it.

Entergy can submit its implementation date change request as a license amendment which NRC can publicly notice with the required opportunity of a hearing to permit an intervention by any adversely affected parties that meet the requirements provided under the protection of the Atomic Energy Act § 189a, 42 U.S.C. § 2239(a).

If and when Entergy can demonstrate that it is in compliance with its modified operating license as per the Order's requirements, the operator may submit to the NRC for the restart of Fitzpatrick's power operations.

**B. Entergy's Request should be denied because it is not timely. Entergy filed the Fitzpatrick Request for Extension to Comply on September 8, 2016, nearly three years after the Order's 20 days filing requirement to notify the Commission if the operator is unable to comply with any of the Phase I requirements in its modified license. (EA-13- 109, Section IV, part C)**

Entergy answered Order EA 13-109 on June 26, 2013 stating, "*Pursuant to 10 C.F.R. § 2.202(a)(2), Entergy hereby submits its answer to the Order. Entergy consents to Order EA-13-1 09 and does not request a hearing.*"<sup>9</sup> Entergy's Answer (EA-13-109), p. 2 of 3

Petitioners argue that even if the Entergy Request were proper, and it is not, Entergy's September 8, 2016 request for the extension to comply was filed nearly three years after the NRC Order required Entergy to answer, request a hearing and show good cause if they were unable or unwilling to comply with any of the required modified license conditions.

Entergy's Request is now an unreasonable stretch far beyond the 20-day filing requirement for the hearing opportunity to request relief as provided in the Section IV C of the Order.

Specifically, Section IV of the Order's Enclosure states,

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<sup>9</sup> "Entergy's Answer to the June 6, 2013, Commission Order Modifying License With Regard To Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (Order Number EA-13-109), June 26, 2013, ML13177A275

*“Accordingly, pursuant to Sections 161 b, 161 i, 1610, and 182 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, "Orders," and 10 CFR Part 50, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT ALL LICENSES IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER ARE MODIFIED AS FOLLOWS:*

*C. All Licensees shall, within twenty (20) days of the issuance date of the Final ISG Phase 1, notify the Commission (1) if they are unable to comply with any of the Phase 1 requirements described in Attachment 2, (2) if compliance with any of the Phase 1 requirements is unnecessary in their specific circumstances, or (3) if implementation of any of the Phase 1 requirements would cause the Licensee to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee's justification for seeking relief from or variation of any specific requirement.”* EA-13-109, Enclosure, p. 11

NRC Interim Staff Guidance (ISG) 2013-02 *“Compliance with Order EA-13-109, Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation under Severe Accident Conditions”*, was issued on November 14, 2013.<sup>10</sup>

Entergy did not file its Request for Extension to Comply until September 8, 2016.

As Entergy *“consented in writing to the order,”* it is not now timely, three years later, to request an extension to comply with implementation of its licensed condition without affording the opportunity for hearing to the adversely affected parties. Petitioners have

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<sup>10</sup> NRC Japan Lesson Learned Project Directorate ISG 2013-02, November 13, 2013, ML13304B836

already argued per NRC standard rules and practice that this is properly conducted through a license amendment request.

The Petitioners point to where EA-13-109 states,

“In accordance with 10 CFR 2.202, the Licensee must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within twenty (20) days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to answer or to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Licensees that consent to this Order and waive their right to a hearing pursuant to 10 CFR 2.202(d) may submit their answers in accordance with 10 CFR 50A instead of following the requirements of the NRC E-filing Rule described below.

“If a hearing is requested by a Licensee or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearings. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained. Pursuant to 10 CFR 2.202(c)(2)(i), the licensee or any other person adversely affected by this Order, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere

suspicion, unfounded allegations, or error.” EA-13-109, pp. 13-14

Entergy’s Answer to EA-13-109 provided its consent to the license modifications including the scheduled compliance dates and waived a request for a hearing. Entergy’s answer did not provide a statement of “good cause” within the 20-day window for relaxing or rescinding any of the modified license conditions. Instead, Entergy inserts the vague and open ended place marker statement “there remain significant uncertainties about the scope of the work that will be required by EA-13-109. As a result, Entergy is unable to state with certainty that it will be able to meet all of the specified compliance deadlines in the Order. As such, Entergy’s future responses may include requests for schedule relief as warranted by subsequent NRC requirements or implementing guidance or the results of engineering analyses not yet performed.”

Entergy Answer (EA-13-109), p.2 of 3

Entergy’s now argues that where it originally consented to the Order and waived its hearing rights and those of adversely impacted parties that might have challenged a timely requested change, it can now rely upon the vague “*uncertainties*” place marker inserted into its answer within that 20-day response time to improperly trump the hearing rights of those same adversely affected parties now three years later.

Further, Entergy's Request is based upon the State of New York Public Service Commission financially ameliorating the economic and market failure of the FitzPatrick nuclear power plant and an expedited NRC license transfer to Exelon Corporation.<sup>11</sup>

The Petitioners argue that Entergy's Request can only reference the Fitzpatrick sale and license transfer to Exelon as "possible." Entergy Request Extension to Comply (EA-13-109), Enclosure, p.1 of 4 Entergy must admit that the timeliness of the Request on the "possible" license transfer is uncertain and that significant delay with increased risk to public safety is also possible. In fact, due to current legal challenges, Entergy cannot now identify with any certainty predict the date when a "possible" sale and license transfer might be negotiated to a final closing, if ever.<sup>12</sup> In fact, a timely license transfer should be based on transferring the operations of FitzPatrick with a compliant licensing basis and not the transfer of a non-compliant operating license.

If Entergy is now allowed to slip off the mooring of its current license condition it amplifies the Petitioners' safety concerns that non-compliant power operations will be adrift potentially on the future request(s) for an extended extension to comply in the event of any further delay or complication in closing the Exelon deal.

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<sup>11</sup> "ENOI and Exelon Letter, Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment CNRO 2016-00019, August 18, 2016, ML16235A081

<sup>12</sup> Petitioners' **EXHIBIT 1** United States District Court, Southern District of New York, Coalition for Competitive Energy et al, Plaintiffs vs. New York Public Service Commission, Defendant, October 19, 2016, Case 1:16-cv-08164 is filed as a complaint alleging the New York Public Service Board unlawfully intruded upon the exclusive authority of the Federal Energy Regulatory Commission by issuing the Zero Emissions Credit bailout of the four uneconomical upstate nuclear power plants including Fitzpatrick.

The Petitioners argue that if Entergy now seeks to reset the technical specification for the calendar date of the Order's scheduled implementation Entergy can properly file its request to modify, i.e. amend, its licensed condition. A properly noticed license amendment request provides the opportunity for a hearing by any adversely affected parties under the standard practices and procedures for the license amendment request process.

**C. Entergy's Request for extension to comply with EA-13-109 Phase I scheduled implementation should be denied because its argument in support is not valid. Entergy does not demonstrate that it provides adequate protection for the public health and safety throughout the requested extension to comply period.**

Entergy's Request should be denied because it has not provided a valid argument in support of its request for an extension to comply with the scheduled implementation EA-13-109 Phase I requirements vital to the adequate protection of public health and safety.

NRC Order EA-13-109 as issued "*immediately effective*" for the scheduled Phase I implementation of a reliable severe accident capable hardened containment vent very clearly states that,

*"...in light of the events at Fukushima Dai-ichi and consistent with the NRC's defense-in-depth strategy, installation of reliable hardened containment vents to help prevent core*

*damage in BWRs with Mark I and Mark II containments was necessary to provide reasonable assurance of adequate protection of public health and safety.” EA-13-109, Enclosure I, p.5*

The EA-13-109 discussion of “Backfitting” clearly supports Petitioners’ contention.  
EA-13-109, Enclosure I, p.6

*“As discussed in SECY-12-0157, the NRC's determination that a venting system should be available during severe accident conditions considered both quantitative assessments of costs and benefits, as well as, various qualitative factors. Among the qualitative factors, one of the more important is enhancing the defense-in-depth characteristics of Mark I and Mark II containments by addressing the relatively high probabilities that those containments would fail should an accident progress to melting the core. Other qualitative factors supporting installation of severe accident capable vents include addressing uncertainties in the understanding of severe accident events, supporting severe accident management and response, improving the control of hydrogen generated during severe accidents, improving readiness for external and multi-unit events, and reducing uncertainties about radiological releases and thereby improving emergency planning and response. The installation of a reliable, severe accident capable containment venting system, in combination with other actions such as ensuring drywell flooding capabilities, reduces the likelihood of containment failures and thereby enhances the defense-in-depth protections for plants with Mark I and Mark II containments.” EA-13-109, Enclosure I, p.9 of 36 [Emphasis added].*

The Order emphatically states that a reliable hardened venting system is needed as a



cost-justified substantial safety improvement:

*“The Commission has determined that requiring BWR facilities with Mark I and Mark II containments to make the necessary plant modifications and procedure changes to provide a reliable hardened venting system that is capable of performing under severe accident conditions is a cost-justified substantial safety improvement. These modifications are needed to protect health and to minimize danger to life or property because they will give licensees greater capabilities to respond to severe accidents and limit the uncontrolled release of radioactive materials. In such situations, the Commission may act in accordance with its statutory authority under Section 161 of the Atomic Energy Act of 1954, as amended, to require Licensees to take appropriate action to reduce the risks posed to the public from the operation of nuclear power plants.”* EA-13-109, p.10 of 36 [Emphasis added].

The Petitioners emphasize the significance of Entergy’s intended operation of FitzPatrick in non-compliance with the scheduled implementation date adds undue risk on the public health, safety and interest with the non-compliant power operation of the nuclear power station.

The NRC explicitly recognizes the risk in its Order which states,

*“In addition, pursuant to 10 CFR 2.202, the NRC finds that the public health, safety and interest require that this Order be made immediately effective.”* EA-13-109, p. 13 of 36 [Emphasis added].

The Petitioners further argue that Entergy does not provide a valid argument for

assuring adequate safety with FitzPatrick's current containment venting system for requested extension period without the scheduled implementation of Phase I requirements.

Entergy's Request states,

*"During the requested period of extension to comply with Phase 1 of the Order, the existing JAF containment vent system used to address GL 89-16, as documented in the NRC Safety Evaluation (ML 13015A634), will continue to provide defense-in-depth measures and enhanced plant capability to mitigate the consequences of a beyond-design-basis external event and to prevent severe accident conditions in accordance with existing Emergency Operating Procedures."*<sup>13</sup> Entergy Request for Extension to Comply with EA-13-109, Attachment, p. 2 of 4

The Entergy extension request for implementation of combustible gas control states,

*"In the NRC's safety evaluation of Fitzpatrick's existing containment vent system (ref: memo from Steven A. Varga to Ralph E. Beedle dated September 28, 1992), the NRC concluded that the Interim Vent Capability design was acceptable and met the intent of GL 89-16 criterion (h), which requires that 'The hardened vent design shall ensure that no ignition sources are present in the pipeway.' The safety evaluation credits, in part, the uncertainty as to whether a combustible mixture could develop, the prevention potential of steam and nitrogen to suppress a hydrogen deflagration, and the mitigation potential of the concrete wall between the SGTS room and the safety related*

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<sup>13</sup> Referencing "Hardened Wetwell Vent Capabilities at the James A. FitzPatrick Nuclear Power Plant," NRC, September 28, 1992, ML13015A634

equipment.

*“A walkdown was conducted by site personnel to address valve accessibility.*

*Additionally, FLEX procedures will be developed to establish the Order EA-12-049 interim anticipatory vent path using the containment vent system used to address GL 89-16 as documented in the NRC Safety Evaluation (ML 13015A634), vent path.”*

Request for Extension to Comply with EA-13-109, Attachment, p. 2 of 4

Entergy’s extension request for implementation of a reliable severe accident capable hardened containment vent states,

*“JAF’s current plans are to implement all outage-required Phase 1 HCVS mechanical and electrical tie-ins and testing during JAF’s RFO22 outage (January/February 2017 timeframe). The field work required to implement the remainder of the Phase 1 HCVS modifications will be performed online during operating cycle CY23, with a completion target no later than 6/30/2018 as specified in Order EA-13-109.”*

Request for Extension to Comply with EA-13-109, Attachment, p.3 of 4

Entergy’s Request concludes,

*“... the requested extension to the compliance requirements of NRC Order EA-13-109 for JAF does not pose a significant increase in plant risk and does not reduce nuclear safety or safe plant operations.”*

Request for Extension to Comply EA-13-109, Attachment, p. 3 of 4

However, the referenced September 28, 1992 NRC Safety Evaluation that Entergy now suggests that station personnel and public safety rely upon is dated and in fact updated

by findings in “NRC Temporary Instruction 2515/183 Inspection Report” dated May 13, 2011.<sup>14</sup> The NRC May 2011 inspection was prompted by the Fukushima Daiichi nuclear accident. The Petitioners point out that the updated NRC inspection findings for the FitzPatrick containment vent are, in fact, omitted and go largely unaddressed in Entergy’s scant argument for the extension to comply with the scheduled implementation of the Phase I reliable severe accident capable hardened containment vent.

In light of the Fukushima Daiichi nuclear accident, on April 29, 2011, the U.S. Nuclear Regulatory Commission completed an inspection of the Fukushima-style FitzPatrick nuclear power station using Temporary Instruction 2515/183 in “Follow-up to the Fukushima Daiichi Fuel Damage Event.”

The inspection report states,

*“The objective of this inspection was to promptly assess the capabilities of Fitzpatrick to respond to extraordinary consequences similar to those that have recently occurred at the Japanese Fukushima Daiichi nuclear station.”* NRC Temporary Inspection Report, p.8

The NRC walk down inspection of the FitzPatrick nuclear power plant discloses that for the control of combustible gases,

*“The licensee identified an apparent beyond design and licensing basis vulnerability in the current procedures do not address hydrogen considerations during primary venting.*

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<sup>14</sup> “NRC Temporary Inspection Report 2515/183 Inspection Report,” May 13, 2011, ML111330455

*This issue was documented in CR-JAF-2011-01529. As an immediate corrective action the licensee revised TSG-9 to provide a caution for operators to consider the presence of hydrogen gas.” NRC Temporary Inspection Report, p.8 [Emphasis added].*

The Petitioners understand this to mean that FitzPatrick operators, as advised, may in fact not be able to reliably and safely vent a severe accident where hydrogen gas is present in FitzPatrick’s only partial vent line.

The NRC’s May 2011 inspection report further discloses more beyond design and design bases vulnerability for the current FitzPatrick containment vent,

*“The [NRC] inspectors identified a beyond design and licensing bases vulnerability, in that FitzPatrick’s current licensing basis did not require the plant to have a primary containment torus air space hardened vent system as part of their Mark I containment improvement program. The current licensed configuration is a hard pipe from primary containment to the suction of the standby gas treatment system, which is located outside of the reactor building in an adjacent building. The NRC has established an agency task force to conduct a task force to conduct a near term evaluation of the need for agency actions which include containment venting, following the events in Japan.”*

NRC Temporary Inspection Report, p.8-9 [Emphasis added].

The Petitioners understand this to mean that the operators of FitzPatrick rely upon an partial containment vent line that contrary to Generic Letter 89-16 NRC recommendations vents the reactor accident’s extreme heat, pressure, explosive gases and radioactivity at ground level.

Now five years later, the NRC inspection that was initiated to “*promptly*” assess FitzPatrick’s containment venting capabilities identifies these same “*beyond design and licensing bases vulnerabilities*” in FitzPatrick’s current licensing basis being proposed as Entergy’s compensatory actions to support the requested delay of the “*immediately effective*” implementation of Order EA-13-109.

The Petitioners assert that Entergy’s argument that public safety should rely upon Entergy’s scant description of the existing FitzPatrick containment vent while omitting its “*beyond design and licensing bases vulnerabilities*” for the requested extension period is not valid nor reasonably supported by the updated findings of the NRC post-Fukushima inspection report.

If Entergy’s request for extension to comply is granted it will present, as the NRC has found, an undue and unacceptable risk that jeopardizes the health, safety, property and interests of Petitioners and their members who live, recreate, conduct business and own property within the vicinity of the FitzPatrick nuclear power Station. The Petitioners’ request for hearing unquestionably addresses a significant public safety and environmental issue.

Therefore, Petitioners argue that Entergy’s request should be denied and instead be treated as a license amendment request subject to the opportunity of a hearing from the adversely affected parties.

## Contention 2

**A. Entergy’s combined “Request for Extension to Comply with NRC Order EA-12-049 and EA-12-051” should be denied on procedural grounds. The combined Request is, in fact, a request for a license amendment affecting public health and safety; and Entergy should therefore be required to follow the NRC’s standard rules and practices for amending a modified operating license.**

Entergy’s combined Request for Extension to Comply with NRC Orders EA-12-049 and EA-12-051 is, in fact, an attempt to avoid the general requirements and guidance for amending an existing license as set forth in 10 C.F.R. §§ 50.90, 50.91. Entergy’s Request should therefore be denied.

In the aftermath of the Fukushima nuclear reactor accident, the NRC issued Orders EA-12-049 and EA-12-051 on March 12, 2013. The Orders issued to all U.S. reactor operators modified, i.e., amended their operating licenses. The same Orders were issued to the operator of the James A. FitzPatrick Mark I boiling water reactor.<sup>15</sup>

### **Order EA-12-049**

NRC Order EA-12-049 states at Section III,

*“The Commission has determined that ensuring adequate protection of public health and safety requires that power reactor Licensees and CP holders develop, implement*

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<sup>15</sup> “Issuance of Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events (EA-12-049), March 12, 2012, ML12056A042 and “Issuance of Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (EA-12-051),” March 12, 2012, ML12054A679

*and maintain guidance and strategies to restore or maintain core cooling, containment, and SFP cooling capabilities in the event of a beyond-design-basis external event. These new requirements provide a greater mitigation capability consistent with the overall defense-in-depth philosophy, and, therefore, greater assurance that the challenges posed by beyond-design-basis external events to power reactors do not pose an undue risk to public health and safety. In order to provide reasonable assurance of adequate protection of public health and safety, all operating reactor licenses and CPs under Part 50 identified in Attachment 1 to this Order shall be modified to include the requirements identified in Attachment 2 to this Order.”*

EA-12-049, Section III, p.6 of 33

“Accordingly, the NRC has concluded that these measures are necessary to ensure adequate protection of public health and safety under the provisions of the backfit rule, 10 CFR 50.109(a)(4)(ii), and is requiring Licensee or CP holder action. In addition, pursuant to 10 CFR 2.202, the NRC finds that the public health, safety and interest require that this Order be made immediately effective.” EA-12-049, Section III, p.7 of 33 [Emphasis added].

NRC EA-12-049 goes on to state at Section IV,

*“Accordingly, pursuant to Sections 161b, 161i, 161o, and 182 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, and 10 CFR Parts 50 and 52, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT ALL LICENSES AND CONSTRUCTION PERMITS IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER ARE MODIFIED AS FOLLOWS:*



*“A. 2. All holders of operating licenses issued under Part 50 shall, notwithstanding the provisions of any Commission regulation or license to the contrary, comply with the requirements described in Attachment 2 to this Order except to the extent that a more stringent requirement is set forth in the license. These Licensees shall promptly start implementation of the requirements in Attachment 2 to the Order and shall complete full implementation no later than two (2) refueling cycles after submittal of the overall integrated plan, as required in Condition C.1.a, or December 31, 2016, whichever comes first.”* EA-12-049, Section IV, p. 7-8 of 33 [Emphasis added]

Section IV of NRC Order EA-12-049 states,

*“B.1. “All Licensees and CP holders shall, within twenty (20) days of the date of this Order, notify the Commission, (1) if they are unable to comply with any of the requirements described in Attachment 2 or Attachment 3, (2) if compliance with any of the requirements is unnecessary in their specific circumstances, or (3) if implementation of any of the requirements would cause the Licensee or CP holder to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee’s or CP holder’s justification for seeking relief from or variation of any specific requirement.”* EA-12-049, Section IV, p. 8 of 33 [Emphasis added].

NRC Order EA-12-049 further states at Section V,

*“In accordance with 10 CFR 2.202, the Licensee or CP holder must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown,* consideration will be given to extending the time to answer or to

*request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Reactor Regulation or to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order.”* EA-12-049, Section V, p. 10 of 33  
[Emphasis added]

On March 30, 2012, Entergy provided its Answer to NRC which consented to make the scheduled modifications at FitzPatrick as required and waived the opportunity to request for a hearing, stating:

*“Pursuant to 10 C.F.R. § 2.202(a)(2), Entergy hereby submits its answer to the Order. Entergy consents to Order EA-12-049 and does not request a hearing.”*<sup>16</sup>

Entergy Answer (EA-12-049), p.2 of 3

### **Order EA-12-051**

Order EA-12-051 states,

*“The U.S. Nuclear Regulatory Commission (NRC) has issued the enclosed Order that modifies the current license for your facility.”* NRC Order EA-12-05, p.1 of 40

Order EA-12-051 states at Section III,

*“The spent fuel pool level instrumentation at U.S. nuclear power plants is typically narrow range and, therefore, only capable of monitoring normal and slightly off-normal*

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<sup>16</sup> “Entergy Nuclear Operations, Incorporated’s Answer to March 12, 2012 Commission Order Modifying License with Regard to Requirements for Mitigation Strategies for Beyond-Design Basis External Events (Order Number EA-12-049),” March 30, 2012, ML12090A498, p.2 of 3

*conditions. Although the likelihood of a catastrophic event affecting nuclear power plants and the associated spent fuel pools in the United States remains very low, beyond-design-basis external events could challenge the ability of existing instrumentation to provide emergency responders with reliable information on the condition of spent fuel pools. Reliable and available indication is essential to ensure plant personnel can effectively prioritize emergency actions.*

*The Commission has determined that the spent fuel pool instrumentation required by this Order represents a significant enhancement to the protection of public health and safety and is an appropriate response to the insights from the Fukushima Dai-ichi accident.” NRC Order EA-12-051, Section III, p.9 of 40*

*“In addition, pursuant to 10 CFR 2.202, the NRC finds that the public health, safety and interest require that this Order be made immediately effective.” EA-12-051, Enclosure, Section III, p.10 of 40 [Emphasis added].*

EA-12-051, goes on to state at Section IV,

*“Accordingly, pursuant to Sections 161b, 161i, 161o, and 182 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, and 10 CFR Parts 50 and 52, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT ALL LICENSES AND CONSTRUCTION PERMITS IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER ARE MODIFIED AS FOLLOWS:*

*“A.2. All holders of operating licenses issued under Part 50 shall, notwithstanding the provisions of any Commission regulation or license to the contrary, comply with the*

*requirements described in Attachment 2 to this Order except to the extent that a more stringent requirement is set forth in the license. These Licensees shall promptly start implementation of the requirements in Attachment 2 to the Order and shall complete full implementation no later than two (2) refueling cycles after submittal of the overall integrated plan, as required in Condition C.1.a, or December 31, 2016, whichever comes first.* EA-12-051, Enclosure, Section IV, p. 11-12 of 33 [Emphasis added]

Section IV of EA-12-051 states,

*“B.1. All Licensees and CP holders shall, within twenty (20) days of the date of this Order, notify the Commission, (1) if they are unable to comply with any of the requirements described in Attachment 2 or Attachment 3, (2) if compliance with any of the requirements is unnecessary in their specific circumstances, or (3) if implementation of any of the requirements would cause the Licensee or CP holder to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee’s or CP holder’s justification for seeking relief from or variation of any specific requirement.* EA-12-051, Enclosure, Section IV, p.12 of 40 [Emphasis added].

Order EA-12-051 further states at Section V,

*“In accordance with 10 CFR 2.202, the Licensee or CP holder must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to answer or to request a hearing. A request for extension of time in which to submit an answer or*

*request a hearing must be made in writing to the Director, Office of Nuclear Reactor Regulation or to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. The answer may consent to this Order.”* EA-12-051, Enclosure, Section V, p. 14 of 40 [Emphasis added]

On March 30, 2012, Entergy provided its Answer to NRC EA-12-051 by consenting to make the scheduled modifications at FitzPatrick and waived the opportunity to request for a hearing to challenge or change its modified operating license, stating:

*“Pursuant to 10 C.F.R. § 2.202(a)(2), Entergy hereby submits its answer to the Order. Entergy consents to Order EA-12-051 and does not request a hearing.”<sup>17</sup>*

Entergy Answer (EA-12-051) p.2 of 3

### **Entergy’s Combined Request for Extension to Comply with EA-12-049 and EA-12-051**

Entergy submits a combined Request for an extension to comply with the FitzPatrick nuclear power plant’s scheduled implementation of referenced Orders EA-12-049 and EA-12-051 by at least six (6) months more than the terms of the scheduled implementation required by its modified operating license. Petitioners assert that Entergy’s combined request to delay or extend the scheduled compliance date in its license is not a reasonable excuse for waiving NRC’s standard practice and

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<sup>17</sup> “Entergy Nuclear Operations, Incorporated’s Answer To March 12, 2012 Commission Order Modifying Licenses With Regard To Reliable Spent Fuel Pool Instrumentation (Order Number EA-12-051), March 30, 2012, ML12090A511, p.2 of 3

procedures put into place to adequately ensure the protection of the public health and safety as provided under the Atomic Energy Act.

The Petitioners argue that Entergy consented to the referenced Orders that modified the licensed condition including Fitzpatrick's scheduled compliance. Entergy's Answers waived its opportunity for a hearing to challenge any aspect of the Order including scheduled compliance. Had Entergy requested a hearing to challenge any aspect of the Orders the Petitioners would have had the opportunity to participate at the same time in a hearing convened in the interest of adequate public safety as adversely effected parties. The licensee's subsequent late request to change its scheduled modified license condition now constitutes a request to amend the license as modified and consented to and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-93- 21, 38 NRC 87, 91 n.6, 93 (1993); *General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station)*, LBP-96- 23, 44 NRC 143, 150 n.6 (1996).

Nothing prevents Entergy from following the rules and submitting a request for the license amendments. Because such a license amendment request involves significant hazards to public health and safety, Entergy should submit license amendment requests before Staff makes any determination on the combined Request for extension to comply.

Petitioners assert that once Entergy is required to follow the standard rules and practices; it can request the license amendments which provide an opportunity for a

hearing to permit intervention by those petitioners who meet the requirements for intervention.

The requirements to requesting a license amendment, as Entergy now seeks to avoid, are explained in NRC NUREG-0386 Staff Practices and Procedures (6.1 Amendments to Existing Licenses and/or Construction Permits). NUREG-0386, GM, p.536 of 796

NUREG-0386 explains,

*“General requirements and guidance for the amendment of an existing license or construction permit for production and utilization facilities are set out in 10 C.F.R. §§ 50.90, 50.91.*

*“In passing upon an application for an amendment to an operating license or construction permit, ‘the Commission will be guided by the considerations which govern the issuance of initial licenses or construction permits to the extent applicable and appropriate.’ 10 C.F.R. § 50.91. These considerations are broadly identified in 10 C.F.R. § 50.40. In essence, Section 50.40 requires that the Commission be persuaded, inter alia, that the application will comply with all applicable regulations, that the health and safety of the public will not be endangered, and that any applicable requirements of 10 C.F.R. Part 51 (governing environmental protection) have been satisfied. Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 44 (1978).”* NUREG-0386, GM, p.536 of 796

Section 6.1.4 of the NRC’s Practice of Practice Hearing requirement for License/Permit Amendments further explains:

*“The Atomic Energy Act of 1954... and the regulations (10 C.F.R. § 2.105(a)(3)) require that, where a proposed amendment involves ‘significant hazards considerations,’ the opportunity for a hearing on the amendment be provided prior to issuance of the amendment and that any hearing requested be held prior to issuance of the amendment. An opportunity for a hearing will also be provided on any other amendment as to which the Commission, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards determines that an opportunity for public hearing should be afforded. 10 C.F.R. § 2.105(a)(3).”*

NUREG-0386, GM, p.538 of 796

*“A technical specification is a license condition. A license request to change that condition constitutes a request to amend the license and therefore creates adjudicatory hearing rights under Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 91 n.6, 93 (1993); General Public Utilities Nuclear Corp. (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 150 n.6 (1996).”* NUREG-0386, GM, p.539 of 796  
[Emphasis added]

*“A prior hearing is not required under Section 189a of the Atomic Energy Act, as amended, for Commission approval of a license amendment in situations where the NRC Staff makes a ‘no significant hazards consideration’ finding. Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622-623 (1981); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC*



113, 123 (1986). See *Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, CLI-86-12, 24 NRC 1, 11 (1986), rev'd and remanded on other grounds sub nom. *San Luis Obispo Mothers For Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986).”  
NUREG-0386, GM, p.539 of 796

The staff is authorized to make a “*significant hazards consideration*” finding only if it finds that operation of the facility in accordance with the proposed amendment would not; 1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or 2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or, 3) Involve a significant reduction in a margin of safety. 10 CFR 50.92(c)

Given the extensive and conclusive findings in the interest of adequate public safety that the Commission made in formulating and issuing the Orders “immediately effective,” the Petitioners argue that the staff cannot properly make a “no significant hazards consideration” finding.

Entergy’s combined Request should therefore be denied. Entergy’s requested change to its modified operating license should not be expedited or excused from the open scrutiny of a formal hearing process by adversely affected parties.. Entergy should not be allowed to circumvent any adversely affected party’s due process for the protection of the public health and safety as provided under the Atomic Energy Act. Because such a license amendment request involves significant hazards as determined by the Orders, it should go to hearing before Staff makes any determination on it.

Petitioners show that once Entergy is required to follow the rules; it can prepare and request license amendments with the opportunity of a hearing to permit an intervention by any adversely affected parties that meet the requirements provided under the protection of the Atomic Energy Act § 189a, 42 U.S.C. § 2239(a).

**B. Entergy's combine Request should be denied because it is not timely.**

**Entergy filed the Fitzpatrick Request for Extension to Comply on September 8, 2016, more than four years after the Order's 20 days filing requirement to notify the Commission if the operator is unable to comply with the requirements in its modified operating license. (EA-12-049 and EA-12-051, Section IV, Part B)**

Entergy answered Order EA-12-049 & EA-12-051 stating, "Pursuant to 10 C.F.R. § 2.202(a)(2), Entergy hereby submits its answer to the Order. Entergy consents to Order EA-12-051 and does not request a hearing." Entergy Answers, March 30, 2012 (EA-12-049 & EA-12-051), p.2 of 3

Petitioners argue that even if the Entergy Requests were proper, and they are not, Entergy's September 8, 2016 combined request for extension to comply was filed more than four years after the NRC Order required Entergy to answer if they were unable or unwilling to comply with any of the required modified license conditions.

Specifically, Section IV of the Orders' Enclosures state:

*"Accordingly, pursuant to Sections 161 b, 161 i, 1610, and 182 of the Atomic Energy Act*

of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 'Orders,' and 10 CFR Part 50, IT IS HEREBY ORDERED, EFFECTIVE IMMEDIATELY, THAT ALL LICENSES IDENTIFIED IN ATTACHMENT 1 TO THIS ORDER ARE MODIFIED AS FOLLOWS:

*"B.1. All Licensees and CP holders shall, within twenty (20) days of the date of this Order, notify the Commission, (1) if they are unable to comply with any of the requirements described in Attachment 2 or Attachment 3, (2) if compliance with any of the requirements is unnecessary in their specific circumstances, or (3) if implementation of any of the requirements would cause the Licensee or CP holder to be in violation of the provisions of any Commission regulation or the facility license. The notification shall provide the Licensee's or CP holder's justification for seeking relief from or variation of any specific requirement."* EA-12-049, p.7-8 of 33 & EA-12-51, p.11-12 of 40 [Emphasis added].

Specifically, Section V of each Order states,

*"In accordance with 10 CFR 2.202, the Licensee or CP holder must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to answer or to request a hearing. A request for extension of time in which to submit an answer or request a hearing must be made in writing to the Director, Office of Nuclear Reactor Regulation or to the Director, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the*

extension. *The answer may consent to this Order.*” EA-12-049, p.10 of 33 & EA-12-51, p.14 of 40 [Emphasis added].

As the Petitioners have previously stated, Entergy did not file its combined Request for Extension to Comply until September 8, 2016.

Entergy's Answers to EA-12-049 and EA-12-051 provided consent to the license modifications including the scheduled compliance dates and waived the request for hearings. Entergy's Answers do not provide a statement of “good cause” within the 20-day window for requesting an extension to comply with any of FitzPatrick's modified license conditions.

Instead, Entergy inserts the vague and open ended place marker statement, *“However, given the uncertainties associated with the ultimate scope of required work caused by the unavailability of implementing guidance until August 2012, and the impact on the ability of Entergy to comply with the specific compliance deadline dates based on the probable availability of that guidance, Entergy's future responses may include requests for schedule relief as warranted by subsequent NRC requirements or implementing guidance or the results of engineering analyses not yet performed.”* Entergy Answer to NRC Orders, EA-12-049, p.2 of 3 & EA-12-051, p.2 of 3

As Entergy *“consented in writing to the order,”* it is not now timely, four years plus later, to request an extension to comply with scheduled implementation requirement of its licensed condition without affording the opportunity for hearing to the adversely affected parties. Petitioners have argued that per NRC standard rules and practice this process

is properly treated as a license amendment request that is properly noticed in The Federal Register with the opportunity for hearing for any adversely affected parties.

Entergy's now argues that where it originally consented to the Order and waived its hearing rights and those of any adversely impacted parties that might have challenged a timely requested change, it can now rely upon a vague and open ended "*uncertainties*" place marker statement inserted into its Answers to improperly trump the hearing rights of those same adversely affected parties now more than four (4) years later.

Further, Entergy's Request is based upon the State of New York Public Service Commission financially ameliorating the economic and market failure of the FitzPatrick nuclear power plant and the expedited sale and NRC license transfer to Exelon Corporation.<sup>18</sup>

The Petitioners argue that Entergy's Request can only reference the Fitzpatrick sale and license transfer to Exelon as "*possible*." Entergy Combined Request for Extension to Comply (EA-12-049 & EA-12-051) Attachment, p.5 of 8

Entergy must admit that the hinging the timeliness of their Request on the "possible" license transfer is uncertain and that significant delay with increased risk to public safety is also possible. In fact, due to current legal challenges, Entergy cannot now identify with any certainty the date when a "possible" sale and license transfer might be

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<sup>18</sup> "ENOI and Exelon Letter, Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment CNRO 2016-00019, August 18, 2016, ML16235A081

negotiated to the closing of a deal, if ever.<sup>19</sup> In fact, a timely sale and license transfer should be based on transferring the operations of FitzPatrick with a compliant licensing basis and not the transfer of a non-compliant operating license.

If Entergy is now allowed to slip off the mooring of the current license condition it amplifies the Petitioners' safety concerns that non-compliant power operation will be adrift potentially on future request(s) for an extended extension to comply in the event of any further delay or complication in closing the deal.

The Petitioners argue that if Entergy now seeks to reset the calendar date of the Orders' scheduled implementation Entergy can properly file its request to modify, i.e. amend, its licensed conditions. A properly noticed license amendment request therefore provides the opportunity for a hearing for the adversely affected parties under the standard practices and procedures for the license amendment request process.

### **III. PETITIONER'S MEET REQUIREMENTS FOR VALID CONTENTIONS**

#### **A. Petitioners Have Standing; The Request for Hearing is filed in a timely manner.**

The nature and extent of the Petitioners' property, financial and other interests in the proceeding are demonstrated. Petitioners believe that if Entergy is granted its Request for extension to comply with Orders EA-12-049, EA-12-051 and EA-13-09 that the

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<sup>19</sup> Petitioners **EXHIBIT 1** United States District Court, Southern District of New York, Coalition for Competitive Energy et al, Plaintiffs vs. New York Public Service Commission, Defendant, October 19, 2016, Case 1:16-cv-08164 is filed as a complaint alleging the New York Public Service Board unlawfully intruded upon the exclusive authority of the Federal Energy Regulatory Commission by issuing the Zero Emissions Credit bailout of the four uneconomical upstate nuclear power plants including Fitzpatrick.

Petitioners would be denied the assurance of adequate and reasonable protection of their health and safety as codified The Atomic Energy Act and the NRC Standard Procedures and Practices. The Petitioners do not have other viable means of protecting their health and safety interests. The Petitioners' participation might reasonably assist in developing a sound record regarding the subjects of this filing; and a materially different result would be likely with their participation. The contention was filed within 60 days of the Entergy Requests appearance in NRC's Electronic Public Library ADAMS on September 16, 2016.

### **B. Petitioners have Pleaded Valid Contentions**

Petitioners respectfully submitted the following contentions for consideration:

1. Entergy's Request for Extension to Comply with EA-12-049, EA-12-051 and EA-13-109 should be denied on procedural grounds. They are in fact requests for license amendments which should follow NRC's standard rules and practices for amending the operating license.
2. Entergy's Request for Extension to Comply with EA-12-049, EA-12-051 and EA-13-109 should be denied because the Requests are not timely.
3. Entergy's Request for Extension to Comply with EA-13-109 should be denied because their argument in support of the request is not valid.

### **C. The Petitioners' Contentions Are Within Scope**

The contentions address two principle reasons that Entergy's requests should be denied; 1) Procedural: Entergy's request should instead be a request for License

Amendment and its filing was not timely and; 2) Substantive: The Petitioners dispute Entergy's arguments on behalf of their request as not being valid.

#### **D. The Issues Raised in the Petitioners' Contentions Are Material**

The issues raised in the contentions are material to the findings the NRC must make.

The deficiencies highlighted in the contentions have substantial health and safety significance.

#### **E. Petitioners' Contentions Are Supported by Concise Statements of Fact**

The Petitioners are not required to prove their case at the contention filing stage; in support of this request Petitioners rely here on government and licensee documents and supported statements of fact.

#### **F. Petitioners Have Presented Substantial Bases for its Contentions.**

The contentions are clearly explained and supported by fact, NRC and licensee documentation and points of law.

### **CONCLUSION**

We respectfully request acceptance of Petitioner's request to deny Entergy's Requests for Extension to Comply and grant Petitioners Request for Hearing and Leave to Intervene. Petitioners' respectfully challenge Entergy's "Request for Extension to Comply" with NRC Orders EA-12-049, EA-12-051 and EA-13-109. In order to protect Petitioners' health, safety and property. We believe that Entergy must be made to follow NRC standard rules and procedures to file valid Requests for a License Amendment.



Respectfully submitted by Beyond Nuclear,

/Signed electronically by EIE digital certificate /

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November 10, 2016

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

November 10, 2016

In the Matter of Fitzpatrick 50-333-EA Entergy's Request for Extension to Comply With  
NRC Orders EA-12-049, E-12-051 and EA-13-109, James A. Fitzpatrick Nuclear Power  
Station

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305 (revised), I hereby certify that copies of the foregoing  
  
BEYOND NUCLEAR & THE ALLIANCE FOR A GREEN ECONOMY PETITION TO  
REQUEST A HEARING AND LEAVE TO INTERVENE ON ENTERGY'S REQUESTS  
FOR AN EXTENSION TO COMPLY WITH NRC ORDERS EA-12-049, EA-12-051 AND  
EA-13-109 REQUIREMENTS FOR THE JAMES A. FITZPATRICK NUCLEAR POWER  
STATION dated November 10, 2016 have been filed and certified for service to all  
appropriate parties through the Electronic Information Exchange, the NRC's E-Filing  
System, in the above-captioned proceeding, on November 10, 2016.

----/Electronically Signed through the EIE/----

Paul Gunter

Beyond Nuclear