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September 9, 2014

Lawrence G. McDade, Chairman
Dr. Michael F. Kennedy
Dr. Richard E. Wardwell
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Docket: ***Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-247-LR and 50-286-LR***

RE: **Entergy Comments Related to Issues Discussed During the July 17, 2014 Teleconference**

Dear Administrative Judges:

On July 17, 2014, the Atomic Safety and Licensing Board (“Board”) held a telephonic conference with the parties and other participants in the proceeding on Entergy Nuclear Operations, Inc.’s (“Entergy”) license renewal application (“LRA”) for Indian Point Nuclear Generating Units 2 and 3.¹ In its June 25, 2014 Order scheduling the conference, the Board identified a number of procedural and schedule-related issues that it wished to discuss (and proceeded to discuss) during the July 17th conference.² At the end of the conference, the Board invited the parties to submit in writing suggestions for facilitating the timely resolution of the remaining Track 2 contentions and other pending issues in this proceeding. This paper provides Entergy’s written views on these and related issues.

¹ See Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 4560-4638 (July 17, 2014) (“July 17, 2014 Tr.”), *available at* ADAMS Accession No. ML14209A932.

² Licensing Board Order (Scheduling Telephonic Conference) at 3-4 (June 25, 2014) (unpublished), *available at* ADAMS Accession No. ML14176A932.

I. Timely Renewal Implications of Potential Adverse Commission Appellate Ruling(s)

During the July 17, 2014 teleconference, the Board queried whether any Commission decision affirming the Board's resolution of contentions NYS-8 or NYS-35/36 would render the Indian Point LRA insufficient for purposes of 10 C.F.R. § 2.109(b), thereby potentially truncating timely renewal protection.³ Counsel for Entergy explained that, even in that circumstance, timely renewal protection would continue.⁴

By way of background, the timely renewal doctrine, established in Section 9 of the Administrative Procedure Act ("APA"), provides that when a licensee of an activity of a continuing nature makes a "timely and sufficient" application for renewal in accordance with agency rules, the existing license does not expire until the application has been finally determined by the agency.⁵ Thus, under the timely renewal doctrine, the current operating license "does not expire" but is extended by law.⁶ The policy underlying the doctrine is "to protect licensees from harm associated with delays in agency action on requests for license renewals."⁷

Section 2.109(b) of the Nuclear Regulatory Commission's ("NRC" or "Commission") regulations implements the APA's timely renewal doctrine. It states: "If the licensee of a nuclear power plant ... files a sufficient application for renewal of either an operating license or a combined license at least 5 years before the expiration of the existing license, the existing license will not be deemed to have expired until the application has been finally determined."⁸ In issuing 10 C.F.R. § 2.109(b), the Commission made clear that a finding by the NRC Staff that an LRA is "sufficient" for docketing and review meets the requirements for invoking the timely renewal doctrine.⁹ The Commission also made clear that the fact "that such documents may require further supplementation or review is of no consequence to continued operation under timely renewal."¹⁰ Importantly, in docketing the LRA for Indian Point, Units 2 and 3, the NRC Staff "determined that

³ July 17, 2014 Tr. at 4568:1-25 (Chairman McDade).

⁴ *Id.* at 4570:17-4571:1 (Mr. Bessette).

⁵ 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."). *See also Pan-Atl. Steamship Corp. v. Atl. Coast Line R.R. Co.*, 353 U.S. 436, 439 (1957) ("Section 9(b) of the Administrative Procedure Act is a direction to the various agencies.").

⁶ 5 U.S.C. § 558(c).

⁷ *Comm. for Open Media*, 543 F.2d 861, 867 (D.C. Cir. 1976).

⁸ 10 C.F.R. § 2.109(b).

⁹ Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991) (a determination that an application is sufficient for purposes of timely renewal would not be litigable).

¹⁰ *Id.*

[Entergy] has submitted *sufficient* information in accordance with 10 CFR Sections 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c) to enable the staff to undertake a review of the application.”¹¹

As discussed during the July 17 teleconference,¹² timely renewal protection continues to apply until the agency—the NRC in this case—makes a final determination on the application; *i.e.*, whether the license or authorization sought should be granted or denied.¹³ Federal courts have concluded that there is no legal limit on how long a license can remain in effect under timely renewal.¹⁴ The Commission has acknowledged the same in its own administrative and licensing proceedings.¹⁵ As such, continued operation under the timely renewal doctrine does not, in and of itself, vitiate a party’s hearing rights.¹⁶

In a contested proceeding, the ultimate decision on whether to grant or deny license renewal rests with the Commission.¹⁷ And that decision is normally made after the Licensing Board renders its final decision on all contested issues placed before it, but that has not yet occurred in this proceeding. Furthermore, in Entergy’s view, a Commission decision affirming the Board’s ruling on one or more contentions would not constitute a “final determination” on the LRA for several

¹¹ Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-26 and DPR-64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134, 42,134 (Aug. 1, 2007) (emphasis added).

¹² July 17, 2014 Tr. at 4581:1-4 (Mr. Bessette).

¹³ See Note to Commissioners’ Assistants, Timely Renewal for Indian Point Nuclear Generating Unit No. 2 (Apr. 30, 2013) (noting that Indian Point Unit 2 can continue to operate under the current license until the license renewal application “has been finally determined by the agency” and describing actions planned by NRC Staff and Entergy regarding implementation of Entergy’s license renewal commitments and incorporation of its aging management programs into the current licensing basis prior to entering the period of timely renewal), *available at* ADAMS Accession No. ML13120A256; Letter from Gregory B. Jaczko to Senator John F. Kerry (July 21, 2010), *available at* ADAMS Accession No. ML101790341 (noting that NRC’s regulations permit operation beyond the term of the current license if a final determination on the license renewal application has not been made).

¹⁴ See *Comm. for Open Media*, 543 F.2d 861, 867 n.32 (“There is no indication in the legislative history that Congress intended to place any time limit on the extension.”).

¹⁵ See, e.g., *Crowe Butte Res., Inc.* (In Situ Leach Facility, Crawford, Neb.), CLI-12-4, 75 NRC 154, 155-56 (2012) (“The license, which was set to expire on February 28, 2008, is in timely renewal; *in situ* leach recovery operations continue on the site pending a decision on the license renewal application.”); *Nuclear Eng’g Co.* (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 674 (1979) (noting that the license had been in timely renewal for over 10 years).

¹⁶ See *Crowe Butte Res.*, CLI-12-4, 75 NRC at 157 (“We appreciate the Board’s bringing its concern to our attention, but we do not agree with its suggestion that the [intervenor] may have been deprived of its hearing rights.... [T]he record before us shows that, while this proceeding undoubtedly has been slow to get off the ground, the Staff has been conducting the necessary safety and environmental reviews on an ongoing basis.”).

¹⁷ See 10 C.F.R. § 2.341(a)(2); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 648 (2005) (“[A]ll the contentions raised by project opponents have now been considered by the Licensing Board Thus, under agency rules governing facilities of this nature, it is now up to the Commission to determine whether to authorize the NRC Staff to issue the requested license.”) (citations omitted).

reasons. With respect to NYS-8, it is unlikely that the Commission would affirm the Board's decision in LBP-13-13 without remanding the issue for further proceedings (*e.g.*, the Commission would give Entergy an opportunity to address the deficiency in its LRA by developing and submitting an appropriate aging management plan ("AMP")).¹⁸ Further, as the Board knows, Entergy has submitted engineering project cost estimates for the cost-beneficial Severe Accident Mitigation Alternatives ("SAMAs") as well as additional information pertaining to the issue of SAMA implementation, in response to the Board's Memorandum and Order (LBP-11-17) granting New York State's motion for summary disposition of contention NYS-35/36.¹⁹ The NRC Staff is completing its review of that information, and plans to document its evaluation in a supplement to the Final Supplemental Environmental Impact Statement ("FSEIS").²⁰ As a result, Entergy anticipates that any Commission decision affirming the Board's ruling on NYS-35/36 in whole or in part likely would include a remand for further proceedings that consider Entergy's and the Staff's supplemental evaluations.

In short, it is Entergy's reasonable expectation that in the scenarios postulated by the Board, the Commission would afford Entergy and the Staff the opportunity to cure any perceived deficiencies in the LRA or the FSEIS, respectively. That expectation flows from longstanding precedent recognizing the "dynamic" nature of the NRC licensing process and an applicant's prerogative to rehabilitate a deficient application—even in the late stages of a proceeding. As the Commission explained: "Nothing in our rules prevents an applicant from amending its application *at any time*. Permitting an application to be 'modified or improved' throughout the NRC's review is compatible 'with the *dynamic licensing process* followed in Commission licensing proceedings.'" ²¹

For the above reasons, even if the Commission rejects all or some aspect of Entergy's appeals on the Board's NYS-8 and NYS-35/36 rulings, Entergy believes that the Commission would not terminate the proceeding without offering Entergy and/or the Staff the opportunity to correct the deficiencies in the LRA and/or FSEIS, as applicable. Consequently, the adjudication would continue, as would Entergy's timely renewal protection under Section 2.109(b).

¹⁸ In this regard, Entergy fully expects the Commission to provide specific guidance to the Board and parties in the event it remands any issues for further proceedings before the Board. If any ambiguities or uncertainties arise, then the Board and the parties have the ability to seek appropriate clarification or direction from the Commission.

¹⁹ See NL-13-075, Letter from F. Dacimo, Entergy, to NRC Document Control Desk, License Renewal Application – Completed Engineering Project Cost Estimates for SAMAs Previously Identified as Potentially Cost-Beneficial (May 6, 2013, available at ADAMS Accession No. ML13127A459; *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-11-17, 74 NRC 11 (2011)).

²⁰ July 17, 2014 Tr. at 4595:6-13, 4597:8-22 (Mr. Turk); NRC Staff's 31st Status Report in Response to the Atomic Safety and Licensing Board's Order of February 16, 2012 at 6 (Sept. 2, 2014).

²¹ *Entergy Nuclear Vt. Yankee* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333 (2011) (emphasis added) (quoting *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)).

II. Suggestions for Timely and Efficient Resolution of Remaining Issues

Throughout this proceeding, Entergy has consistently advocated the timely and efficient conduct of this adjudicatory proceeding—in a manner that advances and protects the rights of all parties, including Entergy’s right to a timely decision on its LRA. For example, early in the proceeding, Entergy suggested the possibility of bifurcating the evidentiary hearing process to allow for earlier hearings on those matters (*i.e.*, safety contentions).²² Entergy also has objected to numerous requests for extensions of time filed in the proceeding, and has sought such extensions of its own only sparingly (and typically in concert with the other parties).²³ And, more recently, when Entergy suggested that any proposed contentions related to Entergy new SAMA engineering project cost estimates be submitted within 30 days of the Staff’s *draft* FSEIS submittal, it did so to “facilitate the timely and efficient resolution of this proceeding.”²⁴

Moving forward, Entergy recommends that, to the maximum extent practicable, the Board should adhere to its previous direction that any new or amended contentions be filed “within 30 days of the date when the new material information on which it is based *first becomes available*.”²⁵ In the case of Entergy’s supplemental SAMA implementation cost estimates, the Board previously established that any further adjudicatory submissions (*i.e.*, new/amended contentions, dispositive motions) be filed no later than 60 days after the Staff issues its draft FSEIS supplement.²⁶ Entergy sees no reason to enlarge that period.

With respect to the remaining Track 2 contentions, Entergy is willing to engage in discussions with the parties regarding potential narrowing or settlement of those contentions, particularly in light of relevant AMP and commitment developments since those contentions were originally admitted.²⁷ Such discussions have proven fruitful in the past, and could serve to narrow

²² See Official Transcript of Proceedings, Indian Point Nuclear Generating Units 2 & 3 at 972:5-13 (June 6, 2011), available at ADAMS Accession No. ML11160A030.

²³ See, e.g., Entergy’s Answer to New York State and Riverkeeper Motion for Extension of Time to File Contentions Related to Draft SEIS (Jan. 12, 2009), available at ADAMS Accession No. ML090370791; Answer of Entergy Nuclear Operations, Inc. to New York State’s Motion for Extension of Time (Feb. 23, 2010), available at ADAMS Accession No. ML100630441; Applicant’s Opposition to the State of New York’s Motion for an Extension of Time (Sept. 28, 2011); Entergy’s Answer Opposing Motion for Extension of Time (Aug. 27, 2012), available at ADAMS Accession No. ML12240A399.

²⁴ Applicant’s Motion for Clarification Regarding the Timing of Adjudicatory Submissions Related to Entergy Letter NL-13-075 at 7 (June 25, 2013), available at ADAMS Accession No. ML13176A448.

²⁵ Scheduling Order at 6 (July 1, 2010) (emphasis added) (unpublished).

²⁶ Licensing Board Order (Granting Entergy’s Motion Clarification) at 3 (July 9, 2013) (unpublished).

²⁷ For example, Entergy has implemented its Unit 2 license renewal commitments and updated the Unit 2 licensing basis to include the required license renewal AMPs. The NRC has conducted inspections under a special inspection procedure to confirm Entergy’s implementation of its license renewal commitments, proposed license conditions, and AMPs for Unit 2. See Letter from M. Evans, NRC, to Vice President, Operations, Indian Point Energy Center, Indian Point Nuclear Generating Unit No. 2 – Actions to be Completed Prior to Entering the Period of Timely Renewal (Aug. 19, 2013), available at ADAMS Accession No. ML13197A034; NL-13-114, Letter from F. Dacimo, Vice President, Indian Point Energy Center, Implementation of License Renewal

the scope of the forthcoming Track 2 hearings. In addition, Entergy encourages the parties to promptly confer and formulate a jointly-proposed hearing schedule for the Track 2 contentions for the Board's consideration and potential adoption, including a schedule for potential dispositive motions, based on the issuance date of the pending safety evaluation report ("SER") supplement. That schedule should take into account both the NRC's model hearing milestones and actual experience in this proceeding. Entergy acknowledges the intervenors' desire to have ample time to prepare their evidentiary submissions.²⁸ However, it reminds the Board and other parties that the principal documents on which the Staff's second SER supplement will be based (*e.g.*, Request for Additional Information responses, additional Entergy technical analyses or calculations, updated NRC and industry guidance documents) have been timely disclosed to the other parties through the mandatory disclosure process. The prior availability of such information should be factored into the schedule for preparation of pre-filed written testimony and evidence (including the updating or revision of previously-filed but deferred testimony on certain issues).

Entergy believes it is premature at this time to make any specific recommendations regarding the schedule for possible hearings on environmental contentions. The Staff has yet to issue a schedule for the preparation of its second FSEIS supplement, the draft of which evidently will not be issued until 2015. Furthermore, future Board and Commission rulings likely will dictate the need for, and scope of, any hearings on the intervenors' proposed waste confidence contentions (which are now pending before the Board per the Commission's directive in CLI-14-8) or issues related to Entergy's SAMA implementation cost estimates. As such, those issues are not ripe for Board consideration at this time and should not delay moving forward on the Track 2 issues.

Entergy appreciates the opportunity to comment on these important issues and respectfully requests that the Board and other parties give the views and suggestions presented herein due consideration.

cc: Service List

Regulatory Commitments, Indian Point Nuclear Generating Unit No. 2, Docket No. 50-247, License No. DPR-26 (Aug. 28, 2013), *available at* ADAMS Accession No. ML13247A175; Letter from J. Trapp, NRC, to J. Ventosa, Site Vice President, Indian Point Energy Center, Indian Point Nuclear Generating Unit 2 – NRC License Renewal Team Inspection Report 05000247/2013010 (Sept. 19, 2013), *available at* ADAMS Accession No. ML13263A020.

²⁸ See July 17, 2014 Tr. at 4609:22-4610:16 (Mr. Sipos).

Respectfully submitted,

Executed in accord with 10 C.F.R. § 2.304(d)

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos. 50-247-LR and
)	50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	
)	
(Indian Point Nuclear Generating Units 2 and 3))	
)	September 9, 2014

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, a copy of Entergy's letter to the Administrative Judges was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Signed (electronically) by Martin J. O'Neill

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