UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 50-333-EA
ENTERGY NUCLEAR FITZPATRICK, LLC & ENTERGY NUCLEAR OPERATIONS, INC.	)	
(James A. FitzPatrick Nuclear Power Plant)	)	December 5, 2016

ENTERGY'S ANSWER OPPOSING REQUEST FOR HEARING REGARDING FITZPATRICK AND EA-12-049, EA-12-051, AND EA-13-109

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Operations, Inc. (collectively, "Entergy") submit this Answer opposing the request for hearing filed on November 10, 2016 ("Hearing Request") by Beyond Nuclear and The Alliance for a Green Economy New York (collectively, "Petitioners").[1] Petitioners challenge Entergy's requests for extensions to comply with certain requirements in three Nuclear Regulatory Commission ("NRC") orders: EA-12-049, EA-12-051, and EA-13-109 (collectively, the "Orders").

Following the 2011 Japan earthquake and tsunami, the NRC issued a series of orders imposing certain requirements on power reactor licensees. Each order required certain facilities, including James A. FitzPatrick Nuclear Power Plant ("FitzPatrick") to take certain actions. EA-12-049 required FitzPatrick to have mitigation strategies for beyond-design-basis external

[1] Beyond Nuclear & The Alliance for a Green Economy Petition to Request a Hearing and Leave to Intervene on Entergy's Request 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 (Nov. 10, 2016) (ML16315A433) ("Hearing Request"). Petitioners filed errata (ML16326A266) and a corrected version of the Hearing Request (ML16326A267) on November 21, 2016 with three minor editorial changes.

events ("BDBEE");[2] EA-12-051 required FitzPatrick to install reliable spent fuel pool instrumentation ("SFPI");[3] and EA-13-109 required FitzPatrick to maintain a hardened containment vent system ("HCVS").[4] As with nearly all orders issued by the NRC, the Orders provided authority to the Director of the Office of Nuclear Reactor Regulation ("NRR") to "relax or rescind" any of the Orders' requirements upon demonstration of "good cause" (the "Relaxation Provisions").[5]

On November 18, 2015, Entergy notified the NRC that FitzPatrick would permanently cease power operations at the end of its current fuel cycle.[6] Entergy's decision was compelled by then-present economic conditions for nuclear power plants in upstate New York. Noting the planned shutdown, Entergy requested an extension of time to comply with the requirements of EA-12-049 and EA-12-051.[7] However, due to certain subsequent policy changes enacted in

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2 *See* Letter from E. Leeds and M. Johnson, NRC, to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events, Attach. 1 (Mar. 12, 2012) (ML12054A735) ("EA-12-049").

3 EA-12-051, Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately) (Mar. 12, 2012) (ML12056A044) ("EA-12-051").

4 *See* Letter from E. Leeds, NRC, to All Operating Boiling-Water Reactor Licensees with Mark I and Mark II Containments, Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions, Attach. 1 (June 6, 2013) (ML13143A321) ("EA-13-109").

5 *See* EA-12-049 § IV; EA-12-051 § IV; EA-13-109 § IV.

6 JAFP-15-0133, Letter from J. Ventosa, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Nov. 18, 2015) (ML15322A273).

7 *See* Letter from B. Sullivan, Entergy, to NRC Document Control Desk, Request for Relaxation of 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 Number EA-12-049 and EA-12-051) (Apr. 14, 2016) (ML16105A379); Letter from B. Sullivan, Entergy, to NRC Document Control Desk, Supporting Information for Request for Relaxation of 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 Number EA-12-049 and EA-12-051) (June 16, 2016) (ML16168A452) (collectively, the "Original Extension Request").

New York, those economic conditions have improved substantially and Exelon Generation Co., LLC ("Exelon") has proposed to acquire and continue to operate FitzPatrick.

On September 8, 2016, in view of the changed economic circumstances and new proposed transactions, Entergy submitted a second request for relaxation seeking an extension of time to comply with the requirements of EA-12-049 and EA-12-051 ("EA-12-049/051 Extension Request"),[8] and also submitted a request for relaxation seeking an extension of time to comply with the requirements of EA-13-109 ("EA-13-109 Extension Request")[9] (collectively, the "Extension Requests"). The Extension Requests explain that the proposed acquisition by Exelon was an unforeseen circumstance and describe the existence of "good cause"—under the Relaxation Provisions in the Orders—to briefly extend their respective completion deadlines. As explained further below, the Extension Requests note that: (1) progress has been made toward compliance with the Orders; (2) Entergy expects to complete additional work prior to the existing deadlines; and (3) during the extension periods, Entergy will implement various compensatory measures to ensure adequate protection of public health and safety. The NRR Director granted the relaxation requested in the EA-12-049/051 Extension Request,[10] but the EA-13-109 Extension Request remains pending.

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8 JAFP-16-0147, Letter from B. Sullivan, Entergy, to NRC Document Control Desk, 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) (Sept. 8, 2016) (ML16252A477) ("EA-12-049/051 Extension Request").

9 JAFP-16-0148, Letter from B. Sullivan, Entergy, to NRC Document Control Desk, 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" (Sept. 8, 2016) (ML16252A482) ("EA-13-109 Extension Request").

10 *See* Notification (Dec. 2, 2016) (referencing Letter from W. Dean, NRR Director, to B. Sullivan, Entergy, James A. FitzPatrick Nuclear Power Plant – Relaxation of the Schedule Requirements for Order EA-12-049, "Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events" and Order EA-12-051, "Reliable Spent Fuel Pool Instrumentation" (Dec. 2, 2016) (ML16173A342) ("EA-12-049/051 Extension Request Approval")).

The Hearing Request and its two proposed contentions challenge Entergy's Extension Requests. Proposed Contention 1 challenges the EA-13-109 Extension Request,[11] and Proposed Contention 2 challenges the EA-12-049/051 Extension Request.[12]

The Hearing Request and proposed contentions should be rejected for multiple, independent reasons. As a procedural matter, there is no valid hearing opportunity, so Petitioners' request is without basis. The Atomic Energy Act of 1954, as amended ("AEA"), requires a hearing opportunity for "the granting, suspending, revoking, or amending of any license."[13] Hearing opportunities are not required for any other action—including relaxation of the requirements of an NRC order. Here, Petitioners fail to even *acknowledge* that the Relaxation Provision is the basis for the Extension Requests, much less identify any hearing right associated with the exercise of this provision. This fundamental flaw invalidates the entire Hearing Request.

Moreover, to the extent Petitioners challenge the timeliness of the Extension Requests, the appropriate procedural avenue is a petition under 10 C.F.R. § 2.206. To the extent they challenge the inclusion and/or substantive aspects of the Relaxation Provisions in the Orders themselves, their challenge is tardy by more than three years. To the extent they allege the Extension Requests constitute license amendments, Petitioners have failed to identify any action granting Entergy any greater authority or otherwise altering the original terms of the FitzPatrick license. Thus, no opportunity for a hearing arises in relation to the Extension Requests and the Orders.

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11 *See* Hearing Request at 18-19.

12 *See id.* at 39.

13 Atomic Energy Act of 1954, Pub. L. No. 83-703, § 189a(1)(A), 68 Stat 919 (1954) (codified as amended at 42 U.S.C. § 2239(a)(1)(A)) ("AEA").

Notwithstanding all of the above, even if a hypothetical hearing opportunity did exist, Petitioners have not met their burden to show standing pursuant to 10 C.F.R. § 2.309(d). Petitioners' stated basis for standing is their proximity to the FitzPatrick facility. While the proximity presumption is a valid basis for standing in certain proceedings, it is not applicable to the type of proceeding alleged by Petitioners (*i.e.*, a purported license amendment proceeding), absent an "obvious potential for offsite consequences."[14] Petitioners do not provide any basis for the Extension Requests involving such "obvious" potential. Hence, they have not demonstrated standing.

Finally, once again assuming that a hypothetical hearing opportunity exists, Petitioners' proposed contentions fail to satisfy the admissibility requirements in 10 C.F.R. § 2.309(f)(1). In essence, Petitioners ask the NRC to deny the Extension Requests. Proposed Contention 1 argues that the EA-13-109 Extension Request is effectively a license amendment and therefore procedurally improper; that it is untimely; and that Entergy has not provided an adequate basis for the requested extension. Proposed Contention 2 argues that the EA-12-049/051 Extension Request is effectively a license amendment and therefore procedurally improper; and that it is untimely. These arguments in Proposed Contention 2 are repeated—nearly verbatim—from Petitioners' first two arguments in Proposed Contention 1.

Petitioners, however, offer nothing beyond mere speculation and conjecture to underpin their arguments; and those arguments are contrary to established law. Furthermore, Petitioners' various arguments are immaterial, unsupported, fail to raise a genuine dispute, impermissibly challenge a speculated future "No Significant Hazards Consideration" determination, and raise

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[14] *Fla. Power & Light Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329-30 (1989).

compliance challenges required to be submitted via the 10 C.F.R. § 2.206 process. Therefore, Petitioners have not proposed an admissible contention.

For all of these reasons, the Hearing Request should be summarily denied.

II. REGULATORY AND PROCEDURAL BACKGROUND

A. NRC Authority to Issue Orders and Relax Their Requirements

AEA Section 161 grants the NRC authority to issue orders. This authority is implemented through 10 C.F.R. Part 2, Subpart B. As noted in the NRC Enforcement Manual, the NRC typically exercises this authority to ensure compliance with existing regulations or when otherwise deemed necessary.[15]

However, the "[r]equirements of an order can be relaxed based on a show of good cause in accordance with directions contained in the Order . . . ."[16] As explicitly noted in the Enforcement Manual, the purpose of inserting discretionary relaxation provisions directly into an order "is to avoid the need to issue another order should the order need to be relaxed."[17]

B. The Orders

On March 11, 2011, a strong earthquake struck Japan and resulted in a 45-foot tsunami. These events led to extensive damage to the Fukushima Dai-ichi nuclear power facility. Subsequently, the NRC issued certain orders and information requests based on lessons learned. As relevant here, the NRC issued:

- EA-12-049 – an order requiring all U.S. nuclear power plants to implement mitigating strategies related to BDBEE;[18]

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15 Nuclear Regulatory Commission Enforcement Manual, Rev. 9 at 154 (Sept. 9, 2013) (updated Dec. 10, 2015) (ML102630150) ("Enforcement Manual").

16 *Id*. at 155.

17 *Id*. at 162.

18 *See* EA-12-049.

- EA-12-051 – an order requiring all U.S. nuclear power plants to install certain SFPI;[19] and

- EA-13-109 – an order requiring all U.S. nuclear power plants with certain containment designs to maintain an HCVS.[20]

Each of the Orders contains essentially identical "Notification Provisions" which require licensees to notify the Commission within 20 days of a specified trigger date if:

> (1) they were unable to comply with any of the requirements described in the order;
>
> (2) compliance with any of the requirements was unnecessary in their specific circumstances;
>
> (3) implementation of any of the requirements would have caused the licensee to be in violation of the provisions of any Commission regulation or their facility license; or
>
> (4) the licensee believed that implementation of any of the requirements in the order would adversely impact safe and secure operation of their facility.[21]

The last paragraph of Section IV of each of the Orders contains the Relaxation Provision, which states that the NRR Director "may, in writing, relax or rescind any of the above conditions upon demonstration by the Licensee [] of good cause."[22] The NRC has granted numerous extensions to deadlines specified in the Orders.[23] Such extensions are routinely granted as part

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19 *See* EA-12-051.

20 *See* EA-13-109. This order superseded EA-12-050, an earlier order on the same subject matter. *See* Letter from E. Leeds, NRC, to All Operating Boiling-Water Reactor Licensees with Mark I and Mark II Containments, Issuance of Order to Modify Licenses with Regard to Reliable Hardened Containment Vents (Mar. 12, 2012) (ML12054A694).

21 EA-12-049 § IV.B; EA-12-051 § IV.B; EA-13-109 § IV.C (collectively, the "Notification Provisions").

22 EA-12-049 § IV; EA-12-051 § IV; EA-13-109 § IV.

23 *See, e.g.*, Letter from W. Dean, NRC, to B. Hanson, Exelon, Oyster Creek Nuclear Generating Station - Relaxation of the Schedule Requirements for Order EA-13-109: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents Capable of Operation Under Severe Accident Conditions (TAC No. MF4352) (Nov. 16, 2015) (ML15092A159) ("Oyster Creek Extension"); Letter from E. Leeds, NRC, to T. Joyce, PSEG, Hope Creek Generating Station - Relaxation of the Schedule Requirements for Order EA-12-049 "Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events" (May 20, 2014) (ML14113A316); Letter from E. Leeds, NRC, to

of the Staff's ongoing oversight activities and are accomplished via the Relaxation Provision within each order.[24]

Section V of the Orders provided an opportunity for licensees "and any other person adversely affected by" the Order to submit an answer or request a hearing "within twenty (20) days of the date of this Order." The Orders further provided that the answer and hearing request deadline could be extended "[w]here good cause is shown." Such extension requests also were due within 20 days of the date of the Order. All of the Orders are final:

- Per Section V of EA-13-109, in the absence of any hearing request or approval of an extension to request a hearing, the Order became "final" within 20 days of its issuance. No such requests were made for EA-13-109, and so it became final in June 2013.

- Per Section V of EA-12-049, in the absence of any hearing request or approval of an extension to request a hearing, the Order became "final" within 20 days of its issuance. No such requests were made for EA-12-049, and so it became final in April 2012.

- Although there were hearing requests for EA-12-051, those were ultimately rejected in 2012.[25]

C. Planned Shutdown and Potential Sale

On November 18, 2015, Entergy submitted to the NRC a "Notification of Permanent Cessation of Power Operations," pursuant to 10 C.F.R. § 50.82(a)(1)(i), stating that FitzPatrick

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M. Pacilio, Exelon, Peach Bottom Atomic Power Station Unit 3 - Relaxation of Certain Schedule Requirements for Order EA-12-049 "Issuance of Order to Modify Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design Basis External Events" (Apr. 15, 2014) (ML14071A606).

[24] For example, Exelon submitted a relaxation request to the NRC on June 2, 2014 for the Oyster Creek Nuclear Generating Station. Due to its plans to permanently shut down Oyster Creek no later than December 31, 2019, Exelon requested relaxation of its EA-13-109 implementation deadlines until January 31, 2020. The NRC Staff reviewed Exelon's request under the Relaxation Provision and "determined that the licensee has presented good cause for a relaxation of the order implementation date for Phase 1 implementation of Order EA-13-109." *See* Oyster Creek Extension at 2.

[25] *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents* (Effective Immediately) and *All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation* (Effective Immediately), LBP-12-14, 76 NRC 1, 8 (2012), *aff'd*, CLI-13-2, 77 NRC 39, 50 (2013).

would permanently cease power operations at the end of its current fuel cycle.[26] Entergy later identified the specific cessation date as January 27, 2017.[27] Entergy's decision was compelled by then-present economic conditions for nuclear power plants in upstate New York.

Subsequently, the New York Public Service Commission approved a new mechanism to adequately compensate eligible nuclear generating facilities for their zero-emission attributes. This change in economic circumstances spurred proposed transactions in which Exelon will acquire FitzPatrick. On August 18, 2016, Exelon submitted a license transfer application to the NRC seeking approvals necessary for the proposed transactions.[28] The application requested that Entergy's previous notice of intent to permanently cease power operations be deemed withdrawn upon approval of the license transfer application and closing of the proposed transactions.[29]

D. Completion Deadlines and Extension Requests

NRC Order EA-13-109 bifurcates its HCVS requirements into two phases and specifies a completion deadline for each. As relevant here, EA-13-109 specifies that the Phase 1 deadline is the earlier of (a) the "hard" deadline of June 30, 2018, or (b) "no later than startup from the second refueling outage that begins after June 30, 2014."[30] However, Entergy expected to shut down FitzPatrick in January 2017—before the "hard" deadline—and did not expect to have a second refueling outage after June 30, 2014.

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26 JAFP-15-0133, Letter from J. Ventosa, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Nov. 18, 2015) (ML15322A273).

27 JAFP-16-0045, Letter from B. Sullivan, Entergy, to NRC Document Control Desk, Notification of Permanent Cessation of Power Operations (Mar. 16, 2016) (ML16076A391).

28 Letter from J.B. Fewell, Exelon, to NRC Document Control Desk, Application for Order Approving Transfer of Renewed Facility Operating License and Proposed Conforming License Amendment (Aug. 18, 2016) (ML16235A081).

29 *Id*. at 2.

30 *See* EA-13-109 § IV.B.

The other two Orders, EA-12-049 and EA-12-051, specified completion dates of "no later than two (2) refueling cycles after submittal of [a plan specified in the respective Orders], or December 31, 2016, whichever comes first."[31] Due to the timing of submission of the respective plans, December 31, 2016 was the relevant deadline at the time of the Extension Request. Entergy worked diligently toward compliance with the requirements of EA-12-049 and EA-12-051—indeed, some aspects of Entergy's work were "at or near 100%" complete.[32] However, this work was accomplished with the expectation that FitzPatrick would not restart from the January 2017 refueling outage.[33]

On September 8, 2016, in view of the changed economic circumstances and new proposed transactions—and pursuant to the Relaxation Provisions of the Orders—Entergy requested an extension of time to comply with the BDBEE and SFPI requirements in EA-12-049 and EA-12-051, respectively,[34] and also of Phase 1 of the HCVS requirements in EA-13-109.[35]

In support of "good cause" for the EA-13-109 Extension Request, which seeks relaxation of the compliance deadline to extend it until June 30, 2018, Entergy explained that: (1) the proposed transaction with Exelon was an unforeseen circumstance; (2) the brief extension is still within the "hard" deadline established by the order; (3) all outage-required work necessary for compliance with the order's HCVS requirements will, in fact, be completed by the end of the January 2017 refueling outage; and (4) during the brief extension period, FitzPatrick's existing containment vent system, as supplemented by various compensatory coping strategies and

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31 EA-12-049 § IV.A.2; EA-12-051 § IV.A.2.

32 EA-12-049/051 Extension Request, Attach., at 2.

33 Noting the planned shutdown, on April 14, 2016, Entergy requested an extension of time to comply with the requirements of EA-12-049 and EA-12-051. *See* Original Extension Request.

34 *See* EA-12-049/051 Extension Request, Attach., at 1-2.

35 *See* EA-13-109 Extension Request at 1-2.

proceduralized manual actions, "will continue to provide defense-in-depth measures and enhanced plant capability . . . ."[36] As of the date of this Answer, the NRC has not acted upon the EA-13-109 Extension Request.

In support of "good cause" for the EA-12-049/051 Extension Request, which sought relaxation of the compliance deadlines to extend them until June 30, 2017, Entergy noted that: (1) in light of the possibility that FitzPatrick will, in fact, restart after the January 2017 refueling outage, the sequence of the EA-12-049 and EA-12-051 work must now be revised to accommodate ongoing work toward completion of the EA-13-109 requirements; (2) due to the timing, winter conditions will now impact certain construction activities; (3) the requested extension is very brief; and (4) compensatory strategies and procedures (*e.g.*, certain proceduralized manual actions, additional on-site equipment) are already in place.[37]

In response to the EA-12-049/051 Extension Request, the NRR Director authorized the requested relaxation of the deadlines for those Orders on December 2, 2016.[38] The authorization letter reviews Entergy's EA-12-049/051 Extension Request and characterizes the extension times as "minimal."[39] The letter states that the additional mitigation measures provide a reasonable degree of mitigation capability to address key safety functions.[40] Therefore, the letter concludes that Entergy has demonstrated good cause for the extensions, and extends the requirement for full implementation of the orders until June 30, 2017.[41]

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36 *See id.*, Attach., at 1-3.

37 *See* EA-12-049/051 Extension Request, Attach., at 1-5.

38 *See* EA-12-049/051 Extension Request Approval at 2.

39 *Id.*

40 *Id.*

41 *Id.*

E. Petitioners' Hearing Request

Petitioners filed the Hearing Request on November 10, 2016, and included two proposed contentions. Proposed Contention 1 states:

> 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.[42]

Proposed Contention 2 states:

> 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.[43]

NRC regulations at 10 C.F.R. § 2.309(i)(1) provide that parties may file answers within 25 days after service of a hearing request. Therefore, this Answer is timely filed.

III. THE HEARING REQUEST MUST BE DENIED BECAUSE THERE IS NO OPPORTUNITY FOR A HEARING

The AEA requires a hearing opportunity in any proceeding for:

- "the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control;"
- "the issuance or modification of rules and regulations dealing with the activities of licensees;" or
- "the payment of compensation, an award, or royalties" under certain sections of the AEA.[44]

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42 Hearing Request at 18-19.

43 *Id.* at 39.

44 AEA § 189a(1)(A).

Hearings are not required for any other proceeding, or where there is no proceeding at all, because, "as should be obvious, there is no general right to a hearing for a hearing's sake."[45] Moreover, Section 189a of the AEA "does not confer the automatic right of intervention upon anyone."[46] The AEA specifies the limited subset of proceedings that require a hearing opportunity.[47]

As detailed below, Entergy's submission of the Extension Requests, and the NRC's review of the same, is not such a proceeding. As an initial matter, Petitioners fail to even mention the Relaxation Provisions in the Orders invoked by the Extension Requests, much less explain how they create a hearing opportunity. Furthermore, Petitioners assert that the Extension Requests are untimely, and base that assertion on the Orders themselves—in other words, they raise a *compliance* challenge. Such challenges must be submitted via the 10 C.F.R. § 2.206 process, and do not create a hearing opportunity. Alternatively, to the extent Petitioners challenge the inclusion and/or substantive provisions of the Relaxation Provisions in the Orders, the opportunity for such a challenge has long since expired. And finally, relaxation of the requirements of an order, pursuant to flexibility purposefully *embedded* in the order *from its inception*, does not "amend" the order, or any license. Thus, the Hearing Request should be rejected.

A. Petitioners' Fundamental Misunderstanding of the Orders and the Extension Requests Are Not a Proper Basis for a Hearing

As discussed above, Entergy submitted its Extension Requests pursuant to the Relaxation Provisions, which state that the NRR Director may, in writing, relax or rescind any of the

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45 *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 282 (2001), *aff'd*, 54 NRC 349 (2001), *reconsid. denied*, 55 NRC 1 (2002).

46 *Bus. and Prof'l People for the Pub. Interest v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974).

47 *See* AEA § 189a(1)(A).

conditions in the Orders upon demonstration by the licensee of good cause.[48] But, Petitioners fail to even mention this provision in their Hearing Request. Nonetheless, in the Hearing Request, Petitioners refer to Entergy's Extension Requests as "relaxation for compliance deadlines,"[49] thus showing that they recognize that the Requests should fall into the Relaxation Provisions themselves (even if they try to ignore those provisions).

Petitioners instead erroneously argue that Entergy submitted the Extension Requests pursuant to the Notification Provisions, and that granting the Extension Requests would require a license amendment because the deadlines specified in the Notification Provisions have passed.[50] Petitioners fundamentally misunderstand the Orders relative to the Extension Requests.

To be clear, Entergy submitted its Extension Requests pursuant to the Relaxation Provision embedded in Section IV of the Orders.[51] That provision does not provide any hearing opportunity for relaxation requests; nor has the Commission ever recognized such a hearing opportunity. Indeed, longstanding Commission policy in the NRC Enforcement Manual clearly explains that relaxation provisions were explicitly designed "to avoid the need to issue another order should the order need to be relaxed."[52] Accordingly, Petitioners have not identified a valid opportunity for a hearing.

Petitioners' failure to correctly assess the procedural basis for the Extension Requests is the first of several fatal flaws in their Hearing Request.

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48 EA-12-049 § IV; EA-12-051 § IV; EA-13-109 § IV.

49 Hearing Request at 8; *see also id.* at 29.

50 *See* Hearing Request at 26-31, 50-54 (incorrectly citing "the Order's 20 days filing requirement to notify the Commission if the operator is unable to comply" as the basis for the Extension Requests).

51 *Compare* EA-12-049 § IV, EA-12-051 § IV, and EA-13-109 § IV (explaining the NRR Director may "relax or rescind any of the above conditions upon demonstration by the Licensee [] of good cause") *with* EA-12-049/051 Extension Request at 2 (noting that Entergy is "requesting relaxation" and "demonstrating good cause for the relaxation") *and* EA-13-109 Extension Request at 2 (stating the same).

52 Enforcement Manual at 162.

B. Petitioners' Challenge to the Timeliness of the Extension Requests Is a Compliance Challenge that Should Have Been Submitted Under the Provisions of 10 C.F.R. § 2.206

Petitioners assert that the Extension Requests should have been submitted within 20 days of the issuance date of the final Interim Staff Guidance ("ISG") for Phase 1 (*i.e.*, December 15, 2013) for EA-13-109 and 20 days of the issuance of the Orders for EA-12-049 and EA-12-051, and that the Extension Requests are untimely because they were submitted in 2016.[53] The Hearing Request plainly asserts that the timing requirement is established by the Notification Provisions (*i.e.*, Section IV.C of EA-13-109 and Section IV.B of EA-12-049 and EA-12-051).[54]

As explained in Section III.A, above, the Extension Requests were submitted pursuant to the Relaxation Provisions (*i.e.*, the last paragraph of Section IV of the Orders), not the Notification Provisions. But, even assuming Petitioners' characterization hypothetically is correct, the Hearing Request must be rejected because a challenge to compliance with currently-applicable requirements is not a proper basis for a hearing request, but rather a call for enforcement action.

Petitioners cannot create a hearing opportunity merely by claiming that a facility has not complied with a regulatory requirement because "[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206, rather than by a request for a hearing under AEA section 189a."[55] In other words, to the extent Petitioners are

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53 *See* Hearing Request at 26-31, 50-54.

54 *See id.* at 26-27, 50-51.

55 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-15-27, 82 NRC 184, 192 (2015), *aff'd*, CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016); *see also Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015).

challenging Entergy's compliance with the Notification Provisions, or any other part of the Orders, they should have submitted a petition under 10 C.F.R. § 2.206.[56]

Regardless, the Extension Requests are in fact timely because the Orders do not impose a deadline for requesting the NRR Director's exercise of authority under the Relaxation Provisions. Petitioners conflate the Notification Provisions with the Relaxation Provisions.[57] But, the Relaxation Provisions provide a mechanism for relaxation of "any of the above conditions"—*including* the Notification Provisions and their timelines—without any temporal restriction. Ultimately, Petitioners' timeliness argument simply does not identify nor provide a hearing opportunity.

C. The Time for a Hearing Opportunity on the Orders Expired Over Three Years Ago

To the extent Petitioners generically assert that an exercise of the Relaxation Provisions in Section IV of the Orders would result in some unspecified harm, they are challenging the NRC's decision to include the Relaxation Provisions in the Orders themselves.

Importantly, the Orders explicitly permitted an opportunity to request a hearing for challenges such as this, *i.e.*, challenges to the inclusion of a relaxation provision. But Section V of the Orders explains that such challenges (including challenges to the Relaxation Provisions) were due within 20 days of the issuance of the Orders.

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[56] The Commission has repeatedly upheld the viability of the 2.206 process. *See, e.g.*, *All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments: Order Modifying Licenses with Regard to Reliable Hardened Containment Vents* (Effective Immediately) and *All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status: Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation* (Effective Immediately), CLI-13-2, 77 NRC 39, 50 n.57 (2013).

[57] *See* Hearing Request at 29 ("Entergy's answer [to EA-13-109] did not provide a statement of 'good cause' [as required by the Relaxation Provision] within the 20-day window [from the Notification Provision] for relaxing or rescinding").

The latest of the Orders, EA-13-109, was issued on June 6, 2013; thus, any challenges were due by June 26, 2013. And while Section V permitted requests for extension of this deadline, such requests also were due within 20 days of the issuance of each of the Orders.[58] As Petitioners' November 10, 2016 Hearing Request is more than three years delinquent from the latest of the Orders, and they neither requested nor received an extension of time to request a hearing, there is no remaining hearing opportunity related to the Orders.

Thus, Petitioners' challenge here is incurably untimely, and does not present a valid opportunity for a hearing.

D. The Extension Requests Do Not Seek or Require a License Amendment

The Commission recently has explained that NRC "case law acknowledges that an agency action not formally labeled a license amendment could constitute a *de facto* license amendment and trigger hearing rights under [AEA] section 189a. if that action '(1) granted the licensee any greater authority or (2) otherwise altered the original terms of the license.'"[59] However, the Extension Requests would not grant Entergy any greater authority—they would modify deadlines—and they do not alter the original terms of the FitzPatrick license. Because the Relaxation Provision embedded in the Orders already permits the action contemplated in the Extension Request—a relaxation of the Order requirements—such action does not entail any modification of authority or license terms.

Moreover, recent Commission decisions have made clear that agency actions related to at least two similar topics do not trigger hearing opportunities: enforcement and oversight. A

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58 *See* EA-13-109 § V.

59 *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016) (citing *Omaha Public Power District* (Fort Calhoun Station, Unit 1), CLI-15-5, 81 NRC 329, 334 (2015)).

request for "relaxation" of the requirements of an order is comparable to both of these topics, and similarly does not trigger hearing rights under AEA Section 189a.

In 2014, the Sierra Club filed a hearing request focused on the NRC Staff's issuance of a Confirmatory Action Letter ("CAL") related to external flooding requirements at Fort Calhoun. The CAL documented actions that the licensee had committed to take prior to restarting the plant. The licensee eventually completed all of its commitments and the NRC closed the CAL, allowing the plant to restart. Among other things, the Sierra Club argued that modifications necessary for proper flood protection would require a license amendment. The Commission denied the hearing request noting that it "reflects a misunderstanding of the distinction between our agency's hearing and oversight processes."[60] The Commission, instead, referred the matter to the Executive Director for Operations for consideration as a request for enforcement action under 10 C.F.R. § 2.206.[61]

Also, on August 26, 2014, Friends of the Earth ("FOE") filed a hearing request claiming that Diablo Canyon had to suspend operations until it evaluated new seismic information. FOE argued that the licensee and NRC Staff interactions on seismic issues constituted a *de facto* license amendment proceeding that triggered an opportunity for a hearing. A licensing board rejected the hearing request, finding that "the NRC has neither granted PG&E greater authority

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60 *Fort Calhoun*, CLI-15-5, 81 NRC at 334.

61 The Commission also commented that "the prospect of a possible future license amendment does not trigger hearing rights now." *Fort Calhoun*, CLI-15-5, 81 NRC at 336. In other words, a "notice of hearing," a "notice of proposed action," or the performance of some action is an absolute prerequisite to any potential hearing opportunity. The reason for this is simple—it would be premature to litigate an issue when a Commission determination might make the issue moot. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 341 (1991). Because no opportunity for a hearing has arisen even under Petitioners' imaginative license amendment theory, the Hearing Request must be rejected.

than that provided by its existing licenses nor otherwise altered the terms of those licenses."[62] In finding that there was no hearing opportunity, the board explained that "[a] *de facto* license amendment proceeding is not initiated merely because a licensee takes an action that requires some type of NRC approval."[63] The Commission recently upheld the board's decision, affirming its view that ongoing oversight activities that do not approve or authorize any change to the license are not *de facto* license amendments.[64]

As in the *Fort Calhoun* and *Diablo Canyon* cases, the Staff reviews relaxation requests as part of its ongoing oversight activities, pursuant to authority granted to it by the Orders. Petitioners confuse the NRC's oversight and hearing processes. The oversight activities prescribed in the Orders do not offer additional future hearing opportunities each time the agency engages in oversight activities under the terms, and within the scope, of the Orders. Thus, Petitioners have not identified any right to a hearing under the AEA.

At all relevant times—from their issuance dates to the date the Hearing Request was filed—the Orders (and the license, to the extent it was modified by the Orders) have included the Relaxation Provisions, and with them, the possibility that the requirements therein could be "relax[ed] or rescind[ed]" without "the need to issue another order"—and without the need to amend the license because such action does not entail any modification of licensee authority or the terms of the license. Accordingly, because the Extension Requests neither seek nor require a license amendment, and because granting the Extension Requests would neither grant Entergy any greater authority nor otherwise alter the original terms of the FitzPatrick license, the Hearing Request fails to identify any right to a hearing under the AEA, and should be rejected.

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62 *Diablo Canyon*, LBP-15-27, 82 NRC at 184.

63 *Id.* at 191.

64 *Diablo Canyon*, CLI-16-09, 83 NRC at __ (slip op. at 31).

IV. THE HEARING REQUEST MUST BE DENIED BECAUSE PETITIONERS HAVE NOT DEMONSTRATED STANDING

Even assuming for the sake of argument that Petitioners had identified a hearing opportunity, they have not demonstrated standing as required by 10 C.F.R. § 2.309(d)(1). Accordingly, the Hearing Request still must be denied for this second independent basis.

A. Governing Legal Standards

AEA Section 189a states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."[65] The Commission's regulations implementing this requirement include the standing requirements in 10 C.F.R. § 2.309(d)(1), which require a petitioner to address: (1) the nature of the petitioner's right under the AEA 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 decision or order that may be issued in the proceeding on the petitioner's interest.

In assessing these factors, the NRC applies "contemporaneous judicial concepts of standing."[66] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[67] These three criteria are referred to as injury-in-fact, causation, and redressability, respectively.

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65 AEA § 189a(1)(A).

66 *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914-16 (2009) (internal citation omitted); *see also Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

67 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

First, a petitioner's injury-in-fact showing "requires that the party seeking review be himself among the injured."[68] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[69] As a result, standing will be "denied when the threat of injury is too speculative."[70] Second, a petitioner must establish that the injuries alleged are "fairly traceable to the proposed action."[71] Finally, each petitioner must demonstrate that the injury can be "redressed" by a favorable decision. Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[72]

Under some circumstances, a petitioner may be presumed to have standing based on his or her geographic proximity to a facility.[73] In certain proceedings involving power reactors, "proximity" standing has been found for petitioners who reside within 50 miles of the facility in question.[74] The Commission has explained, however, that this proximity presumption only applies to proceedings involving applications for "construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool."[75] The presumption applies because "those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences."[76] Thus, in license amendment

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68 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

69 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

70 *Id.*

71 *Id*. at 75.

72 *Id*. at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

73 *See Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

74 *See, e.g.*, *Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16.

75 *St. Lucie*, CLI-89-21, 30 NRC at 329 (citing *Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979)).

76 *Id.* at 329.

proceedings, absent an "obvious potential for offsite consequences," a petitioner must satisfy the traditional standing requirements.[77]

Finally, an organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representational capacity (by demonstrating harm to the interests of its members).[78] To establish representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right; (2) identify that member; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[79]

B. Petitioners Have Not Demonstrated Standing

As a threshold matter, Petitioners bear the burden of showing standing.[80] Generally speaking, the Hearing Request claims that certain of Petitioners' members reside within 50 miles of FitzPatrick and are "reasonably concerned" about health and safety issues related to the Extension Requests. As explained below, these statements are far too vague to demonstrate standing.[81]

1. Petitioners Cannot Rely on the Proximity Presumption

First, Petitioners cannot rely solely on the proximity presumption absent an "obvious potential for offsite consequences." Petitioners cite no authority for proximity-based standing

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77 *Id.* at 329-30; *see also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999); *Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 539 (2008).

78 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Ga. Inst. of Tech*. (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995)).

79 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

80 *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

81 Hearing Request at 13-15; *see also* Declarations of Jessica Azulay Chasnoff, Andra Leimanis, and Steven Penn submitted with the Hearing Request.

under these circumstances. Petitioners cite a licensing board decision for the proposition that the proximity presumption applies "in reactor construction permit and operating license cases, because there is an 'obvious potential for offsite consequences' within that distance."[82] However, the Extension Requests seek neither a reactor construction permit nor an operating license. Further, Petitioners do not even attempt to demonstrate that the proximity presumption would apply to the proceeding purportedly at issue here—a license amendment proceeding. They simply make the conclusory assertion that "the same standing concepts apply."[83]

Notwithstanding, there simply is no "obvious" potential for offsite consequences here.[84] Petitioners make a highly generalized assertion that granting the Extension Requests "presents a tangible and particular harm to the health and well-being of those members living within 50 miles of the site."[85] But, given the actions Entergy already has taken, or will have taken before the current compliance deadlines for the Orders, the brief durations of the Extension Requests, and the compensatory measures taken by Entergy, Petitioners offer no support or explanation for how the Extension Requests would pose an "obvious" potential for offsite consequences.

The Hearing Request does not mention the steps Entergy has taken toward compliance with the Orders, much less offer any meaningful discussion of how the remaining work presents

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82 Hearing Request at 11 (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 426 (2002)).

83 Hearing Request at 11.

84 In fact, the requested extension of the compliance deadline for EA-13-109 is equivalent to the hard deadline in the Order (June 30, 2018), and is sooner than the extended deadline the NRC recently approved for Oyster Creek (January 31, 2020). Additionally, the requested extension of the deadlines for EA-12-049 and EA-12-051 is only 6 months. The NRR Director's relaxation of the EA-12-049 and EA-12-051 deadlines even characterized the extensions as "minimal." EA-12-049/051 Extension Request Approval at 2.

85 Hearing Request at 11; *see also* Declarations of Jessica Azulay Chasnoff, Andra Leimanis, and Steven Penn submitted with the Hearing Request (discussing "concern" that the extensions "could adversely affect" their lives, lives of Petitioners' membership, communities, and the environment, and they are "particularly concerned" by the undue risk these requests for extension to comply present for an accidental release of radiation and the potential harm that it would cause to public health and the environment).

an "obvious" potential for offsite consequences. The lack of an obvious potential for offsite consequences is further highlighted by the nature of the Extension Requests themselves. Those Requests merely seek to retain the *status quo* for the requested period of time. Furthermore, as noted in the NRR Director's letter relaxing the deadlines for EA-12-049 and EA-12-051, the NRC has concluded that the sequence of events that led to the Fukushima accident is unlikely in the United States.[86]

Petitioners effectively assert that the Extension Requests will not be adequately analyzed by Staff absent Petitioners' participation in a hearing.[87] In 1998, a petitioner similarly challenged an actual license amendment request for the Millstone Nuclear Power Station, Unit 3.[88] That petitioner asserted that a requested modification had "not been analyzed adequately."[89] The *Millstone* licensing board found that such vague claims "do[] not demonstrate, without a great deal more, how an accident with offsite consequences results from" the requested amendment.[90] In rejecting the petitioner's claim of standing due to vagueness, the *Millstone* board held that, "even assuming the instant amendment . . . *somehow* presents the potential for offsite . . . consequences, that potential is anything but obvious."[91] Although the *Millstone* petitioner challenged a different type of action, in an actual license amendment proceeding, the same premise applies here—even assuming an extension of the deadlines for the remaining requirements in the Orders could somehow present the potential for offsite consequences, that

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86 *See* EA-12-049/051 Extension Request Approval at 2.

87 Hearing Request at 12 ("public health and safety interests . . . will not be adequately represented absent . . . [Petitioners'] participat[ion] as full parties").

88 *See generally Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

89 *Id.* at 156.

90 *Id.*

91 *Id*. at 155 (emphasis added).

potential is "anything but obvious." As Petitioners have neither argued nor demonstrated such potential, proximity cannot serve as a basis for their standing.

2. Petitioners Have Not Demonstrated Traditional Standing

Additionally, Petitioners' bald assertions that they are "reasonably concerned" about their property and financial interests are far too vague to establish traditional standing.[92] Petitioners offer no explanation for how their concerns are fairly traceable to the challenged action, and thus fail to satisfy the causation element of traditional standing.[93]

As noted above, Petitioners make a highly generalized assertion that granting the Extension Requests "presents a tangible and particular harm to the health and well-being of those members living within 50 miles of the site."[94] Petitioners offer no discussion of how their concerns are "fairly traceable" to an extension of the implementation deadline for the remaining provisions of the Orders.[95] Petitioners' vague concerns also are not "concrete and particularized," but are "conjectural" or "hypothetical" and must be denied as "too speculative."[96] Accordingly, Petitioners have not demonstrated traditional standing.

3. Petitioners Have Not Satisfied the Pleading Requirements for Representational Standing

All of the Petitioners plead representational style standing. However, for the very reasons discussed above, Petitioners have not shown that any of their members would have standing in his or her own right; these members cannot rely on the proximity presumption, and

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92 *See* Hearing Request at 11-13.

93 *See Yankee Nuclear Power Station*, CLI-96-1, 43 NRC at 6.

94 Hearing Request at 11.

95 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

96 *Id*. at 72.

have not otherwise demonstrated traditional standing. Accordingly, Petitioners have not demonstrated representational standing.

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In summary, as Petitioners cannot rely on the proximity presumption, which does not apply here, and have not demonstrated a causal link between their alleged "concerns" and the Extension Requests, the Hearing Request fails to demonstrate standing, contrary to 10 C.F.R. § 2.309(a) and (d). Thus, the Hearing Request should be rejected.

V. THE HEARING REQUEST MUST BE DENIED BECAUSE PETITIONERS HAVE NOT PROPOSED AN ADMISSIBLE CONTENTION

Even assuming for the sake of argument that Petitioners had identified a hearing opportunity, and had demonstrated standing, they still have not submitted an admissible contention, as required by 10 C.F.R. § 2.309(f)(1). Accordingly, the Hearing Request must be denied for this third independent basis.

A. Governing Legal Standards for Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Section 2.309(f)(1)(i) through (vi) identify the six admissibility criteria for each proposed contention:

i. provide a specific statement of the legal or factual issue sought to be raised;
ii. provide a brief explanation of the basis for the contention;
iii. demonstrate that the issue raised is within the scope of the proceeding;
iv. demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
v. provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and
vi. provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[97] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[98]

With respect to factual information or expert opinion proffered in support of a contention, the presiding officer "is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[99] "[A]n expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[100]

To raise a sufficiently-supported genuine dispute on a material issue of law or fact under 10 C.F.R. § 2.309(f)(1)(vi), a petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view"; *i.e.*, explain why it disagrees with the applicant.[101] If a petitioner believes an application fails to adequately address a relevant issue, then the petitioner is to "explain why the application is deficient."[102]

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97 *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

98 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

99 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 37 (1998).

100 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

101 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); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

102 Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station,

Generalized assertions are insufficient.[103] Furthermore, a petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[104]

B. The Proposed Contentions Are Inadmissible

Because Parts A and B of both Proposed Contention 1 and Proposed Contention 2 are nearly identical, they are discussed jointly below, first Part A and then Part B. Part C of Proposed Contention 1 is discussed separately (Proposed Contention 2 does not have a Part C).

1. Petitioners' Procedural Arguments in Part A of the Proposed Contentions Are Immaterial, Unsupported, Outside Scope, and Fail to Raise a Genuine Dispute

Part A of the proposed contentions claims that each of Entergy's Extension Requests "should be denied on procedural grounds. [It 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."[105]

As a preliminary matter, the Extension Requests would not result in a license amendment. Petitioners argue that the Orders "modified [a] license[] condition," and that the Extension Requests "now constitute[] a request to amend the license."[106] As explained in Section III above, however, the Extension Requests would neither modify the Orders nor amend the license; rather, they seek an exercise of the Relaxation Provisions, which already are part of the Orders. And Petitioners have identified no hearing rights for the Relaxation Provisions.

Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 156 (1991). This is because the Commission "reserve[s] [its] hearing process for genuine, material controversies between knowledgeable litigants." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 416 (2012) (internal citations and quotations omitted).

103 *U.S. Dep't of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009).

104 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995), *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

105 Hearing Request at 19, 39.

106 *Id.* at 21.

Furthermore, the Orders are linked to the FitzPatrick license pursuant to paragraph 2.C of the FitzPatrick operating license, which states that it "is subject to all applicable provisions of the Act and to the rules, regulations, and orders of the Commission now or hereafter in effect."[107] Thus, if Petitioners' argument were valid that a change to an order requirement is a license amendment, then changes to the AEA and NRC regulations applicable to FitzPatrick likewise must be considered license amendments with hearing opportunities. This would result in an absurd outcome.

Petitioners also repeatedly refer to the compliance dates in the Orders "as modified in [its/the] operating license,"[108] and imply that the Orders imposed new "licensed [sic] conditions,"[109] but this is incorrect. The Orders modify the requirements imposed on Entergy as a licensee, but they do not modify the terms of the operating license itself. In other words, the FitzPatrick operating license does not include the compliance schedule; instead, the operating license requires the licensee to adhere to any applicable orders.

Petitioners made the outrageous claim that the Orders "amended technical specifications in the operating license to incorporate the referenced scheduled completion . . . ," and they otherwise discuss changes to technical specifications and the need for license amendments.[110] Petitioners, here again, fundamentally misunderstand the licensing basis related to the Orders. FitzPatrick's technical specifications are provided in Appendix A to the operating license. Those

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107 Entergy Nuclear FitzPatrick, LLC and Entergy Nuclear Operations, Inc. (James A. FitzPatrick Nuclear Power Plant), Docket No. 50-333, Renewed Facility Operating License, Renewed License No. DPR-59 at 3 (ML052720287).

108 *See, e.g.*, Hearing Request at 5, 6.

109 *See, e.g.*, *id.* at 11, 27.

110 *Id.* at 20, 23, 31, 48.

technical specifications do not address the schedules in the Orders. Thus, changes to those schedules are not changes to the technical specifications and do not require license amendments.

Additionally, assuming for the purposes of argument that the Extension Requests already have been determined to involve a license amendment—a prerequisite for finding a hearing opportunity—this entire Part A is moot. It argues the threshold question, but is not otherwise aimed at demonstrating any element of an admissible contention. Thus, for contention admissibility purposes, this portion of Part A fails to raise a material issue, or to show that a genuine dispute exists with regard to a material issue of law or fact within the scope of the hearing opportunity, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii), (iv), and (vi).

The remaining portions of Part A do not otherwise explain how, and do not offer any support for the proposition that, the Extension Requests are contrary to "NRC's standard rules and practices for amending its modified operating license."[111] Petitioners cite various NRC regulations and cases related to license amendments, including a discussion of the general standards for granting license amendments.[112] Entergy does not dispute the existence of these standards. But, beyond the threshold question mentioned above (which would be moot if a hearing opportunity already exists), Petitioners do not analyze or even discuss these standards in the context of their claim that the Extension Requests are contrary to "NRC's standard rules and practices for amending its modified operating license." Thus, for contention admissibility purposes, this discussion is unsupported and fails to raise a genuine dispute contrary to 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

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111 *See id.* at 18-25, 39-50.

112 *See id.* at 22-24, 47-49.

Furthermore, Petitioners cite the regulatory prerequisite for Staff to issue an immediately-effective license amendment: a no significant hazards consideration ("NSHC") determination. Petitioners claim that "the staff cannot properly make a 'no significant hazards consideration' finding."[113] However, 10 C.F.R. § 50.58(b)(6) explicitly states that: "No petition or other request for review of or hearing on the Staff's significant hazards consideration determination will be entertained by the Commission." Section 50.58(b)(6) has long been held to be a jurisdictional bar to NSHC challenges.[114] Moreover, this impermissible argument challenges something that does not even exist; the Staff has not issued any NSHC determination here. Petitioners' NSHC arguments are explicitly barred by law and are far beyond scope, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

As Petitioners' arguments in Part A of the proposed contentions are immaterial, unsupported, fail to raise a genuine dispute, and beyond scope, Part A does not support an admissible contention.

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113 *Id.* at 24, 49.

114 *See, e.g.*, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001) (holding that intervenor challenges on this topic will be summarily rejected: "Our regulations provide that '[n]o petition or other request for review of or hearing on the Staff's significant hazards consideration determination will be entertained by the Commission.' . . . The regulations are quite clear in this regard.") (quoting 10 C.F.R. § 50.58(b)(6)); *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 90-91 (1990) ("The issue of whether the proposed amendment does or does not involve a significant hazards consideration is not litigable in any hearing.") (citing *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-86-12, 24 NRC 1, 6 n.3 (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)); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-89-15, 29 NRC 493, 495-96 (1989).

2. Petitioners' Timeliness Argument in Part B of the Proposed Contentions Is Outside Scope, Immaterial, Unsupported, and Fails to Raise a Genuine Dispute, and Is Procedurally Improper Because It Can Only Be Raised via the 10 C.F.R. § 2.206 Process

Petitioners assert, in Part B of their proposed contentions, that each of Entergy's Extension Requests "should be denied because it is not timely."[115] More specifically, Petitioners argue that, based on the Notification Provision, the Extension Request should have been submitted within 20 days of the issuance date of the final ISG for EA-13-109 and 20 days of the issuance of the Orders for EA-12-049 and EA-12-051, and that the Extension Requests are untimely because they were submitted in 2016.[116] This argument is utterly unsupported and rests on a misreading of the applicable documents. Moreover, assuming for the purposes of argument that the Extension Requests already have been determined to involve a license amendment—a prerequisite for finding a hearing opportunity—this argument is circular and misplaced, and does not provide support for an admissible contention.

First, Petitioners' entire timeliness claim is unsupported—and demonstrably incorrect. As explained in Section III.A above, Petitioners conflate the Notification Provision (which required certain notifications to the NRC by a specified date) with the Relaxation Provision (which provides for relaxation of "any of the above conditions," without any temporal restriction). The Extension Requests were submitted under the Relaxation Provisions of the Orders, which Petitioners fail to even mention.[117] NRC case law makes clear that a petitioner's imprecise reading of a document cannot form the basis of a litigable contention, regardless of

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115 Hearing Request at 26, 50.

116 *Id.* at 26-31, 50-54.

117 Petitioners also appear to claim that the Extension Requests are based on "open ended place marker" statements in Entergy's initial responses to the Orders. *See id.* at 29, 52. That is incorrect. The Extension Requests were submitted pursuant to the Relaxation Provisions in the Orders, not to any earlier statements in response to the Orders.

how convenient it may be to their argument.[118] Thus, Part B fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

To the extent Petitioners argue that the Extension Requests were submitted under the Notification Provisions, and that FitzPatrick did not timely submit the information required therein, they are raising a compliance challenge. However, "[s]uch claims are appropriately raised in a petition to initiate an enforcement proceeding under 10 C.F.R. § 2.206."[119] Thus, to the extent this is the argument Petitioners raise in Part B, it is outside scope, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

Alternatively, to the extent Petitioners argue a license amendment is impermissible because the time specified in the Notification Provision has passed, their argument is circular and unsupported. Petitioners cite no authority for the irrational proposition that, to obtain a license amendment, a licensee must demonstrate compliance with the very requirement it seeks to amend. Nor could they—there is no such requirement in 10 C.F.R. §§ 50.90-92. Thus, Petitioners have not provided any support for their argument, contrary to 10 C.F.R. § 2.309(f)(1)(v), and have not identified an issue material to the findings the NRC must make to support a purported license amendment request, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

Petitioners also point to no requirement in 10 C.F.R. §§ 50.90-92 regarding an applicant's decision about when to submit an Extension Request. Nor do they offer a shred of support for their claim. Accordingly, Petitioners have not provided any support for their argument, contrary to 10 C.F.R. § 2.309(f)(1)(v), and have not identified an issue material to the findings the NRC

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118 *See Ga. Tech.*, LBP-95-6, 41 NRC at 300, *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

119 *Diablo Canyon*, LBP-15-27, 82 NRC at 192, *aff'd*, CLI-16-09, 83 NRC __ (slip op. at 2-3) (2016); *see also Fort Calhoun Station*, CLI-15-5, 81 NRC at 334.

must make to support a purported license amendment request, contrary to 10 C.F.R. § 2.309(f)(1)(iv).

Accordingly, Petitioners' timeliness argument in Part B is immaterial, unsupported, outside scope, and fails to raise a genuine dispute, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi). Thus, Part B does not support an admissible contention.

3. Part C of Proposed Contention 1 Is Immaterial, Unsupported, and Fails to Raise a Genuine Dispute

Petitioners assert in Part C of Proposed Contention 1 that "Entergy's Request for extension to comply with EA-13-109 Phase 1 scheduled implementation should be denied because its argument in support is not valid."[120] However, as explained below, Petitioners do not provide any reasoned basis or support for this conclusion. Thus, Part C does not support an admissible contention.

First, to the extent Petitioners' arguments attempt to challenge Entergy's statements in the Extension Request regarding reliance on existing capabilities and compensatory measures, these arguments are unsupported. Petitioners simply declare that the extension "adds undue risk" and assert that Entergy did not provide a "valid argument."[121] Entergy acknowledges that Petitioners are not required to prove their case at the contention admissibility stage—but at least *some* minimal reasoned basis is required. "To proffer an admissible contention, [p]etitioners must 'explain the basis for the contention and read the relevant parts of the . . . application and show where the application is lacking'; an assertion that additional analysis is necessary, without

120 Hearing Request at 31.

121 *Id.* at 31-33.

further support . . . is not sufficient."[122] Petitioners' mere claim of "undue risk," and attempt to shift the burden onto Entergy, without explanation or even mention of a particular fact or document that supports their position is woefully inadequate to demonstrate the support required by 10 C.F.R. § 2.309(f)(1)(v).

Although Petitioners point to statements in an NRC Temporary Instruction 2515/183 Inspection Report about hydrogen considerations during primary venting, the same quotation explains the immediate corrective actions that were taken by Entergy.[123] Petitioners make no attempt to explain why the immediate corrective actions do not resolve the issue raised in the inspection report. As explained above, the presiding officer "is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[124] As Petitioners failed to provide any expert opinion or any reasoned basis, their bare assertion fails to provide the support required by 10 C.F.R. § 2.309(f)(1)(v).

Petitioners also point to other statements in the NRC Temporary Instruction 2515/183 Inspection Report about the design of the containment regarding a primary containment torus air space hardened vent system.[125] However, Petitioners provide no explanation of how this relates to the requested extension or why the requested extension (which even falls within the hard deadline for EA-13-109) cannot be granted.

Notably, Petitioners misread the EA-13-109 Extension Request as claiming that the FitzPatrick containment vent—as it existed in 2011—is "being proposed as Entergy's

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122 *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC __ (slip op. at 10) (Nov. 9, 2015).

123 Hearing Request at 36-37.

124 *Private Fuel Storage*, LBP-98-7, 47 NRC at 181 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 37 (1998).

125 Hearing Request at 37.

compensatory actions to support the [EA-13-109 Extension Request]."[126] This misreading completely ignores the actual compensatory actions proposed in the EA-13-109 Extension Request (*e.g.*, revisions to emergency operating procedures, FLEX support guidelines), and completely disregards the additional features that the EA-13-109 Extension Request notes will be added during the upcoming outage—*i.e.*, before the current implementation deadline—including seismic design modifications and HCVS mechanical and electrical tie-ins and testing.[127] Petitioners cannot simply ignore this pertinent information in the EA-13-109 Extension Request; in order to demonstrate a genuine dispute, they must "read the pertinent portions of the . . . application" and state their opposing view.[128] Petitioners have not done that here. Again, a petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[129]

Thus, this claim is unsupported, fails to raise a material issue, and fails to show that a genuine dispute exists with regard to a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv)-(vi). Accordingly, Part C of Proposed Contention 1 does not support an admissible contention.

VI. CONCLUSION

As demonstrated above, Petitioners have not identified an opportunity for a hearing. Thus, the Hearing Request is procedurally improper and should be summarily denied. Even assuming a hearing opportunity, Petitioners have not satisfied the standing requirements in 10 C.F.R. § 2.309(d) and fail to proffer a contention satisfying the admissibility requirements in

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126 *Id.* at 38.

127 *See* EA-13-109 Extension Request, Attach., at 1-3.

128 *See* Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170.

129 *See Ga. Tech.*, LBP-95-6, 41 NRC at 300, *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

10 C.F.R. § 2.309(f)(1). For these reasons, Entergy respectfully requests that the Hearing Request be rejected in its entirety.

Respectfully submitted,

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

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Dated in Washington, D.C.
this 5th day of December 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 50-333-EA
ENTERGY NUCLEAR FITZPATRICK, LLC & ENTERGY NUCLEAR OPERATIONS, INC.	)	
(James A. FitzPatrick Nuclear Power Plant)	)	December 5, 2016

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing "Entergy's Answer Opposing Request for Hearing Regarding FitzPatrick and EA-12-049, EA-12-051, and EA-13-109" were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned matter.

Signed (electronically) by Ryan K. Lighty

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