

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	Docket No. 50-271
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	December 28, 2015
(Vermont Yankee Nuclear Power Station)	)	
	)	

**MOTION TO STRIKE PORTIONS OF DECEMBER 17, 2015 REPLY FILED BY THE STATE OF VERMONT, VERMONT YANKEE NUCLEAR POWER CORPORATION, AND GREEN MOUNTAIN POWER CORPORATION**

Pursuant to 10 C.F.R. § 2.323(a), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) file this motion to strike portions of the December 17, 2015 reply (“Reply”)<sup>1</sup> of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation (“Petitioners”). Petitioners’ Reply impermissibly includes new arguments or bases related to *de facto* license amendments that are not within the scope of the original November 4, 2015 petition (“Petition”) and that do not appropriately respond to arguments raised in the answers to the Petition.<sup>2</sup> Accordingly, those new arguments and bases are impermissible and must be stricken from the Reply.

**I. BACKGROUND**

On November 4, 2015, Petitioners filed the Petition seeking Commission review of multiple issues related to the decommissioning of the Vermont Yankee Nuclear Power Station

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<sup>1</sup> Reply of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Support of Petition for Review of Entergy Nuclear Operation, Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Dec. 17, 2015) (“Reply”).

<sup>2</sup> Petition of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation for Review of Entergy Nuclear Operation, Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Nov. 4, 2015) (“Petition”).

(“Vermont Yankee”). On December 7, 2015, Entergy and the U.S. Nuclear Regulatory Commission (“NRC”) Staff filed answers opposing the Petition.<sup>3</sup> Petitioners filed their Reply on December 17, 2015, arguing, for the first time, that actions by Entergy and the NRC Staff constitute *de facto* license amendments that raise hearing rights.<sup>4</sup>

## II. LEGAL STANDARDS<sup>5</sup>

Under the Commission’s rules, “a petitioner may respond to the legal or logical arguments presented in the answers to its hearing request.”<sup>6</sup> However, “a petitioner may not use its reply to raise new issues for the first time.”<sup>7</sup> As the Commission has explained, “[i]t is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first present in the original petition or raised in the answers to it.”<sup>8</sup>

The Commission demands adherence to this requirement “so that the other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information,”<sup>9</sup> and to “avoid unnecessary delays and increase the efficiency of NRC

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<sup>3</sup> Entergy’s Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporations (Dec. 7, 2015) (“Entergy Answer”); NRC Staff Answer to the Vermont Petition for Review of Entergy Nuclear Operation Inc.’s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Dec. 7, 2015) (“Staff Answer”).

<sup>4</sup> See Reply at 5, 11-12, 14-16.

<sup>5</sup> Entergy maintains that the Petition “should be rejected for failure to satisfy *any* criteria set forth in the Commission’s Rules of Practice and Procedure in 10 C.F.R. Part 2.” Entergy Answer at 2. If the Commission ultimately agrees, the need for the instant motion would be mooted. Alternatively, if the Commission elects to entertain the Petition, its consideration necessarily must be conducted under Part 2, which “governs the conduct of *all* proceedings.” 10 C.F.R. § 2.1 (emphasis added). Thus, the filing of this motion is consistent with Entergy’s position on the Petition.

<sup>6</sup> *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC \_\_ (slip op. at 15) (Sept. 8, 2015) (citations omitted).

<sup>7</sup> *Id.* (citations omitted).

<sup>8</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>9</sup> *Fermi*, CLI-15-18, slip op. at 15 (citations omitted).

adjudication.”<sup>10</sup> Those answering are “entitled to be told at the outset, with clarity and precision, what arguments are being advanced.”<sup>11</sup> To advance a new argument, a petitioner must, among other things, “explain why it could not have raised the argument or introduced the factual support earlier.”<sup>12</sup> Thus, petitioners are precluded from merely using a reply to “reinvigorate thinly supported” pleadings.<sup>13</sup> The appropriate remedy is to strike new bases and arguments offered in a reply.<sup>14</sup>

### III. PORTIONS OF THE REPLY SHOULD BE STRICKEN

In their Petition, Petitioners urged the Commission to exercise its general supervisory authority to convene a hearing *sua sponte* to address Petitioners’ various grievances.<sup>15</sup> Petitioners also contended that a hearing opportunity was required by statute.<sup>16</sup> The Atomic Energy Act of 1954, as amended (“AEA”), requires a hearing opportunity in any proceeding for “the granting, suspending, revoking, or amending of any license.”<sup>17</sup> Petitioners asserted that their hearing request involved “license-related” matters—and that, “like” license amendment requests, “license-related” matters also entail a statutory right to a hearing.<sup>18</sup> Notably, Petitioners did not identify any action by Entergy or the NRC Staff that would constitute an actual or *de facto* license amendment. The Petition did not contain a single reference to the subject of *de*

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<sup>10</sup> *La. Energy Servs., LP* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004).

<sup>11</sup> *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975).

<sup>12</sup> *Fermi*, CLI-15-18, slip op. at 15 (citations omitted).

<sup>13</sup> *LES*, CLI-04-35, 60 NRC at 622-23.

<sup>14</sup> *See, e.g., Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006), *rev'd on other grounds*, CLI-07-16, 65 NRC 371 (2007); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 404, 429 (2008), *rev'd on other grounds*, CLI-09-3, 69 NRC 68 (2009).

<sup>15</sup> *E.g.*, Petition at 9.

<sup>16</sup> *Id.*

<sup>17</sup> AEA § 189(a)(1)(A).

<sup>18</sup> Petition at 11.

*facto* license amendments.<sup>19</sup> Nor did the Petition reference the Commission’s legal standards applicable to *de facto* license amendment claims. To the contrary, Petitioners presented a legal argument that the Commission should relax its interpretation of the AEA to require a hearing for proceedings that do *not* involve a license amendment but are merely “license-related.”

Several weeks later, in their December 17, 2015 Reply, Petitioners for the first time allege that they now have identified a “*de facto* license amendment [that] requires a hearing.”<sup>20</sup> Petitioners chose to insert these new claims in their Reply, arguing that “Entergy has effectively altered the terms of its license without filing for a license amendment,”<sup>21</sup> and that NRC Staff approval of a regulatory exemption “constitutes a *de facto* amendment.”<sup>22</sup> Contrary to their original claims in the Petition, Petitioners now claim, for the first time, that they have identified an action specifically enumerated in the AEA—a license amendment—which entitles them to a hearing. Clearly, this is a new argument and change in strategy.

Furthermore, neither Entergy’s nor the NRC Staff’s answer to the Petition contains any discussion of *de facto* license amendments.<sup>23</sup> Petitioners also make no attempt to explain why they could not have raised their *de facto* license amendment arguments when they originally filed the Petition.

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<sup>19</sup> The Petition does make a passing reference to the Vermont Yankee license conditions and claims that, “except for the one license amendment request it has now withdrawn, Entergy has not filed any other license amendment requests to relieve itself of those conditions.” *Id.* at 13. Far from arguing that the absence of a license amendment request somehow constitutes a unilateral *de facto* license amendment, Petitioners merely allege that “Entergy’s actions are in derogation of those license conditions.” *Id.*

<sup>20</sup> *Id.* at 12.

<sup>21</sup> Reply at 5.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> The Staff Answer does cite case law in which the facts of the underlying cases involved claims of *de facto* license amendments, but those citations were used to support other assertions, such as the Commission’s ability to refer matters for action under 10 C.F.R. § 2.206, and general arguments regarding the standards for discretionary hearings. *See, e.g.*, Staff Answer at 25 n.120, 45 n.210.

In summary, Petitioners' arguments regarding *de facto* license amendments impermissibly attempt to expand the scope of arguments in the original Petition and do not focus narrowly on issues raised in the answers.<sup>24</sup> Petitioners cannot use their Reply to attempt to “reinvigorate” their Petition.<sup>25</sup> The Commission should therefore strike those arguments because Entergy and the NRC Staff were not “told at the outset, with clarity and precision,”<sup>26</sup> that Petitioners were advancing a *de facto* license amendment theory, and have not been “accorded an appropriate opportunity to respond”<sup>27</sup> to these claims.

#### IV. CONCLUSION

For the reasons discussed above, Entergy requests that the Commission strike the portions of the Reply containing Petitioners' *de facto* license amendment claims. Those sections of the Reply include: Reply at 5 (first sentence of first full paragraph); 11-12 (last paragraph on page 11 extending to page 12); and 14-16 (the entirety of Section I.D). In the alternative (although disfavored because it would create rather than “avoid unnecessary delays”<sup>28</sup>), the Commission should permit Entergy and the NRC Staff to submit additional briefing to respond to Petitioners' *de facto* license amendment claims.

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<sup>24</sup> See *Fermi*, CLI-15-18, slip op. at 15; *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>25</sup> See *LES*, CLI-04-35, 60 NRC at 622-23.

<sup>26</sup> See *Wolf Creek*, ALAB-279, 1 NRC at 576.

<sup>27</sup> See *Fermi*, CLI-15-18, slip op. at 15.

<sup>28</sup> See *LES*, CLI-04-35, 60 NRC at 622-23.

Respectfully submitted,

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

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LLC and Entergy Nuclear Operations, Inc.*

Dated in Washington, DC  
this 28th day of December 2015

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NUCLEAR REGULATORY COMMISSION**

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(Vermont Yankee Nuclear Power Station)	)	December 28, 2015
	)	

**CONSULTATION**

Counsel for Entergy certifies under 10 C.F.R. § 2.323(b) that the movant has made a sincere effort to contact the other participants in this proceeding and resolve the issues raised in this Motion. The Nuclear Regulatory Commission Staff supports the Motion; the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation oppose the Motion and intend to file an opposition to the Motion.

Respectfully submitted,

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

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**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, a copy of the foregoing “Motion to Strike Portions of December 17, 2015 Reply Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation” was served upon the Electronic Information Exchange (the NRC’s E-Filing System) in the above-captioned docket.

*Signed (electronically) by Ryan K. Lighty*

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