

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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

Pursuant to 10 C.F.R. § 2.323(a)(2), the Staff of the U.S. Nuclear Regulatory Commission (Staff) respectfully requests that the Commission strike portions of the 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 Operations, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund, filed on December 17, 2015 (Reply).¹ The Reply includes a new argument: that the exemption that was issued to Entergy Nuclear Operations, Inc. (Entergy) for the Vermont Yankee Nuclear Power Station (VY) constitutes a *de facto* license amendment and should, therefore, be disallowed. Because Vermont's *de facto* license amendment argument is a new argument and improperly expands the bases for the original filing in this matter, it should be stricken.

BACKGROUND

On September 4, 2014, Entergy submitted a license amendment request (LAR) seeking to replace the VY DTF license conditions with the provisions described in the regulations at 10

¹ The Reply is available through the NRC's Agencywide Documents Access and Management System (ADAMS) at Accession No. ML15351A530.

C.F.R. § 50.75(h)(1)-(3).² A few months later, Entergy submitted a request pursuant to 10 C.F.R. § 50.12 seeking an exemption from the provisions of 10 C.F.R. § 50.82(a)(8)(i)(A) and 10 C.F.R. § 50.75(h)(1)(iv) so as to allow Entergy to be able to make withdrawals from the VY decommissioning trust fund (DTF) for certain irradiated fuel management costs and to do so without having to provide 30-days' prior written notice to the NRC.³ The Staff granted the exemption request on June 17, 2015.⁴

On July 6, 2015, Vermont requested a hearing to challenge the LAR and request for exemptions and proffered five contentions.⁵ The Atomic Safety and Licensing Board (ASLB) established to hear the matter admitted two of the contentions.⁶ Entergy then moved to withdraw the LAR, without conditions, and to dismiss the proceeding without prejudice.⁷ The Board granted Entergy's motion to withdraw the LAR without prejudice subject to certain conditions and terminated the proceeding.⁸

² Letter from Christopher Wamser, Entergy, to NRC, Proposed Change No. 310 - Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at 1 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405).

³ Letter from Christopher Wamser, Entergy, to NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 6, 2015) (ADAMS Accession No. ML15013A171).

⁴ Letter from NRC to Entergy, Vermont Yankee Nuclear Power Station - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) (June 17, 2015) (ADAMS Accession No. ML15128A219).

⁵ State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (ADAMS Accession No. ML15110A484); State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) (ADAMS Accession No. ML15187A350).

⁶ *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-24, 82 NRC __ (Aug. 31, 2015) (slip op.).

⁷ Entergy's Motion to Withdraw its September 4, 2014 License Amendment Request (Sept. 22, 2015) (ADAMS Accession No. ML15265A583).

⁸ *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-15-28, 82 NRC __ (Oct. 15, 2015) (slip op.).

On November 5, 2015, Vermont filed a petition asking the Commission to undertake a review of Entergy's use of the VY decommissioning trust fund.⁹ Pursuant to the Commission's November 10, 2015 Order,¹⁰ the Staff and Entergy filed answers on December 7, 2015¹¹ and on December 17, 2015 Vermont filed its reply.¹²

DISCUSSION

It is well established in NRC proceedings that a petitioner may not use its reply to raise new issues for the first time and cannot expand the scope of the arguments set forth in the original hearing request.¹³ Replies must focus narrowly on the legal or factual arguments first

⁹ 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. 5, 2015) (ADAMS Accession No. ML15309A758) (Petition).

¹⁰ Order (Nov. 10, 2015) (ADAMS Accession No. ML15314A822).

¹¹ 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) (ADAMS Accession No. ML15341A361) (NRC Staff Answer); Entergy's Answer Opposing November 4, 2015 Petition Filed by the State of Vermont, Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation (Dec. 7, 2015) (ADAMS Accession No. ML15341A300).

¹² 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 Operations, Inc.'s Planned Use of the Vermont Yankee Nuclear Decommissioning Trust Fund (Dec. 17, 2015) (ADAMS Accession No. ML15351A530). A more detailed discussion of the procedural history is provided in the NRC Staff Answer at pp. 13-21 (ADAMS Accession No. ML15341A361) (Reply).

¹³ *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588 (2009) *citing National Enrichment*, CLI-04-25, 60 NRC 223 (A petitioner "is confined to the contentions as initially filed and may not rectify its deficiencies through its reply brief"); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC __, __ (slip op. at 15) (Sept. 8, 2015) (held: board abused its discretion when it re-wrote contention based on new material raised by petitioner in its reply); *Crow Butte Res., Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 568 (2009); *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-225 (2004), *recons. denied*, CLI-04-35, 60 NRC 619 (2004); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996) (rejecting new argument raised for the first time on appeal); see also Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (Final Rule) (in proceeding to determine contention admissibility, "any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer").

presented in the original pleading or raised in the answers to it.¹⁴ Fundamental fairness dictates that parties should be on notice regarding what is being argued so that they can properly respond. The Commission explained that this practice ensures that “litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information.”¹⁵

While the November 5, 2015 Petition is not an appeal of an ASLB decision, it is more like an appeal than it is any other pleading. Accordingly, the case law on appeals can provide guidance here. That case law explicitly precludes the new *de facto* license amendment argument Vermont advances here. As the Commission stated in the *USEC* case, “The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address.”¹⁶ The Commission’s practice is consistent with the practice in the federal courts, which practice is also rooted in notions of fundamental fairness.¹⁷

¹⁴ *Palisades*, CLI-06-17, 63 NRC at 732; *Louisiana Energy Services*, CLI-04-25, 60 NRC at 224-225; 69 Fed. Reg. at 2203.

¹⁵ *Fermi*, CLI-15-18, 82 NRC at ___ (slip op. at 15); *Palisades*, CLI-06-17, 63 NRC at 732 (“Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims”); *Kansas Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975) (“The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being asked”).

¹⁶ *USEC Inc.* (American Centrifuge Plant), 63 NRC 433, 439 (2006).

¹⁷ *Herbert v. National Academy of Sciences*, 974 F.2d 192, 195 (D.C.Cir.1992) (“To consider an argument for the first time in reply would be manifestly unfair to the appellee [or respondent] who, under our rules, has no opportunity for a written response. Moreover, it would risk the possibility ‘of an improvident or ill-advised opinion,’ given our dependence as an Article III court on the adversarial process for sharpening the issues for decision.”); see also *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C.Cir.1990) (“We require petitioners and appellants to raise all of their arguments in the opening brief to prevent ‘sandbagging’ of appellees and respondents and to provide opposing counsel the chance to respond.”); *Nat. Res. Def. Council, Inc. v. EPA*, 25 F.3d 1063, 1071 n.4 (D.C. Cir. 1994) (“[B]ecause petitioners waited until the reply brief to raise this substantial evidence challenge, the Administrator was given no chance to respond, either by discounting the evidence cited by petitioners or pointing the court to record evidence supporting the Administrator’s conclusion.”).

In its Reply at pages 14-16, Vermont argued that the exemption “granted Entergy the latitude to use the Decommissioning Fund for purposes not allowed under its license” and that it “constitutes a *de facto* amendment” and that a standard enforcement proceeding is not adequate under these circumstances that, instead, Vermont should be afforded a hearing.¹⁸ Vermont refers to this argument in its Reply on page 5 and on the paragraph that spans pages 11 and 12. This argument appears nowhere in the Petition; it was not raised in the Answers filed by the Staff or Entergy; and as this argument does not flow logically from any prior argument, the Staff could not have anticipated it.¹⁹

Thus, fundamental fairness argues strongly in favor of this motion to strike. Allowing the *de facto* license amendment argument to stand would be manifestly unfair to the Staff. The Commission’s Order in this matter allowed the Staff only one opportunity to argue; it did not provide for a response to Vermont’s latest filing. Thus, the Staff is precluded from addressing the *de facto* license amendment argument. Should the Commission decide not to strike the *de facto* license amendment argument, the Staff respectfully requests that it be allowed an opportunity to respond.

CERTIFICATION OF CONSULTATION

I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful. Counsel for Entergy supports the Staff’s motion but counsel for Vermont opposes the motion and stated that Vermont intends to file a responsive pleading.

¹⁸ Reply at 16.

¹⁹ The *de facto* license amendment argument was not even proffered in support of contention admissibility in the proceeding before the ASLB. See *Yankee Atomic*, CLI-96-7, 43 NRC at 261.

CONCLUSION

For the reasons discussed above, counsel for the NRC Staff respectfully submits that the Commission should strike the portions of the Reply that argue that the exemption issued on June 17, 2015 constitutes a *de facto* license amendment. In the alternative, the Staff requests an opportunity to respond to the *de facto* license amendment argument.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 CFR 2.304(d)

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Dated at Rockville, Maryland
This 28th day of December, 2015

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ENTERGY NUCLEAR VERMONT YANKEE, LLC)	
AND ENTERGY NUCLEAR OPERATIONS, INC.)	Docket No. 50-271
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing “NRC STAFF MOTION TO STRIKE PORTIONS OF THE DECEMBER 17, 2015 REPLY OF THE STATE OF VERMONT, THE VERMONT YANKEE NUCLEAR POWER CORPORATION, AND GREEN MOUNTAIN POWER CORPORATION,” dated December 28, 2015, have been filed through the Electronic Information Exchange, the NRC’s E-Filing System, in the above-captioned proceeding, this 28th day of December, 2015.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 28th day of December, 2015