

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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

**ANSWER OF THE STATES TO ENTERGY’S  
MOTION TO STRIKE THE STATES’ REPLY**

In accordance with the Commission’s November 10, 2015 Scheduling Order, which stated—without limitation—that “[a]ny reply to an answer to the petition may be filed by . . . December 17, 2015,”<sup>1</sup> the States submitted their timely Reply to Entergy’s and NRC Staff’s Answers to the Petition.<sup>2</sup> Apparently concerned about how that Reply might influence the Commission’s decision on the Petition, Entergy filed a motion to strike it.<sup>3</sup> The Commission should deny Entergy’s motion because: (1) the States’ Reply was filed in accordance with the Scheduling Order, which authorized the filing of “any” reply and did not limit who could file one; (2) the States’ Reply should, alternatively, be allowed as an Amicus Brief even if the

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<sup>1</sup> Order of the Secretary of the Commission (Nov. 10, 2015) (ADAMS Accession No. ML15314A822).

<sup>2</sup> Reply of the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire to NRC Staff’s and Entergy’s Answers to the 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 (Dec. 17, 2015) (ADAMS Accession No. ML15351A531).

<sup>3</sup> Motion to Strike Impermissible December 17, 2015 Reply Filed by the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire (Dec. 28, 2015) (ADAMS Accession No. ML15362A519).

Agency Rules of Practice and Procedure for filing amicus briefs do apply (which they do not in these particular circumstances); and (3) the States' Reply does not otherwise "impermissibly expand the scope of" the arguments. Instead, the States' Reply seeks to ensure that the Commission understands the significant implications of the issues before it so that it may make a fully informed decision whether to *initiate* a proceeding and conduct a hearing on the issues raised in the Petition. Entergy's attempt to preclude such a fully informed decision is misplaced.

## **ARGUMENT**

### **I. THE COMMISSION'S SCHEDULING ORDER AUTHORIZED THE FILING OF THE STATES' REPLY.**

The States' Reply is consistent with the Commission's Scheduling Order. That Order states: "Any reply to an answer may be filed by Thursday, December 17, 2015." Scheduling Order at 1 (emphasis added). While Entergy emphasizes the Commission's use of the singular form of "reply," *see* Entergy Mot. at 3, Entergy ignores the Commission's use of the word "any"—a word that makes it irrelevant whether what follows the word "any" is singular or plural. Webster's Third New Int'l Dictionary 97 (2002) (defining "any" to mean, *inter alia*, "one, some, or all indiscriminately of whatever quantity" and stating that it is used "to indicate one that is selected without restriction or limitation"). For that reason, the phrase "any reply" encompasses both the singular and the plural just like the phrase "any person" does. Of course, if the Commission had intended to limit the phrase in the manner Entergy suggests, the Commission easily could have done so by saying instead that "*Petitioners* may file a reply by Thursday, December 17, 2015," as it has done in past orders.<sup>4</sup> The Commission did not do so.

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<sup>4</sup> *Sequoyah Fuels Corp. & General Atomics (Gore, Oklahoma Site)*, CLI-96-3, 43 N.R.C. 16, 17 (1996) (stating that "the Petitioners may file reply briefs" within "10 days after service of the responsive briefs"); *see also Louisiana Energy Servs. (Claiborne Enrichment Ctr.)*, CLI-97-

Accordingly, the Commission's Scheduling Order did not limit who could file a reply, and the States' Reply was thus both timely and properly filed in accordance with that Order's terms.

**II. THE STATES' REPLY SHOULD BE ALLOWED AS AN AMICUS BRIEF EVEN IF THE AGENCY RULES OF PRACTICE AND PROCEDURE APPLY.**

Entergy also argues that the Commission's Rules of Practice and Procedure bar the States' Reply whether it is treated as a reply or an amicus brief. *See* Entergy Mot. at 2-3. Those arguments are mistaken, both because they again ignore the Scheduling Order's plain meaning, which authorized the States' Reply, and because the requirements for amicus or reply filings in Subpart C of the Rules of Practice and Procedure simply do not apply yet. The Rules of Practice and Procedure apply generally to "all proceedings . . . under the Atomic Energy Act of 1954" (AEA), *see* 10 C.F.R. §§ 2.1 (2015), and Subpart C of those rules apply to "all adjudications conducted under . . . the [AEA] . . . and 10 CFR Part 2." *Id.* § 2.300. Although the States support Petitioners' arguments that an adjudicative hearing is required here, such a hearing has not yet been ordered. And, for that reason, Subpart C's amicus and reply filing requirements have simply not yet been triggered, a point that Entergy has conceded. In its Answer, Entergy thus argues—in an attempt to procedurally short-circuit the Petition—that there is no "active 'proceeding'" and that the Petitioners have requested only the *initiation* of "an entirely *new* proceeding." Entergy Answer at 13; *see also id.* ("Petitioners have not identified a 'pending proceeding'"; "assuming a new proceeding is convened").<sup>5</sup> Entergy cannot have it both ways.

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7, 45 N.R.C. 437, 438 (1997) (stating that "[t]he staff and LES may file reply briefs on or before September 30, 1997);

<sup>5</sup> The NRC Staff make the same assertions. *E.g.*, NRC Staff Answer at 28-29 (arguing that "[t]he matters [the Petition] seeks to raise are not appropriate for an adjudicatory proceeding," which concedes that there does not yet exist an adjudication subject to subpart C's rules of procedure).

Even if the Scheduling Order did not authorize the States' Reply *and* even if the Rules of Procedure for amicus filings did apply, the Commission's precedent dictates that it should alternatively accept the States' Reply as an amicus brief, as the States also requested. States Reply at 1 n.1. In prior decisions, as Entergy states (even though the statement is incongruous with the Company's principal argument), the Commission has held that its Rules of Practice and Procedure "contemplate *amicus curiae* briefs only after the Commission grants a petition for review, and do not provide for *amicus* briefs supporting or opposing petitions for review." *Louisiana Energy Servs.*, 45 N.R.C. at 439.<sup>6</sup> There, however, the Commission also stated that "special circumstances" may "warrant an exception" to this rule. *Id.* Special circumstances exist here. First, it would disserve the Commission to strike the States' Reply, because doing so would deprive the Commission of the ability to make a decision based on a complete airing of the issues and the significant implications they have for states and the public more generally. Second, the States committed significant time and resources to their Reply based on a good faith reading of the Scheduling Order's text. Given that fact, it would be wholly inequitable to "strike" their filing from the record, especially in light of the fact that they also are sovereign entities with special and unique responsibilities to protect their citizens and resources. *See Massachusetts v. Env'tl. Protection Agency*, 549 U.S. 497, 518-20 (2007).<sup>7</sup>

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<sup>6</sup> The fact that the Commission's rules do not "provide" for the filing of amicus briefs in this context is, of course, different from saying that the Commission absolutely will not consider them when timely filed.

<sup>7</sup> It would, of course, be ironic if the Commission decided that either its Order or its rules prohibit the States' Reply even though the States would be entitled to file such a reply in the form of an amicus brief as a matter of right if the Commission's final decision on the Petition is ultimately subject to judicial review in a United States Court of Appeals or the U.S. Supreme Court. S. Ct. R. 37(4); Fed. R. Civ. P. 29(a). "States," in other words, "are not normal litigants." *Massachusetts*, 549 U.S. at 518. It may be for that reason that the Commission has considered the information put before it by a state even when that information did not arrive *vis-à-vis* the

### III. THE STATES' REPLY AMPLIFIES PETITIONERS' ARGUMENTS AND RESPONDS TO ENTERGY'S AND NRC STAFF'S ARGUMENTS.

Entergy's final argument that the States' Reply impermissibly expands the scope of the Petition or the Answers to it is similarly misplaced. It is settled that a reply brief can “legitimately amplify” arguments made in the petition in response to applicant and NRC Staff answers.” *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4)*, LBP-15-13, 81 N.R.C. 456, 462 (Mar. 23, 2015). That is precisely what the States have done here. *see* States Reply at 1 n.1 (noting that the States filed their Reply because they have “serious concerns about how the positions NRC Staff and Entergy asserted in their Answers may affect [their] distinct interests”). As Entergy knows, the Petition, while filed to seek review of Entergy's use of Vermont Yankee's decommissioning trust fund, raises legal issues regarding the proper interpretation and application of the Commission's regulations on the use of decommissioning funds. Because those regulations apply to all nuclear power plant decommissioning funds, the resolution of those issues will, *a fortiori*, establish precedent that will apply to the use of every decommissioning fund in the nation—a point which NRC Staff has readily conceded.<sup>8</sup> Thus, the States are not requesting a hearing “on ‘every such fund in the

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correct procedural vehicle. *See Sequoyah Fuels Corp. & General Atomics*, 43 N.R.C. at 16 (stating that the State did not have a right to file a petition for review, but not striking it from the record).

<sup>8</sup> In its Answer, NRC Staff indeed argued that the Commission should deny the Petition because the issues it raises “are of broad applicability,” *see* NRC Staff Answer at 24, which is actually a basis for granting the Petition, as the NRC Staff also concede. *Id.* at 21. While the NRC recently started a potential rulemaking process to consider decommissioning issues, the Commission is under no obligation to complete that process within any particular time-frame or, for that matter, to complete it at all. *See* Regulatory Improvements for Decommissioning Power Reactors, 80 Fed. Reg. 72,358, 72,358 col.1 (Nov. 19, 2015) (stating that “[t]he NRC is soliciting public comments on the *contemplated* action . . . .” (emphasis added)). And, at the same time NRC Staff is telling the Commission to deny the Petition because the issues it raises should instead all be raised in a potential future rulemaking process, NRC staff is meeting with the

nation,” *see* Entergy Mot. at 7; instead, they are asking the Commission to resolve legal issues—raised in the Petition—that will govern the *use* of every decommissioning fund in the nation, including the funds established for nuclear plants in their States.<sup>9</sup>

Entergy’s conclusory claim that the States impermissibly “proferr[ed] a wide variety of new topics” is also incorrect. Entergy Mot. at 6.<sup>10</sup> The Petition highlighted Entergy’s refusal to commit to compensating for any shortfall in Vermont Yankee’s decommissioning trust fund, questioned NRC’s commitment to pursuing the parent company in the event of a shortfall, and noted the risks associated with “tracking down and recovering money from Entergy to replace funds that should never have been withdrawn in the first place.” Petition at 16-17.<sup>11</sup> In response, NRC Staff asserted that the Petition’s claim is “speculative.” NRC Staff Answer at 44. The States’ discussion of the risks associated with how power companies have organized their corporate structures in general in the event of a fund shortfall and their focus on Entergy’s corporate structure in particular—the licensee here—are tied directly to points made in the

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Nuclear Energy Institute (NEI) to give NEI feedback on the industry’s proposed guidance on the use of decommissioning funds. *See* Mem. from Joseph J. Halonich, Sr. Project Manager, Licensing Processes Branch, Div. of Policy and Rulemaking, Office of Nuclear Reactor Regulation, to Kevin Hsueh, Chief, Licensing Processes Branch, Div. of Policy and Rulemaking, Office of Nuclear Reactor Regulation, Subj: Forthcoming Meeting with the Nuclear Energy Institute (Dec. 16, 2015) (ADAMS Accession No. ML15344A105).

<sup>9</sup> Petition at 18 (stating that “although a number of the issues raised here are specific to Vermont Yankee, many other stakeholders need to know what licensees can or cannot do with decommissioning funds”).

<sup>10</sup> Entergy also complains about the States’ reference to a bill filed in the Massachusetts Legislature, *see* Entergy Mot. at 6, but it does not explain how that citation prejudices it in any way. That is likely because Entergy cannot do so, because the States cited that bill only to demonstrate the broad public concern about the use of decommissioning funds and whether those funds will be sufficient to decontaminate closed sites. States’ Reply at 3 n.5. The broad public concern about the use of decommissioning funds is something from which Entergy cannot hide.

<sup>11</sup> The Petition also mentioned risks associated with dissolution of the company, the illusory nature of Entergy’s current parental guarantee, and a recent NRC-approved change in Entergy’s corporate structure. Petition at 17 nn.7-9.

Petition and NRC Staff's Answer and otherwise amplify them, as the Commission's precedents clearly allow. *Florida Power & Light Co.*, 81 N.R.C. at 462. While Entergy may not like those points, they are clearly properly before the Commission.

### CONCLUSION

The Commission must grant a hearing when “a hearing is required by the [AEA] or” the Commission’s regulations *or* when the Commission “finds that a hearing is required in the public interest.” 10 C.F.R. § 2.104(a). Here, the States have explained the significant consequences of the Commission’s decision on the Petition and the issues raised by it and why it is so important to the States and their citizens that the Commission grant a hearing on the Petition now. *E.g.*, States Reply at 1-3. In other words, the States have explained why the public interest requires a hearing now. The Commission cannot reasonably make that decision, however, if it refuses to consider the timely filed views of the public’s representatives—the States.<sup>12</sup> For that reason, and the additional ones set forth above, the States respectfully request that the Commission deny Entergy’s Motion to Strike the States’ Reply and grant a hearing on the Petition.<sup>13</sup>

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<sup>12</sup> Recently, the NRC cited a “lack of any evidence even remotely suggesting that the Commission will be derelict in responding to the concerns of a co-sovereign” to support its motion to dismiss Vermont’s petition to the U.S. Court of Appeals for the D.C. Circuit so that the matters raised there could be addressed in this proceeding. Respondents’ Reply to Petitioners’ Opposition to Respondents’ Motion to Dismiss at 7 (Dec. 21, 2015) in *Vermont v. U.S. Nuclear Regulatory Comm’n*, No. 15-1279 (D.C. Cir.). A decision to strike a brief filed on behalf of three sovereign States would, however, constitute exactly that type of evidence.

<sup>13</sup> If the Commission grants a hearing on the Petition and thus initiates a proceeding and the Commission has not already deemed the States parties to that proceeding, then the States will pursue the desired status in accordance with Subpart C at the appropriate time.

Dated: January 15, 2016

Respectfully submitted,

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

THE COMMONWEALTH OF  
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NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

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|  | ) |                   |
| (Vermont Yankee Nuclear Power Station) | ) |                   |
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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 Answer was served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above captioned docket.

/ Signed (electronically) by/  
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