

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
Entergy Nuclear Generation Co.)	Docket No. 50-293-LR
And Entergy Nuclear Operations, Inc.)	
(Pilgrim Nuclear Power Station))	July 21, 2011

**COMMONWEALTH OF MASSACHUSETTS ANSWER IN OPPOSITION TO
ENERGY'S MOTION TO STRIKE PORTIONS OF MASSACHUSETTS REPLY**

The Commonwealth of Massachusetts (Commonwealth) hereby submits this Answer in opposition to Entergy's Motion to Strike¹ the Commonwealth's Reply.² Entergy's Motion relies upon case law and a factual record that do not support the Motion as claimed; the Motion also impermissibly seeks to have the ASLB make premature decisions on the scope and substance of the Commonwealth's contention which should be resolved later in the adjudicatory process. Therefore, the Motion should be denied.

First, Entergy claims that portions of the Commonwealth's Reply should be struck because, under NRC case law, a deficient contention cannot be saved by statements submitted in a reply. *See e.g.* Entergy Motion at 2 *citing Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223 (2004). However, the

¹ Entergy Motion to Strike Portions of the Commonwealth of Massachusetts Reply to Entergy and NRC Staff Answers Opposing Waiver Petition and Motion to Admit Contention (July 15, 2011) (Entergy Motion).

² Commonwealth of Massachusetts Reply to the Responses of the NRC Staff and Entergy to Commonwealth Waiver Petition and Motion to Admit Contention or in the Alternative for Rulemaking (July 5, 2011) (Commonwealth Reply); Declaration of Gordon R. Thompson in Reply to Entergy's Answer of June 27, 2011 and NRC Staff's Response of June 27, 2011(July 5, 2011).

Commonwealth's contention as initially filed clearly satisfies the NRC's pleading requirements;³ therefore the cases relied upon by Entergy have no application to this case.

Second, having submitted expert declarations in opposition to the Commonwealth's contention, Entergy now complains that the Commonwealth should not be permitted to contest those opinions with an expert reply declaration of its own, and that the Commonwealth is impermissibly "making new arguments" and "impermissible new claims." Entergy Motion at 4 -5. However, having opened the door to challenge the Commonwealth's contention with its own expert declaration, Entergy's complaint is inconsistent with the Commission's own rule allowing for a reply in these circumstances⁴ and standard rules of practice for rebuttal.⁵

For example, Entergy claims it is impermissible rebuttal for the Commonwealth's expert to discuss "direct experience" at Fukushima as an appropriate measure to test Entergy's PRA analysis and related matters, *see* Entergy Motion at 5, even though Entergy itself previously and repeatedly argued incorrectly that direct experience has no place in PRA analysis.⁶ Similarly, when the Staff in opposition claimed that a SAMA analysis "has no direct safety or environmental significance," the Commonwealth

³ *See e.g.* Commonwealth of Massachusetts Motion to Admit Contention and, if Necessary, to Re-open Record Regarding New and Significant Information Revealed by the Fukushima Accident (June 2, 2011).

⁴ 10 C.F.R. § 2.309 (h)(2).

⁵ Indeed, since Entergy's opposition to the Commonwealth's contention relied upon expert-supported arguments that the Commonwealth had not previously seen, necessarily the Commonwealth in turn must rely upon its own expert to contest them. *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-07-13, 66 N.R.C. 131, 163, n. 40 (2007)(Marshall, J. dissent) *citing Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 N.R.C. 98, 102 (1993); *see also American Manufacturers Mutual Co. v. American Broadcasting – Paramount Theaters, Inc.*, 388 F. 2d 272, 280 (2d Cir. 1967)(party opposing motion for summary disposition must proffer rebutting evidence to demonstrate a genuine material issue in dispute for trial).

⁶ *See* Commonwealth Reply at 8 – 9 (discussing Staff and Entergy challenges to the use of direct experience).

appropriately rebutted that claim.⁷ It also is illogical for Entergy to argue that issues which it raised in opposition to the Commonwealth's initial contention and expert declaration,⁸ and which the Commonwealth then responded to in rebuttal, somehow are "new" and outside the scope of the matters raised by the initial contention itself. To the contrary, these matters arose from the debate on the Commonwealth's initial contention, are "reasonably inferable" from the contention, and thus fall permissibly within its scope. *See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 2010 WL 1235387, *15 (2010).⁹

Moreover, Entergy's claim that these are "new" issues also is refuted by the factual record. For example, Entergy asserts that the Commonwealth's expert initially did not address the issue of the NRC's Accident Sequence Precursor (ASP) program. Entergy Motion at 6. Yet a report relied upon by Dr. Thompson in his Report expressly did so.¹⁰ Entergy also argues that the Thompson Report did not raise a "nuclear safety regulation" claim, but was only an "environmental contention seeking to challenge Pilgrim's ... SAMA analysis." Entergy Motion at 4. That assertion is incorrect because the Commonwealth's NEPA claims overlap and in part rely upon the same impacts of concern as do AEA safety concerns. *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 730 (3rd Cir. 1989)(noting the overlap in AEA and NEPA issues and indicating that

⁷ *See* Commonwealth Reply at 7 quoting NRC Staff's response to Commonwealth of Massachusetts' Motion to Admit Contention and, if Necessary, Reopen the Record Regarding New and Significant Information Revealed by the Fukushima Accident (June 27, 2011).

⁸ Declaration of Dr. Gordon R. Thompson in Support Of Commonwealth Of Massachusetts' Contention and Related Petitions And Motions (June 1, 2011); New and Significant Information from the Fukushima Daiichi Accident in the Context of Future Operation of the Pilgrim Nuclear Power Plant (June 1, 2011) (collectively, "Thompson Report").

⁹ Entergy suggests that the Commonwealth's impermissibly "new" and burdensome claims extend even to such foundational statements by the Commonwealth's expert as that Entergy should "uphold high scientific standards." *See* Entergy Motion at 5.

¹⁰ *See* Thompson Report at fn. 35, *citing* H. Hirsch et al., *IAEA Safety Targets and Probabilistic Risk Assessment* (Hannover, Germany: Gesellschaft für Okologische Forschung und Beratung, August 1989)(report discussing ASP program, *see* pp 36-41).

both statutes must be satisfied to support licensing). Entergy's assertion also is incorrect because the Thompson Report challenged six separate deficiencies at Pilgrim – not just the SAMA analysis – based upon the lessons learned from Fukushima. Thompson Report at 29 – 31 (summary of findings).

Finally, the ASLB should decline Entergy's request to preempt the standard discovery and litigation process by speculating at this time on all issues or interpretations of fact or law that may be raised by the Commonwealth's contention. *Cf.* Entergy Motion at 4 – 5. The Commonwealth is not required to prove its case at the contention admission stage of the proceeding or “to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 623 (2004). The Commonwealth has met this initial burden.

Beyond this, and consistent with its right of reply, the Commonwealth is not constrained from providing additional support in rebuttal, where Entergy has chosen to contest certain issues at the contention admission stage of the proceeding. And consistent with the Commission's rules of practice, the Commonwealth expects to offer further evidentiary support for its contention later in the discovery and litigation process.

Conclusion

Entergy's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Commonwealth of Massachusetts Answer in Opposition to Entergy's Motion to Strike Portions of Massachusetts Reply, dated July 21, 2011, were provided to the Electronic Information Exchange for service on the individuals below:

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