

May 11, 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	EA-12-050 and EA-12-051
All Operating Boiling Water Licensees)	
With Mark I and Mark II Containments and)	ASLBP No. 12-918-01-EA-BD01
In the Matter of)	
All Power Reactor Licensees and Holders)	
of Construction Permits in Active or)	
Deferred Status)	

MOTION TO STRIKE

Pursuant to 10 C.F.R. § 2.323, Entergy Nuclear Operating Company and Entergy Nuclear Operations, Inc. (collectively “Entergy”) move to strike portions of “Pilgrim Watch Reply to Answers to Pilgrim Watch Requests for Hearing,” (the “Reply”) filed by Pilgrim Watch (“Petitioner”) on May 4, 2012. Petitioner’s Reply makes new arguments for the first time on reply, which exceed the permissible scope of a reply. Accordingly, the portions of the Reply discussed herein should be stricken from the record.

I. Background

On April 2, 2012, Petitioner submitted to the U.S. Nuclear Regulatory Commission (“NRC”) “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Reliable Hardened Containment Vents,” requesting a hearing on an order issued by the NRC to several power reactor licensees, including Entergy. “Order to Modify Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately),” EA-12-050 (Mar. 12, 2012). That same day, Petitioner also submitted to the NRC “Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses with Regard to Spent [sic] Reliable

Spent Fuel Pool Instrumentation,” requesting a hearing on another order issued by the NRC to power reactor licensees, including Entergy. “Order Modifying Licenses with Regard to Reliable Spent Fuel Pool Instrumentation (Effective Immediately),” EA-12-051 (Mar. 12, 2012).¹ Collectively, the two petitions are referred to herein as the “Hearing Requests,” and the two orders, EA-12-050 and EA-12-051, are referred to as the “Orders.” On April 27, 2012, pursuant to 10 C.F.R. § 2.309(h)(1), Entergy and the NRC staff submitted answers opposing the Hearing Requests (collectively, “Answers”).² On May 4, 2012, Petitioner filed its Reply.

In its Reply, Petitioner presents two new arguments, calling them “common adverse effects” – one pertaining to “Backfitting” and one pertaining to what Petitioner characterizes as “Socio-psychological factors.” In its “Backfitting” argument, Petitioner seems to claim that, unless the Orders are changed to include the additional measures it proposes in its contentions, *i.e.*, filtered vents, rupture discs and low-density, open-frame pool storage, such measures would only be addressed by the Commission as backfits that would have to pass a cost-benefit analysis “rooted in a pre-Fukushima way of thinking and assumptions.” Reply at 6. For that reason, Petitioner argues that “there is little chance that any regulatory action [including apparently the measures it proposes] . . . would pass the [cost-benefit] test.” *Id.*

¹ On April 3, 2012, Beyond Nuclear also submitted a request to be added as a co-petitioner to the Petitioner’s Hearing Requests, which Entergy also opposed. On May 9, 2012, Beyond Nuclear withdrew from the proceeding.

² *See, e.g.*, “Entergy’s Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Reliable Hardened Containment Vents”; “Entergy’s Answer to Pilgrim Watch Request for Hearing Regarding Insufficiency of Order Modifying Licenses With Regard to Spent Reliable Spent Fuel Pool Instrumentation.” A number of other power reactor licensees also submitted answers. On May 9, 2012, the Licensing Board issued a scheduling order explaining that the other licensees’ answers would be treated as *amicus curiae* briefs. *Id.* at 3 n. 5.

In the “Socio-psychological factors” argument, Petitioner claims that, because the “Orders recognize that measures are required to ensure ‘adequate protection to the health and safety of the public,’” the public and regulators will presume that the Orders are all that needs to be done to incorporate the lessons-learned from Fukushima and that this “presumption is likely to act as a sedative and foster a hubristic viewpoint that the plants are now safe (fixed) so that there is no real need to do more,” thus putting the public at greater risk. Reply at 7.

II. Legal Standard

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, to expand the scope of arguments set forth in the original petition, or to cure an otherwise deficient contention. *See, e.g., USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006)* (“The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had the opportunity to address.”) (citing *Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)* (“LES”)). As the Commission has stated: “[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 presented in the original petition or raised in the answers to it.” *Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)* (“Palisades”) (citation omitted).

The Commission’s prohibition on new arguments in replies is based on the Commission’s interest in conducting adjudicatory hearings efficiently and basic

principles of fairness. The Commission has recognized that, “[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.” *LES*, CLI-04-25, 60 NRC at 225. It has further stated that “there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (internal quotation marks omitted). Accordingly, a petitioner must include all of its arguments and claims in its initial filing.

Moreover, because NRC regulations do not allow the other parties to respond to a petitioner’s reply (*see* 10 C.F.R. § 2.309(h)(3)), principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the licensee’s or NRC Staff’s answer. “Allowing new claims in a reply . . . would unfairly deprive other participants of an opportunity to rebut the new claims.” *Palisades*, CLI-06-17, 63 NRC at 732; *see also* Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004) (“Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”). In short, the Commission has been clear that any new arguments raised in a reply must be stricken.

III. Basis for Motion to Strike

Both Entergy and the NRC Staff argued in their answers that the Petitioner did not allege an injury from the Orders being sustained. *See* Entergy’s Hardened Vents Answer at 9, 10-11; Entergy’s Spent Fuel Pool Instrumentation Answer at 9 (noting that

Petitioner was asking for a “supplemental order,” not a rescission of the order at issue), 11; NRC Staff Answer at 7. Although Petitioner does not clearly articulate how the arguments it presents as “Common Adverse Effects” relate to its Hearing Requests, it appears that Petitioner is seeking to provide the required allegations of injury to establish standing. For the reasons set forth herein, the entirety of the “Backfitting” discussion on pages 6-7 of the Reply and the entirety of the “Socio-psychological factors” discussion on page 7 of the Reply should be stricken from the record. These are new arguments that were not presented in Petitioner’s Hearing Requests and that do not respond to matters raised in the Answers.

As explained above, a reply may not be used as a vehicle to introduce new arguments or support, to expand the scope of arguments set forth in the original petition, or to cure an otherwise deficient petition. *See, e.g., LES, CLI-04-25, 60 NRC at 225.* Moreover, allowing a reply to include new arguments is unfair to the other parties because they do not get an opportunity to respond (*see* 10 C.F.R. § 2.309(h)(3)), and, as the Commission has pointed out, it would provide a petitioner with a means to circumvent the NRC’s filing deadlines. *Duke, CLI-03-17, 58 NRC at 428-29* (“[t]here would be no end to NRC licensing proceedings” if petitioners could continue to add new arguments). Because the “backfitting” harm³ and “socio-psychological harm”

³ Even if Petitioner had raised it in the Hearing Requests, the “backfitting” argument does not give rise to the requisite allegation of “injury” because, among other reasons, Petitioner assumes, incorrectly, that the Commission found the actions required by the Orders are sufficient to ensure the plants provide “adequate protection to the health and safety of the public,” *i.e.*, that the Order in question represents the end of the discussion about vents. However, the Commission found only that the actions in the Hardened Vents Order were necessary to ensure the minimum level of adequate protection required; it made no finding about sufficiency. *Id.* at 6-7 (“the NRC has concluded that these measures are necessary to ensure adequate protection of public health and safety under the provisions of the backfit rule.”). With respect to the Spent Fuel Pool Instrument Order, the Commission administratively exempted that Order from the Commission’s backfit rule. *Id.* at 7. It is possible that additional actions could be found to be necessary for adequate protection, and no cost-benefit analysis would be required under 10 C.F.R. § 50.109. Petitioner

arguments⁴ were not raised in the Hearing Requests, nor were they raised in the Answers, they constitute new arguments that, under well-settled NRC case law, must be stricken from the record.

IV. Conclusion

For the reasons set forth above, the “Backfitting” section on pages 6-7 of the Reply and the “Socio-psychological factors” section on pages 7 of the Reply should be stricken from the record.

seems to assume, without any explanation or basis, that the Commission is precluded from finding that the Petitioner’s recommended additional actions (*e.g.*, filtered vents) are necessary to ensure adequate protection. Moreover, such a “conjectural or hypothetical injury” is insufficient to establish standing to intervene. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998), *citing Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998) (stating that a petitioner must demonstrate that it will likely suffer an injury that is “distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical.”).

⁴ Even if the Petitioner had raised the “socio-psychological factors” argument in its Hearing Requests, it would not constitute an adequate allegation of “injury” for the reasons similar to those identified in n.3 above, *i.e.*, it presumes, incorrectly, that the actions required by the Orders are sufficient to ensure adequate protection and also presumes that others will believe so as well, and that this would negatively impact their behavior. There is no reason to assume, as the Petitioner alleges, that the public and regulators will be lulled into complacency simply because these Orders have been issued. Indeed, the sheer number of ongoing Fukushima-related meetings at the NRC, in which Petitioner acknowledges in its Reply that it participates, demonstrates that far from lulling the Commission or others into a false sense of security, the Orders are just part of the ongoing post-Fukushima actions. Moreover, the Petitioner’s argument sets forth a “conjectural or hypothetical” injury, and it ignores other ongoing post-Fukushima activities that the NRC has identified for further regulatory action. *See, e.g.*, Hardened Vents Answer at 23; “Request for Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident” (Mar. 12, 2012) at 5 and Enclosure 5 (discussing ongoing emergency preparedness issues).

CERTIFICATION

As required by 10 C.F.R. § 2.323(b), counsel for Entergy certifies that we have consulted with the NRC Staff and Pilgrim Watch and made a sincere effort to resolve the issues raised in this Motion. The NRC Staff has advised Entergy that it takes no position on the Motion. Pilgrim Watch stands by its Reply and is unwilling to support Entergy's suggestion that the two new arguments presented in its Reply are beyond the proper scope of a reply.

Respectfully submitted,

/Signed electronically by Mary Anne Sullivan/

Mary Anne Sullivan

Daniel F. Stenger

Amy C. Roma

Ruth M. Porter

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

ATTORNEYS FOR ENTERGY NUCLEAR OPERATING COMPANY AND
ENTERGY NUCLEAR OPERATIONS, INC.

Dated in Washington, D.C. this
11th Day of May 2012

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	EA-12-050 and EA-12-051
All Operating Boiling Water Licensees)	
With Mark I and Mark II Containments and)	ASLBP No. 12-918-01-EA-BD01
In the Matter of)	
All Power Reactor Licensees and Holders)	
of Construction Permits in Active or)	
Deferred Status)	

CERTIFICATE OF SERVICE

I hereby certify that copies of “Motion to Strike,” dated May 11, 2012, have been served upon the following persons by Electronic Information Exchange (EIE) on this 11th day of May 2012.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001

Administrative Judge
Alan S. Rosenthal, Chair
E-mail: alan.rosenthal@nrc.gov

Administrative Judge
E. Roy Hawkens
E-mail: roy.hawkens@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta
E-mail: Anthony.baratta@nrc.gov

Jonathan Eser, Law Clerk
E-mail: jonathan.eser@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: OCAAMail.Resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, DC 20555-0001
Carrie Safford, Esq.
E-mail: carrie.safford@nrc.gov
Christopher Hair, Esq.
E-mail: Christopher.hair@nrc.gov
Mauri Lemoncelli, Esq.
E-mail: Mauri.lemoncelli@nrc.gov
Catherine Scott, Esq.
E-mail: clm@nrc.gov
E-mail: OGCMailCenter.Resource@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Pilgrim Watch
148 Washington Street
Duxbury, MA 02332
Mary E. Lampert, Director
E-mail: mary.lampert@comcast.net

Morgan, Lewis & Bockius, LLP
1111 Pennsylvania, Ave. N.W.
Washington, D.C. 20004
Paul M. Bessette, Esq.
E-mail: pbessette@morganlewis.com
Stephen J. Burdick, Esq.
E-mail: sburdick@morganlewis.com

Beyond Nuclear
6930 Carroll Avenue Suite 400
Takoma Park, MD 20912
Tel. 301 270 2209 x3
Paul Gunter, Director
Reactor Oversight Project
E-mail: paul@beyondnuclear.org

Pillsbury Winthrop Shaw Pittman
2300 N Street, NW
Washington, DC 20037
David Lewis, Esq.
Counsel for Dominion
E-mail: David.lewis@pillsburylaw.com
Jay Silberg, Esq.
E-mail: jay.silberg@pillsburylaw.com
Stephen L. Markus, Esq.
E-mail: Stephen.markus@pillsburylaw.com

Balch & Bingham LLP
1710 Sixth Avenue North
Birmingham, AL 35203-2015
M. Stanford Blanton, Esq.
E-mail: SBlanton@balch.com
Derek J. Brice, Esq.
E-mail: dbrace@balch.com
April Leemon, Paralegal
E-mail: aleemon@balch.com

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111
Tyson Smith, Esq.
E-mail: trsmith@winston.com

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Donald P. Irwin, Esq.
Counsel for Detroit Edison
E-mail: dirwin@hunton.com
Stephanie Meharg, Esq.
E-mail: smeharg@hunton.com

Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
David A. Repka, Esq.
Counsel for Pacific Gas & Electric Co.
E-mail: drepka@winston.com
Carlos L. Sisco, Paralegal
E-mail: csisco@winston.com

Detroit Edison Company
One Energy Plaza
Detroit, MI 48226-1279
Jon P. Christinidis, Esq.
Office of the General Counsel
E-mail: christinidisj@dteenergy.com

Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
William A. Horin, Esq.
Counsel for Energy Northwest
E-mail: whorin@winston.com
Rachael Miras-Wilson, Esq.
E-mail: rwilson@winston.com

Dominion Resources Services, Inc.
120 Tredegar Street, RS-2
Richmond, VA 23219
Lillian M. Cuoco, Esq.
Senior Counsel
E-mail: Lillian.cuoco@dom.com

Florida Power & Light Company
801 Pennsylvania Avenue, NW
Suite 220
Washington, DC 20004
Mitchell Ross, Esq.
E-mail: mitch.ross@fpl.com
Steven Hamrick, Esq.
E-Mail: Steven.hamrick@fpl.com

Respectfully submitted,

/Signed electronically by Mary Anne Sullivan/
Mary Anne Sullivan

ATTORNEY FOR ENTERGY NUCLEAR OPERATING COMPANY AND ENTERGY
NUCLEAR OPERATIONS, INC.