

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

**MOTION TO STRIKE IMPERMISSIBLE DECEMBER 17, 2015 REPLY
FILED BY THE COMMONWEALTH OF MASSACHUSETTS
AND THE STATES OF CONNECTICUT AND NEW HAMPSHIRE**

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 the December 17, 2015 filing, styled as a Reply (the “Filing”),¹ of the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire (collectively, “States”). The States were not among the participants who filed the original November 4, 2015 petition (“Petition”)² and, therefore, the States have no right of reply to the answers filed by Entergy and the U.S. Nuclear Regulatory Commission (“NRC”) Staff on December 7, 2015.³ The States alternatively ask that their Filing be considered an *amicus* brief, but that too contravenes regulatory requirements applicable to

¹ 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).

² 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”).

³ 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”).

such briefs. The Filing also seeks to impermissibly broaden the scope of issues raised in the Petition. Accordingly, the Filing should be stricken in its entirety.⁴

I. BACKGROUND

On November 4, 2015, the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation (“Petitioners”) filed the Petition seeking Commission review of multiple issues related to the decommissioning of Vermont Yankee Nuclear Power Station (“Vermont Yankee”). On November 10, 2015, the Secretary of the Commission issued an Order setting a schedule for further briefing (“Briefing Order”), directing answers to be filed by December 7, 2015, and the “reply” (singular) to be filed by December 17, 2015.⁵ On December 7, 2015, Entergy and the NRC Staff filed answers opposing the Petition.⁶ Petitioners filed their reply on December 17, 2015.⁷ The States submitted the Filing on December 17, 2015, styled as a “reply” to the answers filed by Entergy and the NRC Staff.⁸ Likely understanding that they had no right of reply, the States asked the Commission, in the alternative, to treat the Filing as an *amicus curiae* brief.⁹

⁴ 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.

⁵ See Order of the Secretary of the Commission (Nov. 10, 2015).

⁶ See Entergy Answer; Staff Answer.

⁷ 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).

⁸ Filing at 1.

⁹ *Id.* at 1 n.1.

II. THE STATES' PROFFERED "REPLY" IS PROHIBITED BY COMMISSION REGULATIONS

The States' Filing should be stricken because they have no right of reply in this matter. The States reason that, "because the Secretary's November 10, 2015 Order did not limit the persons who may file a reply," anyone was free to do so.¹⁰ However, the Briefing Order only referred to a singular "reply" and reasonably can only be interpreted as referring to a reply by Petitioners. Moreover, the State's interpretation of the Briefing Order is inconsistent with Commission regulations and adjudicatory precedent, and must be rejected.

Commission regulations at 10 C.F.R. § 2.309(i)(2) explain that only "the participant who filed" the hearing request may file a reply. None of the States were among the participants who filed the initial Petition and hearing request. The regulations are otherwise explicit—" [n]o other written . . . replies will be entertained."¹¹ More specifically, as relevant here, this regulation has been found to "forbid[]" the filing of a reply by a government entity that did not file the original petition.¹² Contrary to the States' claim that the absence of limiting language in the Briefing Order constituted an open call for any member of the public to submit a "reply," Commission regulations plainly forbid this interpretation. Thus, the Filing (viewed as a reply) is prohibited by law and may not be "entertained" in this matter.

Even assuming, *arguendo*, the absence of this explicit regulatory prohibition, the Filing still would be impermissible because where there is no codified right to a reply, those who do not seek leave to file a reply are expressly denied the opportunity to do so.¹³ The States sought no such leave from the Commission. Nor did the States consult with the other participants on such a

¹⁰ *Id.*

¹¹ 10 C.F.R. § 2.309(i)(3).

¹² *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 456 (2009).

¹³ *See, e.g., Sequoyah Fuels Corp.* (Source Materials License No. Sub-1010), LBP-94-39, 40 NRC 314, 316-17 (1994).

motion, contrary to 10 C.F.R. § 2.323(b);¹⁴ this, alone, is sufficient to reject the Filing.¹⁵

Accordingly, the Commission should strike the Filing in its entirety.

III. THE STATES' PROFFERED *AMICUS* BRIEF IS SIMILARLY PROHIBITED BY COMMISSION REGULATIONS

Alternatively, the States “request that the Commission treat [the Filing] as an *amicus* brief.”¹⁶ However, the Filing was not accompanied by a motion for leave to submit an *amicus* brief, as required by Commission regulations; and Commission regulations disallow *amicus* briefs at the initial petition stage. Accordingly, the Filing (if viewed as an *amicus* brief) is improper and should be stricken.

A state that wishes to file an *amicus* brief must file a motion for leave to do so in accordance with the procedures in 10 C.F.R. § 2.315(d).¹⁷ The regulation is clear—*amicus* briefs “shall” be accompanied by a motion for leave to file the brief.¹⁸ This is not an empty procedural requirement; “Permission to file an *amicus* brief under 10 C.F.R. § 2.315(d) is at the discretion of the Commission,”¹⁹ and a motion is the mechanism to request that necessary permission without embedding the submission in the record, as if by right. Even assuming the Filing, itself, generously could be viewed as the required motion, such a motion must fail because the States

¹⁴ “A motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b) (emphasis added).

¹⁵ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-29, 68 NRC 899, 902 n.12 (2008) (rejecting a motion for failing to comply with consultation requirements of Section 2.323(b)).

¹⁶ Filing at 1 n.1.

¹⁷ *Sequoyah Fuels Corp. & General Atomics* (Gore, OK Site), CLI-96-3, 43 NRC 16, 17 (1996).

¹⁸ 10 C.F.R. § 2.315(d). Also, “[u]nless the Commission provides otherwise,” this procedural defect is not curable by a supplemental filing because the motion and brief were due by December 17, 2015. See 10 C.F.R. § 2.315(d); Briefing Order at 1.

¹⁹ *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-08-22, 68 NRC 355, 359 (2008). See also 10 C.F.R. § 2.315(d) (*amicus* filing is only permitted “in the discretion of the Commission”).

also did not consult with the other participants, as required by 10 C.F.R. § 2.323(b).²⁰ As the Filing violates both 10 C.F.R. §§ 2.315(d) and 2.323(b), the Commission should strike the document entirely.

Furthermore, Commission regulations prescribe a condition precedent to submission of an *amicus* brief: “Our rules contemplate *amicus curiae* briefs *only after* the commission grants a petition,” and “do not provide for *amicus* briefs supporting or opposing petitions.”²¹ As the Commission has not yet ruled on the Petition in this matter, the States’ proffered *amicus curiae* brief, which merely “supports” the Petition,²² is prohibited by NRC regulations and should be stricken.

IV. THE FILING IMPERMISSIBLY EXPANDS THE SCOPE OF ARGUMENTS SET FORTH IN THE PETITION

Moreover, even if the States had filed a proper motion for leave to file a reply or an *amicus* brief, had properly consulted on that motion, and Commission regulations did not explicitly prohibit *amicus* briefs supporting or opposing petitions or did not explicitly prohibit replies from participants other than the one who filed the hearing request, the Filing still impermissibly expands the scope of arguments set forth in the Petition and should be stricken for that additional reason.

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 presented in the original petition or

²⁰ “A motion *must be rejected*” for this reason alone. 10 C.F.R. § 2.323(b) (emphasis added); *see also, e.g., Indian Point*, CLI-08-29, 68 NRC at 902 n.12.

²¹ *La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-97-7, 45 NRC 437, 438-39 (1997) (citing 10 C.F.R. § 2.715(d), now § 2.315(d)) (emphasis added).

²² Filing at 1 n.1.

raised in the answers to it.”²³ Those answering are “entitled to be told at the outset, with clarity and precision, what arguments are being advanced.”²⁴ *Amicus* briefs are similarly limited to matters already at issue in a proceeding. “[A]n *amicus curiae* necessarily takes the proceeding as it finds it. An *amicus curiae* can neither inject new issues into a proceeding nor alter the content of the record developed by the parties.”²⁵

The States claim that their interests are “aligned with Vermont’s,” but in reality they seek to expand the scope of the proposed proceeding well beyond just Vermont Yankee—a shutdown plant—to broadly encompass subject matters applicable to “operational nuclear power plant[s].”²⁶ The States also impermissibly attempt to “inject new issues [and] alter the content of the record”²⁷ by proffering a wide variety of new topics, from proposed legislation in Massachusetts,²⁸ to letters from the New York Attorney General’s Office,²⁹ to arguments about corporate structure³⁰—none of which were the subject of or even mentioned in the original Petition, contrary to NRC requirements.³¹

The Petition, while broadly drafted, pertains specifically to “the use of the Decommissioning Fund for *Vermont Yankee*.”³² However, the States’ Filing seeks to transform

²³ *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

²⁴ *Kan. Gas & Elec. Co. & Kan. City Power & Light Co.* (Wolf Creek Generating Station, Unit 1), ALAB-279, 1 NRC 559, 576 (1975).

²⁵ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-862, 25 NRC 144, 150 (1987).

²⁶ Filing at 2.

²⁷ *See Seabrook*, ALAB-862, 25 NRC at 150.

²⁸ Filing at 3 n.5.

²⁹ *Id.* at 9 n.17.

³⁰ *Id.* at 9-10.

³¹ *See Seabrook*, ALAB-862, 25 NRC at 150.

³² Petition at 8 (emphasis added). More specifically, the Petition identifies the “SCOPE OF REQUESTED REVIEW,” which includes six topics related to the Vermont Yankee Decommissioning Fund for which Petitioners seek review in the requested hearing. *Id.* at 8-9. None of those six topics identifies other states.

the proposed proceeding—specific to Vermont Yankee—into a forum for resolution of broad policy “questions about the use of decommissioning trust funds that apply to every such fund in the nation, including the funds for Entergy’s Pilgrim Nuclear Power Station (Pilgrim) in Plymouth, Massachusetts, and the James A. FitzPatrick Nuclear Power Plant (FitzPatrick) in Scriba, New York.”³³ Thus, the Filing impermissibly³⁴ seeks to expand upon the original scope, essentially demanding a hearing before the Commission on “every such fund in the nation.”³⁵ Whether viewed as a reply or an *amicus* brief, the Filing plainly does not “focus narrowly on the legal or factual arguments first present in the original petition,”³⁶ and impermissibly attempts to inject new issues into the requested proceeding.³⁷ Accordingly, the Filing is improper and must be stricken.

V. THE STATES’ REQUEST FOR “PARTY STATUS” IS DEFICIENT AND IMPROPER

Finally, in the last sentence of the last section of the Filing, the States request, for the first and only time in the Filing, that the Commission “grant the States party status.”³⁸ The States provide no explanation, discussion, or legal or factual support for their request. Conversely, Commission requirements for admission as a party are “strict by design.”³⁹ NRC regulations provide that, “[i]f a State . . . seeks to participate as a party in a proceeding, it must submit a

³³ Filing at 1. As the States note, FitzPatrick is located in New York—not in any of the states participating or requesting participation in this matter (Vermont, Massachusetts, Connecticut, or New Hampshire).

³⁴ See *Palisades*, CLI-06-17, 63 NRC at 732.

³⁵ Filing at 1.

³⁶ See *Palisades*, CLI-06-17, 63 NRC at 732.

³⁷ See *Seabrook*, ALAB-862, 25 NRC at 150.

³⁸ Filing at 15.

³⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 233 (2008).

request for hearing or a petition to intervene containing at least one admissible contention.”⁴⁰

The States have submitted no such request or petition. Furthermore, because Vermont Yankee is “not located within the boundaries of the State[s, they] also must demonstrate standing”⁴¹ under the “same standards as an individual petitioner.”⁴² The Filing does not cite or even discuss Commission standing requirements. Thus, because the Filing is devoid of any demonstration that the strict Commission standards for admission as a party have been satisfied, the States’ request for party status must be denied.

VI. CONCLUSION

For the reasons discussed above, the Commission should strike the Filing in its entirety and deny the States’ request for party status.

Respectfully submitted,

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

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

⁴⁰ 10 C.F.R. § 2.309(h)(1).

⁴¹ 10 C.F.R. § 2.309(h)(2).

⁴² *N. States Power Co. (Indep. Spent Fuel Storage Installation)*, LBP-96-22, 44 NRC 138, 141 (1996).

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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 proposed proceeding and resolve the issues raised in this Motion. The Nuclear Regulatory Commission Staff agrees that the pleading filed by the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire is procedurally defective, and does not object to the Motion; the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire oppose 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 Impermissible December 17, 2015 Reply Filed by the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire” 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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