

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT	)	Docket No. 50-271
YANKEE, LLC AND ENTERGY	)	
NUCLEAR OPERATIONS, INC.	)	January 7, 2016
	)	
(Vermont Yankee Nuclear Power Station)	)	

**Combined Answer of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Opposition to Entergy Nuclear Operation, Inc.’s and NRC Staff’s Motions to Strike Portions of Petitioners’ Reply Brief**

On December 28, 2015, Entergy and NRC Staff moved to strike those portions of Petitioners’ December 17, 2015 Reply Brief that use the phrase “*de facto* license amendment.” Both motions to strike should be denied, because Petitioners’ Reply Brief does not advance a new claim or theory. Rather, Petitioners’ arguments regarding *de facto* license amendments are logical and legitimate amplifications of arguments already made in the Petition. Alternatively, even if these arguments had not already been raised in the Petition (which they were), the arguments are still appropriately included in Petitioners’ Reply Brief as direct rebuttals to arguments made in Entergy’s and NRC Staff’s Answers.<sup>1</sup>

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<sup>1</sup> Entergy also moved to strike in its entirety the December 17, 2015 filing of the Commonwealth of Massachusetts and the States of Connecticut and New Hampshire (“Supporting States”) (ADAMS Accession No. ML15351A531). The Supporting States will respond to that motion directly, but Petitioners note that there is no basis for striking the Supporting States’ brief. The Supporting States’ filing addresses matters within the scope of the Petition and the Answers that had already been filed, and was in accordance with the Commission’s Scheduling Order. Entergy’s claim that the Supporting States’ brief expands the scope of the Petition is incorrect; in fact it seeks only to ensure that the Commission is aware of the full consequences of a ruling in this matter. As the Supporting States note, “[a] decision to delay the resolution of these questions or, worse, a decision to adopt the NRC Staff’s and Entergy’s positions, would threaten to undermine nuclear plant owners’ ability to remediate the radiological contamination at plants that have ceased operations and shift the burden of doing so to the States’ taxpayers.” Supporting States’ Reply Brief at 1.

## **I. The Petition argued that a *de facto* license amendment had occurred.**

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). Petitioners have followed that standard here. The Reply raises no new theory or subject, but is only amplification of arguments contained in the Petition, and, as noted in Argument II below, is also a rebuttal to arguments made by NRC Staff and Entergy in their Answers.<sup>2</sup>

The Petition specifically noted that Entergy’s actions did not comply with its current license conditions and that “except for the one license amendment request it now has withdrawn, *Entergy has not filed any other license amendment requests to relieve itself of those conditions.*” Petition at 13 (emphasis added). Although Entergy claims that this was “[f]ar from arguing that the absence of a license amendment request somehow constitutes a unilateral *de facto* license amendment” (Entergy Mot. at 4 n.19), that is exactly what the Petition was arguing. Indeed, the Petition had an entire section on “license-related matters *requiring a hearing.*” Petition at 11-13 (emphasis added). And Petitioners argued that Entergy’s actions here “trigger hearing rights . . . under the Atomic Energy Act” (Petition at 11), thus tying the right to a hearing to the actions of Entergy and NRC Staff in effectively amending Entergy’s license. By noting that “Entergy has not filed any other license amendment requests” (Petition at 13), Petitioners were explicitly arguing that Entergy *should have* filed license amendment requests before taking the actions it did, but failed to do so. That is an argument that a *de facto* license amendment

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<sup>2</sup> Petitioners note that while on the one hand Entergy and NRC Staff deny in their Answers that this is a “proceeding” in which the issues raised by Petitioners can or should be heard, their motions to strike undermine this argument by seeking to apply regulations that are only applicable to such proceedings. The Petition seeks to *initiate* a “proceeding” to allow the relevant issues to be presented as provided in Subpart C of Part 2. For purposes of this response, Petitioners will address the issue within the context of Subpart C of Part 2 regulations since it is clear even under those regulations and relevant precedents that Petitioners’ Reply was proper and that no portions should be stricken.

occurred. Entergy and NRC Staff are thus incorrect in claiming that this argument was not presented in the Petition.

Entergy's characterization of this argument as a "passing reference" is unconvincing. Entergy Mot. at 4 n.19. The Petition argued in multiple places that the exemptions effectively altered Entergy's license and created new rights that warrant a hearing under the Atomic Energy Act. *See, e.g.*, Petition at 11-13 (arguing that Entergy's actions, including its exemption requests, are licensing actions that trigger hearing rights under the Administrative Procedure Act and the Atomic Energy Act); *id.* at 25-26 (explaining how Entergy's interpretation of the Master Trust Agreement conflicts with that agreement and Entergy's license, and arguing that Entergy should have filed a license amendment request but did not); *id.* at 29 (arguing that Entergy's interpretation of the Master Trust Agreement effectively altered that agreement and the license); *id.* at 33 (explaining the specific impact of Entergy's exemption requests on Entergy's license conditions and how that combined effect should trigger a hearing); *id.* at 48-49 (explaining how the Atomic Safety and Licensing Board "highlighted the connection between the two [exemption] requests" and "the license amendment request"). Thus, the Petition asked the Commission for relief, in part, because the exemptions were effectively license amendments and for that reason Petitioners were entitled to a hearing before those changes could be made.

The Petition also pointed out that the only reason there is not an official license amendment proceeding here is because Entergy chose to take a siloed procedural approach—leading the Atomic Safety and Licensing Board to observe that "procedurally [it] would have been much simpler" if Entergy had made its exemption request part of its license amendment request, "in which case both would have been subject to a hearing." Petition at 5 n.2 & 13 (quoting *Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont

Yankee Nuclear Power Station), Docket No. 50-271-LA-3, LBP-15-24, slip op. at 18 n.96 (Aug. 31, 2015)).

Petitioners' Reply simply develops these arguments further, explaining how Entergy's exemption requests effectively altered the license, thus triggering hearing rights. *See, e.g.*, Reply at 11-12 (referencing the Petition and arguing that "Entergy should not be permitted to contravene the terms of its license"). Thus, the Reply "legitimately amplifies issues presented in the original petition." *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ASLBP No. 08-871-01-LR, 68 N.R.C. 905, 919 (Dec. 5, 2008).

To the extent that Entergy's motion is based on its complaint that the Petition did not specifically use the phrase "*de facto* license amendment" (Entergy Mot. at 3-4), this argument too is unavailing. The purpose underlying the limitation on the issues that can be addressed in a reply brief is to avoid surprise or placing opposing parties at a disadvantage. *DTE Energy Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC \_\_\_, slip op. at 15 (Sept. 8, 2015). Entergy and Staff were fully on notice that Petitioners believed they were entitled to a hearing on the issues raised in the Petition *because* the actions sought by Entergy, and approved by Staff, were the equivalent of license amendments. While Petitioners may not have used the phrase "*de facto* license amendment" in the initial Petition, Entergy's focus on nomenclature elevates form over substance—and the substance of Petitioners' Reply is not new and should therefore be considered by the Commission. *See, e.g., Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 909 n.10 (1990) ("[I]t is the [brief's] substance, and not merely its linguistic form, that determines its nature and legal effect." (quoting 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 7.05, pp. 7-16 to 7-17 (1989))); *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), LBP-15-27, slip op. at 8 (Sept. 28, 2015) (recognizing that substance governs over form: "Hearing

rights may also be triggered when the substance of an NRC action, while not formally labeled as a license amendment, in effect accomplishes the same thing.”).

## **II. The *de facto* license amendment argument responds to Entergy and Staff’s Answers.**

Even if Petitioners’ *de facto* license amendment argument could somehow be seen as a new argument, it is nonetheless properly included in Petitioners’ Reply because it is in direct response to arguments raised in Entergy’s and NRC Staff’s Answers. *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-11-14, 74 N.R.C. 801, 806 (Dec. 22, 2011) (“[W]e have not precluded arguments that respond to the petition *or answers* . . . .” (emphasis added)). As Entergy concedes, a reply is proper if it focuses on arguments raised in the original petition ““*or* raised in the answer to it.”” Entergy Mot. at 2 (emphasis added) (quoting *Nuclear Mgmt. Col, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)).

Petitioners’ Reply properly responds to issues “raised in the answers to” the Petition. *Id.* Entergy’s Answer characterized the exemptions as a mere dispute over current license conditions and argued that Petitioners must pursue enforcement under 10 C.F.R. Section 2.206. Entergy Answer at 10 n.40 (citing *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 N.R.C. \_\_ (Nov. 9, 2015)). NRC Staff’s Answer likewise made the same argument relying on the same authority. NRC Staff Answer at 38 & 45 (citing *Diablo Canyon*).

Petitioner’s Reply responded to those arguments. Petitioners distinguished the cases cited in the Answers, explaining why they do not support diverting this matter to a Section 2.206 enforcement proceeding. *See, e.g.*, Reply at 14-15 (noting that the *Diablo Canyon* matter acknowledged hearing rights without a formal license amendment). The Reply only clarified what the Answers misconstrued: that Section 2.206 enforcement will not address Petitioners’ grievances. That process applies only to mere oversight of existing license conditions. Here, the

exemption requests are effectively an alteration to Entergy's license (i.e., a *de facto* license amendment). Reply at 14. This is entirely proper rebuttal argument. *See, e.g., Northern States Power Co.*, 68 N.R.C. at 919 (“[I]t is proper for a reply to respond to the legal, logical, and factual arguments presented in answers, so long as new issues are not raised.”).

## CONCLUSION

Petitioners' Reply Brief did not advance a new legal theory or argument. The Reply is simply a “legitimate amplification under relevant case law.” *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4), LBP-09-17, 70 N.R.C. 311, 323 (Aug. 6, 2009). Therefore, Entergy's and NRC Staff's motions to strike should be denied.

Respectfully submitted, this 7th day of January 2016,

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the *Combined Answer of the State of Vermont, the Vermont Yankee Nuclear Power Corporation, and Green Mountain Power Corporation in Opposition to Entergy Nuclear Operation, Inc.'s and NRC Staff's Motions to Strike Portions of Petitioners' Reply Brief* have been served upon the Electronic Information Exchange, the NRC's e-filing system, in the above-captioned proceeding, this 7th day of January 2016.

/Signed (electronically) by/  
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Dated at Montpelier, Vermont  
this 7th day of January 2016