

August 19, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
ENTERGY NUCLEAR OPERATIONS, INC.)	Docket Nos. 50-247-LR/286-LR
)	
(Indian Point Nuclear Generating)	
Units 2 and 3))	

NRC STAFF'S ANSWER TO
"THE STATE OF NEW YORK AND THE STATE OF CONNECTICUT'S
COMBINED MOTION TO STRIKE ENTERGY'S UNAUTHORIZED REPLY
IN SUPPORT OF NRC'S ANSWER TO ENTERGY'S PETITION FOR REVIEW"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC Staff" or "Staff") herewith files its answer to the State of New York and State of Connecticut's (hereinafter referred to collectively as "New York") motion of August 17, 2011,¹ seeking to strike the August 16, 2011 reply of Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant")² to the Staff's answer³ to Entergy's petition⁴ for review of LBP-11-17.⁵ For the reasons set forth below, the Staff opposes New York's request that Entergy's Reply be stricken.

¹ "The State of New York and the State of Connecticut's Combined Motion to Strike Entergy's Unauthorized Reply in Support of NRC's Answer to Entergy's Petition For Review" (Aug. 17, 2011) ("Motion").

² "Applicant's Reply to the NRC Staff's Answer to Entergy's Petition for Review of LBP-11-17" (Aug. 16, 2011) ("Entergy's Reply").

³ "NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36" (Aug. 11, 2011) ("Staff Answer").

⁴ "Applicant's Petition for Review of LBP-11-17 Granting Summary Disposition of Consolidated Contention NYS-35/36" (July 29, 2011) ("Petition").

⁵ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-11-17, 74 NRC ____ (July 14, 2011).

DISCUSSION

In its Motion, New York argues that Entergy's Reply to the Staff's Answer should be stricken for three reasons. First, New York argues that Entergy's Reply contravenes 10 C.F.R. § 2.341(b)(3) (which allows a petitioner for review to file "a reply brief" to "any answer"), based on New York's view that Entergy was required to file a single 5-page reply to both the Staff's and New York's answers. Motion, at 1. Second, New York asserts that Entergy's Reply raises issues that were not raised in its Petition or in the Staff's Answer, "without any factual support in this record," and that the introduction of such matters in a reply "for the first time" is improper. *Id.* at 1-2. Third, New York argues that Entergy's Reply is improper insofar as it "embraces and restates" arguments presented in the Staff's Answer. *Id.* at 2.

New York's argument that Entergy was required to file a single reply to the Staff's and New York's answers is without merit. Nothing in 10 C.F.R. § 2.341(b)(3) requires a petitioner for review to address all answers to its petition in a single reply. Indeed, such a requirement would unfairly limit a petitioner's ability to address potentially wide-ranging and disparate arguments presented by multiple parties in separate answers to its petition, each of which could be 25 pages in length. To require a petitioner to respond to all petitions in a combined reply, limited to 5 pages, could eviscerate a petitioner's ability to file a meaningful reply to those answers.

Similarly, New York's assertion that a reply is limited to "rebuttal" and may not express agreement with a party's answer to its petition is lacking in merit. Nothing in 10 C.F.R. § 2.341(b)(3) precludes a petitioner from filing a reply that agrees with or amplifies the statements that appear in an answer filed in support of its petition. Indeed, New York's proposed interpretation of the rule would render meaningless the petitioner's right, explicitly provided in § 2.341(b)(3), to reply to answers filed in support of its petition. Further, New York's reliance on the Commission's decision in *Duke Energy Corp.* (Catawba Nuclear Station, Units 1

and 2), CLI-04-11, 59 NRC 203, 209 (2004), is misplaced,⁶ as that decision did not involve the filing of replies to answers to petitions under 10 C.F.R. § 2.341(b)(3).⁷

In contrast, New York's concern that Entergy's Reply improperly introduces new issues that were not raised in its Petition or in the Staff's Answer merits consideration. See Motion at 1-2, *citing* Entergy's Reply at 2. In this regard, New York points to the discussion in Entergy's Reply of "financial costs from extended litigation, alleged complications regarding Entergy's fuel procurement, and grid reliability." *Id.* In support of this position, New York cites *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-06-22, 64 NRC 37, 46 (2006), where the Commission stated that it "does not credit arguments made for the first time in a reply brief."

The factual matters of concern to New York relate to Entergy's assertion that the Board's decision will result in "serious and irreparable harm" that could not be alleviated on later appeal – one of the two alternative bases for interlocutory review set forth in 10 C.F.R. § 2.341(f)(2). Entergy had cited this legal standard for review in its Petition, but did explain how the Board's decision in LBP-11-17 would cause it to incur irreparable harm. See Entergy's Petition at 6-7. The Staff's Answer, in turn, addressed the standards for interlocutory review, focusing solely on the "pervasive or unusual effect" the Board's decision would have on the structure of this

⁶ See Motion at 2.

⁷ In CLI-04-11, the Commission set out a briefing schedule for the submission of briefs on a question certified by the Board, stating as follows:

[W]e accept the Board's certification and seek briefs on the admissibility of Security Contention 1 and on what the Board characterized as "several pertinent related questions." The briefs shall not exceed 30 pages and should be filed simultaneously Reply briefs, containing only rebuttal, shall not exceed 10 pages and should be filed simultaneously

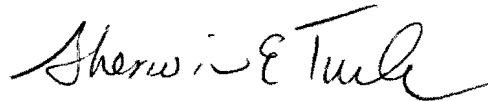
Catawba, CLI-04-11, 59 NRC at 209 (emphasis added; footnote omitted). New York cites this statement in support for its view that replies to answers to petitions for review are limited to "rebuttal"; in fact, however, the Commission's decision in *Catawba* did not address the requirements for replies to answers to petitions under 10 C.F.R. § 2.341(b)(3); rather, the Commission was establishing a schedule for the filing of initial briefs and "replies" thereto (*i.e.*, answers or responses to the parties' initial briefs), on a Board-certified question. Accordingly, New York's reliance on the Commission's scheduling order in *Catawba* is without merit.

proceeding. See Staff Answer at 7-12. Insofar as Entergy's Reply presents factual information pertaining to the issue of "serious and irreparable harm," it falls within the scope of the Petition's assertion that interlocutory review is appropriate, but does not appear to address any statement in the Staff's Answer. Accordingly, if the Commission determines that this factual material exceeds the proper scope of a reply, the Commission may disregard that material in its consideration of Entergy's Petition, consistent with its decision in *LES*. See *LES*, CLI-06-22, 64 RC at 46.⁸ This conclusion, however, does not support New York's request that Entergy's Reply be stricken, in its entirety. See Motion at 1, 2.

CONCLUSION

For the reasons set forth below, the Staff opposes New York's motion to strike Entergy's August 16, 2011 reply to the Staff's Answer, and recommends that the motion be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is fluid and cursive, with the first and last names being more prominent.

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of August 2011

⁸ Where a petitioner files a reply to an answer to its petition for review, it has already had an opportunity to present all relevant arguments that support its position in its petition; for this reason, a petitioner's reply may properly be precluded from raising new arguments that do not address matters raised in an answer to its petition. In contrast, a party's answer to a petition for review constitutes that party's sole opportunity, as of right, to provide its views on whether the Commission should or should not undertake review, and it therefore may address matters beyond the matters raised in the petition, to show that the Board did, or did not, err in the manner asserted. See *generally*, "NRC Staff's Answer to 'The State of New York and the State of Connecticut's Combined Motion For Leave To File A Brief Reply to NRC Staff's Answer to Applicant's Petition for Review of LBP-11-17'" (Aug. 17, 2011), at 4.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO 'THE STATE OF NEW YORK AND THE STATE OF CONNECTICUT'S COMBINED MOTION TO STRIKE ENTERGY'S UNAUTHORIZED REPLY IN SUPPORT OF NRC'S ANSWER TO ENTERGY'S PETITION FOR REVIEW,'" dated August 19, 2011, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or by deposit in the U.S. Postal Service, as indicated by an asterisk, with copies by electronic mail, this 19th day of August, 2011:

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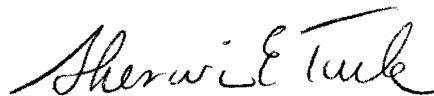
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