

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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In the Matter of:

)  
) Docket No. 50-271-LA-2  
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ENTERGY NUCLEAR VERMONT YANKEE,  
LLC, and ENTERGY NUCLEAR  
OPERATIONS, INC.

)  
) May 11, 2015  
)

(Vermont Yankee Nuclear Power Station)  
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**ENTERGY’S RESPONSE TO THE STATE OF VERMONT’S NOTICE OF  
SUPPLEMENTAL AUTHORITY**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.323(c), Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively, “Entergy”) hereby respond to the State of Vermont’s (“State”) Notice of Supplemental Authority (“Notice”), filed on May 4, 2015. The Notice attaches the NRC Staff’s draft Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”) regarding Entergy’s pending request for exemptions from specified emergency planning regulations,<sup>1</sup> but also presents argument on the purported significance of this Draft EA and FONSI to the State’s proposed contentions in its Petition to Intervene in this proceeding.<sup>2</sup> The Notice represents the State’s fourth unauthorized pleading in this three-month-

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<sup>1</sup> Notice, Attachment 1, Letter from J. Kim, NRC, to Site Vice President, Vermont Yankee Nuclear Power Station, Vermont Yankee Nuclear Power Station – Draft Environmental Assessment and Finding of No Significant Impact Related to Request for Exemptions from Certain Emergency Planning Requirements (Apr. 24, 2015) (“Draft EA and FONSI”). The Draft EA and FONSI have been published in the *Federal Register*. See Nuclear Regulatory Commission, Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, Draft environmental assessment and finding of no significant impact; request for comment, 80 Fed. Reg. 24,291 (Apr. 30, 2015).

<sup>2</sup> State of Vermont’s Petition for Leave to Intervene and Hearing Request (Feb. 9, 2015) (“Petition to Intervene”).

old proceeding,<sup>3</sup> and its second attempt to move for relief from the Board without any prior consultation with the other parties.<sup>4</sup> Fundamental fairness requires that the other parties be afforded the opportunity to respond to the State.<sup>5</sup> As shown below, the Board should not consider the Notice to the extent it attempts to reargue the merits of the State's Petition to Intervene or offers new arguments or bases for its proposed contentions.

## II. ARGUMENT

Commission precedent allows and, in fact, requires parties to notify the Commission or Board of information that is relevant and material to the issues pending before a tribunal.<sup>6</sup> Regardless of whether the Draft EA and FONSI actually constitute relevant and material information, the State, however, did not merely notify the Board. Although styled as a "Notice," the State impermissibly provides new arguments on the merits of its proposed contentions.<sup>7</sup>

The State identifies no regulatory basis for its supplemental pleading. To the extent the Notice seeks to have the Board rely on the Draft EA and FONSI as supporting evidence for its proposed contention, it should be considered to be a motion for leave to amend the State's

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<sup>3</sup> The first three unauthorized pleadings were the: (1) State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests (Mar. 12, 2015) ("Reconsideration Petition"); (2) State of Vermont's Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration (Mar. 12, 2015) ("Motion to Stay"); and (3) the State's "refiling" of the Motion to Stay on March 13, 2015. Among other reasons, these pleadings were unauthorized in that there were no decisions in this adjudicatory proceeding for the Commission to reconsider or the Board to stay.

<sup>4</sup> The first attempt was the filing of the Motion to Stay without consultation.

<sup>5</sup> See *Hous. Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979) ("the cardinal rule, so far as fairness is concerned, is that each side must be heard"). The State itself has invoked "fairness" as the basis for its own actions earlier in this proceeding. See Motion to Stay the License Amendment Proceeding Pending Commission Reconsideration at 2 (Mar. 12, 2015) ("Motion to Stay").

<sup>6</sup> See, e.g., *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623, 625 (1973); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-774, 19 NRC 1350, 1359 (1984).

<sup>7</sup> For example, the State alleges that the Draft EA and FONSI "provide additional supporting evidence for Contentions One and Two," Notice at 1, and that "the Draft EA and FONSI make clear that . . . the Commission must consider the EA and FONSI – after public comments have been received pursuant to the Federal Register notice and reviewed – prior to approval of the exemptions request." *Id.* at 3.

proposed contentions under 10 C.F.R. § 2.309(c). But the Notice does not address or meet the timeliness requirements of that regulation, or the substantive admissibility requirements of Section 2.309(f)(1).<sup>8</sup> At the least, given the new arguments it offers, the Notice is effectively a supplemental reply brief, which is not permitted under Section 2.309(i)(3). Regardless of how the Notice is interpreted, the Board must also deny any relief to the State because it filed its supplemental pleading without consulting the other parties, as required by 10 C.F.R. § 2.323(b).<sup>9</sup> Therefore, the Board should disregard the arguments in the Notice.<sup>10</sup>

Even if the Board were to consider the arguments in the Notice, they do not support the admissibility of the State's proposed contentions. First, as Entergy has explained, the State's arguments regarding the exemption request are outside the scope of this proceeding.<sup>11</sup> The NRC Staff's issuance of the Draft EA and FONSI in no way alters the Commission's approval of the exemption request. Therefore, the Board continues to be bound by the Commission's approval. Moreover, the State's argument that the Commission itself (and not the NRC Staff) must conduct the environmental review of Entergy's exemption request is incorrect.<sup>12</sup>

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<sup>8</sup> See, e.g., *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (holding that a petitioner cannot use their reply to "expand the scope of the arguments set forth in the original hearing request" or introduce new bases for a contention, unless the late filing criteria are met).

<sup>9</sup> Requests for Commission or Board action or permission are treated as motions under the NRC's Rules of Practice. See, e.g., *FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units Nos. 1 and 2; Davis-Besse Power Station, Unit No. 1; Perry Nuclear Power Plant, Unit No. 1), CLI-06-2, 63 NRC 9, 18 n.36 (2006) (denying petitioners' "Request for Clarification" as an untimely motion for clarification under 10 C.F.R. § 2.323(a)); *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 237 (2002) (treating petitioners' request to suspend proceeding as a general motion under 10 C.F.R. § 2.730 (predecessor to § 2.323)).

<sup>10</sup> Cf. *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 (2008) (stating that the Commission did not consider an unauthorized supplemental letter sent by intervenors to the Chairman of the Commission to be part of the adjudicatory record).

<sup>11</sup> See generally, e.g., Entergy's Answer Opposing Petition for Leave to Intervene and Hearing Request (Mar. 6, 2015).

<sup>12</sup> See generally Draft EA and FONSI; see also Entergy's Answer Opposing State of Vermont's Petition for Reconsideration of Commission Decision Approving Entergy's Exemption Requests at 8-9 (Mar. 23, 2015).

### III. CONCLUSION

For the foregoing reasons, Entergy respectfully requests that the Board not consider the Notice to the extent it offers arguments on the merits of the State's Petition to Intervene.

Respectfully submitted,

Signed (electronically) by Raphael P. Kuyler

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*Counsel for Entergy Nuclear Vermont Yankee,  
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Dated in Washington, DC  
this 11th day of May 2015

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NUCLEAR REGULATORY COMMISSION**

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LLC, and ENTERGY NUCLEAR	)	
OPERATIONS, INC.	)	May 11, 2015
	)	
(Vermont Yankee Nuclear Power Station)	)	
	)	

**CERTIFICATE OF SERVICE**

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of the foregoing “Entergy’s Response to the State of Vermont’s Notice of Supplemental Authority” were served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the above-captioned proceeding.

*Signed (electronically) by Raphael P. Kuyler*

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