

January 3, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
Entergy Nuclear Generation Co. and	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-293-LR
	)	
	)	ASLBP No. 06-848-02-LR
(Pilgrim Nuclear Power Station)	)	

NRC STAFF'S ANSWER IN OPPOSITION TO COMMONWEALTH OF MASSACHUSETTS'  
MOTION TO REPLY TO NRC STAFF AND ENTERGY OPPOSITIONS TO  
COMMONWEALTH APPEAL OF LBP-11-35

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff ("Staff") hereby files its answer in opposition to Commonwealth of Massachusetts' ("Massachusetts") motion to file a reply to the Staff's response to the Massachusetts' appeal of the Atomic Safety and Licensing Board ("ASLB") decision in LBP-11-35.<sup>1</sup>

As discussed more fully below, the Reply Motion does not demonstrate that necessity or fairness requires an opportunity to submit a reply or that the reply will add anything of substance to Massachusetts' position. In addition, the Motion to Reply is mistaken in several respects.

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<sup>1</sup> Commonwealth of Massachusetts' Motion to Reply to NRC Staff and Entergy Oppositions to Commonwealth Appeal of LBP-11-35, December 23, 2011("Reply Motion"); NRC Staff 's Answer to Commonwealth of Massachusetts' Brief in Support of Appeal from LBP-11-35, December 19, 2011("Staff Response").

Therefore, the Reply Motion should be denied.

### PROCEDURAL HISTORY

The history of this proceeding has been presented in numerous pleadings before the Commission and the Board, including in the Staff's Answer, and will not be repeated in its entirety herein. Rather, in brief, we focus on the most recent submissions to the Commission.

On June 2, 2011, more than five years after the initiation of this case, Massachusetts filed a motion to admit a new contention, accompanied by a request for waiver, challenging the site-specific Pilgrim severe accident mitigation alternatives ("SAMA") analysis based on information related to the March 2011 Fukushima accident.<sup>2</sup> The Staff (and Entergy) opposed the motion.<sup>3</sup>

On August 11, 2011, Massachusetts filed a motion to supplement the bases of its proposed contention.<sup>4</sup> On November 28, 2011, a Board Majority ruled on Massachusetts' Motion, denying the Stay Request, Waiver Request, and Motion to Admit, while granting the leave to supplement.<sup>5</sup> Massachusetts filed its appeal of the Board's denial of its motions and

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<sup>2</sup> Commonwealth of Massachusetts' Motion to Admit Contention and, If Necessary, to Reopen Record Regarding New and Significant Information Revealed by Fukushima Accident (June 2, 2011) ("Motion to Admit") (ADAMS Accession No. ML111530340); Commonwealth of Massachusetts' Petition for Waiver of 10 C.F.R. Part 51 Subpart A, Appendix B or, in the Alternative, Petition for Rulemaking to Rescind Regulations Excluding Consideration of Spent Fuel Storage Impacts from License Renewal Environmental Review (June 2, 2011) (ADAMS Accession No. ML111530342).

<sup>3</sup> NRC Staff's Answer to the Commonwealth of Massachusetts' Brief in Support of Appeal from LBP-11-35 (December 19, 2011) ("Staff Contention Answer") (ADAMS Accession No. ML11353A448).

<sup>4</sup> Commonwealth of Massachusetts Motion to Supplement Bases to Commonwealth to Commonwealth Contention to Address NRC Task Force Report on Lessons Learned from the Radiological Accident at Fukushima (Aug. 11, 2011) (ADAMS Accession No. ML11223A284).

<sup>5</sup> Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-11-35, 74 NRC \_\_\_\_ (Nov. 28, 2011) (slip op. at 70) (ADAMS Accession No. (continued. . .))

requests on December 8, 2011.<sup>6</sup> The Staff Response was filed on December 19, 2011. Entergy filed its answer on the same day. On December 23, 2011, Massachusetts filed its Reply Motion, accompanied by an unauthorized reply.<sup>7</sup> The Staff now files this answer in opposition to the Reply Motion.

LEGAL STANDARDS FOR MOTIONS TO PERMIT A REPLY

Massachusetts stated that it filed its Reply Motion pursuant to 10 C.F.R. § 2.323(c). Reply Motion at 1. Massachusetts contends that it should be allowed to submit the reply pursuant to § 2.323(c) because “it could not have reasonably anticipated” the arguments that the Staff would put forth in their answers to Massachusetts’ Appeal of LBP-11-35. But 10 C.F.R. § 2.323(c) only applies to replies to motions, not to appeals. See 10 C.F.R. § 2.232(c) (providing only for “answers to motions”). As the Commission has observed, “when reply briefs are permitted, our rules provide explicitly for their filing (10 C.F.R. § 2.341(b)(3), or set strict conditions on their filing.” *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 393 (2008). Although the regulations in 10 C.F.R. § 2.341(b)(3) provide specifically for the possibility of filing reply briefs in appeal, the regulations in 10 C.F.R. § 2.311(b) do not. 10 C.F.R. § 2.341(b)(3); 10 C.F.R. § 2.311(b). Specifically, “[t]he Commission’s regulations

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ML11332A152). Judge Young filed a separate opinion concurring in the results only. *Id.* at 72. For ease of reading, the Board Majority will be referred to as “the Board,” the Board Majority opinion will be referred to as the “Board Order” or the “Board’s decision.”

<sup>6</sup> Commonwealth of Massachusetts’ Notice of Appeal of LBP-11-35 and Brief in Support of Appeal (December 8, 2011) (ADAMS Accession No. ML11342A168) (“Massachusetts’ Appeal”).

<sup>7</sup> Reply Motion; Commonwealth of Massachusetts’ Brief in Reply to NRC Staff and Entergy Oppositions to the Commonwealth’s Appeal of LBP-11-35 (December 23, 2011) (“Massachusetts’ Brief”).

governing appeals from the denial of intervention provide for a notice of appeal with a supporting brief, and for a brief opposing the appeal,” but “[t]he regulations do not provide for replies.” *USEC Inc. (American Centrifuge Plant)*, CLI-06-09, 63 NRC 433, 438-39 (2006); see also *Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site)*, ALAB-473, 7 NRC 737, 745 n. 9 (1978) (merit to motion to strike reply brief; regulation governing appeals does not provide for reply briefs).

Where reply briefs are not provided for in the regulations for appeals from interlocutory decisions, leave to file such reply briefs should be denied. *High-Level Waste*, CLI-08-12, 67 NRC at 393. Such extra filings are permitted “only where necessity or fairness dictates.” *Id.* Additionally, a motion for leave to reply to an answer opposing an appeal will be denied if the reply adds “nothing of substance” to the movant’s position, but simply provides “additional comments regarding the same arguments. *Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-92-11, 36 NRC 47, 51 n. 8 (1992).

#### DISCUSSION

Massachusetts asserts, in cursory fashion, that it could not have reasonably anticipated that the Staff would (1) “incorrectly characterize the Commonwealth’s appeal, in part, as an impermissible challenge to NRC regulations”; (2) “erroneously claim that the Board’s review of the contention against the NRC’s “late-filed” contention standards is sufficient to satisfy the NRC’s legal obligation to take a hard look at new and significant information under NEPA”; and (3) argue that the Board “was correct that the Commonwealth did not present evidence on the costs and benefits of a revised SAMA analysis.” Reply Motion at 1-2. However, Massachusetts fails to demonstrate any basis for these claims.

As discussed below, of the three reasons Massachusetts advances why the Commission should consider its proposed reply, one is an incorrect statement of the Staff’s position, one was

argued in the Staff's original contention answer to the Board, and one was simply an argument by the Staff that the Board itself construed.

Massachusetts states that it "could not have reasonably anticipated" that the Staff would incorrectly characterize Massachusetts' appeal "as an impermissible challenge to NRC regulations." Reply Motion at 1. But, in fact, the Staff never made that argument. The Staff's response to Massachusetts's Appeal argues that Massachusetts' claims fail because 1) "the NRC's regulations applying the reopening standard to contentions raised only after the record has closed have been affirmed on review by the pertinent federal court" (2) "the Board properly applied the contention admissibility requirements, ...[(3)] it did consider the allegedly new and significant information proffered by the Commonwealth; and ...[(4)] its determination that the information did not meet the regulatory requirements for admissibility is well-supported by the record." Staff Response at 8-9. The Staff also argued that there is no right to a hearing under NEPA. The right to a hearing arises from the AEA or the Commission's regulations; thus, the Commission's regulations regarding the admissibility of contentions are applicable. Staff Response at 9-11. Nowhere does the Staff characterize Massachusetts' position as an improper challenge to the regulations.

Massachusetts also maintains that it could not have anticipated the Staff's argument that the Board's review of the contention against the NRC's "late-filed" contention standards is sufficient to satisfy the NRC's legal obligations under NEPA. This claim misses the mark, since from the Staff's first response to Massachusetts' contention, the Staff has argued that Massachusetts must meet the late-filed contention criteria of 10 C.F.R. § 2.309(c) and the contention criteria in order for its contention to be admissible. The Staff has answered Massachusetts' argument by citing prior decisions of both the Commission and the Federal courts, and NEPA itself, which demonstrate that the hearing rights under NEPA stem from the

Atomic Energy Act. Staff Response at 9-10. The Reply Motion provides no information that there is anything further to say on the subject, since Massachusetts had a full opportunity to argue its position when it filed its appeal.

Finally, Massachusetts states that it could not have anticipated that the Staff would argue that the Board “was correct that the Commonwealth did not present evidence on the costs and benefits of a revised SAMA analysis.” Again, this claim is without merit since the Staff made that very argument on June 27, 2011, in its response to the original motion to admit the late filed contention. Staff Contention Answer at 7-10.

Thus, Massachusetts’ bases for filing the reply are not supported by the record and, moreover, Massachusetts cites no regulatory or other authority in support of the request to reply. There is nothing in the motion that demonstrates that a reply is necessary or required for fairness, or that it will add anything of substance to Massachusetts’ arguments.

Massachusetts should have anticipated the arguments to which it now seeks leave to reply. Characterizing the arguments of other parties as “unanticipated” or “erroneous” does not by itself provide justification for additional briefs. Massachusetts had an unfettered opportunity to raise every relevant argument in support of its appeal in the first instance. There is no injustice in denying Massachusetts’ request to make arguments simply because Massachusetts has apparently concluded that that it should strengthen its original pleading. Massachusetts should have anticipated that the Staff would respond to weaknesses in its original reply, would support the Board’s decision, and would respond consistent with its prior positions . Massachusetts provides no authority to support its assertion that any of the Staff’s arguments would give rise to a right to reply.

Massachusetts kept its Reply Motion relatively brief, providing no support for its claims that it should be permitted to file a reply to the Staff’s Answer. Their argument is built upon the

Proposed Reply, which Massachusetts appended to its as-yet-ungranted Reply Motion. In the Staff's view, Massachusetts' cursory Reply Motion invites the Commission to read the Proposed Reply in order to decide whether to allow it, effectively defeating the regulatory presumption against allowing such replies and the requirement that parties file them with "permission." Absent such permission, the Proposed Reply should not be considered or relied upon.

Therefore, Massachusetts does not demonstrate that it should be permitted to reply.

#### CONCLUSION

As demonstrated above, Massachusetts' request to file a reply should be denied.

Respectfully submitted,

**/Signed Electronically By/**

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Dated at Rockville, Maryland  
this 3rd day of January, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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ENERGY NUCLEAR GENERATION CO. and )  
ENERGY NUCLEAR OPERATIONS, INC. ) Docket No. 50-293-LR  
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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER IN OPPOSITION TO COMMONWEALTH OF MASSACHUSETTS' MOTION TO REPLY TO NRC STAFF AND ENERGENCY OPPOSITIONS TO COMMONWEALTH APPEAL OF LBP-11-35" has been served upon the following by the Electronic Information Exchange, this 3rd day of January, 2012:

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