

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

ENTERGY NUCLEAR VERMONT YANKEE, LLC )  
LLC and ENTERGY NUCLEAR OPERATIONS, INC. )

Plaintiffs, )

v. )

Civil Action No. 11-cv-99

PETER SHUMLIN, in his official capacity as )  
GOVERNOR OF THE STATE OF VERMONT; )  
WILLIAM H. SORRELL, as ATTORNEY GENERAL )  
OF THE STATE OF VERMONT; and JAMES VOLZ, )  
JOHN BURKE, and DAVID COEN, in their official )  
capacities as members of THE VERMONT PUBLIC )  
SERVICE BOARD )

Defendants. )

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**DEFENDANTS’ MOTION FOR LEAVE TO FILE SUR-REPLY IN FURTHER  
SUPPORT OF DEFENDANTS’ OPPOSITION TO PRELIMINARY INJUNCTION**

ENVY’s reply memorandum in support of its motion for preliminary injunction raises new legal issues and is accompanied by three substantive reply declarations (totaling 50 pages) and dozens of new exhibits. The State accordingly seeks the Court’s permission to file a brief sur-reply memorandum and three short supplemental declarations in advance of the hearing set for June 23-24.

**MEMORANDUM OF LAW**

When a reply memorandum introduces new legal arguments or factual information, “the rationale of fair play” guides the Court to disregard it or, if the Court is going to consider it, to allow the other side to have “an opportunity to be heard” on the new legal arguments and factual information. *Newton v. City of N.Y.*, 738 F. Supp. 2d 397, 417 n.11 (S.D.N.Y. 2010).

Accordingly, the Court should accept the State’s filings.

**A. ENVY'S new declarations and exhibits warrant a sur-reply.**

ENVY attached 43 new exhibits to its reply. The new exhibits include legislative history, news articles, technical reports, and state and federal materials. Much of this, particularly the legislative history, is entirely new material. ENVY did not include legislative history with its original filing, even though this legislative history was available as part of the public record. ENVY's supplemental declarations also introduce new factual material. Mr. Kee added 35 pages of technical testimony and 6 new exhibits, and Mr. Herron added 12 pages of new testimony and 4 exhibits. And ENVY submitted a declaration from a new witness, Michael Courtemanche. If this Court is to consider ENVY's submission, then it is appropriate for the State to respond. *See, e.g., Bonnie & Co. Fashions v. Bankers Trust Co.*, 945 F. Supp. 693, 708 (S.D.N.Y. 1996) (if new evidence is presented in reply brief or affidavit, district court should permit nonmoving party to respond).

As was raised at the May 5, 2011 status conference, the parties have been discussing and attempting to reach an overall agreement regarding the structure of the preliminary injunction hearing, including the use of expert witness declarations in place of live direct testimony at the hearing. After reviewing ENVY's supplemental reply declarations, Defendants' counsel suggested that the State's experts would respond to this new material through either rebuttal declarations or testimony at the hearing. ENVY's position, however, is that the State may not respond to the new declarations of Kee, Herron, and Courtemanche with either supplemental declarations or with additional testimony at the hearing. In light of ENVY's objection, the State has taken the precaution of filing this motion and submitting the sur-reply declarations to the Court in advance of the hearing. *See Bayway Refining Co. v. Oxygenated Mktg. & Trading A.G.*, 215 F.3d 219, 227 (2d Cir. 2000) (refusing to consider issues not raised because "OMT did not

move the district court for leave to file a sur-reply to respond to Bayway's evidence. OMT thus failed to seek a timely remedy for any injustice."); *Alexander v. F.B.I.*, 186 F.R.D. 71, 74 (D.D.C. 1998) (allowing sur-reply because "[i]f the court were to deny plaintiffs leave to file the surreply, plaintiffs would be unable to contest matters presented to the court for the first time in the form of Davis' declaration"); *Flanagan v. Wyndham Int'l Inc.*, 231 F.R.D. 98, 101 (D.D.C. 2005) (same).

While ENVY may argue that being the movant entitles it to the final word, this does not hold for evidentiary matters, especially given the procedural posture of the pending motion and hearing for preliminary injunction. ENVY's reply declarations are analogous to expert rebuttal testimony that, under the Federal Rules regarding expert disclosures (Fed. R. Civ. P. 26(a)(2)(D)), must be disclosed so that other parties have an opportunity to respond. In *In re Kreta Shipping, S.A.*, 181 F.R.D. 273, 276 (S.D.N.Y. 1998), the court rejected an argument that rebuttal affidavits criticizing a party's experts were exempt from disclosure, noting the rule's "stringent disclosure requirements." Similarly, it is appropriate to treat ENVY's reply declarations as rebuttal expert testimony to which the State may respond, per the Federal Rules. See *In Re Intel Corp. Microprocessor Antitrust Litig.*, 2010 WL 2802271, \*3 (D. Del. Mar. 22, 2010) (in preparation for hearing on motion for class certification, parties filed reply and sur-reply briefs and affidavits; plaintiffs were required to disclose rebuttal testimony filed after the briefing).<sup>1</sup>

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<sup>1</sup> It also is insufficient to say that the State can always cross-examine Plaintiffs' expert witnesses on the new material and statements at the preliminary injunction hearing. The State's witnesses should be able to respond (either via declaration or at the hearing) to ENVY's new facts and contentions. *E.g.*, *Bonnie & Co.*, 945 F. Supp. at 708.

Allowing the State's request would not prejudice ENVY, and it would benefit the Court's review. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. BP Amoco, Inc.*, 2003 WL 1618534, at \*1 (S.D.N.Y. Mar. 27, 2003), allowing sur-reply affidavits and noting that:

[A]n examination of the briefs in the sequence in which they were submitted indicates that the issues . . . simply became further refined as both sides presented their evidence and responded to each previous submission. Thus, since there is no evidence of prejudice to plaintiffs or bad faith on defendants' part, and the parties will be best served by the Court's deciding the . . . issue presented to it on the most complete factual basis possible, the Court will consider the evidence contained in defendants' supplemental affidavit.

On the other hand, as noted above, without a sur-reply, the State is prejudiced. *Cf. Becker v. Ulster County, NY*, 167 F. Supp. 2d 549, 555 n.1 (N.D.N.Y. 2001) (noting that party "filed a sur-reply addressing this new contention and, thus, is not prejudiced"); *Dunn v. Zimmer Inc.*, 2005 WL 563095, at \*2 (D. Conn. Mar. 9, 2005) ("The post-motion disclosure of a witness . . . must be considered highly prejudicial.").

**B. ENVY introduces new legal arguments warranting a sur-reply.**

ENVY's reply raises a new legal issue regarding FERC preemption. In its original filing, ENVY contended principally that the Atomic Energy Act preempted state regulation of VY, while making a limited argument that the Federal Power Act and FERC preempted state regulation of rates and tariffs in the wholesale interstate power market. *See ENVY Mem.* 22-23, 30-34. In its reply, ENVY shifts ground to argue that FERC preempts state regulation of an "interstate wholesale nuclear plant." Reply 4. And similarly, ENVY's reply cites legislative history that was not cited in ENVY's original filing. The legislative record is publicly available and, to the extent it is relevant, ENVY could have addressed it previously. ENVY's decision to introduce this material for the first time in its reply warrants allowing a brief response from the State.

New legal arguments may not be raised for the first time in a reply. *See, e.g., Rowley v. City of New York*, 2005 WL 2429514, at \*5 (S.D.N.Y. Sept. 30, 2005) (noting that the Second Circuit “has made clear it disfavors new issues being raised in reply papers”); *Keefe v. Shalala*, 71 F.3d 1060, 1066 n.2 (2d Cir. 1995) (court “will not consider arguments raised for the first time in a reply brief”). The Court should either disregard the new arguments or allow the State to respond. *See, e.g., Lee v. Coughlin*, 26 F. Supp. 2d 615, 617 n.2 (S.D.N.Y. 1998) (allowing sur-reply to a new issue raised in reply); *Von Hundertmark v. Boston Prof'l Hockey Ass'n, Inc.*, 1996 WL 118538, at \*3 (E.D.N.Y. Mar. 7, 1996) (“[T]o the extent that USAir did introduce new facts and arguments not raised previously, the relevant portions of the surreply brief are incorporated.”).

### CONCLUSION

ENVY’s new submissions warrant a brief response in writing. *See Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985) (finding error in district court’s refusal to allow sur-reply to a reply brief containing new affidavits: “We believe that as the nonmoving party, Caribe should have had an opportunity to examine and reply to the moving party’s papers before the court considered them in its decision process.”). The State respectfully requests leave to file a brief sur-reply and three brief supplemental declarations with supporting exhibits, submitted concurrently.

Dated June 13, 2011, at Montpelier, Vermont.

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**LOCAL RULE 7(A)(7) STATEMENT**

As required by Local Rule 7(a)(7), counsel for Defendants made a good-faith effort to obtain Plaintiffs' agreement to the relief sought in this motion. As explained above, Plaintiffs do not agree.

## CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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