

August 19, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NUCLEAR MANAGEMENT)	Docket No. 50-263
COMPANY, LLC)	
)	
(Monticello Nuclear Generating Plant))	ASLBP No. 05-841-02-LR

NRC STAFF MOTION TO STRIKE COMMENT
OF THE NORTH AMERICAN WATER OFFICE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), the U.S. Nuclear Regulatory Commission staff (“Staff”) hereby moves to strike the North American Water Office’s (“NAWO”) Reply Comment, filed on August 9, 2005.¹ As set forth below, NAWO impermissibly raises new arguments for the first time in its Comment, and, alternatively, fails to address the late-filing criteria of 10 C.F.R. § 2.309(c)(1) and (f)(2). Thus, the Comment should be stricken.²

BACKGROUND

On March 16, 2005, Nuclear Management Company, LLC (“NMC”) submitted an application for renewal of Operating License No. DPR-22 for the Monticello Nuclear Generating Plant for an additional 20 years.³ On July 11, 2005, NAWO filed a Petition to Intervene and

¹ See Reply Comment of [NAWO] (Aug. 9, 2005) (“Comment”).

² As required by 10 C.F.R. § 2.323(b), the Staff has contacted the other participants in this proceeding. NMC does not object to the Motion. NAWO opposes the Motion.

³ See Letter from Thomas J. Palmisano, Site Vice President, Monticello Nuclear Generating Plant, [NMC], to U.S. NRC (Mar. 16, 2005) (ADAMS Accession No. ML050880241).

Request for Hearing on NMC's license renewal application.⁴ Both the Staff and NMC filed Answers to NAWO's Petition on August 3, 2005, opposing it on the grounds that NAWO had failed to establish its standing to intervene and failed to proffer any admissible contention.⁵ NAWO filed a Comment to the Staff's and NMC's Answers on August 9, 2005.

DISCUSSION

A. The Comment is Improper Under 10 C.F.R. § 2.309(h)(2)

NAWO's Comment is improper in that it expands the scope of the arguments set forth in the original Petition, instead of replying to the arguments raised in the Staff's and NMC's Answers. NAWO runs afoul of the principle that "new arguments may not be raised for the first time in a reply brief." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) ("*LES*") (citations omitted). *Cf. Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (holding that an appellant litigant "abandons all issues not raised and argued in its *initial* brief") (emphasis in original). Therefore, the document filed by NAWO should be stricken from the record.

In its initial Petition, NAWO asserted its standing to intervene in this proceeding and advanced seven proposed contentions for consideration. See Petition at 1-6. NAWO asserted its standing to intervene on the basis of it belonging to the community that consumes electricity generated by the Monticello facility, of its history of examining energy policy issues, and of the possibility that the region in which NAWO is geographically located could be adversely impacted by an event at Monticello. *Id.* at 1-2. Regarding its proposed contentions, NAWO alleged the following deficiencies in NMC's license renewal application: (1) an inadequate

⁴ See Request for a Hearing and Petition for Leave to Intervene by [NAWO] (July 9, 2005) ("Petition").

⁵ See [Staff] Answer to Petition to Intervene and Request for Hearing of [NAWO] (Aug. 3, 2005) ("Staff Answer"); [NMC's] Answer to Request for Hearing and Petition to Intervene by [NAWO] (Aug. 3, 2005) ("NMC Answer").

discussion of reasonable alternatives to the proposed action (NAWO 1; see Petition at 2-3); (2) radiation monitoring at Monticello is insufficient (NAWO 2; see Petition at 3); (3) security at Monticello is insufficient (NAWO 3; see Petition at 3-4); (4) additional inspection and maintenance of reactor components should be required to manage aging of those components (NAWO 4; see Petition at 4-5); (5) surface water sources are not adequately safeguarded (NAWO 5; see Petition at 5); (6) inadequate consideration of the effects of global warming (NAWO 6; see Petition at 5); and (7) emergency preparedness is insufficient (NAWO 7; see Petition at 5-6).

The Staff answered the Petition, by first analyzing how NAWO had failed to establish standing to intervene. See Staff Answer at 5-8. The Staff explained how NAWO failed to demonstrate either organizational or representational standing, by failing to establish the existence of an actual “injury in fact” to its organizational interests or to the interests of its members, or to provide the basic information required to establish representational standing. See Staff Answer at 5-8.

The Staff opposed admission of each of NAWO’s proposed contentions on the grounds that NAWO had failed to meet the Commission’s basic requirements for contention admissibility in 10 C.F.R. Part 2. The Staff, in its Answer, argued that contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(ii)–(vi), each contention lacked an adequate supporting basis, raised issues beyond the scope of the proceeding, was immaterial, and lacked the requisite factual information or expert opinion with specific references supporting the contention, as well as sufficient information to show the existence of a genuine dispute with the applicant on an issue of law or fact. See Staff Answer at 11-32. Further, the Staff explained how three of NAWO’s proposed contentions (NAWO 2, NAWO 4, and NAWO 7) constituted impermissible attacks on NRC regulations pursuant to 10 C.F.R. § 2.335(a). *Id.* at 16-17, 23, 32.

NAWO, in its Comment, does not address the deficiencies identified by the Staff or NMC with respect to NAWO's Petition. NAWO fails to controvert the Staff's arguments that NAWO had not demonstrated an "injury in fact" sufficient to confer standing or otherwise met the requirements for organizational or representational standing,⁶ and fails to respond to the Staff's reasoning that the proposed contentions were inadequately pled. Rather than replying to these arguments, NAWO uses its Comment to introduce new arguments that it was required to raise originally in its Petition.

Arguably, the Comment purports to address the Staff's and NMC's arguments, that NAWO 5's assertions regarding drinking water do not relate to the effects of aging, by claiming that "certain passive components are not subject to any aging management review process . . . , yet could fail[.]" See NAWO Comment at 2. See *also* Staff Answer at 28. A closer examination of the Comment, however, reveals that it is no more than a facial attempt to bootstrap new issues into the Petition. These new arguments concern purported deficiencies in the application with regard to the following previously-unmentioned components: (1) "mounting base plates, grout, or mounting hardware" for "pumps"; (2) "mounting plates, grout, or mounting hardware" for "heat exchangers, compressors, tanks, turbines, and motors"; (3) "Valve Stem and Pump Shaft packing" material; (4) "consumable items" such as "oils and greases"; and (5) "valve discs, plugs, or gates[.]" including "the valve stem, valve actuator, and valve actuator to valve mounting hardware[.]" See Comment at 2-9. This entirely new set of issues is unassociated with the arguments raised in the Answers of the Staff and NMC. Therefore, NAWO exceeds the permissible scope of a reply, as allowed by 10 C.F.R. Part 2.

⁶ The only point NAWO makes regarding its standing is that "NAWO represents people who will suffer when reactor operations fail at Monticello[.]" and that "NAWO represents people who may benefit from the more responsible delivery of electric utility services." Comment at 1. These statements merely reiterate the grounds for standing asserted in NAWO's original Petition, instead of responding to the Staff's specific arguments that NAWO failed to demonstrate an "injury in fact" or to establish organizational or representational standing. See Staff Answer at 5-8.

In *LES*, while affirming a Board's rejection of contentions where the petitioners' reply filings "essentially constituted untimely attempts to amend their original petitions[.]" the Commission emphasized:

[O]ur contention admissibility and timeliness requirements 'demand a level of discipline and preparedness on the part of petitioners,' who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be 'narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer, As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be 'no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements' and add new bases or new issues that 'simply did not occur to [them] at the outset.'

CLI-04-25, 60 NRC at 224-25 (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29; Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004)). *Accord Amgen Inc. v. Smith*, 357 F.3d 103, 117-18 (D.C. Cir. 2004) ("The court has 'repeatedly held that an argument first made in a reply brief ordinarily comes too late for our consideration.'"). As in *LES*, the Comment herein introduces new arguments that NAWO was required to raise at the time of its initial filing, but did not.

NAWO's Comment fails to respond to the specific arguments presented in the Staff's and NMC's Answers. The Comment instead identifies, for the first time, asserted deficiencies in the application with respect to certain plant components. The document is not even in the nature of a reply, as it broadens the scope of arguments set forth in the original Petition, instead of being "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," as required. See *LES*, CLI-04-25, 60 NRC at 225. Therefore, the Comment is improper under 10 C.F.R. § 2.309(h)(2) and should be stricken from the record of this proceeding.

B. The Comment is Improper Under 10 C.F.R. § 2.309(c)(1) and (f)(2)

Inasmuch as NAWO's Comment represents the introduction of new issues not previously raised by NAWO in this proceeding, NAWO was required to address the late-filing criteria of 10 C.F.R. § 2.309(c)(1) and (f)(2). The regulations require that a petitioner seeking to file new or amended contentions seek leave of the presiding officer, and show that:

- (i) The information on which the amended or new contention is based was not previously available;
- (ii) The information on which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). The petitioner must also demonstrate good cause for its non-timely filing, and address the other late-filing factors specified in 10 C.F.R. § 2.309(c)(1). As the Commission has stressed, “[t]his agency does not look with favor on ‘amended or new contentions filed after the initial filing.’” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 636 (2004) (citing 10 C.F.R. § 2.309(f)(2)).

NAWO's Comment provides no explanation as to why its filing of new contentions in this proceeding is permissible under the Commission's regulations, and fails to address the late-filing criteria of 10 C.F.R. § 2.309(c)(1) and (f)(2). In particular, the new arguments relating to plant components appear to be based entirely on asserted deficiencies with the renewal application itself, a document that was available for NAWO to rely upon in formulating its contentions at the time of its initial hearing request. As NAWO has made no showing as to the existence of new information that was not previously available to it nor as to any excuse for its lateness in presenting these new arguments, NAWO's arguments should be stricken from the record in this proceeding. *See id.* at 642.

Moreover, as was the case with its initial proposed contentions, the Staff notes that NAWO once again has failed to address the Commission's basic pleading requirements in 10 C.F.R. Part 2. The new arguments raised in the Comment are entirely lacking in specificity, basis, supporting references, and the required factual information or expert opinion. See 10 C.F.R. § 2.309(f)(1)(i)–(vi). Choosing to hide behind trite and insulting invective – see Comment at 1-2, 9 – NAWO evidences a fundamental misapprehension of the Commission's adjudicatory process, and would trivialize the Commission's most fundamental requirements for intervention. In the Commission's own words, its pleading requirements “do not allow mere ‘notice pleading;’ the Commission will not accept ‘the filing of a vague, unparticularized’ issue, unsupported by alleged fact or expert opinion and documentary support.” *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 164 (2000) (citation omitted). The Commission has consistently maintained that the contention standard of 10 C.F.R. § 2.309(f) “is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. at 2,189-90. The purpose of this proceeding is not to permit NAWO to create a record by introducing unsupported arguments; rather, “[t]he ultimate purpose of an adjudicatory proceeding is to resolve material issues with respect to an NRC regulatory action.” *Id.* at 2,201.

CONCLUSION

For the foregoing reasons, NAWO's Comment should be stricken in its entirety for impermissibly broadening the Petition, in contravention of the Commission's rules governing the contents of reply filings, and for failing to address the criteria governing amended or new contentions.

Respectfully submitted,

/RA/

Michael A. Woods
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Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of August, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION TO STRIKE COMMENT OF THE NORTH AMERICAN WATER OFFICE," in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by U.S. mail, first class, as indicated by double asterisk, with copies by electronic mail this 19th day of August, 2005:

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