

RAS 15094

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

February 20, 2008 (4:30pm)

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
Dr. Kaye D. Lathrop

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	February 15, 2008

**ENTERGY NUCLEAR OPERATIONS, INC. MOTION TO STRIKE TOWN OF
CORTLANDT'S REPLY TO ENTERGY AND NRC STAFF ANSWER TO
CORTLANDT'S REQUEST FOR HEARING AND PETITION TO INTERVENE**

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(a), Entergy Nuclear Operations, Inc. ("Entergy" or "Applicant"), hereby files this Motion to Strike new contentions, arguments and new supporting information contained in Town of Cortlandt's ("Petitioner" or "Cortlandt") Reply to (1) NRC Staff's Response to Town of Cortlandt's Request for Hearing and Leave to Intervene and (2) Answer of Entergy Nuclear Operations, Inc. Opposing Town of Cortlandt's Request for Hearing and Leave to Intervene dated February 8, 2007 ("Reply").¹ As discussed below, the Petitioner not only has impermissibly raised various new issues and claims not found in the Petitioner's original petition, but also has failed to comply with the standards governing late-filed

¹ As required by 10 C.F.R. § 2.323(b), counsel for Entergy contacted counsel for the Town of Cortlandt, in an attempt to resolve the issues in this Motion. As of the time of filing, Mr. Riesel was unavailable and Mr. Wood did not return Entergy's phone call. Counsel for the Staff does not oppose this Motion.

TEMPLATE = SECY-037

SECY-02

contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). For the reasons set forth below, these new arguments and supporting documents should be stricken.

II. BACKGROUND

On April 23, 2007, as supplemented by letters dated May 3, 2007 and June 21, 2007, Entergy submitted an application to the NRC to renew the Indian Point Nuclear Generating Units 2 and 3 (“IPEC”) operating licenses (License Nos. DPR-26 and DPR-64) for an additional 20 years (“Application”).² The Commission Hearing Notice stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a petition for leave to intervene within 60 days of the Notice (*i.e.*, October 1, 2007), in accordance with the provisions of 10 C.F.R. § 2.309.³ Subsequently, on October 1, 2007, the Commission extended the period for filing requests for hearing until November 30, 2007.⁴ Cortlandt filed its Request for Hearing and Petition to Intervene (“Petition”) on November 29, 2007. On January 22, 2008, Entergy and the NRC Staff filed separate answers to the Petition. On February 8, 2008, Cortlandt filed its Reply.⁵

² Entergy subsequently submitted two amendments to the Application. *See* Letter from F. Dacimo, Entergy Vice President, License Renewal, to NRC Document Control Desk (Dec. 18, 2007), *available at* ADAMS Accession No. ML073650195; Letter from F. Dacimo, Entergy Vice President, License Renewal, to NRC Document Control Desk (Jan. 22, 2008), *available at* ADAMS Accession No. ML080290659.

³ Notice of Opportunity for Docketing of the Application and Notice of Opportunity for Hearing, 72 Fed. Reg. 42,134 (Aug. 1, 2007).

⁴ Extension of Time for Filing of Requests for Hearing or Petition for Leave to Intervene in the License Renewal Proceeding, 72 Fed. Reg. 55,834 (Oct. 1, 2007).

⁵ *See* Licensing Board Order (Clarifying Time for Entergy to File Answers to CRORIP 10 C.F.R. 2.335 Petition) at 1-2 (Jan 2, 2008) (unpublished) (setting a due date of February 8, 2008 for replies).

III. LEGAL STANDARDS

A. **New Arguments and Supporting Information are Prohibited in Reply Briefing**

Cortlandt may not introduce additional information or make new arguments in its reply brief. “It is well-established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request.”⁶ Because a reply is intended solely to provide a party an opportunity to address arguments raised in answers, it may not use its reply as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in its original petition, and may not attempt to cure an otherwise deficient contention.⁷ Rather, “[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.”⁸

The Commission’s prohibition on new arguments in reply briefing, found in 10 C.F.R. Part 2 and in Commission precedent, is rooted in the Commission’s interests in conducting adjudicatory hearings efficiently and in conformance with basic principles of fairness. The Commission has recognized that “[a]s 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.”⁹ It has further stated that

⁶ *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

⁷ *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198 (2006) (finding that petitioners impermissibly “expand[ed] their arguments” by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contentions). The Board in the same proceeding struck all portions of the petitioners’ expert’s second declaration relating to a steam dryer aging management contention, as well as the entire testimony of a state engineer before the state public service department, finding that these portions of the reply and its supporting documents “include[d] new arguments and factual information that were not included in the initial petition and do not directly address challenges in the answers, and that therefore exceed the permissible scope of a reply.” *Id.* at 191; *See also Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351 (2006) (striking references to various letters, NRC Staff Presentations, and briefings from public meetings not included in the original petition to intervene “as of the sort that might have been included in the original basis for the contention”).

⁸ *Palisades*, CLI-06-17, 63 NRC at 732.

⁹ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they “realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”¹⁰

Accordingly, a party must include all of its arguments and claims in its initial filing. Allowing a party to amend or supplement its pleadings in reply to the applicant’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.¹¹

Because NRC regulations do not allow the applicant to respond to a Petitioner’s reply, principles of fairness mandate that the Petitioner restrict its reply brief to addressing issues raised in the applicants answer;¹² “[a]llowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims.”¹³ Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”¹⁴ Accordingly, “[a]ny reply

¹⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-49 (2003).

¹¹ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotations omitted).

¹² Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner’s reply.

¹³ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁴ *LES*, CLI-04-25, 60 NRC at 225.

should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”¹⁵ Any arguments that improperly expand upon that must be stricken.¹⁶

B. A Petitioner Attempting to Introduce New Information Must Satisfy the Commission’s Late-Filed Contention Criteria

New arguments or support for a contention “cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).”¹⁷ A Petitioner seeking to submit late-filed contentions is under an affirmative burden to demonstrate that it satisfies the criteria of Section 2.309(f)(2):

- (1) The information upon which the amended or new contention is based was not previously available;
- (2) The information upon which the amended or new contention is based is materially different than information previously available;
- (3) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.¹⁸

If a Petitioner cannot satisfy the requirements of Section 2.309(f)(2), then any contention it is seeking to have admitted is considered “non-timely.” In the latter instance, a petitioner must

¹⁵ Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. at 2,203 (Jan. 14, 2004). *See also Entergy Nuclear Generation Co., Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006) (stating that a petitioner may “respond to and focus on any legal, logical, or factual arguments presented in the answer, and [that] the ‘amplification’ of statements provided in an initial petition is legitimate and permissible.”)

¹⁶ A Licensing Board has the authority to strike individual arguments and exhibits. *See generally* 10 C.F.R. § 2.319 (The presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”). *See also* 10 C.F.R. § 2.304(c) (“If a document is not signed . . . it may be struck”); 10 C.F.R. § 2.319(d) (authorizing the presiding officer to “strike any portion of a written presentation”); 10 C.F.R. § 2.333(b) (authorizing the presiding officer to “strike argumentative, repetitious, cumulative, unreliable, immaterial, or irrelevant evidence”); 10 C.F.R. § 2.705(g)(3) (authorizing a presiding officer to strike an unsigned discovery-related request, response, or objection); 10 C.F.R. § 2.1320(a)(9) (authorizing the presiding officer to “strike or reject duplicative, unreliable, immaterial, or irrelevant presentations”).

¹⁷ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁸ 10 C.F.R. § 2.309(f)(2).

then demonstrate that admission of a non-timely contention is warranted by satisfying the eight-factor balancing test in 10 C.F.R. § 2.309(c).

Allowing a Petitioner to raise new issues and arguments in a reply brief without addressing and satisfying the above criteria “would effectively bypass and eviscerate [NRC] rules governing timely filing, contention amendment, and submission of late-filed contentions.”¹⁹

IV. DISCUSSION

Cortlandt’s Reply bears little resemblance to its Petition to Intervene and goes far beyond the arguments raised in the Applicant’s Answer.²⁰ In its Reply, Cortlandt addresses only two of its originally-proposed contentions—the adequacy of an aging management plan (“AMP”) for spent fuel storage and the consideration of terrorism under the National Environmental Policy Act (“NEPA”). The balance of its Reply improperly presents new contentions and new arguments, including purportedly new facts and a new affidavit that was not included in its Petition to Intervene. Moreover, Cortlandt introduces all of these new claims without acknowledging, much less addressing, the late-filed contentions standards set forth in 10 C.F.R. § 2.309(c), (f)(2). Accordingly, these new contentions, arguments, supporting facts, and affidavit must be stricken.

¹⁹ *LES*, CLI-04-35, 60 NRC at, 623 (2004). *See also La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004) (Reply filings containing new arguments “essentially constituted untimely attempts to address the late-filing factors in [10 C.F.R.] section 2.309(c), (f)(2) [and] cannot be considered in determining the admissibility of their contentions.”).

²⁰ The Applicant notes that this Petitioner does not appear before the Board *pro se* but is represented by counsel who should suffer no confusion regarding the appropriate contents of a reply before an administrative tribunal or otherwise. This Petitioner is not entitled to any deference that arguably might be afforded to *pro se* intervenors.

A. New Contention Regarding Alternatives to Spent Fuel Storage Pools Should Be Stricken

As it did in its original Petition to Intervene, Cortland asserts that “the Applicant’s LRA fails to provide a detailed and workable aging management plan to deal with known leaks.”²¹ In its Reply, however, Cortlandt raises a completely new contention focused on alternatives to spent fuel storage pools.²² Cortlandt asserts that the “Applicant needs to address alternatives to spent fuel storage pools in this proceeding” and includes a discussion of the alleged benefits of dry cask storage.²³ In support of this argument, the Petitioner refers to the newly-offered affidavit of G. Sansoucy (“Sansoucy Affidavit”) and yet another newly identified report on reducing the hazards from stored spent fuel (“Alvarez Report”).²⁴ Although the report is dated 2003, Cortlandt did not offer the Alvarez Report in support of its original contention.

Cortlandt’s Petition to Intervene makes no mention of alternatives to spent fuel storage, nor does the Applicant’s Answer. As was stated above, “[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.”²⁵ Thus, Petitioner’s discussion of spent fuel storage alternatives constitutes a new contention presented for the first time in its Reply. It should be stricken.

In addition, the supporting Sansoucy Affidavit and Alvarez Report should likewise be stricken. As stated above, because a reply is intended solely to provide a party an opportunity to address arguments raised in answers, it may not use its reply as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in its original petition,

²¹ *Id.* at 8.

²² *See id.*

²³ *Id.* at 8-9.

²⁴ *Id.* at 9-10.

²⁵ *Palisades*, CLI-06-17, 63 NRC at 732.

and may not attempt to cure an otherwise deficient contention.²⁶ Cortlandt uses the Sansoucy Affidavit and the Alvarez Report for the first time in its Reply as support for its new contention. Thus, both documents should be stricken.

B. New Contention Regarding Metal Fatigue Should Be Stricken

In its Reply, Cortlandt asserts that it “adopts Contention 26” of New York State regarding metal fatigue and repeats certain of the arguments made in New York’s petition.²⁷ Cortlandt points to the Commission’s decision in *Consolidated Edison*²⁸ for its authority to do so.²⁹

First and foremost, Cortlandt never mentions metal fatigue in its original Petition to Intervene. Thus, this is a wholly new and late-filed issue. Moreover, the circumstances in *Consolidated Edison* were different than the ones presented here, as Cortlandt should be well aware. The petitioners in that proceeding, Cortlandt and Citizens Awareness Network, acknowledged their intentions to adopt each other’s contentions *in their petitions to intervene*, thereby giving the Applicant an opportunity to answer.³⁰ As the Commission has held, “[a]llowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims.”³¹ Cortlandt’s adoption of New York’s metal fatigue contention in its Reply at this time both frustrates the Commission’s contention filing rules and unfairly deprives Entergy of its opportunity to rebut this claim. Cortlandt’s adoption of New York’s contention should, thus, be stricken.

²⁶ See *Vermont Yankee*, LBP-06-20, 64 NRC at 198

²⁷ Reply at 11.

²⁸ *Consol. Edison Co. (Indian Point, Units 1 and 2)*, CLI-01-19, 54 NRC 109 (2001).

²⁹ Reply at 11.

³⁰ See *Consolidated Edison*, CLI-01-19, 54 NRC at 131-32.

³¹ *Palisades*, CLI-06-17, 63 NRC at 732.

C. New Contention Regarding Severe Accident Mitigation Alternatives Should Be Stricken

Again, for the first time, Cortlandt asserts in its Reply that the “applicant’s analysis of the probability and scope of severe accidents is inadequate.”³² Cortlandt argues that Entergy’s severe accident mitigation alternatives (“SAMA”) analysis does not satisfy NEPA because it (1) fails to address severe accidents, such as spent fuel pool fires and acts of sabotage, and (2) underestimates the off-site costs of severe accidents.³³ In support of its new contention, Cortlandt points to a November 28, 2007 report submitted by Riverkeeper in Riverkeeper’s Petition to Intervene (“Thompson Report”).³⁴

For reasons not explained in the Reply, Cortlandt did not, in its original Petition to Intervene, challenge the adequacy of Entergy’s SAMA analysis and never referred to the November 28, 2007 Thompson Report, which was available to it at the time of filing. Cortlandt is prohibited from doing so now. Furthermore, its arguments regarding SAMAs in no way constitute mere amplification of its contentions regarding spent fuel pools or terrorism. This is a new contention fashioned from scratch. Thus, Cortlandt’s new contention regarding the adequacy of Entergy’s SAMA analysis, as well as the Thompson Report, should be stricken.

D. New Argument Regarding the Adequacy of the Generic Environmental Impact Statement Should Be Stricken

Cortlandt asserts in its Reply that “Entergy’s License Renewal Application does not adhere to the standards set forth in 10 C.F.R. Part 54.”³⁵ Cortlandt explains that “[b]oth the NRC Staff and Entergy oppose the admission of this contention,”³⁶ although the Petitioner fails to

³² Reply at 16.

³³ *Id.* at 16-17.

³⁴ *Id.* at 17-18.

³⁵ *Id.* at 4.

³⁶ *Id.*

specify which contention and fails to cite to the Applicant's Answer. Again, with no reference, Cortlandt asserts that the "NRC Staff and the Applicant oppose the consideration of [spent fuel storage] by invoking the 1996 Generic Environmental Impact Statement ('GEIS') for the proposition that the GEIS's findings foreclose the issue of appropriateness and safety of these temporary nuclear waste facilities in a licensing proceeding."³⁷ In support of this assertion, Cortlandt argues, for the first time, that the "12-year old GEIS is patently dated and inadequate, and therefore requires supplementation . . . pursuant to 40 C.F.R. § 1502.9(c)."³⁸

Cortlandt's Petition to Intervene in no way impugns the adequacy of the GEIS. The argument in its Reply goes well beyond any amplification of a prior argument; indeed, it is an entirely new argument. As discussed above, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."³⁹ Therefore, Cortlandt's new argument regarding the adequacy of the GEIS should be stricken.

E. New Affidavit and New Exhibits Should Be Stricken

As noted above, Cortlandt, in its Reply, for the first time includes the Sansoucy Affidavit, which discusses spent fuel storage.⁴⁰ For the first time, Cortlandt also cites to a number of additional documents in support of its new contentions and new arguments that were not included in its Petition to Intervene. Specifically, Cortlandt references the following new, yet previously available, documents: (1) Government Accounting Office, Yucca Mountain: DOE Has Improved Its Quality Assurance Program, But Whether Its Application For a NRC License Will Be High Quality Is Unclear (Aug. 2007);⁴¹ (2) Letter from Grace Musumeci, Chief

³⁷ *Id.* at 4-5.

³⁸ *Id.* at 5.

³⁹ *LES*, CLI-04-25, 60 NRC at 225.

⁴⁰ *See* Reply, Ex. A (Affidavit of George E. Sansoucy, P.E.).

⁴¹ *See* Reply at 6.

Environmental Review Section, Environmental Protection Agency, to Chief, NRC Rules and Directives Branch (Oct. 10, 2007) (*available at* ADAMS Accession No. ML072960360);⁴² (3) Robert Alvarez, Reducing the Hazards from Stored Spent Power-Reactor Fuel in the United States, 11 *Science & Global Security* 1 (2003);⁴³ and (4) Gordon Thompson, Risk-Related Impacts from Continued Operation of the Indian Point Nuclear Power Plants 51 (November 28, 2007).⁴⁴

Petitioners, however, are required to “examine the publicly available material and set forth their claims *and the support for their claims at the outset.*”⁴⁵ Importantly, all of the documents referenced in the Cortlandt Reply were available when it submitted its Petition. Accordingly, Cortlandt failed to support its claims at the outset and should not be permitted to supplement its Petition now. Therefore, all of the referenced documents, including the Sansoucy Affidavit, should be stricken.

⁴² *See id.* at 7.

⁴³ *See id.* at 10, 15-16.

⁴⁴ *See id.* at 18.

⁴⁵ *LES, CLI-04-25, 60 NRC at 225 (emphasis added).*

V. CONCLUSION

For the foregoing reasons, the Board should strike the new contentions, arguments, and supporting documents that Cortlandt impermissibly includes for the first time in its Reply.

Respectfully submitted,



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1-WA/2920414.5

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before Administrative Judges:
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In the Matter of)	Docket Nos. 50-247-LR and 50-286-LR
ENTERGY NUCLEAR OPERATIONS, INC.)	ASLBP No. 07-858-03-LR-BD01
(Indian Point Nuclear Generating Units 2 and 3))	February 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of "Entergy Nuclear Operations, Inc. Motion to Strike Town of Cortlandt's Reply to Entergy and NRC Staff Answer to Cortlandt's Request for Hearing and Petition to Intervene" and "Entergy Nuclear Operations, Inc. Motion to Strike Hudson River Sloop Clearwater Inc's Reply to Entergy and NRC Responses to Clearwater Petition to Intervene and Request for Hearing," both dated February 15, 2008, were served this 15th day of February 2008 upon the persons listed below, by first class mail and e-mail as shown below.

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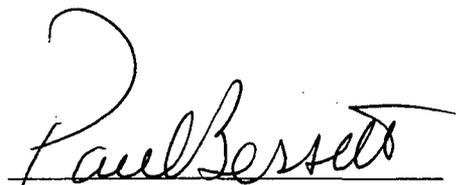
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