RAS 15095

DOCKETED
USNRC

February 20, 2008 (4:30pm)

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

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

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

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 legal arguments in "Hudson River Sloop Clearwater Inc.'s ("Clearwater") Reply to Entergy and the Nuclear Regulatory Commission ("NRC") Responses to Clearwater Petition to Intervene and Request for Hearing," dated February 8, 2008 ("Reply").[1] As discussed below, Clearwater not only has impermissibly raised two new legal theories for the first time in its Reply, but also has failed to comply with the standards governing late-filed contentions in 10 C.F.R. § 2.309(c) and (f)(2). First, Clearwater cites New York State

[1] As required by 10 C.F.R. § 2.323(b), counsel for Entergy contacted Clearwater's representative, in an attempt to resolve the issues in this Motion. Clearwater's representative does not agree to the relief requested in this Motion. Counsel for the Staff does not oppose this Motion.

TEMPLATE = SECY-037

SECY-02

water quality regulations in an attempt to expand the scope of Clearwater Proposed Contention EC-1 beyond the bases presented in its Petition to Intervene and Request for Hearing[2] ("Original Petition"). Second, Clearwater attempts to rehabilitate all of its proposed contentions with a new argument that the Board should relax the Commission's contention pleading requirements. For the reasons set forth below, these new arguments and supporting information 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").[3] 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.[4] Subsequently, on October 1, 2007, the Commission extended the period for filing requests for hearing until November 30, 2007,[5] and the Board later extended the deadline to December 10, 2007.[6] Clearwater filed its Original Petition on December 10,

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2 Dated December 10, 2007.

3 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.

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

5 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).

6 Licensing Board Order (Granting an Extension of Time to Clearwater Within Which to File Requests for Hearing) at 1 (Nov. 27, 2007) (unpublished).

2007. On January 22, 2008, Entergy and the NRC Staff filed separate Answers to the Original Petition. On February 8, 2008, Clearwater filed its Reply.[7]

III. LEGAL STANDARDS

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

Clearwater cannot 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."[8] Because a reply is intended solely to give 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.[9] 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."[10]

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 on basic principles of fairness. The

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7 *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 due date of February 8, 2008 for replies).

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

9 *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 contention). 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, 334-51 (2006) (striking references to various letters, NRC Staff Presentations, and briefings from public meetings not included in the original petition as of the sort that might have been included in the original bases for the contention).

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

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."[11] It has further stated that

> 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.[12]

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.[13]

Moreover, 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 applicant's answer:[14] "[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."[15] Thus, "[i]n Commission practice,

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

[12] *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) (internal quotations omitted).

[13] *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004).

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

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

and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."[16] Accordingly, "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."[17] Any arguments that improperly expand upon that must be stricken.[18]

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)."[19] A Petitioner seeking to submit late-filed contentions is under an affirmative burden to demonstrate that it satisfies the criteria of § 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.[20]

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16 *LES*, CLI-04-25, 60 NRC at 225.

17 Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2181, 2203 (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.")

18 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").

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

20 10 C.F.R. § 2.309(f)(2).

If a Petitioner cannot satisfy the requirements of § 2.309(f)(2), any contention it is seeking to have admitted is considered "non-timely;" petitioner must 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."[21]

IV. DISCUSSION

In Proposed Contention EC-1, Clearwater claimed that Entergy's Environmental Report did not adequately address ongoing spent fuel pool leakage that allegedly is contaminating groundwater and adversely impacting the environment.[22] To support this proposed contention, Clearwater relied exclusively on comparisons of alleged groundwater contamination to unspecified or vague water quality standards, with no specific references to any legal or regulatory requirements.[23] Further, Clearwater itself did not provide any direct supporting information, but instead relied on statements of individuals not associated with Clearwater by quoting from the New York Attorney General's ("New York") Contention 28.[24] The quoted New York material provided comparisons of alleged contamination levels to an unspecified "drinking water

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21 *LES*, CLI-04-35, 60 NRC at 623 ; *see also Louisiana 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.").

22 Petition at 18-19.

23 *See id.* at 19-23.

24 *Id.* at 21

standard."[25] Clearwater similarly included a vague citation to a "Regional Report" purportedly discussing contamination above "the EPA drinking water limit."[26] Finally, Clearwater referred to purported statements by "David Lochbaum from the Union of Concerned Scientists and Phillip Musegaas of Riverkeeper," comparing alleged contamination levels to unspecified New York State and EPA "limits."[27]

Entergy responded to these arguments by explaining that the EPA's drinking water standards were inapplicable because on-site groundwater is not used as drinking water, and that the dose to the maximally-exposed individual was 0.055% of the applicable NRC dose limit.[28] In Reply, Clearwater now attempts to rehabilitate Contention EC-1 by citing, for the first time, Part 701 of New York State's environmental regulations, which, Clearwater argues, "requires that discharge of waste shall not impair water below its best use, which for groundwater is as a potable water supply."[29]

This Clearwater cannot do. The contention pleading rules do not permit Clearwater to file "vague, unsupported, and generalized allegations and simply recast, support, or cure them later."[30] The New York State environmental regulations were

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25 *Id.* (*quoting* New York State Notice of Intention to Participate and Petition to Intervene at 251 (Nov. 30, 2007) ("New York Petition")); *see also* New York Petition Supporting Declarations and Exhibits, Vol. I att. (Declaration of Timothy B. Rice, ¶¶ 16, 19). Moreover, it appears that the comparisons in the New York Petition refer to EPA standards, *not* New York State standards. New York Petition at 6 ("in 2005 and 2006, Entergy found two separate leaks . . . at levels above EPA drinking water limits").

26 Petition at 22.

27 This single vague reference to (unspecified) New York State "limits" in Clearwater's original Petition is insufficient to establish a legitimate basis for Contention EC-1 because it lacks the requisite specificity under 10 C.F.R. § 2.309(f)(1)(i).

28 Answer at 35-37.

29 Reply at 4.

30 *LES*, CLI-04-35, 60 NRC at 622-23.

available to Clearwater at the time it submitted its Original Petition.[31] Thus, if Clearwater intended to rely on comparisons to particular New York State standards as a basis for this contention, Clearwater should have included this information in its Original Petition.[32] To amend their proposed contention with this additional basis now, Clearwater must meet the late-filed contention standards in 10 C.F.R. § 2.309(f)(2) and (c).[33] Consideration of this additional basis, raised for the first time in a reply, would also "unfairly deprive other participants an opportunity to rebut" this new claim.[34] Thus, Clearwater's argument that specific New York State groundwater standards apply to the IPEC site should be stricken.

In its Reply, Clearwater also raises a new challenge to the Commission's contention pleading standards: "Any rule or practice of the Board that denies the admission of a contention without an expert affidavit is contrary to [unspecified] law and public policy."[35] In support of this argument, Clearwater complains that it is unable "to compete financially with an organization such as Entergy" and as a result, "[t]he Board has an obligation not to disenfranchise not-for profits . . . ."[36] In essence, Clearwater appears to ask the Board to lower the bar for contention admissibility based on an alleged

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[31] The Part 701 regulations Clearwater cites were last amended in March 1998. *See* http://www.dec.ny.gov/regs/4592.html.

[32] Although Entergy recognizes that "amplification" of statements in a petition may be permissible in a reply, Clearwater may not build upon a single, unsupported reference to state drinking water "limits" to develop an entirely new purported basis for its contention.

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

[34] *Id.*

[35] Reply at 5 n.2.

[36] *Id.*

disparity of resources. This novel legal theory should also be stricken because Clearwater did not raise it in its Original Petition.[37]

V. CONCLUSION

For the foregoing reasons, the Board should strike the new information and legal arguments that Clearwater impermissibly raises for the first time in its Reply.

Respectfully submitted,

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Dated at Washington, DC
this 15th day of February, 2008

[37] *See Palisades*, CLI-06-17, 63 NRC at 732 (ruling that new claims are not permitted in a reply brief).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Richard E. Wardwell
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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 Cortland'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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