

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|----------------------------------|---|-------------------------------|
| In the Matter of |) | |
| |) | |
| TENNESSEE VALLEY AUTHORITY |) | Docket Nos. 52-014 and 52-015 |
| |) | |
| (Bellefonte Nuclear Power Plant, |) | July 11, 2008 |
| Units 3 and 4) |) | |
| |) | |

APPLICANT’S MOTION TO STRIKE PORTIONS OF PETITIONERS’ REPLY

On July 8, 2008, the Petitioners filed their “Reply of the Blue Ridge Environmental Defense [sic] League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy to the NRC Staff Answer to Petition for Intervention and the Applicant’s Answer Opposing Petition to Intervene, Both Dated July 1, 2008” (“Reply”). Contrary to U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) regulations and past precedent, Petitioners’ Reply improperly includes new arguments, references, and attachments. In accordance with 10 C.F.R. § 2.323, the Tennessee Valley Authority (“TVA”), applicant in the above-captioned matter, hereby files this motion to strike¹ those portions of the Petitioners’ Reply that contain the new information.

I. BACKGROUND

Petitioners filed their “Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy” (“Petition”) on June 7, 2008 and a Supplemental Petition

¹ As required by 10 C.F.R. § 2.323(b), counsel for TVA contacted Mr. Zeller, the representative for the Petitioners, in an attempt to resolve the issues in this Motion. Mr. Zeller did not agree to the relief requested in this Motion. Counsel for the NRC staff has stated that it plans to file an answer to this Motion.

on June 26, 2008. In response, the NRC staff filed the “NRC Staff Answer to ‘Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy,’” and TVA filed the “Applicant’s Answer Opposing Petition to Intervene,” both on July 1, 2008. These answers both oppose admission of all of Petitioners’ proffered contentions. On July 8, 2008, the Petitioners filed their Reply to the NRC staff’s and TVA’s answers. As discussed in Section III below, Petitioners’ Reply contains extensive new arguments, references, and attachments not contained in their Petition.²

II. LEGAL STANDARD

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties’ answers. A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention.³ As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original

² Furthermore, TVA believes that the new arguments, references, and attachments do not provide an adequate basis for an admissible contention. Therefore, if the Licensing Board decides to consider the new arguments, references, and attachments raised in the Reply, TVA requests an opportunity to file a response.

³ See *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (granting in part a motion to strike and 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 licensing board in the same proceeding struck all portions of the petitioners’ expert’s second declaration, 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, 351-63 (2006), *aff’d* CLI-06-17, 63 NRC 727 (2006) (the licensing board did not consider references to various documents identified in a petitioner’s reply that were not included in the original petition).

contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).⁴

The Commission’s prohibition on new arguments in replies is rooted in the Commission’s interest in conducting adjudicatory hearings efficiently and on 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.”⁵ 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.”⁶

Accordingly, a petitioner 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 or staff’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.⁷

Moreover, because NRC regulations do not allow the applicant to respond to a petitioner’s reply, principles of fairness mandate that a petitioner restrict its reply brief to addressing issues

⁴ *Palisades*, CLI-06-17, 63 NRC at 732 (citation omitted).

⁵ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“LES”).

⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

⁷ *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes omitted).

raised in the applicant’s or NRC staff’s answer.⁸ “Allowing 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.”⁹ Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”¹⁰ Accordingly, “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”¹¹ Any arguments that improperly expand upon that should be stricken.¹²

III. BASES FOR MOTION TO STRIKE

As detailed in the following table, Petitioners’ Reply contains numerous new arguments, references, and attachments.

| Location of New Information in the Reply | Description of New Information |
|---|--|
| <p><u>Contention MISC-A (Former Contention 1)</u></p> <ul style="list-style-type: none"> The heading on page 9 which states “<u>Building a nuclear power plant should be reconsidered in pure economic view.</u>” through the end of the discussion of this contention on page 12. | <p>This section of the Reply provides new information and arguments regarding the economics of nuclear power plants. In particular, the Reply provides information related to the costs of construction and power from nuclear plants, and argues that certain alternatives are economically preferable. None of the cost information was included in Contention MISC-A, and the argument related to alternatives was not contained in the original contention, which addresses general welfare, standard of living, and free competition; hardware failures; human factors; and NRC independence. <i>See</i> Petition at 11-19.</p> |

⁸ Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner’s reply. TVA has no opportunity to respond to the new information provided by the Petitioners.

⁹ *Palisades*, CLI-06-17, 63 NRC at 732.

¹⁰ *LES*, CLI-04-25, 60 NRC at 225.

¹¹ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

¹² A licensing board has the authority to strike individual arguments and exhibits. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”).

| Location of New Information in the Reply | Description of New Information |
|--|--|
| <p><u>Contention MISC-D</u> (Former Contention 5)</p> <ul style="list-style-type: none"> The last paragraph of the discussion of this contention on pages 13 and 14. | <p>This paragraph of the Reply provides new information and arguments related to a uranium study and the difficulty of extracting uranium. This study and discussion of uranium extraction is not included or referenced in Contention MISC-D in the Petition. <i>See</i> Petition at 32-34.</p> |
| <p><u>Contention NEPA-B</u> (Former Contention 8)</p> <ul style="list-style-type: none"> The first paragraph on page 15 and the entire affidavit of Shawn Young (Attachment 1). The following sentences related to the Young affidavit in the last paragraph for this contention on page 19: “As stated in Dr. Shawn Young’s attached affidavit, the fish community at BLN, TRM 391, is based upon assumptions, not actual field survey. The assumption that fish communities are similar at TRM 375 and TRM 424 are not supported by statistical tests for similarity, nor are fish communities equally distributed in any aquatic system.” | <p>These sections of the Reply provide new arguments and information that were not identified in the Petition. In particular, the Petition did not include or reference the Young Affidavit or even identify Shawn Young as an expert that would be relied upon. <i>See</i> Petition at 39-45.</p> |
| <p><u>Contention NEPA-D</u> (Former Contention 10)</p> <ul style="list-style-type: none"> The information from the sentence on the fourth line of page 20 that begins “In rebuttal” through the end of the discussion of this contention on page 24. | <p>This section of the Reply provides new arguments and information related to the viability of solar and wind power, including information from Ross McCluney and Amory Lovins. The Petition did not include or reference information from Ross McCluney or Amory Lovins. Additionally, Contention NEPA-D pertains to the no action alternative, not the alternatives of wind and solar power. The only discussion in Contention NEPA-D in the Petition related to wind and solar power is one sentence, stating that “[p]ositive alternatives to nuclear power include solar, wind and other renewable sources of energy.” Petition at 48.</p> |

| Location of New Information in the Reply | Description of New Information |
|--|---|
| <p><u>Contention NEPA-E</u> (Former Contention 11)</p> <ul style="list-style-type: none"> • The first paragraph of the discussion of this contention on page 24 and Attachment 2. • The sentence in the first paragraph on page 25 referencing the EIA AEO2008. • The last two sentences of the discussion of this contention on page 25 regarding Attachment 2 and LBNL 58271. | <p>These sections of the Reply and the new attachment provide new arguments, new references, and other new information related to energy efficiency and population and economic growth. Attachment 2, the reference to LBNL 58271, and the other information were not included in the Petition. <i>See</i> Petition at 49-63. Although AEO2008 was referenced in the Petition at 52, it was referenced for the proposition that the Gross Domestic Product (GDP) would grow at an average annual rate of 2.6 percent from 2006 to 2030, which is different than the 0.3 to 1.0 percent growth rates cited in the Reply.</p> |
| <p><u>Contention MISC-F</u> (Former Contention 13)</p> <ul style="list-style-type: none"> • The first paragraph of the discussion of this contention on page 26 and Diane D’Arrigo’s affidavit and curriculum vitae (Attachments 3 and 4). | <p>The D’Arrigo Affidavit was not included or referenced in the Petition and Ms. D’Arrigo was not referenced as an expert who would be relied upon for this contention. This paragraph of the Reply that discusses the affidavit provides new arguments and information from that contained in the Petition. <i>See</i> Petition at 65-69.</p> |
| <p><u>Contention NEPA-N</u> (Former Contention 16)</p> <ul style="list-style-type: none"> • That part of the first paragraph of the discussion of this contention on page 31 beginning with “But TVA hasn’t” through the end of the paragraph on page 32. | <p>This section of the Reply provides new information and arguments related to baseload power, including the argument that combinations of alternatives (or hybrid plants) involving “biogas” could produce baseload power. Contention NEPA-N in the Petition does not mention biogas or hybrid plants. Furthermore, the argument in the Reply is not contained in the Petition, which instead disputes the costs of the alternatives, not their ability to replace baseload power. Petition at 84-92.</p> |

The Licensing Board should strike these new arguments, references, and attachments that Petitioners impermissibly raise for the first time in their Reply. These portions of Petitioners’ Reply fail to “focus narrowly on the legal or factual arguments first presented in the original petition or raised in answers to it.”¹³ Instead, these portions of the Petitioners’ Reply impermissibly attempt to expand the scope of the contentions in the Petition and provide new bases and supporting material for the contentions, without addressing the criteria for late-

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

filed contentions and amended contentions in 10 C.F.R. § 2.309(c) and (f)(2). Petitioners cannot now try to provide additional information to remedy the defects in their original contentions. Additionally, much of this information is not “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”¹⁴ Instead, Petitioners provide new information in their Reply, to which TVA and the NRC staff are not allowed to respond. Accordingly, the new arguments, references, and attachments should be stricken.

IV. CONCLUSION

For the foregoing reasons, the Licensing Board should strike the new arguments, references, and attachments impermissibly provided in Petitioners’ Reply.

Respectfully submitted,

/signed (electronically) by Steven P. Frantz

Steven P. Frantz
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: sfrantz@morganlewis.com

Co-Counsel for TVA

Edward J. Vigluicci
Scott A. Vance
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
E-mail: ejvigluicci@tva.com

Counsel for TVA

Dated in Washington, D.C.
this 11th day of July 2008

¹⁴ Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2008 a copy of “Applicant’s Motion to Strike Portions of Petitioners’ Reply” was filed electronically with the Electronic Information Exchange on the following recipients:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ajb5@nrc.gov

Administrative Judge
Dr. William W. Sager
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Ann P. Hodgdon
Patrick A. Moulding
Maxwell C. Smith
E-mail: Ann.Hodgdon@nrc.gov;
Patrick.Moulding@nrc.gov; Maxwell.Smith@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Louis A. Zeller
Blue Ridge Environmental Defense League
(BREDL)
P.O. Box 88
Glendale Springs, NC 28629
E-mail: bredl@skybest.com

Louise Gorenflo
Bellefonte Efficiency & Sustainability Team
(BEST)
185 Hood Drive
Crossville, TN 38555
E-mail: lgorenflo@gmail.com

Sara Barczak
Southern Alliance for Clean Energy (SACE)
428 Bull Street, Suite 201
Savannah, GA 31401
E-mail: sara@cleanenergy.org

Signed (electronically) by

/s/ Steven P. Frantz

Steven P. Frantz
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: sfrantz@morganlewis.com

Co-Counsel for TVA