

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

In the Matter of	)	
	)	
DUKE ENERGY CAROLINAS, LLC	)	Docket Nos. 52-018 and 52-019
	)	
(William States Lee III Nuclear Station,	)	August 18, 2008
Units 1 and 2)	)	
	)	

**DUKE ENERGY CAROLINAS, LLC’S MOTION TO STRIKE PORTIONS OF THE  
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE REPLY TO THE DUKE AND  
NRC STAFF ANSWERS TO BREDL’S PETITION TO INTERVENE**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.323(a), Duke Energy Carolinas, LLC (“Duke” or “Applicant”), hereby files this Motion to Strike the new arguments and new supporting information contained in the “Reply of the Blue Ridge Environmental Defense League [“BREDL”] to Answers of Duke Energy Carolinas and NRC Staff,” dated August 8, 2008 (“Reply”).<sup>1</sup> As discussed below, the BREDL Reply impermissibly includes new arguments and support not found in the Petition for Intervention and Request for Hearing filed on June 27, 2008 (“Petition”). The Reply also fails to comply with the standards governing late-filed contentions set forth in 10 C.F.R. § 2.309(c) and (f)(2). Accordingly, these new arguments and supporting documents should be stricken.

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<sup>1</sup> As required by 10 C.F.R. § 2.323(b), counsel for Duke contacted BREDL’s representative, in an attempt to resolve the issues in this Motion. The representative for BREDL did not agree to the relief requested in this Motion. Counsel for the NRC Staff agrees that BREDL inappropriately included new information in its Reply that should not be considered by the Board.

## II. BACKGROUND

In a letter dated December 12, 2007, as supplemented by letters dated January 28, 2008, February 6, 2008, and February 8, 2008, Duke submitted an application to the NRC seeking approval of a combined license (“COL”) for the proposed William States Lee III Nuclear Station (“WLS”) Units 1 and 2.<sup>2</sup> The NRC accepted the COL application for docketing on February 25, 2008,<sup>3</sup> and published a Hearing Notice on April 28, 2008.<sup>4</sup> The Hearing Notice stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a petition for leave to intervene within 60 days of the Notice (*i.e.*, June 27, 2008) in accordance with 10 C.F.R. § 2.309.<sup>5</sup>

BREDL filed its Petition on June 27, 2008. On July 22, 2008, Duke and the NRC Staff filed timely, separate Answers to the Petition.<sup>6</sup> BREDL requested, and the Board granted, a 10-day extension for the due date for BREDL’s Reply (*i.e.*, the Reply was due on August 8, 2008).<sup>7</sup> In granting this extension, the Board specifically reminded BREDL that “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”<sup>8</sup> On August 8, 2008, BREDL filed its Reply to Duke and the NRC Staff Answers.

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<sup>2</sup> See Notice of Receipt and Availability of Application for a Combined License, 73 Fed. Reg. 6218 (Feb. 1, 2008).

<sup>3</sup> See Acceptance for Docketing of an Application for Combined License for William States Lee III Units 1 and 2, 73 Fed. Reg. 11,156 (Feb. 29, 2008).

<sup>4</sup> See Duke Energy; Notice of Hearing and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the William States Lee III Units 1 and 2, 73 Fed. Reg. 22,978 (April 28, 2008) (“Hearing Notice”).

<sup>5</sup> Hearing Notice, 73 Fed. Reg. at 22,979.

<sup>6</sup> Duke Energy Carolinas, LLC’s Answer Opposing Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (July 22, 2008) (“Duke Answer”); NRC Staff Answer to “Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League” (July 22, 2008).

<sup>7</sup> Licensing Board Order (Granting Blue Ridge Environmental Defense League’s Motion to Request Additional Time to Reply) at 1 (July 25, 2008) (unpublished) (“July 25 Extension Order”).

<sup>8</sup> *Id.* at 1-2 (quoting Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)).

### III. LEGAL STANDARDS

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

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 contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).<sup>9</sup>

Thus, a reply may not be used as a vehicle to introduce new support for a contention and may not attempt to cure an otherwise deficient contention.<sup>10</sup>

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."<sup>11</sup> 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

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<sup>9</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citation omitted).

<sup>10</sup> *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).

<sup>11</sup> *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) ("LES").

challenge it either originally opted not to make or which simply did not occur to it at the outset.”<sup>12</sup>

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 NRC 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.<sup>13</sup>

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 raised in the applicant’s or NRC Staff’s answer.<sup>14</sup> “Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims.”<sup>15</sup> Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.”<sup>16</sup> Accordingly, as the Board has already clearly reminded BREDL in this proceeding, “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the

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<sup>12</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (citation omitted), *quoted approvingly in LES*, CLI-04-25, 60 NRC at 224-25.

<sup>13</sup> *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes and citation omitted).

<sup>14</sup> Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner’s reply. Duke has no opportunity to respond to the new information provided by the Petitioner.

<sup>15</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>16</sup> *LES*, CLI-04-25, 60 NRC at 225.

applicant/licensee or NRC staff answer.”<sup>17</sup> Therefore, as discussed below, the BREDL arguments that improperly expand upon that should be stricken.<sup>18</sup>

**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).”<sup>19</sup> A petitioner seeking to submit late-filed contentions is under an affirmative burden to demonstrate that it satisfies the criteria of 10 C.F.R. § 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.<sup>20</sup>

If a petitioner cannot satisfy the requirements of 10 C.F.R. § 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).

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<sup>17</sup> July 25 Extension Order at 1-2 (quoting Changes to Adjudicatory Process, 69 Fed. Reg. at 2203).

<sup>18</sup> 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”).

<sup>19</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>20</sup> 10 C.F.R. § 2.309(f)(2). In addition to the late-filing criteria discussed above, a proposed new or amended contention must meet the substantive admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1). Those criteria are discussed at length in Duke’s July 22, 2008 Answer. *See* Duke Answer at 3-12. Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a proposed new or amended contention. *See* Changes to the Adjudicatory Process, 69 Fed. Reg. at 2221; *see also* *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

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.”<sup>21</sup> Indeed, to do so would serve as a disincentive to the timely filing of appropriately-supported contentions, insofar as petitioners invariably could wait and use applicant or NRC Staff answers as “roadmaps” for curing deficiencies in their proposed contentions at the reply stage of the pleading process.

#### IV. DISCUSSION

BREDL ignored Commission precedent and the Board’s clear Order in this proceeding requiring that the Reply “be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”<sup>22</sup> Instead, it submitted a textbook example of a reply that improperly contains new arguments and new support. Importantly, BREDL cannot claim inexperience or ignorance as an excuse for failing to narrowly tailor its Reply. The Board specifically alerted BREDL to the standard against which its Reply would be judged.

Furthermore, BREDL is an experienced player in NRC proceedings, having participated in almost a dozen adjudications in recent years, including several active proceedings.<sup>23</sup> Nor should BREDL’s status as a *pro se* petitioner excuse its failure to comply with these requirements.

“[T]he right of participation accorded *pro se* representatives carries with it the corresponding

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<sup>21</sup> *LES*, CLI-04-35, 60 NRC at 623; *see also La. Energy Servs., L.P.* (Nat’l Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004) (reply filings containing new arguments “essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in [10 C.F.R.] section 2.309(c), (f)(2), cannot be considered in determining the admissibility of their contentions.”).

<sup>22</sup> July 25 Extension Order at 1-2 (quoting Changes to Adjudicatory Process, 69 Fed. Reg. at 2203).

<sup>23</sup> *See, e.g., Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 & 4), Docket Nos. 52-014-COL and 52-15-COL; *Va. Elec. & Power Co.* (Combined License Application for North Anna Unit 3), Docket No. 52-017-COL; *Shaw AREVA MOX Servs.* (Mixed Oxide Fuel Fabrication Facility), Docket No. 70-3098-MLA; *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Docket No. 52-011-ESP.

responsibilities to comply with and be bound by the same agency procedures as all other parties, even where a party is hampered by limited resources.”<sup>24</sup>

Further, BREDL introduces new claims and supporting references without acknowledging, much less addressing, the late-filed contention standards set forth in 10 C.F.R. § 2.309(c), (f)(2). Whether intentional or not, this tactic deprives Duke and the NRC Staff of the fundamental ability to respond to arguments and issues raised for the first time in BREDL’s Reply, contrary to basic principles of fairness. Accordingly, these new arguments and supporting facts must be stricken.

**A. BREDL’s New Support for Contention 2 Should be Stricken from the Reply**

In Proposed Contention 2, BREDL claims that Duke’s environmental report (“ER”) does not include a discussion of greenhouse gas emissions or “carbon-footprint.”<sup>25</sup> The original Petition notes that an online report entitled, “Nuclear Power – Energy Balance” is “[a] recommended resource for conducting [a carbon-footprint] analysis,” but provides no other indication that BREDL intended to rely on any specific information in the report to support its contention or on any expert opinion.<sup>26</sup> The Petition also fails to identify any legal support for BREDL’s claim that Duke was required to include a “carbon-footprint” analysis in the WLS ER.

In its Reply, BREDL attempts—for the first time—to provide factual and legal support for its assertion that Duke is required to include a “carbon-footprint” analysis in the WLS ER. Specifically, BREDL attempts to recast its referenced report—the “Nuclear Power – Energy Balance”—from a “recommended resource” to “expert opinion.”<sup>27</sup> BREDL also attempts to rehabilitate its impermissibly-vague reference to the 8-part, 331-page report by only now

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<sup>24</sup> *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

<sup>25</sup> Petition at 11-12.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> Compare Petition at 13, with Reply at 7-8.

pointing to Subpart C of the report and by copying and pasting one particular formula from one previously unmentioned page found in the middle of the report that can purportedly be used to calculate carbon dioxide emissions.<sup>28</sup>

In addition, although the Petition originally provided no legal support for the Proposed Contention, the Reply now cites to the Clean Air Act, a Supreme Court case, the Environmental Standard Review Plan (“ESRP”), and a Commission adjudicatory decision, all in a belated attempt to provide legal support for this Proposed Contention that was obviously missing from its Petition.<sup>29</sup> BREDL never explains why it never referenced the carbon dioxide intensity formula in its initial Petition or why it failed previously to cite and discuss the various legal references upon which it now seeks to rely.

As Duke pointed out in its Answer, the vague reference in the Petition to the 331-page “Nuclear Power – Energy Balance” report is wholly insufficient.<sup>30</sup> Section 2.309(f)(1)(v) makes clear that BREDL is required to identify in its Petition the specific portions of the documents on which it relies. Vague references and incorporation of massive documents by reference is unacceptable.<sup>31</sup> In preparing Answers to BREDL’s Petition, Duke and the NRC Staff were not required to sift through the report, which was only identified as a “recommended resource,” culling out what information may or may not support BREDL’s position.<sup>32</sup> Thus, if BREDL intended to rely on the report—and specifically on Subpart C or on the precise calculation now

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<sup>28</sup> Reply at 7-8.

<sup>29</sup> *Id.* at 6-7.

<sup>30</sup> Duke Answer at 26.

<sup>31</sup> *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

<sup>32</sup> *See id.* at 241 (“The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point.”).

cited in its Reply—then BREDL had an obligation to cite to this information in its Petition so that Duke could have had a reasonable opportunity to address this material.

Furthermore, BREDL has failed to explain why it could not provide a more specific citation or the calculation in its original Petition and has made no attempt to otherwise address the late-filing criteria. Similarly, BREDL’s belated attempt to identify legal support for the requirement to conduct a carbon-footprint analysis is improper, as the documents that BREDL identifies in the Reply were clearly available to BREDL when it submitted its Petition.

Accordingly, the new references to Subpart C of the “Nuclear Power – Energy Balance” report, to the formula for calculating carbon dioxide emissions, and to the legal support in the Reply should be stricken. As the Commission has stated, “[a]llowing 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.”<sup>33</sup>

**B. BREDL’s New Support for Contention 3 Should be Stricken from the Reply**

In Proposed Contention 3, BREDL alleges that the WLS COL application “does not identify the plans for meeting its water requirements with sufficient detail in order to determine if there will be adequate water during adverse weather conditions such as droughts.”<sup>34</sup> The original Petition lists ten bases for BREDL’s claim that Duke failed to analyze potential impacts from elevated water temperatures in the Broad River and its watershed, as well as the associated impacts of prolonged periods of drought.<sup>35</sup> Basis (d) of the original Proposed Contention asserts that Duke should consider the impact of elevated water temperatures on withdrawal,

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<sup>33</sup> *LES*, CLI-04-35, 60 NRC at 622.

<sup>34</sup> Petition at 14.

<sup>35</sup> *Id.* at 15-16.

consumption, and evaporation.<sup>36</sup> Basis (e) of the original Proposed Contention claims that the impact of WLS water use on other facilities, upstream and downstream from the WLS site, should have considered the potential for elevated water temperatures.<sup>37</sup>

In response to Proposed Contention 3—and Bases (d) and (e) in particular—Duke pointed out that BREDL failed to provide support for its claim that purportedly higher temperatures would result in any water withdrawal, consumption, or evaporation impacts, or any impacts to upstream or downstream water users that differed from those already discussed in the ER.<sup>38</sup> Duke also noted that BREDL failed to acknowledge—let alone dispute—any specific section of the WLS ER that addressed these issues.<sup>39</sup>

In its Reply, BREDL now attempts to cure these deficiencies by claiming, for the first time:

Unanswered are the facts that Duke’s WS Lee would consume 4.2 times as much water as all public and industrial users in Cherokee County combined. Annual consumptive use would be 12.9 billion gallons; 11.6 million gallons of heated wastewater per day would be discharged back into the river.<sup>40</sup>

BREDL’s original arguments in the Petition relating to water use, consumption, and related impacts contain no such claims.<sup>41</sup> While this new information does not cure the defects

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<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.*

<sup>38</sup> Duke Answer at 36-38.

<sup>39</sup> *Id.*

<sup>40</sup> Reply at 9 (citing WLS Application, ER, § 2.3.2). In the Reply, BREDL also makes assertions regarding the Tennessee Valley Authority’s Browns Ferry Nuclear Plant. *Id.* at 10. While BREDL could not have addressed this particular Browns Ferry shutdown in its Petition, BREDL’s incomplete characterization of the event, which, as indicated in the NRC Event Report, was “caused by an unexpected failure of cooling tower components, rendering the cooling towers unavailable,” highlights the unfairness in BREDL’s attempt to amend the supporting bases of its contention in its Reply rather than through a motion for the admission of a new or amended contention. *Available at* <http://www.nrc.gov/reading-rm/doc-collections/event-status/event/2008/20080808en.html#en44392>.

<sup>41</sup> Petition at 15, 17-19.

in the original Proposed Contention, BREDL provides no explanation as to why it could not have presented this information in its Petition, and BREDL makes no attempt to address the required late-filing criteria. As the Commission has stated, BREDL was required to “set forth their claims *and the support for their claims at the outset.*”<sup>42</sup> Accordingly, BREDL’s new support regarding water use, consumption, and related impacts should be stricken.

**C. BREDL’s New Argument and New Support for Contention 4 Should be Stricken from the Reply**

In Proposed Contention 4, BREDL asserts that Duke “has not demonstrated that it is financially qualified to engage in the activities authorized by the *operating license* in accordance with the regulations in 10 C.F.R. § 50.57(a)(4).”<sup>43</sup> As the basis for this Proposed Contention, BREDL claims that it is not beneficial to build new nuclear power reactors because the current adverse economic conditions likely will decrease energy demand, and because taxpayers will be responsible for loan guarantees.<sup>44</sup> The original Petition also claims that Duke’s estimates of profits were “a little too optimistic” because a large part of Duke’s anticipated capital expenditure on future expansion would be spent outside of the U.S.<sup>45</sup>

In response to Proposed Contention 4, Duke established that, in accordance with 10 C.F.R. § 50.33(f), BREDL’s challenge to whether Duke is financially qualified to *operate* a nuclear plant is not within the scope of this proceeding.<sup>46</sup> Duke also pointed out that even if the Board viewed this Proposed Contention as challenging whether Duke is financially qualified to cover estimated construction and related fuel cycle costs, it still raised issues that are not material

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<sup>42</sup> *LES*, CLI-04-25, 60 NRC at 225 (emphasis added).

<sup>43</sup> Petition at 20 (emphasis added).

<sup>44</sup> *Id.* at 21.

<sup>45</sup> *Id.*

<sup>46</sup> Duke Answer at 56-58.

to the financial qualification review. Specifically, although BREDL's original focus is on adverse impact to taxpayers and future profits, it fails to demonstrate how these issues could adversely impact safety.<sup>47</sup>

In a thinly-veiled attempt to place its original Proposed Contention within the scope of the proceeding, BREDL now asserts in its Reply that “financial performance is crucial to power plant *construction*.”<sup>48</sup> Next, after selectively quoting from 10 C.F.R. § 50.33(f) and ignoring the pertinent language that exempts electric utility applicants like Duke from demonstrating financial qualifications with respect to the activities authorized by an *operating* license, BREDL asserts for the first time in its Reply that the Duke Energy 2006 Annual Report—which was previously available but not referenced in the Petition—purportedly shows a decreasing trend in Duke's operation revenue, earnings from continuing operations, and operating income.<sup>49</sup> Further, BREDL now speculates that while the financial report shows that Duke's “net income remains constant,” BREDL “can easily conclude that is due to decreasing income tax and minority expense, which probably will not keep going after 2008, the election year.”<sup>50</sup> Based on this conjecture, BREDL concludes that Duke has not “demonstrate[d] that it will remain financially healthy in the first few years after construction.”<sup>51</sup>

As noted above, BREDL did not, in its original Proposed Contention, challenge Duke's financial qualifications with respect to construction activities or reference the Duke Energy 2006 Annual Report. BREDL fails to explain, however, why it did not identify this document or these arguments in its Petition. Furthermore, BREDL has made no attempt to address the late-filing

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<sup>47</sup> *Id.* at 58-61.

<sup>48</sup> Reply at 12 (emphasis added).

<sup>49</sup> *Id.* at 11-12.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.*

criteria with respect to these new arguments or the new reference to the Duke Energy 2006 Annual Report. Accordingly, any new argument purporting to challenge whether Duke is financially qualified to construct nuclear power plants, the new reference to the Duke Energy 2006 Annual Report, and the new argument regarding the potential impact of the 2008 election should be stricken.

**D. BREDL's New Arguments and New Support for Contention 5 Should be Stricken from the Reply**

In Proposed Contention 5, BREDL asserts that the WLS "FSAR insufficiently analyzes reactor units' capability to withstand a design-basis and safe shutdown earthquake because [Duke] fail[ed] to include more recent information regarding the type, frequency, and severity of potential earthquakes."<sup>52</sup> BREDL's Petition raises issues in three general areas: (1) seismicity associated with the Charleston seismic source; (2) the potential presence of capable tectonic sources at or near the WLS site; and (3) the seismic design margin of the proposed new WLS AP1000 units.<sup>53</sup>

In response to Proposed Contention 5, Duke pointed out that the original Petition failed to include any specific references to the WLS FSAR or any supporting reasons for its belief that the FSAR failed to include relevant information that was required by law.<sup>54</sup> Furthermore, to highlight that the WLS FSAR did in fact address the issues that BREDL originally raised in its Petition, Duke discussed various sections of the FSAR that addressed BREDL's three general concerns.<sup>55</sup>

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<sup>52</sup> Petition at 22.

<sup>53</sup> *Id.* at 23-28.

<sup>54</sup> Duke Answer at 65-66.

<sup>55</sup> *Id.* at 66-70.

Once again, the BREDL Reply adds new bases and new support in an attempt to rehabilitate this inadmissible Proposed Contention. In its Reply, BREDL—for the first time—cites to a particular section of the WLS FSAR, claiming that Section 2.5.2 “is insufficient because it does not adequately describe how Duke combined random vibration theory with NUREG/CR-6728 Approach 3 to predict ground motion and how these factors were applied to the WS Lee site.”<sup>56</sup> The Reply also, for the first time, discusses the Eastern Tennessee Seismic Zone (“ETSZ”) and claims that Duke failed to update the ETSZ source models.<sup>57</sup> Furthermore, BREDL belatedly cites to and quotes from the NRC’s letter docketing the WLS COL application and the NRC’s letter establishing the WLS COL review schedule in support of its assertion that there are allegedly unresolved seismic issues.<sup>58</sup>

As originally submitted, BREDL alleged that the WLS FSAR omitted certain specified information on the “type, frequency, and severity of potential earthquakes,” but did not challenge—or even reference—Duke’s use of random vibration theory (“RVT”), NUREG/CR-6728 Approach 3, or the combination of RVT and Approach 3. As Duke noted in its Answer, BREDL’s Petition “fail[ed] to include *any* specific references to the FSAR or any supporting reasons for its belief that the FSAR is somehow deficient.”<sup>59</sup> The fact that Duke discussed various sections of the FSAR in its Answer (to underscore the complete lack of specificity in BREDL’s Petition) does not give BREDL license to formulate entirely new arguments, including the use of RVT, that clearly could and should have been presented in its original Petition.

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<sup>56</sup> Reply at 15.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Duke Answer at 66 (emphasis added).

Similarly, in the original Proposed Contention, BREDL focused on the Charleston earthquake and made no mention of the ETSZ or the Electric Power Research Institute Seismicity Owners Group (“EPRI/SOG”) source model for the region. The information that BREDL now cites was included in the FSAR at the time it filed Proposed Contention 5.<sup>60</sup> NRC “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.”<sup>61</sup> However, BREDL failed to include any challenge to the ETSZ and the EPRI/SOG source model in its Petition and failed to address the required late-filing criteria in its Reply. Furthermore, to the extent BREDL attempts to supplement its Petition by now referencing the NRC’s docketing and scheduling letters as purported support for this Proposed Contention, such tactics also are contrary to the permissible scope of a reply.<sup>62</sup>

In summary, BREDL provides no explanation or justification as to why it could not have presented any of this information in its original Petition.<sup>63</sup> Accordingly, BREDL’s new arguments regarding the RVT and NUREG/CR-6728 Approach 3, the ETSZ and the EPRI/SOG source model, and new references to the NRC’s letter docketing the WLS COL application and the NRC’s letter establishing the WLS COL review schedule should be stricken.

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<sup>60</sup> WLS COL Application, Rev. 0, Part 2, FSAR at 2.5-39.

<sup>61</sup> *LES*, CLI-04-25, 60 NRC at 224-25 (quoting *McGuire*, CLI-03-17, 58 NRC at 428-29).

<sup>62</sup> In any case, under Commission precedent, BREDL cannot rest on the NRC Staff’s request for additional information to show there is a genuine dispute regarding these issues. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 336-37 (1999).

<sup>63</sup> In fact, prior to the due date for its Petition, BREDL submitted a proposed contention addressing the ETSZ and EPRI/SOG model in another COL proceeding. *See* 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, at 26 (June 6, 2006), Docket Nos. 52-014 and 52-015. Therefore, this information or line of argument is certainly not new to BREDL and there is no excuse for BREDL failing to raise this issue in its original Petition in this proceeding.

**E. BREDL's New Argument for Contention 6 Should be Stricken from the Reply**

In Proposed Contention 6, BREDL alleges that granting Duke's COL would not improve the general welfare, increase the standard of living, or strengthen free competition in private enterprise.<sup>64</sup> In support of this Proposed Contention, BREDL raises the following general concerns: (1) NRC's ability to identify hardware failures in operating and new reactors; (2) human factors engineering for the AP1000 design; (3) the independence of the NRC's review; and (4) NRC "procedural shell games."<sup>65</sup>

In response to Proposed Contention 6, Duke pointed out that BREDL's reliance on the Atomic Energy Act, 42 U.S.C. § 2011, is misplaced because that section merely provides the general policy for use of nuclear power in the United States and does not require that a COL applicant improve the general welfare, increase the standard of living, or strengthen free competition.<sup>66</sup> Furthermore, Duke demonstrated that each of the four general issues that BREDL raised in its original Petition are unsupported and outside of the scope of this proceeding.<sup>67</sup>

Once again, BREDL in its Reply attempts to improperly add a new basis for this contention by claiming "that the advent of new and arguably better methods of generating electricity forces a comparison regarding the use of nuclear power."<sup>68</sup> In support of this assertion, BREDL notes in its Reply, for the first time, that "[i]n 2007 alone the US wind industry installed 5,244 megawatts of new electric power capacity from wind turbines,

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<sup>64</sup> Petition at 28.

<sup>65</sup> *Id.* at 29-35.

<sup>66</sup> Duke Answer at 71.

<sup>67</sup> *Id.* at 72-76.

<sup>68</sup> Reply at 17.

equivalent to four AP1000 reactors.”<sup>69</sup> While not entirely clear, it appears that BREDL is attempting to add a new contention or new basis regarding energy alternatives.

Clearly, BREDL’s reference to alternative generating sources and the availability of wind power in the Reply goes well beyond any amplification of a prior argument; indeed, it is an entirely new argument. There is no conceivable relationship between these new claims and BREDL’s original concerns regarding hardware failures in operating and new reactors, human factors engineering for the AP1000 design, the independence of NRC licensing reviews, and the fairness of the NRC’s licensing or adjudicatory processes. Furthermore, BREDL has made no attempt to address the late-filing criteria with respect to this new argument regarding energy alternatives. 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.”<sup>70</sup> Therefore, to the extent BREDL is raising a new argument regarding energy alternatives, including wind power, it should be stricken.

**F. BREDL’s New Argument for Contention 9 Should be Stricken from the Reply**

In Proposed Contention 9, BREDL claims that “Duke and NRC fail to include adequate protection from aircraft impacts at the WS Lee site.”<sup>71</sup> The Proposed Contention challenges the adequacy of the design of the proposed new WLS reactors to withstand an aircraft impact.<sup>72</sup> Further, BREDL’s Petition challenges the NRC’s design basis threat (“DBT”) rule and the proposed aircraft impact rule.<sup>73</sup>

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<sup>69</sup> *Id.* (citation omitted).

<sup>70</sup> *LES*, CLI-04-25, 60 NRC at 225.

<sup>71</sup> Petition at 43.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 43-45.

In response to Proposed Contention 9, Duke pointed out that there is no requirement that the WLS COL application provide information demonstrating that Duke can defend against an aircraft attack.<sup>74</sup> Duke also demonstrated that BREDL’s challenge to the DBT rule and to the proposed aircraft impact rule are outside the scope of the proceeding.<sup>75</sup>

In its Reply, BREDL suggests—again for the first time—that the 2006 decision of the 9th Circuit U.S. Court of Appeals in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), which addressed the NRC’s responsibility to consider the environmental impacts of a terrorist attack under the National Environmental Policy Act (“NEPA”), supports admission of this Proposed Contention.<sup>76</sup> Proposed Contention 9, however, as originally proffered, does not raise NEPA issues. Instead, the Proposed Contention only challenges the adequacy of the design of the proposed new reactors to withstand an aircraft impact (*i.e.*, it raised safety issues).<sup>77</sup> As noted above, the Petition also challenges the NRC’s DBT rule and the proposed aircraft impact rule<sup>78</sup>—neither of which addresses compliance with NEPA.

BREDL has failed to explain why it did not discuss the *Mothers for Peace* decision, which was issued in 2006, in its original Proposed Contention 9. Furthermore, BREDL has made no attempt to address the late-filing criteria. BREDL may not use its Reply to expand or

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<sup>74</sup> Duke Answer at 86-88.

<sup>75</sup> *Id.*

<sup>76</sup> Reply at 19.

<sup>77</sup> Petition at 43.

<sup>78</sup> *Id.* at 43-44.

convert this Proposed Contention to now cover environmental issues.<sup>79</sup> Therefore, BREDL's new argument regarding the *Mothers for Peace* decision should be stricken.<sup>80</sup>

## V. CONCLUSION

For the foregoing reasons, the Licensing Board should strike the new arguments and new support impermissibly provided in BREDL's Reply.

Respectfully submitted,

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COUNSEL FOR DUKE ENERGY

CAROLINAS, LLC

Dated in Washington, D.C.  
this 18th day of August 2008

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<sup>79</sup> *LES*, CLI-04-25, 60 NRC at 225 (holding that "new arguments may not be raised for the first time in a reply brief").

<sup>80</sup> Duke's position on the applicability of the *Mothers for Peace* decision is addressed in response to Proposed Contention 10. See Duke Answer at 93-94.

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

	)		
In the Matter of	)		
	)	Docket Nos. 52-018 and 52-019	
DUKE ENERGY CAROLINAS, LLC	)		
	)	August 18, 2008	
(William States Lee III Nuclear Station,	)		
Units 1 and 2)	)		

**CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2008 a copy of “Duke Energy Carolinas, LLC’s Motion to Strike Portions of the Blue Ridge Environmental Defense League Reply to the Duke and NRC Staff Answers to BREDL’s Petition to Intervene” was filed electronically with the Electronic Information Exchange on the following recipients:

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