

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

In the Matter of	)	
	)	
SOUTH CAROLINA ELECTRIC & GAS	)	Docket Nos. 52-027 and 52-028
COMPANY AND SOUTH CAROLINA	)	
PUBLIC SERVICE AUTHORITY (ALSO	)	January 16, 2009
REFERRED TO AS SANTEE COOPER)	)	
	)	
(Virgil C. Summer Nuclear Station Units 2	)	
and 3)	)	

**SOUTH CAROLINA ELECTRIC & GAS COMPANY’S MOTION TO STRIKE  
PORTIONS OF JOSEPH WOJCICKI’S REPLY**

**I. INTRODUCTION**

In accordance with 10 C.F.R. § 2.323(a), South Carolina Electric & Gas Company (“SCE&G”), hereby files this Motion to Strike the new claims and new supporting information contained in the reply entitled, “Additional Information Supporting Joseph Wojcicki’s ‘Petition to Intervene,’” dated January 7, 2008 (“Reply”).<sup>1</sup> As discussed below, the Reply impermissibly includes new arguments and support not found in Mr. Wojcicki’s Petition to Intervene filed on December 8, 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 claims 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 SCE&G made several attempts—on January 14 and 15, 2009, by phone and, at his request, by e-mail—to contact Mr. Wojcicki, in an attempt to resolve the issues in this Motion. Mr. Wojcicki has not responded to SCE&G’s last e-mail sent on January 15, 2009, and thus, we were unable to resolve the matters raised in this Motion. Counsel for the NRC Staff was consulted and agrees that Mr. Wojcicki’s Reply includes new material that properly should have been included in his initial Petition.

## II. BACKGROUND

On March 27, 2008, SCE&G submitted an application to the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for a combined license for Virgil C. Summer Nuclear Station (“VCSNS”) Units 2 and 3.<sup>2</sup> The NRC Staff accepted the application for docketing on August 6, 2008, and a Hearing Notice was published in the *Federal Register* on October 10, 2008.<sup>3</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 Hearing Notice (*i.e.*, by December 9, 2008) in accordance with 10 C.F.R. § 2.309.<sup>4</sup>

Mr. Wojcicki’s filed his Petition on December 8, 2008. On January 2, 2009, SCE&G and the NRC Staff filed timely, separate Answers to the Petition.<sup>5</sup> On January 7, 2009, Mr. Wojcicki filed his Reply to the SCE&G and NRC Staff Answers.

## 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

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<sup>2</sup> See Acceptance for Docketing of an Application for Combined License for Virgil C. Summer Nuclear Station Units 2 and 3, 73 Fed. Reg. 45,792 (Aug. 6, 2008).

<sup>3</sup> *Id.*; S.C. Elec. & Gas Co., Acting for Itself and as Agent for the S.C. Pub. Serv. Auth. (Also Referred to as Santee Cooper) Application for the Virgil C. Summer Nuclear Station Units 2 & 3; Notice of Order, Hearing, and Opportunity To Petition for Leave To Intervene, 73 Fed. Reg. 60,362 (Oct. 10, 2008) (“Hearing Notice”).

<sup>4</sup> Hearing Notice, 73 Fed. Reg. at 60,363.

<sup>5</sup> South Carolina Electric & Gas Company’s Answer Opposing Joseph Wojcicki’s Petition to Intervene (Jan. 2, 2009) (“SCE&G Answer”); NRC Staff’s Answer to “Petition to Intervene” From Joseph Wojcicki (Jan. 2, 2009).

contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).<sup>6</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>7</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>8</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 challenge it either originally opted not to make or which simply did not occur to it at the outset."<sup>9</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:

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<sup>6</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citation omitted).

<sup>7</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>8</sup> *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) ("LES").

<sup>9</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.

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>10</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>11</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>12</sup> "In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."<sup>13</sup> Accordingly, "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."<sup>14</sup> As discussed below, Mr. Wojcicki's Reply strays far a field of the arguments presented in the SCE&G and NRC Staff Answers, in an obvious attempt to cure the problems posed by his original vague, unsupported Petition.<sup>15</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-*

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<sup>10</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>11</sup> Under 10 C.F.R. § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner's reply. SCE&G has no opportunity to respond to the new information provided by Mr. Wojcicki.

<sup>12</sup> *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>13</sup> *LES*, CLI-04-25, 60 NRC at 225.

<sup>14</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

<sup>15</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").

*filing criteria set forth in 10 C.F.R. § 2.309 (c), (f)(2).*”<sup>16</sup> Thus, 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(c) and (f)(2).<sup>17</sup> Mr. Wojcicki not only has failed to narrowly focus his Reply on the arguments presented in the SCE&G and NRC Staff Answers, but also has neglected to demonstrate that his submission of new claims and new supporting documents satisfies the late-filing criteria in 10 C.F.R. Part 2.

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>18</sup> Indeed, to do so would serve as a disincentive to the timely filing of appropriately-supported contentions, insofar as petitioners invariably could simply 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. ARGUMENT

As explained above, Mr. Wojcicki’s Reply must “be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”<sup>19</sup> Instead, Mr. Wojcicki submitted a Reply that improperly attempts to cure a Petition that is wholly

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<sup>16</sup> *Palisades*, CLI-06-17, 63 NRC at 732 (emphasis added).

<sup>17</sup> 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 SCE&G’s January 2, 2009 Answer. *See* SCE&G Answer at 7-15. 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).

<sup>18</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>19</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2203.

deficient and inadmissible.<sup>20</sup> Notwithstanding the latitude that might be afforded Mr. Wojcicki as a *pro se* petitioner, his failure to comply with these fundamental requirements cannot be excused—“the right of participation accorded *pro se* representatives carries with it the corresponding 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>21</sup>

As fully set forth below, Mr. Wojcicki introduces new claims and supporting references in his Reply without acknowledging, much less addressing, the late-filed contention standards set forth in 10 C.F.R. § 2.309(c) and (f)(2). Whether intentional or not, SCE&G and the NRC Staff have been deprived of the fundamental ability to respond to arguments and issues raised for the first time in Mr. Wojcicki’s Reply, contrary to basic principles of fairness. Accordingly, the new claims and supporting documents must be stricken.

**A. Mr. Wojcicki’s Reply Constitutes a Late-Filed Attempt to Amend and Supplement the Original Petition**

As SCE&G points out in its Answer, the original Petition failed to satisfy the requirements in 10 C.F.R. § 2.309 because it is devoid of *any* contention, let alone an admissible contention.<sup>22</sup> In his Reply, Mr. Wojcicki now attempts—for the first time—to frame his still vague concerns regarding the proposed VCSNS reactors as contentions.<sup>23</sup> Mr. Wojcicki also, for the first time, touches on the admissibility criteria in Section 2.309(f)(1).<sup>24</sup>

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<sup>20</sup> Mr. Wojcicki’s new claims and arguments do not, however, confront the statutory and regulatory infirmities identified by SCE&G in its Answer.

<sup>21</sup> *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

<sup>22</sup> SCE&G Answer at 8-9.

<sup>23</sup> Reply at ¶¶ II.10-17, 19-21. While Mr. Wojcicki purports to have submitted an “Atlantic Ocean Location” contention, neither the original Petition nor the Reply set forth “a specific statement of the issue of law or fact to be raised or controverted” for such a contention, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(i). Likewise, although Mr. Wojcicki claims to have submitted “other contentions,” *see* Reply at ¶ 15, no such contentions are found in the Petition or the Reply.

<sup>24</sup> Reply at ¶ 16. Even if the Board considered the Petition and the Reply, however, Mr. Wojcicki still fails to “set forth with particularity the contentions sought to be raised,” contrary to the requirements of 10 C.F.R.

Because the original Petition is conspicuously lacking of anything resembling a proposed contention, Mr. Wojcicki's attempt to flesh-out and explain issues, only briefly mentioned in his initial Petition, constitutes an untimely and *de facto* amendment and supplement to his original Petition. As the Commission has made clear, "[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>25</sup>

This is exactly the situation presented by Mr. Wojcicki's Reply. The Board should not consider this untimely attempt to amend and supplement the original Petition because Mr. Wojcicki has made no attempt to address the Commission's late-filing standards.<sup>26</sup> Therefore, SCE&G hereby moves to strike in their entirety paragraphs 10 to 17 and 19 to 21 of the Reply.

**B. Mr. Wojcicki's New Arguments and New Support from the Public Service Commission Proceeding Should be Stricken from the Reply**

As SCE&G also pointed out in its Answer, Mr. Wojcicki failed to set forth any explanation of the basis for his claim regarding relocating the proposed reactors, but instead included only a vague reference to a "motion" to change the location of the proposed reactors.<sup>27</sup>

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§ 2.309(f)(1). In particular, Mr. Wojcicki mentions only generally an "Atlantic Ocean Location" contention and "other contentions."

<sup>25</sup> *LES*, CLI-04-35, 60 NRC at 622.

<sup>26</sup> *LES*, LBP-04-14, 60 NRC at 58 (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."). *See also* 10 C.F.R. § 2.309(c)(2) ("The requestor/petitioner *shall* address the factors in paragraphs (c)(1)(i) through (c)(1)(viii) of this section in its nontimely filing.") (Emphasis added).

<sup>27</sup> SCE&G Answer at 10-11.

In his Reply, Mr. Wojcicki now attempts—for the first time—to provide various pleadings he previously filed before the South Carolina Public Service Commission (“PSC”).<sup>28</sup>

Mr. Wojcicki’s original Petition, however, only vaguely alluded to a “motion” and only mentioned in passing the ongoing PSC proceeding.<sup>29</sup> While this new information does not cure the defects in the original Petition, Mr. Wojcicki provides no explanation as to why he could not have presented this information in his Petition, and he makes no attempt to address the required late-filing criteria. Such vague references to documents filed in an unrelated proceeding are unacceptable.<sup>30</sup> In preparing their respective Answers to Mr. Wojcicki’s Petition, SCE&G and the NRC Staff were not required to sift through the entire PSC docket culling out what information may or may not support Mr. Wojcicki’s vague statement regarding a new Atlantic Ocean location. If Mr. Wojcicki intended to rely on these documents now-provided in his Reply, then it was his obligation to provide this information in his Petition so that SCE&G would have a reasonable opportunity to address this material.<sup>31</sup> As the Commission has made clear, allowing Mr. Wojcicki to freely supplement his original Petition through a Reply “would effectively bypass and eviscerate [NRC] rules governing timely filing, contention amendment, and

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<sup>28</sup> Reply at 1.

<sup>29</sup> Petition at 1.

<sup>30</sup> See *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989) (requiring that an intervenor identify and append specific portions of documents that are being relied upon).

<sup>31</sup> Mr. Wojcicki appears to be under the misconception that this NRC proceeding is a continuation of (or at least shares the same docket as) the PSC proceeding. See *Rebuttal to SCE&G Testimonies in Docket No. 2008-196-E on Behalf of Common Sense, People, Industry, Institutions of SC*, at 6 (Nov. 25, 2008) (“New proper analysis that needs to be enclosed before a final PSC decision should be sent to the US NRC.”). Clearly these are two distinct proceedings before separate tribunals, involving different regulatory agencies, with different purposes and missions. See *Consol. Edison Co., Entergy Nuclear Indian Point 2, LLC, & Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 149 (2001) (“NRC’s mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest — other agencies, such as the . . . state public service commissions, are charged with that responsibility.”).



submission of late-filed contentions.”<sup>32</sup> Accordingly, all the pleadings from the South Carolina Public Service Commission proceeding provided as Exhibits AOL-01 through AOL-07 for the first time in the Reply should be stricken.

**C. Mr. Wojcicki’s New Arguments Regarding the VCSNS Site and the Atlantic Ocean Location Should be Stricken from the Reply**

In response to the Petition, SCE&G also pointed out that Mr. Wojcicki failed to posit any specific shortcoming in the application or identify any aspect of the application he wished to contest, but instead, merely asserted, without providing any explanation, that building the reactors at some other undisclosed location will provide better economic, environmental, and social solutions.<sup>33</sup> In his Reply, Mr. Wojcicki now attempts to cure these deficiencies by claiming, for the first time, that the VCSNS site would presents problems because of drought, water-level fluctuations, water temperature increases, water availability, and electrical grid distribution issues.<sup>34</sup> Likewise for the first time, Mr. Wojcicki attempts to identify advantages of a still-unidentified Atlantic Ocean site by claiming—without support—that locating the reactors at such a site will save electricity and water, offer better cooling alternatives, shorten the distances to large groups of baseload users, and offer higher reliability and reserve factors.<sup>35</sup>

These statements must be stricken because Mr. Wojcicki provides no explanation or justification as to why he could not have presented any of these claims in his original Petition. As the Commission has stated, petitioners are required to “set forth their claims and the support

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<sup>32</sup> *LES*, CLI-04-35, 60 NRC at 623.

<sup>33</sup> SCE&G Answer at 12.

<sup>34</sup> Reply at ¶¶ II. 10, 16, 17

<sup>35</sup> Reply at ¶¶ II.16.

for their claims at the outset.”<sup>36</sup> Accordingly, for these additional reasons, paragraphs 10, 16, and 17 of the Reply should be stricken in their entirety.

## V. CONCLUSION

For the foregoing reasons, the Licensing Board should strike paragraphs 10 to 17 and 19 to 21 and Exhibits AOL-01 through AOL-07 of Mr. Wojcicki’s Reply in their entirety.

Respectfully submitted,

Signed (electronically) by Kathryn M. Sutton

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Dated in Washington, D.C.  
this 16th day of January 2009

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<sup>36</sup> LES, CLI-04-25, 60 NRC at 225.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 16, 2009, a copy of “South Carolina Electric & Gas Company’s Motion to Strike Portions of Joseph Wojcicki’s Reply” was filed electronically with the Electronic Information Exchange on the following recipients:

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