

**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 22, 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 THE SIERRA CLUB AND FRIENDS OF THE EARTH 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 supporting information contained in the joint “Reply by Sierra Club and Friends of the Earth” (collectively, “Petitioners”), dated January 12, 2008 (“Reply”).<sup>1</sup> As discussed below, the Reply impermissibly includes new supporting references not found in the “Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth” filed on December 8, 2008 (“Petition”). The Reply also fails to comply with the standards governing late filings set forth in 10 C.F.R. § 2.309(c) and (f)(2).

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<sup>1</sup> Contrary to the requirements of 10 C.F.R. §§ 2.304(d) and 2.314(b), counsel for the Petitioners has yet to file a notice of appearance including, among other required information, a telephone number. As a consequence, counsel for SCE&G’s attempts to telephone counsel for the Petitioners on January 21, 2009 at two numbers obtained through a Google search, to resolve the issues in this Motion, as required by 10 C.F.R. § 2.323(b), were unsuccessful. On January 22, 2009, Counsel for the Petitioners responded by telephone to SCE&G’s January 21, 2009 e-mail, but Petitioners and SCE&G were unable to resolve the matters raised in this Motion. Counsel for the NRC Staff was also consulted on January 21, 2009 and indicated that the NRC Staff would respond as appropriate after review of the Motion.

Accordingly, the new supporting references should be stricken, as identified and discussed below.

## **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>

Sierra Club and Friends of the Earth (“FOE”) timely filed a joint Petition on December 9, 2008. On January 5, 2009, SCE&G and the NRC Staff filed timely, separate Answers to the Petition.<sup>5</sup> On January 12, 2009, Petitioners filed their Reply to the SCE&G and NRC Staff Answers.

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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 the Petition to Intervene of Sierra Club and Friends of the Earth (Jan. 5, 2009) (“SCE&G Answer”); NRC Staff Answer to “Petition to Intervene and Request for Hearing by Sierra Club and Friends of the Earth” (Jan. 5, 2009).

### 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>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 against new arguments in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently and in conformance with basic principles of fairness. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount."<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

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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").

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 runs 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>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

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<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.

<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 Petitioners.

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

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

presented in the applicant/licensee or NRC staff answer.”<sup>14</sup> As discussed below, Petitioners’ Reply improperly includes additional supporting information that should be stricken.<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-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>

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.

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<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”).

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

<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.”).

#### IV. ARGUMENT

As explained above, Petitioners' Reply must "be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."<sup>19</sup> Although the Reply generally focuses on amplifying Petitioners' original arguments regarding its Proposed Contention 1 (addressing issues related to the AP1000), as well as Proposed Contention 3, in particular with respect to the prudence of SCE&G's potential selection of nuclear generation options, the Reply also improperly contains new supporting references concerning the latter.<sup>20</sup> Furthermore, Petitioners, in their Reply, introduce this information without acknowledging, much less addressing, the late-filed contention standards set forth in 10 C.F.R. § 2.309(c) and (f)(2) or otherwise providing cause for this unauthorized augmentation of their original proposed contention. Accordingly, the new supporting references must be stricken.<sup>21</sup>

In Proposed Contention 3, Petitioners assert, *inter alia*, that SCE&G fails to account for the current economic crisis in its load forecasts and that SCE&G also ignores renewable energy alternatives.<sup>22</sup> In its Answer, SCE&G pointed out that these arguments failed to provide Proposed Contention 3 with adequate factual or expert support and failed to demonstrate the existence of genuine material dispute because, *inter alia*, economic factors and renewable energy alternatives were considered by SCE&G in the Environmental Report ("ER").<sup>23</sup>

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

<sup>20</sup> Petitioners' supplemental supporting information does not, however, confront the statutory and regulatory infirmities identified by SCE&G in its Answer.

<sup>21</sup> In their Reply, Petitioners submitted the Supplemental Declarations of Thomas W. Clements and Leslie A. Miner, dated January 8, 2009, which indicate that FOE is now in fact authorized to represent their interests in this proceeding. Although these Supplemental Declarations are impermissible and subject to being stricken, SCE&G does not oppose their inclusion in the Reply. Likewise, SCE&G does not oppose inclusion of Nancy Brockway's resume.

<sup>22</sup> Petition at 25, 40-41.

<sup>23</sup> SCE&G Answer at 53-54, 64-65.

In an attempt to bolster their claim and cure the underlying defect, Petitioners provide—for the first time—several additional references purporting to show the magnitude of the current economic downturn.<sup>24</sup> Similarly, Petitioners include a new reference to an undated Federal Energy Regulatory Commission document intending to support Petitioners’ claim that intermittent generation sources such as wind power should have been considered further and appear to expand their contention to now claim generally that intermittent sources of generation need to be considered.<sup>25</sup> The references in footnotes 4 and 26 were available at the time the Petition was filed, but were omitted from that filing, while the references in footnotes 3 and 5 had not been issued at the time the Petition was filed.

These new references and arguments fail to substantively confront the points made in SCE&G’s or the NRC Staff’s Answers regarding the fatal deficiencies in this Proposed Contention, or otherwise provide any support for Petitioners’ claim that SCE&G’s load forecast is unreliable or that SCE&G ignored wind power as an alternative. Nonetheless, these statements must be stricken; to allow Petitioners to continually update and supplement their original Proposed Contention would be patently unfair to SCE&G, which, under NRC regulations, cannot respond to this new information or newly-conceived argument.<sup>26</sup> Furthermore, Petitioners make no attempt to satisfy the late-filing criteria set forth in 10 C.F.R. § 2.309(c) and (f)(2) with respect to any of the additional references. As the Commission has stated, Petitioners are required to “set forth their claims and the support for their claims at the

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<sup>24</sup> Reply at 15. Allowing Petitioners to add new information and new arguments in support of their Proposed Contention is contrary to the NRC regulations that require that proposed contentions “be based on documents or other information available at the time the petition is to be filed,” 10 C.F.R. § 2.309(f)(2), and “would defeat the contention-filing deadline,” *Palisades*, CLI-06-17, 63 NRC at 732.

<sup>25</sup> Reply at 24.

<sup>26</sup> See 10 C.F.R. § 2.309(h)(3). This unfairness is especially apparent in this case, where Petitioners seek to provide additional supporting references that post-date their initial Petition and for which SCE&G was unable to respond. See Reply at 15 n.2-3, 5.

outset.”<sup>27</sup> Accordingly, the new references in footnotes 3 through 5 and 26, and the associated text on pages 15 and 24 of the Reply, should be stricken in their entirety.

## V. CONCLUSION

For the foregoing reasons, the Licensing Board should strike the above-identified new support impermissibly provided in Petitioners’ Reply.

Respectfully submitted,

Signed (electronically) by Kathryn M. Sutton

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Dated in Washington, D.C.  
this 22nd day of January 2009

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<sup>27</sup> LES, CLI-04-25, 60 NRC at 225.



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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 22, 2009, a copy of “South Carolina Electric & Gas Company’s Motion to Strike Portions of the Sierra Club and Friends of the Earth Reply” was filed electronically with the Electronic Information Exchange on the following recipients:

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